1954

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LAW REPORTS

Exchequer Court of Canada

RALPH M. SPANKIE, Q.C.
GABRIEL BELLEAU, Q.C.
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JUDGES
OF THE
EXCHEQUER COURT OF CANADA

During the period of these Reports:

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

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

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

THE HONOURABLE ALPHONSE FOURNIER
(Appointed June 12, 1953)

THE HONOURABLE WILLIAM PITT POTTER
(Appointed September 29, 1953)

DISTRICT JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

The Honourable FRED H. BARLOW, Ontario Admiralty District—appointed October 18, 1938.

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

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

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

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

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

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

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

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

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

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

SOLICITOR GENERAL OF CANADA:
The Honourable R. O. CAMPNEY, Q.C.
The Honourable W. ROSS MACDONALD, Q.C.

CORRIGENDA

At page 128 the word "expensive" appearing in line 16 should read "expansive".

At page 152 the word "of" appearing in line 3 should read "to".

At page 236 the year "1945" in the footnote should read "1943."

At page 529 in the first line of the captions in Minister of National Revenue v. Armstrong, "c. 42" should read "c. 52".

At page 702 the word "defendant" where appearing in the headnote should read "applicant".

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CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

BETWEEN:

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE ..... APPELLANT;

1952
Jan. 28, 29
1953
Dec. 23

AND

PARKE, DAVIS & COMPANY LIMITED ..... RESPONDENT.

Revenue—Customs Duty—Customs Act, R.S.C. 1927, c. 42; ss. 49(1), 49(2), 49(3)—Customs Tariff, R.S.C. 1927, c. 44, item 206a—The Tariff Board Act, S. of C. 1931, c. 55, ss. 3(8), 4, 5(2), 5(7), 5(8), 9—Whether question is one of law dependent on opinion of Court or judge—Leave to appeal restricted to questions arising out of finding or order of Tariff Board—Meaning of "biological products" in Tariff Item 206a—Words in Customs Tariff to receive ordinary meaning unless context requires technical meaning—Court not to interfere with decision of Tariff Board if reasonably made.

The Tariff Board on an appeal from a decision of the Deputy Minister of National Revenue for Customs and Excise decided that two importations of Penicillin S-R made at Windsor in June 1949 were exempt from duty by virtue of Tariff Item 206a of the Customs Tariff and the Deputy Minister after obtaining leave appealed from the Tariff Board's decision on certain specified questions.

Held: That section 49(3) of the Customs Act required that the court or judge in granting leave to appeal should specify the question which in its or his opinion was a question of law and on which the appeal was permitted.

2. That the jurisdiction of the Court to entertain an appeal from a decision of the Tariff Board depends not on whether a question is actually a question of law but on whether it is so in the opinion of the Court or judge hearing the application for leave to appeal.

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3. That leave to appeal from a decision of the Tariff Board upon any question which in the opinion of the Court or judge is a question of law should not be granted unless the question arises out of the finding or order of the Tariff Board.

4. That the Tariff Board was right in its opinion that no person other than the appellant importer and the Deputy Minister had any status to appear before the Board or submit evidence in the appeal and that it could not legally consider evidence submitted by persons other than the parties to the appeal even though such persons should claim to have an interest in the decision of the appeal.

5. That, in the absence of a clear expression to the contrary, words in the Customs Tariff should receive their ordinary meaning but if it appears from the context in which they are used that they have a special technical meaning they should be read with such meaning.

6. That if there was material before the Tariff Board from which it could reasonably decide as it did this Court should not interfere with its decision even if it might have reached a different conclusion if the matter had been originally before it.

APPEAL under the Customs Act from a decision of the Tariff Board.

The appeal was heard before the President of the Court at Ottawa.

W. R. Jackett Q.C. for appellant.

L. A. Kelley Q.C. and *W. Meredith* for respondent.

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

THE PRESIDENT now (December 23, 1953) delivered the following judgment:

This is an appeal on certain specified questions from the decision of the Tariff Board, dated November 29, 1949, that two lots of a substance called Penicillin S-R, imported by the respondent from the United States at Windsor under entries No. 16407-A, June 23, 1949, and No. 17043-A, June 28, 1949, were exempt from duty by virtue of Tariff Item 206*a* of the Customs Tariff, R.S.C. 1927, chapter 44, as amended by section 4 of chapter 31 of the Statutes of Canada, 1936, which, so far as relevant, read as follows:

> 206*a*. Biological products, animal or vegetable, n.o.p., for parenteral administration in the diagnosis or treatment of diseases of man, when manufactured under license of the Department of Pensions and National Health under regulations prescribed by the Food and Drugs Act; . . .

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On their importation the two lots of Penicillin S-R were entered free of duty under Tariff Item 206*a* but the Collector of Customs at Windsor requested that the entries be amended to make them dutiable at 20 per cent ad valorem and the respondent, under protest, paid the amount of Customs duty at this rate. The Deputy Minister then reviewed the appraisal and confirmed it by a letter addressed to the respondent, dated July 15, 1949. This was a decision, on the advice of the Department of National Health and Welfare, that antibiotics, including penicillin, were not considered as biological products and that penicillin was classified under Tariff Item 711.

From this decision the respondent appealed to the Tariff Board under section 49(1) of the Customs Act, R.S.C. 1927, chapter 42, as enacted by section 5 of chapter 41 of the Statutes of Canada, 1948, which read as follows:

49. (1) An importer may, by notice in writing filed with the Secretary of the Board, within sixty days of the decision, appeal to the Tariff Board from any decision of the Deputy Minister

(i) as to tariff classification or value for duty;

(ii) under subsection three of section forty-seven; or

(iii) as to whether any drawback of Customs duties is payable under section twelve of the *Customs Tariff* or as to the rate of drawback so payable.

And section 49(2) provided:

(2) On any such appeal the Tariff Board may make any such order, or finding of fact, as the nature of the matter may require, and, without limiting the generality of the foregoing, may declare

(i) the rate of duty that shall be applicable to the class of goods respecting which appeal has been made, or applicable to the specific goods only;

(ii) the value for duty of the class of goods or of the specific goods; or

(iii) that such goods are exempt from duty; and any such order, finding or declaration of the Board shall have force and effect as if the same had been sanctioned by statute, unless appeal be taken as hereinafter provided.

By a majority decision the Tariff Board allowed the respondent's appeal and the appellant thereupon applied before me for leave to appeal to this Court under section 49(3) of the Customs Act which then read as follows:

49. (3) An importer or the Deputy Minister may, upon leave being obtained from the Exchequer Court of Canada or a judge thereof upon application made within thirty days after the making of the finding or

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order sought to be appealed (or within such further time as the court or judge may allow), appeal to the said court upon any question which in the opinion of the said Court or judge is a question of law.

It was my opinion that section 49(3) required that the court or judge in granting leave to appeal should specify the question which in its or his opinion was a question of law and on which the appeal was permitted. Accordingly, on December 29, 1949, I gave leave to the appellant to appeal to this Court from the decision of the Tariff Board on what, in my opinion, was a question of law, which I specified as follows:

> Did the Tariff Board err as a matter of law in deciding that Penicillin S-R, imported under Windsor entries numbers 16407-A, June 23, 1949, and 17043-A, June 28, 1949, is exempt from duty by virtue of Customs Tariff item 206*a*?

For convenience I shall refer to this as Question 1.

Subsequently, the matter became more complicated. After the Tariff Board's decision had been rendered Mr. H. B. McKinnon, the Chairman of the Tariff Board, signed a certificate, dated December 29, 1949, that the Board made its decision "without considering material submitted by persons claiming to be interested other than the Appellant and the Deputy Minister of National Revenue for the reason that the Board was of opinion that no persons other than the Appellant or the Deputy Minister of National Revenue have any status to appear before the Board or submit evidence in the appeal and was further of opinion that it could not legally consider evidence submitted by persons other than the Appellant or Deputy Minister of National Revenue even though such persons should claim to have an interest in the decision of the appeal." On the strength of this certificate counsel for the appellant made a further application before me for leave to appeal on three other questions and on January 10, 1950, I gave the appellant leave to appeal on two other questions which, in my opinion at that time, were questions of law. These two questions, which I shall refer to as Question 2 and Question 3, were stated in the following terms:

> 2. Is the Tariff Board by law precluded, on an appeal under subsection (1) of section 49 of the Customs Act, from receiving evidence submitted by persons claiming to have an interest other than the Appellant or the Deputy Minister of National Revenue for Customs and Excise?

3. If not, should the Board consider material submitted by such persons as it is satisfied have an interest (after giving the Appellant and the Deputy Minister of National Revenue for Customs and Excise an opportunity of answering such material) and then decide the appeal after considering all the material before it?

I might add, although it has only an indirect bearing on the issue herein, that subsequently, on March 7, 1950, applications were made before me on behalf of Ayerst, McKenna & Harrison Limited and Merck & Company Limited, both Canadian manufacturers of penicillin, for an order adding them as appellants in this appeal on the ground that they had an interest in the decision of the Tariff Board or, in the alternative, permitting them to intervene or to appear and be heard. I reserved my decision on these applications. Then Parliament intervened with statutory amendments. Section 3 of chapter 13 of the Statutes of Canada, 1950, amended sections 49 and 50 of the Customs Act, as enacted in 1948, and section 4 of chapter 14 of the Statutes of Canada amended Tariff Item 206*a* by striking out the term "biological products" and substituting an enumeration of several specific substances, which did not include penicillin or its derivatives. After these amendments had come into effect the two applicants ceased to have any interest in the Tariff Board's decision, since it could no longer affect them, and, on December 21, 1951, with leave, they withdrew their applications.

It was properly conceded that the 1950 amendments were not relevant to the questions involved in this appeal, but they greatly lessen its importance since they nullify the effect of the Tariff Board's decision on future importation of Penicillin S-R, if it should stand in the event of the appeal herein being dismissed, so that, in substance, the dispute is now reduced to the dollars and cents question whether the respondent should have been required to pay the amount of customs duty which it paid under protest.

This is the first appeal to this Court under the Customs Act and certain observations of a general nature may be in order. The right of appeal conferred by the Act is a limited one. In the first place, leave to appeal must be obtained from this Court or a judge thereof. Moreover, the appeal for which leave may be obtained is confined to "any question which in the opinion of the court or judge is a question of law". This language permits possible anomalous results

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since the jurisdiction of the Court to entertain an appeal is made to depend not on whether a question is actually a question of law but on whether in the opinion of the court or judge it is so. That being the case, it is quite possible, through an erroneous opinion of the court or judge that a particular question is a question of law, that the Court will find itself vested with jurisdiction to entertain an appeal on what is actually a question of fact. Conversely, if the court or judge is erroneously of the opinion that the question in issue is not a question of law, the Court will have no jurisdiction to entertain an appeal, although the question is actually one of law. Whether such eventualities were contemplated when the legislation was enacted may be the subject of speculation but that they might result from the language of the enactment does not appear to admit of doubt.

Moreover, the jurisdiction of the Court is restricted. It has no power, under the legislation in effect prior to the 1950 amendments, which do not apply to this case, to refer the question before it back to the Board for re-hearing or further consideration or to render the decision which, in its opinion, the Board should have given. All that it may do is to dismiss or allow the appeal on the question or questions before it with whatever consequences such action may imply.

I now come to the specified questions and shall deal first with Questions 2 and 3. Put briefly, the argument for the appellant was that under section 49(2) of the Customs Act any order, finding or declaration of the Tariff Board on the appeal to it "shall have force and effect as if the same had been sanctioned by statute, unless appeal be taken as hereinafter provided", that persons interested in the decision other than the appealing importer were, therefore, entitled to be heard and that since the Board did not hear them because it thought, as a matter of law, that it was precluded from so doing it had not proceeded as the law required and its decision was, therefore, a nullity. Since I gave leave to appeal on these two questions I have, on further consideration of the matter, come to the conclusion that I ought not to have done so. It will be recalled that the questions arose not out of any decision, finding or order of the Board but out of the Chairman's certificate, dated

December 29, 1949, a month after the decision of the Board. The matters stated in it were not, so far as I have been able to ascertain, mentioned in the course of the hearing before the Board or in its decision. But section 49(3) of the Customs Act contemplates that the question on which leave to appeal to this Court may be given shall be a question arising out of "the finding or order sought to be appealed". That being so, there was no finding or order of the Board out of which the questions now under discussion could arise and the application for leave to appeal should have been dismissed on that ground.

Moreover, the question whether the Board should have considered material submitted by persons other than the parties to the appeal before it is appropriate to proceedings where the remedy would be by way of mandamus, but this Court has no supervisory jurisdiction over the Tariff Board by way of mandamus or otherwise beyond the limited appellate jurisdiction to which I have referred. And I have already mentioned the fact that it has no power to refer any question back to the Board.

There is a further anomaly. If the argument that the Board's decision was a nullity were accepted it would follow, as a matter of course, that leave to appeal on Question 1 should not have been granted for there would then have been no decision to appeal from.

Under the circumstances, I find myself in a quandry for the reason that if I acted in error in granting leave to appeal on Questions 2 and 3 there is no jurisdiction in this Court to correct the error by setting aside the order for leave to appeal granted by me. On the other hand, if the leave was properly granted the questions should be dealt with. In this difficult situation I have concluded, notwithstanding my present opinion, that the best course for me to follow is to deal with the questions as if they were validly before the Court.

In support of his contention that the Board should have considered material submitted by persons other than the parties to the appeal before it counsel for the appellant submitted that when Parliament confers jurisdiction on a statutory authority already in existence and makes no provision for the manner in which it shall be exercised there is an implication that the statutory authority should exercise

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its new jurisdiction in accordance with its ordinary procedure: *vide Local Government Board* v. *Arlidge* (1) where Viscount Haldane L.C., speaking of the duties of the Local Government Board said:

> The result of its inquiry must, as I have said, be taken, in the absence of directions in the statute to the contrary, to be intended to be reached by its ordinary procedure.

Counsel relied upon this statement. He urged that the Tariff Board was constituted originally to conduct investigations, that in conducting its inquiries it heard persons claiming to be interested and that it should do likewise in hearing appeals from a decision of the Deputy Minister. Counsel went on to argue that it should be presumed that when Parliament entrusted the Board with appeals under section 49 of the Customs Act and gave its decisions statutory effect it was intended that it should conduct the appeals according to the same procedure as that which it followed in conducting its inquiries. The contention, in effect, was that the Board should deal with the appeals in the same way as if they were inquiries.

This submission strikes me as astounding and I reject it. In my opinion, it runs counter to section 49(1) of the Customs Act which gave an individual right of appeal to an importer in respect of whose importation the Deputy Minister had made a decision. The right of appeal did not belong to any one else. The fact that Parliament saw fit to give statutory effect to the Board's decision does not affect the matter. That did not detract from the right conferred on the importer or extend it to other persons who claimed to be interested. In my opinion, the appealing importer had the right to have his appeal considered and determined without being affected by representations from other persons, who might be business competitors or otherwise adverse in interest and might "gang up", so to speak, against him. I am, therefore, of the opinion that the Tariff Board was right in the opinion expressed by its Chairman in his certificate.

Moreover, the submission that it was intended that the Board should deal with appeals as if they were inquiries runs counter to the scheme of the applicable legislation. Originally, The Tariff Board Act, Statutes of Canada, 1931,

(1) [1915] A.C. 120 at 133.

chapter 55, was divided into two parts and the Tariff Board was given two separate functions. In Part I its constitution was set out and certain duties relating to inquiries were assigned to it. In Part II it was substituted for the former Board of Customs under the Customs Act and given its powers, functions and duties. The scheme of the Act was considered by the Supreme Court of Canada in the *Reference Concerning The Jurisdiction of the Tariff Board of Canada* (1). There Rinfret J., as he then was, in delivering the judgment of the Court, dealt first with the inquiry provisions of the Act under Part I and then went on to discuss Part II which he said, at page 542, "deals with a different subject altogether". There were amendments of The Tariff Board Act in 1933 and 1940 but these did not change its scheme. The first substantial amendments did not come until 1948. By chapter 70 of the Statutes of 1948 Part II of The Tariff Board Act, which had assigned and transferred the powers, functions and duties of the former Board of Customs to the Tariff Board, was repealed and by chapter 41 of the Statutes of 1948 provision was made by section 49 of the Customs Act for an appeal by an importer to the Tariff Board from a decision of the Deputy Minister and a limited appeal by leave either by the importer or the Deputy Minister to this Court from the decision of the Tariff Board, the particulars of which have been set out. These amendments did not alter the fact that there was still a clear division of the legislative scheme, although it was now no longer embodied in one Act, into two parts, one having to do with inquiries which remained unchanged and the other concerned with the new appellate functions. Thus, the statement of Rinfret J. in the *Tariff Board Act Reference* (*supra*), to which I have referred, is just as applicable to the appeal sections of the scheme as it was to Part II of The Tariff Board Act, namely, that they deal with a different subject altogether from the sections relating to inquiries.

There are several indications in the legislation, apart from section 49(1) of the Customs Act, that it was not intended that the Board should deal with the appeals

(1) [1934] S.C.R. 539.

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entrusted to it in the same way as it dealt with inquiries. For example, section 5(2) of The Tariff Board Act provides:

> 5. (2) The Board shall give reasonable opportunity to persons who may not have been summoned, to appear before them and give evidence upon oath or solemn affirmation as aforesaid, on any matter relevant to an inquiry then being held by the Board.

This provision is specifically referable to an inquiry and not appropriate to an appeal under section 49 of the Customs Act and no attempt was made to make it applicable. Furthermore, subsections (7) and (8) of section 5 provide how many members of the Board shall have power to conduct certain inquiries but when the new appellate jurisdiction was vested in the Board subsection (8) was added to section 3 of the Act as follows:

> 3. (8) With respect to an appeal to the Board under the provisions of the *Customs Act* or the *Excise Tax Act,* two members, including the Chairman, or in his absence the Vice-Chairman, may exercise the powers of the board.

It is significant that this amendment was made not to section 5, which relates to inquiries, but to section 3. Then there is the further difference that when the 1948 amendments were made to The Tariff Board Act section 9 provided as follows:

> 9. The Board shall cause its decisions in any case brought before it under the *Customs Act* or *Excise Tax Act* to be published forthwith in the *Canada Gazette.*

whereas the requirements in the case of inquiries are otherwise. In such cases, under section 4, which was not altered in 1948, the Board is required to report to the Minister or the Governor-in-Council. These various considerations negative the submission of counsel for the appellant.

I, therefore, find that the Board was right in its opinion that no persons other than the appellant importer and the Deputy Minister had any status to appear before the Board or submit evidence in the appeal and that it could not legally consider evidence submitted by persons other than the parties to the appeal even though such persons should claim to have an interest in the decision of the appeal. That being so, and on the assumption that I should deal with the questions, I answer Question 2 in the affirmative. This makes it unnecessary to answer Question 3 but if any answer is required it is in the negative. For these reasons, I dismiss the appeal on Questions 2 and 3.

I now come to the appeal on Question 1. This involves matters of considerable difficulty. The issue before the Tariff Board was whether Penicillin S-R, the subject of the two importations in question, was a biological product within the meaning of Tariff Item 206*a* and exempt from duty by virtue of it. It was urged that the onus was on the appealing importer, the respondent herein, to show that the requirements of the item had been met. Thus it was necessary, in the first place, to show that Penicillin S-R was a biological product. This was the main issue. It is obvious, of course, that the term "biological products" is a term of wide import. But it is equally clear that it was not intended that Tariff Item 206*a* should cover all substances that might come within its wide meaning for it limited the category of biological products that were exempt from customs duty to those that met the two conditions specified in it. The first of these was that the biological product was "for parenteral administration in the diagnosis or treatment of diseases of man", that is to say, for administration by injection. There was no dispute that Penicillin S-R met this condition. But there was a difference of opinion on whether the second condition had been complied with. This was that the biological product should have been manufactured under license of the Department of National Health and Welfare (the successor of the Department of Pensions and National Health referred to in the item) under regulations prescribed by the Food and Drugs Act. It was established that the Penicillin S-R in question had been manufactured by Charles Pfizer and Company of Brooklyn, New York, under License No. 503, issued by the Department of National Health and Welfare. This license did not refer to Penicillin S-R specifically under that name but did so under the name "Procaine Penicillin and Buffered Crystalline Penicillin for Aqueous Injection". While the facts of the issue of the license and the manufacture of the Penicillin S-R under it were not disputed it was contended that this condition meant that in order that a biological product should be admissible under Tariff Item 206*a* it must be shown that it was licensed to be manufactured as a biological product and that since Penicillin S-R had not been so licensed it was not admissible under it. This was the main argument before the Board. There is a simple

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answer to it. Tariff Item 206*a* does not say that the biological product must have been licensed to be manufactured as a biological product. It was a sufficient compliance with the condition that it had been manufactured, as Penicillin S-R was, under a valid license. Thus, if Penicillin S-R was a biological product, both conditions for its admissibility under Tariff Item 206*a* were met, leaving only the question whether it was a biological product.

This was a difficult matter to decide. There were really two questions involved, the first being the meaning of the term "biological products" and the second whether Penicillin S-R was a biological product within such meaning.

The first main contention for the appellant was that the term must be read in the light of the Regulations under the Food and Drugs Act referred to in the item. These were made by Order in Council 123/1852, dated August 16, 1934, and are set out in the Canada Gazette, Volume 68, Part I, in a Supplement, dated September 29, 1934. Division II B of these Regulations is headed "Regulations for the Licensing, Manufacture and Sale of Drugs listed in Parts II and III, Schedule B of the Food and Drugs Act, R.S. 1927, hereinafter referred to as Biological Products" and paragraph 11 of the General Requirements of these Regulations provides as follows:

> 11. For the purpose of these regulations, viruses, serums, toxins, antitoxins, and analogous products intended for use by parenteral administration and applicable to the prevention or treatment of diseases of man, shall be referred to as biological products and defined as follows:

Then follow definitions of the specified substances, virus, serum, toxin, antitoxin and analogous products. The argument in support of the contention was that in 1936, when the term "biological products" first appeared in the Customs Tariff in Tariff Item 206*a*, it did not have a generally known meaning. It was stated that at that time it had not appeared in any dictionary, that it was not in the New English Dictionary, Volume 1, or in the Shorter Oxford English Dictionary, Volume 1 (first published in 1933), or in Webster's New International Dictionary of 1909, as revised on January 1, 1927, and that its first appearance in a dictionary was in Webster's New International Dictionary, Second Edition, in 1942. It was further urged that, while in 1936 there was no dictionary definition of the term and, consequently, no generally known meaning, there was

a statutory definition of it in 1934 in the Food and Drugs Act Regulations referred to and that that was the only definition of the term that was then known. On that basis, the submission was made that it ought to be assumed that Parliament had that statutory definition in mind when it used the term in Tariff Item 206*a* in 1936, particularly in view of the fact that in the item Parliament specifically referred to the very regulations in which the statutory definition had appeared, and that the term should be interpreted accordingly.

There are several reasons for rejecting this submission. The first is that counsel was mistaken in stating that the term "biological products" did not have a generally known meaning in 1936 and that its earliest dictionary definition was in 1942. The fact is that it appeared in 1934 in Webster's New International Dictionary, Second Edition, which was first published in 1934 after more than ten years of preparation. The reason for the mistake is, no doubt, due to the fact that the 1934 print of the Second Edition of Webster's New International Dictionary was not in the Supreme Court Library and only a later print of it was available there. But the 1934 print is in the Parliamentary Library and I was able to consult it there. In this 1934 print there is a full definition of the term "biological product" as follows:

> *Pharm.* A complex substance, preparation, or agent, of organic origin, depending for its action on the processes effecting immunity, and used esp. in diagnosis and treatment of disease, as a vaccine or pollen extract; also, any such complex product (whether of organic or synthetic origin) obtained or standardized by biological methods or assay, as arsphenamine, pituitary extract, or insulin; a biological.

In the same 1934 print the term "biological" was defined as:

> 1. Of or pertaining to biology or to life and living things; pertaining to or characteristic of the processes of life (hence sometimes practically synonymous with *physiological*).
>
> 2. Used in, or produced by, practical application of biology; as, biological methods, products, or supplies.

and when "biological" was used as a noun it meant: "*Pharm.* A biological product." In the same 1934 print there were definitions of "biological assay", "biological method", "biological supplies" and other terms relating to biology. This term was itself extensively defined but it is sufficient to describe it as "the science of life; the branch of knowledge which treats of living organisms." It is plain

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from the fullness of the definition of "biological products" and the broad scope of use of the word "biological" in its various associations that these words were generally known for some time prior to 1934. Consequently, the argument that the term "biological products" must be read in the light of the so-called statutory definition of it in the 1934 Food and Drugs Act Regulations because it was the only definition known in 1936 collapses. The fact is that in 1936 it had a generally known and defined meaning and there was no need to resort to the so-called definition in the Regulations.

Moreover, there was no definition of the term "biological products" in the said Regulations. There was no attempt to set out its meaning. All that was done was to say that certain specified substances, which were themselves separately defined, should be referred to as biological products but the list of such substances did not purport to exhaust the category of biological products.

And it should also be noted that the specific substances were to be referred to as biological products "for the purpose of these regulations". There was nothing in either the Regulations or Tariff Item 206*a* to indicate or suggest that the term "biological products" should, for the purposes of the Customs Tariff, be restricted to include only the specific substances mentioned in the Regulations. If that had been intended the specific substances would have been enumerated in the Tariff Item in the same way as in the Regulations or some other indication to that effect would have been given.

Furthermore, it ought not to be assumed, in the absence of clear terms to that effect, that it was intended that the question whether a substance was or was not exempt from duty under an item of the Customs Tariff should depend on regulations made under some other Act such as the Food and Drugs Act for that would, in effect, remove the administration of the item from the Customs authorities and vest it in the authorities charged with the administration of the Food and Drugs Act. If that had been intended Parliament would not have used the general term "biological products" by itself but would have qualified it and used some other term, such as "biological products as

defined in regulations prescribed by the Food and Drugs Act". But Parliament did not place any such limitation on the meaning of the term.

Accordingly, I am of the opinion that it was erroneous to look to the Food and Drugs Act Regulations for the meaning of the term "biological products" in Tariff Item 206*a* and I, therefore, find it unnecessary to review the changes made in these Regulations from time to time.

It is, I think, sound to say that, in the absence of a clear expression to the contrary, words in the Customs Tariff should receive their ordinary meaning but if it appears from the context in which they are used that they have a special technical meaning they should be read with such meaning. Here it is plain that Tariff Item 206*a* was concerned with substances of a pharmaceutical nature. Consequently, the term "biological products" must be regarded as a technical term and read with the meaning it would have to persons in the pharmaceutical industry. In that field it had in 1936, and for some time previously, a generally known meaning of wide import, namely, the dictionary meaning which I have cited. In my judgment, that is the meaning that should be given to it in Tariff Item 206*a*.

While its meaning was generally known to persons in the pharmaceutical industry the limits of its ambit were not fixed. Consequently, the fact that penicillin was not known commercially until about 1940, although known to scientists previously, did not exclude it from being a biological product within the meaning of Tariff Item 206*a*. Section 10 of the Interpretation Act, R.S.C. 1927, chapter 1, provides that the law shall be considered as always speaking, from which it follows that words used in an enactment may, as the years go by, apply, without any change in their meaning, to things that were not known at the time they were first used. And so it was with Penicillin S-R, if, when it became known, it was a "biological product" within the meaning which the term had in 1936.

I now come to the second question, namely, whether Penicillin S-R was a biological product within the meaning of the term as used in Tariff Item 206*a*. This was a matter of controversy. I shall first deal with the opinion evidence on whether penicillin was a biological product. On this question the Board had assistance from several sources. I

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need not enumerate all of them. The most important witness for the respondent was Dr. F. D. S. Stimpert, the director of biological research in the biological laboratories of the respondent. He said that the biological research division of the respondent was engaged in the investigation and development of biological products pertaining to the prevention and treatment of infectious diseases, which investigations particularly included the study of the characteristics and production of substances produced by the growth of micro-organisms, the study of penicillin and other antibiotics being a major activity, and then made the following statement:

> Products commonly recognized in the pharmaceutical industry as "biological products" have certain common characteristics, namely:
>
> (*a*) They have their source and origin in micro-organisms, such as mold, fungi, bacteria and viruses.
>
> (*b*) They are produced by the growth of such micro-organisms.
>
> (*c*) They have a tendency to lose potency under storage.

And then said:

> Penicillin possesses all of the above characteristics and is therefore considered a biological product.

Then Dr. Stimpert stated that he had reviewed the definition of "biological product" as found in Webster's New International Dictionary, Second Edition, Unabridged, and read it into the record. He did not state the date of the print he referred to and counsel assumed that it was in 1942. Whether that was so or not, the fact is that the definition to which he referred was in exactly the same words as those of the definition in the 1934 print of the dictionary, which I have cited. After Dr. Stimpert read the definition he made the following statement:

> in my opinion penicillin is a biological product within the meaning of this definition.

Counsel for the appellant strongly criticized this statement on the ground that Dr. Stimpert did not state which part of the dictionary definition penicillin fell within. While there is ground for this criticism it does not dispose of the opinion for even if it were shown that penicillin was not a complex substance of the kind referred to in the first part of the definition it might be a complex substance of the kind referred to in the second part.

Then Dr. Stimpert referred to antibiotics. Here I should mention the fact that while it was disputed before the Board that penicillin was a biological product it was agreed that it was an antibiotic. On the controversial subject whether an antibiotic is a biological product Dr. Stimpert gave his opinion. He stated that it had been his experience in the biological field that antibiotics, since their origin, had been regrouped with biological products, particularly in the state of biologics or products arising from bacterial or micro-organism growth. He reviewed the development of the term "antibiotic", which came into use in 1940 and 1941, especially with the introduction of penicillin as a chemotherapeutic agent, and said that the accepted definition of an antibiotic was one given by Dr. Waksman and published in 1947 in a scientific journal called Mycologia, Volume 39, No. 5, at page 568, as follows:

> An antibiotic is a chemical substance, produced by micro-organisms, which has the capacity to inhibit the growth of and even to destroy bacteria and other micro-organisms. The action of an antibiotic against micro-organisms is selective in nature, some organisms being affected and others not at all or only to a limited degree; each antibiotic is thus characterized by a specific anti-microbial spectrum. The selective action of an antibiotic is also manifested against microbial vs. host cells. Antibiotics vary greatly in their physical and chemical properties and in their toxicity to animals. Because of these characteristics, some antibiotics have remarkable chemotherapeutic potentialities and can be used for the control of various microbial infections in man and in animals.

He then gave his opinion as follows:

> Serious analysis of these definitions and of the literature I have quoted, and my experience, prompt me to say it is my opinion that penicillin, as an antibiotic as defined, would come under the scope of a biological product.

Then Mr. F. E. Willson, a pharmaceutical chemist employed by the respondent, agreed with Dr. Stimpert.

There was also a statement by J. H. Kane, the director of the biochemical research and production division of the "Charles Pfizer organization" in Brooklyn, as follows:

> It is of course possible to give special and limited meanings to the term "biological product" for specific purposes but these two words standing alone mean to those trained in this field any product which is (1) produced as a result of the growth processes of micro-organisms which would include molds such as those which are employed in the production of penicillin, (2) assayed by biological methods, and (3) employed primarily in the treatment of diseases.

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This statement closes with the following conclusion:

> Penicillin unquestionably meets all three of these fundamental criteria,

The only contrary opinion before the Board was that of the Department of National Health and Welfare, as expressed by Mr. A. Papineau-Couture, one of its officers that penicillin was an antibiotic but was not considered a biological product. No experts other than Mr. Papineau-Couture were called on behalf of the Deputy Minister. The case against the admission of Penicillin S-R consisted of this opinion and the contention that since penicillin was not licensed to be manufactured as a biological product it was not admissible under Tariff Item 206*a*.

There was thus ample material before the Board from which it could reasonably consider that penicillin was a "biological product". But, according to counsel for the appellant, that did not conclude the matter. It was argued that even if penicillin was a biological product it did not follow that Penicillin S-R was, that there was no evidence before the Board on how Penicillin S-R was manufactured or produced and that it was not shown that it had its source and origin in micro-organisms or that it was produced by the growth of micro-organisms or that it was used as a vaccine or a pollen extract or that it otherwise came within the definition of biological product. It was also urged that such evidence as there was indicated that Penicillin S-R was a different substance from penicillin. It was described as a procaine and buffered crystalline penicillin and it was said that this meant that it was a salt resulting from the reaction of procaine on penicillin and, therefore, a derivative of it and different from it. The fact that it was buffered was said to make it a manufactured product rather than a biological product. This opinion commended itself to the dissenting member of the Board who drew on his own knowledge as a chemist—which, with respect, he had no right to do—to come to his dissenting opinion. Basically, the argument was that the appealing importer had failed to discharge the onus cast upon it of showing that Penicillin S-R was a biological product. There was a general criticism that the experts had spoken in general

terms about penicillin whereas the substance which the Board had to deal with was Penicillin S-R, not penicillin, and there was nothing to show that what was said about penicillin was applicable to Penicillin S-R.

This criticism is not well founded. It is clear from the transcript of the proceedings before the Board that there was no doubt in the minds of the parties and the witnesses that penicillin included Penicillin S-R and that when the former was referred to the reference applied to the latter. For example, Mr. Papineau-Couture said that there were various kinds of penicillin and proceeded to enumerate them. In his enumeration he placed "procaine penicillin and buffered crystalline penicillin for aqueous injection", the proper name by which Penicillin S-R was described in License 503. Moreover, Order in Council P.C. 5090, dated November 5, 1948, which enacted amended Regulations for licensing manufacturers to operate registered establishments for the manufacture of injectable antibiotics and injectable preparations containing antibiotics made it clear that penicillin included its salts and derivatives. Paragraph 20 provided:

> 20. Penicillin shall be an antibiotic as defined in paragraph 1 and shall be one or more of the antibiotic substances produced during the growth of fungi such as *Penicillium notatum, Penicillium chrysogenum,* and the salts and derivatives of such substances. The proper name shall be that specified in the license.

Then paragraphs 27 to 32 deal with crystalline penicillin as a kind of penicillin and paragraphs 38 to 42 refer to procaine penicillin as a kind of penicillin. And there was no doubt in Dr. Stimpert's mind that he was being called upon to give his opinion on whether Penicillin S-R was a biological product and that he considered it a kind of penicillin. The following extract from the transcript is important:

> Mr. KELLEY: Doctor, you are familiar with the question before this Board which I think we can limit to whether or not penicillin S-R is a biological.
>
> Dr. STIMPERT: Yes.
>
> The CHAIRMAN: Do you mind if I ask the Doctor what "S-R" means?
>
> Dr. STIMPERT: The two terms are "soluble" and "repository", which term is used for the action of penicillin. It is a combination of two crystal sizes of penicillin.
>
> The CHAIRMAN: The reason I ask this is to provide for any dispute over the kind of penicillin.
>
> Mr. KELLEY: This is the penicillin we are restricted to

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In my opinion, this completely disposes of the appellant's criticism. Instead of constantly repeating the term Penicillin S-R everyone spoke of it as penicillin but Penicillin S-R was clearly in their minds. Thus everything that was said of penicillin must be considered as having been said of Penicillin S-R.

This brings me to my conclusion. The issue in this appeal is not whether Penicillin S-R was actually a biological product within the meaning of Tariff Item 206*a* but whether the Tariff Board erred as a mater of law in deciding that it was and, therefore, exempt from duty by virtue of it. If there was material before the Board from which it could reasonably decide as it did this Court should not interfere with its decision even if it might have reached a different conclusion if the matter had been originally before it. Moreover, the decision of the Board might not have been the same if the case before it on behalf of the Deputy Minister had been put differently. Whether penicillin is a biological product within the dictionary definition I have cited, either under the first part or under the second, appears to be a matter of controversy but this was not developed as it might have been. The persons presenting the Deputy Minister's case seem to have been so beset with the idea that Penicillin S-R could not be admitted as a biological product under Tariff Item 206*a* because it was not licensed to be manufactured as a biological product and because the officers administering the Food and Drugs Act classed it as an antibiotic and, consequently, not a biological product that they did not bring convincing expert opinion in support of the contention that Penicillin S-R was not a biological product before the Board. The preponderance of expert opinion was thus strongly in favor of the appealing importer's position.

Consequently, I am satisfied that the majority of the Board, on the material before it, acted reasonably in deciding that Penicillin S-R was a biological product within the meaning of Tariff Item 206*a* and exempt from duty by virtue of it. Indeed, it is difficult to see how, on such material, it could have decided otherwise.

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I am, therefore, of the opinion, without attempting to decide positively whether Penicillin S-R was a biological product or not, that the Tariff Board did not err as a matter of law in deciding as it did. That being so, the answer to Question 1 is in the negative.

It follows that the appeal herein must be dismissed with costs.

Judgment accordingly.

BETWEEN:

FREDERICK A. PERRAS ..... APPELLANT;

AND

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

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Oct. 16

Nov. 20

Revenue—Income—The Income War Tax Act, R.S.C. 1927 c. 97, s. 19(1)—Winding up—Undistributed income on hand—Meaning of "on hand"—Appeal allowed.

Appellant and another person owned shares in Commercial Hotel Limited the assets of which company were sold, the money received from such sale being held pending the disposition of certain tax appeals instituted by the Company. The Company was liable for certain tax assessments made on it and these assessments were paid. Thereafter the company passed a resolution that it be wound up and a liquidator was appointed. He carried out the liquidation of the company and distributed the balance, after payment of debts, to appellant and the other shareholder. Respondent computed that the Company had on hand undistributed income and added this amount to the income of appellant and the other shareholder. The added assessment was based on the contention that the Company should have had undistributed income on hand from beer sales made during the years for which such sales were assessed against the Company and which were the subject matter of the appeals referred to above. An appeal from such assessments was taken to this Court.

Held: That the undistributed income on hand in s. 19(1) of the Act means the undistributed income the company has *on hand* and that is determined by ascertaining what the company actually did have on hand, not what it should have had on hand; "on hand" means "in the possession or control of" and so available for distribution, and in computing what is on hand there should be taken into account disbursements and losses which may have lessened the amounts of the profits held in reserve.

2. That the assets of the business of Commercial Hotel Limited sold were all capital assets and that any sum of undistributed income which the Company may have had on hand was completely wiped out upon payment of the arrears of income tax and there was not at the time of the winding up any undistributed income on hand.

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APPEAL from a decision of the Income Tax Appeal Board.

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

J. A. MacInnes, Q.C. and *C. S. Arnold* for appellant.

J. L. Farris, Q.C. and *T. E. Jackson* for respondent.

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

CAMERON J. now (November 20, 1953) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board dated November 21, 1952, by which it affirmed an assessment made upon the appellant for the year 1948. The appeal involves a consideration of the provisions of s. 19(1) of the Income War Tax Act and its application to the facts of this case. In that year, the appellant, as a shareholder of Commercial Hotel Ltd. received certain amounts from its liquidator, and the respondent, being of the opinion that at the time of the winding up, the company had on hand certain undistributed income, added to the declared income of the appellant (as the owner of one-third of the issued shares of the company), one-third of said amount. The only other shareholder in 1948 was Mrs. Dorothy Johnson who was the owner of the remaining two-thirds of the issued shares of that company; she also received in 1948 certain sums from the liquidator, and to her declared income the respondent added two-thirds of what was considered to be the undistributed income of the company. Both the appellant and Mrs. Johnson were assessed accordingly and their appeals to the Income Tax Appeal Board in respect thereof were dismissed. Both have taken an appeal to this Court and at the hearing their appeals were considered together. The principles involved and the evidence adduced are equally applicable to both cases.

S. 19(1) of the Act is 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 main ground of appeal is that, in fact, Commercial Hotel Ltd. at the time of its winding up had no undistributed income *on hand*. It becomes necessary, therefore, to set out certain facts in relation to Commercial Hotel Ltd. (hereinafter to be called the company).

The company was incorporated in 1927 under the Companies Act of British Columbia. From that date until its assets were sold in 1947 it carried on business in rented premises at Vancouver and had a license to sell beer at retail. From about the year 1938 there were three shareholders of the company, namely, George Johnson (husband of Dorothy Johnson), who was its manager and held approximately one-half of its issued shares; Dorothy Johnson, who held approximately one-sixth of the issued shares and who at no time took an active interest in the conduct of the company's business; and F. A. Perras, the appellant, who was employed as a beer waiter and owned two-sixths of the issued shares.

In August, 1945, the Minister of National Revenue, not being satisfied that the company had filed proper income tax returns for the years 1939 to 1943 inclusive, exercised the powers given him by s. 47 of the Income War Tax Act and determined the income of the company for each of those years and assessed it accordingly. The company appealed, but before it had received the decision of the Minister, George Johnson died. Under his will, all his shares in the company were bequeathed to his wife who thereafter was the owner of two-thirds of the issued shares.

Following the death of the said Johnson in January 1947, his widow and Perras, who were the sole owners of the company, decided to dispose of the hotel business. On April 9, 1947, it was sold to Midtown Holdings Ltd. for $80,000, the sale price including (*a*) furniture and equipment, the value of which was fixed at $17,500; (*b*) the beer license; (*c*) goodwill; (*d*) the name "Commercial"; and (*e*) the lease of the hotel premises. The proceeds of the sale, which with certain adjustments totalled $81,223.71, appear to have been paid to the company's solicitors, Messrs. MacInnes and Arnold, and pending the final disposition of the tax appeals then pending, the greater part thereof was placed in Government bonds.

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In June, 1947, the Minister affirmed the assessments made upon the company for the years 1939 to 1943 and an appeal was taken to this Court. That appeal was dismissed with costs by Mr. Justice O'Connor on December 8, 1947 (1). The company thereby became liable to payment of arrears of income tax, interest thereon, and costs in the sum of $23,661.31. In order to satisfy the said judgment, the said solicitors sold bonds having a face value of $25,000 and satisfied the said judgment debt.

Thereafter, and on February 18, 1948, the said company passed a resolution that it be wound up, and appointed William Tomlinson, Esq., C.A., as its liquidator. He took over the remaining assets, paid the debts and expenses and over a period of time distributed the balance between the appellant and Mrs. Johnson in the proportion of one-third and two-thirds. On May 3, 1948, the appellant received $17,000 in bonds and on the same date Mrs. Johnson received bonds to the value of $8,500 in respect of her own shares, and $25,500 in bonds as beneficiary of her husband's shares in the company. According to the computation made by the assessor in the Income Tax office, the company had on hand undistributed income in the sum of $17,218.74, and under s. 19(1) there was added to the income of the appellant one-third of that amount, and to the income of Mrs. Johnson, the remaining two-thirds.

The books of the company did not show any undistributed income on hand at the time it went into liquidation. The assessments made upon Mrs. Johnson and the appellant were based on a computation of the company's undistributed income made by the witness W. S. Dempsey, an assessor in the Income Tax office at Vancouver. He took into consideration the entire operations of the company since it commenced business as disclosed by its income tax returns, making due allowance for adjustments made at the time of each assessment, and also taking into consideration the income assessed for the years 1939 to 1943 which were later affirmed by the judgment in the Exchequer Court. The basic figures are shown in Ex. A-1, the first page of which is for the period from 1928 to December 31, 1948, the second page bringing the computation up to December 31, 1949. Ex. R-3 is the final computation based

(1) [1948] Ex. C.R. 108.

thereon and it indicates that if the books of the company had been properly prepared and if they had included as taxable revenue the added amounts of income from beer sales for the years 1939 to 1943, which were assessed against the company in those years ($30,773.03), there should have been undistributed income of $17,218.74 on hand.

Counsel for the appellant does not challenge the accuracy of that computation as such. He admits that the company was bound by the judgment in this Court and that the full amount of the assessments for those years was paid. His main contention, however, is that no part of that added income of $30,773.02 was *on hand* at the time of the liquidation and consequently that none of it was received by either Mrs. Johnson or the appellant. He submits that all the assets sold to Midtown Holdings Ltd. were capital assets; and that as they were sold for a total amount of $81,223.71, and as the two shareholders received only a total of approximately $65,000 in the liquidation, the capital assets were, in fact, depleted to the extent of approximately $16,000.

The onus is upon the appellant and the taxpayer must establish the existence of facts or law showing an error in relation to the taxation imposed upon him (*Johnson* v. *Minister of National Revenue* (1)). As stated by Rand, J. in that case at p. 489, the onus is upon the taxpayer to demolish the basic fact on which the taxation rested. In this case the basic fact on which the taxation rested was that the company did have undistributed income on hand. Now as I have said, there is no doubt that on the basis of the assessments made upon the company from its inception, the company should have had the sum of $17,218.74 on hand. But as I read the provisions of s. 19(1), the distribution of the company's assets is deemed to be a dividend, in the circumstances named, only to the extent that "the company has *on hand* undistributed income." That it seems to me is a pure question of fact and is not to be determined by showing what undistributed income the company should have had on hand, but by determining what it actually did have on hand. I do not mean by that, of course, that it must be in the form of cash, for it could be

(1) [1948] S.C.R. 486.

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on hand in many other forms. In my opinion, "on hand" means "in the possession or control of" and so available for distribution. The tax therefore arises only against undistributed income on hand; and in computing what is on hand, there should be taken into account disbursements and losses which may have lessened the amounts of the profits held in reserve.

Now, as I have intimated above, the entire case put forward by the respondent is based on the assessments made upon the company for the years 1939 to 1943, which assessments were later affirmed in this Court. By those assessments, there was added to the declared income of the appellant the sum of $30,773.02. Those so-called "arbitrary" assessments were made on the theory that the company had not been reporting in its income the revenue which its purchases of beer suggested it should have reported. Mr. Justice O'Connor, who heard the appeals from those assessments, pointed out in fairness to the company that in presenting its case it was handicapped by the fact that Mr. Johnson, who was the chief shareholder and manager of the company and who knew more about the company's business than any one else, had died before the trial. While he was somewhat doubtful of the weight to be attached to the findings of some of the appellant's witnesses, it would appear that his main reason for dismissing the appeals was that the appellant had not satisfied the onus cast on it, the concluding words of his judgment being, "The appellant has not satisfied me that the actual revenue was less than the revenue estimated by the Minister under s. 47 during the years in question, and the appeal must, therefore, be dismissed with costs."

The effect of that judgment was not to increase the undistributed income actually on hand, but to increase the debts of the company as shown by its books by the sum of approximately $23,000. That debt was paid in full and it seems to me that on a proper accounting basis it would be right to take into account the payment of such disbursements as a charge on the profits actually held in reserve in determining what undistributed income was actually on hand.

Now, however much in error the books of the company may have been at an earlier stage in the history of the company's affairs, and whatever may be the explanation for the

non-appearance in its books of the sum of $30,773.02, the history of its affairs from and after the death of George Johnson and up to the time of the final distribution by the liquidator has been made quite clear by the evidence of Mrs. Johnson, Mr. Tomlinson and the appellant. That evidence is sufficient to establish definitely the assets then on hand and the manner in which they were dealt with.

My first conclusion is that the assets of the business sold to Midtown Holdings Ltd. were all capital assets. That would undoubtedly be the case with regard to the beer license, the lease of the premises, the goodwill and the right to use the name "Commercial." *Prima facie,* also, that would be the case in regard to the furniture and equipment. I have not overlooked the submission of counsel for the respondent that it is a somewhat suspicious circumstance that the total cost of the furniture and equipment as shown by the company's returns, was approximately $12,300 (practically all of which had been written off to depreciation), and that the price put upon it at the time of the sale was $17,500. His suggestion is that some of the undistributed profits may have been put into the purchase of additional furniture and equipment. But in view of the effect of inflation on the prices of all such equipment and that the price established thereon at the time of the sale may well have been a purely arbitrary one, I do not think I should draw any such conclusion in regard thereto.

My second conclusion is that on the evidence the appellant has satisfied me that the other assets of the company did not at any material time after the death of George Johnson exceed in value the sum of $23,661.31, which was paid in satisfaction of the arrears of income tax. Messrs. MacInnes and Arnold, the solicitors for the company, received only the proceeds of the sale of the capital assets, and the remaining assets were taken over directly by the liquidator. I accept the latter's evidence that his total receipts in the winding up proceedings are as shown in para. 17 of the Notice of Appeal. These receipts total $68,220.85, and excluding therefrom the Victory bonds of a value of $51,000 and cash amounting to $649.45 (both of which represent the balance of the proceeds of the sale of capital assets as turned over to him by Messrs. MacInnes and Arnold), the receipts by him of all assets other than of capital assets are shown to be of a value of $16,571.40.

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That amount is made up of $7,000 in Government Bonds, certain book debts owing by the shareholders, a bank balance and various refunds, mainly of the refundable portion of excess profits tax paid by the company in previous years. Assuming that all these various items are made up of undistributed income on hand in some form, it is apparent that when the debt of $23,661.31 was paid and charged to profits held in reserve—as I think the company was entitled to do —no undistributed income remained *on hand.*

It is true that the debt of $23,661.31 was actually paid by Messers. MacInnes and Arnold out of the proceeds of the sale of capital assets. But I do not think that that is a matter of any importance whatever. At the time the judgment was rendered, a liquidator had not been appointed and there were no other liquid assets then available to meet the obligation. It was merely a convenient way of paying the obligation without delay.

My finding on this point, therefore, is that any sum of undistributed income which the company may have had on hand was completely wiped out upon payment of the arrears of income tax; and that upon a proper accounting, there was not at the time of the winding up any undistributed income on hand. It follows that no part of the amounts received by the appellant in 1948 is taxable under the provisions of s. 19(1).

For these reasons, I find that the appellant has satisfied the onus put upon him to establish that on the winding up of Commercial Hotel Ltd., the company had no undistributed income on hand. The appeal will be allowed and the assessment made upon the appellant will be set aside and the matter referred back to the Minister to reassess the appellant upon the basis of these findings.

The appellant is also entitled to his costs after taxation. Inasmuch, however, as the same counsel appeared on behalf of both this appellant and Mrs. Dorothy Johnson, the other appellant, and that the appeals were heard together, I direct that only one set of costs shall be allowed following the service of Notice of Trial, the same to be apportioned equally between this and the Johnson appeal.

Judgment accordingly.

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Oct. 7

Nov. 28

BETWEEN:

ANDREW F. JASPERSON ..... APPELLANT;

AND

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

Revenue—Income tax—Tax based on net worth—Taxable income as claimed by taxpayer not established by proof.

Held: That when a taxpayer has failed to establish that his taxable income was as shown by a statement prepared by his auditor and it is proven to the Court that the statement is incomplete that statement will be rejected in its entirety.

APPEAL from a decision of the Income Tax Appeal Board.

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

A. M. Harradence for appellant.

H. W. Riley, Q.C. and *T. E. Jackson* for respondent.

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

CAMERON J. now (November 28, 1953) delivered the following judgment:

This is an appeal by the taxpayer from a decision of the Income Tax Appeal Board dated October 27, 1952 (7 Tax A.B.C. 177) dismissing his appeal from assessments made upon him in respect of the years 1946 to 1950 inclusive.

The Minister of National Revenue, being dissatisfied with the returns made by the taxpayer, exercised the powers conferred on him by s. 47 of the Income War Tax Act, determined the amount of the tax to be paid for the years 1946, 1947 and 1948, and assessed him accordingly; similarly, for the years 1949 and 1950 he exercised the powers conferred by s. 42(5) of the Income Tax Act and assessed the tax payable by the appellant for those years.

The onus is on the appellant to show the existence of facts or law showing an error in relation to the taxation imposed upon him (*Johnston* v. *M.N.R.* (1)).

(1) [1948] S.C.R. 486.

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Cameron J.

At the hearing, no attempt was made to uphold the returns made by the appellant for any of the years in question. It is obvious that they were incomplete and inaccurate and counsel for the appellant frankly admitted that such was the case. On the basis of those returns, no income tax whatever was payable in any year. However, when the appellant was originally assessed for the year 1948, he paid an amount which in one part of the record is stated to be $537.31 and at another part is said to be $740.54. It was suggested that the inaccuracies were due to the fact that they were prepared for the appellant by his elder son who had little experience in such matters. I am far from being satisfied with the reasonableness of that explanation.

The reassessments made upon the appellant and which are now under appeal are all dated January 28, 1952. They are based upon a Statement of Net Worth (Ex. A) prepared by an assessor from material supplied by the appellant. It shows the net worth of all the appellant's assets as at January 1, 1946 (the commencement of the five-year period in question), and as at December 31, 1950 (the end of that period), after making due allowance for depreciation on all his depreciable assets. The summary contained on p. 4 of that exhibit indicates that his net worth at January 1, 1946, was $22,161.68, and at December 31, 1950, was $64,971.28—an increase of $42,809.60. From that amount is deducted capital gains of $15,993.80, leaving a taxable income in net worth of $26,815.80. To that amount is added $10,000 representing living costs of $2,000 per year (which estimate is not challenged in any way) and also income taxes of $740.54, paid by the appellant. Based on that computation, the appellant had taxable income over the five-year period of $37,556.34. In assessing the appellant, that amount was distributed over the five years in proportion to the gross income reported by the appellant in each year. In the result, the reassessments showed taxable income as follows:

1946	$ 2,554.08
1947	6,612.02
1948	10,061.99
1949	9,144.86
1950	9,183.39
	$ 37,556.34

Counsel for the appellant did not attempt to challenge directly the computation made in the Net Worth Statement. Instead, he endeavoured to establish from the evidence of the appellant, his son Roy Jasperson, and an accountant, Mr. E. D. Battrum, the precise amount of the actual income and disbursements in each year. Exhibits 1, 2, 3, 4 and 5 are folders containing a very large number of cheques, sales slips, statements and receipts for the years 1946 to 1950 respectively. These were supplied to Mr. Battrum and he was asked to prepare an audited statement for each year. He also secured statements from various organizations and corporations to whom the appellant had sold grain and livestock (Exhibits 7-16). Supplementing this data with certain information received from the appellant (such as the value of products produced on his farm and consumed by his family), Mr. Battrum prepared the statement Ex. 18. It contains what is called a "Cash Statement" for each year, but in addition to a statement of income receipts and disbursements it contains a computation of taxable income after allowing for depreciation and personal exemptions. The summary on p. 1 shows gross income for the five years of $63,739.30, a net income of $16,803.47, and taxable income as follows:

1946	nil
1947	$ 2,244.12
1948	2,779.19
1949	2,215.51
1950	nil
	$ 7,231.82

It will be seen, therefore, that the taxable income computed by the respondent is over $30,200 in excess of that computed by Mr. Battrum.

Now I have no doubt that Mr. Battrum's Statement of Income and Disbursements, insofar as it is based on the vouchers and statements supplied to him, may be considered as accurate. Admittedly, however, the vouchers and receipts were incomplete, the appellant having informed Mr. Battrum that a substantial number had been lost. In view of what I consider to be the indisputable facts of the case and to which reference will later be made, it is apparent that very substantial amounts of income were received which are not shown in Mr. Battrum's computation.

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There are other matters, also, which lead me to the same conclusion. I have not attempted to compare in detail the returns made by the appellant with the statement prepared by Mr. Battrum; but a "spot" check of some of the returns shows items of income then reported which are not contained in the auditor's statement. The returns were made at a time when the information was fresh in the minds of the appellant and his son and presumably would be more accurate than statements made from memory after a lapse of many years.

For example, I find in the 1946 return two items for "Livestock Sold" amounting to $370. Then, in the 1947 return, there is an item of "Sundry Sales" such as logs, firewood, sand, gravel, shrubs etc., amounting to $1,290.57. For the same year there is an item of $2,717 for "Grain Turned Over on Rent or Agreement of Sale (2,600 bushels)". Mr. Jasperson gave evidence that prior to January 1, 1946, he had turned over grain to one Smith to whom he was indebted, but that *so far as he could recall* he had always paid him cash after that date until the purchase price of the property was paid in full. This entry strongly suggests that the practice continued at least until the year 1947. In any event, neither that item nor any of the others I have mentioned, appears in Mr. Battrum's computation. The appellant also admitted that he had sold two truckloads of barley privately, and I was unable to trace that item in Mr. Battrum's statement.

As I have intimated above, there is evidence which in my opinion is conclusive that the appellant's income for the years in question was very much greater than that shown in Mr. Battrum's statement. The appellant is a farmer and is concerned mainly with the growing of grain and the buying and selling of livestock. It is not suggested that on January 1, 1946, his assets were other than as shown on the Net Worth Statement or that during the next five years he received any money from any source other than from the operation of his farm and the sale of one of his farms in 1948 for $27,700.

In the five-year period, it is shown that he paid out the following amounts, exclusive of ordinary operating costs.

(*a*) To Smith for balance of purchase price on farm bought in 1945 for $14,400.00 with a downpayment of $3,000.00	$ 11,400.00
(*b*) New machinery and equipment as stated by Mr. Battrum	18,807.82
(*c*) New farm purchased in 1948 for cash	10,500.00
(*d*) New farm purchased in 1948 and paid for by January, 1949	22,400.00
(*e*) Paid on account of income taxes	740.54
(*f*) For living expenses as estimated by the assessor and not disputed	10,000.00
(*g*) Loan made to unidentified person and owing December 31, 1950	1,000.00
	$ 74,848.36

To meet these outlays it is shown that during the five years, he had on hand, exclusive of income, not more than the following amounts:

(*a*) Bonds on hand at January 1, 1946	$ 3,225.00
(*b*) Proceeds of sale of one farm in 1948 (approximately)	27,700.00
(*c*) Depreciation on buildings and equipment for the period January 1, 1946, to December 31, 1950, which for this purpose I shall assume to be as claimed by Mr. Battrum, that amount or more having been allowed in the Statement of Net Worth	11,441 87
	$ 42,366.87

It is apparent that as no new capital was brought into the business and as no capital asset of any importance other than that mentioned was sold, the difference of $32,481.49 must have been derived from income received within the five-year period. It is true that that amount is somewhat less than the figure of $37,556.34 reached by the assessor in the Net Worth Statement; but the difference may be accounted for in whole or in part by the fact that the assessor has included in his computation the sum of $1,650 paid in 1947 for a winter home in Cardston (which I shall refer to later) and to other minor matters which for the purpose of my conclusion I have not found it necessary to consider. It may be noted here that the appellant stated that he laid out certain amounts in changing and adding to the buildings on the farms he purchased in 1948.

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In the light of this evidence, which I have taken from the appellant's own witnesses, there is no doubt that Mr. Battrum's statement is most incomplete. That evidence is sufficient in my opinion to indicate that, subject to a few minor matters which I will now refer to, the Net Worth Statement must be accepted as accurately representing the taxable income of the appellant over the five-year period. Counsel for the appellant made no objection to the manner in which it was apportioned.

There are two items in the Net Worth Statement which should be corrected. The cost price of that part of Sec. 1-4-25-W4 appears as $12,800. The evidence showed that the south one-half thereof was purchased at that price, but that the portion of the north half purchased by the appellant about the year 1939 was acquired for $2,400. The total cost thereof should be increased to $15,200. Some evidence was given that many years after the south half of that section was acquired, the Debt Adjustment Board "put a price of $4,600 on that property", but I was not informed as to whether that was the amount fixed as the total purchase price or the balance to be paid, and as a result I do not propose to consider that matter further.

The Net Worth Statement included as an asset of the appellant a house in Cardston purchased in 1947 for $1,650. The appellant gave evidence that it was purchased with monies belonging to his wife and the latter corroborated that statement. The evidence on that point was perhaps not quite conclusive, but inasmuch as there was no evidence to contradict the statements that the purchase price was wholly contributed by Mrs. Jasperson—although there was some difference of opinion as to just how or when she had acquired it—I have reached the conclusion that the sum of $1,650 should not be included as an asset of the appellant.

The appellant has failed to establish that his taxable income was as shown by the statement prepared by his auditor and I reject that statement in its entirety as being incomplete, and not in accordance with the facts proven before me. Subject to the two matters which I have mentioned and the new computation which will have to be made as a result of such corrections, I accept the Net Worth Statement as shown in Ex. A as having been properly made.

In order that the proper changes may be made, it is necessary to formally allow the appeal and refer the matter back to the Minister.

In the result and for the reasons I have stated, the appeal will be allowed, the decision of the Income Tax Appeal Board set aside, and the matter referred back to the Minister for the purpose of amending the Net Worth Statement by:

(*a*) increasing the book value of Sec. 1-4-25-W4 to the sum of $15,200 and by adjusting the amount of capital gains accordingly;

(*b*) deleting from the assets of the appellant as of December 31, 1950, the sum of $1,650 representing the cost of the Cardston home;

and to reassess the appellant accordingly for the five years in question.

I would also draw the attention of the respondent to a matter not raised at the hearing. It would appear that in the reassessment for the year 1946, the appellant was assessed for the full amount of taxable income without consideration being given to any claim for personal deductions.

While the appeal is allowed for the limited purposes which I have outlined, the assessments made by the respondent will be varied only to a very small extent. In view of the fact and in the light of all the circumstances, I see no reason why the respondent should not be entitled to his full costs after taxation, and I so direct.

Judgment accordingly.

DOROTHY IRENE JOHNSON .....APPELLANT;

AND

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

The appeal was allowed for the reasons stated in *Frederick A. Perras* v. *Minister of National Revenue ante* p. 21.

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Oct. 13
Nov. 20

BETWEEN:

JOSEPH HAROLD WILSON ..... APPELLANT;

AND

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

Revenue—Income—Income tax—The Income War Tax Act R.S.C. 1927, c. 97, s. 6—The Income Tax Act 11-12 Geo. VI, c. 52, s. 12(1)(a)—Income or capital—"Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income"—No deduction in respect of "an outlay or expense except that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer".

A testator by his will bequeathed to appellant the business and lands and premises on which that business was carried on in the City of Victoria under the name of "W. & J. Wilson" subject to appellant entering into and carrying out certain covenants namely, to pay testator's widow a fixed sum each month, to pay all taxes and charges and expenses of repairs on testator's two houses. By the will testator charged the business premises with the performance of such covenants. Appellant accepted the bequest and upon entering into the covenants provided by the will became owner of the business which was carried on under its original name, the legal title to the business premises being retained by the executors of the will.

Appellant fulfilled the obligations upon him by the covenants entered into, all such payments being made by cheque of W. & J. Wilson and posted in the books of the business as "Account of Mrs. A. A. Wilson" such payments being charged to rent account in the auditor's statements of the business of W. &. J. Wilson.

Appellant deducted such amounts from his income for taxation purposes. The deduction was disallowed by respondent and appellant now appeals to this Court.

Held: That the payments were not disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income of appellant, nor were they payments made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the appellant.

2. That the payments were made on account of capital, since money paid for acquiring the business or for property in which a business is to be carried on is a capital expenditure and none the less so if it is paid in part or in whole by a series of payments.

3. That the proprietor of a business which is carried on in his own premises and under his own name may not deduct the annual value of the property or rent in computing his income and that rule applies when the owner is the sole proprietor of the business which is conducted under a somewhat different name.

4. That payments made by appellant were not rent.

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APPEAL from a decision of the Income Tax Appeal Board.

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

L. J. Ladner, Q.C., W. H. M. Haldane, Q.C. and *W. M. Carlyle* for appellant.

J. G. Ruttan and *T. E. Jackson* for respondent.

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

CAMERON J. now (November 20, 1953) delivered the following judgment:

This is an appeal from the decision of the Income Tax Appeal Board dated February 4, 1953, whereby the appellant's appeals in respect of income tax assessments made upon him for the taxation years 1946, 1947, 1948 and 1949, were dismissed.

There is no dispute as to the facts. During each of the years in question the appellant carried on business at Victoria, B.C., and elsewhere, as "W. & J. Wilson," of which business he was the sole proprietor. To his T-1 General returns, he attached in each year an auditor's statement of the business of "W. & J. Wilson," such statements showing annually a deduction for "rent" as follows:

1946	$ 6,927.77
1947	7,132.91
1948	6,950.53
1949	6,798.62

In assessing the appellant, the respondent totally disallowed these items as deductions, added them to the income of the appellant and assessed him accordingly. From such assessments, appeals were taken to the Income Tax Appeal Board and subsequently to this Court.

Prior to January 2, 1945, the business of "W. & J. Wilson" was owned and operated by J. E. Wilson, father of the appellant. For many years he carried on that business at the premises known as 1221 Government Street in the City of Victoria and more particularly known as Lot 166, Block 13, which premises he also owned. J. E. Wilson died on that date and by his will, duly admitted to probate

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(Ex. 1), he appointed the Canada Trust Company and the appellant to be his executors and trustees, and disposed of the said business and premises as follows:

"I GIVE, DEVISE AND BEQUEATH to my said son Joseph Harold Wilson the property and premises known as number 1221 Government Street in said City of Victoria and more particularly described as Lot 166, Block 13, City of Victoria, and the business carried on by me therein under the name of W. & J. Wilson and the goodwill thereof, all goods, stock-in-trade, furniture, machinery, store fittings and plant together with the benefit of all contracts subsisting in relation to the said business, all book debts owing to me in connection with said business and all securities for money, cash and money in bank to the credit of the said business subject to my said son complying with the following terms, namely:"

And then, omitting subclause (*a*), (*b*) and (*c*) not here relevant, the said will continued:

"(*d*) Entering into a covenant under seal with my wife binding himself and his executors and administrators to pay to her during her lifetime the sum of $500 each and every month on the first day thereof in advance, the first of such payments to be made on the 1st day of the month next following my death;

(*e*) Entering into a covenant under seal with my said wife and my Trustees, binding himself and his executors and administrators, whereby he shall covenant that during the lifetime of my wife or until the same be sold, whichever event shall the earlier happen, he or they will pay all taxes, local improvement charges, insurance premiums and expenses of all ordinary repairs to the upkeep of the fabric of my residence known as number 811 St. Charles Street in the said City of Victoria and of the buildings situated on my summer residence property at Finnerty's Beach in the Municipality of Saanich:

(*f*) The said Lot 166 shall be and is hereby charged with the performance by my said son's covenants required above by paragraphs (*d*) and (*e*) to be entered into by him and accordingly, during the lifetime of my wife the title to the said Lot 166 shall be in the names of my said Trustees with the right to my said son, should he desire that the same be sold, to require my Trustees to sell the same provided the sale price thereof and the terms of sale meet with their approval and the moneys to be realized from any such sale shall, if my said son so desires, be used in the purchase of other business premises for my said son, and unless so used shall be invested and the income to be derived therefrom shall be paid to my said son, subject to the performance by him of his covenants as above mentioned, and on the death of my said wife the capital thereof shall be paid to my said son:

(*g*) Upon my son complying with the terms of this bequest and devise to him within three months from the date of my death my Trustees are authorized to turn over the said business to my said son as a going concern as of the date of my death, but should my son fail to carry out the above terms within the said period of three months or thereafter within a period of one month from the giving of written notice to my said son requiring him to elect as to whether he will take the said business over or not, then my Trustees are to sell and convert the said business and land into money, and pay the moneys required to be paid under paragraphs (*a*), (*b*) and (*c*) hereof and to set aside a sufficient amount which when

invested will in the opinion of my Trustees produce a sufficient income to pay to my wife the said sum of $500 as provided by paragraph (*d*) hereof, and the other outgoings provided by paragraph (*e*) hereof, and apply such income for such purpose and to pay the balance of said proceeds to my said son, and on the death of my said wife to pay to my said son the capital retained and invested as above required to be invested. I AUTHORIZE AND EMPOWER my Trustees until the said business be turned over to my son or sold and converted as above provided, to manage and carry on the said business and for such purpose in their discretion to appoint my said son to act in the full management thereof:"

The appellant, having chosen to accept the bequest and devise subject to all the conditions imposed by the said will, duly entered into the agreements as required by subsections (*d*) and (*e*). Thereupon, the said trustees turned over to the appellant the business of "W. & J. Wilson" of which he then became the sole proprietor. Pursuant to the provisions of subsection (*f*), the title to the said Lot 166 was retained by the said executors, and, as shown by the Certificate of Encumbrance dated Nov. 30, 1951 (Ex. 2), it was on that date still held in their names.

By his will, J. E. Wilson gave to his widow a life interest in his Victoria residence and in his summer home at Finnerty's Beach. The disbursement which the appellant now seeks to deduct consisted of the monthly payment of $500 which he had agreed to pay to his mother during her lifetime, and of the taxes and other outgoings on the Victoria residence and on the summer residence, which, by his agreement with the trustees, he had undertaken to pay. It is shown that all such payments for the years in question were paid by the cheque of "W. & J. Wilson" direct to the widow. In the books of that business they were posted to "Account of Mrs. A. A. Wilson," and at the end of each year the total sums paid were charged to "Rent Account" in the annual auditor's statements of the business of "W. & J. Wilson."

The Income War Tax Act is, of course, applicable to the taxation years 1946, 1947 and 1948. Its relevant provisions are as follows:

6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of

(*a*) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income;

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

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(c) the annual value of property, real or personal, except rent actually paid for the use of such property, used in connection with the business to earn the income subject to taxation;

For the taxation year 1949 the Income Tax Act is applicable, its relevant provisions being as follows:

12. (1) In computing income, no deduction shall be made in respect of

(a) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer,

(b) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part,

(d) the annual value of property except rent for property leased by the taxpayer for use in his business.

It is not contended that in this case there is any substantial difference between these provisions of the Income War Tax and the Income Tax Act.

The onus is, of course, on the appellant (*Johnston* v. *M.N.R.* (1)). The first submission is that the sums so paid were "rent" or analogous to rent. It is said that the position here is the same as if the lands and buildings had been left to the trustees for the lifetime of the widow and that the trustees had then entered into a lease with the appellant, or with "W. & J. Wilson"; or, alternatively, as if the property were left to the widow for life and that she had then leased it to the appellant, or to "W. & J. Wilson." In either of such cases, I may assume that the actual rent so paid (to the extent that it was not unreasonable) would have been a deductible expense. In support of this contention, it is pointed out that the title to the property did remain in the name of the trustees and that the evidence establishes that the actual sums so paid were in amount roughly equivalent to what might have been a fair rental for the property.

In my view, however, the facts of the case do not support this contention. The property was, in fact, devised to the appellant, subject to his complying with the conditions named, and with which he did comply. The widow was not given a life interest in the property, and that which she was entitled to receive was not the rent of the property but the fulfilment of the contracts entered into personally by the appellant with her and with the trustees. The

(1) [1948] S.C.R. 486.

charge created on the property and the direction that the paper title should remain in the trustees during the life of the widow, were steps taken to collaterally secure that the appellant's personal covenants should be carried out. She was entitled to the benefits of his covenants whether or not he carried on business on the premises.

No lease for the property was entered into at any time. The fact is that the appellant, whether considered as an individual or as the sole owner of "W. & J. Wilson," was never a tenant of the property. I have considered the terms of the will carefully and have reached the conclusion that the appellant became the beneficial owner of the property immediately upon complying with the conditions laid down in his father's will, namely, payment of the succession duties and the small legacies which he was required to pay, and the completion of the contracts which I have mentioned. That he considered himself as such owner there can be no doubt. In each year his tax returns showed that he included the premises as an asset of "W. & J. Wilson," that he paid the taxes thereon, that depreciation thereon was claimed and allowed, and that some small part of the premises was rented as a barbershop, the rent therefrom being duly accounted for. I am quite unable to reach the conclusion that the payments made by or on behalf of the appellant, who was the beneficial owner and not the tenant of the property, to his mother, who was not the owner of the property, can in any way be regarded as rent or as in the nature of rent.

Counsel for the appellant, however, emphasized the fact that the payments here were made by the business of "W. & J. Wilson." He submits that that business must be considered as a separate entity and that in computing its profits, it was necessary to take into account the disbursements so made. He points out that for the year 1946 and 1947 the business was assessed to excess profits tax. Exhibits 3 and 4 are such assessments and I note therefrom that in each year the Minister disallowed the deductions claimed in respect of the payments to Mrs. A. A. Wilson.

Mr. P. S. Watt, the chartered accountant whose firm had been auditing the accounts of "W. & J. Wilson" for many years, stated that while he had not personally audited the accounts for the years in question, he had examined the

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annual returns and the books of the company and had been informed of the terms of the will of the appellant's father. He said that he considered that the disbursements in question were properly classified as "rents" and that from an accounting point of view they should be taken into account in determining the net profits of the business. At another point he said: "As an accountant I considered 'W. & J. Wilson,' or the appellant, as the owner of the property, which property was burdened with an obligation to pay the annual amounts which I classify as 'rent'." I am unable to follow his conclusion that the monies paid out by an owner of property could be considered as rent for that property.

The remaining submission by the appellant is that the payments were necessarily made for the purpose of ensuring that the business of "W. & J. Wilson" should remain in occupation of the premises. The evidence shows that the business has been carried on in that particular location for a great many years, that it would be difficult to secure an equally valuable site in Victoria, and that if it were moved to another location, some of the goodwill might be lost. It is submitted that if the payments were not made, the appellant's mother, in order to secure the payments to which she was entitled, might institute proceedings to bring the property to sale and that "W. & J. Wilson" might in that case lose possession thereof.

Now "W. & J. Wilson" were under no legal obligation whatever to pay any amounts to Mrs. A. A. Wilson. It was not necessary for them to pay anything of that nature to any one. The obligation to pay her the amounts in question was an obligation personal to the appellant. The disbursements were made in satisfaction of his personal obligations and were not made for the purpose of earning the profits. In *Minister of National Revenue* v. *Dominion Natural Gas Co. Ltd.* (1), Crocket, J. referred to and applied the principle laid down by Lord Davey in *Strong & Company Ltd.* v. *Woodifield* (2), that "it is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits."

(1) [1941] S.C.R. 19. (2) [1906] A.C. 448.

There is no evidence before me as to the reason for the payments being made by "W. & J. Wilson" rather than by the appellant personally. But even if it were found that the purpose was to prevent the possible extinction of the business in that property—and I do not think that was the real purpose—that would not be an expense incurred for the production of income. That point was referred to in *The Dominion Natural Gas* case (*supra*), in which Duff, C.J. cited the case of *Ward & Co.* v. *Commissioner of Taxes* (1), in which the Judicial Committee of the Privy Council approved a statement in the Court of Appeal of New Zealand as follows:

'We find it quite impossible to hold that the expenditure was incurred exclusively, or at all, in the production of the assessable income. It was incurred not for the production of income, but for the purpose of preventing the extinction of the business from which the income was derived, which is quite a different thing. It was contended by the Company that it was illogical that while legitimate expenses incurred in the production of the income are deductible, similar expenses incurred for the much more important purpose of keeping the profit-making business alive are not deductible, and, further, that it was inequitable that the Legislature should, on the one hand, force a certain class of traders into a struggle for their very existence, and, on the other hand, treat the reasonable expenses incurred in connection with such struggle as part of the profits assessable to income tax. These aspects of the matter are clearly and forcibly set out in the contentions of the Company as embodied in the correspondence with the Commissioner contained in the case, but they raise questions which can only be dealt with appropriately by the Legislature. This Court, however, cannot be influenced by such considerations, being concerned only with the interpretation and application of the law as it stands.'

Their Lordships agree with this reasoning . . . The expense may have been wisely undertaken, and may properly find a place, either in the balance sheet or in the profit-and-loss account of the appellants; but this is not enough to take it out of the prohibition in s. 6, subs. 1(*a*), of the Act.

Reference may also be made to the case of *Calvert* v. *Commissioner of Taxes* (2). That was a decision of the High Court of Australia in which the Court unanimously affirmed the judgment of the Supreme Court of Victoria (3). In that case the taxpayer carried on the business of a grazier on lands which had been conveyed to him by his father. By the agreement between them, the taxpayer agreed to pay a certain annuity to his father, and in the event that his mother survived his father, to pay her a

(1) [1923] A.C. 145. (2) (1927-8) 40 Commonwealth L.R. 142.
(3) 49 A L.T. 42.

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certain annuity for her life, such annuities to be secured by a registered charge upon the said lands. Following the death of the father, other lands were substituted for the original lands so purchased and charged (but that fact was held to be of no importance), and the taxpayer made the required annual payments to his mother. In his income tax return for the year 1925, he reported the income received from his business as a grazier, as well as his income from property, and claimed the right to deduct from the former the amount paid to his mother during that year. The Commissioner of Taxes disallowed the said deduction on the ground that it was barred by the provisions of s. 19(2) of the Income Tax Act 1915 Vict., which provided that "in estimating the balance of the income liable to tax no sum shall be deducted therefrom for . . . (*g*) any disbursements or expenses whatever not being money wholly and exclusively laid out or expended for the purpose of such trade."

In the Supreme Court of Victoria, Cussen, J., speaking for the full Court, said at p. 44:

> The position then would be that on condition of paying this annuity . . . certain land had been transferred to him by his father and he had personally covenanted to pay this annuity the charge being given as security for the payment. On the land so charged he is now and has for some time been carrying on the business of a grazier. But he entered into no undertaking to retain the land so charged or to carry on the business of a grazier upon it. . . .
>
> Here the payment of this annuity is in no way legally connected with the taxpayer's carrying on his business of a grazier. It would have to be paid by the taxpayer and would remain a charge on the land whether he remained the owner of the land or not and whether he carried on the business of a grazier or not. It is therefore not a disbursement wholly expended for the purpose of his trade as a grazier.

The taxpayer's appeal was dismissed, the Court being of the opinion that it was unnecessary to consider the further question as to whether the payment was a capital payment or not. An appeal to the High Court of Australia was dismissed, the Court merely stating that the decision below was correct in that s. 19(2)(*g*) excluded the item as a deduction. In that Court, counsel for the appellant made practically the same submissions as have been made to me in this case.

For these reasons I am of the opinion that the disbursements so made in the years 1946, 1947 and 1948 were barred by the provisions of s. 6(1)(*a*) of the Income War

Tax Act; and that those made for the year 1949 were barred by the provisions of s. 12(1)(*a*) of the Income Tax Act.

I am also of the opinion that the deductions were barred by the provisions of s. 6(1)(*b*) of the Income War Tax Act and by s. 12(1)(*d*) of the Income Tax Act as being payments on account of capital.

As I read the will of the appellant's father, its intention was clearly to confer on the appellant an option to acquire —and, in effect to purchase—the business and the property. He could exercise that option only by accepting the conditions laid down, namely, to pay the succession duties and small legacies and to enter into the contracts with his mother and the trustees. Part of the consideration, therefore, was the monthly sums to be paid his mother and the taxes and other charges on the two residences. Money paid for acquiring the business or for property in which a business is to be carried on is a capital expenditure and none the less so if it is paid in part or in whole by a series of annual payments. (See Konstam on the Law of Income Tax, 10th Ed., 115.)

Were I to give effect to the arguments advanced by counsel for the appellant, the result would be that an individual who is the sole proprietor of a business which is carried on on his own property, but under a name somewhat different from his own, in computing the income derived from that business could deduct the annual value of property. S. 6(1)(*c*) of the Income War Tax Act and s. 12(1)(*d*) of the Income Tax Act (*supra*) are applicable to all taxpayers, including partnerships, and by their terms the annual value of property—except *rent* actually paid for the use of such property or *rent* for property leased by the taxpayer for use in his business—may not be deducted. The proprietor of a business which is carried on in his own premises and under his own name may not deduct the annual value of the property or rent in computing his taxable income. In my view, the same rule applies where—as in this case—the owner is the sole proprietor of the business which is conducted under a somewhat different name.

For these reasons the appeal will be dismissed with costs, and the assessment made upon the appellant will be affirmed.

Judgment accordingly.

1953
Nov. 19

BETWEEN:

EMPIRE DOCK LIMITED .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Practice—Pleadings—General Rules and Orders, Rule 88 and following—Requirements as to proper pleading—Reference to documents—Prayer for relief—Motion to strike out a pleading as being embarrassing.

Held: That proper pleadings should set out the basic facts upon which a litigant purports to make his claim. He may refer briefly to documents on which he may intend to rely at trial. His prayer for relief should be concise and state specifically the relief claimed against the other party.

2. That when a pleading is so confused that it is impossible for the Court or a Judge to ascertain the exact nature of the claim put forward, it ought to be struck out.

MOTION to strike out the whole of a Petition of Right or to stay the proceedings on the ground that it is embarrassing and an abuse of the process of the Court.

K. E. Eaton for the motion.

The suppliant was authorized by the Court to reply in writing.

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

CAMERON J. at the conclusion of the hearing of the motion (November 19, 1953) delivered the following judgment:

I have before me three Notices of Motion in this matter. The first is by the respondent in which I am asked to make an order striking out the whole of the Petition of Right and either dismissing the Petition with costs or staying proceedings on such terms as may seem just, on one or more of the grounds that the said Petition discloses no reasonable cause of action, is vexatious, frivolous, and an abuse of the process of the Court. Then follows an alternative claim that if the first claim be not allowed, certain specific sections of the Petition of Right be struck out on various grounds.

Secondly, I have a Notice of Motion by the Canadian Pacific Railway Company, which was served with a copy of the Petition of Right, to strike out the Petition of Right or in the alternative such portions thereof as may constitute claims or allegations against it on the ground

that this Honourable Court has no jurisdiction to try an action as between the suppliant and the respondent the Canadian Pacific Railway.

Finally, there is a further Notice of Motion by the Northland Terminal Company, Limited, also served with the Petition, for an Order striking out the Petition of Right or in the alternative such portions thereof as may constitute claims or allegations against it on one or more of the grounds

that this Honourable Court has no jurisdiction to try an action between the suppliant and the respondent Northland Terminal Company Limited or that the Petition discloses no reasonable cause of action, is vexatious, frivolous, and an abuse of the process of the Court and for such further Order as this Court may deem just.

Notices of Motion were duly served upon the suppliant and I have before me written replies by it. The suppliant requested permission under Rule 277A of this Court to dispense with its personal appearance either in person or by an attorney on the return of the Motion and that consideration of its representations in writing be approved of. That permission was granted and I have before me its various representations in reply to the Notice of Motion.

In view of the disposition which I propose to make of the first Motion which I have heard, that is the Motion by the Crown, it will not be necessary to consider separately the Notices of Motion made by the Canadian Pacific Railway and the Northland Terminal Company Limited.

Now I have looked at the Petition of Right and have gone through it with considerable care. It consists of a total of 114 pages. Pages numbered 104 to 114 are headed "Redress" and I assume from that, that they purport to contain the normal prayer for relief.

The main application by the respondent is to strike out all of the Petition of Right (but not to dismiss it) on the ground that it is embarrassing. I am of the opinion that that contention is well warranted. As I say, I have gone through the Petition of Right on several occasions, and on each occasion I was left in the greatest confusion as to the nature of the claim attempted to be put forward by the suppliant. Obviously it was not prepared by a solicitor or by counsel, but by someone who had access to legal reports, the Rules and the like, but who had no knowledge whatever of the requirements of this Court as to the form in which pleadings should be presented. It is prolix to an amazing degree. It is repetitious. It contains page after page of references to previous decisions, matters which, of course,

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do not appear in a Petition of Right or in any other pleading. There are pages and pages of argument, of lengthy extracts from reports made in other matters such as commissions and the like, and from documents, all of which, of course, should not appear in a pleading of this sort at all. Because the suppliant was not represented on the motion, I have endeavoured to find out whether any portions of the Petition of Right were expressed with sufficient clarity as to convey their proper meaning, to find out whether any such clauses should remain in the Petition of Right. But the whole pleading is so mixed up and confused that it was impossible for me, and I think for counsel who appeared before me, to ascertain what exactly is the nature of the claim put forward, and just what relief is claimed against the various parties served with the Petition. For that reason I have come to the conclusion that the Motion by the Crown should be allowed and the entire pleading as such struck out.

I have been referred by Mr. Eaton, counsel for the respondent, to the Rules of the Court and to certain well known decisions which set out the requirements as to a proper pleading. They should, of course, set out the basic facts upon which the suppliant purports to make his claim. He may refer briefly to documents on which he may intend to rely at trial and finally his prayer for relief should be concise and state specifically the relief that he claims against the respondent or other interested parties.

I do not think that I have at any time seen a pleading which so completely offends the requirements of what should be a proper pleading as the present one. As I have said, the Crown originally asked that the action be dismissed but that part of the Motion has been abandoned and I think rightly so. It is, of course, not necessary for me to find at this time that the suppliant has or has not a cause of action. It may have a cause of action and for that reason I shall not dismiss the Petition of Right but will direct that the pleading as such be entirely struck out. Secondly, all counsel consenting, I direct that the suppliant will have leave within six months from the date of service upon it of the Order to be taken out on this Motion to file an amended statement of its claim as it may be advised. I should point out that the time which I have fixed at six

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months is in accordance with the application of the suppliant and is a much longer period than would normally be allowed.

Finally, the costs of the Motions made by the Crown, by the Canadian Pacific Railway and by Northland Terminal Company, Limited, will be costs against the suppliant. In view of the particular circumstances of this case, and that there is a possibility that some of the parties now moving before me may not be parties in the amended claim if made by the suppliant, I direct that the costs on the three motions be payable by the suppliant forthwith after taxation.

Judgment accordingly.

1954

Jan. 11

Jan. 13

BETWEEN:

ROSAIRE LAFLAMME .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Practice—Examination for discovery—General Rules and Orders, Rule 130—Driver of a motor vehicle belonging to the Crown—Officer of the Crown.

Held: That the Court having made its own rules for the oral examination for discovery (General Rules and Orders 129 and following) the practice in the provinces of Canada with regard to such examination would apply only in cases not otherwise provided by the said Rules and Orders.

2. That an officer of the Crown within the meaning of Rule 130 is a person who at all times is considered as such and who may make admissions that can bind the Crown.

3. That the occurrence of a cause of action does not invest an employee or servant of the Crown with a new status. A motor accident allegedly imputed to the driver of a vehicle belonging to the Crown cannot have the effect of promoting him to the status of an officer who may bind the Crown through his statements and admissions. *Yarmolinsky* v. *The King* [1944] Ex. C.R. 85 referred to and followed.

MOTION for an order to examine for discovery the driver of a motor vehicle belonging to the Crown as an officer of the Crown under Rule 130.

The motion was heard before the Honourable Mr. Justice Fournier, in Court, at Quebec.

Ross Drouin, Q.C. for the motion.

Antonio Laplante, Q.C. contra.

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

FOURNIER J. now (January 13, 1954) delivered the following judgment:

Il s'agit d'une motion de la part du requérant pour examiner avant l'audition Armand Crochetière, employé et préposé de l'intimée, le prétendu conducteur de la camionnette de l'intimée qui aurait frappé et blessé le requérant le 27 avril 1953 dans la cité de Québec.

Le procureur du requérant a basé, en partie, son argument sur le paragraphe 4 de l'article 286 du Code de Procédure Civile de la province de Québec qui se lit comme suit:

286. En tout temps après la production de la défense, *une partie peut,* après avis d'un jour franc au procureur de la partie adverse, assigner à comparaître devant le juge ou le protonotaire pour être interrogé comme témoin sur tous faits se rapportant à la demande ou à la défense:

4. Dans les actions résultant d'un délit ou d'un quasi-délit, la personne ayant la charge, la direction, la garde ou le fonctionnement de la chose qui a causé le dommage, que la partie adverse soit une personne, une corporation, une société ou une corporation étrangère faisant affaires dans cette province.

La Cour de l'Echiquier du Canada a ses propres règles et ordonnances de pratique et le Code de Procédure Civile de la province de Québec et les règles de pratique des autres provinces ne s'appliquent que dans des cas spécifiés.

En vertu de l'article 87 de la Loi de la Cour de l'Echiquier du Canada le Président peut au besoin rendre des règles et ordonnances générales pour réglementer la procédure de la Cour.

Ce pouvoir a été exercé à plusieurs reprises. En particulier le 21 avril 1931 le Président de la Cour a formulé des règles et ordonnances qui ont force de loi avec les amendements y apportés depuis.

Les dispositions de la règle 2, paragraphe (1), sous-para *b*), se lisent ainsi:

(1) Dans les poursuites, actions, matières ou autres procédures judiciaires devant la cour de l'Echiquier du Canada, non autrement visées par quelque loi du Parlement du Canada ou par une règle ou ordonnance générale de la Cour,

b) Si la cause d'action prend naissance dans la province de Québec, la pratique et la procédure doivent se conformer, autant que possible, à celles qui sont alors en vigueur dans des poursuites, actions et matières semblables devant la Court supérieure de Sa Majesté pour la province de Québec et être régies par ces dernières.

Il est clair que si cette Cour n'avait pas de règles concernant les examens préalables, le Code de Procédure Civile de la province de Québec s'appliquerait à la présente motion, mais la procédure à suivre quant aux examens préalables est prescrite au chapitre X des règles et ordonnances de la Cour de l'Echiquier (règles 129 à 138 inclusivement). Ces règles ne stipulent pas de prescription semblable à celle du paragraphe 4 de l'article 286 du Code de Procédure Civile.

La règle 130 qui s'applique à la présente demande se lit ainsi:

> Tout fonctionnaire de ministère ou autre officier de la Couronne peut,
>
> *a*) par consentement du procureur général du Canada ou du sous-procureur général du Canada, ou
>
> *b*) par ordonnance de la Cour ou d'un juge, être interrogé sur l'instance de la partie adverse à la Couronne dans toute action pour le même objet, et devant les officiers mentionnés à la Règle 129 ou devant la Cour ou un juge, s'il en est ainsi ordonné.

Cette règle 130 est en force depuis 1878 et doit s'appliquer à la présente motion.

Le requérant prétend que la personne à être interrogée, qu'il décrit dans ses procédures comme employé et préposé, est un officier de la Couronne parce qu'au moment où la cause d'action prend naissance il occupe une position de responsabilité et de contrôle.

A l'encontre de cette prétention, il me semble qu'un officier de la Couronne en vertu de la règle 130 est une personne qui en tout temps est considérée comme officier de la Couronne et peut faire des admissions liant la Couronne. Je ne crois pas que la naissance d'une cause d'action crée un nouveau statut à un employé ou préposé de la Couronne. Le fait d'un accident supposé avoir été causé par le conducteur d'un véhicule de l'intimée ne peut avoir l'effet *de le* promouvoir à la position d'un officier de la Couronne qui peut engager et lier la Couronne par ses déclarations et admissions.

Autrement, la Couronne, qui est une personne fictive, incapable d'être interrogée sauf par l'entremise d'une personne en autorité, pourrait être liée par des admissions de personnes sans responsabilité ou autorité. Je ne crois pas que les termes de la règle 130 puissent être interprétés d'une manière aussi étendue.

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En 1944, le Président de cette Cour a rendu un jugement sur une demande semblable: voir *Yarmolinsky and His Majesty the King* (1). Je cite les deux principes énoncés dans cette décision:

1. That Rule 130 providing for the examination for discovery of a departmental or other officer of the Crown contemplates that the person ordered to be examined shall be a person in a position of responsibility and authority who is qualified to represent the Crown on the examination, make discovery of the relevant facts within the knowledge of the Crown and make such admissions on its behalf as may properly be made.

2. That the driver of an army truck is not a departmental or other officer of the Crown within the meaning of Rule 130.

Elle fait autorité devant cette Cour. Je fais miens les motifs et les conclusions de ce jugement.

Motion renvoyée sans frais.

Judgment accordingly.

1952

Mar. 6

1953

Dec. 31

BETWEEN:

HOFFMAN-LA ROCHE LIMITED .....APPELLANT;

AND

THE COMMISSIONER OF PATENTS ....RESPONDENT.

Patents—Process for manufacture of aldehyde—The Patent Act, 1935, S. of C. 1935, c. 32, s. 2(d), 12(2), 26(1), 35(2), 40—The Patent Rules, 1948, R. 53—When product old process dependent product claim invalid for lack of novelty—Process dependent product claim unnecessary.

In an application for a patent for a process for the manufacture of an aldehyde the applicant made claims for the product when prepared according to his process. The Commissioner rejected the product claims and an appeal was taken from this decision.

Held: That where a product is old a process dependent claim for it cannot make it new and is invalid as a product claim for lack of novelty.

2. That since a process patent protects not only the process, but the thing produced by the process, a claim for the product when prepared according to the patentable process is not necessary.

APPEAL from the decision of Commissioner of Patents.

The appeal was heard before the President of the Court at Ottawa.

A. A. MacNaughton, Q.C. and *G. F. Henderson, Q.C.* for appellant.

W. P. J. O'Meara, Q.C. for respondent.

(1) [1944] Ex. C.R. 85.

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

THE PRESIDENT now (December 31, 1953) delivered the following judgment:

This is an appeal from the decision of the Commissioner of Patents, dated September 12, 1951, rejecting certain claims in an application for a Canadian patent entitled "Process for the manufacture of an aldehyde" made by Herbert Lindlar and filed on October 1, 1951, in the Canadian Patent Office under Serial Number 565,296, of which the appellant is the assignee.

In the specification the applicant described his invention of a process for the manufacture of an aldehyde and end- it with 18 claims, of which claims 1 to 13 are for a process as specified in them and claims 14 to 18 for a product when prepared according to the process of the specified claims. The process claims were not questioned by the Commissioner but he rejected all the product claims and it is from this decision that this appeal is taken.

It will be sufficient to consider only claim 14 which reads as follows:

14. Products when prepared according to the process of claims 1, 2 or 3.

This claim is typical of all the product claims and what is said of it is applicable to the other product claims. It is an example of what are called process dependent product claims and the issue in the appeal is whether such claims are allowable in an application for a Canadian patent for an invention.

The issue is one of difficulty and importance and there is a dearth of judicial authority on it.

The case for the appellant was put on several grounds. It was admitted that aldehyde, which is a chemical substance used in the production of Vitamin A, was an old product and was not claimed *per se*. Any person was free to produce it by a new process or an old one or to deal with it in any way so long as it was not prepared according to the applicant's process. But his process was new and it was

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submitted that when aldehyde was prepared according to it there was sufficient novelty in it when so prepared on which to found a process dependent claim for it. It was argued that in making such a claim the applicant was not claiming more than he had invented or fencing off property that did not belong to him. He had a monopoly in respect of his process and all that he was doing by his product claim was to claim the result of his process. By law he had a monopoly in respect of aldehyde when prepared according to his process: *Vide Von Heyden* v. *Neustadt* (1) and *Saccharin Corporation, Ld.* v. *Anglo-Continental Chemical Works, Ld. et al* (2). Thus by his process dependent product claim he was not seeking any protection for his invention beyond that to which he was entitled. His claim was only commensurate with his invention and his contribution to the art and the public was not deprived of anything it had before. Finally on this argument, it was submitted that process dependent product claims were recognized as valid by this Court and by the Supreme Court of Canada in *J. R. Short Milling Co. (Canada) Ltd.* v. *Geo. Weston Bread & Cakes Ltd. et al* (3) and should be allowed in the present case.

The next submission was that process dependent product claims are allowable under The Patent Act, 1935, Statutes of Canada, 1935, chapter 32, as a matter of implication from the specific provisions of section 40. This section, which was considered in *Winthrop Chemical Company Inc.* v. *Commissioner of Patents (No. 2)* (4), prohibits a claim for a substance *per se* in cases where it is prepared or produced by a chemical process and is intended for food or medicine. It allows a claim for such a substance only when it is prepared or produced by a method or process of manufacture particularly described in the claim and there is a claim for such method or process. That is to say, there must be a patentable process before there can be a claim for the substance and the claim for the substance must be limited to the substance as prepared or produced by the process. Thus section 40 recognizes process dependent product claims in

(1) (1881) L.J. 50 Eq. 126.
(2) (1900) 17 R.P.C. 307.
(3) [1941] Ex. C.R. 69; [1942] S.C.R. 187.
(4) [1947] Ex. C.R. 36; [1948] S.C.R. 46.

the cases to which it applies. From this premise it was argued that since such claims are recognized in cases under section 40 where there is a statutory bar to a claim for the product *per se* it should also be recognized in other cases where the bar to a claim for the product is a priority bar, namely, that the product is old. It was pointed out that the Patent Office allowed process dependent product claims in cases under section 40 and urged that there was no reason why a similar practice should not be followed in other cases. Coupled with this submission was the argument that although an invention resides in a process a process dependent product claim is a proper way of claiming the invention of the process.

The third main submission was that process dependent product claims are allowed in England: *Vide* 24 Hals (Second Edition) at page 551:

> An invention may . . . be claimed under different aspects, e.g., there may be a claim for a process . . . and for the product, even though not new in itself, manufactured by such process.

and also the statement in Patents for Invention by T. A. Blanco White, at page 59. There, after referring, *inter alia,* to *Von Heyden* v. *Neustadt* (*supra*) in which it was held that the importation into and sale in England of a patented article that had been made abroad by a patented process was an infringement of the English patent and to *Saccharin Corporation, Ld.* v. *Anglo-Continental Chemical Works, Ld. et al* (1) where it was held, *inter alia,* that the importation of saccharin in which the product of a patented process was used was an infringement of the patent for the process, the author made the following statement:

> it would seem logically to follow that the product of a patented process must be treated precisely as if there were a separate claim for the product "when made by the process claimed in any preceding claim". It is, of course, very common to insert such a claim, or a series of claims to the same effect.

Counsel also referred to three English patents containing process dependent product claims similar to claim 14 and contended that since such claims are allowed in England under an Act not as liberal as the Canadian Act they should be allowed in Canada.

(1) (1900) 17 R.P.C. 307.

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Finally, counsel urged that since the applicant had a monopoly in respect of aldehyde when prepared according to his process it was in the public interest that he should be allowed to make a process dependent claim for it so that the public might be apprised of his rights and duly warned that any unauthorized dealing with it when prepared according to his process was an infringement of his invention.

While the argument in support of the appeal was impressive I have come to the conclusion for several reasons that effect should not be given to it.

It is essential to the validity of a claim that the thing claimed should have novelty. This is lacking in claim 14. Aldehyde is admittedly an old product and the submission that when it is prepared according to the appellant's process there is sufficient novelty on which to found a claim for it when so prepared cannot be accepted. The weight of judicial authority in Canada and the United States is against it. In *Hosiers Limited* v. *Penmans Limited* (1) Maclean J. made the following statement:

> If a product is known to the trade, its production by a new process or new instruments cannot make it new. A manufacture is not new and patentable until the creative act in which it originated, is distinct from that required to invent the process or apparatus by which it is made.

This is the only Canadian judicial statement directly on the question that has been brought to my attention. But there is ample support for it in United States decisions: *vide Collar Company* v. *Van Dusen* (2); *Cochrane* v. *Badische Anilin & Soda Fabrik* (3); *Societe Fabriques de Produits Chimiques de Thann et De Mulhouse* v. *George Bueders & Co.* (4); and *ex parte Fesenmeier* (5) where Kinman, First Assistant Commissioner, said:

> Where the product is old, it is not patentable because a new process of producing it has been discovered, nor does a claim for the product become patentable merely by including the steps of the new process. If such a claim is sustained by the court, it is construed as a claim for a novel process, and should, therefore, be drawn in the form of a process claim.

In my opinion, this statement is applicable to the present case.

(1) [1925] Ex. C.R. 93 at 104.
(2) (1874) 90 U.S. (23 Wall). 530 at 563.
(3) (1883) 111 U.S. 293 at 311.
(4) (1904) 135 Fed. Rep. 102.
(5) (1922) C.D. 18 at 20.

Consequently, I find that claim 14 lacks novelty. That being so, it is not a claim for an invention within the meaning of section 2(*d*) of The Patent Act, 1935, which defines an invention as follows:

> 2. In this Act, and in any rule, regulation or order made under it, unless the context otherwise requires,
>
> (*d*) "invention" means any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter;

And it follows automatically that it cannot comply with the requirement of section 26(1) of the Act in that aldehyde was known and used before the so-called invention. And it would be impossible for the applicant to meet the requirements of section 35(2) of the Act and state what he regards as new in his product claim.

Nor can I agree with the argument that the decision in the *J. R. Short Milling Company* case (*supra*) sanctioned process dependent product claims generally. It is true that the claim for the product in that case was held to be valid because the product was limited to a dry process instead of a wet one and in that sense was a process dependent product claim. But the product was a new manufacture so that the decision has really no bearing on the question now under consideration. Certainly, there is no warrant for saying that it recognizes process product claims where the product is old. I am, therefore, of the opinion that where a product is old a process dependent claim for it, such as claim 14, cannot make it new and is invalid as a product claim for lack of novelty. There was novelty only in the applicant's process but none in the product even when prepared according to his process.

There is, I think, a brief answer to counsel's submission based on the recognition of process dependent product claims in cases to which section 40 of the Act applies. This is the necessary consequence of the prohibition of claims for products *per se* contained in it. But this prohibition is confined to a limited class of products, namely, substances prepared or produced by chemical processes and intended for food or medicine. In the case of other substances there is

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no such prohibition. There can be a claim for them without being limited to the processes by which they are prepared or produced. This is now settled: *vide Continental Soya Co. Ltd.* v. *J. R. Short Milling Co. (Canada) Ltd.* (1). Just as the prohibition of claims for products *per se* is limited to the class of substances specified in the section so also is the recognition of process dependent product claims restricted to the same class of substances. Under the circumstances, I am unable to find any logical reason for thinking that this limited recognition should become general and there is nothing in the Act to indicate or suggest that any such extension of it was intended.

There is a further reason for not allowing claims like claim 14. While it is framed as a product claim, albeit a process dependent one, the only justification for finding it valid would be to consider it as another way of claiming the applicant's process. That is really what it is. The only novelty in his invention is in his process. There is none in the aldehyde produced by it. But if a process dependent product claim is regarded as merely another way of claiming the process by which the product is produced, as I think must be the case where the product is old, then there is no need for the product claim, for it is well established that the law gives the owner of the patented process all the protection for his process that is necessary. I have already touched on this subject. The most concise statement of the extent of the protection that I have been able to find is in Fisher and Smart on Patents, at page 184:

> A process patent protects not only the process, but the thing produced by the process, and an action will therefore lie against any person purchasing and using or selling articles made in derogation of the patent, no matter whether they are made in Canada or elsewhere.

And the authors cite several decisions in support of this statement, including the *Von Heyden* case (*supra*) and the *Saccharin Corporation* case (*supra*) to which I have already referred. That being so, a dependent product claim is not necessary to protect the applicant's invention for he is entitled to the same protection for his process without a process dependent product claim as he would get with one. He is entitled only to protection for his process for that is

(1) [1942] S.C.R. 187 at 189.

all that he has invented. Consequently, the applicant falls within the ambit of Rule 53 of The Patent Rules, 1948, which provides:

> 53. No more claims will be allowed than are necessary adequately to protect the invention disclosed; if two or more claims differ so slightly that the several claims could not be allowed in separate patents the applicant may be required to elect which of such claims he desires to have allowed and to cancel the others.

In my opinion, the Commissioner might well have justified his decision under the first part of this Rule, which by virtue of section 12(2) of The Patent Act, 1935, has the same force and effect as if it had been enacted in the Act. I should add that I was advised by counsel for the respondent that he had not been able to find any similar rule in England. That being so, I need not deal with the submission that since process dependent product claims are allowed in England they should be allowed in Canada beyond saying that even if Rule 53 were not in effect I can see no reason, in the absence of express or implied statutory direction to do so, for allowing process dependent product claims such as claim 14.

For the reasons given I have reached the conclusion that it is only the applicant's process that should be covered by a patent and that the Commissioner was right in rejecting his product claims. The appeal will, therefore, be dismissed, but without costs.

Judgment accordingly.

BETWEEN:

HER MAJESTY THE QUEEN .....PLAINTIFF;

AND

O-PEE-CHEE COMPANY LIMITED .....DEFENDANT.

Revenue—Excise Tax—The Excise Tax Act, R.S.C. 1952, c. 100, s. 22(b), s. 23, Schedule I, para. 16, s. 30, s. 38, s. 50—"Sale Price"—Imposition of tax on manufacture of chewing gum in Canada does not include a tax on the wrapper, labels, packages or other material accompanying the chewing gum when sold—"Incorporated into and form a constituent or component part" of an article or product—Wrappers and other materials do not form constituent or component parts of main article or product—Defendant liable for tax on chewing gum only.

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Defendant manufactures, produces and sells in Canada several kinds of popcorn and chewing gum. It sold large quantities of gum in individual packages each of which contained a small slab of gum wrapped in waxed paper and a card bearing a picture of some individual, fictional or historical, an aeroplane or something of interest to children. The gum so sold was manufactured or produced in Canada by the defendant. It did not manufacture the individual wax paper wrapper, the picture cards, the outside individual wrappers and the display boxes containing the individual pieces of gum. The picture cards and some outside wrappers of the individual pieces of chewing gum were purchased in and imported from the United States of America.

The Excise Tax Act, R.S.C. 1952, c. 100, s. 23, Schedule I, para. 16, imposes a tax on "candy, chocolate, chewing gum . . .". The action is brought to recover the tax so imposed from defendant as the manufacturer or producer in Canada of chewing gum during the period of time set forth in the information.

During the period in question defendant deducted from the face value of its sales of chewing gum the cost of the picture cards and paid the excise tax on the cost of the gum only. Plaintiff contends that defendant is liable for excise tax on the total cost of each sale which includes the wrappers, picture cards, display boxes and sealing tape used thereon as well as the cost of the chewing gum.

Held: That the general words in s. 22(*b*)(ii) of the Act should be construed as being limited to the actual object of the Act which here is the imposition of a tax on chewing gum manufactured or produced in Canada.

2. That the wrappers, picture and other materials sold with the chewing gum were not incorporated into and did not form constituent or component parts of the main article or product, namely the chewing gum.

3. That the defendant is liable for excise tax on the cost of the chewing gum only.

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

The action was tried before the Honourable Mr. Justice Potter at London.

M. Lerner for plaintiff.

M. J. Grant, Q.C. for defendant.

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

POTTER J. now (January 16, 1954) delivered the following judgment:

This is a proceeding by way of information within section 30 of The Exchequer Court Act, chapter 34 of the R.S.C. 1927, as amended, now section 29 of chapter 98 of the R.S.C. 1952, brought in accordance with the provisions of section 108 of The Excise Tax Act, chapter 179 of the

R.S.C. 1927, as amended, now section 50 of chapter 100 of the R.S.C. 1952, to recover from the defendant corporation the sum of $2,261.77 for which it is alleged to be liable under section 80 of the said Act of 1927, as amended, now section 23 of The Excise Tax Act, chapter 100 of the R.S.C. 1952, as the manufacturer or producer in Canada of chewing gum in the period from December 5, 1951, to May 31, 1952, both dates inclusive; for penalties to the 31st day of March, 1953, amounting to $163.13, and additional penalties or interest to the date of judgment.

Section 7 of chapter 67 of the Statutes of Canada, 1948, an Act respecting the Revised Statutes of Canada, provides in effect that certain statutes shall stand and be repealed on from and after the day on which the said Revised Statutes come into force and section 9 of the said chapter 67 provides in effect that all proceedings under statutes in force before the effective date of the said Revised Statutes may and shall be continued under the said Revised Statutes as if no such repeal had taken place.

The Revised Statutes of Canada, 1952, were by Statutory Order and Regulation 53-286 dated the 2nd day of July, 1953, declared in force on from and after the 15th day of September, 1953, and this proceeding, which was commenced before that date is continued under the relevant provisions of the Revised Statutes of Canada, 1952.

The testimony of the General Manager and of the Secretary-Treasurer of the defendant corporation was to the effect that as part of its business, it manufactures or produces and sells several kinds of popcorn and chewing gum.

According to Exhibit "1", filed on behalf of the plaintiff, and which was prepared by an Inspector under The Excise Tax Act, the excise tax of fifteen per cent on sales of chewing gum during the said period, payable under paragraph 16 of Schedule I to The Excise Tax Act, section 80 of chapter 179 of the R.S.C. 1927, now section 23 of chapter 100 of the R.S.C. 1952, was $27,116.03, on which the defendant corporation had paid $24,854.26, leaving a balance of $2,261.77, the amount claimed as excise tax in this proceeding.

Counsel for the Crown frankly stated that the defendant corporation's omission to pay the amount claimed was not a fraudulent attempt to evade payment of taxes for which

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it was lawfully liable but that it contended that it was not, according to its interpretation of the Statute, liable to pay the same.

Counsel for the defendant corporation stated that it had made an honest attempt to meet the requirements of the statute, and what were understood by its officers to be rulings of the Department administering the same.

The relevant parts of section 80 of chapter 179 of the R.S.C. 1927, as amended to and including chapter 27 of the Statutes of Canada, 1952, and paragraph 16 of Schedule I thereto are as follows:—

80. (1) Whenever goods mentioned in Schedules I and II of this Act are imported into Canada or taken out of warehouse, or manufactured or produced in Canada and delivered to a purchaser thereof, there shall be imposed, levied and collected, in addition to any other duty or tax that may be payable under this Act or any other Statute or law, an excise tax in respect of goods mentioned

(a) In Schedule I, at the rate set opposite to each item in the said Schedule computed on the duty paid value or the sale price, as the case may be;

(b) . . .

2. Where the goods are imported, such excise tax shall be paid by the importer or transferee who takes the goods out of bond for consumption at the time when the goods are imported or taken out of warehouse for consumption, and where the goods are manufactured or produced and sold in Canada, such excise tax shall be paid by the manufacturer or producer at the time of delivery of such goods to the purchaser thereof.

3. The tax imposed by this section or by section eighty-three is not payable in the case of goods that are purchased or imported by a manufacturer licensed under this Part or under section one hundred and thirty of The Excise Act, 1934, and that are to be incorporated into and form a constituent or component part of an article or product that is subject to an excise tax under this Part or to an excise duty under The Excise Act, 1934.

SCHEDULE I

16. Candy, chocolate, chewing gum and confectionary that may be classed as candy or a substitute for candy . . . fifteen per cent.

Section 23 of The Excise Tax Act, chapter 100 of the R.S.C. 1952, and paragraph 16 of Schedule I thereto, are to the same effect.

The defendant corporation during the period in question sold, in wholesale lots, boxes containing several hundred individual packages of chewing gum. Each individual package contained or was made up of a small slab of gum, wrapped in waxed paper, a card bearing a picture of some

individual, fictional or historical, an aeroplane or something of interest to children. Some of the cards carried numbers indicating that they were parts of sets to induce the purchasers to make enough purchases to complete the same.

The defendant corporation manufactured or produced in Canada the chewing gum contained in the said packages, but did not manufacture the individual wax paper wrappers, the picture cards, the outside individual wrappers, the "display boxes" containing the individual pieces of gum, etc.; the picture cards and some outside wrappers of the individual pieces of chewing gum being purchased in and imported from the United States of America.

It is not disputed that during the period in question the defendant corporation deducted from the face values of its sales of chewing gum the cost of the picture cards and paid the excise tax of fifteen per cent on the cost of the chewing gum alone.

The plaintiff contended that excise tax was payable on the total cost of each sale, i.e. on the cost of the wrappers, picture cards, "display boxes" and the sealing tape used thereon, as well as on the cost of the chewing gum, and in support of such contention relied on certain sections of The Excise Tax Act, including section 80 of chapter 179 of the R.S.C. 1927, as amended, now section 23 of chapter 100 of the R.S.C. 1952, already quoted, and in particular, section 79(*b*) of said chapter 179, now section 22(*b*) of chapter 100, R.S.C. 1952, which defines "sale price" and which is in part as follows:—

> 79. In this Part,
> (*b*) 'sale price,' for the purpose of determining the excise tax payable under this Part, means the aggregate of
> (i) the amount charged as price before any amount payable in respect of any other tax under this Act is added thereto
> (ii) any amount that the purchaser is liable to pay to the vendor by reason of or in respect of the sale in addition to the amount charged as price (whether payable at the same or some other time) including, without limiting the generality of the foregoing, any amount charged for, or to make provision for, advertising, financing, servicing, warranty, commission or any other matter,

The plaintiff suggested that in reading section 22(*b*)(ii), only the following words should be considered, viz. "any amount that the purchaser is liable to pay to the vendor by

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reason of or in respect of the sale"—"or any other matter." He urged that the use of the words "without limiting the generality of the foregoing" removes the words "any other matter" from the operation of the *ejusdem generis* rule.

"Sale price" is however determined in one case (ss(*b*)(i)) by taking the amount charged as price, and in the other, (ss(*b*)(ii)) by taking the amount charged as price plus those named charges which are added to the same. To accept this argument of the plaintiff would be to render meaningless section 22(*b*)(i).

Furthermore, the words used in section 22(*b*)(ii) indicate the intention to include in the sale price, the amount charged as price for the article or material upon which tax is imposed, and in addition thereto, any other specific amounts which the purchaser renders himself liable to pay concurrently with the sale or at some future time or to some third party.

The general words contained in section 22(*b*)(ii), though wide and comprehensive in their literal sense, should be construed as being limited to the actual object of the Act, which, in the case under consideration, is the imposition of a tax on chewing gum, manufactured or produced in Canada.

If Parliament had intended to impose a tax on the wrappers, labels, packages and other material accompanying chewing gum when sold by the manufacturer or producer, appropriate provisions could have been enacted.

The plaintiff also relied on the provisions of section 80.3, now section 23(3) of chapter 100, R.S.C. 1952, quoted above, and in particular, the words "that are to be incorporated into and form a constituent or component part of an article or product that is subject to excise tax under this Part" and in support of this contention adduced evidence to prove that the defendant corporation had not paid excise tax on the wax paper wrapper which had been purchased in Canada, the picture card and in some cases the outside wrapper of the individual piece of gum which had been imported from the United States, and further contended that all these articles were incorporated into and formed constituents or component parts of the main article or product, viz.—the chewing gum, which is subject to an excise tax under Schedule I, paragraph 16 to the Act.

The plaintiff also relied on paragraph 1 of the regulations pertaining to Part 13 of The Excise Tax Act with regard to Certificates of Exemption and quoted the same as follows:—

1. CERTIFICATES OF EXEMPTION Licensed Manufacturers:—

(a) A licensed manufacturer, when purchasing or importing goods which cannot be used in, wrought into, or attached to articles to be manufactured or produced for sale, shall not quote his licence number nor give the certificate on the order or entry. On purchases or importations of goods which can be used in, wrought into, or attached to taxable goods for sale, a licensed manufacturer shall quote his licence number and give the certificate on the order or entry. The certificate to be given by a licensed manufacturer is to be in the following general form:—

I/We certify that the goods ordered/imported hereby are to be used in, wrought into, or attached to taxable goods for sale,

Licence No. ....
(Name of Purchaser).

The plaintiff produced and showed to the Secretary-Treasurer of the defendant corporation as Exhibits "4" and "5", dated March 7 and March 31, 1952, respectively, on which the Secretary-Treasurer of the company admitted the following certificates had been endorsed, "We hereby certify that the goods covered by this entry are to be used in, wrought into, or attached to taxable articles for sale. Sales Tax Licence No. 169." Exhibit "4" was a customs entry for home consumption for 62 packages of "Frank Buck" animal insert cards, printed matter, of a value for duty of $890, and Exhibit "5" was a customs entry for home consumption of 156 packages of "Hopalong Cassidy" coloured cards, printed matter, and "Hopalong Cassidy" wraps, printed or partly printed having a value for duty of $1,934. Both these shipments had been purchased from Topps Chewing Gum Incorporated in the United States of America and the defendant corporation had used its sales tax licence no. 169 and was relieved from the payment of sales tax on the same by virtue of the certificates endorsed on the entries.

Section 99 of chapter 179 of the R.S.C. 1927, as amended, is as follows:—

99. (1) The Minister of Finance or the Minister of National Revenue, as the case may be, may make such regulations as he deems necessary or advisable for carrying out the provisions of this Act.

Section 38 of chapter 100 of the R.S.C. 1952, is to the same effect.

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Section 86 of chapter 179 of the R.S.C. 1927, is in part as follows:—

> 86. (1) There shall be imposed, levied and collected a consumption or sales tax of ten per cent on the sale price of all goods
>
> (a) produced or manufactured in Canada, etc. etc.
>
> 2. Notwithstanding anything contained in the preceding subsection, the consumption or sales tax shall not be payable on goods
>
> (c) imported by a licensed manufacturer if the goods are partly manufactured goods.

Section 30(2)(*b*) of chapter 100 of the R.S.C. 1952, with some alterations is to the same effect.

Counsel for the plaintiff submitted that the defendant corporation by having used its sales tax licence and endorsed the certificates quoted on the entries for home consumption, Exhibits "4" and "5", is now stopped from contending that the wrappers, the picture cards and the outside wrappers were not wrought into or attached to taxable goods for sale, viz.—the actual chewing gum and that in any event, these articles formed constituents or component parts of the chewing gum.

It is evident that these articles were not used in or wrought into the chewing gum.

If, by being included in, or forming part of the same package as the chewing gum they were "attached" to it within the meaning applied by the plaintiff to that word in the regulation, it might be necessary to decide whether so much of the regulation is authorized by the statute. It is, however, clear from what is hereinafter stated that purchased or imported goods can be attached to articles to be manufactured or produced in such a manner as to be constituents or component parts of the same and that the regulations relative thereto are therefore authorized as being necessary or advisable for carrying out the provisions of the Act.

The law of estoppel is a branch of the law of evidence, and has been defined as a disability whereby a party is precluded from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear by the matter giving rise to that disability. Halsbury's Laws of England, Volume 13, page 398.

The liability of the articles in question to sales tax is not before this Court, and the acts of the defendant corporation in connection with the importation of the same are not relevant to the interpretation and application of the statute to the issues raised in this proceeding.

It is important to ascertain the meanings to be given to the words "form a constituent or component part." It is not clear whether these words mean "a constituent part or a component part" or a "constituent" or "component part."

It is for the Court to interpret the statute as best they can. In so doing the Court may no doubt assist themselves in the discharge of their duty by any literary help which they can find including of course the consultation of standard authors and references to well-known and authoritative dictionaries, which refer to the sources in which the interpretation which they give to the words of the English language is to be found. Per Cozens-Hardy, M.R. in *Camden* v. *Inland Revenue Commissioners* [1914] K.B. at pp. 647 and 648.

The Shorter Oxford English Dictionary has the following:—

Constituent: That constitutes a thing what it is. That jointly constitute or compose; component.

Component: Composing, making up, constituted. A constituent part or element.

Murray's English Dictionary, published in 1893 gives the following:—

Component: 2. A constituent element or part. Logically applicable only in plural to the whole of the elements or parts of a compound body; but in practice each element is called a component.

In the supplement to this dictionary, published in 1933, the following was added:—

Applied specially to the separate parts of motor cars and bicycles. Hence attributively and combined as component maker, component built.

Analytical chemistry has for its purpose the determination of the constituents of which a substance or mixture (or compound) is composed by methods which are qualitative when the identity only is ascertained or quantitative when the quantity or proportion is determined. Encyclopaedia Britannica, 1952 edition, volume 5, page 395.

The words "constituent" and "component" have special meanings in the science of chemistry and the following is taken from Hackh's Chemical Dictionary, 3rd Edition, 1944:—

Constituent (1) Any of the elements or parts of a compound (in contradistinction to the ingredients or components of a mixture). (2) Elements or compounds present in a system which are formed from the components thus in the system

$$Ca\ CO_3 = CaO + CO_2$$

there are three constituents (Ca CO_3, CaO and CO_2), but only two components, as any two substances will determine the amount of the third.

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Component: (1) An ingredient or part of a mixture (as distinct from the constituents of a compound). (2) The smallest number of chemical substances capable of forming all the constituents of a system in whatever proportion they may be present.

And the following is a definition of a compound:—

Compound. (*a*) A substance whose molecules consist of unlike atoms and whose constituents cannot be separated by physical means. A compound differs from a physical mixture by reason of the definite proportions of the constituent elements (a proportion which depends upon their atomic weights), by the disappearance of the properties of the constituent elements and the appearance of entirely new properties characteristic of the compound.

There was no evidence given by either party to assist the Court in determining whether the chewing gum in question was a compound or a mixture. The composition of the chewing gum was, however, given as—the gum base, sugar, glucose and flavour.

If the meanings to be attached to the words "constituent" and "component" are to be accepted as those given in the ordinary dictionaries of the English language, and in dictionaries of technical terms, as already quoted, it undoubtedly follows that the wax paper wrapper on the slab of gum itself, the picture card contained in the package and the outside wrapper, the display box in which the individual packages were packed, the corrugated shipping container and the sealing tape, were not constituent or component parts of the chewing gum itself, on which alone the Statute and Schedule thereto imposes an excise tax of fifteen per cent.

In *Poer* v. *Curry* (1), the Appellate Court of Alabama was required to deal with a somewhat similar problem, although other provisions of a taxing statute were considered. And it was held that a cap on bottled soft drink was not an ingredient or component part of the drink itself within statutes exempting from use tax a manufacturer purchasing at wholesale personalty becoming an ingredient or component part of manufacturer's products.

Considerable correspondence passed between the defendant corporation and the Department which indicated an attempt by the defendant corporation to obtain a definite ruling and some difference of opinion, at least between the

(1) (1942) 8 So.2d. 418 at 421.

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officials of the Department, and no definite ruling was made by the Department until its letter of December 5, 1951, which was marked Exhibit "S".

The only question for this Court is whether the defendant corporation should have paid excise tax on the selling price or the prices of the packages of gum and their contents or on the chewing gum portion of the same only.

Statutes which impose pecuniary burdens are subject to a strict rule of construction:—

> It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language because in some degree they operate as penalties. The subject is not to be taxed unless the language of the statute clearly imposes the obligation. Maxwell on Interpretation of Statutes, 10th edition, page 288.

The defendant corporation sold in its packaged goods chewing gum, which is liable to an excise tax of fifteen per cent, but the statute does not expressly or by implication impose a tax on the accompanying picture cards.

The action will therefore be dismissed with costs.

Judgment accordingly.

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Sept. 22, 23, 24, 25

Dec. 29

BETWEEN:

JEAN LACROIX .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Expropriation—The Expropriation Act, R.S.C. 1927, c. 64, s. 47—Expropriation of an easement over property close to an airport—Damages claimed by reason of establishment of an airport flightway over property—Article 414, Civil Code of Quebec— Article 552, Code Napoleon—Air and space not susceptible of ownership—Owner's right in air space over his property limited—Crown cannot expropriate that which is not susceptible of ownership.

Suppliant owned some vacant land close to the Dorval airport and used it intermittently for agricultural purposes. In 1942 the Crown expropriated an easement over it and adjoining lands for an underground cable and poles for the installation and maintenance of an approach lighting system to one of the runways of the airport. In his action suppliant, in addition to the claim for compensation for the expropriation of the easement over his property and the injurious affection of the remaining land as a result thereof, sought damages by reason of the establishment of what he described as a flightway over his property through which aircraft would fly to take off or land at the airport, the basis of this latter claim being that (1) the suppliant

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being the owner not only of the surface of his land but also of what is below and above, the establishment of this flightway and the flying of planes over his land was an interference with his rights of ownership and a disturbance of his full enjoyment of his property and (2) the Crown, having established this flightway and interfered with his rights of ownership, was liable for the damages claimed.

On the evidence the Court allowed certain amounts on the claim for the expropriation of the easement and for the injurious affection of the remaining land.

Held: That suppliant's claim for damages by reason of the so-called establishment of a flightway over his land fails.

2. That air and space are not susceptible of ownership and fall in the category of *res omnium communis*. This does not mean that the owner of the soil is deprived of the right of using his land for plantations and constructions or in any way which is not prohibited by law or against the public interest.

3. That the owner of land has a limited right in the air space over his property; it is limited by what he can possess or occupy for the use and enjoyment of his land. By putting up buildings or other constructions the owner does not take possession of the air but unites or incorporates something to the surface of his land. This which is annexed or incorporated to his land becomes part and parcel of the property.

4. That the Crown could not expropriate that which is not susceptible of possession. It is contrary to fact to say that by the so-called establishment of a flightway and the flying of planes it had taken any property belonging to the suppliant or interfered with his rights of ownership.

PETITION OF RIGHT claiming compensation from the Crown for the expropriation of an easement over suppliant's property and for damages by reason of the alleged establishment of an airport flightway over his property.

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

Jacques Decary and *Neil S. King* for suppliant.

Paul Dalmé and *Jean Provost* for respondent.

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

FOURNIER J. now (December 29, 1953) delivered the following judgment:

In this petition of right the suppliant combines two claims, one for compensation for the expropriation of an easement over his property and the injurious affection of his remaining land as a result of the easement and the other for damages by reason of the establishment of what he called or described a flightway over his land.

The facts relative to the claim for compensation for the expropriation may be set out first. On July 8, 1942, His late Majesty the King expropriated an easement over the suppliant's land, which was the north-east half of lot No. 172 of the parish of St. Laurent, County of Jacques Cartier, in the Province of Quebec, consisting of thirty-three arpents, and other lands for an underground cable and poles for a lighting system in connection with the Dorval airport. The expropriation was completed by depositing a plan and description of the lands and the easement taken in the office of the Registrar of Deeds for the registration division of Montreal, in which the lands are situate, on July 8, 1942, pursuant to section 9 of the Expropriation Act. Thereupon the said easement became vested in His late Majesty.

The first easement over the suppliant's land was for a length of 288 feet and a width of 15 feet. Subsequently, it was decided that this width was not necessary, and on December 21, 1944, there was a so-called abandonment of the easement, the width of the easement being changed from a width of 15 feet "to be of sufficient width to lay cables and erect poles and the right to maintain the same." The notice of the so-called partial abandonment of the easement and the alteration in the width taken was registered in the office of the Registrar of Deeds for the registration division of Montreal on December 21, 1944, pursuant to section 24 of the Act.

The amount of compensation money to which the suppliant is entitled for the expropriation consists of the value of the easement taken and the damages for injurious affection of the suppliant's remaining land by reason of the easement. The amount of such value and damages must, by virtue of section 47 of the Exchequer Court Act, be estimated by the Court as of the date of the expropriation.

Before I make this estimate, I should deal with the other claim put forward by the suppliant. This depends in part on an expropriation of an easement in perpetuity over lands not belonging to the suppliant, that is to say over lots 174, 175 and 176 of the parish of St. Laurent. These lie to the north-east of the suppliant's land. The easement over these lands was an easement in perpetuity for the installation and maintenance of an approach lighting system to

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runway No. 24 in connection with the Dorval airport. The plan and description of these lands and the easement taken was deposited of record in the office of the Registrar of Deeds for the registration division of Montreal on November 30, 1951.

The grounds for this claim were set forth by the suppliant's counsel as follows:

(1) The expropriation of an easement on the suppliant's land and on the adjoining properties for a lighting system had established a flightway over his land through which aircraft would fly to take off or land at Dorval airport;

(2) The suppliant being the owner not only of the surface of his land but also of what is below and above, the establishment of this flightway and the flying of planes over his land was an interference with his rights of ownership and a disturbance of his full enjoyment of his property and

(3) The Crown, having established this flightway and interfered with his rights of ownership, was liable for the damages claimed.

Let us examine these three propositions, keeping in mind that the claim is against the Crown and that the burden of proof rested on the suppliant.

Before the taking of the easement and the partial abandonment, planes landed at and took off from Dorval airport. The easement was taken and the lighting system installed as an aid to aerial navigation. What was done in reality was to lay an underground cable and erect a pole surmounted by lights. Nothing in the evidence or in the plans and descriptions filed by the suppliant could be construed as an indication that anything was being taken from the suppliant outside of the easement. Furthermore, the expropriation of an easement on the adjoining lots in 1951 could not give rise to the suppliant to a claim against the respondent. These acts had nothing to do with the expropriation of any interest in his land and were independent of his rights in respect of what was taken from him in 1942 and 1944. Planes, I assume, could fly in and out of the airport without this lighting system. This was done before this easement was taken.

A device to help aerial navigation, say a lighting system in the vicinity of an airport as in this case, cannot be considered as establishing a flightway to or from the airport. Even if this view were not agreed to, could the suppliant's second proposition be concurred in?

Most of his argument is predicated on the assumption that the soil carries with it the ownership of what is above and below and that the flying of planes in the air space or flightway over private property disturbs the owner in the enjoyment of his land and gives redress before the Court. He insists that by reason of the flightway his property became and was, either for sale or occupation, permanently damaged and diminished in value because of the appropriation for exclusive use by the Crown of the air space over his land.

What is the suppliant's interest in the air space above his land and what are his rights in cases where aircraft fly over his property are important questions.

Though section 414 of the civil code of the Province of Quebec states "that the owner of the soil is also the owner of what is above and what is below", it is useful to recall that this section of the civil code is a repetition, not in words but in thought, of what is said in section 552 of the Code Napoleon—which, if it did not repeat the same words, expressed the principle enunciated in the "Coutume de Paris":

> Quiconque a le sol, appelé l'étage du rez-de-chaussée, d'aucun héritage, peut et doit avoir le dessus et le dessous de son sol et peut faire édifier par dessus et par dessous et y faire fruits et autres chose licites, s'il n'y a titre au contraire.

This could be related to the maxim *cujus est solum, ejus est solum, ejus est usque ad coelum* of the Middle Ages.

This principle was admitted at a time when nobody could foresee our modern inventions and developments. It would be difficult to apply rules of law of a past period which had no idea of the sets of facts and circumstances that exist at the present time. So in France, the United Kingdom and the United States the tendency has been to restrict the interpretation of the above maxim and rule of law, always keeping in mind that the owner is entitled to full enjoyment of his property.

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In a study entitled "A qui appartient le milieu aérien?", by Nicolas Mateesco, published in the May 1952 issue of La Revue du Barreau de la Province de Québec, the author arrives at certain conclusions useful to our purpose and worth quoting:

I. L'abandon de l'expression 'espace aérien', inadéquate à l'ordre juridique et son remplacement par celle de 'milieu aérien', notion qui représente substantiellement, et sur le plan phénoménologique, un corps matériel, et dans l'ordre juridique un bien commun (res omnium communis).

II. Juridiquement, le milieu aérien ne peut être approprié ou devenir domaine privé, de même qu'il ne peut être catalogué parmi les 'res nullius', biens qui ont l'aptitude—par leur autonomie, distinction et individualisation,—de devenir propriété privée.

Ce qui oblige à la constatation que l'art. 552 C.N. (et les articles respectifs d'autres codes civils qui ont reproduit, en grande partie, le Code Napoléon), l'art. 637 C.N., de même que la première partie de l'art 714 C.N., ne sont pas les vrais sièges légaux du milieu aérien.

III. L'application de l'art. 552 C.N. quant à la propriété sur 'l'espace aérien' en fonction de l'intérêt concret du propriétaire, n'est, non plus, soutenable; car, dès qu'on construit ou on plante, le volume occupé *en espace* cesse d'être *aérien;* même si on pouvait parler, avant la construction ou la plantation respective, d'un milieu aérien, celui-ci perd cette nature, au moment où un volume quelconque est borné au profit de l'homme; cela ne veut aucunement dire qu'on a pris propriété de 'l'espace aérien'.

IV. Le milieu aérien est *res communis* et, à l'étape actuelle des inventions, ce milieu est constitué par 'l'atmosphère' de la façon que la mer constitue le milieu de la navigation maritime.

. . .

Le milieu aérien reste, donc, un bien commun, à l'usage de tous.

. . .

VII. Sur le plan public, comme sur le plan privé,—et en remplaçant la discussion de la notion de propriété par celle de souveraineté—la situation est pareille: le milieu aérien, au-delà des intérêts immédiats et parfois égoïstes des Etats, est un bien commun mis à l'usage pacifique de l'humanité, sans conditions et sans restrictions.

Another article of great interest and of assistance in the preparation of these reasons for judgment appeared in The Canadian Bar Review of February 1953, entitled "Private Property Rights in the Air Space at Common Law", by Jack E. Richardson.

I will cite the following:

1. It has not been necessary for an English court to give literal effect to the maxim *cujus est solum, ejus est usque ad coelum,* and no court has done so. . . .

2. English courts have always accepted the general right of the landowner to the uninterrupted use and enjoyment of his property. When the right is threatened or has been infringed, the courts will find an appropriate legal remedy to ensure his protection. . . .

3. As a corollary of the owner's right of full enjoyment, no one has the right in normal circumstances to prevent him building upwards from his land. He can, therefore, object to anyone who purports to occupy the column of air, or a part of it, which is above his land. . . .

4. There is an underlying assumption in the cases that use and enjoyment of land are meaningless without the ability to use the space above it, but the courts have not pronounced upon ownership of space. . . .

5. The decisions do not inhibit persons from making transient use of air space above private property in circumstances having no bearing on an occupier's use and enjoyment of the subjacent soil. . . .

Then the author continues and examines the decisions of the United States Courts in cases where the flying of aircraft over private property is the cause of damage claims. The following principles underline the cases reviewed, which are hereinafter quoted:

(1) The property owner has a right to the continuous useful enjoyment and occupation of his property without interference by the intrusions of aircraft in the flight space above him;

(2) United States courts recognize that a landowner has an interest in the air above his property, which is of a possessory character and may be proprietary as well, to the extent he is able to occupy or make use of it;

(3) the courts have, without exception, afforded adequate protection to the landowner in the use and enjoyment of his land, but they have, at the same time, declined to enjoin air operations unless the landowner's interest is affected or threatened;

(4) a landowner in the United States may occupy or otherwise make use of the air space above his property as incidental to his lawful use and enjoyment of the soil and no one may occupy the space or otherwise interfere with his rights;

(5) the maxim, *cujus est solum, ejus est usque ad coelum,* has not been applied literally and today almost certainly does not form part of United States law; and

(6) an aircraft may fly above private property in the United States provided the flight does not interfere with the occupier's use and enjoyment of the land.

The principles submitted and the conclusions arrived at by these two authors may be in part applied to the present case.

The principle that the suppliant has the right to the uninterrupted use and enjoyment of his land is sound; but has the use and enjoyment of his property been interrupted? If so, when, how and by whom were his rights interfered with?

At the time of the expropriation, the suppliant and his authors used intermittently the land in question for agricultural purposes. They did not live on the property and

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there were no buildings on the suppliant's land. It was close to the Dorval airport and planes flew over his property in and out of the airport. An easement was taken to provide a lighting system and for no other purpose. In 1942, no doubt the use and enjoyment of the property was interrupted by the taking of the easement by the Crown, but by nothing else. I will deal with this later.

To maintain that the owner of land could claim compensation against the Crown because aircraft fly or will fly over his property in a way permitted by law and regulations would be exorbitant and contrary to decisions in the Courts of England, the United States and France. To agree with the position taken by the suppliant that the Crown, by expropriating an easement for a lighting system, had created a flightway and appropriated air space over his land would be admitting that air and space may be appropriated or possessed.

In my view, air and space are not susceptible of ownership and fall in the category of *res omnium communis*, which does not mean that the owner of the soil is deprived of the right of using his land for plantations and constructions or in any way which is not prohibited by law or against the public interest.

It seems to me that the owner of land has a limited right in the air space over his property; it is limited by what he can possess or occupy for the use and enjoyment of his land. By putting up buildings or other constructions the owner does not take possession of the air but unites or incorporates something to the surface of his land. This which is annexed or incorporated to his land becomes part and parcel of the property.

The Crown could not expropriate that which is not susceptible of possession. It is contrary to fact to say that by the so-called establishment of a flightway and the flying of planes it had taken any property belonging to the suppliant or interfered with his rights of ownership.

In this instance it did not appropriate any air or space over his land and did not interfere with his rights. I need go only so far as to say that the owner of land is not and cannot be the owner of the unlimited air space over his land, because air and space fall in the category of *res*

omnium communis. For these reasons the suppliant's claim for damages by reason of the so-called establishment of a flightway over his land fails.

This leaves the claim for compensation for the expropriation of the easement and the injurious affection of his remaining land as a result of the easement. The suppliant is undoubtedly entitled to compensation for the value of the easement taken.

The evidence revealed that the suppliant's property consisted of 33 arpents of farm land on which there were no buildings. It was agreed by the parties that $200 per arpent in 1942 and 1944 would be a fair valuation of the land and that $6,600 was the total value of the property. It was unutilized land, only small portions had been cultivated at different periods. This property is situated at about 1,500 feet, more or less, to the east of Dorval airport. The easement was for the laying of an underground cable across the width of the property, a length of 288 feet, the erection of one pole with lights at the top and the maintenance of this public work.

The suppliant's expert witnesses assessed at $128.80 the value of the easement at the time of the expropriation and the notice of partial abandonment, being $100 for the pole and lights and the maintenance of same and $28.80 for the underground cable and maintenance.

The respondent by his witnesses assessed the easement in two ways. One giving a valuation of $25 for the pole and $28.80 for the cable, the other by stating that the value should cover 25 feet on each side of the cable on a length of 288 feet or a total of 14,400 square feet valued at .00543 cents per square foot or $78.19.

It seems that there was no difference in the value of the lands in question as between 1944 when the notice of abandonment was filed and the date of the expropriation in 1942.

After perusing the evidence, I came to the conclusion that the second method of assessing the value should apply in this case because the maintenance of a lighting system needs far more travelling over the grounds than the maintenance of a telephone or power line. Furthermore and for the above reason, I would fix a value for 50 feet on each side

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of the cable or 100 feet in width by 288 feet in length or a total of 28,800 square feet at ·00542 cents per square foot or $156.39.

Having disposed of the claim for the easement, there remains the claim for the injurious affection of the remaining land. Though the suppliant will be compensated for the easement taken, he will not have full enjoyment of all portions of the balance of his land. I do not believe the front part affected, because the access is from the roadway. But there will be severance of the land by the cable and pole. The use of the land to a certain extent will be restricted. The plowing, sowing of the crops and the other operations on farm land will be affected. Having people in and out of the property to maintain the works will interfere in some degree with the use and enjoyment of the property.

For these reasons I would allow an amount of $150 for the injurious affection of the suppliant's remaining land. The total compensation to which the suppliant is entitled is $306.39. Since this amount exceeds the amount offered by the respondent, the suppliant is entitled to interest at the rate of 5 per cent per annum from July 8, 1942, to date. The suppliant is also entitled to costs.

There will be the usual declaration that the easement over the suppliant's land taken on July 8, 1942, and modified in 1944 is vested in Her Majesty the Queen.

There will, therefore, be judgment that the easement taken over the suppliant's land on July 8, 1942, and modified in 1944, is vested in Her Majesty the Queen; that the amount of compensation money to which the suppliant is entitled, subject to the usual conditions as to all necessary releases and discharges of claims, is the sum of $306.39, with interest thereon at the rate of 5 per cent per annum from July 8, 1942, to this date, and that the suppliant is entitled to costs to be taxed in the usual way.

Judgment accordingly.

BETWEEN:

ALUMINUM GOODS LIMITED .....PETITIONER;

AND

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

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Trade Marks—The Unfair Competition Act, 1932, 22-23 Geo. V, c. 38, ss. 2(m), 26(1)(c), 29—Application to register a trade mark under s. 29 of the Act—"Wear-Ever" used in connection with cooking utensils—Whether purely or merely laudatory—Whether descriptive—Distinction to be drawn between descriptive words and words purely laudatory—Registration of trade mark "Wear-Ever" not a cause of substantial difficulty or confusion in view of right of user by other traders—Judicial decisions not to rule out words from s. 29 of the Act if onus to establish distinctiveness in fact satisfied—Application allowed.

Petitioner's application is one for the registration in Canada under the provisions of s. 29 of the Unfair Competition Act, 1932, of the mark "Wear-Ever" used in connection with cooking utensils. It was opposed by the Registrar of Trade Marks on the ground that the word "Wear-Ever" is not a word which is "adapted to distinguish" the wares of one person from those of another. On the evidence the Court found that the trade mark "Wear-Ever" had become distinctive of its wares and that the petitioner had satisfied the onus cast upon it by s. 29.

Held: That "Wear-Ever" is, *prima facie,* descriptive of the character or quality of the wares with which it is used and therefore unregistrable under s. 26(1)(c) of the Unfair Competition Act, 1932. There is nothing in the opinions of the majority of the Supreme Court of Canada in the *Super-Weave* case, *Registrar of Trade Marks* v. *G. A. Hardie and Co. Ltd.* [1949] S.C.R. 483, which would indicate that descriptive words as such can never qualify for the declaration provided in s. 29 of the Unfair Competition Act, 1932. If it had been the intention of Parliament to exclude such words from the provisions of the section it would have said so in clear terms.

2. That if descriptive words are not to be barred as a class, then a distinction must be drawn between such words and other words which are purely laudatory. *In the matter of an Application by J. and P. Coats Ld. for Registration of a Trade Mark* (the *Sheen* case) (1936) 53 R.P.C. 355 referred to and followed.

3. That in the instant case the registration of the trade mark "Wear-Ever" would cause no substantial difficulty or confusion in view of the right of user by other traders, not only because of the nature of the word itself but also because, on the evidence, the exclusive and long user thereof by petitioner and its predecessors has limited the possibility of other traders safely or honestly using the word.

4. That taking into consideration the opening words of s. 29 of the Unfair Competition Act, 1932—"Notwithstanding that a trade mark is not registrable under any other provisions of this Act it may be registered . . ."—judicial decisions should not rule out a great body of words from the section if, in fact, the petitioner has satisfied the onus

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cast upon him to establish distinctiveness in fact. In so far as descriptive words are concerned, the exclusions should be limited to those words which are purely laudatory and commonly known as such.

5. That "Wear-Ever" is not within that class of words which by their very nature are incapable of qualifying for a declaration under s. 29 of the Unfair Competition Act, 1932. It is not purely or merely laudatory but descriptive.

APPLICATION for registration of a trade mark under provisions of s. 29 of the Unfair Competition Act, 1932.

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

Dr. Harold G. Fox, Q.C. and *Christopher Robinson, Q.C.* for petitioner.

W. P. J. O'Meara, Q.C. for respondent.

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

CAMERON J. now (February 1, 1954) delivered the following judgment:

This is a petition by Aluminum Goods Limited for a declaration:

THAT this Honourable Court may be pleased to declare that it has been proved to its satisfaction that the word "WEAR-EVER" has been so used by your petitioner and its predecessor in business as to have become generally recognized by dealers in and users of cooking utensils as indicating that your petitioner assumes responsibility for the character and quality of cooking utensils in association with which the said word is used, and that, having regard to the evidence adduced, your petitioner is entitled to registration thereof, and that such registration should extend to the whole of the Dominion of Canada.

The application is made under s. 29 of The Unfair Competition Act, 1932, which, in part, 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.

(2) Any such declaration shall define the class of wares with respect to which proof has been adduced as aforesaid and shall specify whether, having regard to the evidence adduced, the registration should extend to the whole of Canada or should be limited to a defined territorial area in Canada.

The petitioner is a body corporate having its head office at Toronto. The evidence establishes that the petitioner and its predecessor in title have for approximately fifty years sold throughout Canada cooking utensils marked with the trade mark "Wear-Ever". The value of such sales have been very substantial, the value in 1951 totalling over three million dollars. The goods are sold in retail and departmental stores and by house-to-house canvassers employed directly by the petitioner. Goods bearing the trade mark have been widely advertised in Canada, the costs of such advertising in 1951 being in excess of $128,000.

Cooking utensils made of aluminum and bearing the trade mark "Wear-Ever" were first manufactured and sold by the Aluminum Cooking Utensil Company of New Kensington, Pennsylvania, in the year 1903, and that company sold such goods in Canada continuously from 1905 until 1910. In 1910 it sold and assigned the goodwill of its business in Canada, and the trade mark "Wear-Ever" used in connection therewith, to Northern Aluminum Company, Ltd., having its head office at Toronto. The latter company in 1925 changed its name to Aluminum Company of Canada, Ltd. and in 1931 assigned to the petitioner all the goodwill of its business in Canada, and the trade mark "Wear-Ever" used in connection therewith. From 1904 to 1951, the Aluminum Cooking Utensil Company of New Kensington (which I assume to be the parent company) advertised the said wares in association with the trade mark "Wear-Ever" in magazines and periodicals published in the United States, many of which have a wide circulation in Canada. The annual cost of such advertising at times has been in excess of $450,000 and in 1950 exceeded $275,000.

In my view, it is not necessary to consider in great detail the evidence led on behalf of the petitioner to establish that *in fact* the trade mark "Wear-Ever" has become distinctive of its wares. I have already referred to the fact that the petitioner and its predecessors in title have used the trade mark continuously in Canada for almost fifty years, that the sales of cooking utensils bearing that trade mark have been very extensive and that very substantial amounts have been expended in advertising such goods in Canada and in American publications having a wide circulation in Canada.

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The petitioner sells its goods to wholesalers, to retailers and to householders direct by house-to-house distributors, throughout the whole of Canada, and for two sample years such outlets were as follows:

	1939	1950
Wholesale outlets	14	40
Retail outlets	153	661
House-to-house distributors	147	561

Then there is the evidence of N. E. Russell, President of the petitioner company, who has been associated with it and its predecessors continuously since 1925, that "Wear-Ever" has been used by the company and its predecessors for the purpose of indicating to dealers in and users of such cooking utensils that cooking utensils bearing the said word have been manufactured and sold by the petitioner. He further states that throughout the entire period of his employment with the company, its use of the trade mark in association with cooking utensils has been exclusive and undisputed and that during that period no other manufacturer has objected to the company's exclusive right to the trade mark or attempted to place upon the market any utensils bearing the trade mark "Wear-Ever" or a similar trade mark. Further, he states that he is advised and believes that the same facts apply in respect to the petitioner's predecessors in business.

The most important part of the evidence relates to the report (Ex.1) of a survey conducted on behalf of the petitioner in 1951 by the firm of Elliott-Haynes Limited to ascertain the consumer and dealer knowledge of the word "Wear-Ever". That organization was completely independent of the petitioner and conducted the survey throughout Canada by its own employees who, in personal interviews, submitted a series of non-leading questions to 3007 housewives and 505 dealers in cooking utensils in 64 cities, towns and rural communities. The questions submitted to householders differed somewhat from those submitted to dealers, but in each case I am satisfied that no objection could be taken to the form of the questions or to the manner in which the survey was conducted. I am satisfied that the report indicates a fair sampling of both consumer and dealer knowledge throughout Canada.

I do not propose to state in detail the contents of the report and the accompanying documents. It is sufficient to state that as a result of the questioning, 91 per cent of 3007 housewives and 96·5 per cent of 505 dealers identified "Wear-Ever" as a brand. It is a significant fact that while 44 per cent of the dealers questioned did not deal in "Wear-Ever" utensils, 96·5 per cent of all identified "Wear-Ever" as a brand, thus indicating the widespread knowledge among dealers of the manner in which the word was used.

On the whole of the evidence I have no hesitation whatever in reaching the conclusion that the petitioner has satisfied the onus cast upon it by s. 29, and were it not for the consideration which I must give to the word itself, I would at the hearing have made the declaration asked for in the petition and would have directed that such registration when made should extend to the whole of Canada. It is true, as pointed out by counsel for the Registrar of Trade Marks, that the recognition by dealers and users is not perhaps universal, a small percentage of those questioned stating that they thought the word referred to a quality of the wares and was not used as a brand. The section, however, requires only that the trade mark be *generally* recognized in the manner stated. To borrow a phrase used by the Master of the Rolls in the *Sheen* case—*In the Matter of an Application by J. & P. Coats Ld. for Registration of a Trade Mark* (1)—the distinctiveness in fact in this case is as wide and as long continued as one could expect to find in any case.

The application is opposed by the Registrar and his main objection is on the ground that the word "Wear-Ever" is not a word which is "adapted to distinguish" the wares of one person from those of another. Counsel for the Registrar submitted that the word indicates that the product with which it is used has a special characteristic of very great durability, that it will wear forever; that durability in cooking utensils is a quality much desired by their users and that to describe kitchen utensils by a word which indicates that they will last forever is to praise or eulogize them, and that therefore "Wear-Ever" is a laudatory word and, on authority, cannot be the subject of a declaration

(1) (1936) 53 R.P.C. 355 at 381.

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under s. 29. He relies on the *Super-Weave* case, *Registrar of Trade Marks* v. *G. A. Hardie & Co. Ltd.* (1), as well as on the *Perfection* case, *Joseph Crosfield & Sons, Ld. Application* (2), and the *Sea-lect* case, *C. Fairall Fisher* v. *British Columbia Packers Ltd.* (3).

In the *Super-Weave* case, the Supreme Court of Canada considered for the first time the interpretation to be placed on s. 29. The majority of the Court—Kerwin, Taschereau and Estey JJ.—seem to have been of the opinion that no distinction should be drawn between the Canadian Act in which a trade mark is defined as meaning a symbol which *has* become adapted to distinguish, and the English Act in which "distinctive" means "adapted to distinguish". They therefore held as stated in the headnote:

> 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 the result the appeal was allowed and the application dismissed. The other two members of the Court—Rand and Kellock JJ, while of the opinion that the appeal should be allowed, reached that conclusion only on the ground that the onus of proof imposed on an applicant by s. 29 had not been met; they would have referred the matter back to this Court in order to permit the applicant to produce further evidence. As I read their judgments, they were both of the opinion that to satisfy the requirements of s. 29 was to establish, in fact, that the trade mark "has become adapted to distinguish" and is therefore within the definition of a trade mark in s. 2(*m*).

I am bound, of course, by the decision of the majority in that case and it becomes necessary, therefore, to examine it with care in order to ascertain the limitations placed upon the words found in s. 29. In view of that case and of the *Perfection* case (*supra*) which was there followed, there can now be no doubt that certain words by their very nature are incapable of qualifying for a declaration under s. 29. Examples of such words are "perfection", "best", "classic",

(1) [1949] S.C.R. 483. (2) (1909) 26 R.P.C. 837.
(3) [1945] Ex. C.R. 128.

"universal" and "artistic", which, as noted by Kerwin J. at p. 489, are merely laudatory words. On the same page he stated the principle to be applied in these words:

> 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.

It is apparent, I think, that the decision in the *Super-Weave* case was arrived at because of the use of "super", an abbreviation of the word "superior", which, of course, is a purely laudatory word. It will be noted that Kerwin J. in that part of his judgment which I have quoted, used the expression "purely laudatory". Estey, J. in summing up the principles to be followed, said at p. 509: "It follows that words commonly used and appropriately described as laudatory epithets cannot become registrable as trade marks."

Now "Wear-Ever", it must be conceded, is, *prima facie,* descriptive of the character or quality of the wares with which it is used and therefore unregistrable under s. 26(1)(*c*). I do not find anything in the opinions of the majority of the Court of the *Super-Weave* case which would indicate that descriptive words as such can never qualify for the declaration provided for in s. 29. If it had been the intention of Parliament to exclude such words from the provisions of s. 29, I think it would have said so in clear terms.

Now however unwise a person may be in choosing as a trade mark a word which is descriptive of the character or quality of his goods, I think he would almost invariably as a practical measure select a trade mark which would describe a quality of his wares which users would desire to find in them. Would such words be considered as purely laudatory words and therefore outside of the provisions of s. 29 as that section has been interpreted? It seems to me

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that if descriptive words are not to be barred as a class, then a distinction must be drawn between such words and other words which are purely laudatory.

I find considerable support for that distinction in the *Sheen* case much relied on by the petitioner (*supra*). That was an application to register the trade mark "Sheen" in respect of "Machine Twist being Sewing Cotton", under the provisions of s. 9(5) of the English Act, and it was refused by the Registrar. Luxmoore, J. allowed an appeal from the Registrar's decision and a further appeal to the Court of Appeal was dismissed, that Court directing that the application should proceed. In that case "Sheen" was admittedly, *prima facie,* descriptive of the quality of sewing cotton, namely, shininess, a quality which was much desired by its users. In the Court of Appeal great stress was laid by counsel for the Comptroller on the *Perfection* case and the Court was asked to consider the decision in that case as not being limited to laudatory words, but as including common, descriptive words. On p. 373 of the report there are two comments made by the members of the Court which I think are very significant, although they do not form part of the actual decision. The Master of the Rolls (Lord Wright) said: "Best, Perfection, etc., are words of general approbation, but 'Sheen' describes a quality. It may not be registrable, but for other reasons." And Romer L.J. said: "Lord Justice Farwell says that no amount of user could withdraw 'Perfection' from its proper use, he might decline to believe a large number of affidavits but I do not believe that judicial decisions can rule out a great body of words from subsection 5."

At p. 380 the Master of the Rolls disposed of the argument that there was something in the nature of the word "Sheen" itself which rendered it incapable of registration as a trade mark, as follows:

> I do not think, dealing with the particular circumstances of this case, as I must, as a practical question, that any such argument is made out. The word "sheen" in this connection is clearly not a merely laudatory word like "perfection" or "best" or "classic" or "universal" or "artistic". To use the words which are the subject of discussion in *Sharpe, Limited* v. *Solomon Brothers, Limited* (1915) 32 Reports of Patent Cases, page 15, they are words which describe the character of the goods, but they are not the only or natural words which would be chosen for that purpose. With regard to the "Orlwoola", one of the cases referred to in the *Crosfield* case from

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which I have just read, "Orlwoola" was a simple description of the character of the goods, apparently not correct, with the laudatory observation that the goods were all wool, the words being mis-spelled. There you had an attempt to monopolise the natural description of woollen goods—that and nothing else. In the same way the word "diamine" was rejected as being a possible trade mark because it simply described the ordinary chemical constitution of an article of ordinary commerce; similarly the word "gramaphone" was not admitted to registration as a trade mark because it simply described what we all know as a gramophone with a disc. It is perfectly true that in the gramophone case there was evidence that in the trade it was necessarily identified with the products of the applicants; but against that was the admitted fact that in the eyes of the public it meant, and only meant, a machine whether made by the applicants or not. The word "sheen" in this case does not appear to me to assimilate itself to any of those categories. As I have already said, so far as the trade is concerned, the natural word to use and the word normally and habitually used in connection with glossiness is "lustre". Therefore, the use of the word "sheen" is something special; it is not merely a colour description, a description of something by a mere colour such as "blue" or any word of that sort; it is the peculiar use of a word which is rather poetic and obsolete or in unfamiliar use and which is not customary in this particular connection. So that so far as the word is concerned, it does not appear to me to come within those cases in which a word has been rejected on the grounds which I have stated; nor is there any danger of it failing to satisfy the test which has been put, namely: Is it a word which is likely to harass or embarass an honest trader in the exercise of his rights to use an ordinary word under Section 44 in order to describe something in which he is dealing? Is it likely to impede an honest trader in the use of the word "sheen" if he wants to use it as a *bona fide* description of the character or quality of his goods? It seems to me very unlikely that any such contingency would arise, but, if it did arise, so far as I can judge, there is no probability at all that the danger which has been complained of would follow, . . .

Again at p. 381, after referring to the *Liverpool Cable* case (1) he said:

The particular ground as to why the monopoly was held to be undesirable there does not apply here. There is no evidence that anybody has ever wanted or desired to use the word "sheen" in connection with goods of this character or on any textile, and I see no reason at all why this word, which has established itself as the trade mark associated with the name of *Coats* so that anyone asked for "Sheen" thread or Machine Twist would naturally and inevitably be taken to be asking for the manufacture of a twist or thread manufactured by *Coats,* should not be accepted and given the status of a trade mark.

In the same case, Romer L.J. said at p. 384-5:

It is said, and really the appeal is based upon this contention, that the Courts have laid down that, even though a word having direct reference to the character or quality of the goods has lost its primary signification and has obtained a secondary meaning, that is to say, is descriptive of

(1) (1929) 46 R.P.C. 99.

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some particular manufacturer's goods, and although the use of that mark will cause no confusion whatsoever, nevertheless the mark must be refused by the Registrar because it is not registrable.

I know that when the Legislature introduces a change, especially a striking change in the law, there is always a tendency in the Courts to put that construction upon the amending legislation that makes the change in the law as small as possible, but in all these cases the Act with which the Court is dealing is capable, or, at any rate, is thought by the Court to be capable of the restricted construction that the Court places upon it. In the present case the words of the Section are not capable of that construction. If there be any such limitation upon the power of the Registrar as is suggested by the arguments on behalf of the Appellants in this case, that limitation must be found in the Act, and it cannot be imposed under the guise of an exercise of discretion either on the part of the Registrar or on the part of the Court.

In view of those circumstances, I confess that I felt very sceptical as to whether I should find that any Court has laid down any such proposition as that for which the Appellants are contending. At this stage I do not propose to go through the decisions at length. I do venture to say this, however, that in not a single one of the cases to which our attention has been called, if they be really critically examined, will any authority be found for the proposition. In every case the question is a question of fact, that is to say, where evidence proves conclusively that a descriptive word has lost its primary meaning, and has acquired a secondary meaning, it is a question of fact whether the registration of that mark will or will not cause confusion. The word is not merely by reason of the fact that it is a descriptive word incapable of registration. The Act, in my opinion, says in plain words that it is registrable. When we come to look at the evidence in this case it seems to me to be perfectly plain that, applying the test which Lord Justice Fletcher Moulton and Lord Parker said should be applied, no one can *bona fide* use the word "sheen" by itself as descriptive of his goods, honestly. He may want in the future to say that his cotton thread has a nice sheen. The registration of this mark will not prevent him from doing so. But I do assert in view of the evidence that no one can wish in the future to describe his cotton as "sheen" cotton if he has an honest intention. That being so, it appears to me that there can be no confusion in the future by any *bona fide* use by the public or other traders of the word "Sheen" in connection with cotton.

It may be well to note also that in the same case the Master of the Rolls disposed of the argument that if a word is proved to be descriptive, then it has been proven that it cannot be distinctive, and quoted from the judgment of Lord Justice Moulton in the *Perfection* case at p. 145 as follows:

Much of the argument before us on the part of the opponents of the Board of Trade was based on an assumption that there is a natural and innate antagonism between distinctive and descriptive as applied to words, and that, if you can show that a word is descriptive, you have proved that it cannot be distinctive. To my mind this is a fallacy. Descriptive names may be distinctive and vice versa.

I turn now to a consideration of the word "Wear-Ever". While it is made up of two common words, each of which is in ordinary use, neither of its component parts is of a laudatory nature. In combination, however, as I have stated above, it is *prima facie* a descriptive word describing, in this case, the quality of durability of kitchen utensils. The word itself, however, is not one which is in common use and, in fact, it does not appear in any dictionary at my disposal and to a somewhat limited extent, therefore, it may be considered as an invented word. It is not a word which dealers in such goods would generally or naturally use in describing their goods and the uncontradicted evidence is that during the fifty years it has been used by the petitioner, no other firms have used or attempted to use it in describing their kitchen utensils. Then, too, it differs from purely laudatory words such as best, perfection, etc., which as Lord Wright pointed out are words of general approbation. Words of that type are words which any dealer would normally and naturally desire to use in describing his goods. It is significant to note that in the *Sheen* case, Lord Wright at p. 375 referred to the fact that "Sheen" was to be found in dictionaries, trade dictionaries and specifications, and was in more or less common use as describing a bright or shiny surface of a fabric, but that it was not on the evidence a word generally used in that connection in the sewing cotton trade. In the present case, "Wear-Ever" is not a word in common usage and has never been used in the trade. The test was laid down by Lord Justice Fletcher Moulton in the *Perfection* case at p. 148 in these terms:

> Will the registration of the trade mark cause substantial difficulty or confusion in view of these rights of user by other traders? If the answer is in the affirmative, the Court will probably hesitate to allow the word to be registered. But if the answer be in the negative, either by reason of the nature of the words, or because past user has limited the possibility of other traders safely or honestly using the words, the Court may well grant the desired permission.

In the instant case I have no hestitation in arriving at the conclusion that the registration of the trade mark in question would cause no substantial difficulty or confusion in view of the right of user by other traders and I do so not only because of the nature of the word itself, but also

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because, on the evidence, the exclusive and long use thereof by the petitioner and its predecessors has limited the possibility of other traders safely or honestly using the word.

I am of the opinion, also, that, taking into consideration the opening words of s. 29—"Notwithstanding that a trade mark is not registrable under any other provisions of this Act it may be registered . . ."—judicial decisions should not rule out a great body of words from the section if, in fact, the petitioner has satisfied the onus cast upon him to establish distinctiveness in fact. In so far as descriptive words are concerned, the exclusions in my opinion should be limited to those words which are purely laudatory and commonly known and used as such, of which "good", "perfection", "best" and "classic" are but a few examples.

My opinion, therefore, is that "Wear-Ever" is not within that class of words which by their very nature are incapable of qualifying for a declaration under s. 29. It is not purely or merely laudatory, but rather descriptive. In my opinion, it does not fall within the principles laid down by the majority of the Court in the *Super-Weave* case, but rather within those stated in the *Sheen* case. Having already found that I accept the evidence that it has in fact acquired the secondary meaning required by s. 29, it must follow that the petitioner is entitled to succeed.

For these reasons, the application will be allowed and there will be a declaration that it has been proved to the satisfaction of the Court that the mark "Wear-Ever" has been so used by the petitioner and its predecessors in title as to have become generally recognized by dealers in and users of cooking utensils as indicating that the petitioner assumes responsibility for the character and quality of cooking utensils in association with which the said word is used, and that having regard to the evidence adduced, the registration should extend to the whole of Canada.

Following the usual practice in such cases, there will be no order as to costs.

Judgment accordingly.

BETWEEN:

HER MAJESTY THE QUEEN .....PLAINTIFF;

AND

EMMA WILHEMINA KAUFMANN .....DEFENDANT.

1953
Nov. 23 & 24
1954
Jan. 16

Revenue—Excise Tax—The Excise Tax Act, R.S.C. 1952, c. 100, s. 23(1), schedule 1, para. 3(a), s. 23(3), s. 61—Coffee maker consisting of percolator and electric hot plate—"Component" part—Liability for tax.

The Excise Tax Act R.S.C. 1952, c. 100, s. 23(1) schedule 1, para. 3(*a*) imposes an excise tax on "Electrical appliances adapted to household or apartment use, viz. . . coffee makers . . ." manufactured in Canada. Defendant manufactured and sold in Canada an aluminum coffee percolator which to be used as such was attached to an electric hot plate separate from the percolator itself.

The action is for the recovery of the excise tax imposed on the manufacture of electric coffee makers. At one time the defendant advertised the article as an "electric coffee maker".

Held: That the percolator and the electric hot plate were designed to be used together and when so used each is a component part of an electric coffee maker, and defendant is liable for the excise tax imposed by The Excise Tax Act.

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

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

Joseph Singer, Q.C. for plaintiff.

W. J. Anderson for defendant.

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

POTTER J. now (January 16, 1954) delivered the following judgment:

This is a proceeding by way of information within section 30 of The Exchequer Court Act, chapter 34 of R.S.C. 1927, as amended, now section 29 of chapter 98 of R.S.C. 1952, brought within the provisions of section 108 of The Excise Tax Act, chapter 179 of R.S.C. 1927, as amended, now section 50 of chapter 100 of R.S.C. 1952, to recover the sum of $1,827.34, as taxes, which the defendant was allegedly liable to pay to Her Majesty in the period from October 1, 1952 to December 31, 1952, under section 80, subsection 1 and Schedule I, paragraph 3(*a*) of said chapter 179

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of R.S.C. 1927, as amended, now section 23(1) of chapter 100 of R.S.C. 1952, and Schedule I, paragraph 3(*a*) thereto, which section and Schedule are in part as follows:—

23 (1) Whenever goods mentioned in Schedules I and II of this Act are imported into Canada or taken out of warehouse or manufactured or produced in Canada and delivered to a purchaser thereof there shall be imposed, levied and collected, in addition to any other duty or tax that may be payable under this Act or any other statute or law, an excise tax in respect of goods mentioned.

(*a*) In Schedule I, at the rate set opposite to each item in said schedule, computed on the duty paid value or the sale price, as the case may be;

Schedule I

3(*a*) Electrical appliances adapted to household or apartment use, viz.: blankets; chafing dishes; coffee makers; curling irons or tongs; dish washers; food or drink mixers; food choppers and grinders; floor waxers and polishers; garbage disposal units; hair dryers; irons and ironers; juice extractors; kettles; portable humidifiers; razors and shavers; toasters of all kinds; vacuum cleaners and attachments therefor; waffle irons.... twenty-five (formerly fifteen) per cent.

The plaintiff also claims penalties imposed under the provisions of the said statute up to the 30th day of April, 1953, amounting to $50.28, and additional penalties or interest subsequent to the 30th day of April, 1953, and prior to the date of judgment.

The plaintiff alternatively claims the sum of $1,827.34, plus a penalty of $500 under the provisions of section 119 of said chapter 179, as amended, now section 61 of chapter 100, R.S.C. 1952, which is as follows:—

61. Everyone liable under this Act to pay to Her Majesty any of the taxes hereby imposed, or to collect the same on Her Majesty's behalf, who collects, under colour of this Act, any sum of money in excess of such sum as he is hereby required to pay to Her Majesty, shall pay to Her Majesty all monies so collected and shall in addition be liable to a penalty not exceeding $500.

During the period in question, the defendant manufactured or produced an aluminum coffee percolator, about four and three-quarter inches in diameter, which was similar in construction to the ordinary aluminum coffee percolator except that its bottom was not flat but between one-half and three-quarters of an inch inside the edges, was recessed about one-quarter of an inch, at a diameter of about three and one-half inches and in the centre there was a hinged piece of aluminum about three sixteenths of an inch wide, so arranged that it could be pulled down to a position in

which it projected about one and one-half inches perpendicularly from the bottom and when folded upward, against the bottom, allowed the percolator to stand in a level position on a flat surface.

In the lower end of the hinged strip of aluminum was a hole or slot. When this strip of aluminum was pulled down to a position perpendicular to the bottom of the percolator, it could be inserted into a hole or slot in the centre of the top of a small hotplate, of about the same diameter as the percolator, and locked in that position by means of a rod attached to a projecting knob on the side of the hotplate, which, when pulled outward, allowed the hinged aluminum strip to be inserted and when then pushed forward, engaged the hole or slot in the bottom of the same and the two parts or pieces, viz.—the aluminum percolator and the small electric hotplate, were then fixed or fastened together. Samples of these articles were filed as Exhibits "B" and "3".

According to the testimony of Sigmund Kaufmann, husband of the defendant, Emma Wilhemina Kaufmann, and manager of the business carried on by her under the firm name and style of Filtro Products, the defendant, had, for some time, sold these two articles and had sent out invoices for large numbers of the same, describing them as so many electric percolators or percolator and hotplate combinations, "Model 107".

Later, the defendant, instead of invoicing them as so many units, made one invoice for a number of percolators and another for the same number of hotplates,—Exhibits "4" and "4A".

The question for decision, is whether or not the defendant was manufacturing or producing electric coffee makers in the sense that the percolator and hotplate combined made one unit or manufacturing percolators as separate articles, and hotplates as separate articles.

The Crown contends that the percolator and hotplate together was an electric coffee maker and therefore subject to excise tax. The defendant, on the other hand, maintains that the percolator could be and was, on some occasions, sold separately from the hotplate and that no excise tax was payable on non-electric percolators and that she also sold the electric hotplates separately and no excise tax was payable on the same.

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Undoubtedly, the percolator, with the hinged strip of aluminum turned up against its bottom, could be used as a non-electric percolator, and, undoubtedly, the hotplate could be used for purposes other than heating water and making coffee in the percolator, but it is equally certain that the two articles, when the hinged aluminum strip is pulled down perpendicularly to the bottom of the percolator, and fixed into the slot in the centre of the hotplate, together make an electric appliance adapted to household or apartment use, viz.—a coffee maker.

The question is one of some difficulty, but it is clear that the two articles, viz.—the percolator and the electric hotplate were designed to be used together and when so used, each is a component part of an electric coffee maker.

The supplement to Murray's English Dictionary, published in 1933, the original of which was published in 1893, gives what was then a recent meaning of the word "component" as follows:—

> applied specially to the separate parts of motor cars and bicycles. Hence attributively and combined as component maker, component built.

While the circumstances provided for thereby are not before this Court, the words used in subsection 3 of section 80 of chapter 179, R.S.C. 1927, as amended, now section 23(3), c. 100, R.S.C. 1952, are of assistance:—

> 23(3). The tax imposed by this section or by section 28 is not payable in the case of goods that are purchased or imported by a manufacturer licensed under this Part or under section 129 of The Excise Act, and that are to be incorporated into and form a constituent or component part of an article or product that is subject to an excise tax under this Part or to an excise duty under The Excise Act.

Even if the electric hotplates in question were manufactured by one person and the percolators in question by another, but both for a third person who sold the two together, it would follow that the combination sold by the third party would be a component built electric coffee maker.

While the acts or statements of the defendant, her employees and purchasers are not to be taken as interpretations of the law, when words in common use are contained in a statute such acts and statements are some evidence of their accepted meaning.

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In the early stages of the manufacture and sale of the combinations in question, they were described by the defendant in invoices, as already stated, as electric percolators, and an advertisement appearing in the Ottawa Journal, Exhibit "2", describes the combination as an "electric coffee maker", which is further evidence of the common use of the words.

An electrical engineer was called as a witness by the defendant, who described the two parts of the combination as a hotplate and a percolator and who stated that the combination was not an electric coffee maker.

> The testimony of experts may be given to explain the meaning of technical, local, obsolete, or foreign terms . . . but not of ordinary words used in modern statutes, of which the Court, aided where necessary by dictionaries and other literary authorities, will take judicial notice. Phipson On Evidence, 9th edition, page 682.

There will be judgment for the plaintiff for the sum of $1,827.34 tax and $50.28, the penalty imposed by the statute, together with interest subsequent to the 30th day of April, 1953, and prior to the date of judgment with costs.

Judgment accordingly.

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Jan. 21

Feb. 22

BETWEEN:

ERIC CERNY ..... APPELLANT;

AND

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

Revenue—Income tax—Undistributed income—Loan by corporation to shareholder deemed to be a dividend—The Income War Tax Act, R.S.C. 1927, c. 97, s. 18(1)—Assessment carries presumption of validity and legality—Onus on taxpayer assessment is erroneous in fact or in law—Presumption of continuance one of fact—Failure to satisfy onus—Appeal from Income Tax Appeal Board dismissed.

Appellant is a shareholder of a company whose fiscal year ends on August 31 of each year. On August 31, 1946, the company had on hand undistributed income and, on September 3, 1946, appellant received from it as a loan the sum of $26,500 which he did not report in his income tax return for that year. That amount was added by the Minister to appellant's net income as being a dividend subject to tax pursuant to the provisions of s. 18(1) of the Income War Tax Act,

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R.S.C. 1927, c. 97. From the assessment appellant appealed to the Income Tax Appeal Board which dismissed the appeal and an appeal from the decision was taken to this Court.

Held: That an assessment carries with it a presumption of validity and legality and the onus of showing that it is erroneous in fact or in law is on the taxpayer who appeals against it. *Johnston* v. *Minister of National Revenue* [1948] S.C.R. 486; *Dezura* v. *Minister of National Revenue* [1948] Ex. C.R. 10 referred to and followed.

2. That the undistributed income in the hands of the Company on August 31, 1946, was still in its hands on September 3, 1946. On that last date the appellant received a loan or advance from the Company. This was found as a fact by the Minister and served as the basis of his assessment of the appellant's income. The presumption of continuance being one of fact, the appellant could have readily adduced evidence to destroy this presumption, if the facts on which the Minister based his assessment were incorrect. The burden of proof to this effect rested on him. He failed to satisfy the onus cast upon him.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Fournier at Montreal.

Clarence Gross for appellant.

Lyon W. Jacobs, Q.C. and *Claude Couture* for respondent.

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

FOURNIER J. now (February 22, 1954) delivered the following judgment:

This is an appeal from the decision of the Income Tax Appeal Board of July 11, 1952, dismissing the appellant's appeal from his income tax assessment for 1946, whereby a certain amount which he had received from Fine Silk Limited, a corporation of which he was a shareholder, was added by the Minister to the amount of taxable income reported by him.

The following facts are not disputed. The appellant is a shareholder of Fine Silk Limited (hereinafter called the Company), a corporation whose fiscal year ends on August 31 of each year. On August 31, 1946, it had on hand undistributed income in the amount of $77,426.09. On

September 3, 1946, the appellant received from the Company the sum of $26,500, which was said to be a loan. The appellant's income tax return for the year 1946 made no mention of that amount.

In assessing the appellant the Minister added to the net income of the appellant as reported by him the sum of $11,319.09. To explain this addition, on March 5, 1951, the Minister addressed to the appellant with the notice of assessment a document known as Form T. 7-W which reads partly as follows:

According to section 18 of the Income War Tax Act, the following amount received from Fine Silk Co. is considered as a dividend subject to tax:

Total amount	$26,500.00
1945	15,180.91
1946	11,319.09

Pursuant to the provisions of section 69A of the Income War Tax Act, the appellant served upon the Minister a notice of objection on April 3, 1951, and on April 7 of the same year the appellant was notified by the Minister as follows:

WHEREAS the taxpayer was assessed for income tax by Notice of Assessment in respect of the taxation year ended December 31, 1946,

AND WHEREAS by Notice of Objection the taxpayer has objected to the assessed tax for the reasons therein set forth;

The Honourable the Minister of National Revenue having reconsidered the assessment and having considered the facts and reasons set forth in the Notice of Objection hereby notifies the taxpayer of his intention to amend the said assessment to increase the income by an amount of $15,180.91 in respect of advances from Fine Silk Company Limited and hereby confirms the said assessment in other respects as having been made in accordance with the provisions of the Act and in particular on the ground that the advance to the taxpayer by Fine Silk Company Limited has been deemed to be a dividend and taxed in his hands in accordance with the provisions of section 18 of the Act.

From the assessment so confirmed the appellant appealed to the Income Tax Appeal Board and the appeal was dismissed. The appeal to this Court is from that decision.

The section of the Income War Tax to be construed in deciding this appeal is section 18 which reads:

Sec. 18—1. For the purpose of this Act, any loan or advance by a corporation, or appropriation of its funds to a shareholder thereof, other than a loan or advance incidental to the business of the corporation shall be deemed to be a dividend to the extent that such corporation has on hand undistributed income and such dividend shall be deemed to be income received by such shareholder in the year in which made.

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2. This section shall not apply to a loan or advance made by a corporation in the ordinary course of its business where the lending of money is part of the ordinary business of the company. (R.S., Chap. 97, sec. 18; 1940-41, chap. 18, sec. 20).

It is established that the loan which the Company is said to have made was not incidental to the business of the Company. It is also established that the lending of money was not part of its business, therefore their loan or advance to the appellant could not be covered by section 18(2). It is in evidence that the Company on August 31, 1946, had on hand undistributed income to the amount of $77,426.09.

It is also clear that the Minister found that the Company had on hand on September 3, 1946, undistributed income the extent of which was sufficient to cover the loan or advance made to the appellant.

These are the facts of the case.

This is an appeal from an assessment. An assessment for income tax is deemed to be valid and binding until it is proved to be erroneous. The facts found or assumed by the Minister must be accepted unless disputed by the appellant. The onus is his to establish that the facts are incorrect.

It has been held in the case of *Dezura and The Minister of National Revenue* (1) "that the onus of proof of error in the amount of determination rests on the appellant."

In *Johnston and Minister of National Revenue* (2) it was held:

> That an assessment for income tax is valid and binding unless an appeal is taken from such assessment and the Court determines that such was made on an incorrect basis and where an appellant has failed to show that the assessment was incorrect, either in fact or law, the appeal must be dismissed.

On appeal to the Supreme Court of Canada this decision was affirmed. In that case Mr. Justice Rand, speaking for the Court, said (p. 489):

> . . . the proceeding is an appeal from the taxation; and since the taxation is on the basis of certain facts and certain provisions of law either those facts or the application of the law is challenged. Every such fact found or assumed by the assessor or the Minister must then be accepted as it was dealt with by the persons unless questioned by the appellant. If the taxpayer here intended to contest the fact that he supported his wife within the meaning of the Rules mentioned he should have raised that issue in his pleading, and the burden would have rested on him as on any appellant to show that the conclusion below was not warranted. For that

(1) [1948] Ex. C.R. 10. (2) [1947] Ex. C.R. 483; [1948] S.C.R. 486.

purpose he might bring evidence before the Court notwithstanding that it had not been placed before the assessor or the Minister, but the onus was his to demolish the basic fact on which the taxation rested.

These decisions establish that an assessment carries with it a presumption of validity and legality and the onus of showing that it is erroneous in fact or in law is on the taxpayer who appeals against it.

In *Phipson on Evidence,* 9th edition, p. 107, under the title "Previous and Subsequent Existence of Facts", it is said:

> Continuance. (*b*) States of mind, persons, or things, at a given time may in some cases be proved by showing their previous or subsequent existence in the same state, there being a probability that certain conditions and relationships continue. The presumption of continuance, which is one of fact and not of law, will, however, weaken with remoteness of time, and only prevails till the contrary is shown, or a different presumption arises from the nature of the case. . . .

Having this in mind, I believe that the undistributed income in the hands of the Company on August 31, 1946, was still in its hands on September 3, 1946. On that last date the appellant received a loan or advance from the Company. This was found as a fact by the Minister and served as the basis of his assessment of the appellant's income. The presumption of continuance being one of fact, the appellant could have readily adduced evidence to destroy this presumption, if the facts on which the Minister based his assessment were incorrect. The burden of proof to this effect rested on him. He failed to satisfy the onus cast upon him.

Under these circumstances I have arrived at the conclusion that the Minister's assessment of the appellant's income was made according to the provisions of section 18 of the Income War Tax Act.

The appeal is dismissed with costs.

Judgment accordingly.

BETWEEN:

ISRAEL ROMOFF .....APPELLANT;

AND

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

The appeal was dismissed for the reasons stated in *Eric Cerny* v. *The Minister of National Revenue ante* p. 95.

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Jan. 21

Feb. 22

BETWEEN:

MIRON & FRERES LIMITEE .....APPELLANT;

AND

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

Revenue—Income Tax—The Income Tax Act, S. of C. 1948, c. 52, ss. 11(1)(a), 20(2)(a), 127(5)—"A corporation and one of several persons by whom it is directly and indirectly controlled"—Arms-length —Capital cost of property—Finding of fact by Minister—Assessment based on finding of fact—Onus on appellant to demolish basic fact on which taxation rests—Failure to contradict Minister's finding of fact— Appeal from Income Tax Appeal Board dismissed.

In 1948 one M. bought a stone quarry for the price of $90,000 and sold it in 1949 to the appellant company for $600,000. At the time of the sale M. was the owner of 200 common voting shares of the 1,000 issued by the company and his five brothers owned the balance less three shares: one brother owned 200 shares and each of the other four 149. In its income tax return for the taxation year 1950, signed by M. as president of the company, appellant claimed a capital cost allowance on its purchase price of the quarry. The Minister contending that appellant came within the provisions of s. 20(2) of the Income Tax Act, S. of C. 1948, c. 52, assessed the company on the basis of the actual cost of the property to M., the previous owner. An appeal from the assessment to the Income Tax Appeal Board was dismissed and from that decision appellant appealed to this Court, its ground of appeal being that the sale of the quarry from M. to it was a transaction between parties dealing at arms-length.

Held: That the Minister having found as a matter of fact and having based his assessment on that fact, that M. was one of several persons by whom the appellant company was controlled, the onus of proof that the Minister's conclusion was not warranted rested on appellant who had challenged that fact. His obligation was to demolish the basic fact on which taxation rested. *Johnston* v. *Minister of National Revenue* [1948] S.C.R. 486 at 489 referred to and followed.

2. That by not bringing forth evidence to contradict the Minister's finding of fact appellant has failed to establish that the transaction was at arms-length.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Fournier at Montreal.

Alderic Laurendeau, Q.C. for appellant.

Raymond G. Decary and *Claude Couture* for respondent.

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

FOURNIER J. now (February 22, 1954) delivered the following judgment:

This is an appeal from the decision of the Income Tax Appeal Board, dated August 26, 1953, dismissing the appellant's appeal from his income tax assessment for 1950, whereby the Minister reduced the amount of the capital cost allowance claimed by the appellant in his income tax return for that year.

The facts not being disputed, no verbal evidence was heard at the hearing of this appeal.

The pleadings and documents filed state that Gérard Miron was at all time material a shareholder of Miron & Frères Limitée, the appellant company. In 1948 he brought a farm property in the Town of St. Michel for the price of $90,000 and in 1949 he sold this property to Miron & Frères Limitée for the price of $600,000. The farm contained a stone quarry and since its acquisition the company has operated the property as such. At the time of the sale Gérard Miron was the owner of 200 common voting shares of the 1,000 issued by the company and his brothers owned the balance of the shares less three shares out of 800 which were owned by other parties. One of his brothers owned 200 shares and each of the other four brothers owned 149 shares.

On June 7, 1951, the company in its income tax return for its taxing year 1950 signed by Gérard Miron, President, claimed a capital cost allowance of $44,000 on its purchase price of the above property. On January 4, 1952, the Minister in assessing the appellant reduced the capital cost

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allowance to $6,800. On March 11, 1952, the company served a notice of objection to this assessment. On July 22, 1952, the Minister issued his notification in which he notified the company of his intention to reduce the capital cost allowance still further from $6,800 to $3,163, but confirmed the said assessment in other respects as having been made in accordance with the Act and, in particular, on the ground that, for the purposes of paragraph (*a*) of subsection (1) of section 11 of the Act and the Income Tax Regulations made thereunder, the capital cost of the property acquired from Gérard Miron had been determined at its cost to the said Gérard Miron in accordance with the provisions of subsection (2) of section 20 of the Act.

From this assessment the company appealed to the Income Tax Appeal Board and the appeal was dismissed. The appeal to this Court is from that decision.

The appellant contends that the above sale of the said property from Gérard Miron to the company was a transaction between parties dealing at arms-length and that subsection (2) of section 20 and subsection (5) of section 127 of the Act are not applicable in the present case. Therefore the appellant claims that it should receive a capital cost allowance based on the amount it paid for the property and not on the cost to the former owner. The Minister by having, in his assessment, allowed a capital cost allowance on the cost to the previous owner gave an erroneous interpretation to subsection (5) of section 127 of the Act.

The sections of the Income Tax Act referred to above read as follows:

20 (2) Where depreciable property did, at any time after the commencement of 1949, belong to one person (herinafter referred to as the original owner) and has, by one or more transactions between persons not dealing at arms-length, become vested in the taxpayer, the following rules are, notwithstanding section 17, applicable for the purposes of this section and regulations made under paragraph (*a*) of subsection (1) of section 11;

(*a*) the capital cost of the property to the taxpayer shall be deemed to be the amount that was capital cost of the property to the original owner;

127 (5) For the purposes of this Act,

(*a*) A corporation and a person or one of several persons by whom it is directly or indirectly controlled;

(*b*) Corporations controlled directly or indirectly by the same person, or

(c) Persons connected by blood relationship, marriage or adoption shall without extending the meaning of the expression 'to deal with each other at arms-length', be deemed not to deal with each other at arms-length.

It is clear that certain words in paragraph (*a*), viz. "a corporation and a person by whom it is directly or indirectly controlled", and paragraphs (*b*) and (*c*) are not applicable to the facts of this case.

The dispute between the parties is on the interpretation to be given to the words "a corporation and one of several persons by whom it is directly or indirectly controlled shall be deemed not to deal at arms-length."

Whatever interpretation is given to the above words, one thing is certain, the Minister found as a matter of fact that Gérard Miron was one of several persons by whom the corporation was controlled. On this fact the Minister based his assessment. The appellant having challenged this fact, the burden of proof that this was incorrect rested on him. The onus was his to show that the Minister's conclusion was not warranted and he could have brought forth evidence to that effect. His obligation was to demolish the basic fact on which the taxation rested.

That directive given by Mr. Justice Rand in the case of *Roderick W. S. Johnston and Minister of National Revenue* (1) is followed by this Court.

The only evidence is to the effect that Géard Miron was a minority shareholder, but the file reveals that he was president of the Company. It may be presumed that he was also one of its directors. Being a minority shareholder would not bar him from being a shareholder with several (four or five) shareholders by whom the corporation was controlled. When this took place it would be a question of fact. This was the finding of the Minister; if he had found otherwise, the assessment would have been on a different basis. Nothing in the pleadings and in the documents filed indicates that he was not a person, one of several by whom the corporation was controlled.

Keeping in mind that evidence would be adduced to substantiate the facts, one could imagine situations and circumstances under which a shareholder could be considered

(1) [1948] S.C.R. 489.

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as dealing at arms-length with a corporation and this would render the section inapplicable.

As an instance, a minority shareholder dies, say Gérard Miron. His shares are bought by an outsider. This new shareholder never takes part in the activities or the management of the affairs of the company except to receive his dividends and the several other owners administer the business of the corporation. I would be inclined, these facts being proven, to consider that this shareholder was not one of several persons in control.

I cannot agree that this section applies only when a sufficient number of shares to control a company are owned jointly by several persons, of whom the person dealing with the company was one. This would be giving the phrase "one of several persons" a meaning difficult to justify in the context of the section.

I would doubt also that the decision in this case would mean that any transaction between a corporation and any shareholder, even though he might own only one share, could be considered as a deal not at arms-length. I believe that this would be a much too sweeping deduction.

It seems to me that the appellant has not brought forth evidence to contradict the finding of the Minister that Gérard Miron was one of several persons by whom the company was controlled. That being so, he failed to establish that the transaction in this instance was at arms-length and that the provisions of section 20(2) were not applicable.

For these reasons, I am of the view that when Gérard Miron, one of the shareholders, sold the property to the company he was one of four or five shareholders by whom the corporation was controlled and was not dealing at arms-length and that the assessment made under the provisions of section 20, subsection (2) of the Income Tax Act is in accordance with the law.

Therefore the appeal is dismissed with costs.

Judgment accordingly.

BETWEEN:

HER MAJESTY THE QUEEN ..... PLAINTIFF;

AND

SUPERTEST PETROLEUM CORPORATION LIMITED ..... DEFENDANT.

1951
Apr. 9-13
June 5-7, 29
1954
Mar. 5

Expropriation—The Expropriation Act, R.S.C. 1927, c. 64, s. 9—Award of compensation to be fair to Crown as well as to owner—Need for statutory definition of value—Unwillingness of owner to sell and urgent need of purchaser to buy to be disregarded—Municipal assessment not evidence of value—Accumulation of profits and savings not to be added to market value—Price at which owner willing to sell not a test of value—Disadvantages of property to be considered—Value of property to owner includes right to compensation for disturbance—Expropriation not a tort or delict—Right under certain circumstances to ten per cent additional allowance for compulsory taking.

The plaintiff expropriated property in the City of Hull on which the defendant had a gasoline service station and a terminal bulk storage plant. The action was taken to have the amount of compensation payable to the defendant determined by the Court.

Held: That in measuring the amount of money which the owner of expropriated property should receive as the equivalent in value of the property taken from him it is just as important to ensure that the Crown, which has lawfully taken the property for public purposes, is not required to pay more for it than it was worth as it is to make sure that its owner receives its fair value. The duty of determining the equivalence in money of the value of the expropriated property demands fairness to the expropriating public as well as to the owner of the property and an excessive award is a breach of this duty.

2. That it is essential to the fair administration of expropriation law that there should be a statutory definition of value.

3. That the test put by Lord Moulton in the *Pastoral Finance Association* case [1914] A.C. 1083 that 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" envisages negotiations between the owners and a prudent purchaser, each knowing the advantages of the property and the possibilities of savings and profits from its use, culminating in a sale of it to the prudent purchaser at the price beyond which, in the ordinary course and without the pressure of urgent need, he would not be willing to go.

4. That in determining the amount of the compensation "the disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy must alike be disregarded". *Vyricherla Narayana Gajapatiraju* v. *The Revenue Divisional Officer, Vizagapatam* [1939] A.C. 302 at 311 followed.

5. That the municipal assessment of expropriated property is not evidence of its value.

6. That the capitalization of anticipated savings and profits or their accumulation for a term of years must not be added to the market value of the land. What should be considered is the adaptability of the land and its advantages for the making of profits and savings.

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7. That the amount for which the owner would have been willing to sell the land is not a test of its value.

8. That in estimating the value of the land regard should be had not only to its advantages but also to its disadvantages.

9. That the right of the owner of expropriated property to compensation for disturbance is included in his right to compensation for its value to him.

10. That it is anachronistic to apply the philosophy that the compulsory taking of property is in the nature of trespass to the conditions of the present times when it frequently happens that the property of individuals has to be expropriated for public purposes. There is no element of tort or delict in an expropriation under the Expropriation Act. It is the lawful exercise by the Crown in right of Canada of its right of eminent domain under the authority of an enactment of Parliament. All that the owner is entitled to is such compensation as Parliament has decreed.

11. That since the case falls within the ambit of the rule in *The King* v. *Lavoie* [December 18, 1950, unreported] an additional allowance of ten per cent for compulsory taking must be added, notwithstanding my opinion that any additional allowance would be an unwarranted bonus and that additional allowances for compulsory taking should be prohibited.

INFORMATION by the Crown to have the amount of compensation money payable to the defendant determined by the Court.

The action was tried before the President of the Court at Ottawa.

F. B. Major, Q.C. and *J. Ste. Marie* for plaintiff.

D. K. MacTavish, Q.C. and *J. C. Osborne* for defendant.

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

THE PRESIDENT now (March 5, 1954) delivered the following judgment:

The amended information herein shows that the lands of the defendant described in paragraph 3 thereof together with other lands were taken by His late Majesty under the Expropriation Act, R.S.C. 1927, chapter 64, for the purposes of a public work of Canada and that the expropriation was completed by depositing a plan and description of the said lands in the office of the registrar of deeds of the registration division of Hull in Quebec, in which the lands are situate, on April 2, 1946, pursuant to section 9 of the Act. Thereupon the said lands became vested in His late Majesty and the defendant ceased to have any right, title or interest therein or thereto.

The parties were unable to agree on the amount of compensation money to which the defendant is entitled and these proceedings were brought for an adjudication thereof. By the information the plaintiff offered the sum of $97,400.60. By its statement of defence the defendant claimed the sum of $220,000 but at the trial its claim was increased to $349,716.27. There is thus a very wide spread between the parties.

The expropriated property is in the City of Hull a short distance north of the Interprovincial Bridge. It was in two parcels, the first having a frontage of 89 feet on the east side of Laurier Street and comprising the whole block between it and the Ottawa River to the east and between St. Laurent Street on the south and Guigues Street on the north except for the northeast corner of Laurier Street and St. Laurent Street and the second on the south side of St. Laurent Street near the river. The total area of the property in the two parcels came to 2·819 acres or 122,820 square feet.

At the date of the expropriation the defendant carried on two operations on its property. On the Laurier Street frontage there was a gasoline service station for the retail sale of its products which, in accordance with its regular practice, it leased to a tenant. On the remainder of the property it maintained a terminal bulk storage plant for its Ottawa sales division for the storage and distribution of its various petroleum products and its tires, tubes and repair accessories and also a garage and repair shop for the storage and repair of its tank wagons and trucks. During the navigation season it received supplies of gasoline and furnace fuel oil by water from a tanker operated by its subsidiary, the Pioneer Transportation Company Limited, plying between its refinery in Montreal and the government wharf at the foot of St. Laurent Street. The cargoes were unloaded at the wharf into a pipe-line leading to the marine storage tanks. Prior to the close of the season these tanks were filled to help meet the needs of the division during the winter. The defendant's additional gasoline and fuel oil requirements came by railway tank cars delivered by the Hull Electric Railway Company on its railway siding on Guigues Street. Other products such as stove oil, diesel oil and kerosene came by railway tanks cars and were unloaded

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into the other storage tanks. Still other products such as lubricating oils, greases, antifreeze, soap and various solvents came to the terminal in steel drums by truck or railway and were stored in the warehouse. Necessary stocks of tires, tubes and repair accessories were also stored in the warehouse for distribution throughout the division. A portion of the warehouse building was used as headquarters for a staff of mechanics who looked after the installation, maintenance and repair of equipment throughout the division. The defendant's tanks and other trucks were stored on the premises when not in use either in the garage or outdoors.

After the expropriation the defendant searched for other premises. There was no available suitable property with marine and railway facilities on the Ontario side of the Ottawa River nearer than Rockland. For a time the defendant considered a site on the Quebec side of the river at Gatineau Mills but it would have been necessary to build a dock there, dredge a channel and bring in a railway spur line. The cost of doing this, the increased cost of distribution and other disadvantages were against the choice of this site. The defendant also considered other possible locations but finally decided on what is called the Heron Road site. This is off the Metcalfe Road about 2 miles south of Billings Bridge. This had several advantages. It was the nearest suitable site to the centre of the Ottawa area for which a permit could be obtained. There were satisfactory railway facilities and an advantageous change in railway freight rates. There was plenty of room for expansion and there was also the advantage that other oil storage plants were near by. In October, 1946, the defendant bought 5 acres of land from the Shell Oil Company for $9,000 and commenced construction of a new storage plant immediately. It did not need as much storage capacity for there was no longer any use for the 3 large marine storage tanks which it had at the Hull plant but otherwise the Heron Road plant was substantially larger than its Hull plant had been. The total cost of the new plant came to $163,000.

While the new plant was being constructed the defendant continued to use the Hull plant for gasoline storage until May 22, 1947, and for lubricating oil storage until July 20,

1947. Then on July 28, 1947, it obtained permission to use the fuel oil marine storage tanks until May 1, 1948. On April 30, 1948, it closed the Hull plant and made no further use of it. Then a dispute arose. On May 7, 1948, the defendant offered delivery of the premises to the Department of Public Works but this was rejected, the Department taking the position that it would accept the keys only when the tanks had been decontaminated. The defendant then arranged for the decontamination and on October 26, 1948, the Department advised that it was satisfied with it. Finally, on March 8, 1949, the defendant turned the premises over to the Department.

The principles to be applied in determining the amount of compensation to be paid to the owner of expropriated property have been discussed in many cases but it would not be correct to say that they are wholly settled. It is established, of course, that the owner is to receive its money equivalent, that is to say, its worth to him in money, that, while his property is changed in form, it is not diminished in amount and that its money equivalent is estimated on its value to him and not on its value to the purchaser: *Vide In re Lucas and Chesterfield Gas and Water Board* (1). But there are differences in the statements of the tests of value to be used.

Before I deal with these tests I must refer to the second last paragraph of the reasons for judgment of the Supreme Court of Canada in *Woods Manufacturing Co. Ltd.* v. *The King* (2) which reads as follows:

> There is this to be added. It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced, including the interpretation by this Court of the decisions of the Judicial Committee, should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationship between the courts. If the rules in question are to be accorded any further examination or review, it must come either from this Court or from the Judicial Committee.

This is a remarkable statement. While there will be general agreement with most of its sentiments it is subject to objection on several counts. It was neither necessary

(1) [1909] 1 K.B. 16 at 29. (2) [1951] S.C.R. 504 at 515.

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nor relevant to the decision in the case. Consequently, its admonitions, being *obiter dicta,* have no binding effect. That being so, the easier course to follow would be to let them pass without comment but, in view of the circumstances, it would not be proper to do so.

The implications in the statement have caused me deeper concern than I care to express. For, while the reason for making it is not apparent on its face, there is no doubt that it was because of the fact that I have disagreed with some of the opinions expressed by individual judges of the Supreme Court of Canada in certain expropriation cases.

If there is implied in the statement, as appears to be the case, an imputation that by disagreeing with the opinions referred to I have not shown proper respect for the authority of the Supreme Court of Canada and that my disagreements have tended to the administration of justice becoming disordered, the law becoming uncertain and the confidence of the public in it being undermined there is the simple answer that there is no foundation or justification for any such imputation.

Here I may perhaps be permitted to interject what I hope will not be considered too personal a note. Prior to my appointment I was made aware of the fact that there was criticism of the Exchequer Court of Canada on the ground that many of its awards in expropriation cases were excessive. In an attempt to remove this ground of criticism I have since my appointment to the presidency of the Court set myself rigidly against excessive awards. It was, and is, my opinion that in measuring the amount of money which the owner of expropriated property should receive as the equivalent in value of the property taken from him it is just as important to ensure that the Crown, which has lawfully taken the property for public purposes, is not required to pay more for it than it was worth as it is to make sure that its owner receives its fair value. The duty of determining the equivalence in money of the value of the expropriated property demands fairness to the expropriating public as well as to the owner of the property and an excessive award is a breach of this duty.

In the course of attempting to make awards that would be as fair to the Crown as to the owner I sought, as carefully as I could, to apply what I considered, in my view of

the decisions, a fair test of the value to the owner of the expropriated property under consideration and it was in the search for such a test that the disagreements to which I have referred occurred. They were intended to be impersonal and objective and were expressed in the belief, as Joseph H. Choate, a great American lawyer, once put it, that it is "only on the anvil of discussion that the spark of truth can be struck out". There was no vestige of disrespect for the Supreme Court of Canada or any of its judges in any of my remarks and any imputation or suggestion to the contrary is quite unjustified.

But there is a more serious objection to the statement than that which I have mentioned. This is to the *dictum* in its last sentence, which reads as follows:

> If the rules in question are to be accorded any further examination or review, it must come either from this Court or from the Judicial Committee.

The meaning of the *dictum* is not clear. But if it purports to prohibit this Court from any further examination of judgments dealing with the difficult question of the value of expropriated property and the tests by which it is to be measured it seeks to impose a restriction on the judicial independence and freedom of the Court to which it has hitherto not been subject.

There are several reasons for objecting to the *dictum*. In the first place, the Court could not, in my opinion, properly perform its duty if it were to cease its inquiry as suggested. I doubt whether there is any concept in the whole field of law that is more elusive than that of value. There has been a long and ceaseless search by judges and others charged with the valuation of property to ascertain the proper tests by which the amount of such value can be ascertained in any given case. And the search must continue for the factors of value that should be taken into account are not static. On the contrary, there is a continuing shift in their respective weights as the circumstances under which they arise alter.

Moreover, the restriction sought to be imposed is not required under even the strictest view of the doctrine of *stare decisis* and it is certainly not in accord with the spirit that has permitted judges, even of courts of first instance, to make a useful contribution to the administration of justice

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by pointing out defects in the law as they become manifest and recommending legislative action for their remedy when reform by judicial decision has become impossible. Under the circumstances, I respectfully suggest that the ends of justice will be better served by the continued freedom of inquiry of this Court than by the prohibition of it.

In my opinion, there are several features in this case that call for careful analysis of the various tests of value that have been laid down in the leading cases but before I attempt such analysis I should set out the breakdown of the defendant's claim and then dispose of those portions of it that are not seriously in dispute. As I have already stated, the defendant put its claim at $349,716.26. Of this amount $215,999.24 was for the land and $39,172 for the buildings. The claim for the storage and operational equipment was put at $59,896.17, against which there was a contra account credit of $21,566.03 for tanks and other equipment removed by the defendant to its Heron Road site, leaving a net claim of $38,330.14. In addition, there were claims of $23,355.62 for disturbance and $1,066.88 for abandonment costs. The total of these claims came to $317,923.88 to which the defendant added ten per cent, or $31,792.38, by way of additional allowance for compulsory taking.

Evidence of value was given for the defendant by Mr. W. G. Perry, who was its comptroller at the date of the expropriation, Mr. A. S. Eadie, its construction superintendent, Mr. E. S. Sherwood, an Ottawa real estate agent, Mr. W. F. Hadley, an Ottawa engineer and real estate agent, Mr. W. H. Bosley, a Toronto real estate agent, and Mr. B. Doran, an Ottawa general contractor; and for the plaintiff by Mr. J. A. Coote, a retired engineer and former assistant professor of mechanical engineering at McGill University, Mr. D. H. Sharp, a Montreal professional engineer, Mr. S. E. Farley, an Ottawa and Hull civil engineer and land surveyor, and Mr. T. Lanctot, a Hull professional and former City engineer.

The only real problem in this case is the value of the land. It will, therefore, be desirable to dispose of the valuations of the buildings and the storage and operational equipment first. It is not difficult to determine the value of the buildings of which there were six altogether, namely, the service

station with its attached garage, a warehouse storage shed, a truck garage and repair shop, a warehouse and foreman's office, a foamite shed and pumphouse. Detailed descriptions of each of these buildings were given in Section B of Exhibit C, which was prepared under the direction and supervision of Mr. Eadie, the defendant's construction superintendent. Page 42 of this exhibit summarizes for each building the year of its construction, its replacement cost at the date of the expropriation, its expectancy of life, the rate and amount of its depreciation and its depreciated value at the date of the expropriation. The total amount for replacement cost of all the buildings came to $50,921.98 and for depreciated value to $39,172. Mr. Sherwood estimated the value of the buildings after taking depreciation into account at $43,317 and Mr. Hadley put it at $42,925.50. Mr. Bosley had the benefit of these two valuations and put his estimate in round figures at $40,000. Mr. Doran estimated the reconstruction cost of the buildings at the date of the expropriation at $50,460, which is remarkably near the amount of Mr. Eadie's estimate, but this should be reduced by $750. For the plaintiff, Mr. Lanctot and Mr. Farley valued the buildings at $33,898.35, according to Exhibits 11 and 12, but this should be reduced by $720, leaving a valuation of $33,178.35. Of these valuations I accept that prepared by Mr. Eadie, supported as it was by Mr. Bosley. I am satisfied that his statements of replacement costs were accurate and that his allowances for depreciation were reasonably fair. I, therefore, find $39,172 as the value of the buildings.

The determination of the value of the storage and operational equipment is somewhat more difficult. The details of each item were given in Section C of Exhibit C, which was also prepared under the direction and supervision of Mr. Eadie. I shall deal first with the tanks with a view to determining the value of those that were not taken away by the defendant. There were 17 storage tanks altogether, 13 of them being vertical and 4 horizontal. In addition, there were 4 underground tanks at the service station. Page 43 of Exhibit C gives for each tank the year of its installation, its replacement cost at the date of expropriation, its life expectancy, the rate and amount of its depreciation and its depreciated value at the date of the expropriation. The total replacement cost of the 21 tanks came to

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$61,388.47 and their depreciated value to $41,823.42. All the storage tanks except the 3 large marine storage tanks were removed by the defendant to its Heron Road site and the figures for these in the contra account came to $33,912.20 for replacement cost and $20,625.89 for depreciated value. This left the replacement cost of the tanks that were not taken away at $27,471.27 and their depreciated value at $21,197.53. To arrive at the figures for the 3 large marine storage tanks there must be deducted the replacement cost of the 4 underground tanks at $405.67 and their depreciated value at $202.84. This left $27,065.60 as the replacement cost of the three large storage tanks and $20,994.69 as their depreciated value. These were the amounts according to Mr. Eadie's evidence. I would be prepared to accept these figures as fair and reasonable except for the fact that Mr. Eadie put the life expectancy of the storage tanks at 40 years.

Against Mr. Eadie's evidence there was the valuation made by Professor Coote and Mr. Sharp who worked together. This was set out in Exhibit 5 which covered all the storage and operational equipment but I shall for the moment refer only to those portions of it that relate to the 3 large marine storage tanks. The reconstruction cost of these was placed at $27,445 and their depreciated value at $17,350. In Exhibit 5 the reconstruction cost of tank fittings was first put at $500 and their depreciated value at $300, but on cross-examination Mr. Sharp agreed that this was an error and that the reconstruction cost of the fittings should have been put at $1,000 instead of $500 and their depreciated value at $600 instead of $300 and that these amounts should have been added for each of the 5 larger tanks. But only the 3 large marine storage tanks that were not taken away need be considered. This means that there should be added to the figures mentioned $3,000 for the reconstruction cost of the fittings for the 3 tanks and $1,800 for their depreciated value bringing the revised figures for them up to $30,445 for reconstruction cost and $19,150 for depreciated value to which there should be added some amount for labor. In Exhibit 5 the life expectancy of the tanks was put at 25 years. Then Professor Coote put in Exhibit 10 under circumstances to which I shall refer later. This estimated the life expectancy of the tanks at 30 years

instead of 25 years, which left the reconstruction cost of the 3 tanks at $27,445 but brought their depreciated value up to $19,036 to which there must be added the corrections made by Mr. Sharp in respect of the fittings bringing the figures up to $30,445 for reconstruction cost and $20,836 for depreciated value.

In my judgment, the best figures for the replacement cost of the tanks are those given by Mr. Eadie and the only question in dispute is the amount of their depreciation. Page 43 of Exhibit C shows the expectancy of life of the storage tanks as 40 years and Mr. Eadie stated that he had taken this estimate from page 54 of Bulletin "F", a pamphlet issued by the Bureau of Internal Revenue of the United States Treasury Department and published by the United States Government Printing Office at Washington. Bulletin "F" deals with Income Tax, Depreciation and Obsolescence, Estimated Useful Lives and Depreciation Rates. It is primarily intended for use in connection with income tax deductions but is used for other purposes. It is stated, on page 11, that the probable useful lives shown in it for each kind or class of assets are based on the usual experience of property owners and are predicated on a reasonable expense policy as to the cost of repairs and maintenance. Counsel for the defendant relied on it as a record of actual experience and Mr. Eadie considered it fair. But in Exhibit 5 Professor Coote and Mr. Sharp put the expectancy of life of the tanks at 25 years and Professor Coote stated that he had taken this estimate from Marston and Agg's treatise on Engineering Valuation, published by McGraw Hill Book Company Inc. of New York and London. Professor Coote described this as the best recognized text book in the field but in reply to a question which I put to him expressed the opinion that Bulletin "F" was more authoritative than Marston and Agg's book and I then requested him to prepare another valuation, using the expectancy of life figures given in Bulletin "F", and he stood down for that purpose. Mr. Sharp did not agree with Professor Coote's opinion about Bulletin "F". His preference as a practical man was for Marston and Agg's book, because the data in it came from so many sources. But the importance of Mr. Sharp's evidence was in his opinion that if Bulletin "F" was to be taken as the authority for

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determining the life of the tanks, as put forward for the defendant, then Mr. Eadie was in error in putting it at 40 years and should have put it at 30 years or even less. Mr. Sharp drew attention to page 53 of Bulletin "F". There under the general head of "Oil and Gas" and the sub-head of "Marketing" there is an item "Tanks, storage" and the average useful life of such storage tanks is put at 30 years for cylindrical horizontal tanks and 20 years for underground tanks. Mr. Sharp's opinion was that the life of horizontal tanks which are off the ground would be longer than that of vertical tanks such as the 3 large marine storage tanks which rest on the ground, with which opinion Mr. Eadie later agreed, and for that reason he thought that the estimate of 25 years for the useful life of the storage tanks was fair. It appeared from Mr. Sharp's evidence that Mr. Eadie had taken his 40 year expectancy of life estimate from page 54 of Bulletin "F". There under the general head of Oil and Gas and under the subhead of "Transportation" and a further sub-head of "Oil Pipe Lines" there is an item "Oil Tanks" against which there is a useful life of 30 years for gathering lines and 40 years for trunk lines. After Mr. Sharp had pointed this out Mr. Eadie was recalled to explain how he got the storage tanks into the class of assets referred to on page 54. He was unable to give a reasonable explanation. The defendant's storage tanks were part of its bulk storage plant in its Ottawa marketing division and there was no justification for applying the 40 year life expectancy estimate referred to on page 54 of Bulletin "F" to them, and Mr. Eadie was in error in so doing. The fact is that he picked out the estimate that was most favourable to the defendant in that it put the expectancy of life of the tanks at the highest figure with their resulting high depreciated value. When Professor Coote came back to the stand with his revision of Exhibit 5, which he had prepared at my request, which was filed as Exhibit 10, he explained that the only change he had made had been to put the life expectancy of the tanks at 30 years instead of 25 years with the resulting increase in the figures which I have mentioned. In so doing he somewhat qualified his opinion that Bulletin "F" was more authoritative than Marston and Agg's book by saying that both publications should be considered as guides and that the tables of useful life of the various assets contained in each should be used in the light of the actual

situation. With this statement I am in agreement. Both Bulletin "F" and Marston and Agg's Engineering Valuation are useful and dependable books but the tables of useful life in each are not to be read as absolute. The actual condition of the asset under consideration should be taken into account. Professor Coote then made a statement which, I think, offers a solution of the problem. He said that he did not think that there was any item in Bulletin "F" that applied specifically to vertical tanks such as those in question, but his opinion was that they were of the same type as the oil tanks that are used in connection with oil pipe lines that are gathering lines for which a life expectancy of 30 years was given on page 54 of Bulletin "F". He also stated that if he had had access to Bulletin "F" when he prepared his report he would have put the life expectancy of the tanks at 30 years instead of at 25 years but 30 years was the maximum that was reasonable.

After careful consideration I accept Professor Coote's estimate of 30 years as the reasonable expectancy of life of the storage tanks. I have already stated that the best figures for their replacement cost are those given by Mr. Eadie. But, in view of my finding on the expectancy of life of the tanks Mr. Eadie's estimate of their depreciated value must be revised. For the 3 large marine storage tanks this will come to $18,972.23, instead of $20,994.69, to which there should be added $202.84 as the depreciated value of the 4 underground tanks making the total depreciated value of the tanks that were not taken away come to $19,175.07.

The remainder of the storage and operational equipment consisted of a great many items, including loading racks and platforms, railway siding, pumps, pipe lines, heating plant, light poles and flood lights, sewers and water service, fire-walls, fire protection equipment, driveways, fence and gates. The details of these items were given in Section C of Exhibit C and summarized on pages 44 and 45. For each item particulars were given of the year of construction, the replacement cost at the date of expropriation, the expectancy of life, the rate and amount of depreciation and the depreciated value at the date of the expropriation. Some of the items of equipment were removed by the defendant to its Heron Road site. The replacement cost of these came to $2,116.83 and their depreciated value to $940.14.

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The replacement cost of the remaining items that were left on the property came to $25,991.66 and their depreciated value to $17,132.61. The evidence for the plaintiff on these items was not prepared in the same way. To obtain figures that would be comparable to those appearing on pages 44 and 45 of Exhibit C it is necessary not only to look at Exhibit 10 for the valuations made by Professor Coote and Mr. Sharp and Exhibit 11 for those made by Mr. Farley and Mr. Lanctot but also to review the evidence of these witnesses and the corrections made by them on their cross-examinations. I have found Mr. Osborne's analysis of the evidence on the various items very helpful in arriving at the total figures. As I have calculated them the total reconstruction cost of the items, other than the tanks and excluding those mentioned in the contra account, came to $24,509 and their depreciated value to $14,981.30. This latter figure is subject to some increase by reason of Mr. Sharp's acceptance of Mr. Eadie's figures regarding the catwalks on the tanks. There will then be a difference of somewhat less than $2,000 between the opposing estimates. This difference is not large. While I feel that Mr. Eadie's estimates on some items were somewhat high I accept them. Consequently, I find that the depreciated value of the operational equipment, other than the tanks, that was not taken away was $17,132.61. This puts the value of all the storage and operational equipment that remained on the property at slightly over $36,000.

I now come to the value of the land. This presents a serious problem. It is, of course, well established that the Court should estimate the value of the expropriated property on the basis of its most advantageous use, whether present or prospective, but it is only the present value, as at the date of the expropriation, of its prospective advantages that is to be determined: *The King* v. *Elgin Realty Company Limited* (1).

There is no doubt that the land was conveniently located and that its location gave it many advantages. It was near the centre of the two cities of Hull and Ottawa. It was also adjacent to the Government wharf on the Ottawa River which made it possible for the defendant to bring its supplies of gasoline and fuel oil from its refinery in Montreal

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

by tanker and unload them there into a pipe line connected with its storage tanks with a considerable saving in transportation costs over those of transport by rail or truck. Moreover, the property was served by a railway siding running down Guigues Street by which railway cars operated by the Hull Electric Railway Company could deliver supplies to it. In addition the location of the property on the river bank and near the Interprovincial Bridge made for effective advertising display. And the nearness of the property to the Hull labor market reduced the defendant's labor problem to a minimum. Moreover, the service station portion of the property enjoyed several special advantages. It had a frontage on Laurier Street which is a main traffic artery of the City of Hull and part of Provincial Highway No. 8 and carries heavy local and tourist traffic. There was commercial development in the immediate vicinity and the proximity of the station to the storage plant made the delivery costs of supplies to it negligible.

In this case Mr. Sherwood expressed the opinion that the land would have been desirable for apartment site purposes but Mr. Hadley disagreed with this. He considered it as commercial property and Mr. Bosley thought its best possible use was for industrial purposes. Indeed, his opinion was that the best and most advantageous use that could have been made of the land was that to which it was actually put. This was also the view of Mr. Farley and Mr. Lanctot. There can be no doubt of this and it is on that basis that the value should be estimated.

The evidence is that the land was acquired by the defendant in 1930 at a cost to it of $14,000. It was purchased by the defendant's subsidiary, Pioneer Transportation Company Limited, on April 2, 1929, from J. E. Laflamme for $13,000 and then sold by it to the defendant on September 17, 1930, for the expressed consideration of $1.00 but Mr. Perry stated that it was carried on the defendant's books at a cost of $14,000.

It is manifest that the land had substantially the same advantages, potentially at any rate, in 1930 as at the date of the expropriation and Mr. Perry admitted that the defendant had taken them into account when it acquired the property.

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It also appeared that the defendant did not consider that the price was cheap for as late as October 31, 1940, when its general manager wrote to the Mayor of the City of Hull protesting against the proposal to have the Hull Electric Railway Company remove the rails from the streets serving its plant he stressed the fact that the defendant had acquired the property "à prix très substantiel". This had worked out at slightly less than $5,000 per acre.

But now the defendant claims that on April 2, 1946, the date of the expropriation, the value of the land was $215,999.24, which works out at over $76,000 per acre.

This claim was built up by the defendant by the addition of three items. These were stated on page 32 of Exhibit 32 as follows, namely, assessed value, $45,825, marine facilities, Pioneer Transportation Company Limited, $125,557.20, and central location, $44,617.04, making the total of $215,994.24. These three items may be summarized briefly. The first is the assessed value of the land at $45,825. The details are set out in a sheet headed "Supertest Assessment 1948-1949", attached to Mr. Hadley's report, Exhibit J. Mr. Hadley explained that he had gone to the City Hall in Hull to find out what lands the defendant had and what the areas were, that the sheet was copied from the assessment roll and was given to him by the City Assessor himself. This will be commented on later.

The next item in the claim, namely, $125,577.20, equals the amount of the net profits after tax made by Pioneer Transportation Company Limited in the ten year period between 1936 and 1945 inclusive. This company was a subsidiary of the defendant and was incorporated in 1928 for the purpose of acquiring and operating a tanker and the profits made by it during the period mentioned came from the transport by its tanker of gasoline and furnace fuel oil from the defendant's refinery at Montreal to the Government wharf adjoining its terminal storage plant in Hull where the cargoes were unloaded into a pipe line leading to the defendant's marine storage tanks. The tanker had been built for river service and after the defendant ceased its use of the marine storage tanks the tanker was no longer required for the use to which it had been put and the Pioneer Transportation Company Limited finally sold it in 1948. The defendant owned all the shares in Pioneer

Transportation Company Limited except the qualifying shares of the directors and in that capacity received all its profits in the form of dividends as they were declared. The details of the profits and the dividends appear in Exhibits D and E. Some of the profits came from services other than the transport of supplies to the defendant and it was also admitted that, to some extent at any rate, the profits were the result of good management. But the whole amount was claimed as part of the value of the land to the defendant.

The third item in the defendant's claim is its measure of the value of its central location. This was put at $44,617.04. This amount is described on page 37 of Exhibit C as being the saving in tank truck operating costs of the Hull plant as against the Heron Road plant in the ten year period from 1947 to 1956 both inclusive. The figures are based on the calculation that a round trip for each tank truck from the Hull plant is 3·432 miles shorter than from the Heron Road plant. The page shows the number of loads, the total lower mileage, the operating costs per mile and finally the total saving in operation costs for each of the years 1947 to 1956. The figures for the years 1947 to 1949 are actual cost figures, the details appearing on pages 38 to 40, whereas the figures for the years 1950 to 1956 are estimates.

I have never before had to consider a claim built up in this manner. It is a novel one in my experience of expropriation cases. It also raises several questions of great importance. This makes it essential to consider the leading decisions on the principles to be applied in determining the value of the land in question. It will, I think, be useful to set out side by side with one another the several tests of value that have been laid down in these decisions.

My first reference is to the outstanding statement of Fletcher Moulton L.J., as he then was, in *In re Lucas and Chesterfield Gas and Water Board* (1) where he said:

> The owner receives for the lands he gives up their equivalent, i.e., that which they were worth to him in money. His property is therefore not diminished in amount, but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser, and hence it has from the first been recognized as an absolute rule that this value is to be estimated as it stood before the grant of the compulsory powers. *The owner is only to receive*

(1) [1909] 1 K.B. 16 at 29.

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compensation based upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses. Subject to that he is entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him.

This statement was expressly approved by the Judicial Committee of the Privy Council in *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (1). There the appellant company had power to expropriate lands required for a water power development scheme. The respondents owned three properties that were necessary to it. The majority of the arbitrators had valued their lands purely as agricultural land, but their award had been set aside by the Superior Court of Quebec which held that the owners were entitled to share in the value of the scheme. The Judicial Committee disagreed with this view, allowed the appeal from the decision of the Court below and ordered it to remit the matter to the arbitrators so that they might consider the value in the light of the possibiliy of a company coming into existence and obtaining powers. In delivering the judgment of the Committee Lord Dunedin made the following statement, at page 576:

> The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England, and it has been explained in numerous cases, nowhere with greater precision than in the case of *In re Lucas and Chesterfield Gas and Water Board* [1909] 1 K.B. 16, where Vaughan Williams and Fletcher Moulton L. JJ. deal with the whole subject exhaustively and accurately.
>
> For the present purpose it may be sufficient to state two brief propositions:— (1) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. (2) 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.
>
> Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking (though adapatibility, as pointed out by Fletcher Moulton L.J. in the case cited, is really rather an unfortunate expression) *the value* is not a proportional part of the assumed value of the whole undertaking, but *is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale but before any undertakers had secured the powers, or required the other subjects which made the undertaking as a whole a realized possibility.*

(1) [1914] A.C. 569.

And, at page 579, he put the test of value as follows:

The real question to be investigated was, for what would these three subjects have been sold, had they been put up for auction without the appellant company being in existence with its acquired powers, but with the possibility of that or any other company coming into existence and obtaining powers.

In the same year the Judicial Committee decided *Pastoral Finance Association, Limited* v. *The Minister* (1). There the land taken by the Minister had been bought by the appellants for the expansion of their business. Evidence was given at the trial as to the savings and additional profits which they would have made in their business if it had been transferred to the expropriated land and the trial judge directed the jury as follows:

Then you will consider what capital amount fairly represents those savings and those profits and you will add that to the amount that you consider fairly represents the market value of the land independently of these special questions.

On this direction the jury gave a verdict for the appellants for £23,550, adding by way of rider that they valued the land at £9,950. The trial judge entered judgment for the appellants for the amount of the verdict. The Full Court reduced the verdict to £9,950 on the ground that the appellants were not entitled to anything beyond the market value of the land by reason of the fact that they had not as yet erected any building thereon. The Judicial Committee decided that the principle underlying this decision was erroneous. They had difficulty in arriving at the meaning of the rider but decided that it was not in law the verdict of the jury and that no legal effect could be given to it. While their Lordships allowed the appeal from the decision of the Full Court they disagreed with the trial judge's direction to the jury. Lord Moulton said, at page 1088:

Their Lordships are of opinion that this direction is seriously at fault. That which the appellants were entitled to receive was compensation not for the business profits or savings which they expected to make from the use of the land, but for the value of the land to them. No doubt the suitability of the land for the purpose of their special business affected the value of the land to them, and the prospective savings and additional profits which it could be shewn would probably attend the use of the land in their business furnished material for estimating what was the real value of the land to them. But that is a very different thing from saying that they were entitled to have the capitalized value of these savings and additional profits added to the market value of the land in estimating their

(1) [1914] A.C. 1083.

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compensation. They were only entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land. *Probably the most practical form in which the matter can be put is that they 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.* Now it is evident that no man would pay for land in addition to its market value the capitalized value of the savings and additional profits which he would hope to make by the use of it. He would no doubt reckon out these savings and additional profits as indicating the elements of value of the land to him, and they would guide him in arriving at the price he would be willing to pay for the land, but certainly if he were a business man that price would not be calculated by adding the capitalized savings and additional profits to the market value.

The next decision to which I refer is that of the Judicial Committee in *Vyricherla Narayana Gajapatiraju* v. *The Revenue Divisional Officer, Vizagapatam* (1). There a harbour was being constructed at Vizagapatam and land acquired by the harbour authorities on the south of the harbour had been allocated to oil companies and other industrial concerns. This land was malarious. The appellant's land, which was south of this land, contained a spring which yielded good drinking water which could easily be made available for the oil companies and people engaged in the harbour and was acquired for the purpose of the execution of anti-malarial works. The appellant claimed compensation on the footing of its potentialities as a building site but the Land Acquisition Officer disallowed such claim and awarded compensation on a valuation of it as partly waste and partly cultivated with an allowance for buildings and trees. On appeal to the Subordinate Judge the appellant made a further claim on the footing of its potentialities as a source of water supply. The Subordinate Judge found against its potentialities as a building site but held that the water could be sold to the oil companies and others at a profit, that the only possible buyers were the oil companies and the harbour authorities and that compensation for potentialities could be awarded even where the only possible buyer was the acquiring authority and assessed the value of such potentialities at a very substantial sum. On appeal the High Court of Madras set aside his award and restored that of the Land Acquisition Officer, but on appeal to the Judicial Committee of the Privy Council the judgment of the High Court was reversed and the amount found by the Subordinate Judge was reduced. Lord Romer, who

(1) [1939] A.C. 302.

delivered the judgment of the Committee, dealt with a number of important matters. After setting forth the facts and referring to certain provisions of the Indian Land Acquisition Act, 1894, he said, at page 311:

> The general principles for determining compensation that are specified in these sections differ in no material respect from those upon which compensation was awarded in this country under the Lands Clauses Act of 1845 before the coming into operation of the Acquisition of Land (Assessment of Compensation) Act of 1919. As was said by Wadsworth J. when giving judgment in the High Court in the present case, "It is well settled that English decisions under the Lands Clauses Act of 1845 lay down principles which are equally applicable to proceedings under the Indian Act." *The compensation must be determined, therefore, by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy must alike be disregarded.* Neither must be considered as acting under compulsion. This is implied in the common saying that the value of the land is not to be estimated at its value to the purchaser. But this does not mean that the fact that some particular purchaser might desire the land more than others is to be disregarded. The wish of a particular purchaser, though not his compulsion, may always be taken into consideration for what it is worth. But the question of what it may be worth, that is to say, to what extent it should affect the compensation to be awarded, is one that will be dealt with later in this judgment. It may also be observed in passing that it is often said that it is the value of the land to the vendor that has to be estimated. This, however, is not in strictness accurate. The land, for instance, may have for the vendor a sentimental value far in excess of its "market value". But the compensation must not be increased by reason of any such consideration. The vendor is to be treated as a vendor willing to sell at "the market price", to use the words of s. 23 of the Indian Act. It is perhaps desirable in this connection to say something about this expression "the market price". There is not in general any market for land in the sense in which one speaks of a market for shares or a market for sugar or any like commodity. The value of any such article at any particular time can readily be ascertained by the prices being obtained for similar articles in the market. In the case of land, its value in general can also be measured by a consideration of the prices that have been obtained in the past for land of similar quality and in similar positions, and this is what must be meant in general by "the market value" in s. 23. But sometimes it happens that the land to be valued possesses some unusual, and it may be, unique features, as regards its position or its potentialities. In such a case the arbitrator in determining its value will have no market value to guide him, and he will have to ascertain as best he may from the materials before him, what a willing vendor might reasonably expect to obtain from a willing purchaser, for the land in that particular position and with those particular potentialities. For it has been established by numerous authorities that the land is not to be valued merely by reference to the use to which it is being put at the time at which its value has to be determined (that time under the Indian Act being the date of the notification under s. 4, sub-s. 1), but also by reference to the uses to which it is reasonably capable of being put in the future.

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There are also two decisions of the Supreme Court of Canada to which reference should be made. The first of these is *Diggon-Hibben Limited* v. *The King* (1). In that case Rand J., at page 715, paraphrased the statement in the *Pastoral Finance Association* case (*supra*), which is set out in italics above, as follows:

> The statement means . . . that *the owner* at the moment of expropriation *is to be deemed as without title,* but all else remaining the same, *and the question is what would he, as a prudent man,* at that moment, *pay for the property rather than be ejected from it.* It is assumed, in the situation here, that he is to continue in business. In this we have no need of an imaginary market, purchase, or interest; we have the real interest of the owner, and its measurement in value is the task for the Court.

Finally, this statement was expressly approved by Rinfret C.J., in delivering the judgment of the Supreme Court of Canada in *Woods Manufacturing Co. Ltd.* v. *The King* (2).

The italics in the above statements are mine. I have used them so that the variations in the tests of value laid down in them may more readily be seen. It is obvious that it is impossible to reconcile all the statements. For example, there is a sharp divergence between the statement of Fletcher Moulton L.J. in the *Lucas and Chesterfield Gas and Water Board* case (*supra*) that the owner is *only* to receive compensation based upon the market value of his lands as they stood before the scheme was authorized and that *subject to that* he is to be paid the full price of his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him and the statement in the *Diggon-Hibben* case (*supra*). The two tests cannot possibly stand together. In the *King* v. *Thomas Lawson & Sons Limited* (3) I expressed the opinion that the definition of value to the owner as realizable money value which I had deduced from the cases was essentially the same as that of fair market value, as given in Nichols on Eminent Domain, 2nd edition, at page 658, but in the *Woods Manufacturing Company* case (*supra*), at page 509, Rinfret C.J. expressly rejected this definition as not a true expression of the law. It must follow, I respectfully suggest, that in rejecting this

(1) [1949] S.C.R. 712. (2) [1951] S.C.R. 504 at 508.
(3) [1947] Ex. C.R. 44 at 80.

definition the Supreme Court of Canada has also disapproved the limitation of market value which *Fletcher Moulton* L.J. expressly put on value to the owner in the *Lucas and Chesterfield Gas and Water Board* case (*supra*).

It follows, as a matter of course, that the statement in the *Diggon-Hibben* case (*supra*) is at variance with the decision of the Judicial Committee in the *Cedars Rapids Manufacturing Company* case (*supra*) for in that case Lord Dunedin expressly adopted the test of value laid down by Fletcher Moulton L.J. Moreover, I cannot see how the statement can be reconciled with the test put by Lord Dunedin that the value was a *price* that must be tested by the imaginary *market* which would have ruled had the land been exposed for sale under the conditions specified or his statement that the real question was for what would the properties have been sold had they been put up for auction under the conditions specified.

And I must confess that I cannot see how the test in the *Diggon-Hibben* case (*supra*) can be considered the same as that put by Lord Moulton in the *Pastoral Finance Association* case (*supra*). As I read his statement the value of the property is the amount which a prudent purchaser, in a position similar to that of the owner, would have been willing to pay for it after he had considered the elements of value indicated by the possibility of the savings and additional profits referred to and been guided by them in arriving at the price he would be willing to pay. But the statement in the *Diggon-Hibben* case (*supra*) rejects any such limitation.

And, of course, the test stated in the *Diggon-Hibben* case (*supra*) is quite different from that laid down by Lord Romer in *Vyricherla* case (*supra*) that the compensation must be determined by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser.

It is thus plainly evident that the law on this vexatious question is, to say the least, in a very unsatisfactory state and it is very doubtful that any clarification by judicial decision is possible. Under the circumstances, I have come to the conclusion that it is essential to the fair administration of this branch of the law that there should be a statutory definition of value. It was found necessary in the

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United Kingdom, as long ago as 1919, to lay down such a definition for use in the case of all lands compulsorily acquired by a government department or a local or public authority. This was accomplished by the Acquisition of Land (Assessment of Compensation) Act, 1919. In my opinion, similar action should be taken in Canada.

In view of this recommendation it would not be out of order to express my opinion on what would be the most desirable definition even although this will involve critical comment on some of the tests of value that have been laid down. My first comment must, with respect, be on the test stated in the *Diggon-Hibben* case (*supra*) and adopted in *Woods Manufacturing Company* case (*supra*). This is a novel one for which there is no precedent in England. But the criticism of the test is not on the ground of its novelty. I think it will be conceded that it is the most expensive test that has been laid down. My experience in expropriation cases makes me fearful that attempts to apply it will result in excessive awards through the difficulty of avoiding duplication in the weighting of the various factors of value that should be taken into account just as there has been duplication in the defendant's claim for the value of the land in the present case. But whether there is such danger or not there is a more serious objection to the test, namely, the difficulty of applying it. For my part, I must frankly confess that I do not understand it and I am at a loss to know how to operate it. Is the market value of the land to be wholly disregarded? How is the amount which the assumed owner would be willing to pay to be determined? Whose opinion on this subject, if it is not left to the owner to decide, will be available to the Court? Real estate experts will not be able to give it any help. During the trial I put the test to Mr. Bosley, one of the most experienced and reliable real estate experts in the country, but he could not assist the Court in arriving at an answer to it. He explained that he could not apply the test because he could not know what was in the owner's mind. In his opinion, it was only the owner who could decide how much he would be willing to pay. While the wording of the test lends itself to such an opinion it could not have been intended that the owner should be the arbiter of his own entitlement. Under these

circumstances it seems to me that in view of the difficulty of applying this test a search should be made for a more easily applicable one.

Some help towards the solution of the problem is to be found in the remarks of Rand J. in the *Diggon-Hibben* case (*supra*). He drew a distinction between those factors of value that might influence the judgment of a purchaser and those with which a purchaser would not be concerned. After pointing out that the meaning of Lord Moulton's language in the *Pastoral Finance Association* case (*supra*) had been somewhat misconceived by me in the course of the trial and in my reasons for judgment, he said at page 715:

> It is obvious that the purchaser will pay according to the strength or value of his interest or his "anxiety" to obtain the property and to nothing else. He is not concerned with the consequences of disturbance to the owner.

But he made it very clear that in his view value to the owner includes factors of value other than those with which a purchaser would be concerned. He refers to factors of this sort at page 714:

> The question arises here in connection with the claim for disturbance of possession, including expenses of moving, damages to or loss of fixtures, and for interruption of business generally. The debate is whether these are to be taken as elements of the value of the land to the owner or items of an independent claim for damages. There is no serious dispute that they should be allowed; that they must be such as can be brought within the scope of the "value of the land to the owner" has not been questioned; and what is at issue in the particular items is in reality a conceptual refinement which is devoid of practical significance.

With deference I suggest that the last part of the statement is open to question. In my opinion, it is essential, in the interests of precision, to recognize the distinction between the factors of value that would be likely to affect the judgment of a purchaser and those that would not. The statutory definition of value should be such as to exclude from consideration all factors that would not be likely to affect the judgment of a prudent purchaser. I do not see how there could be any objection to such a definition if statutory provision was also made for due consideration of those factors of value to the owner with which a purchaser would not be concerned. I shall defer the discussion of such a provision until I deal with the defendant's claim for disturbance. In the meantime, I shall confine myself to consideration of what definition of value would best meet the suggested condition.

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The tests of value stated in the first four decisions above referred to are basically the same. In each one the value of the land is limited to the amount which it is assumed some purchaser would be willing to pay. But while the tests all have this advantage in common it does not follow that they are all equally desirable. Some are less valuable than others. For example, the test in the *Pastoral Finance Association* case (*supra*), notwithstanding its high authority, is not as clear in meaning as it might be and it could lead to unsatisfactory results if stretched to the limits of its language. I have already expressed the opinion that I do not see how it can be considered the same as that put in the *Diggon-Hibben* case (*supra*), but if its language is open to the paraphrasing of it made by Rand J. in the *Diggon-Hibben* case (*supra*) then its meaning is ambiguous for it has not been interpreted in that way in other cases in which it has been followed and applied: *vide*, for example, the decision of the High Court of Australia in *The Minister* v. *New South Wales Aerated Water and Confectionery Co. Ltd.* (1) where Isaacs J., as he then was, after referring to Lord Moulton's statement, said:

> That assumes a sale, an imaginary sale, in the "imaginary market" and the question was what an imaginary prudent buyer in the claimant's position—because such a person was assumed to make the best use of the land—would give for it.

Thus value was limited to the amount that a prudent purchaser would pay. Moreover, if the words in the test, particularly the words "sooner than fail to obtain it", were stretched to the full limit of their meaning the test could lead to unsatisfactory results. When I put it to Mr. Bosley he said that he could not apply it for the reason that he could not tell how much a purchaser would be willing to pay for a property "sooner than fail to obtain it" without knowing how urgently the purchaser needed it. There is room for this criticism. Moreover, he gave two interesting illustrations. He related an experience in Toronto where the firm he was with had been retained to buy a block of land. One owner of a lot in the block, suspecting that someone was interested in the whole block, pushed his price up to four or five times what his lot was considered to be worth but the purchaser paid it "sooner than fail to obtain it".

(1) (1916-17) 22 C.L.R. 56 at 83.

Mr. Bosley's second illustration was a more recent one. He had been instructed to acquire a parcel of land at Oakville. The owner of part of it, sensing the purchaser's need, ran the price of his property, consisting of 2 acres, up to $20,000 per acre. Its ordinary value was not more than $3,000 per acre but its acquisition was essential to the success of the project and Mr. Bosley's principal was put in the position of having to pay the exhorbitant price asked for it "sooner than fail to obtain it". In each case the amount paid by the purchaser answered the test of value as put in the *Pastoral Finance Association* case (*supra*) but it would be absurd to say that it represented the value of the property. Thus the test, when the words in which it was expressed are stretched, appears to be capable of leading to a result based not on the value of the land to its owner, as ought to be the case, but on its value to the purchaser because of the urgency of his need, which is contrary to all precepts. But while there is this possibility I am confident that it was never intended that the test should be capable of such results. As I read Lord Moulton's judgment it envisages negotations between the owner of the property and the prudent man referred to, who is a purchaser, each knowing the advantages of the property and the possibilities of savings and profits from its use, culminating in a sale of it to the prudent purchaser at the price beyond which, in the ordinary course and without the pressure of urgent need, he would not be willing to go. In that sense, Lord Moulton's test in the *Pastoral Finance Association* case (*supra*) is the same as that which he had laid down earlier in the *Lucas and Chesterfield Gas and Water Board* case (*supra*). I am unable to believe that he intended it to be different. But since the Supreme Courts of two countries have taken conflicting views of the meaning of the formula in which the test was expressed and since it might be capable of the results indicated by Mr. Bosley's illustrations it would surely not be wise to adopt it as a statutory definition of value.

Moreover, I draw attention to the statement of Lord Romer in the *Vyricherla* case (*supra*) that in determining the compensation "the disinclination of the vendor to part with his land and the urgent necessity of the purchaser to

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buy must alike be disregarded." The exclusion of these two considerations seems to me to be essential for neither can have any true bearing on the value of the land.

This leaves the other three tests, namely, those laid down by Fletcher Moulton L.J., Lord Dunedin and Lord Romer. While these are all similar to one another and clear, it seems to me that the best definition of value would be that which was actually adopted by the Parliament of the United Kingdom in the Acquisition of Land (Assessment of Compensation) Act, 1919, in which one of the rules governing the assessment of compensation by an official arbitrator was put in part by section 2(2) of the Act as follows:

> The value of land shall . . . be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realize:

This definition would have several advantages. It would be of general application and readily applicable by real estate experts who could thereupon give realistic and reasonably certain opinions of value and it would be conducive to precise and fair awards. In my judgment, the adoption of this definition would go a long way towards the solution of the problem under discussion. Certainly, it would be of great assistance to this Court in carrying out its duty.

After this discussion, some of which is a digression, but perhaps permissible in view of the importance of the subject, I return to the defendant's claim. But before I summarize the valuations of the experts I should refer to other evidence bearing on the value of the land.

Fortunately, there was evidence of three sales of fairly large parcels of land all facing on Laurier Street and extending easterly to the Ottawa River. There was, first of all, the acquisition of the land in question by the defendant in 1930 at a cost of $14,000 for 2.819 acres. Then on September 26, 1930, the Shell Oil Company bought land immediately north of and adjoining the defendant's land for $21,000 for 2.6 acres. And on September 31, 1931, the Sisters of Charity bought land a little north of the two oil company properties at $12,000 for 2.4 acres. The average for these three large parcels works out at a little over $6,000 per acre.

There was some conflict in the evidence on the rise in land values between the time of these sales and the date of the expropriation. Mr. Sherwood expressed the opinion that land values had reached their high points in 1929 and 1930. Of this, I think, there can be little doubt. Then came the depression years and values slumped. Mr. Sherwood thought that they had recovered prior to 1939 or 1940 but was not definite. He would not express an opinion on the rise in values between 1930 and 1946. Mr. Hadley put the increase at 100 per cent. Mr. Bosley considered that it had been not less than 25 per cent. Mr. Lanctot put it at 35 per cent. I consider his opinion on this point to be the best one. If this rate of increase were to be applied to the average value of a little over $6,000 per acre for the land the average would be increased to somewhat less than $8,500 per acre. This is, I think, a reasonably fair starting point in the estimation of the land value. I should point out, of course, that the average value of a little over $6,000 per acre which I mentioned was for each whole parcel including the frontage on Laurier Street.

I shall now summarize the valuations of the land made by the various experts. Mr. Sherwood estimated the area of the land at 123,651 square feet. He valued the Laurier Street frontage of 89 feet to a depth of 100 feet at 84 cents per square foot, or $7,476, and the remaining 114,751 feet at 25 cents per square foot, or $28,687.75, making a valuation of $36,163.75. He said that in this valuation he had not taken into account the benefit to the defendant of being able to bring in its supplies by water transportation with its substantial saving of cost. His attention was called to Mr. Perry's evidence on the profits made by the Pioneer Transportation Company Limited and he expressed the opinion that the defendant was entitled to ten years of reasonably anticipated profits and that these should be added to his valuation. This, in Mr. Sherwood's opinion, would be a greater amount than that which was claimed by reason of the fact that in some of the years 1936 to 1945 gasoline had been rationed and the defendant's sales had been restricted.

Mr. Hadley, using the same area as Mr. Sherwood, valued the Laurier Street frontage at 88 cents per square foot, or $7,832, and the remainder at 27½ cents per square foot, or

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$31,500.56, making a total of $39,332.56. He said that he did not take the presence of the siding into account when making his valuation nor the attribute of the property resulting from its being on the river and adjacent to the wharf, except as a means of access. Then after having stated that he would have advised the defendant to sell for the amount of his valuation plus the value of the equipment, considering it as a piece of real estate, he expressed the opinion, in reply to suggestive questions, that the defendant should get something in excess of his valuation by reason of the special facilities for water transport which the land enjoyed.

The other three experts, Mr. Bosley for the defendant and Mr. Farley and Mr. Lanctot for the plaintiff, approached their valuations differently. They considered the sales that I have mentioned and the general increase in land values that had taken place. They also stated that they had taken into account the advantages which the land possessed. Mr. Bosley referred to all the advantages which I mentioned earlier in these reasons for judgment. He valued the land fronting on Laurier Street for a depth of 66 feet, which was the actual depth of the service station property, at $1.00 per square foot, or $5,874. The area of this came to ·135 of an acre. This left 2·684 acres for the storage plant property, which he divided into two parts, one consisting of the land fronting on the river and extending 250 feet back from it, amounting to 1·818 acres, and the other of the land between this portion and the service station land, amounting to ·866 acres. Mr. Bosley took the sales that I have mentioned into account and then referred to his valuation of the land in the *Woods Manufacturing Company* case, in which he had been a witness, at $7,700 per acre. He thought that this should be increased for the defendant's land because of the advantages specified and put it at $10,000. His view was that land fronting on water which provides transportation by water as well as by rail commands a premium price which should be double the ordinary price. For that reason he put a valuation of $20,000 per acre on the part fronting on the river, which for 1·818 acres came to $36,350. The remaining intermediate part he valued at $10,000 per acre, which for ·866

acres came to $8,660. This made Mr. Bosley's total valuation come to $50,894, which he put in round figures at $50,000.

Mr. Farley valued the Laurier Street frontage of 89 feet for a depth of 66 feet at 69 cents per square foot, or $4,053.06, and the rest of the property amounting to 2·68 acres, at $12,500 per acre, or $33,500, making a total valuation of $37,553.06.

Mr. Lanctot's valuation was a little higher. He valued the service station land at 69 cents per square foot, or $4,053.06, and the balance, consisting of 116,965 square feet, at 30 cents per square foot, or $35,089.50, making a valuation of $39,142.56.

Having thus summarized the various valuations put forward I must now come to my estimate of the value of the land. It is obvious from my confession that I do not understand the test laid down in the *Diggon-Hibben* case (*supra*) and adopted in the *Woods Manufacturing Company* case (*supra*) and do not know how it operates that I cannot apply it. That being so, I apply to the determination of the value of the land the principles laid down by the Judicial Committee of the Privy Council in the three decisions which I have cited and by Fletcher Moulton L.J. in the *Lucas and Chesterfield Gas and Water Board* case (*supra*). I take the term "prudent man in their position" in Lord Moulton's formula in the *Pastoral Finance Association* case (*supra*) not as referring to a prudent owner but as meaning a "prudent purchaser in a position similar to that of the owners". Such a purchaser could, for example, be another oil company which might be assumed to have full knowledge of all the advantages of the land and the use that could be made of it with its facilities. The value should be the price that a purchaser of this sort might be expected to be willing to pay. In making this statement I am not overlooking the fact that what the Court must estimate is not the value of the land, buildings and equipment, separately found and then added together, which would make for a high estimate, but the value of the land as it stood at the date of the expropriation with the buildings and equipment on it, less the equipment that was removed. In addition, the Court must take into account

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the factors of value to the owner involved in the defendant's claim for disturbance with which, as Rand J. put it, a purchaser is not concerned. On this basis, I proceed to my estimate.

The defendant's claim of $215,999.24 for the value of the land is plainly excessive. In this connection it is interesting to note the striking difference between the amount of its claim and that made by the Shell Oil Company for its land which was immediately adjacent to the defendant's land and almost as large in area, 2·6 acres as against 2·819 acres. The Shell Oil Company operated a bulk storage plant with large marine storage tanks in much the same way as the defendant did, except that its plant was a little smaller. During the navigation season it brought its supplies of fuel oil and gasoline by its tanker from Montreal to the government wharf and the tanker unloaded its cargoes into a pipe line leading to its marine storage tanks. It was also served by the same railway siding as that which served the defendant. After the expropriation the Shell Oil Company moved to Heron Road and the defendant followed it there. It would be hard to find two situations that were more alike. There was one difference. The Shell Oil Company continued to use its tanker, whereas the defendant's subsidiary ceased its tanker operation. It is obvious that the Shell Oil Company's land enjoyed the same advantages as the defendant's land and was of approximately the same value. Yet, as appears from the judgment of this Court in *The King* v. *Shell Oil Company of Canada Limited* (1), the Shell Oil Company claimed $40,000 for its land as against the defendant's claim of $215,999.24 for its land.

While my opinion is that the defendant's claim is excessive it would not be fair, in view of the state of the law, to find fault with the defendant for making it. And I should add that both counsel for the defendant prepared and presented its case with great care and ability.

But, in my judgment, the components of the claim must be rejected. It is established in this Court that the municipal assessment of expropriated property is not evidence of its value. It is made for municipal taxation purposes and not for the purpose of determining value for compensation.

(1) (June 16, 1948) unreported.

But it has been the practice to allow evidence of the municipal assessment to be given as a check on excessive valuation. Moreover, it should also be pointed out that the municipal assessment of the defendant's land in 1946 was not $45,825, as claimed, but only $17,800, as appears from the evidence of Mr. L. Leblanc, the Clerk of the City of Hull. Mr. Grandguillot's re-assessment of the City had not been completed at the date of the expropriation.

Nor can the claim of $125,577.20 for the marine facilities be admitted. This was the amount of the profits made by the Pioneer Transportation Company Limited for a ten year period prior to the expropriation. Counsel for the defendant argued that this amount was not being claimed for loss of profits as such but described it as the yardstick for the measurement of the value of the land to the defendant. It will be recalled that in the *Pastoral Finance Association* case (*supra*) it was held that the capitalization of anticipated savings and profits should not be added to the market value of the land. In my opinion, the addition of an accumulation of profits for a ten year period is subject to a similar objection. The difference is one of degree rather than of kind. An attempt was made to show that the addition of profits for ten years was fair and reasonable but counsel could not suggest any principle in support of his attempt. Why not take five years instead of ten? And, on the other hand, why stop at ten years? Why not take fifteen or twenty years? Who can with any degree of accuracy answer these questions? Moreover, the loss ought not to be attributed to the expropriation. Mr. Perry explained that the Pioneer Transportation Company Limited had decided on a tanker exclusively for river use. The result was that when it lost its chief customer on the Ottawa River the tanker was of no further use to it. If it had built a tanker like that which the Shell Oil Company used it could have continued to operate its tanker just as the Shell Oil Company did and there would then, in all likelihood, have been no loss of profits at all. Under the circumstances, the claim is tantamount to saying that because the defendant's subsidiary had acquired a tanker that was suitable only for river use the defendant's land was worth $125,577.20 more than if the subsidiary had used a tanker that had a wider scope of use. Moreover, the loss of profits

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from an operation such as that conducted by the defendant's subsidiary cannot be said to be a factor of value in the land for the making of profits may, to a substantial extent, be the result of good management. And finally, there is never an allowance for loss of profits as such in cases such as this. What should really be considered is not the profits but the adaptability and the advantages of the land for the making of profits. That is what the prudent purchaser referred to in the *Pastoral Finance Association* case (*supra*) would consider. He would take into account the profits that were likely to be made and they would guide him in arriving at the price he would be willing to pay. That is quite a different approach to the value of the land from that made by the defendant.

The defendant's claim of $44,617.04 for the central location of its land is subject to similar objections. This represents the savings over a ten year period in distribution costs which it might have made if it had remained on its land over those which it has incurred or may incur from its Heron Road site. There is no more justification for adding an accumulation of anticipated savings to the value of the land than for adding an accumulation of profits. As in the case of likely profits so in the case of likely savings the prudent purchaser will consider them only as a guide in arriving at the price he will be willing to pay.

I should refer to another matter. Counsel for the defendant sought to establish from several witnesses the amount for which they would have advised the defendant to sell. Their answer was, in effect, the amount of the defendant's claim. I should really not have allowed these questions. In my opinion, the amount for which the owner of expropriated property would have been willing to sell it is not a test of its value. It would be anomalous if its value were dependent on whether the owner was willing to sell it or the price at which he would be willing to sell. I have already referred to Lord Romer's judgment in the *Vyricherla* case (*supra*) that the unwillingness of the owner to part with his property should be disregarded. The price at which he would be willing to sell it is also irrelevant. If that were the test the task of the Court in determining the value of the property would simply resolve itself into

awarding the owner the amount for which he would be willing to sell which would be just another way of saying that he should be the arbiter of his own entitlement. That would be absurd.

In estimating the value of the land regard should be had not only to its advantages but also to its disadvantages. One of these was the possibility that the railway services to it would be withdrawn. It is true that the Hull Electric Company was still serving the defendant's land on the date of the expropriation. But it applied for leave to abandon its line on September 17, 1946, and the Board of Transport Commissioners on November 26, 1946, gave it permission to do so as from November 30, 1946. But prior to the date of the expropriation there were many complaints against the service and on the evidence I have no hesitation in finding that the cessation of the railway service was likely. I am also of the view that the consequences of such a cessation would have been much more serious than several of the defendant's witnesses made it out to be.

I now return to the opinions of the experts. While I have great respect for Mr. Sherwood's experience and knowledge of land values in the Ottawa area I cannot accept his valuation in the present case. For reasons that I have already indicated I disagree with his opinion that there ought to be added to his valuation of $36,163.75 a sum equal to ten years of anticipated profits from the operations of the defendant's subsidiary's tanker. I cannot escape the feeling that in putting forward this opinion he has really taken the river frontage advantages of the land into account twice. And I am also of the view that the weight of his opinion is lessened by the fact that when he was a witness in the *Shell Oil Company* case (*supra*) he valued the Shell Oil Company land at $42,000 without any addition to its value such as he made in the present case.

Nor was I favourably impressed with Mr. Hadley's valuation. There was no indication of how it was arrived at. But it is interesting to note that without the advantage of the marine facilities which the land afforded he put its value at $39,332.56, which was almost three times as much as it had cost the defendant in 1930, although Mr. Hadley had put the increase in land value from 1930 to 1946 at

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100 per cent. If he excluded from his valuation the advantage of the land from its location on the river and its adaptability for the water transport of supplies to it his valuation was considerably too high.

In my view, Mr. Bosley's opinion of the value of the land is much to be preferred over that given by the other witnesses called by the defendant. He was, I think, the best qualified of all the witnesses to express an opinion on the value of the particular land. He had experience of land values in every part of Canada from British Columbia to Newfoundland. While he never bought or sold a bulk storage plant he acted for the defendant in the purchase of all its sites in Toronto and had a good knowledge of its requirements. He also acted for and advised all the major oil companies on their sites. Moreover, he took all the advantages of the property into account, including its central location and the marine facilities it afforded. He also considered the sales and the rise in land values. It was on this basis that he valued the land at the round figure of $50,000. He was also of the view, on the assumption that the storage and operational equipment was worth $60,000, that the defendant's property could have been sold for $150,000, that this was the amount that the defendant might reasonably have expected to receive from a willing purchaser, who might well have been some other oil company, and that this represented the value of the property. Of course, if the value of the equipment was less than $60,000, then the amount of $150,000 for the property as a whole would be correspondingly reduced.

Mr. Farley and Mr. Lanctot considered Mr. Bosley's valuation of $50,000 too high. There was nothing in the Hull area to warrant it and they pointed out that the river frontage values at Hull were really not to be compared with those at Toronto and Windsor.

While there is a good deal of merit in the opinions of Mr. Farley and Mr. Lanctot and while I consider Mr. Bosley's valuation of $50,000 for the land somewhat high I have decided to accept it.

I next come to the defendant's claim of $23,355.62 for disturbance. It is interesting to note that there is no express provision in the Lands Clauses Consolidation Act, 1845 giving compensation for disturbance. That Act recognized only two kinds of compensation to the owner of land compulsorily acquired under it, namely, for the value to him of the land that was taken and for injurious affection to his remaining land. Similarly, there is no express statutory provision in Canada for compensation for disturbance. But, as Scott L.J. put it in *Horn* v. *Sunderland Corporation* (1), the "judicial eye" has discerned the right to compensation for disturbance in the owner's right to "the fair purchase price of the land taken". Similarly in Canada it is now settled that the right of the owner of expropriated property to compensation for disturbance is included in his right to compensation for the value to him of the expropriated property. It is also interesting to note that when the Bill leading to the Acquisition of Land (Assessment of Compensation) Act, 1919, was introduced into the British House of Commons there was no provision in it for any claim for disturbance. So that if it had passed in the form in which it was introduced the owner of the land would not have been entitled to any compensation for disturbance. But rule 6 was added to section 2 of the Bill when it was before the House of Lords in the following terms:

(6) The provisions of r. (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of the land.

The effect of this provision was considered in the interesting case of *Horn* v. *Sunderland Corporation* (*supra*). It does not give a separate right of compensation in addition to the value of the land. If a statutory test of value of expropriated property is laid down by the Parliament of Canada, it is important that provision should also be made for compensation for disturbance but care should be taken that such provision does not result in profit to the owner

(1) [1942] 2 K.B. 26 at 43.

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such as would be the case if the right to compensation to the owner were made a separate and independent cause of action. In this connection I withdraw the suggestion that I made in *The King* v. *Woods Manufacturing Co. Ltd.* (1) that the owner should have a "right to compensation for loss by disturbance of his business as an independent cause of action quite apart from the value of the property". Such an independent right would be fraught with danger of double compensation as was pointed out in the *Horn* v. *Sunderland Corporation* case (*supra*). And care should likewise be taken to guard against such an award of compensation for disturbance as was made in the *Woods Manufacturing Company* case (*supra*) where a claim for $78,000 for disturbance was allowed for a disturbance that has thus far not happened, the owner still being in undisturbed occupation of the property almost eight years after the date of its expropriation. There is something wrong with a principle that allows such a claim for a loss that has not happened and may possibly never happen.

The actual amount of the defendant's claim for disturbance in the present case was not disputed. The details are set out on page 47 of Exhibit C. There was the cost of moving the tanks amounting to $19,595.86, the particulars of which are set out on pages 48 to 50 of Exhibit C, the cost of moving stock and equipment amounting to $273.10, the details of which appear on page 51 of Exhibit C, and the expense of duplicated warehouse facilities at Hull and at the Heron Road site up to July 20, 1947, amounting to $3,486.66, the details of which are given on page 52 of Exhibit C. The total of these three items comes to $23,355.62. While I am satisfied that these items are correct in their amounts I should add that it is not possible to determine absolutely whether the defendant has suffered a loss by disturbance. It is true that it has lost the advantage of its marine facilities and its present site on the Heron Road is not as close to the centre of Hull and

(1) [1948] Ex. C.R. 9 at 59.

Ottawa as its former site was. But, on the other hand, it now has the advantage of continuous railway service, which it was in danger of losing, and favourable freight rates. Moreover, it has now a better and bigger plant and there is plenty of room for expansion. Actually, only the future can tell whether the move was disadvantageous. Moreover, by the move the defendant has realized a substantial increase over the amount which it paid for the land which could not have been realized otherwise than by disturbance. But since the amount of the claim was not disputed by counsel for the plaintiff, I have decided to accept it substantially.

Finally, there is the claim for so-called abandonment costs amounting to $1,066.86. This has no connection with the value of the land or any claim for disturbance. While its justification is not clear it was not disputed and I, therefore, take it into account.

In the result, I have come to the conclusion that the sum of $150,000 would be ample compensation to the defendant. It would cover all the factors of value to the defendant of the expropriated property to which it could be entitled including its claims for disturbance and abandonment costs. I, therefore, estimate the value of the expropriated property as at the date of the expropriation at $150,000.

I now come to the defendant's claim for a ten per cent additional allowance for compulsory taking. I dealt at length with the question of this allowance in *The Queen* v. *Sisters of Charity* (1) and incorporate herein what I said on the subject in that case. There I reviewed the jurisprudence on the additional allowance in England and in Canada and pointed out that neither in England nor in Canada has there ever been any Act of Parliament authorizing it or any rule of law requiring it and that its grant in Canada is based on a practice adopted from a similar practice in England. But the fact is that although the granting

(1) [1952] Ex. C.R. 113 at 131.

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of any allowance for compulsory taking was expressly prohibited in England by the Acquisition of Land (Assessment of Compensation) Act, 1919, in all cases where land was compulsorily acquired by any government department or any local or public authority, the practice of granting it still persists in Canada, under certain circumstances, as the result of recent decisions of the Supreme Court of Canada, in cases under the Expropriation Act even although such expropriations are by the Crown in right of Canada. Thus the practice still prevails in Canada under the circumstances referred to in cases where in analogous cases in England it would not be applicable.

The reason for the prohibition of the allowance by the Acquisition of Land (Assessment of Compensation) Act, 1919, in the case to which it applies is clear. The granting of the allowance was one of two prime causes of excessive awards under the Lands Clauses Consolidation Act, 1845, the other being excessive valuations of land, which militated against the success of many important public projects requiring the acquisition of land. There was such widespread objection on the part of the public to these excessive awards that when the Bill leading to the Act was before the British Parliament for consideration the provision prohibiting any allowance for compulsory taking was almost unanimously approved. This was a worth while reform in the public interest.

In my opinion, it would have been competent for the Courts in Canada to accomplish a similar reform in cases under the Expropriation Act without any legislative action since the English practice on which the Canadian practice was said to depend had ceased to exist in analogous cases, but it has been decided by the Supreme Court of Canada that under certain circumstances there should be an additional allowance for compulsory taking over and above the value of the expropriated property.

For my part, I could not see any justification as a matter of principle for giving the owner of expropriated property more than its value for that is what the additional allowance does. I am confirmed in this view by my later study of the origin of the English practice and the reason for it. In the *Sisters of Charity* case (*supra*), on page 132, I set out in part the report of the Select Committee of the House of Lords in 1845. A study of this report will show that it was considered to be quite in order to make railway company speculators pay for the land they required at least 50 per cent more than it was worth "for the compulsion only" to which its owner had to submit. While this percentage was later reduced to 10 per cent it is plain that the idea that speculators "have no right to complain of being obliged to purchase, *at a somewhat high rate,* the means of carrying on their speculation" lay back of the idea of the additional allowance. But it seems to me that it is singularly inappropriate to extend this idea of the propriety of "calling upon the speculators to pay *largely* for the rights which they acquire over the property of others", which may crudely but accurately be called a policy of "soaking" the speculators, to expropriations of property for public purposes lawfully made by the Crown in right of Canada under the authority of the Expropriation Act. It should also be remembered that the additional allowance was "for the compulsion only" as if the taking were a tortious act for which there should be compensation *per se.* Indeed, that idea was undoubtedly in the mind of Erle C.J. in the frequently cited dictum in *Ricketts* v. *Metropolitan Railway Company* (1):

> The company claiming to take land by compulsory process, expel the owner from his property, and are bound to compensate him for all the loss caused by the expulsion; and the principle of compensation, then, is the same as in *trespass* for expulsion; and so it has been determined in *Jubb* v. *The Hull Dock Company* (1846) 9 Q.B. 443.

(1) (1865) 34 L.J. Q.B. 257 at 261.

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It is time that this outmoded view should be rejected: *vide* also the comment to the same effect of Scott L.J. in *Horn* v. *Sunderland Corporation* (1). It is anachronistic to apply the philosophy that the compulsory taking of property is in the nature of trespass to the conditions of the present times when it frequently happens that the property of individuals has to be expropriated for important public purposes. There is no element of tort or delict in an expropriation under the Expropriation Act. It is the lawful exercise by the Crown in right of Canada of its right of eminent domain under the authority of an enactment of the Parliament of Canada. All that the owner is entitled to is such compensation as Parliament has decreed. There is no value in sweeping generalizations of inherent right to compensation. It is well to keep in mind the statement of Lord Romer, in delivering the judgment of the Judicial Committee of the Privy Council, in *Sisters of Charity of Rockingham* v. *The King* (2) where he said:

> Compensation claims are statutory and depend on statutory provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of land taken, or for damage, on the ground that his land is "injuriously affected", unless he can establish a statutory right. The claim, therefore, of the appellants, if any, must be found in a Canadian statute.

Under these circumstances, I have never been able to see why the owner of expropriated property should receive more than his property is worth. And since there was no Act of Parliament or rule of law compelling me to make an additional allowance for compulsory taking I could not see any reason for applying in Canada a practice borrowed from England which had ceased to exist there in analogous cases, particularly when I considered the additional allowance for compulsory taking an improper one. I, therefore, never allowed it in any expropriation case coming before me until after the decision of the Supreme Court of Canada in

(1) [1941] 2 K.B. 26 at 46. (2) [1922] A.C. 315 at 322.

Diggon-Hibben Limited v. *The King* (1) in which an appeal from my judgment was allowed because I had refused to grant any additional allowance and an additional allowance of $10,000 was added to the amount of my award.

The *Diggon-Hibben* case (*supra*) followed the decision in *Irving Oil Company Limited* v. *The King* (2) and then came the latest pronouncement of the Supreme Court of Canada on the subject in *The King* v. *Lavoie* (3). In this case, Taschereau J., delivering the unanimous judgment of the Court, laid down the following rule:

> Le contre-appellant soumet, en second lieu, qu'il a droit à un montant supplémentaire de 10 p. 100 de la compensation accordée, pour dépossession forcée. Ce montant additionnel de 10 p. 100 n'est pas accordé dans tous les cas d'expropriation, et ce n'est que dans les causes où il est difficile, par suite de certaines incertitudes dans l'appréciation du montant de la compensation qu'il y a lieu de l'ajouter à l'indemnité. (*Irving Oil Co.* v. *The King* 1946, S.C.R. 551; *Diggon-Hibben Ltd.* v. *The King* 1949, S.C.R. 712). Ici, on ne rencontre pas les circonstances qui existaient dans les deux causes que je viens de citer, et qui alors ont justifié l'application de la règle. Il n'a pas été démontré qu'il existait des éventualités inappréciables et incertaines, impossibles à évaluer au moment du procès.

This statement in the *Lavoie* case (*supra*), which is now the leading Canadian case on the subject, is in sharp conflict with that of Fitzpatrick C.J. in *The King* v. *Hunting et al* (4), the previous leading Canadian case on the subject, where he expressed the following opinion:

> The allowance of 10 per cent for compulsory purchase has become so thoroughly established a rule from the innumerable cases both here and in England in which it has been awarded almost as a matter of course, that I certainly should not be prepared to countenance its being questioned in any ordinary case.

The statement of Fitzpatrick C.J. in the *Hunting* case (*supra*) was in accord with the English practice that then prevailed for the decision was prior to the enactment of the Acquisition of Land (Assessment of Compensation) Act, 1919. The same cannot be said of the recent decisions of

(1) [1949] S.C.R. 712.
(2) [1946] S.C.R. 551.
(3) [December 18, 1950], unreported.
(4) (1917) 32 D.L.R. 331.

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the Supreme Court of Canada to which I have referred. In restricting the grant of the allowance as it has done and in deciding that there should be an additional allowance for compulsory taking only in the circumstances which it has specified it has, in effect, created new law. In this connection I repeat what I said in the *Sisters of Charity* case (*supra*), at page 145, namely, that I have made a careful search of the authorities on the subject of the additional allowance for compulsory taking in England, Canada, Australia and New Zealand and have found no case prior to the *Diggon-Hibben* case (*supra*) in which the application of the additional allowance has been restricted to cases of difficulty or uncertainty or difficulty by reason of uncertainty in estimating the amount of the compensation. I am satisfied that there is no such case. Moreover, there was nothing in the English practice to warrant such a restriction and there is no Canadian statutory enactment or prior rule of law that supports it. The test thus laid down by the Court for determining in what circumstances the additional allowance should be granted is entirely of its own creation without any precedent for it. In this connection I repeat what I said in the *Sisters of Charity* case (*supra*) that the decision in the *Lavoie* case (*supra*) is a marked advance towards recognition that the former practice of giving every owner of expropriated property ten per cent more than its value to him simply because it was expropriated cannot be defended. My only criticism of the decision is that it did not do away with the allowance altogether, as could have been done.

Since the decisions in these cases I have in compliance with the direction of the Supreme Court of Canada granted the ten per cent additional allowance for compulsory taking in those cases where the circumstances were, in my opinion, similar to those referred to by Taschereau J. in the *Lavoie*

case (*supra*): *vide The King* v. *Northern Empire Theatres Limited* (1): *The Queen* v. *Charron et al* (2); *The Queen* v. *Sisters of Charity of Providence* (3); *The Queen* v. *Super Service Stations Limited et al* (4); and *The Queen* v. *Cowper et al* (5). The total amount of my additional allowances in these cases has thus far come to slightly over $135,000. I have refused the additional allowance in all other cases on the ground that they did not, in my judgment, come within the confines of the *Lavoie* case (*supra*). I should add that in each case where I granted the allowance I expressed the opinion, as I have the right to do, that it was an unwarranted bonus and that the granting of any additional allowance should be prohibited. In view of the recent decisions of the Supreme Court of Canada it is apparent that such prohibition can come only by way of legislative action similar to that taken in England in 1919. In the interests of fair valuations such reform is long overdue.

I must now decide whether the additional allowance should be granted in the present case and have concluded that it must be. Notwithstanding my own opinion that the sum of $150,000 which I have found as the value of the expropriated property to the defendant is, to say the least, ample and that any additional allowance would be an unwarranted bonus, I find that the estimation of the amount of the compensation in this case involves sufficient difficulty and uncertainty to bring it within the ambit of the rule in the *Lavoie* case (*supra*). Consequently, an additional allowance of ten per cent must be added to my estimate of the value of the property. I must now determine the amount to which the ten per cent should be applied. Counsel for the defendant contended that it should be applied to the whole amount of the defendant's claim,

(1) [1951] Ex. C.R. 321 at 333.
(2) [March 24, 1952], unreported.
(3) [1952] Ex. C.R. 113 at 148.
(4) [June 18, 1952], unreported.
(5) [1953] Ex. C.R. 107 at 113.

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including its claim for disturbance, notwithstanding the comments made by Rand J. in the *Diggon-Hibben* case (*supra*). I agree with his contention for reasons similar to those which I set out in the *Sisters of Charity* case (*supra*), at page 147. I have found the value of the expropriated property to the defendant at $150,000 and add ten per cent of this amount, or $15,000, as the additional allowance for compulsory taking, making my total award come to $165,000.

The value of the whole expropriated property having been determined, it is necessary for limited purposes to determine the separate value of the service station portion of it. The reason for this may be put briefly. In accordance with its usual policy in operating its service stations the defendant had leased the Laurier Street service station to a tenant and this arrangement was not interfered with after the date of the expropriation. For a period of time the defendant continued to collect the rents of the service station from its tenant without paying any rent to the Crown. But by a lease, dated April 25, 1949, between His late Majesty the King and the defendant it was required to pay $25 per month for the property on a month to month basis, commencing March 10, 1949, the rental being subject to the following qualification:

> Provided, however, that the rental aforesaid shall be adjusted to amount to the sum of five per cent per annum of the compensation value fixed and adjudged by the Exchequer Court of Canada upon the premises hereby devised together with an amount equivalent to any municipal and school taxes which may be levied against the property as a result of this lease payable monthly.

In view of this provision it becomes necessary to determine the amount of compensation for the service station portion of the expropriated property. This is not difficult. The defendant valued the service station and the facilities and equipment that went with it, exclusive of the land, at $12,472.21. Mr. Sherwood valued the building at $13,237 and the land at $5,874 or a total of $19,111. Mr. Hadley

put the building at $13,769.50 and the land at $6,265.60 making a total of $20,035.10. Mr. Bosley valued the land at $5,874 and the building at $12,000 or a total of $17,874, which he put at $18,000 in round figures. He thought that the defendant could easily have sold the station for that amount if it had wished to do so, which was not likely unless it could have obtained another station in exchange. But on that basis his opinion was that $18,000 would be a fair consideration for the service station property. For the plaintiff, Mr. Farley and Mr. Lanctot valued the building on much the same basis as the defendant at $12,685.55 and the land at $4,053.06 or a total of $16,738.61. In my opinion, Mr. Bosley's valuation was a fair one and I determine the value of the service station property at $18,000 to which there should be added its share of the additional allowance of $1,800 making a total for the service station property of $19,800. This, I assume, will be the amount on which the rent for the service station property will be adjusted as from March 10, 1949.

There remains the question of interest. It is the settled practice of this Court that there should be no allowance of interest to the owner of expropriated property when he has been left in undisturbed possession of the property without payment of any rent. So far as the bulk storage plant portion of the property is concerned the evidence is that while the defendant did not turn it over to the Crown until March 8, 1949, it had closed the plant on April 30, 1948, and made no further use of it for its own purposes after that date. In my judgment, the interest on the amount of compensation for this portion should run from May 1, 1948. As for the service station portion of the property there should be no interest prior to March 10, 1949, but there should be interest on the amount of compensation for this portion from March 10, 1949. This will really balance the amount of the rent for the period that the defendant was in occupation under the lease. There will, therefore, be

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interest at the rate of five per cent per annum on $145,200 as from May 1, 1948, and on $19,800 as from March 10, 1949, in each case of the date hereof.

There will, therefore, be judgment declaring that the expropriated property is vested in Her Majesty as from April 2, 1946; that the amount of compensation to which the defendant is entitled, subject to the usual conditions as to all necessary releases and discharges of claims, is the sum of $165,000 with interest as indicated; and that the defendant is entitled to costs to be taxed in the usual way.

Judgment accordingly.

BETWEEN:

1953
Nov. 25 & 26
1954
Jan. 20

BENJAMIN KENZIK, BERT HEDGES and S. C. TOMLIN, LIMITED ..... SUPPLIANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Crown—Petition of Right—Claim for return of goods or money of the suppliants in possession of the Crown—The Exchequer Court Act, R.S.C. 1952, c. 98, s. 17—The Customs Act, R.S.C. 1952, c. 58, s. 2(q), 18, 178(1), 181(1), 190(a)(c)—Minister not bound by reasons given in Notice of Seizure and Forfeiture—Burden of proof on suppliants to prove goods not forfeited under any section of Customs Act—Failure to prove goods not forfeited.

Held: That where suppliants seek the return of goods and money formerly their property but now in the possession of the Crown as forfeited under the provisions of the Customs Act, R.S.C. 1952, c. 58, the burden is on them and each of them to prove that such goods and money deposited in lieu of a bond on the release of a seized van and tractor were not forfeited under any provision of the Customs Act and in the present case this the suppliants have failed to do.

2. That the Crown is not bound by the reasons given by the Minister when he ordered the seizure and forfeiture of the goods and is not confined to the reasons given in the Notice of Seizure and Forfeiture.

PETITION OF RIGHT seeking return of goods and money of suppliants in possession of Crown.

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

E. A. Goodman for suppliants.

G. B. Bagwell, Q.C. for respondent.

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

POTTER J. now (January 20, 1954) delivered the following judgment:

This is a petition of right within the Petition of Right Act, chapter 158, R.S.C. 1927, as amended, now chapter 210, R.S.C. 1952, by which the suppliants pray the return of certain goods and money which are in the possession of the Crown as having been forfeited under the provisions of The Customs Act, chapter 42, R.S.C. 1927, as amended, now chapter 58, R.S.C. 1952.

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The suppliant, Benjamin Kenzik, prays the return of one 21" screen Motorola television set, of the console type, valued at $315; the suppliant, Bert Hedges, prays the return of one 21" Motorola television set, valued at $238 and one glass panel heater, valued at $42.60; and the suppliant, S. C. Tomlin, Limited, prays the return of the sum of $600, deposited in lieu of a bond, for the release of a tractor and trailer. The television sets, the glass panel heater and the tractor and trailer were seized by Canadian Customs Officers at the Peace Bridge at Fort Erie, in the province of Ontario, on December 1, 1952—Notice of Seizure of the Department of National Revenue No. 61709/4539, dated December 6, 1952.

Subsequently, the suppliant, Kenzik, in accordance with the provisions of section 172 of chapter 42, R.S.C. 1927, as amended, now section 159 of chapter 58, R.S.C. 1952, made representations or furnished evidence to the Deputy Minister of National Revenue, Customs & Excise, and on February 2, 1953, the Deputy Minister rendered his decision to the effect: "that the deposit be forfeited; that the goods be released on payment of a further sum of $864.71, to be forfeited and in default of such further payment for thirty days that the goods be forfeited."

On February 7, 1952, the suppliant, Kenzik, served notice on the Minister of National Revenue, Customs & Excise, that he would not accept the said decision and requested the Minister to refer the matter to this Court, and on February 17, 1953, the Minister served notice upon the agents of the solicitors for the suppliants that he would not refer the matter to the Court. The suppliant, Kenzik, filed his petition herein, on March 24, 1953, which was amended on praecipe on June 5, 1953, by joining the suppliants, Hedges and S. C. Tomlin, Limited, as petitioners.

The statement of defence submits that the petition of right does not allege facts, giving rise to any liability for which Her Majesty is bound or may be adjudged to respond, or claim relief for which a petition of right will lie, but these objections were not urged at the trial.

The evidence established the following:—

The suppliant corporation, incorporated under the laws of Ontario, with Head Office at Toronto in that province, is the owner of a number of tractor-drawn horse trailers or

vans, and the suppliant, Kenzik, is the President and General Manager of the suppliant corporation. The principal business of the suppliant corporation is to operate horse-vans and transport race horses from the stables of their owners to the various race tracks in Canada and the United States.

On December 1, 1952, the suppliant, Kenzik, accompanied by his wife and a Mr. Watt, and travelling in his own automobile, was in charge of a convoy of three horse-vans which were on their way from Pawtucket, Rhode Island, to the Peace Bridge, connecting Buffalo in the United States of America with Fort Erie in the province of Ontario. Two of the vans accommodated six horses each and the third, nine horses.

In the middle sections of the six-horse vans, which were of considerable length, were the stalls in which the horses were carried, three on each side of a lateral passageway, about four or five feet in width, and facing the same. Bars were placed across the passageways, to prevent the horses crossing the same, and the grooms, accompanying the horses, rode in the passageways. At the forward ends of the vans were compartments about seven feet two inches in width, by ten feet eleven inches in extreme length and six feet two inches in height, from floor to roof, which had no connection with the stalls and which were fitted with doors opening through one side of the vans. There were also small compartments in the rear ends of the vans. The tractors, operating the vans were operated by drivers who were in the employ of the suppliant corporation, and acting under the orders of the suppliant, Kenzik.

On approaching Buffalo, the suppliant, Kenzik, ordered one Kenyon, who had been driving one of the six-horse vans, to get into his, Kenzik's, passenger automobile, which Watt was then to drive, and he, Kenzik, took Kenyon's position as driver of the tractor drawing a six-horse van. Kenzik stated that he had told Kenyon and Watt to leave his wife at a hotel in Buffalo and that Kenyon was then to meet him at the corner of Genesee and Ellicott streets in Buffalo, as he considered that a good approach to the bridge, and that he had told Kenyon and the drivers of the

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other vans, at breakfast that morning, not to cross the border between the United States and Canada until he arrived there.

After Kenzik had taken over the driving of the tractor from Kenyon, he, Kenzik, drove the same to Buffalo, arriving between 4:30 and 5:00 o'clock in the afternoon, and parked it, telling the grooms, who were accompanying the horses, that they could go and get something to eat.

Kenzik then drove about two blocks to what he called "Ellicott's Electric" where he purchased a 21" screen Motorola television set of the console type for $315. He did not pay the full cash price for the same, but paid the difference between the price and what he said a Mr. Simon of the shop owed him for transporting his horses at some earlier date. He neither gave Simon a receipt for the amount owing by him, nor did Simon receipt the invoice for this television set, which invoice was produced and marked Exhibit "5".

He further stated that after purchasing the television set for himself Simon asked him if he would transport a 21" Motorola television set, invoiced at $238, and a glass panel heater, invoiced at $42.60, across the border to the suppliant, Bert Hedges, who was not called as a witness, and to whom Simon was selling the same. This, the suppliant, Kenzik, agreed to do without any authority from Hedges to transport or pay the duty on them.

The invoices for the glass panel heater and the television set, supposedly sold to the suppliant, Bert Hedges, were produced and marked Exhibits "6" and "7" respectively. No money was paid by Kenzik on these purchases.

After completing these arrangements, the suppliant, Kenzik, with the assistance of men employed by Simon, removed some of the equipment consisting of buckets, harnesses, saddles, blankets, tubs, trunks and bedding, which were in the front compartment of the horse van, to make room for the cartons containing the television sets and the glass panel heater, and placed them on the floor of the compartment against the forward end of the same. Equipment was then placed around the cartons and blankets placed over or between them in such a manner, according to the evidence of the Canadian Customs Officers who made the

search, hereinafter described, that the cartons could not be seen, and a large spare tyre used for either the tractor or the trailer was then placed in the compartment, as Kenzik stated, on top of the equipment, but according to the evidence of the Canadian Customs Officers, it was found jammed in the doorway of the compartment, some distance above the floor in such a manner that it took the strength of two men to remove it, and who only succeeded in doing so after some minutes work.

After the goods in question and the equipment and the tyre had been stowed in the compartment, and the doors closed it is assumed, the grooms returned from their meal and took their places in the van with the horses.

Later, the suppliant, Kenzik, picked up the driver of the tractor, Kenyon, at the corner of Genesee and Ellicott streets, and he, Kenyon, took over the driving of the tractor again. Kenzik did not tell Kenyon that the television sets and the glass panel heater were in the van, nor did he give him the invoices of the same.

Notwithstanding that he had previously told his drivers to wait for him on the American side, Kenzik proceeded immediately to the Peace Bridge, and on talking to an American customs broker at that place, he was told by him, that Greenwood, the driver of another van, had telephoned that he had had motor trouble on coming into Buffalo, whereupon he, Kenzik, drove back with his car to find Greenwood, which he did, several miles back on the road, and found that he had trouble with the transmission of his tractor. Kenzik gave Greenwood orders to proceed as best he could and then returned to the Peace Bridge. Greenwood, in the meantime attempted to proceed with his truck, but finally had to stop in Buffalo for the night and have repairs made next morning.

William Kelly, the driver of the third van, stated that he had breakfast with the other drivers about 200 miles from Buffalo that morning, and was told by Kenzik to wait at the border until he arrived.

When Kelly arrived at the border with his van, he was told by some one there that Kenzik had already been there but had returned for some purpose. He waited awhile, but as one of the horses in the van seemed ill he filled out

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the necessary papers for export of the animals from the United States and went across to the Canadian side where the Canadian customs officers asked him the usual questions and made a partial search of the van.

While Kelly's van was being searched, the van, driven by Kenyon, which was the one containing the television sets and the glass panel heater arrived. When Kenyon arrived on the Canadian side, he, Kelly, asked him why he had not waited on the other side of the border, to which he replied that he also had a sick horse.

Kenyon was not called as a witness and the evidence in connection with the search and seizure adduced on behalf of the suppliants was given by the driver, Kelly.

According to Kelly's evidence, the trailer driven by Kenyon was stopped by the Canadian customs officers, the doors of the front compartment opened, when a spare tyre was found jammed in the doorway; that it was a heavy tyre and that it ordinarily took two men to lift it and that it took him and Kenyon some time to get the tyre out of the doorway, and further time to get the equipment out of the compartment, so that the cartons containing the television sets and the glass panel heater could be seen clearly.

Albert C. Simon, a Canadian customs officer, and not the Simon from whom the suppliant, Kenzik, had purchased the goods in question, testified that he had been a customs officer for a number of years, and on December 1, 1952, was stationed at the Peace Bridge and had gone on duty at 4:00 o'clock that afternoon. Shortly before 6:00 o'clock that afternoon, a horse-van of S. C. Tomlin, Limited, crossed the border and entered Canada, and shortly after 6:00 o'clock, another of the S. C. Tomlin, Limited horse-vans crossed, that he, Simon, gave instructions to another customs officer, A. W. Zanutto, to search the vans thoroughly.

The two drivers, Kelly and Kenyon, were asked the usual questions as to where they were born and where they lived and they were then asked if they had anything to declare and who was in charge of the tractors and vans. Kenyon replied that he was in charge of the tractor and van, which he was driving and that it contained horses and race track equipment. He did not declare the television sets and the glass panel heater.

Kenyon and his companion, were then required by the customs officers to open the forward compartment of the van driven by Kenyon, and upon their doing so, a large spare tyre was seen to be wedged in the doorway some distance from the floor of the compartment, some blankets, buckets, and other things could be seen, but not the cartons containing the goods in question. Kenyon and his companions were ordered to remove the tyre, which took them some time and still the cartons containing the goods in question could not be seen, and they were ordered to remove the race track equipment, and after they had taken out more blankets, burlap bags and a couple of club bags, the customs officer, Zanutto, got up and with his flashlight looked into the compartment, and asked the customs officer Simon to also look. The cartons containing the television sets and the glass panel heater were then seen by the customs officers, but Kenyon stated that he did not know what they were.

The cartons were then taken out and placed on the ground, the whole operation, from the time the doors of the compartment were opened until the cartons were found, taking about one half an hour.

The evidence of Aldo Zanutto was to the effect that he went on duty at the Peace Bridge at 4:00 o'clock on the afternoon of December 1, and at about 6:00 o'clock went out to examine a truck which had entered the examination yard on the Canadian side, and while he was proceeding with such examination, a second van, known by him to be a van of S. C. Tomlin, Limited, arrived, which was driven by one Hugh Kenyon. He, Simon, questioned Kenyon as to his immigration status, that is with reference to his place of birth and where he lived, and then questioned him as to what he had to declare other than personal effects, horses and personal effects of the men in the vehicle, to which he replied, "Nothing!" and he was then asked a second time what he had to declare and he replied as in the first instance. The other men, that is the grooms accompanying the horses, were also questioned. He, Zanutto, then opened the doors to the horse compartment, where he found five horses and a pony, and then proceeded to examine the front compartment of the van.

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As the door was opened, he could see a spare tyre practically at the top of the doorway and jammed in the same, and below it were pails, trunks, feed, etc. He described the tyre as being flat up against the doors when they were closed, and wedged across the doorway. On requesting Kenyon to take the tyre out, he was reluctant to do so, but with the help of the other men, it was removed after about ten minutes effort.

Zanutto then attempted to enter the compartment but the goods described as above, were piled up so high, that he could not stay up in the doorway, and Kenyon and his companions were required to remove the same. They took out pails, and ropes to about halfway down the door, when he, Zanutto, climbed up again and, although using his flashlight, could still see nothing in the compartment other than race track tackle and he instructed Kenyon and the others to remove more goods, which they did. On this occasion, they took out two trunks and everything directly in front of the door and he got up again and saw part of a carton, but there was still considerable material, viz.—a suitcase burlap bag and ropes, piled on top of the cartons.

Zanutto drew the attention of Simon to the carton and required Kenyon and his companions to remove the remainder of the goods, when he, Zanutto, then removed two large cartons and a smaller carton, which were leaning up against the forward wall of the compartment. About this time, customs officer Simon had called his superintendent, Arthur L. Armstrong, by telephone, and when he appeared, the cartons were examined.

About fifteen minutes later, the suppliant, Kenzik, appeared, the cartons being at that time on the ground beside the truck, and he said that he owned the goods and wished to declare them. He was referred by Zanutto to customs officer Simon, and they all, with superintendent Armstrong, went into his office.

Kenzik was then questioned as to who owned the television sets and the glass panel heater and he produced the invoices, marked Exhibits "5", "6" and "7", and said that he and the suppliant, Hedges, owned the goods.

Kenzik then wanted to pay the duty and was asked how much money he had, to which he replied—"Between $40 and $50." He also produced his wallet with his identifications. When he was told the amount of the duty, or that the money he had with him was not sufficient to pay the same, he, according to the evidence of all the customs officers, said he had more money at the hotel in Buffalo.

At this point, it appeared that Kelly had *not* declared the horses in his van or that there was some irregularity in that connection, and he had to go back across the border for that purpose.

The television sets and glass panel heater were subsequently appraised for duty, which was calculated as follows:—

Duty and tax on glass panel heater	$ 14.43
Duty on 21" television console	153.55
Duty on 21" television table model	116.03
Total	$ 284.01

The evidence of Arthur L. Armstrong, superintendent of customs and excise for the Port of Fort Erie, was to the effect that between 6:00 and 7:00 o'clock in the evening of December 1, he received a telephone call and as a consequence went to the Peace Bridge where he arrived shortly before 7:00 o'clock and saw an S. C. Tomlin, Limited van, with goods on the ground beside it. He viewed the goods and the inside of the van but could see nothing in the forward compartment of the same at that time. He then went to his office and later, customs officer Simon brought the suppliant, Kenzik, in, and they were followed by customs officer Zanutto.

Superintendent Armstrong asked the suppliant, Kenzik, who he was, and he said that he was the president of S. C. Tomlin, Limited, and produced the invoices for the two television sets and the glass panel heater, marked Exhibits "5", "6" and "7". Armstrong asked Kenzik who Hedges was, and he told him, and said that he, Kenzik, intended to pay the duty on the goods, but that his driver had disobeyed orders. He was then asked by superintendent Armstrong how much money he had, and he said $40 or $50, which he produced. When he was told that that

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would not be enough money to pay the duty, he said he had more money in Buffalo. The superintendent decided to seize the television sets, the glass panel heater and van, but was worried about the horses, and therefore, told Kenzik not to take his car out, but to take the van to Montana Farm, not far away, to which the horses belonged, in company with one of the customs officers. This was done, and the van got back about half past eight o'clock the next morning, when the suppliant, Kenzik, came to see the collector for the port.

The television sets and the heater were held for appraisal.

On being questioned by the Court, superintendent Armstrong stated that if the van had been permitted to proceed past the Canadian customs line without examination, there would have been nothing to prevent the television sets and the glass panel heater being unloaded at any point beyond, as no further inspections would have been made of the contents of the van.

The evidence of the suppliant, Kenzik, differs somewhat from that of the customs officers, and particularly, with regard to his statement as to where he had more money. He, Kenzik, swore that he told the customs officers that he had more money in his car, and explained to the Court that he frequently carried large sums of money in the pocket of a jacket which he had, on this occasion, left in his car, without locking the same.

In this connection, it is significant, that the suppliant Kenzik's evidence was to the effect that he had made arrangements to join his wife at a hotel in Buffalo, and to stay there all night and that the customs officers testified that he had stated Buffalo, instead of his car, as the place where he had more money. If he had said it was in his car, it is possible that he might have been asked to go to the car and obtain it.

Dr. A. S. Lawson and Mr. H. J. Addison were offered as witnesses as to the character of the suppliant, Kenzik, and their evidence was received, subject to objection. They were, however, confined to evidence of his character as affecting his credibility.

Thus, in criminal cases, to prove that the defendant committed the crime charged, evidence may not be given that he (1) bore a bad reputation in the community; or (2) had a disposition to commit crimes of that kind; or (3) had on other occasions committed particular acts of the same class evincing such a disposition. . . .

The same rule prevails in civil cases. Thus, where a will was impeached for fraud, the defendant was not allowed to prove his good character in answer.

In all criminal cases involving punishment as distinguished from penalty the accused is allowed to prove his general good character (though not specific instances thereof) either by cross-examination of the witnesses for the prosecution, or in chief by his own testimony or that of independent witnesses. It has been held, however, that such evidence does not stand on precisely the same plane as that concerning the relevant facts going to prove or disprove the issue, but that the jury is only entitled to take into consideration the good character of the defendant when, weighing the other evidence, one view of that evidence would be favourable to the accused. There are some offences which no one but a person of good character should be in a position to commit. Phipson on Evidence, 9th Edition, pp. 188-9.

The knowledge of both witnesses as to the general reputation of the suppliant, insofar as it affected his credibility as a witness, was limited to their knowledge of him in connection with business carried on by him with them and their fellow sportsmen. Neither witness actually lived in the same community with the suppliant. The evidence of Dr. Lawson was that his general reputation in the community was "The very best and an honourable man", and that of Mr. Addison was, "I believe in the community Kenzik lives in he enjoys the reputation of having the highest and finest character, I have ever seen in any man."

In my opinion, such evidence was inadmissible and, in any event, it had no probative value relative to the issues before the Court.

Section 18 of the Exchequer Court Act, chapter 34 of R.S.C. 1927, as amended, and now section 17 of chapter 98 of R.S.C. 1952, is as follows:—

17. The Exchequer Court has 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.

Section 262 of The Customs Act, chapter 42 of R.S.C. 1927, as amended, now section 248 of chapter 58 of R.S.C. 1952, is as follows:—

248 (1). In any proceedings instituted for any penalty, punishment or forfeiture or for the recovery of any duty under this Act, or any other law relating to the Customs or to trade and navigation, in case of any

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question of, or relating to the identity, origin, *importation*, landing or exportation of any goods or the payment of duties on any goods, or the compliance with the requirements of this Act with regard to the entry of any goods, or the doing or omission of anything by which such penalty, punishment, forfeiture or liability for duty would be incurred or avoided, the burden of proof shall lie upon the owner or claimant of the goods or the person whose duty it was to comply with this Act or in whose possession the goods were found, and not upon Her Majesty or upon the person representing Her Majesty.

(2) Similarly, in any proceeding instituted against Her Majesty or any officer for the recovery of any goods seized or money deposited under this Act or any other law, if any such question arises the burden of proof shall lie upon the claimant of the goods seized or money deposited, and not upon Her Majesty or upon such person representing Her Majesty.

Section 2(*o*) of chapter 42 of R.S.C. 1927, as amended, now section 2(*q*) of chapter 58, R.S.C. 1952, is as follows:—

(*c*) 'Seized and forfeited', 'liable to forfeiture' or 'subject to forfeiture', or any other expression that might of itself imply that some act subsequent to the commission of the offence is necessary to work the forfeiture, shall not be construed as rendering any such subsequent act necessary, but the forfeiture shall accrue at the time and by the commission of the offence, in respect of which the penalty or forfeiture is imposed;

The statute contains no provision for a period of limitation within which goods or money may be forfeited to the Crown for some violation of the provisions of the same working a forfeiture, and in view of the provisions just quoted, if it were discovered that goods or money had become subject to forfeiture some years ago, but no proceeding taken, such proceedings could be taken at any time and the forfeiture would relate back to the time of the commission of the offence.

In *Wilkins and Others* v. *Despard* (1), the plaintiff brought an action in trespass against the Governor of Honduras, who had seized the plaintiff's ship as forfeited to the use of the King and himself for violation of the Navigation Act, 12 Car. 2. c. 18, and the Court held, according to the marginal note, that the owner could not maintain trespass against the parties seizing although the latter had not proceeded to condemnation; for by the forfeiture the property is devested out of the owner.

The Annandale (2), was a case of forfeiture under the 103rd section of the Merchant Shipping Act, 1854, instituted on behalf of a British officer of customs against a

(1) (1793) 5 T.R. 112.

(2) (1877) 2 P.D. 179.

vessel seized for an alleged infringement of the provisions of that section, in that one of her owners, being a British subject, had falsely represented, contrary to the fact, and with intent to conceal the British character of such ship, that she had been sold to foreigners.

Sir Robert Phillimore at p. 185 stated:—

> The case principally and properly relied upon is the case of *Wilkins* v. *Despard,* 5 T.R. 112, which seems to have followed two former decisions referred to in it—*Robert* v. *Witherhead,* 12 Mod. 92 and *Hennell* v. *Perry,* 5 T.R. 117; and the principle laid down in those cases, and adopted in *Wilkins* v. *Despard* is, that the forfeiture accrued before seizure, and before the institution of any suit, at the time when the illegal and fraudulent act was done, and that it divested out of the owners the property which before they had in the ship, and that the seizure related back to the act which was the cause of the forfeiture.
>
> I am of opinion that this position is a sound one in law, looking to the cases to which I have adverted and that the demurrer must be sustained on the ground that the forfeiture accrued at the time when the illegal act was done, and that the seizure of the *Annandale* related back to the time of the wrongful act committed by the then owners.

If the law laid down in these cases is sound, it may very well be, assuming the procedure to have been regular, that this is not a case in which goods or money of the subject are in the possession of the Crown, within section 17 of chapter 98, R.S.C. 1952, for the property in the television sets, the glass panel heater and the van and tractor, or the sum of $600 deposited in lieu of a bond on the release of the van and tractor, is in the Crown and not in the suppliants, and the relief claimed by the suppliants is not one for which a petition of right will lie, but, as before stated, that question was not argued and this decision is based on other principles.

This is a proceeding by petition of right in which the suppliants claim the return of goods, and money deposited in lieu of a bond which should have been furnished at the time the tractor and trailer of the suppliant corporation were detained or seized. The burden is on the suppliants to prove that the Crown has no right, under any provision of The Customs Act working a forfeiture, to retain the goods and the money deposited as aforesaid. The Crown is, therefore, not confined to the reasons given by the Minister when he ordered the seizure and the forfeiture of the same. Even if, for the purpose of this proceeding, the Minister were confined to the reasons given in the Notice of Seizure and Forfeiture, and the goods and money were about to be

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released because such reasons had not been proved, they could be retained or seized again and forfeited as soon as knowledge was received that some other provision of the statute working a forfeiture had been contravened. The burden is, therefore, upon the suppliants to establish that the Crown has no right, under any provision of the statute, to retain the goods and the money so deposited in lieu of a bond.

Section 203(*c*) of chapter 42 of R.S.C. 1927, as amended, now section 190(1)(*a*) and (*c*) of R.S.C. 1952, c. 58, is as follows:—

190(1) If any person

(*a*) smuggles or clandestinely introduces into Canada any goods subject to duty under the value for duty of two hundred dollars;

(*c*) in any way attempts to defraud the revenue by avoiding the payment of the duty or any part of the duty on any goods of whatever value;

such goods if found shall be seized and forfeited . . . such forfeiture to be without power of remission in cases of offences under paragraph (*a*).

Section 193(1) of chapter 42, R.S.C. 1927, now section 181(1) of chapter 58, R.S.C. 1952, is as follows:—

181(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.

Section 190(*a*) of R.S.C. 1927, now section 178(1), is in part as follows:—

178(1) The following articles namely:

(*a*) any vehicle containing goods, other than a railway carriage, arriving by land at any place in Canada, whether any duty is payable on such goods or not;

(*b*) any such vehicle on arriving, if the vehicle or its fittings, furnishings or appurtenances, or the animals drawing the same, or their harness or tackle, is or are liable to duty; and

(*c*) any goods brought into Canada in the charge or custody of any person arriving in Canada on foot or otherwise;

shall be forfeited and may be seized and dealt with accordingly, if before unloading or in any manner disposing of any such vehicle or goods, the person in charge thereof does not

(i) come to the Custom-house nearest to the point at which he crossed the frontier line or to the station of the officer nearest to such point, if such station is nearer thereto than any Custom-house, and there make a report in writing to the collector or other proper officer, stating the contents of each and every package and parcel of such goods and the quantities and values of the same;

(ii) then truly answer all such questions respecting such goods or packages, and the vehicles, fittings, furnishings and appurtenances appertaining thereto, as the collector or proper officer requires of him; and

(iii) then and there make due entry of the same in accordance with the law in that behalf.

Section 18 of chapter 42, R.S.C. 1927, now section 18, chapter 58, R.S.C. 1952, should evidently be read with section 190 and section 178 of those two statutes respectively. Section 18 of both Revisions imposes certain duties on persons in charge of vehicles and persons on foot or otherwise, arriving in Canada, and having with them or in their charge or custody, any goods, whether the same are dutiable or not, but such sections do not state the consequences of the failure of such persons to perform such duties. Section 190, chapter 42, R.S.C. 1927, and section 178, chapter 58, R.S.C. 1952, provide for the forfeiture of such vehicles and goods under the circumstances specified therein.

The movements of the suppliant, Kenzik, the instructions which he gave or omitted to give to the men under his control, and the manner in which he stowed the television sets and the glass panel heater in the forward compartment of the horse van at Buffalo, indicate an attempt to defraud the revenue by avoiding the payment of duty on them; the tractor and van containing the television sets and the glass panel heater, arrived by land in Canada, and Kenyon, the person in charge of the same and their contents, including the television sets and the glass panel heater, on coming to the Custom-house nearest to the point at which he crossed the frontier line, did not comply with the provisions of section 18 or section 178 of the Customs Act, chapter 58, R.S.C. 1952.

It may be suggested that these two sections, when strictly interpreted, only require compliance with their provisions before unloading or in any manner disposing of any such vehicles or goods, and that it is conceivable that Kenyon might still have complied with the same before unloading or disposing of them.

The evidence of Superintendent Armstrong was that had the vehicle passed through the Custom examination yard at Fort Erie without the goods in question having been found, there would have been nothing to prevent their being

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unloaded or disposed of at any point beyond that place. It follows, therefore, that the intention of the Act is that there should be complete compliance with the provisions of these sections at the Custom-house nearest to the point at which the frontier line is crossed, or at the station of the officer nearest to such point.

In *The King* v. *Bureau* (1), somewhat similar facts were considered and it was held by the majority of the Court that the respondent, Bureau, not only had not succeeded in proving that he had a lawful excuse to have in his possession goods which were dutiable, but had not discharged the onus upon him and that the seizure and forfeiture of dutiable cigarettes, and the automobile in which they were carried, should be confirmed.

In the case under consideration, the suppliants are praying for the return of goods and money formerly their property, but now in the possession of the Crown as forfeited under the provisions of the Customs Act. The burden is on them and each of them, to prove that such goods and money deposited in lieu of a bond on the release of the van and tractor, were not forfeited under any provision of the Customs Act, and they have not only failed to do so, but on the evidence of the witnesses produced on their behalf, have established their forfeiture to the Crown.

For the reasons given, the judgment of the Court must be that the suppliants are not entitled to any of the relief sought by them, or any of them, in their petition of right, and that the respondent is entitled to costs.

Judgment accordingly.

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(1) [1949] S.C.R. 367.

BETWEEN:

SETTER BROS. INC. .....APPELLANT;

AND

MORRIS LIGHT .....RESPONDENT.

1953
Dec. 22
1954
Feb. 9

Patents—Motion to dismiss an appeal from order of Commissioner of Patents or in the alternative to stay same—Order of Commissioner of Patents granting a licence without settling terms thereof—The Patent Act, 1935, 25-26 Geo. V, c. 32, ss. 67(2)(a)(d), 66, 70 and 71—Words "all orders and decisions" in s. 71 of the Patent Act of very wide meaning —Licence granted without terms of no practical usefulness to applicant—Appeal from order of Commissioner of Patents premature.

On an application made by respondent the Commissioner of Patents ordered the grant of a non-exclusive licence to it to manufacture under certain Canadian patents. The terms of the licence were to be settled by the parties within three months from the date of the order or by the Commissioner should they fail to agree. From this order appellant appealed to the Court and respondent moved that the appeal be dismissed on the ground that it is premature in that the Commissioner is still seized with the application for the licence or in the alternative that it be stayed until he has settled the terms of the licence.

Held: That the words "all orders and decisions" in s. 71 of the Patent Act, 1935, 25-26 Geo. V, c. 32, have a very wide meaning. To say that an order of the Commissioner granting a licence has to include the terms thereof to become subject to an appeal would have the effect of depriving interested parties of a right clearly stated in the section. In the absence of any restriction or proviso in the Act the right of appeal is available from orders or decisions granting a licence though the terms thereof are not embodied in same.

2. That without terms and conditions the licence granted by the Commissioner has no practical usefulness. The proceedings before the Commissioner will have to be completed to meet the respondent's demand and the requirements of s. 70 of the Act.

3. That to allow the appeal to proceed while the Commissioner is considering the terms of the licence would give rise to a multiplicity of proceedings and result in delays and increased costs and would be dealing piecemeal with matters in controversy between the parties. *In the Goods of Tharp* (1877-8) Law Rep. 3 P.D. 76; *Byrne* v. *Brown* (1889) 22 Q.B.D. 657 at 666; *Williams* v. *Hunt* [1905] 1 K.B. 512 referred to and followed.

4. That the appeal is premature and should be stayed until the Commissioner of Patents has settled the terms of the licence.

MOTION to dismiss an appeal from an order of the Commissioner of Patents or in the alternative to stay same.

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

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G. F. Henderson, Q.C. for the motion.

G. E. Maybee, Q.C. contra.

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

FOURNIER J. now (February 9, 1954) delivered the following judgment:

This is a motion for an order to dismiss an appeal from an order of the Commissioner of Patents granting a compulsory non-exclusive licence without settling its terms on the ground that it is premature in that the Commissioner is still seized with the application for the licence or in the alternative to stay the appeal until he has settled the terms of the licence.

The order was issued pursuant to section 67, par. 2, subsections (*a*) and (*d*) of the Patent Act 1935, which reads as follows:

67. The Attorney General of Canada or any person interested may at any time after the expiration of three years from the date of the grant of a patent apply to the Commissioner alleging in the case of that patent that there has been an abuse of the exclusive rights thereunder and asking for relief under this Act.

2. The exclusive rights under a patent shall be deemed to have been abused in any of the following circumstances:—

(*a*) if the patented invention (being one capable of being worked within Canada) is not being worked within Canada on a commercial scale, and no satisfactory reason can be given for such non-working . . .

(*d*) if, by reason of the refusal of the patentee to grant a licence or licences upon reasonable terms, the trade or industry of Canada, or the trade of any person or class of persons trading in Canada, or the establishment of any new trade or industry in Canada, is prejudiced, and it is in the public interest that a licence or licences should be granted;

The Commissioner having arrived at the conclusion that there had been an abuse of the exclusive rights of the patents, proceeded to make his order in accordance with his powers under section 68 of the Act.

This section provides that the Commissioner:

68. On being satisfied that a case of abuse of the exclusive rights under a patent has been established may exercise any of the following powers as he may deem expedient in the circumstances:

(*a*) He may order the grant to the applicant of a licence on such terms as he may think expedient,

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His order reads: "I order that a non-exclusive licence be granted to the applicant to manufacture under Canadian Patents No. 417,873 issued January 18, 1944, and No. 422,669 issued September 12, 1944; the form of the licence to be settled by agreement between the parties within three months from the date hereof and the royalties to be such that the price of the product to the Canadian candy manufacturers will not be unduly increased. All importation of paper sticks under the above mentioned patents shall stop on the date the above licence takes effect.

Should the parties fail to come to an agreement within the time fixed above, I shall set a date for a hearing to deal with the terms and conditions of the licence and thereafter issue an order fixing the said terms."

This order is dated October 31, 1952. From this order the (respondent) appellant has appealed and the (petitioner) respondent has moved that the appeal be dismissed or stayed.

The application for a licence contains the following words: "That an exclusive licence be granted to him set on terms which will enable such sticks to be sold, etc." The Commissioner decided that as a matter of principle the licence should be granted, but he did not settle its terms. All through the relevant sections of the Act it will be found that the Commissioner may grant a licence on such terms as he may think expedient or on such terms settled by him.

It would seem that the fixing of the terms of the licence is of the essence of the granting of the licence itself. The Commissioner, though bound by certain principles, is the officer designated to exercise this power of fixing the terms. This is not contested. It is illustrated by the decision of *Irving Air Chute Inc.* v. *The King* (1).

The Commissioner thought expedient to refer the matter of the form of the licence to the interested parties to be settled by them within three months. Failing agreement, he would deal with the terms and conditions and issue an order fixing the said terms. The parties did not settle the terms and conditions.

The questions to be determined are:

(1) Is the Commissioner's order subject to appeal under section 71 of the Patent Act, 1935?

(1) [1949] S.C.R. 613.

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(2) Is the appeal premature?

(3) In the affirmative, should it be dismissed or stayed?

The section dealing with the first question reads as follows:

> 73. All orders and decisions of the Commisisoner under sections sixty-seven to seventy-two, shall be subject to appeal to the Exchequer Court, and on such appeal the Attorney General of Canada or such counsel as he may appoint shall be entitled to appear and be heard.

The words "All orders and decisions" have a very wide meaning. To say that an order of the Commisisoner granting a licence has to include the terms of the licence to become subject to appeal would, in my view, have the effect of depriving interested parties of a right clearly stated in the section. If the legislator had intended giving a right of appeal only from certain orders or decisions he could have easily indicated that intention. In the absence of any restriction or proviso, I believe the appeal should be available from orders or decisions granting a licence though the terms of the licence are not embodied in same.

To deny the right of appeal in this instance would be a denial of even the existence of an order which would be contrary to the facts. He did order the granting of a licence. The effect of this order is another matter which may have a bearing on the answer to be given to the other questions.

I will deal now with the two following questions: (2) Is the appeal premature? and (3) In the affirmative, should it be dismissed or stayed?

The order as drafted is not a final order. To meet the request of the applicant for a licence set on terms which will enable (*to operate*) etc., and to complete the duties required by section 66 of the Act by settling the terms of the licence the Commisisoner shall issue a second order. Failing agreement by the parties, this was contemplated in the first order. The mere lapse of time and the lodging of this appeal would indicate that the parties have not settled the terms. He is now requested to fix the terms and conditions of the licence.

At this stage, the licence is not effective. Section 70 of the Act provides that any order for the grant of a licence

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under the Act shall operate as if it were embodied in a deed granting a licence executed by the patentee and all other parties.

Without terms and conditions the licence has no practicable usefulness. The proceedings before the Commissioner will have to be completed to meet the applicant's demand and the requirements of the Statute.

There is no doubt in my mind that the Commissioner is still seized with the application for a compulsory licence. What is before the Court is an order granting a licence, the terms of which are to be fixed if the licence is to become effective. The respondent is entitled to a complete decision on his application.

To allow the appeal to proceed while the Commissioner is considering the terms of the licence would give rise to a multiplicity of proceedings and result in delays and increased costs. Furthermore, it would be dealing piecemeal with matters in controversy between the parties. In this case, the petitioner (respondent) had to make a second request for the complete disposal of his application for the granting to him of a licence on such terms, etc., for the reason that the Commissioner referred the fixing of the terms to the parties instead of settling the conditions himself. Under these circumstances, I believe that it would be, at this time, unreasonable and prejudicial to the respondent if the appeal were proceeded with, keeping in mind that he was entitled to relief on one proceeding, to wit, his application for a licence.

The decision held *In the Goods of Tharp* (1), *Byrne* v. *Brown* (2) and especially in *Williams* v. *Hunt* (3) "that all matters before the Court should be settled in one action in which all interested parties should be represented" in my view is pertinent.

For these reasons, I have come to the conclusion that the appeal is premature and that the respondent is entitled to an order staying the appeal until the Commisisoner of Patents has settled the terms of the licence and the Court so orders. The order will be without costs.

Judgment accordingly.

(1) (1877-8) Law Rep. 3 P.D. 76. (2) (1889) 22 Q.B.D. 657 at 666.
(3) [1905] 1 K.B. 512.

1954
Feb. 26
Mar. 8

BETWEEN:

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

AND

ARTHUR TOPHAM ..... RESPONDENT.

Revenue—Income tax—The Income Tax Act, S. of C. 1948, ss. 39(1), 40(1)(c), 129(1)—Farmers and fishermen—Right to average income—Meaning of the words "as required by this Part" in s. 39(1) of the Act—Requirements in s. 39 of the Act must be met before right to average can be exercised—Powers of Parliament to impose conditions and make them imperative—Appeal from Income Tax Appeal Board allowed.

Respondent, a farmer whose chief source of income was farming, desirous of taking advantage of the provisions of s. 39(1) of the Income Tax Act, S. of C. 1948, c. 52, filed his election to average income within the time limited by the Act in respect to the years 1946, 1947, 1948 and 1949. His income tax returns for the years 1946, 1947 and 1949 were also filed within the same time limit, but due to an oversight on the part of his agents, the return for the year 1948 was not filed until June 7, 1949. The penalties for late filing imposed by the Minister were paid by respondent. The Minister, however, in the assessment for the year 1949 denied respondent the right to average his income on the ground that by reason of the delay in filing the 1948 return he did not file returns of income for the preceding years "as required by this Part" (Part I). From the assessment the respondent appealed to the Income Tax Appeal Board which allowed the appeal and from this decision the Minister brought the present appeal.

Held: That Parliament has the power to impose the conditions under which special privileges may be granted to groups of taxpayers even if anomalies may result therefrom. Likewise, Parliament may make those conditions of such an imperative nature, that, if not complied with, the right to the special benefits will be unavailable to the taxpayer. If anomalies follow from such an enactment or if the penalties or loss of rights which follow from non-observance of the conditions be thought to be too severe, it is for Parliament to amend the law and not for the Courts to give relief.

2. That one of the requirements in s. 39(1) of the Act that must be met before the right to average can be exercised is that "and the taxpayer has filed returns of income for the preceding years as required by this Part", which means not only that the returns must have been filed, but also that they must have been filed *as required by this Part.* S. 40 of the Act itself contains the requirements (*a*) that the return *shall* be filed with the Minister in prescribed form and containing prescribed information; and (*b*) in the case of an individual who has taxable income that his return *shall* be filed "on or before April in the next year".

3. That both of these requirements are conditions which fall within the ambit of the words "as required in this Part". These words cannot be considered as merely surplusage which would be the result if one

was to adopt the submission that to merely have filed the returns of the preceding years at any time is a sufficient compliance with the provisions of s. 39(1).

4. That the appeal is allowed.

APPEAL from a decision of the Income Tax Appeal Board.

Pursuant to an order of this Court the appeal was considered by the Honourable Mr. Justice Cameron based on the evidence adduced before the Honourable Mr. Justice Angers at Vancouver and on written argument submitted by counsel.

R. V. Prenter and *E. S. MacLatchy* for appellant.

D. C. Fillmore for respondent.

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

CAMERON J. now (March 8, 1954) delivered the following judgment:

This is an appeal by the Minister of National Revenue from a decision of the Income Tax Appeal Board dated March 28, 1952 (6 T.A.B.C. 242), allowing the appeal of the respondent from an assesment to income tax for the taxation year 1949. The appeal to this Court was heard by Angers, J. who retired before rendering judgment thereon. By consent of the parties an Order was made that the appeal be re-heard by me on the evidence adduced before Angers, J., together with written argument, which has now been received.

The respondent was desirous of taking advantage of the provisions of s. 39 of the Income Tax Act and within the time limited by that section filed his Election to Average Income in respect to the years 1946, 1947, 1948 and 1949, on or before April 25, 1950. The appellant, however, in the assessment dated March 7, 1951, for the year 1949, refused to permit the respondent the right of averaging his income, his grounds for so doing being stated in the Notification by the Minister as follows:

The taxpayer is not entitled to average his income in accordance with the provisions of subsection (1) of section 39 of the Act as he did not file a return for the 1948 taxation year as required by the Act.

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The facts are not in dispute. The respondent is a farmer whose chief source of income is farming. His income tax returns for the years 1946, 1947 and 1949 were duly filed within the time limited for so doing as was also his application to average income. His income tax return for the year 1948 should have been filed by April 30, 1949 (s. 33 of the Income War Tax Act and s. 40 of the Income Tax Act), but in fact was not filed until June 7, 1949. The return for that year had been prepared on the respondent's instructions by a firm of chartered accountants and was signed by the respondent prior to April 30, 1949, instructions being given to the firm of accountants to file it in the proper district taxation office at Vancouver. Unfortunately, it was misplaced in the files of that firm and was not discovered until some time after April 30; it was then immediately forwarded to the district office and filed on June 7. The penalties for late filing were imposed by the Minister pursuant to s. 77 of the Income War Tax Act and paid by the respondent. For each of the years 1946 to 1949 the respondent had taxable income. It is agreed, also, that following the signing of the income tax return for 1948 the respondent up to April 30, 1949, was under no disability and was capable of looking after his own affairs.

The applicable part of s. 39 is as follows:

> 39. (1) Where a taxpayer's chief source of income has been farming or fishing during a taxation year (in this section referred to as the "year of averaging") and the four immediately preceding years (in this section referred to as the "preceding years") and the taxpayer has filed returns of income for the preceding years as required by this Part, if the taxpayer, before the day on or before which he was required to file his return of income for the year of averaging, files with the Minister an election in prescribed form, the tax payable under this Part for the year of averaging is an amount determined by the following rules . . .

By the provisions of s. 129(1) of the Income Tax Act, the period of averaging the income in the year 1949 was limited to the "year of averaging" and the three years immediately preceding.

From the facts which I have stated, it is clear that the respondent had brought himself within all of the requirements of s. 39(1) except in regard to one disputed matter. The appellant says that by reason of the delay in filing the 1948 return, the respondent has not filed returns of income for the preceding years "as required by this Part" (Part 1)

and is not, therefore, entitled to average his income. The sole question for determination, therefore, is the meaning to be put upon the words "as required by this Part".

Counsel for the appellant submits that in enacting s. 39, Parliament laid down certain conditions, all of which a taxpayer must meet before he becomes entitled to the special right to average his income, and that filing of the income tax return for each of the "preceding years" within the time limited was one of such requirements. He says that the requirement is not merely directory, but imperative, and that even a late filing of one day in one year would be fatal to the application to average.

Counsel for the appellant further submits that s. 39 confers on farmers and fishermen an extraordinary benefit which is not available to other taxpayers—namely, the right to average the income over a period of years. He says, therefore, that it must be construed with the same strictness as an exempting section. He relies on *Lumbers* v. *The Minister of National Revenue* (1), where the President of the Court said:

> It is a well established rule that the exemption provisions of a taxing act must be construed strictly. In *Wylie* v. *City of Montreal*, (1885) 12 Can. S.C.R. 384 at 386, Sir W. J. Ritchie C.J. said:
>
> > 'I am quite willing to admit that the intention to exempt must be expressed in clear unambiguous language; that taxation is the rule and exemption the exception, and therefore to be strictly construed;'
>
> The rule may be expressed in a somewhat different way with specific reference to the Income War Tax Act. Just as receipts of money in the hands of a taxpayer are not taxable income unless the Income War Tax Act has clearly made them such, so also, in respect of what would otherwise be taxable income in his hands a taxpayer cannot succeed in claiming an exemption from income tax unless his claim comes clearly within the provisions of some exempting section of the Income War Tax Act: he must show that every constituent element necessary to the exemption is present in his case and that every condition required by the exempting section has been complied with.

Counsel for the respondent does not contend that a taxpayer who had taxable income in the taxation year 1948—as had the respondent—was not required to file his return by April 30, 1949, under the provisions of s. 40(1) of the Income Tax Act, which section formed a portion of Part I. He submits, however, that by use of the words "as required

(1) [1943] Ex. C.R. 202 at 211.

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by this Part" Parliament intended only that the returns for the "preceding years" should be in the prescribed form and contain the prescribed information, and that if the returns were filed at any time prior to the date of filing the election to average, the requirements of the section would have been met. He points out that in the corresponding section in the Income War Tax Act (s. 9(5)), Parliament used the words "Where . . . the taxpayer has filed, under section 33 of this Act, returns of income during the said two preceding years *within the time limited therefor*", thereby indicating that the time of filing was then clearly one of the conditions that must be met. He submits that as the words which I have underlined were not carried forward into the Income Tax Act and as the words in question are merely "as required" and not "as and when required", or words to that effect, Parliament could not in the later Act have intended to make prompt filing a condition precedent to obtaining the benefit of the section. Further, he says that as his client has paid the penalty laid down for late filing, he should not now be subjected to a further and more drastic penalty—that of being deprived completely of his right to average for the preceding years and also for the succeeding four years (s. 39(3) as it then was), unless the intention that such a result would follow is clearly expressed.

I must admit that upon first reading the respondent's argument, I was considerably impressed by these submissions. They were accepted by Mr. Fisher who heard the appeal. He pointed out that a farmer or fisherman who wished to average his income and who had not filed income tax returns for one or more of the preceding years because he had no taxable income in those years (and was therefore not required to file his returns for such years by April 30 of the following year—unless requested to do so by the Minister), could come within the provisions of s. 39(1) by filing returns for those years on or before the time when he filed his election to average. (I should point out that the Minister in his argument submitted in this case has admitted that that is so). Mr. Fisher was of the opinion that if in such a case a taxpayer were allowed to average his income, it would make an absurdity of the law to deny the

right of averaging in a case such as the instant one in which returns had been made for all the preceding years, only one of which was filed later than the required date.

With considerable reluctance, I have come to the conclusion that the submission made on behalf of the respondent cannot be accepted. There can be no doubt that Parliament has the power to impose the conditions under which special privileges may be granted to groups of taxpayers even if anomalies may result therefrom. Likewise, Parliament may make those conditions of such an imperative nature, that, if not complied with, the right to the special benefits will be unavailable to the taxpayer. If anomalies follow from such an enactment or if the penalties or loss of rights which follow from non-observance of the conditions be thought to be too severe, it is for Parliament to amend the law and not for the Courts to give relief.

My conclusion has been arrived at in the main by considering the provisions of s. 39(1) (*supra*) and by s. 40, the relevant parts of which are as follows:

40. (1) A return of the income for each taxation year in the case of a corporation and for each taxation year for which a tax is payable in the case of an individual shall, without notice or demand therefor, be filed with the Minister in prescribed form and containing prescribed information,

(*a*) in the case of a corporation, by or on behalf of the corporation within 6 months from the end of the year,

(*b*) in the case of a person who has died without making the return, by his legal representatives, within 6 months from the day of death,

(*c*) in the case of any other person, on or before April 30, in the next year, by that person or, if he is unable for any reason to file the return, by his guardian, curator, tutor, committee or other legal representative, or

(*d*) in a case where no person described by paragraph (*a*), (*b*) or (*c*) has filed the return, by such person as is required by notice in writing from the Minister to file the return, within such reasonable time as the notice specifies.

40. (2) Every person, whether or not he is liable to pay tax under this Part for a taxation year and whether or not he has filed a return under subsection (1), shall, upon receipt at any time of a demand therefor in writing from the Minister or any person thereunto authorized by the Minister, file forthwith with the Minister a return of his income for the year in prescribed form and containing prescribed information.

As I have noted above, one of the requirements that must be met before the right to average can be exercised is that "and the taxpayer has filed returns of income for the preceding years as required by this Part". In my view, that

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means not only that the returns must have been filed, but also that they must have been filed *as required by this Part.* Now s. 40 which immediately follows contains within itself the requirements (*a*) that the return *shall* be filed with the Minister in prescribed form and containing prescribed information; and (*b*) that in the case of an individual who has taxable income that his return *shall* be filed "on or before April 30 in the next year". Both of these matters, in my opinion, are requirements which fall within the ambit of the words "as required in this Part". I am quite unable to reach the conclusion that one of the requirements in s. 40(1), namely, that relating to the form and content of the returns—falls within the term "as required by this Part" (as it admittedly does), and the other requirement contained in the same section, and which is made equally as imperative as the first requirement, can be said to be excluded from the ambit of those words. These words cannot be considered as merely surplusage, which would be the result if I were to adopt the submission of the respondent that to merely have filed the returns of the preceding years at any time is a sufficient compliance with the provisions of the section.

For these reasons and applying the principles laid down in the *Lumbers* case (*supra*), I must allow the appeal. The same result was arrived at by Angers, J. in *Minister of National Revenue* v. *Nielsen* (1), in which he affirmed the decision of the Income Tax Appeal Board (5 T.A.B.C. 321).

The appeal will therefore be allowed, the decision of the Tax Appeal Board set aside and the assessment made upon the respondent will be affirmed.

The appellant is also entitled to be paid his costs.

Judgment accordingly.

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(1) 53 D.T.C. 1029.

BETWEEN: 1954

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT; Feb. 26 / Mar. 8

AND

FRED TOPHAM, JR. .....RESPONDENT.

The appeal was allowed for the reasons stated in *Minister of National Revenue* v. *Arthur Topham* ante p. 174.

BETWEEN: 1953 Apr. 2

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT; 1954 Mar. 8

AND

JOHN MacINNES .....RESPONDENT.

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, s. 32(2) —Term "property substituted therefore" does not include property substituted for substituted property.

The respondent gave money and bonds to his wife. With the money she purchased other bonds. She sold some of these and with the proceeds the respondent bought other shares for and on her behalf. Subsequently, the respondent sold these shares for her and bought other shares for her. She invested the balance of the proceeds in other securities. From the last named shares and the other securities she derived income and the respondent was assessed in respect of it. The respondent appealed successfully to the Income Tax Appeal Board and the Minister appealed from its decision.

Held: That a tax liability cannot be fastened upon a person unless his case comes within the express terms of the enactment by which it is imposed. It is the letter of the law that governs in a taxing Act.

2. That since section 32(2) of the Income War Tax Act does not expressly extend the liability of the husband to be taxed on the income derived from property transferred by him to his wife or from property substituted therefor to the income derived from property substituted for such substituted property he is not liable under the section.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the President of the Court at Vancouver.

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MINISTER OF NATIONAL REVENUE v. MACINNES

W. H. Campbell, and *T. Z. Boles* for appellant.

W. Murphy, Q.C. and *F. Bonnell* for respondent.

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

THE PRESIDENT now (March 8, 1954) delivered the following judgment.

This is an appeal from the decision of the Income Tax Appeal Board, *sub nomine No. 19* v. *Minister of National Revenue* (1), dated July 9, 1951, allowing the respondent's appeal from his income tax assessment for 1948.

There is agreement on the facts. From about 1939 and up to March, 1947 the respondent made gifts of money and bonds to the value of more than $9,000 to his wife Agnes MacInnes. With the money she purchased other bonds. In March, 1947 she sold some $9,000 worth of these bonds and on March 21, 1947, deposited $9,486.36 in her savings account. On April 8, 1947, she handed the respondent her cheque for $9,000 to enable him to buy for her 900 treasury shares of Western Canada Steamships Limited of the nominal or par value of $10 each and the respondent bought the said shares for and on her behalf and also bought shares for and on behalf of other persons. By reason of the fact that Western Canada Steamships Limited was a private company and had its full quota of shareholders the respondent had all these shares registered in his name, but it is agreed that he purchased the 900 shares for and on behalf of his wife and that they were her property. There were no dividends or other receipts of income from these 900 shares. On August 29, 1947, the respondent sold the said shares for his wife together with the shares which he had bought for other persons to Torcan Limited for $73·125 per share and on the same day purchased for her and the other persons common and preferred shares of Western Canada Steamship Company Limited in her name and in their names respectively and issued his cheque to her for $28,800.00, being the balance of the proceeds of the sale of the 900 shares of Western Canada Steamships Limited. She invested this sum in other securities and in 1948 received income from these securities and from the preferred shares

(1) (1951) 4 Tax A.B.C. 335.

of Western Canada Steamship Company Limited amounting to $2,606.68. In assessing the respondent for 1948 the Minister added this amount to the amount of taxable income reported by him on his return. The respondent objected to the assessment and appealed to the Income Tax Appeal Board. The appeal turned on whether the facts brought the case within the ambit of section 32(2) of the Income War Tax Act, R.S.C. 1927, Chapter 97, which provides as follows:

> 32. (2) Where a husband transfers property to his wife, or *vice versa,* the husband or the wife, as the case may be, shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made.

The Board held that this section was not applicable in the circumstances of the case and allowed the appeal from the assessment referring it back to the Minister for re-assessment by reducing the amount of the respondent's taxable income by $2,606.68. From this decision the Minister appeals to this Court.

The issue in the appeal is a very narrow one, namely, whether the term "property substituted therefor" in section 32(2) of the Act includes property substituted for substituted property. Mr. W. S. Fisher, Q.C., who delivered the judgment of the Board, took the view that section 32(2) was applicable only in respect of the income from the transferred property or from any property substituted for it but was not applicable in respect of the income arising from property substituted for the substituted property. While this objection to the validity of the assessment appears to be a technical one I am of the opinion that it was well founded and that Mr. Fisher was right in allowing the appeal on the ground stated by him.

It was pointed out in *Connell* v. *Minister of National Revenue* (1) that section 32 (2) of the Income War Tax Act is a special provision imposing upon a taxpayer a tax liability under certain specified circumstances which, apart from the section, would not have rested upon him. It is, therefore, essential to valid imposition of liability under the section that it should clearly apply to the facts of the case. It is well established that a tax liability cannot be fastened upon a person unless his case comes within the

(1) [1946] Ex. C.R. 562 at 566.

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express terms of the enactment by which it is imposed. It is the letter of the law that governs in a taxing Act. This was laid down by the House of Lords in the leading case of *Partington* v. *Attorney General* (1) where Lord Cairns made the classic statement:

> If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the 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.

Moreover, the Court has no right to assume that a transaction is within the intention or purpose of a taxing Act if it does not fall within its express terms. There is no intention to tax other than that which its words express. Lord Halsbury, L.C. put this rule clearly in *Tennant* v. *Smith* (2) where he said:

> 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 all be 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 the tax is expressly imposed.
>
> Cases, therefore, under the Taxing Act always resolve themselves into the question whether or not the words of the Act have reached the alleged subject of taxation.

These are basic principles of income tax law.

Consequently, if Parliament had intended that a husband should be liable to tax in respect of income derived not only from property transferred by him to his wife and property substituted therefor but also from property substituted for such substituted property it should have expressed its intention in clear terms. It could easily have done so. Just as in the case of the proviso to section 6(1)(*n*) Parliament expressly stated that the term "previous owner" included a series of owners so it could have declared in section 32(2) that "property substituted therefor" included property substituted for substituted property regardless of the number of substitutions, as in fact, it did when it enacted section 22(3) of the Income Tax Act, Statutes of

(1) (1869) L.R. 4 H.L. 100 at 122. (2) [1892] A.C. 150 at 154.

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Canada 1947-48, chapter 52, by section 6 (1) of chapter 29 of the Statutes of 1952. While this, of course, nullifies the effect of the decision appealed from in respect of assessments for 1952 and subsequent years it has no bearing on the present case which must be dealt with under the law as it stood in 1948 when the assessment appealed from was made.

In my opinion, since section 32(2) does not expressly extend the liability of the husband to be taxed on the income derived from property transferred by him to his wife or from property substituted therefor to the income derived from property substituted for such substituted property he is not liable under the section. The Income Tax Appeal Board was, therefore, right in allowing the appeal and referring the assessment back to the Minister and this appeal must be dismissed with costs.

Judgment accordingly.

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Jan. 21

Mar. 8

BETWEEN:

CYRIL WARD .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

AND

ROY BROOKS .....THIRD PARTY.

Crown—Petition of Right—Damages—Third Party proceedings—Degree of negligence—Costs—The Highway Traffic Act R.S.O. 1950, c. 167, s. 43(1)—The Negligence Act R.S.O. 1950, c. 252, s. 2(1), 4, 5 & 8—Regulations made under The Highway Traffic Act—Collision between two vehicles—Third vehicle improperly parked on highway—Apportionment of damages borne by respondent and third party—Division of costs borne by respondent and third party.

In a petition of right proceeding brought by the suppliant to recover from the respondent damages suffered by him through the alleged negligent operation on the highway of a motor vehicle by a servant of the Crown acting within the scope of his duties or employment the third party was added on application of the respondent who alleged that the third party's vehicle was improperly parked on the highway. The Court found that the operator of suppliant's vehicle contributed to the damages suffered by suppliant to the degree of thirty per cent;

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that the fault or negligence of the operator of respondent's vehicle contributed to the damages suffered by suppliant to the degree of twenty per cent and that the fault or negligence of the third party contributed to the damages suffered by suppliant to the degree of fifty per cent and assessed damages accordingly.

Held: That since the ultimate fault or negligence of any one of the parties as the direct or approximate cause of the damage to the exclusion of fault or neglect on the part of each of the others could not be determined it was necessary for the Court to find the degree in which each party was at fault or negligent in accordance with The Negligence Act R.S.O. 1950, c. 252, s. 2, ss. 1, 4, 5, 8.

2. That the suppliant should recover from the respondent his full costs of the action and that the third party should contribute to respondent fifty per cent of those costs and in addition five-sevenths of costs of the third party proceedings.

PETITION OF RIGHT by suppliant to recover from respondent damages alleged to have been suffered by suppliant due to the negligent operation of respondent's motor vehicle by a servant of respondent acting within the scope of his duties or employment.

The action was tried before the Honourable Mr. Justice Potter at Belleville.

R. E. Nourse for suppliant.

E. O. Butler for respondent.

B. W. Hurley for third party.

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

POTTER J. now (March 8, 1954) delivered the following judgment:

This is a petition of right within the Petition of Right Act, chapter 158, R.S.C. 1927, as amended, now chapter 210, R.S.C. 1952, by which the suppliant, Cyril Ward, prays that he be granted damages for damage to his motor vehicle and loss of use of the same as the result of a collision allegedly caused by the negligent operation of a motor vehicle owned by the Crown and driven by Sergeant Karl Hogan of the Hastings and Prince Edward Regiment, a servant of the Crown, while acting within the scope of his duties or employment.

A third party notice was filed herein by the respondent on the 9th day of March, 1953, and served on Roy Brooks, the third party, on the 14th day of March, 1953.

By order made herein on the 26th day of May, 1953, it was directed that the question of liability of the third party to the respondent be disposed of at the trial and that pleadings be filed and served.

Shortly before 8.30 o'clock in the evening of the 13th day of October, 1952, Douglas Ward, son of the suppliant, was driving his father's motor vehicle, which was described as a Plymouth Sedan built in about the year 1939, southwardly along the Schoharie Road in the County of Prince Edward, in the Province of Ontario. Although it began to rain later in the evening, the weather at the time was good; the road, which had a gravelled surface, was dry, the travelled portion of the same being about 24 feet wide, according to the evidence of Constable John G. Thompson of the Ontario Provincial Police, who investigated the accident, with a grass shoulder of about 6 feet in width on both sides before the scene of the accident on which cars could be parked, but, according to the evidence of the suppliant's son, with a grassy shoulder of about 1 foot or 1 foot and a half wide on the western side of the same dropping into a ditch of a depth of about 18 or 20 inches. The road was level, excepting for a slight elevation in the same, said by some witnesses to be about 300 feet to the southward of the point of collision, hereinafter described, and there was, some distance farther south, a slight curve in the road.

Slightly to the southward of the point of collision, and coming in from the eastward, was another road which intersected the Schoharie Road at about right angles. Slightly to the northward of such intersection, and on the western side of the Schoharie Road was the entrance to a narrow lane, and near the corner formed by the intersection of the northern boundary line of such lane and the western boundary line of the Schoharie Road, was the Schoharie schoolhouse.

As the driver of the suppliant's car approached the vicinity of the schoolhouse he saw on the eastern side of the road, and between one-half and three-quarters of a mile ahead, the lights of a parked vehicle and shortly after he saw, about three-eighths of a mile away, and coming from the southward, the headlights of another vehicle. The parked vehicle was afterwards learned to be that owned by

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the third party and the vehicle proceeding from the southward to be one owned by the Crown, operated by Sergeant Karl Hogan of the Hastings and Prince Edward Regiment, a servant of the Crown, while acting within the scope of his duties or employment.

The driver of the suppliant's vehicle stated in direct examination, that when he saw the said parking lights he was travelling at a speed of between forty and forty-five miles an hour on his right hand side of the travelled portion of the highway and that when he saw the headlights of the Crown vehicle approaching from the opposite direction, he dimmed his lights and continued on slightly more to his right hand side of the road without reducing his speed.

In cross examination he said that he dimmed his lights before he passed the parked vehicle and was travelling about thirty miles an hour at that time.

As he approached the parked vehicle he thought that the vehicle of the Crown appeared to be stopping, but when he was within ten or fifteen feet of the parked vehicle that of the Crown turned out to its left to pass the same and the two cars collided; the left end of the front bumper of the Crown vehicle striking the left forward end of the suppliant's car damaging the length of its left side so severely that the cost of repairing it would have exceeded its market value when repaired. Following the impact the suppliant's vehicle continued on its course for about one hundred feet and came to rest with its rear end in the ditch on the western side of the road and its front end facing the same.

According to the evidence of Karl Hogan, who described himself as a motor transport sergeant, and an "instructor on wheels and track", he was, at the time and place in question, operating a Dodge "Special Design" vehicle with hydraulic brakes, designed to carry a load of about three-quarters of a ton. The vehicle weighed something over two thousand pounds and was provided with governors, connected with its carburettor, which were set and sealed for a speed of forty miles an hour.

As he was approaching the Schoharie schoolhouse, driving on his proper side of the road, at a speed between thirty and thirty-five miles an hour, he saw the bright headlights of a car coming towards him from the northward and he

dimmed his lights. As the car approaching from the opposite direction continued to come forward without dimming its lights and as he was "blinded" by them, he raised his lights for an instant and dimmed them again, and the lights of the other vehicle were then dimmed shortly after he, Hogan, had passed over an elevation in the road. At that instant, or immediately after, he saw ahead of him for the first time on his right hand side of the road, a motor vehicle which he afterwards learned to be that of the third party to these proceedings. He had not seen and did not see the tail lights of the vehicle, and upon realising that it was standing still, he decided that he had not sufficient time or distance within which to apply his brakes and stop his vehicle, and was obliged to choose between running into the rear of the same or attempting to pass to its left between it and the motor vehicle of the suppliant which was coming from the opposite direction.

When Hogan said in cross-examination that he dimmed his lights when the suppliant's vehicle was from one hundred to one hundred and fifty feet away he was evidently referring to the second time that he did so.

Other witnesses, who described the road in question, and who measured the same by travelling over it and taking the mileage recorded on the speedometer of a car estimated that there was a slight elevation in the road, about three hundred feet to the southward of the intersection of the road entering the Schoharie Road from the eastward. Sergeant Hogan, estimated the distance of the elevation in the road from the parked truck of the third party, to be about twice the width of the courtroom, or about seventy-five feet.

Assuming that the elevation in the road taken with the height of Sergeant Hogan's eyes above the level of the same prevented his seeing the tail lights of the parked vehicle, which were eighteen or twenty inches forward of and about six inches below the rear end of the platform on the vehicle, or that they were obscured by fumes from the exhaust of its motor which was running, that such elevation was, according to the evidence of other witnesses, about three hundred feet southward from the parked truck of the third party, and that the speed of Sergeant Hogan's vehicle was between thirty and thirty-five miles an hour, it follows that

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he had very little time within which to form a judgment. A speed of thirty-five miles an hour would be equivalent to fifty-one and one tenth feet a second, and a speed of thirty miles an hour would be equivalent to forty-four feet a second, which would have given him between five and seven seconds within which to form a judgment and act upon it.

Sergeant Hogan further stated that he passed so close to the parked vehicle, that the cab or the superstructure of his truck caught the rear view mirror of the parked vehicle which was projecting from the left-hand door frame of the same and, upon the collision occurring, the front end of his truck was turned to his left, and the aerial bracket, which projected from the frame of his car at the rear, grazed the truck of the third party.

Further evidence established that the truck of the third party was so parked that it was wholly on the travelled portion of the road, with a space of seventeen feet between its left side and the western side of the road, and with its rear end between two and three feet north of the northern boundary line of the road coming from the eastward and intersecting the eastern boundary line of the Schoharie Road.

Assuming the width of the Crown vehicle to have been between six and seven feet, there would have been at least ten feet of the road clear for the suppliant's vehicle with the width of the shoulder in addition.

The speed of the suppliant's car was evidently fairly high, for although it was struck on its left forward end and its left side badly damaged, it continued on its course for a distance of about one hundred feet after the impact, then slewed, and came to rest with its rear end in the ditch on the western side of the highway and its front end facing the road. The Crown vehicle on the other hand, came to rest almost immediately after the impact.

It may be thought that as the suppliant's vehicle was travelling on a course approximately parallel to the side of the highway, while the Crown vehicle was, or had been, cutting obliquely across it, the impact had a greater effect on the forward motion of the Crown vehicle than on that of the suppliant, but nevertheless, one hundred feet seems

a considerable distance for a damaged car to travel on a level road with a gravelled surface. Sergeant Hogan's evidence would, however, indicate that he had resumed a course parallel to the road before the impact for the rear view mirror on the door frame of the third party vehicle was struck by the cab of the Crown vehicle.

The third party, Charles Roy Brooks, was called as a witness and although he denied in his defence to the statement of claim of the respondent that he was the owner of a 1948 Chevrolet Stake Body truck, admitted on his examination for discovery that he and his brother together owned such a vehicle and, in his evidence, that he was operating it on the evening in question and had stopped opposite the Schoharie schoolhouse, shortly before the accident already described, for his brother who was the schoolteacher in charge of such school. He blew his horn two or three times but as his brother did not come, he parked the vehicle in question by the eastern side of the road and, leaving the motor running, went over to the schoolhouse to tell his brother that he had arrived. He said that the distance between the lefthand side of his vehicle and the western boundary of the highway was seventeen feet, which agreed with the measurement made by Constable John G. Thompson of the Ontario Provincial Police who had investigated the accident, as well as the evidence of other witnesses.

Brooks said that before leaving his truck he had turned off his headlights and left it with two parking lights on the front end of the same and two red lights on the rear end, and described them as consisting of a cluster of three, four inches apart, one of them not being lighted, and that there were reflectors on the mud flaps behind the rear wheels.

The third party did not say that it was not practicable to park the vehicle off the travelled portion of such highway and the evidence of Constable Thompson in this connection is accepted.

Section 43(1) of The Highway Traffic Act, chapter 167, R.S.O. 1950, is as follows:

43. (1) No person shall park or leave standing any vehicle whether attended or unattended, upon the travelled portion of a highway, when it is practicable to park or leave such vehicle off the travelled portion of such highway; provided, that in any event, no person shall park or leave

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standing any vehicle, whether attended or unattended, upon such a highway unless a clear view of such vehicle and of the highway for at least 400 feet beyond the vehicle may be obtained from a distance of at least 400 feet from the vehicle in each direction upon such highway.

Section 2, subsection 1, of The Negligence Act, R.S.O. 1950, chapter 252, is as follows:—

2. (1) Where damages have been caused or contributed to by the fault or neglect of two or more persons, the Court shall determine the degree in which each of such persons is at fault or negligent, and, except as provided by subsections 2 and 3, where two or more persons are found at fault or negligent, they shall be jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each shall be liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

Section 4 is as follows:—

4. In any action for damages which is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff which contributed to the damages, the Court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

Section 5 is as follows:—

5. If it is not practicable to determine the respective degree of fault or negligence as between any parties to an action, such parties shall be deemed to be equally at fault or negligent.

Section 8 is as follows:—

8. Where the damages are occasioned by the fault or negligence of more than one party, the Court shall have power to direct that the plaintiff shall bear some portion of the costs if the circumstances render this just.

I am unable to determine that the ultimate fault or neglect of any one of the parties was the direct or proximate cause of the damage to the exclusion of fault or neglect on the part of each of the others and find that it was contributed to by the fault or neglect of each of the parties to the action in different degrees.

In such circumstances, the Legislature of the Province in which the accident occurred has imposed upon the Court the duty of determining the degree in which each party was at fault or negligent, although it must have anticipated that it cannot be done with mathematical precision and that such determinations can only be attempts at fair estimates.

In order of time, the third party was the first to be at fault or negligent in parking or leaving standing the vehicle which he had been operating, and of which he had charge, wholly upon the travelled portion of the highway when it was practicable to leave it off the same, in disregard of the duty to himself and others using the highway imposed by section 43(1) of The Highway Traffic Act, chapter 167, R.S.O. 1950. *Groves* v. *Wimborne* (1).

The law of the highway defines what is or is not reasonable conduct, and if an accident occurs as a result of its contravention, then *prima facie* the contravention is negligence causing or contributing to the accident.

The vehicle which was operated by the third party had been stationary for some short space of time before the vehicles of the suppliant and the respondent arrived on that section of the highway and in a case in which it were possible to find that one of the other parties had the last opportunity to avoid the accident, the third party would not be liable. But, in this case, the evidence indicates that the accident would not have occurred if the third party had complied with the statute which was evidently enacted to prevent the occurrence of such situations.

I therefore find that the fault or negligence of the third party contributed to the damages suffered by the suppliant to the degree of fifty per cent.

The operator of the suppliant's vehicle first saw the parking lights of the third party vehicle at a distance of one-half to three-quarters of a mile and the headlights of the Crown vehicle at a distance of three-eighths of a mile, but he did not dim his headlights until about to pass the vehicle of the third party or reduce his speed, which must have been high, as already indicated. He, also, disregarded duties to himself and others using the highway, imposed by statute.

The Highway Traffic Act, chapter 167, R.S.O. 1950, provides by section 10(15) as follows:—

10. (15) The Lieutenant-Governor in Council may make regulations prescribing the type and maximum strength of lights which shall be carried by vehicles, and regulating the location, direction, focus and use of such lights;

(1) [1898] 2 Q.B. 402.

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By section 3 of chapter 46 of the Statutes of Ontario, 1953, section 10(15) was repealed and a new section substituted, but the effect of that portion of the same, already quoted, was not altered thereby.

Part III of the regulations made and filed under The Highway Traffic Act, by paragraph 27(*a*) and (*b*) thereof provides in effect that motor vehicles shall be provided with headlamps having an upper or main beam so aimed and of such an intensity, as to reveal persons or vehicles at a distance of at least 200 feet ahead for all conditions of loading and also a lower or passing beam so aimed that when the vehicle is not loaded, none of the high intensity of the same which is directed to the left of the vehicle shall rise higher than a level of eight inches below the horizontal centre of the headlamp from which it comes, at a distance of twenty-five feet ahead of it.

Section 10(2) of the said Act is to the same effect.

Paragraph 28 of the said Regulations is as follows:—

28. Whenever on a highway after dusk and before dawn the driver or operator of a motor vehicle approaches an oncoming vehicle within 500 feet he shall use the lower or passing beam.

It has been held in a number of cases that failure to dim headlights under the circumstances thereof was negligence. *Tinkler* v. *Gobel* (1); *Faber* v. *Patron Oil Company* (2); *Bennett* v. *Gardewine* (3); *Rubin* v. *Steeves* (4).

Judicial notice has been taken of the fact that a motorist, after passing at night an oncoming car carrying the lights required by law, cannot see well during the short time it takes his eyes to become accustomed again to the comparative darkness. *Forrest* v. *Davidson and Malnyk* (5).

The suppliant, by failing to dim his lights at the proper time, blinded the driver of the Crown vehicle so that he was unable to see objects or low-power lights ahead of him on the road and when he did dim his lights, created a situation in which the operator of the Crown vehicle was required to make a quick, but perhaps unwise decision.

(1) [1931] 2 W.W.R. 413 (Sask.)
(2) [1941] 3 W.W.R. 836 (Sask.)
(3) [1948] 2 W.W.R. 474 (Man.)
(4) [1951] 28 M.P.R. 421 (N.B.C.A.)
(5) [1951] 4 W.W.R. (N.S.) 273 (Sask. C.A.).

The driver of the suppliant's vehicle also failed to reduce his speed after dimming his lights, which he ought to have done as a careful man, and was, as a result, travelling at a high rate of speed, when the collision became imminent and occurred.

In the emergency which the driver of the suppliant's vehicle created, the operator of the Crown vehicle could not be expected to exercise nice judgment and prompt decision. *Tatisich and Harding* v. *Edwards* (1).

I therefore find that the fault or negligence of the operator of the suppliant's vehicle contributed to the damage suffered by the suppliant to the degree of thirty per cent.

When the operator of the respondent's vehicle saw the bright headlights of the suppliant's vehicle approaching from the northward he dimmed his lights, but, as the lights of the suppliant's vehicle were not dimmed, he became blinded by them. He, no doubt, assumed that the operator of the suppliant's vehicle would, at any instant, comply with the law and dim his lights and he, therefore, continued on his course without reducing his speed and finally raised his lights and dimmed them again, when the operator of the suppliant's vehicle dimmed his.

It has been held in some jurisdictions that a driver "blinded" by the lights of another vehicle should stop or reduce his speed so as to be able to stop instantly if danger arises. *Turner* v. *Fletcher* (2); *LeBlanc* v. *Ouellet* (3); *Larose* v. *Décary* (4).

It has also been held that there is no general rule in this connection and the conduct of a driver blinded by the lights of another vehicle is to be determined in each case by the surrounding circumstances. *Turner* v. *Fletcher* (*supra*); *Armond* v. *Carr* (5).

There was no evidence of other vehicles following that of the respondent immediately before the collision or of other circumstances making it unsafe for the operator of the same to stop, and while, under the circumstances, the failure of the operator of the respondent's vehicle to remain on his

(1) [1931] S.C.R. 167, affirming 64 O.L.R. 98.
(2) [1939] 3 W.W.R. 550.
[1940] 1 D.L.R. 204 (Sask.).
(3) [1948] Que. S.C. 127.
(4) [1938] 76 Que. S.C. 536.
(5) [1926] S.C.R. 575.

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right-hand side of the road in the emergency created by the negligence of the third party and the suppliant is not to be held to be negligence, he nevertheless should have stopped his car or reduced the speed of the same when blinded by the lights of the suppliant's vehicle, so that he could have stopped upon danger arising.

I therefore find that the fault or negligence of the operator of the respondent's vehicle contributed to the damages suffered by the suppliant to the degree of twenty per cent.

The pleadings of all parties, including the particulars thereof, shall be deemed to have been amended in so far as necessary for the purpose of determining the questions in controversy between them.

As to damages. No claims have been made for damage to the vehicles of the respondent or the third party.

The suppliant, by his petition, claimed $900 for the loss of his vehicle, and at the trial, a motion was made pursuant to notice, and granted, amending his petition by adding a claim for $20 for towing the damaged vehicle, and a further claim of $5.00 per week for rental of another vehicle, to be used in place of the one lost, for an indefinite period of time.

It was established that the suppliant purchased the motor vehicle in question late in the year 1950 at a price of $1,000, that it was in exceptionally good condition at that time as well as at the time of the accident in October, 1952, and that the cost of parts and the labour of installing them would have exceeded the market value of the car when repaired.

The dealer who sold the car to the suppliant valued it at $850 at the time of the accident. The vehicle filled the needs of the suppliant; he evidently had no desire to accept the prevailing market price for a used car of that type and I assess this item of his claim at $800.

The wreck of the suppliant's car had not been sold and witnesses varied in their estimates of value from $25 to $75. I fix the same at $50.

The claim for $20 for towage was not questioned and will be included in the damage suffered by the suppliant.

As to the suppliant's claim for monies paid for hire of a car in place of the one destroyed, counsel submitted no amount based on a definite period, but asked the Court to

fix such an amount. A claim for loss of use of a vehicle for a reasonable period of time pending its repair, or pending the acquisition of another vehicle to replace it, will be allowed in a proper case, but a plaintiff is bound to take all reasonable steps to mitigate the amount of his damages.

Eight weeks should have been sufficient time within which the suppliant could have obtained another car to replace the one lost, and I fix that item of his claim at $40.

The loss suffered by the suppliant was therefore:—

One 1939 Plymouth Sedan	$ 850.00	
Less value of wreck	50.00	
		800.00
Paid for towing wreck		20.00
Eight weeks' loss of use of car at $5.00 per week		40.00
Total		$ 860.00

These damages will be apportioned as follows:—

Amount of damages apportioned to and to be borne by the Suppliant, 30 per cent of $860.00		$ 258.00
Amount of damages apportioned to the Third Party, 50 per cent of $860.00	430.00	
Amount of damages apportioned to the Respondent, 20 per cent of $860.00	172.00	
		602.00
Total		$ 860.00

As to costs. At common law:—

> The King (and any person suing to his use) shall neither pay, nor receive costs: for besides that he is not included under the general words of these statutes, (those named) as it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them. 3 Blackstone's Commentaries, 390 to 400.

Lord Advocate of Scotland v. *Lord Douglas* (1); *Smith* v. *The Earl of Stair* (2).

This rule was not, however, completely applicable to proceedings in Chancery, where the Attorney-General received costs where he had been made a defendant in respect of legacies given to charities; and even where he was made a defendant in respect of the immediate rights of the Crown in cases of intestacy. Robertson on Civil Proceedings by and against the Crown, p. 621.

(1) (1842) 9 Cl. & F. 173 at 212. (2) (1849) 9 H.L.C. 807 at 809.

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In *A. G.* v. *The Earl of Ashburnham* (1), Leach, V.C. said that:—

> Although the Attorney-General, suing in discharge of his public duty, could never be made to pay costs in a Court of Equity, and that he was, therefore, obliged to name a relator in matters of charity, yet it is not the rule of a Court of Equity that he can not receive costs.

This statement was confirmed by Lord Langdale, M.R. in *A.-G.* v. *London Corporation* (2), but in the same case on appeal (3) Lord Cottenham, L.C. said:—

> It is perfectly true that justice requires that the rule which has been so often acted upon, and so generally received as an axiom, should not be lost sight of, and nothing would be more unjust than in a contest in which the Attorney-General could not be made to pay costs, that he should be, under any circumstances, entitled to receive costs, for it is not putting the parties at all upon equal terms.

And at page 273:—

> I have consulted with the best authorities upon the subject, and we are all of opinion that it would be well to consider, not as a rule without exception (because it is always matter of discussion to a certain extent), but as a general rule, that the principle that the Attorney-General never receives nor pays costs, may be modified in this way; namely, that the Attorney-General never receives costs in a contest in which he could have been called upon to pay them had he been a private individual.

In 1855 the Crown Suits Act (18 & 19 Vict. ch. 90) was enacted which by sections 1 and 2 provided in effect for the payment of costs to and by the Crown as between subject and subject in certain legal proceedings instituted before any court by or on behalf of the Crown, such costs to be recoverable by the Attorney-General or Lord Advocate on behalf of the Crown, and for a defendant's costs if judgment should be given against the Crown.

In *The Leda* (4), Doctor Lushington gave the practice with reference to costs against the Crown in the Courts of Common Law, Equity and Admiralty and in the Ecclesiastical Courts before and after 18 and 19 Vict. ch. 90. This statute was followed by others including the Petitions of Right Act 1860 (23 & 24 Vict. ch. 34) which provided for costs payable to and by the Crown.

Rules 260 and 261 of this Court provide in effect that costs may be awarded against the Crown and that the costs of and incidental to all proceedings in the Court shall be

(1) (1823) 1 Sim. & S. 394 at 397.
(2) (1849) 12 Beav. 171 at 178.
(3) (1850) 2 Mac. & G. 247 at 271.
(4) (1863) Br. & L. 19.

in the discretion of the Court or a Judge and Rule 239 which provides for costs upon third party notice is as follows:—

239. The Court or a Judge may decide all questions of costs, as between a third party and any other parties to the action, and may order any one or more to pay the costs of any other, or others, or give such direction as to the costs as the justice of the case may require.

It has been the practice of the Court that a person in the position of a plaintiff who succeeds against the Crown in an action for damages based on negligence is entitled to his full costs irrespective of the fact that it may have been determined that he was to some degree at fault or negligent. But I have been unable to find any evidence of an established practice with regard to third party proceedings in which the Crown has claimed contribution, as distinguished from indemnity, and in which the damages have been caused or contributed to by the fault or neglect of the Crown and a third party in different degrees.

The respondent has asked for the costs of the third party proceedings against the third party. But it has been determined that the operator of the respondent's vehicle contributed to the damages suffered by the suppliant to the degree of twenty per cent and that the third party contributed to the same in the degree of fifty per cent.

It would seem unjust for the third party to pay the full third party costs of a party partly at fault and if an individual were in the position of the respondent it would in all probability be directed that he should pay some portion of the costs of the third party proceedings. Applying the principle laid down by Lord Cottenham in *A.-G.* v. *London Corporation* to the effect that "the Attorney-General never receives costs in a contest in which he could have been called upon to pay them had he been a private individual" it would appear to be just in the circumstances to direct that the respondent shall bear some portion of the third party proceedings.

The degrees at which the operator of the respondent's vehicle and the third party were at fault being twenty per cent and fifty per cent respectively, the respondent will bear two-sevenths and the third party five-sevenths of the third party proceedings.

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The suppliant is entitled to recover from the respondent the sum of $602, being part of the relief sought by his petition of right herein, of which sum the third party will contribute to the respondent the sum of $430; the suppliant will have his costs and the third party will contribute to the respondent fifty per cent of the same and, in addition thereto, the third party will pay to the respondent five-sevenths of the costs of the third party proceedings.

Judgment accordingly.

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Mar. 8

BETWEEN:

JOHN T. IVEY .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Damages—The Exchequer Court Act R.S.C. 1952, c. 98, s. 31—The Highway Traffic Act R.S.O. 1950, c. 167, s. 61(1) —Claim barred by provincial law relating to prescription and limitation of actions—"Damages occasioned by a motor vehicle".

Suppliant's motor boat resting on blocks and a trailer and supported by props was standing on dry ground about ten or fifteen feet from the highway. Respondent's servant while acting within the scope of his duties or employment damaged the motor boat through the negligent operation of a motor vehicle owned by respondent. Suppliant brought his petition of right to recover from respondent the damage sustained. The damage was sustained beyond twelve months prior to the date when the petition of right was filed.

Held: That the claim of suppliant is barred by The Exchequer Court Act, R.S.C. 1952, c. 98, s. 31 and The Highway Traffic Act, R.S.O. 1950, c. 167, s. 61(1).

2. That the words in The Highway Traffic Act "occasioned by a motor vehicle" are not to be restricted so that they do not cover the damages sustained by suppliant.

PETITION OF RIGHT by suppliant seeking damages from the Crown for injury to his motor boat through the alleged negligent operation of a motor vehicle by a servant of respondent acting within the scope of his duties or employment.

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

John G. McGarry, Q.C. for suppliant.

A. W. Winter for respondent.

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

POTTER J. now (March 8, 1954) delivered the following judgment:

This is a petition of right within the Petition of Right Act, chapter 158, R.S.C. 1927, now chapter 210, R.S.C. 1952, by which the suppliant, John T. Ivey, prays that he be granted damages for damage allegedly caused to his motor boat *Stealaway Too* by the negligent operation of a motor vehicle owned by the Crown and driven by Gunner James Young of the Royal Canadian Artillery, a servant of the Crown, while acting within the scope of his duties or employment.

On the evening of the 19th day of March, 1951, the 25th Medium Regiment of the Royal Canadian Artillery (Reserve), having its headquarters at the armouries at Simcoe in the County of Norfolk, in the Province of Ontario, was to hold one of its weekly parades and Captain W. J. Metcalfe of that regiment, whose duty it was, issued a Transport Work Ticket to Gunner Driver James Young of the same unit, authorizing him to use a 15-cwt. vehicle of the Crown to transport a number of the personnel of the regiment from their homes to the said armouries.

Young, in the course of his duty, picked up a gunner James Noble and proceeded with him to the home of Ivan Reid on River Drive of Port Dover in the said County, about eight miles from Simcoe, to pick up his son, a member of the regiment. The Reid home adjoined the cottage property of the suppliant on which was hauled out or stored his motor boat *Stealaway Too*.

The boat, which was twenty seven feet in length with a beam of eleven feet, was supported by trailer wheels under her stern and blocks under her bow. On one side, at least, there were shores or props set obliquely against the sides of the boat with the lower ends braced in the earth. The boat was standing, bow toward the road, and about ten to fifteen

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feet from the same. A tarpaulin which covered her deck and accommodations hung down over her sides to about her water line.

According to the evidence of Noble, he was riding in the front seat of the vehicle with gunner James Young, and when gunner Reid got in, he, Reid, sat in the rear. Young then drove the vehicle part way round a circular driveway, stopped and backed a short distance when a slight bump was felt and Young said that he had backed into a boat.

Ivan Reid, father of gunner Reid, who was in his house with the doors and windows closed, said that he heard a crash shortly after his son left the house.

The suppliant stated that on Good Friday, March 23, he visited his cottage property and discovered that the tarpaulin covering his boat had been torn, that there was a hole in her starboard side above the chime, about two feet above the ground and another in her gunwale, where the deck met the side and near to, but above the hole first described and according to the evidence of another witness, about six feet from the ground.

The Crown admitted liability for the damage done to the gunwale of the suppliant's boat, but denied liability for the damage done at or near the chime, for the reason that, according to the construction of the vehicle in question and the flare of the boat's side, it would have been impossible for any part of the vehicle to have touched the boat at that place.

It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a Court to act upon. Any conclusion short of certainty may be miscalled conjecture or surmise, but Courts, like individuals, habitually act upon a balance of probabilities.

Per Lord Loreburn in *Richard Evans and Company* v. *Astley* (1) which was adopted by Duff J. in *Grand Trunk Railway Company* v. *Griffith* (2).

Broadly speaking in civil proceedings the burden of proof being upon a party to establish a given allegation of fact, the party on whom the burden lies is not called upon to establish his allegation in a fashion so rigorous as to leave no room for doubt in the mind of the tribunal with

(1) [1911] A.C. 674 at 678. (2) (1911) 45 S.C.R. 380 at 387.

whom the decision rests. It is, generally speaking, sufficient if he has produced such a preponderance of evidence as to show that the conclusion he seeks to establish is substantially the most probable of the possible views of the facts. This proposition is referred to by Mr. Justice Willes in *Cooper* v. *Slade,* 6 H.L. CAS. 746, in these words 'The elementary proposition that in civil cases the preponderance of probability may constitute sufficient ground for a verdict.'

Duff, C.J. in *Clark* v. *The King* (1).

This principle was acted on in several cases arising out of fires allegedly set by railway locomotives and in which it was either proved that a fire started shortly after a locomotive passed or that a fire was known to have been set by a locomotive in one place and later another fire broke out some distance away. See *Young* v. *C.P.R.* (2), per Turgeon, J.A.; *Armour* v. *Marshall* (3), and *C.P.R. v. Kerr* (4), per Idington, J.

I find therefore that the damage done to the suppliant's boat both at or above the chime and at or on the gunwale on the starboard side, was caused by the operation of the respondent's vehicle on the occasion alleged.

As to damages. The evidence established that what the suppliant called "temporary repairs" were made by a local boat builder at a cost of $106.15 shortly after the damage was done; that the repair work could be seen from the inside; that the boat "looked very well"; was seaworthy and that he had operated her during the following seasons.

The suppliant had purchased the boat in the year 1950 for $4,900 which he at that time considered somewhat less than her market value. He said that boats of that type had increased in value and, at the time of the trial, it had a market value of about $6,000. He was, however, unable to estimate her market value immediately before the accident.

Captain V. J. Green, who was called by the suppliant, stated that he had been engaged in the inspection of hulls and the assessing of damages to the same and cargoes for a number of years. He examined the boat after the repairs were made, and said that the rule generally applied by him was to estimate the damage in such a case to be one-third of the market value of the craft at the time the damage was

(1) (1921) 61 S.C.R. 608 at 616.
(2) [1931] 2 D.L.R. 968 at 972.
(3) (1910) 15 W.L.R. 173, 3 Sask. L.R. 394.
(4) (1913) 49 S.C.R. 33 at 36.

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done and, assuming that the suppliant's boat was worth $4,500 at the time of the accident, the boat thereby was reduced in value by $1,500.

Other witnesses called by the suppliant with regard to damages, had no opinion of the value of the boat before the damage was done or had no experience with that type of craft.

G. E. Black, called by the respondent, was a foreman in the employ of a boat building company at Hamilton, Ontario, and had inspected the boat shortly before giving evidence. He stated that he had had considerable experience in valuing boats and that he knew the one owned by the suppliant. He expressed the opinion that the depreciation of the boat due to the accident was the amount of the cost of repairs—by which he must have meant to be immediately after the accident and before the repairs were made, or, in other words, that there was no depreciation after the repairs were made.

The question for the Court is—What was the loss to the suppliant as a result of the respondent's vehicle striking his boat? He paid $106.15 to have her repaired; he had her painted for which no cost was given, but which he said he would not have done but for the accident. The suppliant had a boat in which he evidently took considerable pride and used with care and he probably would have refused a large sum before agreeing to permit such damage to be done to it, but that of course is not the measure to be applied. If there had been reliable evidence of the market value of the boat immediately before the accident and of its market value immediately after she was repaired and painted, the difference between such values, if any, would have been the loss suffered by the suppliant. But such evidence was evidently not available.

It is obvious, however, that the boat was not, following the accident and the repairs, as attractive to a purchaser as she formerly was, and after considering all the evidence I fix the depreciation at the sum of $500. The loss suffered by the suppliant was therefore $606.15.

There is, however, another question to be considered.

The respondent has pleaded that the petition of right was not brought within a period of twelve months from the time when the suppliant is alleged to have sustained the damages complained of, as required by section 32 of the Exchequer Court Act, chapter 34, R.S.C. 1927, (now section 31 of chapter 98, R.S.C. 1952), and section 61 of The Highway Traffic Act, chapter 167, R.S.O. 1950, and that the suppliant is therefore barred from bringing these proceedings.

Section 31 of chapter 98, R.S.C. 1952, the Exchequer Court Act, is as follows:—

31. Subject to any act of the Parliament of Canada, the laws relating to prescription and limitation of actions in force in any province between subject and subject apply to any proceedings against the Crown in respect of a cause of action arising in such province.

Section 61, subsection (1) of The Highway Traffic Act, chapter 167, R.S.O. 1950, is as follows:—

61. (1) Subject to subsections (2) and (3) no action shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of twelve months from the time when the damages were sustained.

Subsection (2) deals with limitation in case of death and subsection (3) deals with counterclaims and third party proceedings and are not relevant to this action.

A number of cases in which Courts were required to interpret statutes of limitation were cited by counsel for the suppliant and respondent and taking them in chronological order, they were:—

Winnipeg Electric Railway Company v. *Aitken* (1). In this case, the Manitoba Railway Act, by section 116, provided that:—

All suits for indemnity for any damage or injury sustained by reason of the construction or operation of the railway shall be instituted within twelve months next after the time of such supposed damage sustained, or if there be continuation of damages then within twelve months next after the doing or committing of such damage ceases, and not afterwards.

The respondent was injured whilst a passenger on the appellant's railway by reason of one of the company's cars running behind that in which he was being carried negligently colliding with the said car. The question to be decided was did this section embrace within its purview an

(1) (1921) 63 S.C.R. 586.

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action brought by a passenger for default in the company's duties arising out of a contract of carriage or from the acceptance of the passenger for carriage?

It was argued that an action by a passenger for the negligent working of the railway was excluded from the operation of this section, but it was held by the Court, Idington and Cassels (*ad hoc*) JJ. dissenting, that the limitation prescribed applied to an action brought by a railway passenger claiming indemnity for injury so sustained.

B.C. Electric Railway Company Limited v. *Pribble* (1). In this case, section 60 of the Consolidated Railway Company's Act, 1896 (B.C.) chapter 55, provided in part as follows:—

> All actions or suits for indemnity for any damage or injuries sustained by reason of the tramway or railway, or the works or operations of the company, shall be commenced within six months next after the time when such supposed damage is sustained, . . .

The respondent was a passenger on the appellant's street railway in the City of Vancouver, who had paid her fare and reached the end of her journey, when she fell from the car as she was getting off the step at the rear of it. There was a hole in the step which ought not to have been there and her heel caught in it, so that, as she moved on, her foot was held. She recovered $5,000 on the trial, although the action was brought more than six months after she had received her injuries. It was held by the Privy Council that the action was barred by the provisions of the section and that the application of the same could not be limited (*a*) to cases incapable of being pleaded as breaches of contract; (*b*) to cases of injuries occasioned without negligence; or (*c*) by excluding cases where injuries were occasioned by the operation and user of the railway in the course of its business. *Winnipeg Electric Railway Company* v. *Aitken* (*supra*) was approved.

In *Harris* v. *Yellow Cab Limited* (2), the Court had to interpret what was then section 54 of chapter 48 of The Highway Traffic Act, 1923 (Ontario), which provided in part that:—

> No action shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of six months from the time when the damages were sustained.

(1) [1926] A.C. 466; [1926] 2 D.L.R. 865.

(2) [1926] 3 D.L.R. 254.

The plaintiff, a passenger in one of the defendant company's motor cabs, had her thumb broken by the driver employed by the defendant negligently closing the cab door upon it, and the defendant pleaded that it was not liable because the action was commenced more than six months after the injury. It was held by the Appellate Division of the Ontario Supreme Court, Magee, J.A. dissenting, that the limitation was only intended to apply to damages caused by violations of The Highway Traffic Act and did not include a negligent act such as that on which the action was based.

In *Hughes* v. *Watkins & Company* (1), an automobile truck owned by the defendant, in charge of an employee, loaded with bales of straw which projected about eight inches beyond the platform of the truck, was being driven along a street in Toronto, and at the intersection of the same with another street turned northwardly following closely the curb at the north-east corner of the two streets. The plaintiff, who was coming eastwardly along the northern side of one street stepped on the curb on the east side, when she was struck by a projecting bale of straw and injured.

The action was not brought until after the expiration of six months from the time when the plaintiff's damages were sustained and the defendant pleaded section 54 of The Highway Traffic Act, 1923, chapter 48, (Ontario) to the action.

Magee, J.A. said at page 179:—

> I cannot convince myself that section 54 refers to less than what it says, that is, to damages occasioned by a motor vehicle—or that it would not apply to collisions or negligence on a farmer's driveway just as much as to the same on a highway.

And he held that the action was barred.

Hodgins, J.A. considered the contention of plaintiff's counsel to the effect that it was a common law cause of action for damages which still existed notwithstanding that the damages were occasioned by a motor vehicle on the highway and he said at page 181:—

> The elements or onus of proof may be different, but the action is nevertheless one for damages for an act of negligence which is common to both causes of action. But, as the negligence in this case falls clearly

(1) [1928] 2 D.L.R. 176.

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within the prohibition of the statute, the cause of the damage being reckless and negligent driving of a motor vehicle on the highway, I find it impossible to bring myself to think that any such cause of action as at common law can survive or exist apart from that exigible under the statute.

Commenting on *Harris* v. *Yellow Cab Limited* (*supra*), he said at pages 179 and 180:—

> In the case of *Harris* v. *Yellow Cab Ltd.*, it was decided that the accident, which was due to the negligence of a chauffeur in shutting the car door by which the passenger's hand was injured, was not occasioned by a motor vehicle on the highway within the purview of the statute. Consequently the limitation s. 54 did not bar it.

The other members of the Court agreed and the appeal of the plaintiff was dismissed.

In *Hubbell* v. *Oshawa* (1), the facts were that a nurse in the employ of the Board of Health of the Municipality of Oshawa while in the course of her duties and using her own car, for the use of which she was paid by the Board, visited the Water Works of the Corporation and while off the highway, negligently backed her car into the plaintiff seriously injuring him. The defence of the limitation section of The Highway Traffic Act, section 53(1) of chapter 251, R.S.O. 1927, was pleaded. But it was held, that as the accident had not occurred upon a highway, that the section did not apply.

In *Dufferin Paving & Crushed Stone Limited* v. *Anger* (2), the plaintiff sued the defendant for damages for injury to the plaintiff's dwelling house in the City of Toronto through the vibrations caused by the operation of the defendant's cement-mixing motor trucks in the street in front of the house. Permission had been granted (pursuant to authority under The Highway Traffic Act) by the City of Toronto to the defendant to operate the said trucks on said street (otherwise the use of such trucks was prohibited by the Act). Practically all the damage was sustained beyond twelve months prior to the date when the action was brought and the defendant corporation pleaded section 53 of The Highway Traffic Act, R.S.O. 1927, chapter 251, as amended by 1930 chapter 48, section 11 and which was as follows:—

> 53. (1) Subject to the provisions of subsections (2) and (3) no action shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of twelve months from the time when the damages were sustained.

(1) [1932] O.W.R. 103. (2) [1939] S.C.R. 174.

McTague J., before whom the action was tried decided that:—

> The right to damages here is a common law right. I cannot find that it is within the purview of The Highway Traffic Act. Therefore I am of opinion that this defence has no application. sub nom. *Anger et al* v. *Northern Construction Co. et al* [1938] 4 D.L.R. at 76.

The Ontario Court of Appeal evidently accepted the decision of McTague, J. on this point for his judgment was affirmed on appeal without reference to the same (1).

With the exception of the words "the provision of" section 53(1) of chapter 251, R.S.O. 1927, as amended, was in exactly the same language as section 61(1) of chapter 167, R.S.O. 1950, and section 41*a* as added by 1930, chapter 48, section 10, with reference to the responsibility of the owner of a motor vehicle causing damage and section 42 with respect to the onus of disproving negligence were similar in their terms to sections 50 and 51 of the Act now in force.

The Supreme Court of Canada reviewed *Winnipeg Electric Railway Company* v. *Aitken; B. C. Electric Railway Company Limited* v. *Pribble; Harris* v. *Yellow Cab Limited* and *Hughes* v. *Watkins and Company* already cited but applied the rule of construction of statutes to the effect that:—

> If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver.

and held that the action was barred by the statute.

> Taken by themselves the words used in this subsection are clear and unambiguous. In terms they are not limited to circumstances where damages are occasioned by a motor vehicle on a highway; they are not restricted to cases where damages are caused by a motor vehicle coming in contact with a person or thing; they do not state that the damages must have been occasioned by negligence in the operation of a motor vehicle or by reason of the violation of any of the provisions of the Act. It is contended on behalf of the respondents that the subsection must be construed in a narrower sense and that such a claim as the present, based as it is on an alleged nuisance at common law, is not within its purview.

Per Kerwin, J. at page 189.

And at pages 189 and 190 Kerwin, J. said:—

> Attention is called to the liability for loss or damage section and the onus section (now ss. 47 and 48 of the current Highway Traffic Act, R.S.O. 1937, c. 288) and it is argued that s-s. (1) to s. 53, should be construed as limited to damages occasioned by contact with a motor vehicle itself in its use of the highway for the purpose of traffic. . . .

(1) [1938] 4 D.L.R. 738.

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Further at page 190:—

> Upon consideration, I am unable to agree with these contentions.
>
> Considerable difference of opinion upon the question has existed in the Courts of Ontario, but upon the whole I am forced to the conclusion that there is nothing in the Act to warrant restricting the plain words of the subsection, 'occasioned by a motor vehicle,' so that they do not cover the damages sustained by the present respondents.

As the action was not commenced within the time limited by the section, the appeal of the defendant corporation was allowed with costs.

In *Allard* v. *Charbonneau* (1), an action for damages resulting from a motor car collision which occurred on a provincial highway in the province of Quebec was brought in the province of Ontario, the place of residence of the defendant, but more than one year after the date of the accident and section 61(1) of The Highway Traffic Act, R.S.O. 1950, chapter 167, was pleaded by the defendant.

Following the judgment of the Supreme Court of Canada in *Dufferin Paving & Crushed Stone Limited* v. *Anger* (2), it was held that the action was barred by the provisions of the statute.

The Legislature of the Province of Ontario must be taken to have had cognizance of the interpretations given the various statutes of limitation by the various Courts of Canada and in particular of the differences of opinion existing in the Courts of Ontario prior to the revision of the statutes in 1937. The Legislature nevertheless by section 60(1) of chapter 288 of the R.S.O. 1937, reenacted without change section 53(1) of chapter 251, R.S.O. 1927, as amended by 1930, chapter 48, section 11. No amendment was made to section 60(1) of chapter 288, R.S.O. 1937, following the decision of the Supreme Court of Canada in *Dufferin Paving & Crushed Stone Limited* v. *Anger* (*supra*) on December 9, 1939, and when the statutes were revised in 1950, these provisions were reenacted as section 61(1) of chapter 167, R.S.O. 1950.

It must therefore follow that the Legislature did not intend to restrict or extend the meaning of the section under consideration.

(1) [1953] 2 D.L.R. 442.

(2) [1939] S.C.R. 174; [1940] 1 D.L.R. 1.

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The damage to the suppliant's motor boat by the respondant's motor vehicle was done on the 19th day of March, 1951, and the petition of right, by which these proceedings were commenced was dated the 10th day of November and was filed the 13th day of November, 1952, more than twelve months from the time when the damages were sustained.

For the above reasons the Court has no other alternative than to hold that the claim of the suppliant is barred by the provisions of section 61(1) of chapter 167, R.S.O. 1950, and section 32 of the Exchequer Court Act, R.S.C. 1927, now section 31 of chapter 98, R.S.C. 1952.

The suppliant is therefore not entitled to recover anything from the respondent and the respondent will recover against the suppliant her costs to be taxed.

Judgment accordingly.

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Nov. 16, 17

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BETWEEN:

CANADA STEAMSHIP LINES LIMITED ..... APPELLANT;

AND

THE SHIP *MARIA PAOLINA G* AND HER OWNERS ..... RESPONDENTS.

Shipping—Collision—Excessive speed in dense fog—Narrow channels—Articles 16 and 25 of the International Rules—Course of another vessel within a danger zone not yet ascertained—Safety of navigation—Radar aid to navigation only—Common sense duty to avoid danger of collision—Excessive speed in fog being a statutory fault onus on vessel violating the rule to prove speed not the sole or a contributory cause of collision—Appeal from District Judge in Admiralty dismissed.

On June 10, 1950, at about 5.28 p.m., the *St. Lawrence,* owned by the appellant, while in the entrance of the Saguenay River and proceeding up to Tadoussac, came into collision, port to port, with the *Maria Paolina G.* which was proceeding down to the St. Lawrence River. There was a dense fog at the time and an ebb tide running in a westerly direction with a force of about 1·5 to 4 knots.

Alleging that the *Maria Paolina G.* was on the wrong side of the fairway and that this was the cause of the collision, appellant took an action for its damages resulting from the collision. The action was dismissed by the District Judge in Admiralty for the Quebec Admiralty District. On appeal the Court found that the *St. Lawrence* was at fault by

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proceeding at an excessive speed at the time of the collision and that the *Maria Paolina G.* was on her right side of the fairway and committed no fault.

Held: That it is a general rule of navigation when in fog that a vessel hearing a fog signal apparently forward of her beam should slow down her engines and navigate cautiously until the course of the other vessel within the danger zone has been ascertained. The contention that it was impossible because of the danger to the passengers, crew and vessel and would not have been good seamanship is unsound. *The Campania* (1899-1904) 9 Aspinall's Rep. 151 referred to.

2. That radar is an aid to navigation and does not override the principles of article 16 of the International Rules. *Puget Sound Navigation Co.* v. *The Ship Dagmar Salem* [1950] Ex. C.R. 284 referred to and followed.

3. That in a dense fog and knowing the difficulties of navigation on the Saguenay River, one would, as an ordinary prudent person, stop until the direction of the approaching vessel was ascertained and there remain until the danger which might arise had passed. *The Oceanic* (1899-1904) 9 Aspinall's Rep. 378 referred to and followed.

4. That excessive speed in fog being a statutory fault, a vessel violating this rule has to prove that her speed was not the sole or a contributory cause of the collision.

APPEAL from the judgment of the District Judge in Admiralty for the Quebec Admiralty District.

The appeal was heard before the Honourable Mr. Justice Fournier at Montreal.

R. C. Holden, Q.C. for appellant.

Lucien Beauregard, Q.C. for respondents.

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

FOURNIER J. now (March 8, 1954) delivered the following judgment:

This is an appeal from the judgment of the District Judge in Admiralty for the Quebec Admiralty District, whereby in an action for damages arising out of a collision between the ss. *St. Lawrence,* owned by the appellant, and the ss. *Maria Paolina G,* owned by the defendants, he dismissed the plaintiff's action and maintained the defendant's cross-action.

The facts of the collision in dispute are hereinafter summarized. The *St. Lawrence* is a steel twin screw passenger steamship, 329·8 feet in length, 68·1 feet in beam, of 6,828 gross tons, engaged in a regular service between Montreal

and Bagotville. Her full speed was 14 knots, her half speed 7 or 8 knots and her slow speed 3 or 4 knots. The *Maria Paolina G* is a steel single screw steamship, 416 feet in length, 56·10½ feet in beam, of 7,166 gross tons, registered at the port of Genova and engaged in the carrier trade. Her full speed was 10½ knots, her half speed 8 knots and her slow speed 5 knots.

The former was in the entrance of the Saguenay River proceeding up river from Prince Shoal lightship No. 7 to the harbour of Tadoussac and the latter was proceeding down river from Port Alfred to the St. Lawrence River. The critical time runs from 5.13 p.m. (Eastern Daylight Saving Time) on June 10, 1950. At that moment the *St. Lawrence* was abeam the lightship and about 1,000 feet off. She was fitted with triple expansion engines of 4,500 h.p. nominal and equipped with a radar detector screen. There was little or no wind but there was a dense fog and the tide was ebb of a force of about 1·5 to 4 knots. She was making about 14 knots through the water with an ebb tide that may have brought her speed down to approximately 12 knots over land. Her engines were on stand by and she was sounding fog signals regularly at intervals of less than two minutes.

After rounding the lightship she steered a course of 298° magnetic for about one minute and then put on a course of 300° magnetic. All her courses are magnetic. Her witnesses estimate that she proceeded on that course for about 8 minutes. She received a radio telephone message from Pointe Noire warning that a large vessel was downward bound and sounding fog signals infrequently and then her course was altered to 305° for three or four minutes. While on that course, the chief officer, who was at the radar, reported that he saw the other vessel nearing the course line of the *St. Lawrence*. Then another alteration of the course to 310° was made for two minutes and a third alteration to 315° some short time before the collision. The times on these different courses are estimates. As to her speed, she proceeded at full speed till her course was 310°, then reduced to half speed and again reduced to slow speed when on the 315° course. After the collision she continued on course 300° to Tadoussac harbour at full speed.

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The *Maria Paolina G* was proceeding downward on the Saguenay when at 5.20 p.m., approaching Pointe Noire, the weather became misty. The order "stand by" was given on the engines and a lookout was sent forward. Fog signals of one prolonged blast were given regularly at intervals of less than two minutes. The radar was not working properly though it had been repaired a short time previous. At 5.25 Pointe Noire Lower Range Light was abeam and the distance off shore was between 200 and 1,000 feet. Her course was set at 97° true. The fog became dense and her engines were ordered slow. At practically the same moment a long blast was heard forward and her engines were stopped and the vessel navigated with caution. When the lookout shouted that there was a ship ahead, seven or eight minutes later, her engines were put full speed astern and the helm ordered hard astarboard. She was struck by the *St. Lawrence* on her port bow while she was practically still in the water.

Two questions are to be determined. First, did the *Maria Paolina G* come across to her port side of the narrow channel contrary to article 25 of the International Rules of the Road relating to navigation in narrow channels? This article reads as follows:

> 25. In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

Second, did the *St. Lawrence* contravene article 16 of the International Rules which enacts:

> 16. Every vessel shall, in a fog, mist, falling snow or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.
>
> A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over.

To establish the fact that the *Maria Paolina G* was on her wrong side of the fairway at the time of the collision, three groups of persons were brought forward as witnesses, namely, members of the personnel of the *St. Lawrence,* two passengers travelling on the *Maria Paolina G* and persons who heard the noise of the collision from or close to shore or who from the shore saw the *Maria Paolina G* after the fog lifted.

The evidence of the captain, the chief officer and the pilot is to the effect that after passing Prince Shoal Lightship No. 7 the course of the *St. Lawrence* was changed four times from 5.13 to 5.27. The reason given for changing from 298° to 300° was to take the course she ordinarily followed at ebb tide going up to Tadoussac. Three other alterations were made in the course to try to keep clear of the oncoming vessel, whose direction seemed on the radar screen to close in on the course of the *St. Lawrence.*

The times of the different courses being estimates, it is quite difficult to pin-point the exact spot or location where the collision occurred. No record was kept of the times and of the different alterations of courses. Furthermore the effect of ebb tide on the two vessels is a matter of conjecture and the evidence on that point is far from conclusive. My assessors tell me that at the time of the collision, the water being low the current and tide had little effect on the vessels. The direction of the ebb tide and current was east-west and would not alter their courses to any appreciable degree.

After the collision, no bearings or soundings were taken; she proceeded at full speed in a dense fog on course 300° to the harbour of Tadoussac. There is no evidence that the radar apparatus was used after the collision. It seems to me that the conclusions arrived at by the officers of the ss. *St. Lawrence* as to the place of the collision are based on estimates as to speed, times and courses (magnetic).

One fact seems positive and not contradicted: the course followed by the *Maria Paolina G* from a point close to Pointe Noire was 97° true and no alteration to this course was made from there on to the place of the collision. When the *Maria Paolina G* was first seen on the radar screen on the port bow of the *St. Lawrence* she was at a distance of two miles, the latter being then between buoys 95B and 94B and on a course of 300°. The *Maria Paolina G* had her engines slow at the time and the *St. Lawrence* was proceeding at full speed. The time lapse from the moment the *Maria Paolina G* was seen and the time of the collision was seven or eight minutes. How the two vessels covered this distance is important.

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The *St. Lawrence,* for three or four minutes, was at full speed, till her course was changed to 310°, then at half speed for two minutes or so and for the remaining time before the collision her engines had been ordered at low speed. Fog sounds were heard a few times by both vessels. In my mind she was proceeding fast at the moment of the impact. During all this time and up to the moment the chief officer lost sight of the *Maria Paolina G,* she was seen on the radar screen on the port side of the *St. Lawrence.* The *Maria Paolina G* during the same time had her engines stopped and was moving with the tide and current on her course of 97° true.

As to the other witnesses (Black and McCall) who were passengers on the *Maria Paolina G,* I have read their evidence carefully. They speak of what they saw two hours after the collision when the *Maria Paolina G* was laying at anchor at the end of 800 feet of chain and their evidence was given a year after the event. They give an estimate of the distance from the *Maria Paolina G* to certain rocks on the shore and they say that she was not in mid-channel but close to the shore. At the time of the collision her anchor was dropped and approximately 800 feet of her chain came out. Her length is over 450 feet and she swung around owing to the tide and current. If the collision had taken place where the plaintiff's witnesses contend, I am convinced that she would have grounded. I have given a lot of thought to their testimony without being able to convince myself that I should give it more weight than to the evidence of the witnesses called on behalf of the *Maria Paolina G* who claim that she was on her right side of the fairway.

As to the witnesses that were on shore or in small craft and heard the noise of the collision, they certainly could not judge the position of the vessels at the moment of the impact. Very little reliance can be placed on their evidence on account of the vagaries of sounds in fog. The others saw the *Maria Paolina G* after the fog lifted, at a distance of more than two miles. Their evidence in my mind should not carry very much weight, it being most difficult to establish the location of a body at that distance.

My assessors, basing their opinion on the evidence of the plaintiff's witnesses, who said that all her courses were magnetic, conclude that her course was on her wrong side of the channel. On the other hand, the course 97° true followed by the *Maria Paolina G* would have kept her on her right side of the fairway even taking into consideration the effect of the ebb tide and current on her course. I agree with these conclusions.

As to the second question—Did the *St. Lawrence* contravene article 16 of the International Rules relating to navigation in a thick fog?

The evidence is to the effect that the *St. Lawrence* approached the entrance of the Saguenay River at full speed and in a dense fog. She proceeded at full speed, though the lookout heard and reported a fog signal ahead, until the other vessel was seen on her radar screen at a distance of two miles. Then her engines were ordered half speed and then slow shortly before the collision. The *Maria Paolina G* was lost sight of on the radar screen when she was at about one half mile distant. According to the pilot's evidence, at that moment he was and had been for some time fearful of a collision because he could not ascertain the position of the *Maria Paolina G*. He was listening for a fog sound so as to locate her course and position. That is when he changed the *St. Lawrence's* course to 315°. A few moments afterwards the *Maria Paolina G* was seen by the lookout at a distance of approximately 100 feet and the collision occurred. According to the engine room log, the order "slow" was given at 5.27 and opposite this entry, on the same line, is written the word "collision". I agree with the learned trial judge that the collision took place about one minute after the order slow. It would seem to me that the two vessels were nearly on the same course and that the collision of port to port would indicate that the *Maria Paolina G*, on hearing a fog signal right ahead, ordered her engines full speed astern and hard astarboard.

Proceeding at full speed in a thick fog, having heard a fog sound ahead without knowing exactly the course followed by the *Maria Paolina G*, even apprehensive of a collision after having lost the downbound vessel on her radar screen, was not in my mind good seamanship. I have

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the impression that they relied on their knowledge of the Saguenay River and proceeded on their journey as if there were no fog. Even after the collision they continued on their regular course without stopping or taking soundings or bearings or inquiring about the other ship. I believe they were negligent and careless by proceeding at full speed under the circumstances.

On the other hand, the *Maria Paolina G* at about 5.20 sent a lookout forward. A "stand by" order was given and fog signals were given at regular intervals because the weather was becoming misty. At Pointe Noire her course was set at 97° true and was not thereafter altered. At 5.27 her engines were ordered slow and immediately after stop, upon hearing a fog signal ahead.

When her lookout reported a vessel ahead the engines were ordered full speed astern and the helmsman received the order hard astarboard.

It is a general rule of navigation that in fog, when by one vessel the course of another within a danger zone is not yet ascertained, and hearing a fog signal apparently forward of her beam, she should slow down her engines. I believe that under the circumstances the moment the fog signal ahead was heard she should have slowed down her engines and navigated cautiously. The answer that it was impossible because of the danger to the passengers, crew and vessel and would not have been good seamanship is not a valid one. Those in charge knew this route well. If it was as dangerous as described they should have slowed or stopped when they were advised that a large vessel was downbound. Another vessel which came into the river a short time later stopped and awaited the lifting of the fog before proceeding. If the channel was not dangerous they could have stopped at any time and resumed their journey after satisfying themselves that no danger existed. This point is dealt with in the case of *The Campania* (1), where Barnes J. says (p. 154):

> The 16th article is imperative, and I believe it would be most dangerous, having regard to the traffic to be met with everywhere, especially near to the coasts, in crowded waters, if this contention were to be upheld. It is based on the supposed necessity of the *Campania* to keep the speed at which she was going for the safety of her own navigation. But I am advised that this basis is unsound.

(1) (1899-1904) 9 Aspinall's Rep., 151.

The fog was so dense that vessels could only be seen at 100 or 200 feet. Actually they were seen by each other at about those distances. True the *St. Lawrence* had the help of her radar, but radar is an aid to navigation and does not override the principles of article 16.

In *Puget Sound Navigation Co.* v. *The Ship "Dagmar Salem"* (1) it was held:

That radar is an aid to navigation only and does not override the general principles applicable to navigation in fog, the first of which is moderate speed and the second, great care.

I am not convinced that the radar apparatus was properly used. It is known that objects are lost sight of on the screen at quite a distance, as it happened in this instance. Knowing that fact, it would seem that good seamanship indicated that in those circumstances they should not have relied on the fact that they had those facilities to justify them of proceeding in thick fog at an excessive speed and not stopping her engines when the fog signal of the other vessel was heard.

Though there may be some doubt as to the application to this case of the "Regulations for the River St. Lawrence from Father Point to Victoria Bridge at Montreal", I am of the view that it is a good directive to those navigating the Saguenay River. It reads:

12. All vessels navigating against the current, or tide on each occasion, before meeting another vessel at sharp turns, narrow passages, or where the navigation is intricate, shall stop, then, if necessary, come to a position of safety below or above the point of danger, and there remain until the channel is clear.

It would seem that in a dense fog and knowing the difficulties of the navigation on the Saguenay River, one would as an ordinary prudent person conform to such wise counsel. This is what past decisions in similar cases would indicate.

In re *"The Oceanic"* (2) the Lord Chancellor (Halsbury) at p. 380 says:

. . . Now the rule appears to me to be a very intelligible and common sense one to avoid danger to vessels in the navigation of the seas and the question what is or is not a moderate speed in a fog must depend in a great measure whether the fog is slight or dense, and whether there is an opportunity of seeing the near approach of a ship so as to know what can be done or ought to be done by nautical skill to

(1) [1950] Ex. C.R., 284. (2) (1899-1904) Aspinall's Rep., 378.

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avoid collision. Apart from any rule, one would think that where it was known that two bodies were approaching, and that there was no absolute means of knowing the direction in which they were coming and the danger which was to be avoided, the common sense thing would be to stop until the direction was ascertained, and also whether it was possible to avoid the serious danger which might arise . . .

Excessive speed in fog being a statutory fault, a vessel violating this rule has to prove that her speed was not the or one of the causes of the collision.

In *Griffin on Collision,* pp. 312 et seq., it is stated:

> Since the obligation to go at moderate speed in fog is statutory, a vessel violating the rule has the burden of showing that her speed could not have contributed to the collision,—a burden which can rarely be sustained.

Very little was said by the plaintiff concerning the speed of the *S.S. St. Lawrence* and no serious explanation is given of this way of proceeding in dangerous waters and in a dense fog. The only attempt made by the plaintiff was to try to establish that the *Maria Paolina G* was on her wrong side of the channel and that this was the only cause of the collision. In my view she failed on that point. On the other hand, the evidence is to the effect that she proceeded at full speed up to a minute or so before the impact. Even if her engines were ordered at half speed and then at low speed, her speed was reduced gradually and it is my opinion that she was going at an excessive speed at the time of the collision.

It seems to me that the *St. Lawrence* did not know the position of the *Maria Paolina G* from the time she passed Prince Shoal Lightship No. 7 to the time of the collision. True, she had the help of a radar apparatus but she does not seem to have taken the bearings of the oncoming vessel. She saw it at all times on the port side but could not ascertain if both vessels could proceed without risk of collision. Her pilot admitted so much in his testimony. Her duty under the circumstances was to follow the dictates of article 16. In my view she failed to do so and those in charge were negligent in their seamanship. On the other hand I find that those in charge of the *Maria Paolina G* acted in conformity with the rules of good seamanship and committed no fault.

There is no doubt in my mind that had the ss. *St. Lawrence* conformed to rule 16 the collision would have been avoided. In the circumstances I find that she was responsible for the collision and the damages resulting therefrom.

Therefore the appeal is dismissed with costs.

Judgment accordingly.

Reasons for judgment of Smith, D.J.A.:—

This case relates to a collision between the ss. *St. Lawrence,* owned by the plaintiff company, and the ss. *Maria Paolina G.* which occurred in dense fog on the 10th of June 1950, at approximately 5.30 p.m. (Eastern Daylight Saving Time) in the entrance to the Saguenay River. (Plaintiff's Preliminary Act fixes the time of the collision at about 5.29, while according to the defendant's Preliminary Act it took place at 5.35 or 5.36).

In the plaintiff's Preliminary Act the collision is stated to have occurred on the North side of the channel in the vicinity of Red Can Buoy 94½B, whereas according to the defendants' Preliminary Act it took place at a point South Easterly from Pointe Noire at a distance of 1½ and 1¾ miles from Pointe Noire, whose approximate bearing was 271° true.

The ss. *St. Lawrence* is a steel twin screw passenger steamship of the Port of Montreal of 6,328 tons gross and 3,650 tons net registered, 329·8 feet in length and 68·1 feet in beam fitted with triple expansion engines of 4,500 h.p. nominal and manned by a crew of 195 all told. At the time of the collision she was carrying 400 passengers. Full speed for the ss. *St. Lawrence* (128 revolutions) was 14 knots; half speed (63 revolutions) 7 or 8 knots, slow 3 or 4 knots.

The *Maria Paolina G,* is a steel single crew steamship registered at the Port of Genova of 7,166 gross tons and 4,312 tons net registered, 416 feet in length and 56·10½ feet in beam equipped with triple expansion engines of 2,500 h.p. and manned by a crew of 35 all told and owned by Sicieta Gestioni Esercizio G.E.N. Full speed for the *Maria Paolina G.* was 10 or 10½ knots; half speed 7 or 8 knots.

The case for the plaintiff is that the ss. *St. Lawrence* in the course of a regular voyage from Montreal to Bagotville via Tadoussac was in the entrance of the Saguenay River proceeding on her usual course from Prince Shoal Lightship No. 7 to the Harbour of Tadoussac. There was little or no wind but the weather was foggy and the tide was ebb of a force of about 4 to 5 knots. The engines of the ss. *St. Lawrence* were on "stand by" and she was sounding fog signals regularly at intervals of less than two minutes, a good lookout being kept.

It is alleged that in these circumstances, the ss. *St. Lawrence* observed in the radar a downbound vessel which later proved to be the *Maria Paolina G.* distant about two miles and bearing a little on the port bow. The course of the ss. *St. Lawrence* was thereupon altered 5° to starboard to take her further to her right side of the channel. Subsequently, the course of the ss. *St. Lawrence* was twice altered an additional 5° to starboard and she was taken as close to her right side of the channel as it was possible for her to go and her engines were reduced to slow speed but the *Maria Paolina G.* improperly came across to the north side of the chan-

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nel and with her stem and port bow struck the port side of the ss. *St. Lawrence* causing serious damage.

On the other hand the case for the *Maria Paolina G.* is that she was in the Saguenay River, with a licenced pilot on board, in the course of a voyage from Port Alfred bound for Lisbon and Mediterranean Ports with a general cargo of 9,964 tons, her draft being 27·07 feet forward and 28·03 feet aft, fresh water. At about 5.20 p.m. while the *Maria Paolina G.* was approaching Pointe Noire the weather became misty and although visibility was still comparatively good, the order "Stand By" was given on the engines and a lookout was sent forward and fog signals of one prolonged blast were thereafter given regularly at intervals of less than two minutes and a sharp look-out kept. The radar was ordered into operation, but was reported not to be working properly. In fact, the screen became blank and remained so, although the radar had been repaired before the vessel left Montreal. At 17.25 Pointe Noire Lower Range Light was abeam and the distance off shore was approximately 200 feet. At this moment the course of the vessel was set at 95° by gyro compass to make 97° true, there being an error in the gyro compass of 2° low. It is alleged that shortly afterwards the fog became dense and the engines were ordered to slow; at the same time a prolonged blast was heard forward of the beam, whereupon the engines of the *Maria Paolina G.* were stopped and the vessel navgated with caution. About eight minutes thereafter the look-out shouted there was a ship ahead and the engines were put full speed astern and the helm ordered hard astarboard, but the ss. *St. Lawrence* was seen coming forward at great speed and she struck the port bow of the *Maria Paolina G.* with her own port side, the *Maria Paolina G.* being then stopped in the water.

Although other faults were alleged against the defendants, the one upon which the plaintiff appeared to rely and the only one which any serious attempt was made to prove, was that of having contravened Rule 25.

Some attempt was made, it is true, to establish that the *Maria Paolina G.* failed to give the regulation fog signals. The evidence of her own officers, however, is that from the time she entered the fog bank, almost immediately after passing Pointe Noire, until the time of the collision, fog signals were given at regular intervals of less than two minutes. It is true that several witnesses heard on behalf of the plaintiff testified respectively to having heard only one, two, three and four fog signals from the *Maria Paolina G.* The evidence on this point has however been carefully considered, and I am satisfied that the proof does not justify the conclusion that the defendant vessel failed to comply with the rule as to fog signals. That the *Maria Paolina G.* gave some fog signals is admitted by the plaintiff's own witnesses. The evidence of those on board the *Maria Paolina G.* is that they were given regularly and at intervals of one minute. The vagaries which characterize the carriage of sound over water and particularly in heavy fog are well known and moreover were testified to, and there is also—the possibility that some of her fog signals synchronized with some given by the ss. *St. Lawrence.* The positive evidence of those in charge of the *Maria Paolina G.* that the statutory fog signals were given, corroborated by the testimony of the various witnesses heard on behalf of the plaintiff to the effect that, at least, some fog signals were heard from the *Maria Paolina G.* must be accepted.

Moreover, even if the proof did establish the failure of the *Maria Paolina G.* to comply with the rule requiring fog signals at regular intervals, such failure would not have been a fault contributing to the accident since it is admitted that the ss. *St. Lawrence* heard the first fog signal of the *Maria Paolina G.* while she was still at a distance of two miles and thereafter the ss. *St. Lawrence* was fully aware of her presence and followed her course superficially, at least, until she no longer became visible in the radar. The plaintiff's case can therefore be properly said to rest upon the allegation that the *Maria Paolina G.* contravened Rule 25 of the International Rules which reads as follows:

Article 25.—In narrow channels every steam vessel shall when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

The burden of proving this allegation rested upon the plaintiff and it must first of all be determined whether it has been established that the *Maria Paolina G.* was on her wrong side of the channel when the collision occurred.

In an effort to discharge this burden the plaintiff:

1o. Attempted *to fix the point* at which the collision occurred at a spot close to the north side;

2o. Sought to establish that the ss. *St. Lawrence* was at all times on *her right side of* the channel;

3o. Attempted to prove that after the collision the *Mario Paolina G. was seen* to be *anchored* close to the north side of the channel in the vicinity of Red Can Buoy *94½B.*

The only direct evidence that the collision occurred at the point contended for by the Plaintiff and marked on the chart produced as Exhibit P-10 is the testimony of Captain Simard.

There is however no proof that either bearings or soundings were taken by those on board the ss. *St. Lawrence* immediately prior to or following the collision. The evidence is rather that no thought was at the time given to the matter of establishing the position of the collision, insofar as the ss. *St. Lawrence* is concerned. In fact, following the accident the ss. *St. Lawrence* proceeded at full speed to the pier at Tadoussac. The record does not disclose any direct proof of the statement of Captain Simard to the effect that the collision occurred at the point marked on Exhibit P-10, and I am completely in the dark as to how this witness was able to state that it did.

As to the plaintiff's attempt to establish that the ss. *St. Lawrence* was at all times on her side of the channel, plaintiff's position would seem to be little better. Captain Simard and the witness Savard, who acted as pilot on the ss. *St. Lawrence,* testified in detail as to the courses steered by the ss. *St. Lawrence* after she rounded the Lightship and the respective times during which she held to these various courses. My assessors have plotted the course of the ss. *St. Lawrence* on the basis of the testimony of these witnesses, and I am advised that her said course would have taken her slightly to her left of the center of the channel and that, on this course, it would have been impossible for her to be at or near the point which the plaintiff fixes as being the point where the collision took place.

Finally, the plaintiff endeavoured to establish that the collision occurred on the North side of the channel by bringing a number of persons who testified to having been on the pier at Tadoussac and to having seen the *Maria Paolina G.* upwards of an hour and a half after the collision when the fog had partially lifted and while she was still at anchor. The purport of this evidence is that the *Maria Paolina G.* appeared to be anchored North of the center of the channel and in the vicinity of Red Can Buoy 94½ B.

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The Court is satisfied, however, that no great reliance can be placed upon this evidence as proof of the point at which the collision actually occurred. These witnesses on the pier at Tadoussac approximately two miles distant from the said vessel, the fog being only partially lifted, were obviously not in the best position to determine exactly how the vessels lay in relation to the center of the channel. The Court is satisfied that looking at the *Maria Paolina G.* at that distance and from that angle, it would have been almost impossible for these witnesses to determine whether she was in the exact center of the channel or 400 to 500 feet on either side of the center. Moreover, at the time the *Maria Paolina G.* was riding at anchor at the end of 800 feet of chain.

Two fishermen who were in small boats close to the North shore at the time of the collision and distant respectively ½ and ¾ of a mile from Red Can Buoy 94½ B, testified to having heard the collision. They, of course, saw nothing. While these witnesses expressed the opinion that the collision took place near the North side of the channel, their testimony on this point must also be considered with caution. The fact that it is most difficult to judge of distance travelled by sound over water, particularly in a fog, is common knowledge.

The channel at the point where these witnesses were is a little over 3,000 feet wide and I am convinced that they, under the conditions then prevailing, could not be relied upon to calculate with any degree of accuracy whether the collision occurred 1,000 or 1,500 distant from the North side of the channel.

The plaintiff also called as witnesses two persons who were passengers on the *Maria Paolina G.* Messrs. Black and McCall. These young men testified that after the fog had lifted and while the vessel was still anchored, she was not more than 1,000 feet from rocks which, it is claimed, were on the North side of the channel. Here again there was considerable uncertainty and diversity in the testimony of these witnesses as the distances testified to and moreover it must again be borne in mind that the *Maria Paolina G.* was at that time riding at anchor with some 800 feet of chain out and was probably swinging towards the North side of the center of the channel, the tide not having yet turned. Moreover had the *Maria Paolina G.* come to anchor at the point where, according to the plaintiff the collision occurred, with 800 feet of chain out and had she been swinging to starboard, as the proof shows she did for some time after coming to anchor, she would almost certainly have gone ashore.

So much for the attempt on the part of the plaintiff to establish that the collision took place to the North of the center of the channel and that it was caused by defendants' breach of Rule 25.

On the other hand, there is positive evidence that the *Maria Paolina G.* was not on the wrong side of the channel. The testimony of those in charge of her navigation is that she passed Pointe Noire at a distance of approximately 200 feet and set a course of 97° true. The light-keeper at Pointe Noire estimated that the vessel was nearer mid-channel or approximately 1,000 feet off shore as she passed the point.

In any event the testimony of the officers of the *Maria Paolina G.* is that she kept on a course of 97° true from the time she passed Pointe Noire to the moment of the collision, and the assessors advise me that on this bearing whether the point of departure is taken as being 200 or 1,000 feet from Point Noire the vessel would have been to her right of the center of the channel throughout its entire length.

Moreover, the proof, which on this point is uncontradicted, is that at the moment of the impact the port anchor of the *Maria Paolina G.* was dislodged or broke loose and went to the bottom with the result that the vessel was brought up at the end of some 800 feet of chain and continued to ride at anchor for approximately one hour and a half until the fog had sufficiently lifted to permit her to proceed.

It was doubtless the noise of the anchor chain running out which was described by the witness Hovington, one of the fishermen above referred to.

There is furthermore the evidence of those in charge of the *Maria Paolina G.* (and there is nothing to discredit this testimony) that after the fog had lifted and before the anchor was hove up bearings were taken by which the position of the *Maria Paolina G.* was established as being that indicated by Captain Martinolli on the Chart Exhibit D-6.

It was argued on behalf of the plaintiff that the bearings taken by the *Maria Paolina G.* after the fog had lifted tended to support the plaintiff's contention that the collision occurred on the North side of the channel because before the said bearings were taken, the *Maria Paolina G.* must have swung on the rising tide and been then riding at the end of 800 feet of chain and heading towards Tadoussac. This is not the proof. According to the book of "Information concerning the River St. Lawrence Ship Channel" issued by the Department of Transport for the year 1950, low water at Tadoussac on the evening of June 10, 1950 came at 6.16 o'clock (D.S.T.) and the turn of the tide two hours later at 8.16 o'clock. The proof is that bearings were taken by the *Maria Paolina G.* at 7.45 p.m. The evidence is that the tide had just commenced to change as the anchor was heaved and Captain Martinolli is definite in stating that at the moment when said bearings were taken the tide had not yet changed and the *Maria Paolina G.* was still heading towards Pointe Noire.

In the view which I take the plaintiff has failed to establish that the *Maria Paolina G.* was at any time prior to the collision on the wrong side of the channel. On the contrary, I find that the collision occurred close to the center of the said channel and near the point indicated on Exhibit D-6. It is approximately at this point that the course 97° which was being steered by the *Maria Paolina G.* meets the course on which, according to the evidence of Captain Simard, the ss. *St. Lawrence* was being steered.

The proof establishes that on reaching the fog bank just after passing Pointe Noire, the engines of the *Maria Paolina G.* were stopped and that they remained stopped for a period of eight minutes and until the time the ss. *St. Lawrence* was sighted when they were put full astern.

It appears that those in charge of the *Maria Paolina G.* were fully aware of the danger of collision in the dense fog and that they adopted those measures which, in the circumstances, were demanded by prudence and good seamanship as well as by the rules of navigation. Such is the advice of the assessors and with it I completely concur.

There was no other course of action which the *Maria Paolina G.* could have followed with safety. In view of the dangerous reefs to starboard and the strong set of the current in that direction she could not have anchored. She stopped her engines and proceeded with the current holding her course of 97° true. There is no proof that she came off this course. To the contrary, there is the evidence of those in charge of her navigation who continued to check her course and

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who say she did not. The proof indicates that the speed through the water of the *Maria Paolina G.* at the moment of the collision, must have been low since otherwise her anchor chain would almost certainly have parted as soon as it caught and held.

I accordingly conclude that the plaintiff has failed to establish that that *Maria Paolina G.* was guilty of any fault or negligence contributing to the collision.

It remains to deal with the cross-action taken by the owners of the *Maria Paolina G.* charging the ss. *St. Lawrence,* in particular, with the contravention of Art. 16 of the International Rule which reads as follows:—

Art. 16—Every vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

The proof is that the ss. *St. Lawrence* approached the entrance to the Saguenay River at full speed and in a dense fog.

According to her story she passed to her right of and about 1,000 feet from Prince Shoal Lightship No. 7 at 5.13 p.m., her engines being on "stand by" and steered a course at 298° magnetic for about one minute after which her course was altered to 300°. Shortly thereafter she received a radio-telephone message from Pointe Noire warning that a large vessel was downward bound and was sounding fog signals infrequently.

After the ss. *St. Lawrence* had run for several minutes on course 300° the mate reported seeing a boat in the radar slightly off the port bow and about 2 miles distant and well to the North side of the channel. About the same time a fog signal was heard from this vessel. At this moment the ss. *St. Lawrence,* according to the testimony of those navigating her, was about mid-channel between Buoys 94 B. and 95 B. (at the point marked X on Exhibit P-10). On hearing the fog signal of the other vessel the course of the ss. *St. Lawrence* was altered 5° to starboard which put her on course 305. She continued on course 305 for two or three minutes when the mate reported that the other vessel was approaching the course of the ss. *St. Lawrence* and was then about one mile distant. The course of the ss. *St. Lawrence* was thereupon altered another 5° to starboard to put her on course 310, she having been on course 305 for a matter of about four minutes.

The ss. *St. Lawrence* continued still at full speed on course 310 for about two minutes when the mate reported that the vessel continued to approach the course of the ss. *St. Lawrence.* The engines of the ss. *St. Lawrence* were then put at half speed; the time being 5.26 according to the engine room log. At the same time the course of the ss. *St. Lawrence* was altered another 5° to starboard which put her on course 315 and almost immediately thereafter the mate reported that both the other vessel and Red Can Buoy 94½ B. which had been seen on the starboard bow, had ceased to be visible in the radar. At the same time the mate warned that the other vessel could not be far off. Upon this the engines of the ss. *St. Lawrence* were ordered at slow and the collision appears to have followed almost immediately.

The testimony is not satisfactory as to how long an interval there was between the time the order slow was given and the collision. The estimates vary from one to three minutes. According to the engine room log, however, the order slow was given at 5.27 and opposite

this entry on the same line is written the word "collision". Having regard to the evidence as to the speed at which the ss. *St. Lawrence* was going at the time of the collision and to the entries in her engine room log, I accept the estimate of one minute as being the approximate time which elapsed between the signal for slow and the collision.

The *Maria Paolina G.* was seen for the first time by those on board the ss. *St. Lawrence* as she emerged from the fog at the distance of 75 to 100 feet. Although some of the crew of the ss. *St. Lawrence* testified that the *Maria Paolina G.* appeared to come at the ss. *St. Lawrence* at an angle of 30 to 40°, I am satisfied that this is an error which is understandable having regard to the excitement of the moment and the fact that they had merely a glimpse of the *Maria Paolina G.* before the collision occurred. I find that just prior to the collision the vessels were approaching each other almost, if not actually, head on.

While the evidence does not establish that the course of the *Maria Paolina G.* was altered immediately prior to the collision, I am inclined to believe that her helm may have been put hard astarboard a matter of seconds before the ss. *St. Lawrence* was actually sighted and this for the reason that there is evidence that those on board the *Maria Paolina G.* heard a fog signal ahead and very close, just prior to sighting the ss. *St. Lawrence.*

I am, however, satisfied that the *Maria Paolina G.* had only started to swing to starboard when the collision took place and it was this light swing which accounts for the fact that the ss. *St. Lawrence* came into only glancing contact with the curve of the port bow of the *Maria Paolina G.* with the fortunate result that much greater and more disastrous loss or damage was averted.

In such circumstances, I have no doubt that those in charge of the ss. *St. Lawrence* were gravely negligent in continuing at the speed and in the manner they did in contravention of Article 16 which required them to navigate with caution if not to stop and await the lifting of the fog. The conditions were surely such as to bring her within the application of the well recognized rule stated in Marsden's Collision at Sea. 9th Edit. page 347, as follows:— "In a fog so dense that it is not possible for a ship to see others in time to avoid them, she is not justified in being under way at all".

Moreover there is rule 12 of the Regulations for the River St. Lawrence from Father Point to Montreal which provides that:

12.—All vessels navigating against the current or tide on each occasion before meeting another vessel at sharp turns, narrow passages or where the navigation is intricate, shall stop, then if necessary, come to a position of safety below or above the point of danger and there remain until the channel is clear.

It was argued on behalf of the plaintiff that this rule is without application, because the collision did not take place in the St. Lawrence River. It is however unnecessary for the purposes of the recent case to decide whether or not the collision took place in the navigable waters of St. Lawrence within the meaning of the said regulations since Counsel for plaintiff in their notes and authorities admit that the entrance to the Saguenay, at least up to Buoy 94 B. on the North side of the channel, does form part of the "navigable waters of the River St. Lawrence lying between Victoria Bridge at Montreal and Father Point".

It has already been noted that prior to reaching Buoy 94 B. the ss. *St. Lawrence* had received a radio-telephone message warning her that a large vessel was down bound and had also heard the

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Maria Paolina's fog signal. The ss. *St. Lawrence* was at that time in waters to which Rule extended and the nature of the channel and the conditions then prevailing made the rule applicable.

In this connection it is not out of place to note that the ss. *St. Lawrence* was not carrying a licenced pilot and that the plaintiff's employee Savard, who was acting as pilot, admitted at the hearing that he was completely ignorant concerning Rule 12 as well as the other regulations.

It should also be noted that the ss. *St. Lawrence* was being navigated exclusively by her magnetic compass without reference to her gyro compass. In such circumstances, I have doubt as to the accuracy and reliability of much of the testimony of those who were in charge of the ss. *St. Lawrence* as to the courses steered and the positions testified to.

It is common knowledge that the magnetic compass is subject to variation due to the influence of metallic objects in its vicinity and it is, at least, noteworthy that at the time of the collision the ss. *St. Lawrence* had several automobiles stowed on the freight deck immediately below the navigating bridge and there is no evidence that this was considered or that any attempt was made to verify the correctness of the magnetic compass by checking it with the gyro compass. In this connection it is noteworthy that, according to the chart, this is an area of magnetic disturbance.

In any event, and regardless of these considerations, there is no evidence to show that the ss. *St. Lawrence,* at the time she received the radio-telephone message warning her that a large vessel was down bound or even later when she heard the first fog signal of the *Maria Paolina G.* would not have stopped and come to a position of safety below the point of danger. This is the course which was adopted by the Dominion Coal vessel which entered the mouth of the River shortly after the ss. *St. Lawrence,* and it was the course which was made obligatory by Rule 12 and by the dictates of prudence and good seamanship.

In any case whether or not the circumstances were such as to require the ss. *St. Lawrence* to stop until such time as the fog had lifted, she was guilty of grave fault in proceeding at the speed she did. She was required by Rule 16 of the International Rules and by ordinary prudence to first ascertain the position of the *Maria Paolina G.* and having done so to navigate with extreme caution having regard to the dense fog, the nature of the channel, and the fact that she had warning of the approach of the *Maria Paolina G.* In the circumstances, I have no doubt that the ss. *St. Lawrence* had not "ascertained" the position of the *Maria Paolina G.* or established that she could proceed without risk of collision within the meaning of Article 16.

Nippon Yusen Kaisha [1935] A.C. 177:

> In order that the position of a vessel whose fog signal is heard by another vessel may be "ascertained" within the meaning of Article 16, *"the vessel must be known* by the other vessel to be in such a position that both vessels can proceed without risk of collision. An *inference* as to the vessel's position based upon the direction from which the fog whistle was heard, the probable course she is taking and the improbability of her crossing the fairway in a fog is not an ascertainment justifying a disregard of the precautions enjoined by the Article.

See also *Rover Shipping Co. Ltd.* v. *The Ship Kaipaki* et al [1948] Ex. C.R. 507.

Those in charge of the ss. *St. Lawrence* therefore not only failed to take reasonable steps to satisfy themselves that they could proceed with safety but they ignored and failed to act on clear notice of the

existence of risk of collision, a risk which Savard, who was acting as pilot, admits he realized for some time prior to sighting the *Maria Paolina G.*

Marden's Collisions at Sea, 9th Edit. page 351:

Risk of collision can, where circumstances permit, be ascertained by watching the compass bearing of an approaching vessel. If the bearing does not appreciable change, such risk should be deemed to exist.

In this connection the following excerpt from the testimony of Savard, who acted as pilot on the ss. *St. Lawrence* is noteworthy:

D. Par conséquence, vous saviez parfaitement qu'il y avait un navire qui descendait?—R. Oui, monsieur.

D. Aviez-vous eu des moments d'anxiété en aucun temps, avez-vous pensé qu'il pouvait y avoir danger d'abordage?—R. Non, je n'y ai pas pensé. J'ai pensé qu'il pouvait y avoir danger d'abordage quand le bâtiment est venu assez proche.

D. Est-ce à dire quand vous l'avez vu?—R. Avant de le voir.

D. Vous avez cru qu'il y avait danger dabordage. Qu'est-ce qui vous a fait penser qu'il y avait danger d'abordage?—R. Parce qu'on avait le rapport par le radar que le bâtiment ne changeait pas de position. Alors il fallait naviguer en conséquence pour clairer le bâtiment. C'est ce que j'ai fait.

D. Savez-vous si on vous a rapporté à un moment donné qu'on avait perdu de vue le navire?—R. Oui, ils m'ont rapporté qu'on l'avait perdu.

D. C'est à ce moment là que vous avez cru qu'il pouvait y avoir danger d'abordage?—R. Là, j'ai cru qu'il y avait danger et j'ai crains avant cela.

It appears therefore not only that the relative positions of the vessels and the courses which they were following indicated risk of collision, but that although its risk was realized by those navigating the ss. *St. Lawrence* they took no reasonable steps to avert the danger. Although the *Maria Paolina G.* was seen in the radar to be following a converging course which was bringing her closer and closer to that of the ss. *St. Lawrence,* and although at a given moment she ceased to be visible in the radar there is no proof that actual bearings of the *Maria Paolina G.* were taken and all that was done was to alter her course 5° to starboard apparently on the chance that she would thereby clear the *Maria Paolina G.* I find that this was a flagrant contravention of Rule 16 and that it was the failure of the ss. *St. Lawrence* to comply with the requirements of this rule which alone brought about the collision. If the speed of the ss. *St. Lawrence* had even been reduced to a speed not exceeding that required to give her steerage way, it is probable that, with the *Maria Paolina G.* proceeding slowly as she was, it would have been possible for the vessels to avert the collision notwithstanding the fact the visibility was almost zero. As it was, neither those in charge of the *Maria Paolina G.,* who had acted with prudence and good seamanship, nor those navigating the ss. *St. Lawrence* were able to take any effective steps to avoid the collision because of the excessive speed of the ss. *St. Lawrence,* which I am satisfied was from 8 to 10 knots, if not more, at the moment of the collision. In so finding I not only take into consideration the testimony of those on board the *Maria Paolina G.* but also the fact that, according to her own engine room log, she continued at full speed up to within a minute of the collision.

From the testimony of Captain Simard I derive the impression that those in charge of the ss. *St. Lawrence* were lulled into a false sense of security by the mere fact that the vessel was equipped with radar. There is some evidence, however, to indicate that the reliability and usefulness of radar in such narrow waters are subject to limitation. Moreover of what value is such equipment unless an efficient and

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intelligent use of it is made. Reference to the following excerpt from the judgment rendered by the Honourable Mr. Justice Pilcher in *The Southport*, 82 L.L.L.R. 862 at page 871 would seem to be pertinent:

> The point raised by Mr. Hayward, namely, that a speed in fog which would in ordinary circumstances be regarded as excessive may still be a moderate speed under Art. 16 of the Regulations for a vessel fitted with radar, will, no doubt, have to be decided in some future case. The proposition seems to me to involve at least an assumption that a vessel fitted with radar in fact makes proper use of the apparatus with which she is fitted.
>
> I am satisfied in the present case that those on board *The Southport* who were concerned with the radar apparatus made no proper use of their instrument, and are consequently not entitled to rely upon the fact that they had facilities, of which they made no intelligent use, to excuse them for proceeding in thick fog at a speed which, but for the existence of such facilities, would have been highly excessive.

In the result I find the ss. *St. Lawrence* solely responsible for the said collision and the damages resulting therefrom for the reason that she failed to comply with the requirements of Art. 16.

The assessors concur in all findings upon matters on which it was within their province to advise.

There will therefore be judgment dismissing plaintiff's action and maintaining defendant's cross-action, the whole with costs and in the event that the parties fail to reach an agreement as to the amount of defendant's damages there will be a reference to the Registrar to fix same.

D.J.A.

Montreal, 5th May 1952.

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BETWEEN:

STOCK EXCHANGE BUILDING CORPORATION LIMITED ..... } APPELLANT;

AND

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

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97 ss. 5(b), 6(n), 62—Ruling No. 15—Minister's discretion under s. 5(b) relates only to allowance of rate of interest—Borrower-lender relationship essential to deductibility of interest under s. 5(b)—Interest on unpaid interest not deductible under s. 5(b)—No right in appellant to have depreciation allowances recast—Amount of depreciation allowance in discretion of Minister—Interest on borrowed capital deductible only to the extent that it was used in the business to earn the income.

By a deed of mortgage and trust the appellant conveyed its property to a trustee to secure the issue of $550,000 first mortgage bonds. The bonds carried interest at 6 per cent after as well as before maturity and after as well as before default and interest on overdue interest at the same rate. The bonds were sold to the public at $99 per $100 bond and the underwriters charged the appellant $9 per $100 bond for its services. Except for the first three years the appellant did not pay any interest on the bonds but in every year it deducted the interest payable including the interest on the interest, although unpaid, as a charge

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against its operating revenue. In assessing the appellant for 1946, 1947 and 1948 the Minister disallowed the deductions of the compound interest and also the deductions of the interest on 10 per cent of the face value of the bonds. The appellant appealed to the Income Tax Appeal Board which dismissed the appeals against the disallowance of the compound interest and the claim relating to depreciation but allowed it in respect of the disallowance of the deduction of the simple interest. From this decision the appellant appealed to this Court and the respondent cross-appealed.

Held: That the discretion vested by section 5(b) in the Minister relates only to the allowance of the rate of interest. When in the exercise of his discretion the Minister has determined the rate which he considers reasonable he has no further discretionary powers under the section.

2. That it is essential to the deductibility of interest under section 5(*b*) that it should be payable pursuant to a contract between a borrower and a lender, that is to say, a contract that establishes a *bona fide* borrower-lender relationship between the parties to it.
3. That the compound interest sought to be deducted by the appellant, being interest payable on the unpaid interest on the bonds, was not interest on borrowed capital used in the business to earn the income within the meaning of section 5(*b*).
4. That the appellant had no right to have its allowances in respect of depreciation reviewed from the beginning.
5. That what the Minister did prior to the years under review has no bearing on the correctness of his allowances of deductions for such years.
6. That the amount of the depreciation deduction allowance is in the discretion of the Minister and it is not for the Court to review the exercise of his discretion or to substitute its opinion for his. The Minister's allowance is not to be disturbed unless it can be shown that his discretion was wrongfully exercised.
7. That interest on borrowed capital is deductible under s. 5(*b*) only to the extent that it was used in the business to earn the income.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the President of the Court at Vancouver.

J. A. Clark Q.C. and *W. A. Craig* for appellant.

A. H. J. Swencisky and *T. Z. Boles* for respondent.

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

THE PRESIDENT now (March 11, 1954) delivered the following judgment:

The appellant herein appeals against the decision of the Income Tax Appeal Board, dated November 5, 1952, to the extent that it dismissed its appeals against its income tax

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assessments for 1946, 1947 and 1948 and appeals directly to this Court against its income tax assessment for 1945. On the other hand the respondent herein cross-appeals against the said decision to the extent that it allowed the appellant's appeals against the disallowance of certain simple interest.

I must say, at the outset, that the appeal against the assessment for 1945 cannot be entertained. The facts are that on April 4, 1950, the appellant appealed against the assessment to the Minister, that on November 24, 1951, the Minister gave his decision whereby he allowed a deduction of $300 for legal fees which he had previously disallowed on the assessment but otherwise affirmed it and that on December 21, 1951, the appellant gave notice of dissatisfaction. That is as far as the steps went. The Minister had not, at the date of the hearing, made any reply to the notice of dissatisfaction as required by section 62 of the Act. Since the making of a reply is one of the conditions precedent to there being a right of appeal to this Court it follows that the appeal is premature and that the Court has no jurisdiction to hear it. It must, therefore, be dismissed but the dismissal will be without costs and without prejudice to the appellant's right to appeal against the assessment when the necessary precedent steps have been taken.

There was agreement on certain facts. The appellant was incorporated under the laws of British Columbia on November 9, 1928, with an authorized capital of $500,000 divided into 2,500 preference shares and 2,500 common shares of the par value of $100 each and has its head office in Vancouver. It is the registered owner of a property in Vancouver on which there is a large building known as the Stock Exchange Building. By a deed of mortgage and trust, dated February 1, 1929, the appellant conveyed this property to the Toronto General Trusts Corporation as trustee for the bondholders to secure an issue of $550,000 first (closed) mortgage six per cent. fifteen year sinking fund gold bonds. The mortgage deed contained, *inter alia,* the following provisions:

> The Bonds shall bear the interest at the rate of six (6) per cent per annum (after as well as before maturity and after as well as before default and interest on overdue interest at the said rate) payable semi-annually on the first days of February and August in each year during the currency of the Bonds upon surrender of the coupons attached thereto.

Except for the first three years up to the end of 1931 the appellant did not pay the interest on these bonds when it came due. As at December 31, 1932, this interest was in arrears in the sum of $29,384.68. As at December 31, 1946, the arrears amounted to $449,151.93, as at December 31, 1947, $509,050.24 and as at December 31, 1948, $571,527.54. These arrears included compound interest, that is to say, interest on unpaid interest, computed in accordance with the terms of the deed of mortgage and trust. In its income tax returns the appellant claimed this interest, including the compound interest, as an exemption or deduction under section 5(*b*) of the Income War Tax Act, R.S.C. 1927, chapter 97, and its right to do so does not appear to have been challenged prior to 1944. But in assessing the appellant for 1945, 1946, 1947, and 1948 the Minister, as appears from notices of assessment, dated March 6, 1950, disallowed deductions of interest claimed by it in its returns in the amount of $24,361.28 for 1945, $27,602.27 for 1946, $31,040.71 for 1947 and $31,482.10 for 1948. In the assessment for 1948 the Minister also disallowed $901.57 in respect of the depreciation claimed by the appellant. The result of these disallowances showed taxable incomes in the hands of the appellant in each of the years in question instead of the losses reported by it in its returns.

On April 4, 1950, the appellant objected to each of the assessments on certain grounds, to which further reference will be made, and on November 24, 1951, the Minister notified the appellant as follows:

> The Honourable the Minister of National Revenue having reconsidered the assessments and having considered the facts and reasons set forth in the Notices of Objection hereby notifies the taxpayer of his intention to amend the assessment for the 1948 taxation year to disallow an amount of $3,099.52 claimed as a deduction from income in respect of bond discount which was incorrectly allowed on assessment and to reduce the income by an amount of $1,378.51 shown on Exhibit A of the taxpayer's financial statements and hereby confirms the assessments in other respects as having been made in accordance with the provisions of the Act and in particular on the ground that interest amounting to $27,602.27 in 1946, $31,040.71 in 1947 and $34,581.62 in 1948 is not interest on borrowed money used in the business to earn the income within the meaning of paragraph (*b*) of subsection (i) of Section 5 of the Act; that the Minister in his discretion under the provisions of paragraph (*n*) of subsection (1) of section 6 of the Act has allowed amounts of $8,026.20 in 1946, $8,041.20 in 1947 and $15,189.92 in 1948 as deductions from income in respect of depreciation.

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Certain other facts should also be stated. The bonds were issued by the appellant to the public at $99 for each $100 bond. The payment by the public was made to a firm of underwriters acting for the appellant which deducted $9 out of every $99 to cover its charges to the appellant for underwriting the bond issue, leaving it with a net 90 per cent of the face value of the bonds.

It should also be mentioned that the amount of $27,602.27 disallowed for 1946 included $24,395.87 of compound interest, that is to say, interest on unpaid interest, and also $3,206.40 of simple interest on $10 per $100 bond consisting of the $1 per $100 bond discount and the $9 per $100 bond paid to the underwriters. Similarly, the amount of $31,040.71 disallowed for 1947 included $27,834.31 of compound interest and $3,206.40 for simple interest on the $10 per $100 bond. The amount of $31,482.10 disallowed for 1948 was for compound interest to which the Minister added $3,099.52 as interest on what he called bond discount but was really interest on the $10 per $100 bond above referred to.

The appellant then appealed to the Income Tax Appeal Board and the appeal was heard by Mr. W. S. Fisher, Q.C. He dismissed the appeal against the disallowance of the deduction of the compound interest and the claim relating to depreciation but allowed it in respect of the disallowance of the deduction of the simple interest. It is from this decision that the appeal and cross-appeal are taken.

The appellant's main ground of appeal is that the Minister had no right to disallow the deduction of the compound interest that is to say, the interest on the unpaid interest on the bonds. This raises the question whether the interest on the interest on borrowed capital is deductible from what would otherwise be taxable income under section 5(*b*) of the Income War Tax Act, which reads as follows:

> 5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—
>
> (*b*) Such reasonable rate of interest on borrowed capital used in the business to earn the income as the Minister in his discretion may allow notwithstanding the rate of interest payable by the taxpayer, but to the extent that the interest payable by the taxpayer is in excess of the amount allowed by the Minister hereunder, it shall not be allowed as a deduction and the rate of interest allowed shall not in any case exceed the rate stipulated for in the bond, debenture, mortgage, note, agreement or other similar document, whether with or without security, by virtue of which the interest is payable;

While the section is not well drafted it is clear that the discretion vested by it in the Minister relates only to the allowance of the rate of interest. When in the exercise of his discretion the Minister has determined the rate which he considers reasonable he has no further discretionary powers under the section. But, of course, this does not mean that he has no other duties under it for he must determine in any case where the deduction of interest is claimed whether such deduction is permissible under the section. But such determination does not involve the exercise of discretion on his part.

In the present case there is no dispute about the rate of interest. It is to be assumed from the facts that the Minister has exercised his discretion in allowing the rate of six per cent. The only issue in this branch of the appeal is whether the Minister was right in holding that the section did not permit the deduction of the interest on the unpaid interest.

The argument of counsel for the appellant on this point may now be summarized. He submitted that interest charges have always been recognized as proper charges against operating revenues, that compound interest has been charged by the appellant and allowed by the Department in previous years, that there is no prohibition in section 6 of the Act against the deduction of compound interest, that the cost of earning the income of the appellant included compound interest, that there was no difference between compound interest and other interest, that the appellant had money on hand with which to pay the interest but that if it had done so it could not have paid its operating expenses and would have had to borrow money for such purposes, that, under the circumstances, the unpaid interest became borrowed capital just as if the interest had been paid and additional capital had been borrowed from the bondholders, that since the money that had not been paid for interest had been used to pay operating expenses the position really was that the money in question was money that belonged to the bondholders but was retained by the appellant and must, therefore, be regarded as capital borrowed from them and that since it had been used to pay the operating expenses it was borrowed capital used in the business to earn the income.

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There are several reasons for rejecting this argument. There is, of course, no merit in the submission that previously to the years in question the appellant charged interest on unpaid interest as an expense against its operating revenues and that this was allowed by the Department. The evidence on this point is that the deduction of the compound interest was not challenged until 1944 and that the first assessment in which it was disallowed was in that made for 1945. The action of the department in the past has no bearing on the question under review. If the deduction of the interest on the unpaid interest was not permissible under the section then the action of the Department in allowing it was not in accordance with the law. The practice of the Department cannot override the law.

Moreover, it is, I think, obvious that if it were not for section 5(*b*) interest on borrowed capital could not be deducted at all. Its deduction would be prohibited by section 6(*b*) of the Act as being a payment on account of capital. It is certainly not contemplated by section 5(*b*) that interest on borrowed capital may be regarded as an operating expense and deductible from operating revenues in the ordinary course of arriving at net profit or gain within the meaning of section 3 of the Act, for it is from "income" as defined in section 3 that the interest on borrowed capital is allowed to be deducted. Moreover, since the section permits the deduction of the specified interest from what would otherwise be taxable income the circumstances under which it may be deducted must be such as to come within its express terms. In *Lumbers* v. *Minister of National Revenue* (1) I expressed the rule governing the construction of an exempting provision of the Income War Tax Ast as follows:

> in respect of what would otherwise be taxable income in his hands a taxpayer cannot succeed in claiming an exemption from income tax unless his claim comes clearly within the provisions of some exempting section of the Income War Tax Act: he must show that every constituent element necessary to the exemption is present in his case and that every condition required by the exempting section has been complied with.

This rule has been consistently applied. To put it in another way, section 5(*b*) confers a benefit or a privilege on a taxpayer which is by way of exception and its ambit must not be extended to cover cases that do not come within its

(1) [1945] Ex. C.R. 202 at 211.

express terms. It is the letter of such an Act as the Income War Tax Act that governs: *vide Partington* v. *Attorney General* (1): *Tennant* v. *Smith* (2).

To bring the interest on the unpaid interest within the ambit of the exemption or deduction permitted by section 5(*b*) it must be shown that the unpaid interest on the bonds was itself borrowed capital used in the business to earn the income within the meaning of the section. That is to say, it must be shown that the unpaid interest was capital, that it was borrowed and that it was used in the business to earn the income. All these conditions must be met in order to make interest on it deductible. Counsel for the appellant contended vigorously that the unpaid interest was borrowed capital and that it had been used in the appellant's business to earn the income.

I do not agree. Certainly, the appellant never dealt with the unpaid interest as if it were capital. In every year, according to the evidence of Mr. A. D. Russell, the appellant's auditor, it charged the interest as it fell due, including the interest on the interest as it fell due, including the interest on the interest, although none of this was ever in fact paid, as an operating expense against its operating revenue. Indeed, it is fanciful to speak of the unpaid interest as capital of the appellant. In *Baymond Corporation Ltd.* v. *Minister of National Revenue* (3) I had occasion to consider the meaning of the word "capital" as used in section 5(*b*). I referred to the fact that the word is used in many senses and cited a statement in Lindley's law of Companies, 6th Edition, at page 543:

> The idea underlying the various meanings of the word capital in connection with a company is that of money obtained or to be obtained for the purpose of commencing or extending a company's business as distinguished from money earned in carrying on its business.

Later, I pointed out that a company may raise capital either by the sale of its shares or by borrowing on the issue of debentures or bonds and then said, at page 15:

> But there is an important difference between the share capital of a company and its borrowed capital: in respect of the latter the company owes a debt to its debenture or bondholders, whereas, in respect of the former, the liability of the company to its shareholders, whatever its nature may be, is clearly not that of debt.

(1) (1869) L.R. 4 H.L. 100 at 122. (2) [1892] A.C. 150 at 154.
(3) [1945] Ex. C.R. 11.

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Then I stated that this is the reason why section 5(*b*) confines the deductibility of interest to interest on borrowed capital for there is no interest payable in respect of share capital. Then, at page 16, I drew a distinction between the capital obtained by the borrowing and the obligation incurred in respect of it:

> It is, I think, inherent in the idea of capital, whether of a company or of an individual, that there is an asset in the form of money or a fund or other property capable of being or becoming a source of income to its owner. Its amount must be distinguished from the obligation or liability incidental to it.

In this sense it is plain that the unpaid interest never became an asset to the appellant in the form of money or a fund or other property that could be or become a source of income to it. The appellant did not acquire an asset by the nonpayment of the interest. What it did by not paying it was to incur the contractual obligation to pay interest on it. Thus the piling up of the unpaid interest, far from being an accumulation of wealth by it, as counsel suggested, was a pyramiding of indebtedness by it. One does not accumulate wealth by going deeper into debt.

Moreover, it cannot be said that the unpaid interest was borrowed from the bondholders and that it was, therefore, borrowed capital. It is essential to the deductibility of interest under section 5(*b*) that it should be payable pursuant to a contract between a borrower and a lender, that is to say, a contract that establishes a *bona fide* borrower-lender relationship between the parties to it. That is, I think, settled by the decision in *J. E. McCool Ltd.* v. *Minister of National Revenue* (1). While that case was primarily concerned with the question of depletion allowance it also dealt with the deductibility of interest under section 5(*b*). The appellant in that case had purchased from McCool certain assets, including timber limits, for which McCool had previously paid $35,000. Pursuant to the agreement for sale the appellant, among other considerations, gave McCool a demand note for $123,097.34 bearing interest at 5 per cent per annum. In its income tax return for 1942 the appellant claimed a depletion allowance on the timber limits on a valuation of $150,000 and also claimed the deduction of interest on the note as an operating expense. The Minister allowed depletion on the basis of the cost of the

(1) [1948] Ex. C.R. 548; [1950] S.C.R. 80.

limits at $35,000 and disallowed the claim for deduction of the interest. In this Court Cameron J. allowed the appeal on the depletion allowance but dismissed it so far as the claim for deduction of the interest was concerned. The Minister appealed to the Supreme Court of Canada from the decision on the depletion allowance and the taxpayer cross-appealed against the decision on the interest. We are not here concerned with the question of the depletion allowance but only with that of the interest. Cameron J. held that on the facts of the case before him the appellant was not a borrower from McCool and that McCool had not lent anything to the appellant, that as between them the relationship of borrower and lender did not exist at any time, the relationship at the time of the sale being that of vendor and purchaser and following the giving of the note that of creditor and debtor. In his reasons for judgment he referred to the judgment of the English Court of Appeal in *Inland Revenue Commissioners* v. *Rowntree & Co. Ltd.* (1). When the case came to the Supreme Court of Canada, while a majority allowed the appeal in the matter of the depletion allowance, the Court was unanimous in dismissing the cross-appeal relating to the interest, holding that the interest paid on the demand note was not "interest on borrowed capital used in the business to earn income" within the meaning of section 5(*b*). Rand J., speaking also for Kerwin J., said that it was misleading to convert a transaction of the kind in question into what was considered to be its equivalent and then to attribute to it special incidents that belong to the latter. At page 84, he said:

> Whether, if the company had raised money by issuing bonds, with which McCool had been paid off I do not stop to consider; that is not what we have before us. There was no borrowing and lending of money and no use of money for which interest would be the compensation. What the vendor did was to sell his property, for the consideration, in addition to the shares of a price plus interest; that interest is part of the capital cost to the company.

And Kellock J. agreed with Cameron J. that there was no relationship of borrower and lender between the appellant and McCool. He emphasized that in order to make the section applicable "there must be a real loan and a real borrowing": *vide Commissioner of Inland Revenue* v. *Port of London Authority* (2). Estey J. was of the same

(1) [1948] 1 All E.R. 482. (2) [1923] A.C. 507 at 514.

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opinion. Before the section could come into play there had to be the relationship of lender and borrower. And Lock J. agreed with Cameron J. that the deduction of the interest on the promissory note could not be allowed. The McCool case has been followed by the Income Tax Appeal Board in several cases: *vide Reinhorn* v. *Minister of National Revenue* (1); *Minshall Organ Limited* v. *Minister of National Revenue* (2); *Spanner Products Limited* v. *Minister of National Revenue* (3); *New Method Cleaners Limited* v. *Minister of National Revenue* (4). In all of these cases the deduction of interest was disallowed on the ground that there was no true relationship of borrower and lender. Here the situation is the same. It is not sufficient to say that the appellant could have paid the interest on the bonds and then borrowed money with which to pay its operating costs. That sort of argument comes within the disapproval voiced by Rand J. in the *McCool* case (*supra*). The Court is not asked to decide on the result of steps that might have been taken. Here it cannot properly be said that when the appellant did not pay the interest on the bonds and thereby incurred the liability of paying interest on it that it borrowed the unpaid interest. It did not do so. When the interest was not paid the relationship between the appellant and its bondholders in respect of the unpaid interest and the liability to pay interest on it was that of debtor and creditor, not that of borrower and lender.

And it is quite unrealistic to argue that the money with which the appellant might have paid the interest on the bonds but which it used to pay its operating expenses was really the bondholders' money but was retained by the appellant to pay its operating expenses and was, consequently, borrowed capital used in the appellant's business to earn the income. This argument is founded on Mr. Russell's statement that if the appellant had used its funds to pay the bond interest it would not have had the money required for its operating expenses and would then have had to borrow money or "go broke". But to proceed from this statement and say, in effect, that this meant that the unpaid interest should be regarded as having been borrowed

(1) (1949-50) 1 T.A.B.C. 279.
(2) (1950-51) 3 T.A.B.C. 172.
(3) (1950-51) 3 T.A.B.C. 273.
(4) (1951) 4 T.A.B.C. 383.

capital used in the business cannot be supported. The money used to pay the operating expenses came out of the appellant's income and never became part of its capital. And certainly, the unpaid interest never did.

I have, therefore, no hesitation in finding that the compound interest sought to be deducted by the appellant, being interest payable on the unpaid interest on the bonds, was not interest on borrowed capital used in the business to earn the income within the meaning of section 5(*b*) of the Act and that the Minister was right in disallowing its deduction.

While this disposes of this branch of the appeal it could have been disposed of on another ground that was not referred to by either of the parties. Since the interest on the interest was not paid it was not deductible: *vide Trapp* v. *Minister of National Revenue* (1). It is fortunate for the appellant that the principle of this case was not applied for if it had been the deduction of all the unpaid interest on the bonds, whether simple or compound, would have been disallowed.

The appellant's second ground of appeal was against the allowances in respect of depreciation permitted by the Minister. It was admitted that in reaching his decision the Minister reviewed the income tax returns made by the appellant for the years 1929 to 1948 and varied the depreciation deductions made by it. Counsel for the defendant submitted that since he had done so the appellant ought to be allowed to recast its accounts and financial statements from the beginning of its operations in 1929 and have its deductions in respect of depreciation allowed in accordance with the practice and rulings of the Department and that if this were done it would be entitled to larger deductions in respect of depreciation in some of the years in question than had been allowed and there would be a larger amount left for future deduction claims. The essence of the complaint was that the Minister had allowed larger deductions in respect of depreciation in the past than he should have done. The particulars of the complaint appear in a table of figures filed as Exhibit 5. This shows for each of the years from 1929 to 1948 three sets of figures. The first was taken from the appellant's books from which it made its

(1) [1946] Ex. C.R. 245 at 262.

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income tax returns and shows the amounts which it claimed in respect of depreciation of the building and the equipment and the total of its claim. The second set shows the amounts allowed by the Department. The third set shows the amounts which the appellant now contends should have been allowed. In 1929 and 1930 the appellant claimed depreciation at 2½ per cent for the building and 10 per cent for the equipment. The Department allowed 2 per cent for the building and 10 per cent for the equipment and the appellant agrees with these allowances. In 1931 the appellant claimed 2½ per cent for the building and 10 per cent for the equipment and these percentages were allowed by the Department but the appellant now contends that the Department should have allowed only 2 per cent for the building because of its type of construction. In 1932 the appellant again claimed 2½ per cent for the building and 10 per cent for the equipment and this was allowed by the Department but the appellant contends that it should have allowed only 1 per cent for the building and 5 per cent for the equipment. This contention was based on Ruling No. 15, to which further reference will be made. In 1933 and 1934 the appellant again claimed 2½ per cent for the building and 5 per cent for the equipment in 1934, no claim being made for it in 1933. The Department allowed 2½ per cent for the building and 5 per cent for the equipment in each year and the appellant now complains that only 2 per cent should have been allowed for the building. From 1935 to 1942 the appellant claimed 1½ per cent for the building and 5 per cent for the equipment and its claims were allowed by the Department but the appellant now says that under Ruling No. 15 it should have allowed only 1 per cent for the building. In 1943 to 1945 the appellant claimed ½ of 1½ per cent for the building and approximately 2½ per cent for the equipment. The Department allowed 1 per cent for the building and 5 per cent for the equipment in 1943 and smaller amounts in 1944 and 1945. The appellant agrees with the allowance for the building but says that 5 per cent should have been allowed for the equipment in each of the three years. This brings us up to the years in question in these proceedings. In 1946 and 1947 the appellant claimed ½ of 1½ per cent for the building and 5 per cent for the equipment or a total of $8,020.80 in 1946

and $8,041.20 in 1947. The Department allowed 1 per cent for the building in each year and only small amounts for equipment but the total amount claimed by the appellant in each year was allowed by the Department. Now the appellant claims that it should have allowed 2 per cent for the building, although it had claimed only ½ of 1½ per cent, and smaller amounts for the equipment, or a total of $16,039.64 in 1946 and $14,986.29 in 1947. In 1948 the appellant claimed 1½ per cent for the building and approximately 5 per cent for the equipment, or a total of $16,091.49. The Department allowed 2 per cent for the building and a small amount for the equipment, or a total of $15,189.92, the difference being $901.57 which the Minister disallowed on the assessment for 1948. For this year the appellant now says that the allowance should have been 2 per cent for the building and a small amount for equipment, making a total of $14,990.76, being less than the amount allowed. The summary of the figures shows that the appellant claimed $233,291.52 for the building and $88,913.43 for the equipment, or a total of $322,204.95, and that the Department allowed $247,615.37 for the building and $89,226.84 for the equipment, or a total of $336,842.21. The appellant's contention is that the Department should have allowed only $194,067.30 for the building, although the appellant had claimed $233,291.52, and $93,457.35 for the equipment, or a total of $287,524.73.

The ruling to which counsel referred read as follows:

RULING No. 15
Depreciation on Plant

(Supplementing and to be read in conjunction with Memorandum of 28th July, 1927).

The Department has been giving consideration to the question of Depreciation in periods in which a taxpayer has no taxable income. It has been found that in many cases the taxpayer's operations have not resulted in a profit owing to the fact that his plant has not been employed to the utmost of its capacity and in such cases it can be deduced that the plant has not suffered depreciation to the same extent as when operated at the maximum.

For this and other reasons the Department has come to the conclusion that some consideration should be given to the taxpayers whose operations in any year have resulted in a loss, or where there is no taxable profit. Accordingly, commencing with the taxation year 1928, you are advised that in such cases the following ruling will apply.

(1) 50% of the normal depreciation allowance will be deemed to have accrued in the periods where no taxable income results and such 50% rate will be taken into account for taxation purposes even though the taxpayer may not have made any charge for depreciation in his accounts during such period.

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(2) If a taxpayer has claimed and charged the maximum depreciation in his books, the consideration given in the preceding clause will only be extended in the event of the taxpayer adjusting his books to agree with the Department's allowance of 50%.

4th January, 1929.

Counsel's main complaints were that in 1931 to 1934 the Department had allowed 2½ per cent depreciation on the building when the practice was to allow only 2 per cent on a re-inforced concrete building such as the appellant's and that in the years from 1932 to 1943 the Department had failed to give the appellant the benefit of 50 per cent of normal depreciation pursuant to Ruling No. 15.

I am unable to find any ground for the appellant's claim that it has the right to have its allowances in respect of depreciation reviewed from the beginning and adjusted as set out in the third set of figures shown in Exhibit 5. What the Minister did prior to 1946 is not before the Court in these proceedings which are concerned with the correctness of the assessments for 1946, 1947 and 1948. The Court is, therefore, not called upon to pass any opinion on the Minister's action in allowing deductions of 2½ per cent for the building for the years 1931 to 1934, instead of only 2 per cent. In any event, what he did then has no bearing on the correctness of his allowances for the years now under review.

Nor can the Court express any opinion on whether the Minister should have applied Ruling No. 15 for the years 1932 to 1943. It may be pointed out, of course, that in the years prior to 1943 the appellant never claimed the benefit of the Ruling and has never adjusted its books. It is no answer to say that the Ruling was not communicated to it or that it was not aware of it. Its auditors must have known of it. Certainly, Mr. Russell did.

The appellant's right to a deduction in respect of depreciation is, for the years in question, governed by section 6(*n*) of the Act which reads in part as follows:

6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of

(*n*) depreciation, except such amount as the Minister in his discretion may allow, ...

I dealt with the meaning of this section in *Minister of National Revenue* v. *Simpson's Limited* (1) and there discussed the change which it had effected in the previous law.

(1) [1953] Ex. C.R. 93.

The amount that may now be deducted in respect of depreciation is only such amount as the Minister in his discretion may allow. Consequently, it is not for the Court to review the exercise by the Minister of his discretion or to substitute its opinion for his. The Minister's allowance of a deduction in respect of depreciation is not to be disturbed unless it can be shown that his discretion was wrongfully exercised. There was no evidence before me of any wrongful exercise of discretion in the allowances of deductions in respect of depreciation made by the Minister for 1946, 1947 or 1948. In 1946 and 1947 he allowed the total amount claimed by the appellant. If in these years it chose to claim less than it might have done that was its concern and it has no right to say that in failing to allow it a greater deduction the Minister exercised his discretion improperly. He was under no duty to allow a greater deduction than it claimed. And for 1948 the sum of $901.57 was properly disallowed on the ground that the amount allowed was 2 per cent for the building amounting to $14,951.75, regarding which the appellant does not complain, and all that was available for the equipment was $238.17. There was thus no evidence before me to warrant any finding that the Minister did not exercise his discretion properly. This branch of the appeal must, therefore, fall.

I now come to the cross-appeal. The Board allowed the appeals from the assessments to the extent that the Minister had disallowed the deduction of simple interest on the $9.00 per $100 bond which the underwriters had charged to the appellants for their underwriting services. Mr. Fisher held that the Minister had erred in law in disallowing this interest. I am unable to agree. I do not see how it can be said that this $9.00 per $100 bond was "used in the business to earn the income". It was not. It never came into the business. It was the cost to the appellant of its financing and as such was a capital cost and not properly deductible as an operating expense: *vide Montreal Coke and Manufacturing Co.* v *Minister of National Revenue* (1). That being so, it was not borrowed capital "used in the business to earn the income". Consequently, the interest on it is not deductible under section 5(*b*). The situation is really not distinguishable from that which obtained in *Baymond*

(1) [1944] A.C. 126.

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Corporation Ltd. v. *Minister of National Revenue* (1), to which I have already referred. In that case, although the company had incurred a liability of $600,000.00 on an issue of second mortgage bonds and had to pay interest on this amount, all that it realized on the sale of the bonds was $157,000.00 and it was allowed to deduct only the interest on this latter amount. I put the reason for this in the following terms, at page 16:

> The expression "used in the business to earn the income" contained in section 5(*b*) of the Income War Tax Act shows in clear and explicit terms that the right of a taxpayer to deduct from what would otherwise be his taxable income interest on borrowed capital is not to be measured by the extent of his obligations in respect thereof but is restricted to only such borrowed capital as has actually been used in his business to earn the income. It is not the obligation incurred through the borrowing but the asset in the form of money or other property received from it and actually put into the business to earn the income that is the measure of the taxpayer's right, once the rate of interest has been allowed. The taxpayer is entitled only to such deduction as the section clearly permits and the expression referred to expressly limits his right in the manner specified. Consequently, whatever the appellant's borrowed capital was, it is clear that all that was used in the business to earn the income was the sum of $157,000. That was all that could have been so used for that was all that the appellant ever received. That is the limit of the amount in respect of which it is entitled to deduct interest.

It may be said that in the present case $99 per $100 bond was received by the appellant. While it is not entirely clear that this was so it does not alter the fact that $9 per $100 bond went to the underwriters as a cost of financing and that only $90 per $100 bond was used in the business to earn the income. Consequently, it is only on $90 per $100 bond that interest is deductible under section 5(*b*). It follows that the cross-appeal must be allowed.

The decision of the Board stands to the extent that it allowed the appeal from the assessment for 1948 in that the Minister had reduced the taxable income of the appellant for that year by $1,378.51. But subject to this the appellant's appeal is dismissed and the respondent's cross-appeal allowed, in each case with costs.

Judgment accordingly.

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(1) [1945] Ex. C.R. 11.

BETWEEN:

HER MAJESTY THE QUEEN .....PLAINTIFF;

AND

UNIVERSAL FUR DRESSERS AND DYERS LIMITED .....DEFENDANT.

1953
Dec. 14, 15, 16 & 17
1954
Mar. 17

Revenue—Excise tax—The Excise Tax Act, R.S.C. 1927, c. 179 as amended, s. 80A(1)—"Furs"—"Mouton"—Sheepskins—Whether process followed in producing "mouton" is dressing and dyeing furs or dyeing furs under s. 80A(1) of the Excise Tax Act—Whether "furs" include "mouton"—Words of a statute not applied to any particular art or science to be construed as they are understood in common language—Primary meaning attributed to "furs" in definitions found in recognized dictionaries—Meaning attributed to furs by those conversant with the trade.

S. 80A(1) of the Excise Tax Act, R.S.C. 1927, c. 179, as amended, is in part as follows:

80A. 1. There shall be imposed, levied and collected, an excise tax equal to fifteen per cent of the current market value of all dressed furs, dyed furs and dressed and dyed furs,—

(i) imported into Canada, payable by the importer or transferee of such goods before they are removed from the custody of the proper customs officer; or

(ii) dressed, dyed, or dressed and dyed in Canada, payable by the dresser or dyer at the time of delivery by him.

Defendant carries on business in Canada of purchasing sheepskins and processing them into "mouton". In defence to an action by the Crown to recover excise tax from defendant under the section the defendant answers that it purchased sheepskins, not furs; that "mouton", which it sells, is not within the term "furs"; that the process it followed in the production of "mouton" was neither the dressing and dyeing of furs nor the dyeing of furs; and that "furs" do not include "mouton". On the evidence the Court found that "mouton" of the type which defendant delivered was (*a*) advertised as a fur; (*b*) treated in trade publications as a fur; (*c*) purchased by the public as a fur; (*d*) considered by salesmen dealing with customers in retail stores as a fur; (*e*) considered as a fur in the fur storage business; (*f*) sold in garments by fur retailers, in fur departments and departmental stores, and in exclusive fur shops, as fur.

Held: That the words of the Excise Tax Act are not applied to a particular science or art and are therefore to be construed as they are understood in common language. *Milne-Bingham Printing Co. Ltd.* v. *The King* [1930] S.C.R. 282, 283; *The King* v. *Montreal Stock Exchange* [1935] S.C.R. 614, 616; *Attorney-General* v. *Bailey* (1847) 1 Ex. 281; *Attorney-General of Ontario* v. *Mercer* (1882) 8 A.C. 767, 778 and *The King* v. *Planters Nut and Chocolate Co. Ltd.* [1952] Ex. C.R. 91 referred to and followed.

2. That the primary meaning attributed for "furs" in the definitions found in some of the recognized dictionaries is the coat of certain animals—that is, the skin with the hair intact—which is used for trimming or lining garments.

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3. That to those conversant with the buying and selling and advertising of fur garments, the word "furs" would be construed so as to include "mouton".

4. That plaintiff has established all the necessary facts to render defendant liable under s. 80A(1) of the Excise Tax Act, R.S.C. 1927, c. 179 as amended.

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

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

W. R. Jackett, Q.C. and *K. E. Eaton* for plaintiff.

J. J. Spector, Q.C. and *H. J. Plaxton* for defendant.

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

CAMERON J. now (March 17, 1954) delivered the following judgment:

This is an Information exhibited by the Deputy Attorney General of Canada in which the Crown claims payment of excise tax from the defendant under the provisions of s. 80A of the Excise Tax Act, R.S.C. 1927, c. 179, as amended, together with certain penalties. That section is in part as follows:

80A. 1. There shall be imposed, levied and collected, an excise tax equal to fifteen per cent of the current market value of all dressed furs, dyed furs and dressed and dyed furs,—

(i) imported into Canada, payable by the importer or transferee of such goods before they are removed from the custody of the proper customs officer; or

(ii) dressed, dyed, or dressed and dyed in Canada, payable by the dresser or dyer at the time of delivery by him.

The Information alleges that the defendant was a dresser and dyer of furs and upon delivery by it of such goods was liable for the tax imposed by that section; that during the period from February 2, 1953, to February 6, 1953, it delivered, dressed and dyed, furs that were dressed and dyed by it in Canada; and, alternatively, that during the said period it delivered dyed furs that were dyed by it in Canada.

The defendant is a corporation carrying on business in Canada and having its head office at Toronto. It was incorporated in 1938 and for a few years carried on the business of dressing and dyeing furs exclusively. About 1941

as a sideline, it began to purchase certain sheepskins and to process them into "mouton". Since 1947 its operations have been confined exclusively to the latter.

This is a test case. The defendant prior to February 2, 1953, was required to and did pay excise tax on "mouton" and I gather from the evidence that all companies carrying on similar operations have at all times paid that tax. The Regulations under the Act, dated October, 1951, required dressers and dyers of sheepskin shearlings to account for the excise tax on certain of such shearlings in accordance with the departmental unnumbered circular dated August 27, 1951. Briefly, the defence is that the defendant purchased sheepskins, not furs; that "mouton", which it sells, is not within the term "furs"; and that in any event the process which it followed in the production of "mouton" was neither the dressing and dyeing of furs nor the dyeing of furs. "Furs" it says, do not include "mouton".

It becomes necessary, therefore, to set out in some detail the nature of the defendant's operations. It was known that lambs of the Merino strain after their first shearing (called "shearlings") had certain fur fibre-like characteristics and that, when processed and "plasticized" to resist rain for better wear, these "shearlings" could be dyed to simulate beaver, nutria or seal. The defendant purchased Grade One Merino Shearlings in carload lots, usually from meat packers and wool pullers, the greatest proportion being purchased in the United States and only a very few in Canada. Ex. 1 is a sample of raw sheepskins so purchased by the defendant. It is first scoured and then tanned; then the fibres are ironed or electrified at a high temperature and then subjected to plasticising. Plasticizing consists of coating the fibres with formaldehyde resin and baking them at a high temperature, the operation being designed to give the fibres rigidity so that when the sheepskin has been further processed it retains its smooth surface for some time, the straightness of the fibres being maintained. Then the skins are given the colour desired by dyeing and after a further ironing, the product is ready for sale and is called "mouton"—the French equivalent of "sheep"

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When sold it is used for making ladies' coats, for trimming station wagon coats and other coats or jackets, for trimming gloves, overshoes and the like. Its uses, therefore, parallel the uses of "furs" as that term is ordinarily understood. The defendant sells it to manufacturers "by the foot", his sale price being substantially less than for the "furs" which it is designed to simulate. Sheepskins are not sold at the regular fur auction sales which are conducted annually at various points in Canada.

Counsel for the defendant submits that in order to bring his client within the liability imposed by s. 80A, the Crown must establish that what it did was to dress, or dye, or dress and dye, a fur, and he argues, therefore, that the first and main question for determination is this—Is a sheepskin (or the Merino type shearling which his client bought) a fur? He contends, of course, that no one would consider what he calls "a barnyard sheepskin" to be a fur.

In my view, however, that is not the question to be answered. It is rather this. Was that which the defendant delivered ("mouton")—a dyed fur or a dressed and dyed fur?

The word "furs" is not defined in the Excise Tax Act, nor (so far as I am aware) in any other Act in *pari materia.* The words of that Act are not applied to a particular science or art and in my opinion are therefore to be construed as they are understood in common language.

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."

(1) (1831) 2 D. & Cl. 302. (2) (1876) 1 Ex. D. 242, 248.

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".

Further reference may be made to *Attorney-General of Ontario* v. *Mercer* (4) and to *King* v. *Planters Nut and Chocolate Company Ltd.* (5), in the latter of which cases I had to consider the meaning to be attriubted to the word "shortening" as found in Schedule III of the Excise Tax Act.

Before considering the meaning attributed to "furs" by those conversant with the trade, I think it advisable to refer to the definitions found in some of the recognized dictionaries. Many of the definitions relate to matters which are not here relevant and need not be mentioned.

Shorter Oxford English Dictionary

1. A trimming or lining for a garment, made of the dressed coat of certain animals; hence, the coat of such animals as material for such use. Also, a garment made of, or trimmed or lined with, this material; now chiefly pl.

2. Short, fine, soft hair of the sable, ermine, beaver, otter, bear, etc. Growing thick upon the skin, and distinguished from the ordinary hair.

Webster's New International Dictionary, 2nd Ed., p. 1020

Fur is a strip or piece of the dressed pelt of any of certain animals, as a sable, ermine, or furry seal, or one or more of such pelts, worn as a trimming or lining to a garment for warmth or ornament, or as a mark of office or state, or badge of certain university degree; hence, such a dressed pelt or pelts as a material for trimmings, linings or garments.

(1) [1930] S.C.R. 282, 283.
(2) [1935] S.C.R. 614, 616.
(3) (1847) 1 Ex. 281.
(4) (1882) 8 A.C. 767 at 778.
(5) [1952] Ex. C.R. 91.

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Funk & Wagnall's New Standard Dictionary of the English Language 1945, p. 993

1. The short, soft fine coat thinly covering the skin of many mammals distinguished from hair and there it is the coat itself. Fur is a superior non-conductor of heat, resists water, and is most perfect on certain aquatic and Arctic carnivores.

2. Skins of fur bearing animals, peltry. The natural supply of furs is drawn from the Carnivora, Ungulata, Rodentia and Marsupialia, of which the more common varieties are the badger, used for carriage rugs and the British trade.

Encyclopaedia Britannica, 1952, Vol. 9

P. 935. The covering of the skin in certain animals lying alongside another covering called the overhair, or guard hair. The fur is barbed lengthwise and is soft, silky, downy and inclined to curl. On the living animal the over hair keeps the fur filaments apart, prevents their tendency to mat or felt, and protects them from injury, thus securing to the animal an immunity from cold and storm.

P. 938. The classification of animals as fur bearing and non fur bearing has always been arbitrary and with the refinement of modern methods of manipulation of skins the terms are becoming very elastic. Roughly speaking, the term 'fur' is applied to skins which have a deep coating of hair, a layer of comparatively short, soft, curly, barbed hairs next to the skin, protected by longer, smoother and stiffer hairs which grow up through these and are known as guard hair or over hair.

The greater number of species of fur bearing animals belong to the Carnivora, Rodentia, Ungulata and Marsupialia. The Ungulata provide antelopes, goats, ponies and sheep.

Then in *Corpus Juris Secundum*, Vol. 37, p. 1407, the following appears:

Fur. (English) The soft, silky, curly, downy and longitudinally barbed filament, which, mixed with a hair that is straight and smooth, and comparatively long, coarse and rigid, constitutes the pelage of certain animals native to the colder climes. The term is usually reserved for the short, fine hair of certain animals whose skins are largely used for clothing, yet, in a commercial sense, it has been regarded as including other skins, more properly designated by the term 'peltry', and as including, in that sense, the covering of all animals whose skin is used either for warmth or ornament, with the hair on.

For the purposes of this case, I think I may discard the definitions which refer to the hair of certain animals, it being obvious that the hair by itself would not be subjected to dressing and/or dyeing or be converted into garments. Likewise, I think I may discard the definitions which refer to garments made out of or trimmed with fur. In my opinion, the primary meaning which is to be found in these definitions is the coat of certain animals—that is, the skin with the hair intact—which is used for trimming or lining garments. It will be noted, also, that in Funk & Wagnall's

Dictionary the animals included in the Ungulata species are considered as fur-bearing animals and that the Encyclopaedia Britannica states that Ungulata includes antelopes, goats, ponies and sheep. It will be noted, also, that the article extracted from *Corpus Juris* states that in a commercial sense the word "furs" includes "the covering of all animals whose skin is used either for warmth or ornament, with the hair on."

I turn now to consider the evidence as to the manner in which "mouton" is viewed in the trade. The only oral evidence introduced by the plaintiff was that of W. E. Shepherd, Manager of the Fur Department in Robert Simpson's Company at Toronto, a position which he has held for seventeen years. He is also the buyer for that department, is in charge of fur storage and the fur factory, as well as the retail outlets, and is a group buyer of furs for the entire company. His department employs about 125 people and Simpson's is one of the largest fur retailers in Toronto. For many years that company has sold "mouton" garments in large numbers. So far as he knew, "mouton" was sold exclusively in the fur departments of department stores and in fur retail stores. In his opinion, a shearling of the Merino type is a fur bearing animal.

Asked to state from his experience whether "mouton" was regarded as a fur in the trade, Mr. Shepherd said:

> Yes, I would definitely say that it is. It is sold by fur manufacturers whom we buy from. It is dressed and dyed by fur dressers and dyers. It is exhibited in our store as other stores as a fur and operated on as such, being sold in fur departments and to our customers we present it as a fur coat having purchased it as a fur from a manufacturer who in turn has had it processed by a fur buyer and therefore we consider it a fur coat because of the fact that it is processed along that line and identified in all departments as a fur.

He added, also, that customers regarded a "mouton" coat as a fur coat, that fur manufacturers and buyers looked upon "mouton" as a fur, that it is sold in fur fashion shows, including those at his own store and that in the fur storage business (including that of Simpson's) "mouton" coats are accepted as fur coats. In his own store "mouton" coats are sold in the fur department as a fur coat.

Mr. Shepherd was asked to express an opinion as to his views on certain passages in "Pictorial Encyclopaedia of Furs" by Arthur Samet. He considered the author to be

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one of the outstanding authorities on fur in North America, that he used this book frequently and that it was used in all of Simpson's many branches. He fully agreed with the following statements in that text:

> In a commercial sense, this is true, for an animal's skin with the hair intact and used in our fur trade is called a 'fur'. Yet not all commercial fur bearers have real fur and the monkey is one of them.
>
> P. 477. 'Dressing'. The process of converting the fur skin from the raw state in order to preserve the skin and bring out a natural gloss and beauty of the hair and give the pelt a softness, pliability and feel.
>
> P. 447. 'Fur fibre'. The true fur. Soft interlocking downy fibres that act as a blockade preventing the chill from entering the body of the animal. Also called wool hair, ground, under ground, under hair and under fur.
>
> P. 448. 'Tanning'. A process of converting the skin of an animal into leather.

The witness also agreed with the author, who, in the "Scheme of Animal Classifications" at p. 451, included "mouton" as one of the hoofed animals (Ungulata), and in the alphabetical list of fur bearers, included "lamb". I may add, also, that in the List "Persian" is included under the general heading "Lamb".

In cross-examination the witness stated that he agreed with a statement of Samet at p. 92 that "When processed and 'plasticized' to resist rain for better wear, this shearling (i.e. of the Merino type) could be dyed to simulate beaver, nutria or seal." While agreeing that "simulate" might mean "imitate", he explained that the practice of processing known furs to imitate other furs was well known in the trade and he referred to muskrats which could be dyed to represent Alaska Seal and is called a Hudson Seal; and also to rabbits which can be made to look like Lapins, Beaver or Hudson Seal. He said that "mouton" was a genuine fur and not an imitation.

The plaintiff also filed a large number of advertisements in the daily papers, published in many of the larger cities in Canada by leading department stores and by retailers dealing exclusively in furs (Exhibits G1 to G17). I shall refer specifically to but a few of them. Ex. G1 is an advertisement by Hudson's Bay Company in Calgary and is headed "New Water Repellant Moutonia" . . . "The Amazing New Processed Fur by Universal Dressers and Dyers" (the defendant company). Many of these advertisements include "mouton" or "mouton lamb" under the

general heading of "Furs". "Mouton" is referred to as "The hard-wearing young flattering fur", "Perfect coats in the hard-wearing fur", "Lustrous furs", "Beautifully matched skins of the ever popular furs", "Mouton is a fur that will give satisfactory wear".

Ex. H includes the 1953 catalogues of Eaton's and Simpson Sears. Therein "mouton" is described as "A good wearing fur", "A deep thick pile fur"; and under the heading "The gift of a fur coat". Throughout these catalogues, "mouton" coats appear in conjunction with other varieties of fur coats.

Exhibits I-1 to I-7 are trade publications such as Fur Age Weekly, Women's Wear Daily, Canadian Fur Review and Tescan Fur and Fashion Review. In all these publications, "mouton" (or its trade name "moutonia") is treated and advertised as a fur.

Counsel for the defendant had agreed that he would not require formal proof of the publication of Exhibits G, H and I. At the trial, however, he submitted that they were inadmissible on the ground of irrelevancy, that they were not connected in any way with the defendant who should not, therefore, be affected by them in any manner. I have reached the conclusion, however, that they are admissible as evidence—and perhaps the best evidence—of the manner in which those engaged in the buying and selling of furs and of "mouton" actually regarded the latter.

It is of some interest, to note how Mr. Moskoff—President of the defendant corporation—viewed its product prior to the commencement of these proceedings. Ex. L is a copy of a letter dated May 22, 1952, from the defendant company (and written by Mr. Moskoff) to H. M. Short of the Hudson's Bay Company at Winnipeg. The opening sentence is—"Enclosed you will find commercial copy for your forthcoming 'Moutonia' demonstration." The copy attached refers to "Lovely to look at fur—a fur they now call Moutonia", "I urge all my listeners to visit the fur salon of the Hudson's Bay Company", "In my estimation and the estimation of the leading fur stylists, Moutonia is the greatest step in scientific approach the fur industry has ever seen."

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Ex. K is an article in the Financial Post of June 22, 1946, written by one Dack from material supplied by Mr. Moskoff. Among other things it says "Three or four years ago there wasn't a mouton fur coat in captivity. Now mouton is offering the customers fur coats at . . ." "Mouton has made 'fur coats for all' a real possibility". "The mouton coat is more desirable than most other fur coats, Mr. Moskoff says."

Counsel for the defendant made much of the fact that in the advertisement of "mouton" and in the labels of "mouton" garments in retail stores, it was described as "sheared, processed lamb". I do not think that that fact leads to the inference that "mouton" was not considered to be a fur by dealers. In so describing it, dealers were complying with the provisions of P.C. 2336 of May 16, 1951, "Regulations respecting the labelling of fur garments", under the National Trade Mark and True Labelling Act. In these Regulations "fur" means "the skin of any animal whether furbearing, hair-bearing or wool-bearing, that is not in the unhaired condition". Every dealer in fur garments is required to use descriptive labels which bear the true fur name for the fur in the garment as set forth in the schedule. That schedule requires that the fur trade names of Alaskan Mouton, American Broadtail, Laskin Beaver, Laskin Mouton and Lincoln Lamb shall bear the true fur name of "sheared, processed lamb". The true fur name of "dyed rabbit" must be applied to very many fur trade names such as Baltic Seal, Baby Beaver and the like. I have mentioned this matter solely for the purpose of indicating that in my view "mouton" was described as "sheared, processed lamb" in order to comply with the regulations and not for the purpose of indicating that in the minds of the dealers it was not considered a fur.

Evidence was given on behalf of the defendant by a number of witnesses of long experience and prominent in the fur business in Canada. While they were not allowed to say that "mouton" was not a fur within the meaning to be attributed to "furs" in the Act—that being the very question which I have to decide—it is abundantly clear that they did not regard it as such. They distinguished it from "furs" on a number of grounds. They said it was not from a fur bearing animal but rather a wool bearing animal; that

almost invariably fur bearing animals have two types of hair, the undergrowth and the longer guard hair, while the sheep has no guard hair; that the fur bearing animals generally have but one layer of skin while the sheep has two layers; that in general furs are animals that can be sold in or close to their natural state and can be made into attractive garments; that the processing of "mouton" is not the same as the dressing of furs; that the shearling is processed to look like fur, is a camouflaged fur but not a genuine fur.

It is significant to note, however, that of these witnesses, all but one sold "mouton" garments in their fur shops or fur departments. Mr. Alexandor, who for many years has conducted a large and exclusive fur shop in Montreal, admitted that in his business *as a furrier* he had for eighteen years sold "mouton" coats. Mr. Wexler, a retail furrier in Ottawa, included "mouton" in his fur advertising. Mr. Dodman, Supervisor of Furs for Henry Morgan & Company, stated that in their stores "mouton" garments were sold both in the fur departments and in the budget shops where lower-priced garments were sold. Ex. G13 is an advertisement of that firm, the general heading being "Morgan Budget Summer Fur Sale Continues", and a "mouton" coat (dyed and processed lamb) is described as "a summer budget fur feature"—along with Persian Lamb and muskrat. He said that the Better Business Bureau, of which he has been president for many years, does not regard it as unethical to sell "mouton" in fur stores. Mr. Dodman was also asked to comment on the extract from "Samet"—"In a commercial sense this is true, for an animal's skin with the hair intact and used in our fur trade is called 'fur' ", and to the question, "Is that true in your experience?", he replied, "Usually, yes." Mr. Samuel Silver is president of Samuel Silver Co. Ltd. of Montreal and for many years has been a furrier. He has not sold garments made of "mouton", being of the opinion that they are not genuine furs but substitutes for fur. He has no knowledge of the practice in any store other than his own.

It is of great importance to note that while these witnesses for the defendant were all of the opinion that "mouton" was not a fur because it was a skin of a wool bearing and not of a fur bearing animal, they were all in

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complete agreement with the plaintiff's evidence that Persian Lamb has always been regarded in Canada as a proper, genuine fur and all the witnesses who were dealers considered it as such and sold it as a fur. Now Persian Lamb fur is the pelt of a young Caracul lamb, killed almost immediately after birth. It has then the special qualities which make it desirable; but if the lamb is allowed to age its tight curls are lost and it becomes just another sheep, the hide then being unsuitable as Persian Lamb. None of the witnesses for the defendant could give me any valid or satisfactory reason for including Persian Lamb in the category of "furs" and excluding "mouton"—which is also the pelt of a young lamb of the Merino type—from that category. All they could and did say was that Persian Lamb had particularly desirable qualities and has always been considered to be a fur.

I have no reason whatever to question the honesty or sincerity of any of the witnesses. In the light of the documentary and oral evidence relating to the actual manner in which "mouton" is considered in the trade, I have no hesitation, however, in preferring the conclusions of the witness Shepherd to those of the defendant's witnesses. I think that the views of the defendant's witnesses, while erroneous, are easily understood. "Mouton" is a comparative newcomer to the fur trade in Canada. It is known that it comes from a young sheep; the best known product of a sheep is its wool and therefore to many individuals the sheep is a wool bearing animal and therefore not included in the category of fur bearing animals and so is not a fur. To some of them, at least, the "mouton" derived from the humble lamb is a parvenu. In my opinion, the Merino lamb, which later by processing becomes known as "mouton", may be regarded both as a "wool bearing animal" and a "fur bearing animal". It has wool which may be clipped from time to time during its lifetime. It also has a pelt, which, with the hair intact may, by processing, become "mouton" and be used in garments precisely the same as other furs.

It has been established to my satisfaction that "mouton" of the same type as that which the defendant delivered during the period mentioned, was (*a*) advertised as a fur; (*b*) treated in trade publications as a fur; (*c*) purchased by the public as a fur; (*d*) considered by salesmen dealing

with customers in retail stores as a fur; (*e*) considered as a fur in the fur storage business; (*f*) sold in garments by fur retailers, in fur departments and departmental stores, and in exclusive fur shops, as fur.

In my view, therefore, it has been clearly shown that to those conversant with the buying and selling and advertising of fur garments, the word "furs" would be construed so as to include "mouton". As I have mentioned above, "mouton" also falls within the dictionary definition of furs which I have adopted. The defendant has also admitted that the "mouton" which it delivered was dyed by it in Canada. There being no dispute as to the amount of tax involved, the plaintiff has established all the necessary facts to render the defendant liable under s. 80A of the Act.

In view of these findings, it is not necessary, perhaps, to discuss the question as to whether the "mouton" delivered by the defendant was also "dressed and dyed" by it. There was considerable evidence by the defendant that the process of preparing "mouton" from shearlings is different in many respects from that of "dressing" other furs. Plasticising is usually confined to operations such as those of the defendant. On the other hand, there was evidence that even the defendant's process came within the definition of "dressing" set out in Samet's text (*supra*). Were it necessary to make a finding on this point, my opinion would be that the defendant had not only delivered dyed furs, which it had dyed in Canada, but also dressed and dyed furs which it had dressed and dyed in Canada.

One further point only need be mentioned. At the trial counsel for the defendant introduced evidence as to certain artificial textiles which are made up so as to resemble furs of various sorts. The point urged by counsel was that if "mouton"—which he considered to be an imitation of fur—could be considered as a fur and therefore subject to tax, so also could these various synthetic textiles which are definitely imitations of furs. I reserved my finding on the admissibility of such evidence but upon consideration have reached the conclusion that none of it bears any possible relevancy to the issue before me and I declare such evidence and the exhibits tendered in relation thereto, wholly inadmissible.

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For these reasons, the plaintiff is entitled to judgment against the defendant for the sum of $573.08, as excise tax, together with the penalties provided for non-payment by the Excise Tax Act, and costs to be taxed. In the event of the parties being unable to agree as to the amount of such penalties, the matter may be spoken to.

Judgment accordingly.

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Nov. 12

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Mar. 27

BETWEEN:

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

AND

J. T. LABADIE LIMITED ..... RESPONDENT.

Revenue—Income Tax—The Income Tax Act, S. of C. 1948, c. 52, ss. 3, 11(1), 20(1), 127(1)(e), 131—An Act to amend the Income Tax Act and the Income War Tax Act, S. of C. 1949, 2nd Session, c. 25, s. 8—Depreciable capital assets—Previous assessment may be reconsidered by Minister in light of subsequent evidence—Profit on sale of motor cars used as service and salesmen's cars—Whether capital profit—Whether inventory profit—Intention of a corporation acting through its officers relevant to the question—Bookkeeping not conclusive of what is capital profit and what is revenue profit—Appeal from Income Tax Appeal Board allowed.

In the course of its business operations as dealer in all kinds of motor vehicles respondent purchased from November, 1947, to January, 1949, twelve new passenger cars which were used as service and salesmen's cars. Of these twelve cars the first eight were carried over from 1948 to 1949 while the last four were acquired in 1949. In its income tax returns for the years 1947 and 1948 made under the provisions of the Income War Tax Act, R.S.C. 1927, c. 97, as amended, by which depreciation was in the discretion of the Minister, the cars in question were shown as depreciable capital assets and assessed as such. The twelve cars were sold in 1949 at prices exceeding the amounts at which they were carried on respondent's books, which according to its method of bookkeeping were capital gains on the sale of capital assets and did not form part of its 1949 taxable income as reported in its tax return made this time under the provisions of the Income Tax Act, c. 52, S. of C. 1948. From an assessment by the Minister whereby he added these amounts to respondent's declared income for the year 1949 the latter appealed to the Income Tax Appeal Board which allowed the appeal and the Minister appealed to this Court from the decision. On the facts the Court found that it was not the true intention of the respondent acting through its officers, to appropriate the cars to plant, i.e. capital, and that it did not actually deal with them as capital assets.

Held: That the fact that depreciation was allowed by the Minister for years 1947 and 1948 on the motor vehicles used as service and salesmen's cars did not preclude him from treating as inventory the same cars sold at a profit in 1949. The decision of the Court on this point in *Minister of National Revenue* v. *British and American Motors Toronto Ltd.* [1953] Ex. C.R. 153 is a correct application of the Income Tax Act, R.S.C. 1952, c. 148, s. 144.

2. That the intention of a corporation acting through its officers may be binding not only on its shareholders but strangers and even revenue authorities. *Bouch* v. *Sproule* (1887) 12 A.C. 385; *Commissioners of Inland Revenue* v. *Blott* and *Commissioners of Inland Revenue* v. *Greenwood* [1920] 1 K.B. 114 and [1921] 2 A.C. 171; *Bagg* v. *Minister of National Revenue* [1948] Ex. C.R. 244; [1949] S.C.R. 574 referred to.

3. That the method in which a corporation is keeping its books is not conclusive of what is a capital profit and what is a revenue profit. *J. and M. Craig (Kilmarnock) Ltd.* v. *Inland Revenue* [1914] S.C. 338; *Doughty* v. *Commissioner of Taxes* [1927] A.C. 327 at 336; *Inland Revenue* v. *Scottish Automobile and General Insurance Company* [1932] S.C. 87; *Cowen's Ideal Stamping Co. Ltd.* v. *Inland Revenue* (1935) 19 T.C. 155 referred to.

4. That the purchase and sale by respondent of the twelve cars in question was really the carrying on of part of its business which by its Letters Patent it was authorized to carry on viz., "to buy, sell, import, export, exchange, rebuild, repair, maintain and generally deal in all kinds of automobiles . . ."

5. That the profit on the sales of the said cars was income within the meaning of the Income Tax Act 1948, c. 52, ss. 3 and 127(1)(e), S. of C. 1948 (now R.S.C. 1952, c. 148, ss. 3 and 139).

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Potter at Windsor.

M. C. Meretsky, Q.C. and *T. Z. Boles* for appellant.

Leon Z. McPherson, Q.C. for respondent.

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

POTTER J. now (March 27, 1954) delivered the following judgment:

This is an appeal by the Minister of National Revenue, hereinafter called the appellant, from a decision of the Income Tax Appeal Board dated the 22nd day of January, 1952, allowing an appeal from an assessment by the appellant dated the 14th day of February, 1951, whereby the appellant added the sum of $6,996.67 to the respondent corporation's declared income for the year 1949; disallowed

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a deduction therefrom of $5,549.82, claimed as capital cost allowance, and allowed a reduction in the value of the respondent corporation's inventory of $5,549.82.

The respondent corporation was incorporated by Letters Patent issued by the Secretary of State on the 10th day of November, 1945, with powers *inter alia*:—

> To buy, sell, import, export, exchange, rebuild, repair, maintain and generally deal in all kinds of automobiles, buses, station wagons, trucks, tractors, motors, engines, parts and accessories appertaining thereto, including implements, utensils, apparatus, lubricants, fuels, cements, solutions and appliances whether incidental to the construction of motor-cars or otherwise and all things capable of being used in the manufacture, rebuilding, repair, maintenance or servicing thereof respectively.

Following its incorporation the respondent corporation under the direction of its president, treasurer and general manager, Mr. J. T. Labadie, acquired premises in Windsor, in the County of Essex, in the Province of Ontario, and secured the right to distribute Cadillac, Buick, Pontiac and Vauxhall motor-cars and General Motors Company trucks. In 1949 it employed approximately one hundred persons. Its business was conducted from 465 Goyeau Street in Windsor where it operated a main repair garage and new car sales premises and also from 465 Pitt Street West where new cars were serviced before sale and all body and metal work performed. In addition it carried on a business of dealing in used motor vehicles at two locations on Tecumseh Road East, some two or three miles from its main office, and was distributor for General Motors products for the County of Essex (except the town of Leamington) and it supervised four associate dealers located throughout the county. In addition it conducted a business known as "Parts Wholesale" with all service garages in the county.

According to the evidence adduced on behalf of the respondent corporation, it required for the purpose of carrying on and developing its business a number of motor vehicles including wrecking trucks, pick-ups and several types of passenger motor-cars.

Twelve passenger type cars owned by the respondent corporation, and designated by it "Service and Salesmen's Cars", were sold during the year 1949 at prices exceeding the amounts at which they were carried on its books, which according to the respondent corporation's method of bookkeeping were capital gains on the sale of capital assets and

did not form part of its 1949 taxable income. These amounts aggregating $6,996.67 were by the appellant's said assessment added to the income of the respondent corporation for the year 1949.

According to Ex. 1 filed by the respondent corporation this amount of $6,996.67 was arrived at in the following manner:—

Aggregate purchase prices of twelve cars purchased from November 1947 to January 31, 1949, both inclusive		$ 22,342.01
Total depreciation for the year 1949 on those purchased from November 1947 to July 1948, both inclusive		4,337.30
Net value		$ 18,004.71
Aggregate selling prices of same from March 5, 1949 to December 3, 1949	$ 25,001.38	
Profit		6,996.67
	$ 25,001.38	$ 25,001.38

Of these twelve cars it was established that the first eight were carried over from 1948 to 1949 while the last four were acquired in 1949, all twelve however being sold during the year 1949 as above stated.

The evidence of Mr. J. T. Labadie, president, treasurer and general manager of the respondent corporation, was to the effect that the cars described in Ex. 1 were bought by the respondent corporation for particular uses in its operations, viz.—to enable parts salesmen to sell and deliver parts to garages in Essex County; to supervise four associate dealers; for transportation between 465 Goyeau Street and 675 Pitt Street West and the used car locations; to be available for the use of customers when their cars were being repaired; to enable the service manager, sales manager, parts manager and salesmen to be available continuously twenty-four hours each day when needed; to collect accounts; to enable truck managers to travel to different parts of the county to estimate trade-in values and truck requisites; to appraise damage and insurance claims.

The employees, in whose custody such vehicles were given, understood the purposes for which they were intended and were under strict limitations as to who drove the same. In short, the evidence of Mr. Labadie was that

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the cars in question were primarily for helping the respondent corporation to carry on its business and produce its income. Other witnesses who had formerly been in the employ of the respondent corporation and who had had cars issued to them, according to this arrangement, were called and gave evidence corroborating that of Mr. Labadie.

According to the evidence given and Ex. 1, the twelve cars in question had an aggregate net value, after depreciation, of $18,004.71 as of December 31, 1948, and that eight of them had been carried over from 1948 to 1949, the aggregate net value of such cars as of December 31, 1948, and after depreciation, being, according to Ex. 1, $10,463.04. The other four cars shown on Ex. 1 were acquired during the year 1949 from the months of January to July 31, 1949 and had an aggregate value, without deducting any depreciation, of $7,541.67 as of December 31, 1948. Three of the cars acquired in the year 1949 were sold at profits of $77.17, $624.94 and $52.06 respectively, or together a profit of $754.17, but one was sold at a loss of $74.46, making a net profit on the 1949 cars of $679.71. No explanation was given why two of these cars, which were Vauxhalls, brought profits of only $77.17 and $52.06 respectively, why another Vauxhall was sold at a loss of $74.46 or why a Pontiac was sold at a profit of $624.94.

While the questions to be decided are whether the twelve cars in question were capital assets or stock-in-trade and whether the profits on their sale capital gains or income, it is stated in passing that the amount of $5,549.82 which was disallowed as a deduction from the respondent corporation's declared income for the year 1949 and deducted from the value of its inventory appears to have been arrived at in the following manner:—

By schedule No. 2, (sheets 12 and 13) attached to its 1949 Income Tax Return, it claimed depreciation for the year 1949 on service and salesmen's cars, and on a deferred charge, of $6,853.33 plus $48.83 or a total $6,902.16.

By the assessment four of these vehicles only were treated as capital, viz.—one ½ ton pick-up $777.25; one ½ ton pick-up $835.94; one wrecker at $3,185.40; one pick-up at $1,234.09, making a total of $6,032.68. Two of these vehicles were disposed of in 1949, one, which had been carried at $777.25, being sold for $688.95 and another, which

had been carried at $835.94, being sold for $1,225.00. Taking the lesser in each case, viz.—$688.95 and $835.94, gave the sum of $1,524.89, which amount being deducted from $6,032.68 left the sum of $4,507.79.

On this amount of $4,507.79, thirty per cent depreciation or $1,352.34 was allowed, which being deducted from $6,902.16, left the amount of $5,549.82, i.e. the amount disallowed as a deduction from the respondent corporation's declared income and the amount by which its inventory was reduced for the year 1949.

The respondent corporation's Income Tax Returns for the years 1947 and 1948 were made under the provisions of the Income War Tax Act, chapter 97, R.S.C. 1927, as amended, by which depreciation was in the discretion of the Minister. In such Returns "service and salesmen's cars" were shown as depreciable capital assets and, no objection having been made by the appellant to this method of accounting, the respondent corporation contends that assessments made accordingly established a practice of the Department of National Revenue.

The respondent corporation's Income Tax Return for the year 1949 was made under the provisions of the Income Tax Act, 1948, chapter 52, Statutes of 1948, which was assented to on June 30, 1948, became effective for the year 1949, section 131 thereof being as follows:—

131. Part II of this Act is applicable to amounts paid or credited after 1948 and the other provisions of this Act are, unless otherwise specifically provided, applicable to the 1949 and subsequent taxation years.

Section 11 provided as follows:—

11. (1) Notwithstanding any other provision in this Division, the following amounts may, subject to subsections (2) and (3) of section 12, be deducted in computing the income of a taxpayer for a taxation year:

(a) such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation.

The respondent corporation relies on section 8 of chapter 25, R.S.C. 1949, by which were promulgated as of December 1949, regulations having a retroactive effect to January 1, 1949, and which were reenacted as section 144 of chapter 148, R.S.C. 1952, entitled the "Income Tax Act, 1948" and which are as follows:—

144. (1) Where a taxpayer has acquired depreciable property before the commencement of the 1949 taxation year, the following rules are

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applicable for the purpose of section 20 and regulations made under paragraph (*a*) of subsection (1) of section 11:

(*a*) except in a case to which paragraph (*b*) applies, all such property shall be deemed to have been acquired at the commencement of that year at a capital cost equal to

(i) the actual capital cost (or the capital cost as it is deemed to be by subsection (3) or (4)), of such of the said property as the taxpayer had at the commencement of that year

minus the aggregate of

(ii) the total amount of depreciation for such of the said property as he had at the commencement of that year that, since the commencement of 1917, has been or should have been taken into account, in accordance with the practice of the Department of National Revenue, in ascertaining the taxpayer's income for the purpose of the *Income War Tax Act*, or in ascertaining his loss for a year for which there was no income under that Act, ...

The respondent corporation argued that the effect of this enactment is a complete answer to the repeated assertion that the practice of the appellant in one year does not prevent a reversal of practice in a subsequent year and that the appellant is in effect estopped from claiming that the profit on the cars in question was income instead of capital gain.

It is also suggested by the respondent corporation that the appellant is relying on the following:—

(*a*) the respondent corporation is a dealer in motor vehicles;

(*b*) the respondent corporation is not entitled to capitalize automotive equipment under the regulations published in the Canada Gazette on December 22, 1949, P.C. 6385, the relevant parts of which are as follows:—

PART XI

Allowances in respect of Capital Cost

1100. (1) Under paragraph (*a*) of subsection (1) of section 11 of the Act, there is hereby allowed to a taxpayer, in computing his income from a business or property, as the case may be, deductions for each taxation year equal to

(*a*) such amount as he may claim in respect of property of each of the classes numbered one to twelve, inclusive, in schedule B to these Regulations not exceeding in respect of property

(x) of class 10, thirty per cent

of the undepreciated capital cost to him as of the end of the taxation year (before making any deduction under this subsection for the taxation year) of property of the class;

Schedule B insofar as it relates to this subsection is as follows:

SCHEDULE B
Class 10
(30 per cent)

Property not included in any other class that is
(a) an automobile,

because:—

First, regulation 1102(1) is as follows:—

1102. (1) The classes of property described in this Part and in Schedule B to these Regulations shall be deemed not to include property
(b) that is described in the taxpayer's inventory.

Second, that the respondent corporation does have in its inventory not the vehicles referred to in Ex. 1 but other motor vehicles and therefore because it has motor vehicles in its stock-in-trade it cannot be permitted to have other motor vehicles "automotive equipment" for the purpose of earning its income.

Or, in other words, all of its "automotive equipment" must be available for sale at all times and be classified as "inventory."

The appellant, however, does not put his argument in that form. He does not say that because articles of a certain class are carried as stock-in-trade, that articles of the same class can not also be carried as plant. He says that the cars in question were purchased by the respondent corporation wholesale, as were all its cars, for re-sale and upon receipt of the same, they formed part of the respondent corporation's inventory of stock-in-trade and were then borrowed temporarily from the same for the purposes described by the president, treasurer and general manager of the respondent corporation and were later returned to the inventory of stock-in-trade and sold in the normal course of the company's business; that the respondent corporation at all times was holding the cars for sale and never with any intention that they should become permanent capital assets.

Mr. J. P. Labadie, president, treasurer and general manager of the respondent corporation said in this connection, that:—

The vehicles in question are ordered specifically by an order number. They are ordered by colour and by model for the specific use they are going to be designated for. When those vehicles arrive, they are allocated

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to the department by which they will be used from the order number in which the order was originally placed. Immediately the Sales Department have allocated the vehicle to its proper department, then within a matter of days it is immediately charged to that particular department through our accounting procedure.

And in cross-examination:—

Q. What determined the time at which you decided to sell that car? —A. The mileage and the general condition of it.

Q. Was there any average mileage?—A. We think economically that it is sound business to replace those vehicles operated in our business at somewhere between 6,000, 10,000 or 12,000 miles.

And further:—

Q. How long would you say it would take a car to run that?—A. It varied a great deal.

Q. Can you give me any idea?—A. Normally it would take to put 6,000 miles on a car—and I will deal with 6,000 miles as an illustration—on one car it might take five months, on another car it might take three months to put the same 6,000 miles on.

Further:—

A. Yes, I would say an average to put 6,000 miles on would be somewhere around five months.

The intention of the officers of the respondent corporation with regard to the cars in question is relevant, as will be stated later, and the foregoing testimony will be considered in that connection.

Referring to the summary of Ex. 1 set out earlier herein, it will be noted that the aggregate purchase prices of the twelve cars in question was $22,342.01 and that the aggregate selling prices of the same was $25,001.38, or an excess of selling prices over purchase prices of $2,659.37. Without applying the depreciation of $4,337.30, therefore the respondent corporation would have made a profit on these twelve cars of $2,659.37.

It is true that three of the cars shown in Ex. 1 were sold at losses of $15.33, .06c and $74.46 or together $89.85, but the profit on the remaining nine cars, that is the difference between the purchase prices and the selling prices was $2,749.22 or a net excess of selling prices over purchase prices of $2,659.37.

The profit of $6,996.67 shown in Ex. 1 is therefore made up of the amount charged for depreciation, $4,337.30 and $2,659.37.

As already stated, the respondent corporation submits that the provisions of section 8, chapter 25, R.S.C. 1949, now section 144 of chapter 148, R.S.C. 1952, preclude the appellant from treating as inventory the motor vehicles designated as service and salesmen's cars.

A similar point was dealt with by Cameron J. in *Minister of National Revenue* v. *British American Motors Toronto Limited,* (1), as follows:—

> In my view, the mere fact that a concession of this nature had been made to a taxpayer in one year, does not, in the absence of any statutory provisions to the contrary, preclude the Minister from taking another view of the facts in a later year when he has more complete data on the subject matter. The provisions of s.42(4) of the Income Tax Act, (1948) (now s.46(4) of the Income Tax Act as amended by chapter 148, R.S.C. 1952) empowering the Minister to reassess or make additional assessments in certain cases within six years from the day of the original assessment, would seem to be a fair indication that a previous assessment is not in all cases final and conclusive, but may be reconsidered in the light of subsequent evidence.

In support of this statement the learned judge cites *Gloucester Railway Carriage and Wagon Co.* v. *Inland Revenue Commissioners,* (2), and the finding of the special commissioners cited at page 472.

While the decision of one judge of this Court is not binding on another, I accept the foregoing as a correct application of the provisions of the statute.

The respondent corporation acknowledges that the sole issue in these proceedings is the determination as to whether the motor vehicles or "automotive equipment" set forth in Ex. 1 were capital assets and consequently the profit arising under their disposition was a capital profit not forming part of the respondent corporation's taxable income under section 20(1) of the Act.

The intention of a corporation, acting through its officers, is relevant to the consideration of a question of this nature as is established by the following authorities, and the method of proof is in effect stated in Halsbury, volume XIII, pages 565 and 566 as follows:—

> The state of a person's mind may be proved whenever it is material. Intention, therefore, may be proved by the direct testimony of the party whose intention is in question; . . . . and much more often, be established circumstantially by the party's conduct, whether prior to, contemporaneous

(1) [1953] Ex.C.R. 153 at 156. (2) [1925] A.C. 469.

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with, or subsequent to the act in question. When the act is unequivocal, the proof that it was done may of itself be evidence of the intention which the nature of the act conveys.

That the intention of a corporation acting through its officers may be binding not only on its shareholders but strangers and even revenue authorities has been established in a number of cases.

In *Bouch* v. *Sproule* (1), the question was whether a number of shares issued as a bonus were capital or income of the estate of a deceased shareholder, and it was held by the House of Lords that the question depended upon the action and intention of the company and that what it declared to be capital was capital as between the parties interested in the trust estate of which the shares formed a part.

Lord Herschell said at page 398:—

> I come now to the question whether the company did in the present case distribute the accumulated profits as dividend, or convert them into capital.

and at page 399:—

> I cannot, therefore, avoid the conclusion that the substance of the whole transaction was, and was intended to be, to convert the undivided profits into paid-up capital upon newly-created shares.

and further at the same page:—

> Upon the whole, then, I am of opinion that the company did not pay, or intend to pay, any sum as dividend, but intended to and did appropriate the undivided profit dealt with as an increase of the capital stock in the concern.

Lord Watson said at pages 404 and 405:—

> I am unable to resist the conclusion that, in adopting the scheme recommended by the directors the company must have intended that each shareholder should get an allotment of new shares, . . . It (the report) states expressly that if the shareholders sanctioned these proposals . . . .

and further at page 405, after stating that the shareholders had sanctioned these proposals, said:—

> If I am right in my conclusion the substantial bonus which was meant to be given to each shareholder was not a money payment but a proportional share of the increased capital of the company.

Lord Bramwell and Lord FitzGerald agreed.

In *Commissioners of Inland Revenue* v. *Blott* and *Commissioners of Inland Revenue* v. *Greenwood,* reported together (2), a company having by its articles power to do so

(1)(1887) 12 A.C. 385. (2) [1920] 1 K.B. 114.

passed a resolution declaring that out of its undivided profits a bonus should be paid to its shareholders and authorizing in satisfaction of that bonus a distribution among its shareholders of certain of its unissued shares credited as fully paid up and the respondent Blott's shares were allotted to him accordingly.

For the Commissioners of Inland Revenue it was contended that the shares received by the respondent were income and that the rule in *Bouch* v. *Sproule* did not apply, and for the respondent Blott that, following the rule in *Bouch* v. *Sproule,* they should have been treated as a distribution of capital. The special commissioners had held that the rule in *Bouch* v. *Sproule* applied and discharged the assessment appealed against.

In the King's Bench Division on special case stated by the special commissioners, it was argued for the respondent that the rule in *Bouch* v. *Sproule* applied and that:—

> If the intention of the company is the governing factor as between life tenant and remainder man it must equally be so as between subject and the Crown.

The appeal of the commissioners was dismissed.

The Commissioners of Inland Revenue appealed to the House of Lords (1), and Viscount Haldane at page 181 said:—

> *Bouch* v. *Sproule* is relied on as decisive of the principle to be applied, as being that the company itself can decide conclusively whether what is given is given as capital or income.

and at page 185:—

> It appears to me that the Court of Appeal have rightly held that the question is concluded adversely to the contention of the Crown by the decision of this House in *Bouche* v. *Sproule.*

and at page 188:—

> I am, therefore, of opinion, both on principle and on authority, that the transaction in the present case was one in which the company was in law dominant on the question whether the money in question was to be capital or income for all purposes, ...

Viscount Finlay and Viscount Cave concurred with Viscount Haldane,—Lord Dunedin and Lord Sumner dissenting.

Lord Sumner stated at page 218:—

> In any literal sense of the word intention has nothing to do with the matter . . . .the company, insofar as intention is a mental act, was

(1) [1921] 2 A.C. 171.

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incapable of having any intention at all. . . . . .The intention, which the final decision assumed, was one of those so-called intentions which the law imputes; it is the legal construction put on something done in fact.

In *Bagg* v. *The Minister of National Revenue* (1), a similar problem was considered by O'Connor, J. and he held that the whole of a company's undistributed income had been capitalized but not the good-will.

On appeal to the Supreme Court of Canada (2), Rand, J. said at page 589:—

An increase of capital assets may be effected in several ways, but where the shares are of one class only with the same rights, I see no reason why the company by such action as was taken here, cannot appropriate profits to lost capital. Whether it does so is a question of intention, and it must appear that the appropriation was to be irrevocable.

Kellock, J. who dissented, stated at page 595:—

Such a change must, in the first place, depend upon some act of the company with the intention of appropriating income to capital.

The true intention of the respondent corporation, acting through its officers, with regard to, and its actual dealings with, the twelve cars sold during the year 1949 are questions of fact; but whether the profits on their sales were capital gains or income is a question of law.

Was it the intention of the president, treasurer and general manager of the respondent corporation, who, according to the evidence, controlled its operations, to make the cars under consideration part of its plant and therefore capital assets?

All the matters permanently used for the purposes of trade, as distinguished from the fluctuating stock, are commonly included in the term "plant".

It consists sometimes of things which are fixed, as for example, counters, heating, gas, and other apparatus and things of that kind, and in other cases of horses, locomotives and the like, which are in this sense only fixed that they form a part of the permanent establishment intended to be replaced when dead or worn out as the case may be. Per Wood V.C. in *Blake* v. *Shaw*, (3).

In *Bagg* v. *The Minister of National Revenue*, (*supra*), Rand, J. said at page 589 dealing with appropriations to capital:—

It must appear that the appropriation was to be irrevocable.

The evidence of the president, treasurer and general manager of the respondent corporation, already quoted, does not indicate that the cars in question were to be made plant

(1) [1948] Ex. C.R. 244. (2) [1949] S.C.R. 574.
(3) (1860) John. 732 at 734.

within the definition of that word given by Wood V. C. in *Blake* v. *Shaw* (*supra*). They were not to form part of the permanent establishment or intended to be kept and replaced when worn out. On the contrary, the intention was to use them until they had been driven on an average of about 6,000 miles or "somewhere around five months." Such use of these vehicles would not result in their being worn out and require replacement in the sense that a machine or tool used in operations may be worn out and require replacement. He said further:—

> We think economically that it is sound business to replace those vehicles operated in our business at somewhere between 6,000, 10,000 or 12,000 miles.

Ex. 1, filed on behalf of the respondent corporation, shows, as already stated, that the aggregate selling prices of these cars exceeded by $2,659.37 their aggregate wholesale prices although it is true that three of the same were sold at small losses.

It can therefore be deduced that when the president, treasurer and general manager of the respondent corporation stated that "We think economically that it is sound business to replace those vehicles . . . at somewhere between 6,000, 10,000 or 12,000 miles" he had in mind, and was expressing his intention, that they should be sold while they would still bring more than the prices at which they were purchased and that there was no intention of using them until they were worn out.

It is clear from the evidence that the vehicles in question were purchased from the manufacturers in the ordinary course of business and, as a whole, sold at a profit, commissions being paid to salesmen in cases in which they effected the sales.

It is true that they were carried on its books as capital assets and that in its Income Tax Returns for the years 1947 and 1948, as well as for the year 1949, a number of vehicles designated "service and salesmen's cars" had been shown among its fixed assets; that eight of the twelve cars in question sold during the year 1949 had been carried over from the year 1948.

It has, however, been held many times that mere bookkeeping is not conclusive.

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In *J. & M. Craig (Kilmarnock) Ltd.* v. *Inland Revenue* (1), Lord Johnston said at page 349 in dealing with book-keeping entries:—

> Figures adopted for bookkeeping purposes can be no true guide to the ascertainment of profit and loss.

and further:—

> The Inland Revenue are not entitled as matter of course to hold the company to entries made in their books for purely bookkeeping purposes and these entries may in many cases be wholly disregarded, and that for two reasons:—The first a general reason, viz., that the Revenue cannot have it both ways; they cannot accept entries in a company's books when they find them to be to the advantage of the fisc, and disregard them when they are to its disavantage. They invariably set aside, and rightly so, entries which favour a company, but do not give the real results of their business. And I do not think that they can be allowed to hold a company to entries which favour the Revenue, but equally do not show the real results of their business. etc. etc.

This ruling was approved in *Doughty* v. *Commissioner of Taxes* (2).

In *Inland Revenue* v. *Scottish Automobile and General Insurance Company* (3), the Lord President (Clyde) said at page 94:—

> The way in which a particular trader keeps his books does not determine, or help much in determining, what is a capital profit and what is a revenue profit.

In *Cowen's Ideal Stamping Company Limited* v. *Inland Revenue* (4), the Court approved the Commissioners' action in not accepting in toto the method in which the company was keeping its books.

The principles on which the foregoing decisions are based would also apply to the manner in which the cars in question were shown in the respondent corporation's Income Tax Returns.

I am therefore constrained to find as facts that it was not the true intention of the respondent corporation to appropriate these cars to plant, i.e., capital, and that it did not actually deal with them as capital assets.

Were the profits on the sale of the cars in question capital gains or income?

The answer to this question may seem to follow logically from the findings of fact but the following cases, though some were decided under other statutes, are of assistance:—

(1) [1914] S.C. 338.
(2) [1927] A.C. 327 at 336.
(3) [1932] S.C. 87.
(4) (1935) 19 T.C. 155.

In *Californian Copper Syndicate Limited* v. *Harris* (1), the Lord Justice Clerk (Macdonald) applied the test:—

> Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

In this case, the syndicate had been formed *inter alia* to acquire copper and other mines and of £28,332 realized by sale of shares, £24,000 was invested in a copper bearing field in the United States which was subsequently sold to another company for £300,000 in fully paid up shares of that company. Although the sale price was to be paid in shares the Court held that the profit was income.

This judgment was approved by Lord Dunedin in *Commissioner of Taxes* v. *Melbourne Trust Limited* (2).

In *Gloucester Railway Carriage & Wagon Co. Ltd.* v. *Inland Revenue Commissioners* (3), cited by Cameron, J. in the case of *Minister of National Revenue* v. *British American Motors Toronto Limited* (*supra*), the Commissioners said at page 472:—

> We do not regard ourselves as precluded by the fact that as long as the wagons were left, they were treated "as plant and machinery" subject to wear and tear, from deciding that they are stock in trade when they are sold, even though let under tenancy agreements, for they seem to us to have in fact the one or other aspect according as they are regarded from the point of view of the users or the company.

A case stated by the Commissioners was heard before Rowlatt, J. (reported (4)) and he said at page 694:—

> On the part of the appellant company it is said that there were really two businesses. They were a manufacturing company and a company which let out wagons as a separate business. The wagons when they were put on the hire list were brought into the accounts at a price which allowed for a profit to the manufacturers as if that were a separate business. But the businesses were never really separated.

and further at pages 694 and 695:—

> It is said for the appellant company that, even if the businesses were not separate, the transaction was a realisation of plant. On the other hand it is said for the Crown that the appellant company manufactures and sells wagons, and although it does not always sell them en bloc, there is no difference in principle between the sale in question and an ordinary trade receipt.
>
> I do not think the case is quite so clear as either side put it, and the commissioners have not recorded a finding in terms that this is a trade receipt. That, however, is in effect how they have looked at it; they have declined to regard the two businesses of manufacturing and letting on hire

(1) (1904) 5 T.C. 159 at 166.
(2) [1914] A.C. 1010.
(3) [1925] A.C. 469.
(4) (1923) 129 L.T.R. 691.

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as separate from each other. On the contrary, they have found that the profit made by the appellant company from the sale is simply a profit made by a company whose business it was to make a profit out of wagons in one way or another. The commissioners have taken this view of the facts, and I cannot say they were wrong.

On appeal to the Court of Appeal (reported (1)) the appeal was dismissed.

In the course of his judgment Pollock, M.R. said that it was argued that the decision of the Commissioners was upon a question of fact and could not therefore be reviewed but he thought the finding of the Commissioners was one of mixed facts and law and therefore open to review.

Warrington, L.J. and Eve, J. at page 105 held that:—

> The question whether the company carried on one business or two businesses was one of fact, and in dealing with it there was no room for misdirection in point of law. On the facts as the Commissioners had found them there was no ground for interfering with their decision. But, assuming that the question in part depended on an inference of law to be drawn from the facts, their Lordships thought that the wagons were sold in the ordinary course of the company's trade, and could not be regarded as having been realised in the winding up of a severable part of the company's business.

On the appeal to the House of Lords which was dismissed, Lord Dunedin said at pages 474 and 475:—

> The appellants argue that this is really a capital increment; and to say so they call these wagons plant of the hiring business. I am of opinion that in calling them plant they really beg the whole question. The Commissioners have found—and I think it is the fact—that there was here one business. . . . There is no similarity whatever between these wagons and plant in the proper sense, e.g., machinery, or between them and investments the sale of which plant or investments at a price greater than that at which they had been acquired would be a capital increment and not an item of income.

In *Anderson Logging Company* v. *The King* (2), a company was incorporated to take over as a going concern a logging business and had power to acquire timber lands with a view to dealing in them and turning them to account for the profit of the company. At page 49 Duff, J. said:—

> The appellant company is a company incorporated for the purpose of making a profit by carrying on business in various ways including, as already mentioned, by buying timber lands and dealing in them. It is difficult to discover any reason derived from the history of the operations of the company for thinking that in buying these timber limits the company did not envisage the course it actually pursued for turning these limits to account for its profit as at least a possible contingency; and, assuming that the correct inference from the true facts is that the limits

(1) [1924] W.N. 105. (2) [1924] S.C.R. 45.

were purchased with the intention of turning them to account for profit in any way which might present itself as the most convenient, including the sale of them, the proper conclusion seems to be that the assessor was right in treating this profit as income.

And at page 56:—

The sole raison d'etre of a public company is to have a business and to carry it on. If the transaction in question belongs to a class of profit-making operations contemplated by the memorandum of association, prima facie, at all events, the profit derived from it is a profit derived from the business of the company.

On appeal to the Privy Council reported sub nom. *The King* v. *Anderson Logging Company Limited* (1), Lord Dunedin said at page 212:—

It may here be as well to say that their Lordships have not the slightest doubt that the judgment of the Supreme Court on the main question was right, being indeed entirely in conformity with the case of *Commissioner of Taxes (Victoria)* v. *Melbourne Trust,* (1914) A.C. 1001.

In *Cooper* v. *Stubbs* (2), Warrington, L.J. in considering the circumstances of that case said:—

The question therefore is simply this, were these dealings and transactions entered into with a view to producing, in the result, income or revenue for the person who entered into them? If they were, then in my opinion profits arising from them were annual gains or profits within the meaning of para. 1(*b*) of Sch. D.

In *Commissioner of Taxes* v. *British Australian Wool Realization Association Ltd.* (3), while on the facts it was held that a profit made was a capital gain, Lord Blanesburgh, who delivered the judgment of the judicial committee, said at page 250:—

To their Lordships, therefore, there is disclosed, on their view of the facts here, a case entirely within the terms of the following words from the judgment in *Californian Copper Syndicate* v. *Harris,* (supra), which have since been so often cited with approval: 'it is quite a well settled principle in dealing with questions of assessment of income tax, that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit . . . assessable to income tax.'

And at page 251 in making a distinction between the realization of assets by an individual and a corporation he said:—

A company is so bounded by its memorandum that it may be both permissible and essential to consider its authorized objects in connection with the actual transaction in question and even to seek for the principal purpose of its formation.

(1) [1917-27] C.T.C. 210. (2) [1925] 2 K.B. 753 at 769.
(3) [1931] A.C. 224.

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And at page 252 he quoted Rowlatt, J. in *Alabama Coal Co.* v. *Mylam* (1):—

> Merely realizing is not trading.

In *Spiers and Son Ltd.* v. *Ogden (H. M. Inspector of Taxes)* (2), Finlay, J. said at pages 125 and 126:—

> The general principle is laid down in the very well-known case, which has been constantly referred to since, of the *Californian Copper Syndicate,* reported in 5 T.C. at page 159 and the judgment at page 165. There are many other cases (which he cited including *Gloucester Railway Carriage & Wagon Co. Ltd.* v. *Inland Revenue Commissioners,* supra). These cases, all of them, seem to me to be simply illustrations of the general principle which was clearly expressed in the judgment of the Lord Justice Clerk in the *Californian Copper Syndicate,* and I think that what the cases show is that you have to look at the whole of the circumstances of the case and arrive at a conclusion on this: Was this the carrying on of a business or was it simply the realization of a capital asset? To take a case perfectly clearly on one side of the law, if, say a bank, finds that it does not want some premises and sells them, no one would for a moment suggest that because the bank happens to be able to sell the premises for a good deal larger price than it gave for them, that was an assessable profit of banking business. Of course it is not. That is a case perfectly clearly on what we may call from the taxpayer's point of view the right side of the line. Innumerable illustrations may be put. The Wagon case affords quite a good illustration on the other side of the line, but I am not going to multiply references to cases or to multiply illustrations. They all seem to me to be merely applications to particular facts of a general principle which is perfectly well established.

In *Minister of National Revenue* v. *Walker* (3), Hyndman, D.J. said at page 7 in applying the test:—

> I infer that his intention in embarking on this business was to make profits out of it. If that was his intention, then I think it can be said he was engaged in a scheme other than a hobby, or for amusement, and any winnings would be assessable to tax.

The facts in this case were that the taxpayer had regularly frequented race tracks during the racing seasons and over a period of years had won considerable money by betting.

In *Minister of National Revenue* v. *British and American Motors Toronto Ltd.* (*supra*), Cameron, J. had to deal with a similar problem although in that case the vehicles under consideration had been carried in an inventory account and were not segregated from its normal buying and selling operations. He found that they were not worn out or obsolete and said at page 163:—

> I find it impossible to reach any other conclusion than that they were always considered as part of the inventory which would later be sold in

(1) 11 T.C. 232 at 252. (2) [1932] T.C. 117.
(3) [1952] Ex. C.R. 1.

the normal course of business. It is true that they were temporarily removed from the stock of cars immediately available for sale. For a short period they were held for use of the employees pending sale, but the primary purpose of the respondent was that they would be sold. I find that they were not service cars or plant in any ordinary or proper sense.

It having been found as facts that it was not the true intention of the respondent corporation, acting through its officers, to allocate the cars in question to capital as plant and that they were dealt with, that is purchased and sold, as cars ordinarily carried as stock-in-trade, although temporarily used by employees of the respondent corporation, it follows from the foregoing authorities that notwithstanding the method of bookeeping used, and notwithstanding that they were shown as fixed assets in the Income Tax Returns of the respondent corporation, their purchase and sale was really the carrying on of part of the respondent corporation's business which by its Letters Patent it was authorized to carry on viz., "to buy, sell, import, export, exchange, rebuild, repair, maintain and generally deal in all kinds of automobiles . . ."

And it also follows that the profit on the sales of the cars in question was income within the meaning of sections 3 and 127(1)(*e*) of the Income Tax Act, 1948, chapter 52 of that year (now sections 3 and 139(1)(*e*) of chapter 148, R.S.C. 1952), which are as follows:—

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) business, (previously businesses)

(*b*) property, and

(*c*) offices and employments.

139(1)(*e*) 'business' includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment;

The appeal will therefore be allowed, the assessment restored and the appellant will have his costs.

Judgment accordingly.

1954
Feb. 4
Mar. 27

BETWEEN:

GEO. T. DAVIE AND SONS LIMITED ....APPELLANT;

AND

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

Revenue—Income—Income Tax—The Income Tax Act, c. 52 ss. 3 and 4, S. of C. 1948—Shipbuilding contracts—Loans from Canadian Commercial Corporation established under The Canadian Commercial Corporation Act, 10 Geo. VI, c. 40, S. of C. 1946—Trading receipts—Loss assumed by the Crown under shipbuilding contracts—Abatement of capital indebtedness—Whether a subsidy—Whether income—Appeal from Income Tax Appeal Board allowed.

Appellant, a dry dock owner and shipbuilder, got into financial and technical difficulties while building two small and three large Yangtze River freight and passenger vessels which a Chinese company had purchased with funds derived mainly from loans guaranteed by the Government of Canada. It obtained under a mortgage security advances from the Canadian Commercial Corporation—a Crown company—established under the Canadian Commercial Corporation Act, 10 Geo. VI, c. 40, S. of C. 1946, to which it was already indebted in the amount of $450,000 for previous loans. Upon completion of the shipbuilding contracts appellant's total indebtedness to the Canadian Commercial Corporation under the loan and mortgage deed amounted to $914,000. By an agreement effective November 2, 1949, between the Crown and appellant, the indebtedness of appellant was abated in respect of two amounts: the first of $284,813.83 "being the amount of a payment received by the Canadian Commercial Corporation from the Chinese company, representing the final increase in the price of the three large vessels"; the second of $450,000, "being a portion of the said advances made by the Canadian Commercial Corporation to the shipbuilder and representing the portion of the loss assumed by the Canadian Government under the shipbuilding contract". The payment of $284,813.83 by the Chinese company was taken into appellant's accounts for the year 1949 as a trading receipt but the sum of $450,000 was shown in its income tax return for the same year as an increase to its capital surplus. To appellant's declared income for that year the Minister added the said sum of $450,000 and from the assessment appellant appealed to the Income Tax Appeal Board which dismissed the appeal. An appeal was taken to this Court from the Board's decision. On the facts the Court found that the advances by the Canadian Commercial Corporation to appellant were advances on capital account and the abatement of $450,000 was an abatement of the capital indebtedness.

Held: That the direct payment by the Chinese company to the Canadian Commercial Corporation of the sum of $284,813.83 was not a contribution to appellant's losses under the shipbuilding contracts but rather a true trading receipt. The mere fact that the two items of abatement were dealt with in one agreement does not lead to the inference that they were of the same character. They were of a

totally different character. The relationship between appellant and the Chinese company was that of vendor and purchaser; whereas the relationship between appellant and the Canadian Commercial Corporation (or the Crown) was that of debtor and creditor.

2. That the benefit received by appellant by reason of the abatement cannot be considered as a subsidy since appellant's indebtedness to the Canadian Commercial Corporation secured as it was by a mortgage of all its immoveable properties was an indebtedness on capital account. While the advances made by the Canadian Commercial Corporation were used by appellant in building the ships, the Canadian Commercial Corporation itself was in the same position as a banker advancing working capital or as a lender who had advanced capital and had taken security by way of mortgage. It was not a party to the shipbuilding contracts and neither it nor its principal, the Crown, was under any legal obligation to assume or bear any part of appellant's loss. What the Crown did was to enter into a compromise of a capital debt by abating it to the extent stated. The case, therefore, falls to be decided on the law applicable to abatements rather than to that applicable to subsidies.

3. The mere cancellation or abatement of an undisputed trade debt does not give rise to taxable income in the hands of a taxpayer whose trade debt has been cancelled or abated. The abatement of a capital indebtedness cannot give rise to taxable income. *British Mexican Petroleum Co. Ltd.* v. *Jackson (Inspector of Taxes)* 16 T.C. 570; *Income Tax Case No. 455* 11 South Africa T.C. 168 referred to and followed.

4. The benefit conferred on appellant by the abatement of its capital liability was not something received in the course of its normal trading operations. It was outside those operations entirely. It did not in 1949 receive payment of the sum of $450,000 or acquire any right to receive it. The liability was diminished purely as an act of grace. The benefit received was not a profit from appellant's business.

APPEAL from a decision of the Income Tax Appeal Board.

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

Roger Letourneau, Q.C. for appellant.

Paul Taschereau, Q.C. and *E. S. MacLatchy* for respondent.

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

CAMERON J. now (March 27, 1954) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board dated January 13, 1953 (reported as *No. 78* v. *M.N.R.*—7 T.A.B.C. 408) dismissing by a majority an

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appeal by the taxpayer from an assessment made upon it for its taxation year 1949. To the appellant's declared income the respondent had added the sum of $450,000, the ground for so doing being stated in the Notification by the Minister as follows:

> The amount of $450,000 received by the taxpayer from Canadian Commercial Corporation has been properly taken into account in computing the income of the taxpayer in accordance with the provisions of the Act.

The facts in the case are not in dispute. The appellant was incorporated as a private company in 1941 under the Dominion Companies Act for the purpose of carrying on generally the business of a dry dock company and the business of building and repairing ships and other vessels. In December, 1946, it entered into a contract with Ming Sung Industrial Co. Ltd. (hereinafter to be called the Chinese Company) whereby it undertook to build and deliver four small Yangtze River Freight and Passenger Vessels at a fixed price per vessel, which price was later increased to a larger sum. In March, 1947 this contract was amended in order to provide that the appellant should deliver only two of such small vessels. At the same time the appellant entered into a further agreement to build and deliver three larger vessels for the Chinese Company at a fixed price. The two smaller vessels were delivered prior to September, 1948 and the last of the three larger vessels in July, 1949.

For the purpose of financing the construction of the said vessels, the Chinese Company had obtained loans from Canadian banks, the repayment of such loans being guaranteed by the Government of China. In March, 1947 under the authority of Part II of the Export Credits Insurance Act (1944-45, 8-9 George VI, c. 39 and Amendments, more particularly those resulting from 10 George VI, c. 49), the Government of Canada had guaranteed the undertaking of the Government of China in this respect.

By August, 1948 the appellant was in such financial difficulties due to increased costs and to certain technical difficulties that it could not fulfil its obligations or complete and deliver the vessels in accordance with its contracts. On September 21, 1948 it entered into a Deed of Loan and Mortgage (Ex. A) with the Canadian Commercial Corporation (hereinafter to be referred to as C.C.C.), established under the Canadian Commercial Corporation Act (1946—

10 George VI, c. 40). Prior to that date the C.C.C. had loaned the appellant sums aggregating $450,000. In that Deed the appellant was referred to as the Borrower and the C.C.C. as the Lender, and the agreement contained the following clause:

> To secure the reimbursement of the said capital sum of $450,000, and in order to guarantee further advances to the extent of an additional amount of one million dollars which the Lender may from time to time advance but does not hereby undertake to advance, the Borrower specially charges and hypothecates in favour of the Lender . . .

the immoveable properties therein described which were in fact all the immoveable properties then owned by the appellant.

By the Appropriation Act, No. 2, 1949 (13 Geo. VI, Vol. I, c. 15) assented to on April 7, 1949, a sum of $850,000 was appropriated by Parliament for the financial year ending March 31, 1949, and the purposes for which the said sum was granted to His Majesty were stated to be as follows:

> Vote No. 638. To reimburse the Canadian Commercial Corporation for amounts advanced by it as working capital under mortgage security to George T. Davie & Sons, Ltd. (losses on which advances cannot yet be estimated) for the purpose of enabling that company to complete and to deliver ships to the Ming Sung Industrial Company, Ltd., which purchased such ships with funds derived mainly from a loan for this purpose guaranteed by Canada under Part II of the Export Credits Insurance Act $850,000

Pursuant to the said appropriation, the sum of $850,000 was transferred by the Comptroller of the Treasury to C.C.C. upon requisition of the Minister of Trade and Commerce. On July 31, 1949, upon completion of the shipbuilding agreements, the appellant's total indebtedness to C.C.C. under the aforesaid Deed of Loan and Mortgage amounted to $914,000. By the fall of that year the losses on the Chinese contracts were ascertained to be $1,150,164.05 in all, as admitted by the respondent. The appellant was then in a precarious financial position and quite unable to meet its obligations to C.C.C. In the meantime the Chinese Company had paid direct to C.C.C. the sum of $284,813.83, "as the final increase of contract price in respect of the three larger vessels", thereby reducing the appellant's net overall losses on both types of vessels to $865,350.22. The appellant, having assented to the Deputy Minister's proposal to that effect, that sum of $284,813.83 was applied in

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reduction of the appellant's indebtedness to C.C.C., thus reducing its liability to $629,186.17. That payment of $284,813.83 was taken by the appellant into its trading receipts as being an additional payment on account of the contract price of the three large vessels.

On November 2, 1949, the Deputy Minister of Trade and Commerce wrote the appellant, part of that letter (Ex. R1) being as follows:

> This will confirm that, as a result of recent re-negotiations between officials of your company and officers of this Department, agreement has been reached whereby the Minister is prepared to recommend to the Governor in Council that the amount of the advances due the Canadian Government by your Company at July 31, 1949, be abated by an amount of $450,000 in respect of losses sustained in the construction of the three 270' Yangtze vessels for the Ming Sung Industrial Company Limited.
>
> It is proposed that the foregoing abatement be effected by a reduction of $450,000 in the amount of the advances outstanding at July 31, 1949, which are to be further reduced by an amount of $284,813.83 received by the Canadian Commercial Corporation from the Ming Sung Company as the final increase of contract price in respect of the three larger vessels. *The net result of these credits* will be the reduction of your Government advance account from $914,000 to the amount of $179,186.17.
>
> This indebtedness of $179,186.17 will be secured by First Mortgage held by the Canadian Commercial Corporation on the assets of the Geo. T. Davie & Sons Limited. Security now held by the Canadian Commercial Corporation on the Company's assets may be altered accordingly, if required by either party.

The net result of the foregoing proposals, accepted by the appellant, was to reduce the appellant's indebtedness under the Deed of Loan and Mortgage to the sum of $179,186.17. Later an understanding was reached regarding the terms of repayment and the security to be given in respect of that balance, and an agreement embodying the same and effective on November 2, 1949 (but actually executed on June 29, 1950) was entered into. In that agreement (Ex. A4), the appellant was the party of the first part, and His Majesty the King in Right of Canada (represented by the Minister of Trade and Commerce) was the party of the second part. In draft form it was attached to Order in Council P.C. 145/1111, dated March 4, 1950, which was as follows:

TRADE AND COMMERCE

> The Board had under consideration a memorandum from the Right Honourable the Minister of Trade and Commerce reporting:
>
> 'THAT, in March 1947, under authority of Part II of the Export Credits Insurance Act, the Government of Canada guaranteed the undertaking of the Government of China, which latter Government

had guaranteed the repayment of loans by Canadian banks to the Ming Sung Industrial Company Limited for the purpose of financing construction of Yangtze River Freight and Passenger Vessels by Canadian shipyards;

THAT due to increased costs of labour and materials and to certain technical difficulties, it became apparent during August 1948 that George T. Davie & Sons Limited would be unable to complete and deliver vessels in accordance with its contracts with the Ming Sung Industrial Company Limited;

THAT in order to carry out the purposes for which the Canadian Government had originally entered into the transaction and to minimize the possible loss under its guarantee, the Government of Canada acting through the Canadian Commercial Corporation advanced funds under mortgage security to George T. Davie & Sons Limited for working capital to enable the Company to complete and deliver the ships, funds for such purpose being provided by Vote 638 of the Further Supplementary Estimates of 1948-49 in the amount of $850,000, pending completion of the contracts and determination of the actual losses thereon;

THAT the vessels have now been constructed, delivered to, and accepted by the Ming Sung Industrial Company Limited, and the amount of the losses thereon determined;

THAT it is proposed to effect final settlement of advances made in respect of such transactions with George T. Davie and Sons Limited substantially in accordance with the terms of the Agreement annexed hereto as Schedule "A", which provides, inter alia, that the Government of Canada will assume losses to the extent of $450,000 on the Ming Sung contracts;

THAT the matter has been carefully reviewed by officials of this Department and, having regard to all the circumstances, it is considered that the proposed settlement is fair and reasonable and in the public interest.

The undersigned, therefore, has the honour to recommend that authority be given for the execution and delivery of such Agreement and other documents as may be necessary to give effect thereto.'

The Board concur in the above report and recommendation, and submit the same for favourable consideration.

One of the recitals in the said agreement is as follows:

WHEREAS, having regard to the guarantee of the Canadian Government, and all other circumstances, it is considered fair and equitable that the remainder of the loss incurred under the ship building agreement, amounting to $450,000, be assumed by the Canadian Government, and that the amount of the outstanding advances be abated accordingly.

Then Clause 1 of the operative part is as follows:

1. The total advance of Nine Hundred and Fourteen Thousand Dollars ($914,000) made by the Canadian Government to the Shipbuilder shall be and the same is hereby abated by the sum of Seven Hundred and Thirty-Four Thousand, Eight Hundred and Thirteen Dollars and Eighty-Three cents ($734,813.83), made up of the following sums, namely:

(a) the sum of $284,813.83, being the amount of a payment received by the Corporation from Ming Sung representing the increase in the price of the said three (3) vessels; and

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(b) the sum of $450,000, being a portion of the said advances made by the Corporation to the Shipbuilder under mortgage security, and representing the portion of the loss assumed by the Canadian Government under the shipbuilding agreement; and

the repayable portion of the total advance made by the Canadian Government to the Shipbuilder is hereby fixed at the sum of One Hundred and Seventy-Nine Thousand, One Hundred and Eighty-Six Dollars and Seventeen Cents ($179,186.17).

Then followed certain other provisions not here of importance. Clause 4 fixes the time of payment of the balance of the said indebtedness and by Clause 5 the appellant, upon full payment of principal and interest thereof, is to be discharged from all liability. By Clause 6 the appellant agreed to execute a first mortgage to the Canadian Government as collateral security for the said indebtedness, on all its real property, and upon delivery thereof the mortgage given to the C.C.C. on September 21, 1948, was to be discharged.

In the meantime, C.C.C. had paid back to the Comptroller of the Treasury the sum of $400,000 in respect of the original sum of $850,000 advanced to it under Vote 638, and the balance of $450,000 was accounted for by the aforesaid abatement of $450,000 and the agreement of November 2, 1949, above mentioned. The provisions of the said agreement relating to the giving of the new mortgage for the sum of $179,186.17 and the discharge of the former mortgage to C.C.C. were duly carried out.

As I have indicated above, the respondent added to the appellant's declared income for the year 1949 the said sum of $450,000, i.e., the amount by which the indebtedness of the appellant had been abated.

The appellant says that at all relevant times the relationship between it and C.C.C., or the Canadian Government, was that of debtor and creditor on capital account and that the abatement or cancellation of a debt of a capital nature cannot give rise to anything but a capital gain. In his Reply to the Notice of Appeal, the Minister alleges that under the agreement of November 2, 1949, of Order in Council P.C. 145/1111, His Majesty made a grant or subsidy to the appellant in respect of losses sustained by the appellant in the course of carrying on its business, which amount was applied in reducing the amount owed by the appellant to the C.C.C.; and that in adding to the appellant's income for 1949 the sum of $450,000, it did so in

accordance with the provisions of s. 3 and s. 4 of the Income Tax Act, which are as follows:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

One of the submissions on behalf of the respondent may be disposed of at once. By the agreement effective November 2, 1949, the indebtedness of the appellant to C.C.C. was abated in respect of two amounts. The first was that of $284,813.23, "being the amount of a payment received by the Corporation (i.e. the C.C.C.) from Ming Sung, representing the increase in the price of the said three vessels". The second abatement was the sum of $450,000, "being a portion of the said advances made by the corporation to the shipbuilder under mortage security, and representing the portion of the loss assumed by the Canadian Government under the shipbuilding agreement." The amount of the first abatement was taken into the accounts of the appellant for the year 1949 as a trading receipt and I think properly so. Counsel for the respondent submits, however, that there is no essential difference between these two items and that if the first abatement is properly a trading receipt, so also is the second. He suggests that owing to the financial difficulties in which the appellant found itself, the losses which it had sustained in respect of the three vessels were made up in part by Ming Sung, and as to another part, by the Crown.

In my view, however, that submission cannot be supported. There is no evidence whatever that in paying the additional sum of $248,813.83, Ming Sung was contributing to the losses of the appellant. The letter of the Deputy Minister dated November 2, 1949, states that that sum "was received by the C.C.C. from Ming Sung as the final increase of contract price in respect of the three large vessels." A statement in para. 28 of the Notice of Appeal —and admitted in the respondent's Reply—was that that sum was taken into the appellant's trading receipts as being an additional payment on account of the contract price of

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the three large vessels. It was therefore, in my opinion, not a contribution to the appellant's losses but rather a true trading receipt. The mere fact that the two items of abatement were dealt with in the one agreement does not lead to the inference that they were of the same character. In my view they were of a totally different character. The relationship between the appellant and Ming Sung was that of vendor and purchaser; whereas the relationship between the appellant and the Crown (or its agent the C.C.C.) was that of debtor and creditor.

In its return for 1949 the appellant did not show the sum of $450,000 as a trading receipt but as an increase in its capital surplus. It is well settled, however, that the mere way in which a company keeps its accounts is not conclusive in the matter.

It is quite clear that the advances by C.C.C. to the appellant were advances on capital account. They are described as "capital" in the mortgage (Ex. A) and as working capital in Vote No. 638 (*supra*). Indeed, counsel for the respondent agreed that they were advances of capital and on the facts they could not be otherwise. They were not taken into the appellant's accounts as trading receipts.

It follows that whatever may have been the reason for the abatement, it was, in fact, an abatement of the capital indebtedness. The substantial question for consideration, therefore, is whether such an abatement can give rise to taxable income. Is it "income" within the meaning of that term in the Income Tax Act—a profit from the appellant's business in 1949?

The respondent endeavours to bring this amount within the purview of the appellant's trading operations by reference to the fact that the abatement arose because or in respect of the appellant's losses in the Ming Sung contract. It cannot be disputed that such is the case, as counsel for the appellant readily admits. Counsel for the respondent goes further and submits that the letter of the Deputy Minister of November 2, 1949, and the contract effective as of that date, are clear indications that the Crown was assuming a portion of the losses sustained by the appellant in the Ming Sung contract, that the abatement in the indebtedness was merely a mode of artifically supplementing the income of the appellant in respect of that contract—

a contract which undoubtedly was within the ambit of the appellant's normal trading operations. He submitted, therefore, that it was in the nature of an income subsidy and so subject to tax. He says that what happened was this. The Crown in order to stimulate the production of goods for export had guaranteed to the Canadian banks the repayment of loans made by them to Ming Sung; that when the appellant got into financial difficulties in carrying out its contract, advances were made to it by the Crown's agent—the C.C.C.; that when the losses were finally established, the Crown, having perhaps a moral obligation to assist the appellant by bearing part of its losses, agreed to abate the appellant's liability to C.C.C.; and that the agreement to reduce the mortgage held by C.C.C. by $450,000 had the same result as if the Crown had paid that sum to the appellant and the appellant had then in turn paid it to C.C.C.

As pointed out by the President of this Court in the *St. John Drydock* case (1), statutory subsidies may be of a capital nature or of a revenue nature. In that case it was held that the payment to the taxpayer was a construction subsidy payable in respect of the capital expenditure and that the taxpayer did not receive it in the course of its trading or business operations or because of them and so was not "income" in the hands of the taxpayer. The case of *Smart (Inspector of Taxes)* v. *The Lincolnshire Sugar Co. Ltd.* (2) is an illustration of the statutory subsidy resulting in taxable income. There the subsidy was paid on sugar manufactured in Great Britain from beet grown there. It was held that in view of the business nature of the sums paid, that they were trading receipts and proper to be taken into account for income tax purposes in the year in which they were received. Another similar case is that of *Charles Brown & Company* v. *C.I.R.* (3).

The submissions so made by counsel for the respondent are substantial, but in view of the facts as I consider them to be I cannot give effect to his argument. In the first place I do not think that the benefit received by the appellant by reason of the abatement can be considered as a subsidy. I was not referred to any statute which would

(1) [1944] Ex. C.R. 186. (2) 20 T.C. 643.
(3) 12 T.C. 1256.

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authorize the payment of any subsidy to the appellant, and in the correspondence and documents filed it is referred to as an abatement and not as a subsidy. Secondly, I think the argument entirely overlooks the fact that the indebtedness of the appellant to C.C.C.—and which was secured by a mortgage of all the immoveable properties of the appellant—was an indebtedness on capital account. I think this is the most important fact in the entire case and counsel for the respondent admitted that it was a formidable barrier in his way.

I think it is of importance also to note that while advances made by C.C.C. were doubtless used by the appellant in building the ships under the Ming Sung contract, the C.C.C. itself was in exactly the same position as a banker advancing working capital or as a lender who had advanced working capital and had taken security by way of mortgage. It was not a party to the Ming Sung contract and neither it nor its principal, the Crown, was under any legal obligation to assume or bear any part of the appellant's loss.

Now, as I view the matter, this is what happened. The appellant owed the C.C.C.—the agent of the Crown—very substantial amounts on capital account. Due to its losses under the contract, the appellant could not pay the debt and was facing bankruptcy. The C.C.C. could have foreclosed the mortgage and might thereby have realized a part of its claim. But the Crown for good and valid reasons preferred not to deal with the matter in that way. It may have felt a moral obligation to bear some part of the losses due to the manner in which it had encouraged the appellant to enter into the contract—as suggested by counsel for the respondent. As a matter of policy it may have decided not to put the appellant into bankruptcy and thereby throw a substantial number of men out of employment. It is clear from the terms of Vote 628 (*supra*) that losses on the advances made by C.C.C. to the appellant were anticipated at that time, the amount of which was not fully determined. What the Crown actually did was to enter into a compromise of the capital debt by abating it to the extent stated. I think, therefore, that the case falls to be decided on the law applicable to abatements rather than to that applicable to subsidies.

The leading case which has to do with the position of a taxpayer whose trade liabilities have been lessened is that of the *British Mexican Petroleum Co. Ltd.* v. *Jackson (Inspector of Taxes)* (1). The facts in that case are briefly as follows:

In 1919 the appellant had entered into a contract with an oil producing company (which held a large interest in the shares of the appellant company) for the purchase of petroleum. By reason of the slump in the petroleum business in 1921, the appellant was unable to meet its obligations under its contract. Accounts of the appellant company's business were made up for the year ended the 30th June, 1921, and for the eighteen months ended the 31st December, 1922. At the 30th June, 1921, the agreed amount owing to the oil-producing company under the contract was £1,073,281; at the 30th September, 1921, the amount was £1,270,232.

Under the terms of an agreement dated the 25th November, 1921, the appellant company paid to the producing company the sum of £325,000 and was released by the producing company from its liability to pay the balance remaining due, namely, £945,232. The amount so released was carried direct to the appellant company's balance sheet and was shown as a separate item under the head 'Reserve' at the 31st December, 1922.

The Crown contended that the amount released should be brought into account in computing the appellant company's profits for purposes of Income Tax and Corporation Profits Tax, either in the account for the eighteen months to the 31st December, 1922, or, alternatively, in the account for the year to the 30th June, 1921, that account being re-opened for the purpose.

The Special Commissioners held that the amount released should be brought into the profit and loss account of the company for the eighteen months to the 31st December, 1922.

Rowlatt, J. reversed the finding of the Special Commissioners, and appeals to the Court of Appeal and to the House of Lords were both dismissed. It was held that the amount remitted should not be included as a receipt in the account for the eighteen months to the 31st of December,

(1) 16 T.C. 570.

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1922, and that the account for the year to the 30th June, 1921, should not be re-opened and adjusted by reference to the remission.

At p. 584 Rowlatt, J. said:

> All these companies are very closely connected—at any rate, two of them are, the oil company and the ship-owning company; the oil company and the ship-owning company are very closely connected with this Company in that they own all the shares, or something of that sort. What they said was: 'We will release this debt or a very large part of it —we will absolutely release it and write it off and you can go on trading on that footing.' They could have wound up the Company and reconstructed it; but they did not do that. They simply carried on releasing the debt. That is what they have done. Under those circumstances the Commissioners have held what Mr. Hills himself finds it difficult to support—on broad business lines it cannot be supported; I do not understand it myself in the least—that in the year of release, when the business entered into a new lease of life and a new bargain was struck, the amount released must be brought into the revenue account . . . They resisted it in the other case, and I have to decide whether or not that is right. I literally cannot understand why they should be entitled to do that. What is chargeable to Income Tax under either the First or Second Case of Schedule D, I forget which it is—the trading case—is the profit which is made by comparing the amount which you receive from selling goods or rendering services, or whatever it is, with the amount which you pay out in putting yourself in a position to do that by buying goods and equipping yourself, finding the expenses for rendering the services or whatever it is —with the necessary adjustments in the account to allow for the stock which is carried over from year to year in the way Mr. Hills drew my attention to—that is what it is, the difference which you enjoy between what you receive and what you have to pay out in the year's trading. How on earth the forgiveness in that year of a past indebtedness can add to those profits I cannot understand. It is not a matter depending upon the form in which the accounts are kept. It is a matter of substance, looking at the thing as it happened, as a man who knows nothing of scientific accountancy might look at it—it is the receipts against payments in trading.

In the Court of Appeal, Lord Hanworth, M.R., speaking for the full Court, placed considerable stress on the fact that in the agreement by which the debt was reduced the parties had agreed that the abatement was to be placed to the credit of the depreciation account and not otherwise. It is significant to note, however, that in the House of Lords, no reference whatever was made to that clause of the agreement, nor was it mentioned in the opinion of Rowlatt, J. Lord Thankerton, whose judgment was concurred in by all the judges in the House of Lords, stated, in part, as follows:

> My Lords, I am of opinion in the present case, that the account to 30th June, 1921, cannot be reopened, as the amount of the liability there stated was correctly stated as the finally agreed amount of the liability and the subsequent release of the Respondents proceeds on the footing of the correctness of that statement.

The Appellant's alternative contention, which was not seriously pressed by the Attorney-General, is equally unsound, in my opinion. I am unable to see how the release from a liability, which liability has been finally dealt with in the preceding account, can form a trading receipt in the account for the year in which it is granted.

Accordingly, I agree with the unanimous decision of the Courts below, who disagreed with the decision of the Special Commissioners, and the appeal should be dismissed.

Lord Macmillan, with whom Lord Warrington of Clyffe concurred, gave additional reasons for dismissing the appeal, stating at p. 593 as follows:

If, then, the accounts for the year to 30th June, 1921, cannot now be gone back upon, still less in my opinion can the Appellant Company be required to enter as a credit item in its accounts for the eighteen months to 31st December, 1922, the sum of £945,232, being the extent to which the Huasteca Company agreed to release the Appellant Company's debt to it. I say so for the short and simple reason that the Appellant Company did not, in those eighteen months, either receive payment of that sum or acquire any right to receive payment of it. I cannot see how the extent to which a debt is forgiven can become a credit item in the trading account for the period within which the concession is made.

I observe that of the Appellant Company's total indebtedness to the Huasteca Company, £196,951 was incurred during the eighteen months covered by the accounts to 31st December, 1922, and that the date on which the Huasteca Company agreed to forgo £945,232 of the Appellant Company's total indebtedness was 25th November, 1921, also within that period of eighteen months. Now it may be that where during the currency of an accounting period a trading debt is incurred, and the creditor agrees during the currency of the same period to accept less than the full amount of the debt due to him, it is only the balance of the debt as exacted, or agreed to be exacted, which ought to enter, as a debit, the debtor's accounts for the period. As to this I say nothing, for the present case has been argued by the Crown on the footing that the whole sum of £945,232 ought either to be dealt with in a reopened account for the year to 30th June, 1921, or credited in the eighteen months' account to 31st December, 1922, and as, in my opinion, neither of these contentions is admissible, I concur in the motion that the appeal be dismissed.

It will be noted that in the second paragraph of Lord Macmillan's opinion, he was careful to reserve the question as to the effect of releasing a *trade* debt in the year in which it was incurred. In the instant case it is clear that much if not all of the indebtedness was incurred in the previous year, and that it has been argued by the Crown on the footing that the whole of the amount abated should be treated as income in the year 1949.

That case was followed in *Income Tax Case No. 455,* (1). The facts there were as follows:

Appellants were three subsidiaries of a company to which they were indebted in certain large amounts, incurred in the course of trading. The

(1) 11 South Africa T.C. 168.

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parent company owned or controlled all the shares in the appellant companies, whose business consisted of the sale of goods purchased by the parent company. The parent company also sold goods produced by the appellant companies. The parent company, during the year of assessment under review, passed resolutions recording its decision to forego a substantial portion of the amounts owing to it by the appellant companies. The amounts of the debts so forgiven by the parent company, which were reflected in the accounts submitted by the appellant companies in support of their returns of income, were included by the Commissioner for Inland Revenue in the respective incomes of the appellant companies subject to normal tax and assessed accordingly.

Dr. M. Nathan, K.C., President of the Court, summarized the position of the parties as follows:

It was contended on behalf of the appellants that these were gratuitous releases, and that they constituted donations. They were not, therefore, subject to tax, being in their nature capital receipts. On behalf of the Commissioner it was said that these releases of indebtedness were made in the course of trading and, therefore, the receipts were trading receipts, and not capital receipts. Counsel for the Commissioner relied upon the fact that the indebtedness of the appellants to the parent company arose out of trading; the remissions by the parent company of the indebtedness increased the prospects of future trading between the companies; and it was suggested that the remissions were rebates or discounts or allowances in reduction of the price paid for goods sold to the appellants, or the remissions were in the nature of remuneratory donations for services rendered to the parent company.

At p. 169 he said:

In our view, the remissions made by the parent company were not rebates or discounts or allowances in reduction of the prices paid for goods sold to the appellants. They cannot be regarded as part of the ordinary trading of the appellant companies, nor were they in the nature of remuneratory donations for services rendered to the parent company. It appears to us that this case is governed by the decision of the English Courts in *British Mexican Petroleum Company Limited* v. *Jackson*.

Then, after adopting what was said by Rowlatt, J. and Lord Hanworth, M.R., and Lord Macmillan in the *British Mexican Petroleum* case, the President said:

It appears to us that this is an identical case. The amounts remitted were not receipts in the course of trading.

The result is that the appeals are allowed, and the assessments must be amended accordingly.

The facts in the *British Mexican Petroleum* case are, of course, somewhat different from those in the instant case. There the debt which was abated was incurred in the ordinary course of trading and it was held that the accounts for the earlier period in which most of the debt had been incurred could not be re-opened and those accounts readjusted because of the abatement; and also that the amount

of the abatement could not be brought into account in the later period in which some part of the debt had been incurred and the abatement made. As I read the judgment of Rowlatt, J., he considered the benefit received by the taxpayer as something quite outside the scope of its trading activities; something which was conferred on it "as an act of grace although business methods were behind it". Lord Macmillan, in disposing of the suggestion that the amount of the abatement should be treated as a revenue item in the taxation period in which the abatement was made, stated his reasons in these few sentences:

> I say so for the short and simple reason that the Appellant Company did not, in those eighteen months, either receive payment of that sum or acquire any right to receive payment of it. I cannot see how the extent to which a debt is forgiven can become a credit item in the trading account for the period within which the concession is made.

In my view, that case is authority for the proposition that the mere cancellation or abatement of an undisputed trade debt does not give rise to taxable income in the hands of a taxpayer whose trade debt has been cancelled or abated, subject perhaps to the question reserved by Lord Macmillan and which I have referred to above. That being so, it cannot be found that the abatement of a capital indebtedness —as in the instant case—can give rise to taxable income.

In my opinion, also, the benefit conferred on the appellant by the abatement of its capital liability was not something received in the course of its normal trading operations. It was outside those operations entirely. Moreover, to adopt the language of Lord Macmillan, it did not in 1949 receive payment of the sum of $450,000 or acquire any right to receive it. The liability was diminished purely as an act of grace, coupled possibly to some extent with matters of public policy and business motives. The benefit received by the appellant was not a profit from its business.

It is of some interest, also, to refer to Income Tax Law and Practice by Newport and Shaw, 25 Ed., where under the heading "Compositions" at p. 120, the following comment appears:

> Where the taxpayer himself makes a composition with his creditors, the Revenue do not normally seek to bring in the 'benefit' as an addition to his profits, or as a deduction from the amount of a corresponding loss.

And reference is made to the *British Mexican Petroleum* case as authority for that statement.

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For these reasons, I think the appeal must be allowed. The decision of the Income Tax Appeal Board will be set aside and the matter referred back to the Minister for the purpose of re-assessing the appellant in accordance with these findings. The appellant is also entitled to be paid his costs after taxation.

Judgment accordingly.

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Mar. 23-25

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Mar. 30

BETWEEN:

ROY McDEVITT .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

AND BETWEEN:

HELEN MARGARET McDEVITT, administratrix of the Estate of Ivan Charles McDevitt (deceased) ..... SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Negligence—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(c)—Ordinance Respecting Compensation to the Families of Persons Killed by Accident—C.O.Y.T. 1914, c. 19—The Public Trustee Act, S. of A., 1949, c. 85—Measure of damages pecuniary loss to family —No claim for funeral expenses—Principles in determining damages in claims under Fatal Accidents Acts—Child's share to be paid to Public Trustee of Alberta.

The actions were brought to recover damages for loss sustained by the suppliants as the result of a collision between a car owned by one of them and driven by his son and a Canadian Army truck driven in the course of his employment by a civilian employee of the Crown, whereby the car was practically demolished and the son so badly injured that he died, leaving a widow with an unborn child. The owner of the car claimed damages for the loss of his car and loss of revenue and the widow claimed funeral expenses and damages for loss of her husband.

Held: That the driver of the Army truck was negligent in failing to keep to the right of the centre of the highway, as he could safely and easily have done, and cutting over to the left of the centre without keeping a proper lookout for on-coming traffic from the south and that his negligence was the sole cause of the collision with its resulting consequences.

2. That in a claim under the Yukon Territory Fatal Accidents Act the measure of damages is not the injury to the deceased but the pecuniary loss to his family resulting from his death.

3. That in a claim under 19(*c*) of the Exchequer Court Act based on a provincial or territorial Fatal Accidents Act, corresponding to Lord Campbell's Act, where the fatal accident was the result of negligent operation of a motor vehicle, this Court, in determining whether a claim for the funeral expenses of the deceased should be allowed, must ascertain and apply the statutory law on the subject in force in the province or territory in which the death occurred as it stood on June 24, 1938, when the Crown was first made responsible for the negligence of its officers or servants in driving a motor vehicle. If, at that time, in an action as between subject and subject under the applicable provincial or territorial Fatal Accidents Act a claim for funeral expenses could not have been maintained, it should not be allowed in this Court even if it has become permissible in such province or territory by an amendment made since June 24, 1938, for it is not competent for a provincial or territorial legislative assembly or body to alter the extent of the responsibility of the Crown in right of Canada as imposed by Parliament. Only Parliament can do so.

4. That under the applicable law in the Yukon Territory funeral expenses for the deceased are not recoverable.

5. That where there is liability under a Fatal Accidents Act the compensation authorized by it is for the loss of pecuniary benefit or advantage to the family of the deceased as the result of his death, and not otherwise. But it is not necessary to prove actual loss at the date of his death if there was a reasonable expectation of future pecuniary benefit to a member of his family from the continuance of his life. The compensation should be proportionate to the pecuniary advantage which the persons for whose benefit the action is brought might reasonably have been expected to enjoy if the deceased had not been killed so that regard must be had to the station in life of the parties concerned. The Court should estimate what sums the deceased would have applied out of his income to the maintenance of his wife and family and also what portion of his additional savings he would or might have left to them. In this estimate regard must be had to the expectancies of life of the deceased and his family. But, of course, it is only the present value of the future benefits that should be taken into account and there must be appropriate deduction for any acceleration of devolution of estate. Moreover, the amount of the compensation must not be so large that its investment will produce an income equal to the amount of income lost, for consideration must be given to possible contingencies, such as the death by accident of the deceased prior to the expiration of his normal expectancy of life or his disability or loss of earning power or income or the remarriage of his widow or her premature death. It is thus obvious that the contingencies that must be considered are so uncertain that the extent of the loss of pecuniary benefit or advantage to the family of the deceased cannot be ascertained with certainty. At best, the evaluation of the amount of compensation must be a matter of estimate or rough calculation involving an element of conjecture or even of guess work. But while the task of determining the amount of compensation is difficult the Court must do its best to arrive at an award that is both fair and realistic with due regard to the contingencies that should be considered.

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6. That the child's share of the damages should be paid to the Public Trustee of Alberta to be held by him in trust for the child under the powers vested in him by The Public Trustee Act of Alberta.

PETITIONS OF RIGHT to recover damages for loss sustained by the suppliants resulting from the negligence of a servant of the Crown.

The petitions were tried together before the President of the Court at Whitehorse in the Yukon Territory.

C. Becker, Q.C., and *R. S. Matheson* for suppliants.

G. Van Roggen and *A. J. MacLeod* for respondent.

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

THE PRESIDENT now (March 30, 1954) delivered the following judgment:

These two petitions of right were tried together at Whitehorse in the Yukon Territory. They arose out of a collision between the suppliant Roy McDevitt's car driven by his son Ivan Charles McDevitt and a Canadian Army truck owned by the Crown and driven in the course of his employment by Charles N. Novak, a civilian employee of the Crown. The collision occurred on September 17, 1951, at about 2.30 p.m., at a point on the Alaska Highway about 4 miles south of Mile 630 inside the Yukon Territory. As the result of the collision the suppliant Roy McDevitt's car was practically demolished and its driver Ivan Charles McDevitt so seriously injured that he died a few hours afterwards in the hospital at Whitehorse leaving his widow the suppliant Helen Margaret McDevitt with her then unborn child.

On December 17, 1951, the said child was born and his name registered as Ivan Charles McDevitt. On March 20, 1952, Letters of Administration of the property of Ivan Charles McDevitt deceased were granted by the District Court of Northern Alberta to the suppliant Helen Margaret McDevitt and the said Letters of Administration were sealed with the seal of the Territorial Court of the Yukon Territory on April 23, 1953.

The petitions were brought under section 19(*c*) of the Exchequer Court Act, R.S.C. 1927, chapter 34, which, as amended on June 24, 1938, provides 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 his petition the suppliant Roy McDevitt claimed $4,200 damages for the loss of his car and loss of revenue. In her petition the suppliant Helen Margaret McDevitt claimed $387.88 for funeral expenses and $50,000 damages for the loss of her husband. This claim was made under An Ordinance Respecting Compensation to the Families of Persons Killed by Accident, C.O.Y.T. 1914, chapter 19, as amended, which will be referred to as the Yukon Territory Fatal Accidents Act.

In each action the respondent counterclaimed for $3,939 for damage to the Army truck.

It was admitted that at the time of the collision Charles N. Novak was a servant of the Crown and acting within the scope of his employment, so that the only issues are whether he was guilty of negligence and whether the damage to the car and the death of Ivan Charles McDevitt resulted therefrom. The onus of proof is, of course, on the suppliants.

There is no dispute about certain facts. It is established that at the time of the collision Ivan Charles McDevitt was driving his father's car from Lower Post in British Columbia to Watson Lake and was on a stretch of the Alaska Highway that was a few miles inside the Yukon Territory and that Charles N. Novak was driving the Army truck towards Lower Post. For purposes of convenience I shall refer to the stretch of road from Lower Post to Watson Lake as running from south to north and McDevitt's right side of the road as east of its centre. The location of the collision is also settled. This is shown on a series of sketches, Exhibit 9, prepared by Mr. Dalziel. It occurred on a rise in the road about 360 feet south of a culvert at the bottom of a valley. The grade from the culvert to the point of collision was not a steep one but became steeper further south. The collision occurred on a slight curve or bend in the road towards the east. The road had been cut out of the side of a hill so that east of it there was a bank

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of earth and south of it a slope down into the valley of about 150 feet. At the point of the collision the road was about 38 feet wide including both shoulders, the west one being wider than the east and east of the east shoulder there was a ditch between it and the bank. It was also established that the gravel on the road was well packed and that it had been recently graded. It was a hot sunny day and the road was very dusty. This was common in such weather.

Although many persons were called as witnesses there were only two that were actually in the collision, namely, Craig Forfar, who was riding in the front seat with McDevitt, and Charles N. Novak, the driver of the Army truck. Neither could give evidence of the actual impact for it happened in a cloud of dust. They were able to testify only on what happened immediately prior to the collision and in such testimony there was conflict. I shall first summarize the evidence of Craig Forfar. He had left Watson Lake with McDevitt about noon or 12.30 p.m. to go to Lower Post to meet a friend there. They all stayed at Bob Kirk's cabin and then went to Christie's cafe for lunch. They then left Lower Post to go back to Watson Lake at about 1.30 p.m. There were three persons in the front seat, McDevitt, Earnest Frank next to him and Forfar nearest the right side. Before they left Forfar noticed one of Smith's trucks pulling out of Watson Lake. It was hauling a trailer—called a lowboy—carrying a heavy load of pipe. McDevitt left about 15 or 20 minutes after the lowboy. He was travelling about 30 to 35 miles per hour before he caught up to it. It was very dusty as he got close to it and he slowed down. He was on the right hand side of the road. Forfar was looking out into the ditch. The car was travelling right near it as it was following the lowboy. The next thing Forfar knew he was in the hospital at Whitehorse. But he was definite that before he was hit McDevitt was on his right hand side of the road right on the crown of the ditch. Forfar was watching the car going down the hill. It had not gone down as far as the culvert when it was hit by something. Forfar was not shaken on his cross-examination. The dust left behind by the lowboy was so heavy that McDevitt slowed down. They could see only a couple of car lengths ahead and could not see

the lowboy through the dust. Driving in the dust was like driving in a fog where the driver will use the right hand ditch as a guide. McDevitt had not attempted to pass the lowboy. He had caught up to it and proceeded into its dust cloud just before the accident. They were going down the hill and getting near the bottom when the collision happened.

Conflicting evidence was given by Charles N. Novak, the driver of the Army truck. He operated from the maintenance camp at Watson Lake and was engaged in hauling gravel for the 6-mile stretch of the Alaska Highway from Mile 626 to Mile 632. At the time of the collision his truck, which had a 4-wheel drive, was empty. He had just dumped a load of gravel and was returning south to the steam shovel for his next load. He had stopped for a drink of water at the culvert just south of Mile 630 at the foot of the hill and had started up again. He then saw the trailer coming around the bend. He was in third gear at the time. He then shifted into fourth gear and was going 14 miles per hour. He passed the trailer as he started up the rise. The dust behind it was pretty thick. It was like hitting a sack of flour. He said that he was on his right side of the road as he passed. The dust cloud created by the lowboy was 15 to 20 feet behind it coming in a sort of spin or roll. He could see that there was 4 feet of clearance between his truck and the edge of the road. The next thing he knew after he hit the dust cloud was that an object hit him. He did not know whether it was a car or a truck. It was not more than a second after he hit the dust cloud. He insisted that he was on his right side of the road when he entered the dust cloud and that he maintained that position. He did not observe the shoulder on his right but he was not worried about sinking in it in view of the fact that his truck was empty. He did not see any car coming to warn him before they hit. He could see the right side of the road but could not see more than 4 to 5 feet ahead of him. When the impact happened he was hit in the stomach by his steering wheel and the next thing he knew was that he was stopped on the other side of the road with the nose of his truck in the ditch. He remembered nothing about the course of his vehicle after the impact. He was in fourth gear at the time. When he came to after the impact he

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saw that the front left wheel was off his truck. He climbed out of it and rushed over to the car. Then two vehicles came, one from Watson Lake, which he sent back to notify the Royal Canadian Mounted Police, and the other from Lower Post with Robert Kirk in it. He arrived 10 or 15 minutes after the accident. He and Kirk put Forfar on an airfilled mattress which Kirk had in his car and put a pillow under McDevitt. Then Constable Deer arrived about half an hour after the accident. Novak did not observe any of the tire marks made by the car or the truck prior to the collision. On his cross-examination he said that he had walked down to the culvert, saw the lowboy after he had started up again and passed it about 150 feet south of the culvert. He kept to his own side of the road but could not tell how near he was to the right hand side or to the edge. The hill curved to his left but he denied that he had cut to his left because of the curve. He was still on the up grade when they hit. He did not notice the debris on the road. He did notice the gouge marks but could not tell whether they were all on the east half of the road. He had not tried to apply his brakes.

While there is this conflict in what might be called the most nearly direct evidence on where the vehicles were at the time of the collision there is a considerable amount of what might be called physical evidence which strongly supports Forfar's statement. Evidence of what they saw after the collision was given for the suppliants by Robert W. Kirk, who arrived on the scene just a few minutes after the collision, Corporal Curtis B. Sullivan of the Royal Canadian Mounted Police, who took measurements, Jack Christie and George C. Dalziel and for the respondent by Constable Bertram A. Deer of the Royal Canadian Mounted Police who got there soon after Kirk and before Corporal Sullivan. He looked after the injured persons and then helped Corporal Sullivan with the measurements. I shall state the evidence of these witnesses by topics without giving it in detail.

There can be no dispute about the positions of the car and the Army truck when they had come to rest after the collision. These were described by several witnesses and are shown on the photograph, Exhibit 5. The car had been swung around sideways so that it was almost at right angles

to the highway, pointing slightly south. It had been pushed back so that its rear wheels were almost at the ditch that was east of the east shoulder of the highway. Its front wheels were on the travelled portion. The whole of the car was east of the centre of the road. The truck had gone about 85 feet from what appeared to be the point of impact between the two vehicles and ended up with its front in the ditch east of the road at an angle facing south-east with its left front rammed and embedded into the bank east of the ditch. And, of course, it was wholly on its wrong side of the road.

The evidence on the gouge marks in the road made by the Army truck after its collision with the car was also consistent. These started from where the point of impact must have been and went diagonally to where the truck ended up in the ditch. There is no doubt that they were made by the truck. They could have been caused by its axle after the left front wheel had been knocked off or, as is more likely, by something at the front of the truck or hanging down from under it, such as the differential housing. But whatever may have caused the gouges the significant fact is that all the gouge marks were to the east of the centre of the road. All the witnesses who saw them were agreed on this fact.

And the witnesses were agreed on the location of the broken glass and other debris, including parts of the car's battery, which must have fallen on the road at the spot where the two vehicles collided. This was not in a large area and was generally near the first gouge mark. All the debris was east of the centre of the road and one witness, Constable Deer, added that he did not observe any glass on the other side of the road.

The evidence on the tire marks made by the truck prior to the collision is largely confined to one witness, Robert Kirk, who was the first person to arrive at the scene after the collision. He got there about 10 minutes afterwards. He said that he could see the marks made by the truck tires. They had started on the hill cutting over to the driver's left. He could follow them for quite a distance, for 150 feet north of the car. The truck driver had gradually cut to his left and the marks were well over the centre of the road at the time of the collision. On his cross-examination

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he said that he had looked forward and saw the tire tracks coming gradually on an angle for 150 feet. He said that he could still follow them after the impact and also saw the gouges on the road. The other witnesses were not able to give any evidence on this point by reason of the fact that by the time of their arrival on the scene the truck tire marks had become obliterated.

There was more evidence regarding the car tire marks. This indicates that they were well over on the east side of the road. Kirk said that they were 2 or 3 feet inside the centre of the road and Dalziel put them farther east. His statement was that they were 3 or 4 feet east of the centre of the road and continued in a straight line without any sign of swerving.

And there is also the evidence of W. Lennox, the driver of the truck hauling the lowboy, that he had seen McDevitt's car behind him through his rear-view mirror and that he had not tried to pass.

While Corporal Sullivan could not say whether the point of impact was east of the centre of the road, since all tire tracks had become obliterated by the time he arrived on the scene, I am convinced that it was. In my judgment, the evidence points strongly to the conclusion that at the time of the collision McDevitt was driving well on his right side of the road a fair distance behind the lowboy and that Novak, the driver of the Army truck, had veered over to his left and was on his wrong side of the road when the truck hit the car and I so find. It seems clear to me that as he was approaching the bend in the road to his left with the steep slope down into the valley on his right he cut to his left and went over to his wrong side of the road without proper regard to what traffic might be following the lowboy in the wake of the dust cloud thrown up by it through which he could not see. This action was, under the circumstances, negligence on his part and, in my judgment, the sole cause of the collision with its resulting consequences. There was some suggestion by Dalziel that the truck was going at a high rate of speed and Lennox, the driver of the lowboy, estimated it at from 25 to 30 miles per hour. But Novak said that his truck was in fourth gear and that he was travelling at not more than 14 miles per hour. I do not put Novak's negligence on the basis of

excessive speed *per se*. His negligence consisted in failing to keep to the right of the centre of the highway, as he could safely and easily have done, and cutting over to the left of the centre without keeping a proper lookout for oncoming traffic from the south. He had plenty of room on his right. If he had any doubt in his mind about the cliff he should have slowed down until he could see where he was going. If he had done so and kept further to his right, as he should and could have done, there would not have been any collision.

Moreover, I find that there was no negligence on the part of Ivan Charles McDevitt. It was pleaded by way of defence and in support of the respondent's counterclaim in both petitions that McDevitt was operating a motor vehicle while his ability to do so was impaired by alcohol. There is no evidence to support such a plea or allegation and I reject it as unfounded. Forfar said that McDevitt never had anything to drink that day and that he was sober in his manner and actions. Kirk said that he had had a glass of beer at his house at Lower Post and that he was perfectly sober. Constable Deer did not smell any liquor on the injured persons. It was also pleaded and alleged that McDevitt was travelling at an excessive rate of speed. There is no evidence to support this. On the contrary, the evidence indicates that he slowed up because of the dust cloud and that the lowboy was a fair distance ahead of him although I do not believe that it was half a mile ahead. In any event, the speed at which McDevitt was travelling could not have contributed to the accident.

On the evidence, I find that the suppliants have succeeded in bringing their claims within the ambit of section 19(*c*) of the Exchequer Court Act and that the responsibility of the Crown to the suppliants is engaged accordingly.

The amount of the suppliant Roy McDevitt's claim may easily be determined. His car was a 1951 Dodge Coronet Sedan which he had bought new at Dawson Creek. It had cost him $4,000 at Watson Lake. It was almost totally demolished as the photographs show. He had used it for taxi and pleasure purposes and had gone from 24,000 to 25,000 miles. He put its depreciation at from $700 to $800 but I put it higher because of its use as a taxi and its hard usage due to the condition of the roads. The suppliant had

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tried to sell it as salvage but without success. Some parts may still have salvage but it cannot be great. I put the loss of the car at $3,000. In addition, the suppliant claimed that he had lost revenues from its use for about 5 weeks while a new car was being obtained. He put this gross loss at from $350 to $400 with a net loss of $300 which he later reduced to $200. This would be a fair amount. I, therefore, find $3,200 as the amount of damages and that the suppliant Roy McDevitt is entitled to recover this amount.

The amount of the damage to the Army truck was proved at $3,939. I understood counsel for the respondent to abandon the counterclaims for this amount. But whether he did so or not, it is obvious, in view of my finding that there was no negligence on Ivan Charles McDevitt's part, that the counterclaims must be dismissed.

I now come to the assessment of damages for the suppliant Helen Margaret McDevitt. The remedy given to her and her infant son by the Yukon Territory Fatal Accidents Act is entirely different from that which the deceased Ivan Charles McDevitt would have had if he had survived the collision. The measure of damages is not the injury to the deceased but the pecuniary loss to his family resulting from his death. But before I set out the general principles to be applied I shall first deal with the specific claim of $387.88 for funeral expenses. There was no dispute about its amount. After the suppliant's right to the claim had been questioned by me counsel for the suppliant stated that he was satisfied that he could not maintain it. In my judgment, he was right. The principle to be applied by this Court on the subject may be put briefly.

In a claim under section 19(*c*) of the Exchequer Court Act based on a provincial or territorial Fatal Accidents Act, corresponding to Lord Campbell's Act, where the fatal accident was the result of negligent operation of a motor vehicle, this Court, in determining whether a claim for the funeral expenses of the deceased should be allowed, must ascertain and apply the statutory law on the subject in force in the province or territory in which the death occurred as it stood on June 24, 1938, when the Crown was first made responsible for the negligence of its officers or servants in driving a motor vehicle. If, at that time, in an action as between subject and subject under the applicable

provincial or territorial Fatal Accidents Act a claim for funeral expenses could not have been maintained, it should not be allowed in this Court even if it has become permissible in such province or territory by an amendment made since June 24, 1938, for it is not competent for a provincial or territorial legislative assembly or body to alter the extent of the responsibility of the Crown in right of Canada as imposed by Parliament. Only Parliament can do so: *Vide Tremblay* v. *The King* (1); *The King* v. *Armstrong* (2); *Gauthier* v. *The King* (3); *The Queen* v. *Nisbet Shipping Co. Ltd.* (4).

In this case the applicable law of the Yukon Territory is that of the Northwest Territories as it stood on June 13, 1898, except as altered by competent legislative authority: *vide* Yukon Act, R.S.C. 1927, chapter 215, section 33. The decisions in cases under Lord Campbell's Act would therefore govern. These held that funeral expenses were not a pecuniary loss resulting from the death of the deceased within the meaning of the Act and were not recoverable: *vide Dalton* v. *South Eastern Railway Co.* (5); *Clark* v. *London General Omnibus Company, Limited* (6). The fact that such claims became subsequently admissible in England under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 2(3) does not affect the question, for there has been no similar amendment of the applicable Yukon Territory Act. And even if there had been such amendment it would not, for the reasons mentioned, have made any difference unless it had been made prior to June 24, 1938. The claim for the funeral expenses must, therefore, be disallowed.

There have been many decisions dealing with the principles to be applied in determining the quantum of damages in claims under Lord Campbell's Act, 1844, or its corresponding Acts in various parts of Canada, which may be referred to generally as Fatal Accidents Act, but it will be sufficient to cite the following namely, *Grand Trunk Railway Company of Canada* v. *Jennings* (7); *Johnston* v.

(1) [1944] Ex. C.R. 1.
(2) (1908) 40 Can. S.C.R. 229 at 248.
(3) (1918) 56 Can. S.C.R. 176 at 180.
(4) [1953] S.C.R. 480.
(5) (1858) 4 C.B. (N.S.) 296; (1858) 27 L.J.C.P. 227.
(6) (1906) 2 K.B. 648.
(7) (1888) 13 A.C. 800.

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Great Western Railway (1); *Royal Trust Co.* v. *Canadian Pacific Railway* (2); *Humphreys* v. *London* (3); *Pash* v. *Registrar of Motor Vehicles* (4); *Drewry et al* v. *Towns* (5); *Nance* v. *British Columbia Electric Railway Co.* (6). The effect of these decisions may be summarized briefly. Where there is liability under a Fatal Accidents Act the compensation authorized by it is for the loss of pecuniary benefit or advantage to the family of the deceased as the result of his death, and not otherwise. But it is not necessary to prove actual loss at the date of his death if there was a reasonable expectation of future pecuniary benefit to a member of his family from the continuance of his life. The compensation should be proportionate to the pecuniary advantage which the persons for whose benefit the action is brought might reasonably have been expected to enjoy if the deceased had not been killed so that regard must be had to the station in life of the parties concerned. The Court should estimate what sums the deceased would have applied out of his income to the maintenance of his wife and family and also what portion of his additional savings he would or might have left to them. In this estimate regard must be had to the expectancies of life of the deceased and his family. But, of course, it is only the present value of the future benefits that should be taken into account and there must be appropriate deduction for any acceleration of devolution of estate. Moreover, the amount of the compensation must not be so large that its investment will produce an income equal to the amount of income lost, for consideration must be given to possible contingencies, such as the death by accident of the deceased prior to the expiration of his normal expectancy of life or his disability or loss of earning power or income or the remarriage of his widow or her premature death. It is thus obvious that the contingencies that must be considered are so uncertain that the extent of the loss of pecuniary benefit or advantage to the family of the deceased cannot be ascertained with certainty. At best, the evaluation of the amount of compensation must be a matter of estimate or rough calculation involving an element of conjecture or even of guess work. But while the task of determining the

(1) [1904] 2 K.B. 250.
(2) (1922) 3 W.W.R. 24.
(3) [1935] 3 D.L.R. 39.
(4) (1949) 57 M.R. 130.
(5) (1951) 59 M.R. 119.
(6) [1951] 3 D.L.R. 705.

amount of compensation is difficult the Court must do its best to arrive at an award that is both fair and realistic with due regard to the contingencies that should be considered.

With these general principles in mind I proceed to the facts. Immediately prior to his death Ivan Charles McDevitt was working with his father, the suppliant Roy McDevitt, in what may be called the Watson Lake Hotel business. In addition to the hotel business there was also a trading post, a filling station and a taxi service. The business had flourished and greatly expanded since 1950 when the father took over the business. The son had been with him since then, keeping the books and generally acting as manager. The son was receiving $350 per month with the understanding that he was to come in as a third partner in the business. The suppliant Helen Margaret McDevitt also lived with her husband at Watson Lake Hotel. At the time of his death Ivan Charles McDevitt was between 26 and 27 years of age and his wife between 30 and 31 years. According to the expectancy of life tables in Exhibit 11, McDevitt's expectancy was between 40 and 41 years and his wife's between 36 and 37 years. While the agreement between McDevitt and his father was not in writing I see no reason for questioning it. His financial prospects for the future were excellent.

Under the circumstances, the suppliant Helen Margaret McDevitt is entitled to substantial damages for herself and her infant child. In my judgment, $30,000 would be a fair and realistic award, of which $25,000 will be for her and $5,000 for Ivan Charles McDevitt her infant child. The suppliant and her child are living in Edmonton and the child's share should be paid to the Public Trustee of Alberta to be held by him in trust for the infant Ivan Charles McDevitt under the powers vested in him by The Public Trustee Act, Statutes of Alberta, 1949, chapter 85.

There will, therefore, be judgment in the first petition that the suppliant Roy McDevitt is entitled to recover $3,200 and costs and that the counterclaim of the respondent is dismissed with costs. And there will be judgment in the second petition that the suppliant Helen Margaret McDevitt is entitled to recover the sum of $30,000 and

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costs and that the counterclaim of the respondent is dismissed with costs and that out of the said sum of $30,000 the sum of $5,000 is to be paid to The Public Trustee of the Province of Alberta in trust for the infant Ivan Charles McDevitt as stated. Since the two petitions were tried together there will be only one set of counsel fees.

Judgment accordingly.

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Mar. 29, 30

Mar. 31

BETWEEN:

JACOB MAYER & SONS LTD. .....APPELLANT;

AND

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

Revenue—Income Tax—The Income Tax Act, S. of C. 1948, c. 52, ss. 20(2)(a), 127(5)(a)—Capital cost allowance—Dealing at arms length—Meaning of "one of several persons" in s. 127(5)(a)—Agreement to control not a condition of applicability of section.

The appellant was incorporated in Alberta with an authorized capital of $60,000, divided into 600 shares of $100 each, the signatories to the memorandum of association being Jacob Mayer and two of his sons, each subscribing for one share. Jacob Mayer sold the assets of his business to the appellant for 294 shares of its capital stock and three promissory notes of $10,200 each made by his three sons who each became the owner of 102 shares. The appellant claimed capital cost allowances based on valuations of the assets made for or by it. The Minister considered that the transaction between the appellant and Jacob Mayer was not a dealing at arms length and that it was entitled only to capital cost allowances based on the cost of the assets to Jacob Mayer, their former owner, and assessed the appellant accordingly. The appellant appealed to the Income Tax Appeal Board which dismissed the appeal and the present appeal is from this decision.

Held: That while the precise limits of the application of the word "several" may not be possible to define it is clear that it means more than two or three but not many. It is limitative in its effect. But whatever may be the extent of the limitation implied in the word "several" it is plain that four persons would not be outside its range.

2. That it is not a necessary condition of the applicability of section 127(5)(*a*) of the Act that there should be an agreement between the several persons referred to in it that they should act in concert in directly or indirectly controlling the corporation. There is no such requirement in the section.

3. That Jacob Mayer was one of several persons by whom the appellant was controlled within the meaning of section 127(5)(*a*) and that the transaction between him and the appellant was not a dealing at arms length.

APPEAL from a decision of the Income Tax Appeal Board.

The Appeal was heard before the President of the Court at Edmonton.

A. W. Crossley for appellant.

D. B. MacKenzie Q.C. and *J. D. C. Boland* for respondent.

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

THE PRESIDENT, on the conclusion of the hearing, delivered the following judgment:

This is an appeal from the decision of the Income Tax Appeal Board (1), dated May 26, 1953, dismissing the appellant's appeal against its income tax assessment for 1950.

While the actual issue in the appeal is a narrow one it is desirable to set out the facts in their chronological order. Prior to 1949 Jacob Mayer carried on business at Stoney Plain in Alberta as a garage operator under the name of J. Mayer & Sons. The business was entirely his and he owned all its assets. In the business he employed his three sons, Edward H. Mayer, Frederick W. Mayer and Jack O. Mayer. They were not satisfied with this arrangement but were anxious to have a share in the business. Jacob Mayer appreciated their views and generously fell in with them. Sometime in 1949 he entered into a partnership agreement with them whereby his business was to be carried on under the name, style and firm of J. Mayer & Sons. This agreement was subsequently put into writing by a deed of copartnership, dated December 1, 1949. It was provided in this deed that Jacob Mayer should receive 50 per cent of the profits of the business and his sons 18, 16 and 16 per cent respectively. But it was expressly stated that the assets and liabilities should remain in the sole ownership and obligation of Jacob Mayer as they stood on January 1, 1949. The partnership arrangement was for the term of one year to be computed from January 1, 1949, but before it expired Jacob Mayer or Jacob Mayer and his sons decided

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to form a limited company. This step was decided upon after consultation with Jacob Mayer's solicitor and advice from Mr. Auxier on the advantages of incorporation over a co-partnership in the matter of income tax liability incidence. There was also the desire on the part of the sons to have a permanent share in the assets of the business as well as its profits and Jacob Mayer's desire to keep them in the business with him and his willingness to meet their wishes. Accordingly, Jacob Mayer and two of his sons, Edward H. Mayer and Jack O. Mayer, on December 21, 1949, signed a memorandum and articles of association for the incorporation of a company under the name of Jacob Mayer & Sons Ltd., the name of the appellant herein, with an authorized capital of $60,000, divided into 600 shares of $100 each, each of the signatories to the memorandum subscribing for one share. On January 16, 1950, the appellant was duly incorporated under The Companies Act of Alberta. The appellant then held its first meeting on February 4, 1950. At the first general meeting of the shareholders, consisting of Jacob Mayer and his two sons, Edward H. Mayer and Jack O. Mayer, they were elected as directors and the directors were authorized to negotiate with Jacob Mayer for the purchase of the business operated under the name and style of J. Mayer & Sons. A meeting of the directors followed immediately afterwards. At that meeting Jacob Mayer was elected President and Edward H. Mayer Secretary-Treasurer. According to the minutes of the meeting the Secretary advised that Edward H. Mayer, Jack O. Mayer and Fred W. Mayer had each applied for 102 shares of the capital stock and had agreed to tender in payment his promissory note for $10,200. The offer was accepted and the Secretary instructed to issue the shares on receipt of the notes. The minutes also stated that the Secretary advised that Jacob Mayer had agreed to sell the business operated under the name and style of J. Mayer & Sons, including the real property, stock, equipment, good will, accounts payable and receivable, to the Company for $60,000 and had agreed to accept the notes made in favour of the Company by his three sons in payment of $30,600, provided that the shares issued to them were deposited with him as collateral to the notes, together with 294 shares of the capital stock in payment of the balance. The sons

agreed to deposit the shares as collateral to their notes. The minutes also stated that it was agreed that the Company should purchase the assets of J. Mayer & Sons for the sum of $60,000 to be paid by the issue of 294 shares of the capital stock to Jacob and the assignment of the notes to him and the President and Secretary were instructed to make all necessary arrangements for carrying out the transaction and issuing the shares. At the same meeting Fred W. Mayer was added to the board of directors.

On February 4, 1950, the shares were issued to Jacob Mayer and his three sons in the amounts mentioned but no promissory notes were given to the Company by the sons. But on February 18, 1950, the three sons made promissory notes for $10,200 each payable to Jacob Mayer on demand. The sons have never paid Jacob Mayer anything on these notes but each year he has given each of them a credit of $1,000 so that the notes now stand at $6,200 each.

It is not entirely clear how the three sons came to be shareholders in the Company. While the minutes are as stated, the appellant wrote a letter to the Director of Income Tax at Edmonton which it attached to its income tax return for 1950, in which it was stated, *inter alia,* that "at the end of 1949 Jacob Mayer decided to incorporate, the three sons agreeing to buy from the father shares in the business, which it was agreed should be valued at $60,000." It may possibly be, and I do not have to decide the matter, notwithstanding the statement in the minutes, that the real transaction was that Jacob Mayer, being the owner of all the assets was entitled to all the shares and that in effect he turned them over to his sons, although they were issued directly to them instead of being issued first to him and then transferred to them. The making of the notes payable to him is consistent with this view of the matter.

On March 11, 1950, Jacob Mayer transferred the land, including the building, to the appellant for the expressed consideration of $24,500 and on the same date gave it a bill of sale of his other assets for the expressed consideration of $35,500.

The upshot of the matter was that Jacob Mayer, who had been the sole owner of all the property acquired by the appellant, was now the owner of 294 shares of its capital stock and the holder of three promissory notes of $10,200

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each given to him by his sons and that each of them was the owner of 102 shares of the capital stock, Jacob Mayer holding the said shares as collateral to the unpaid notes.

In its income tax return for 1950, dated April 5, 1951, the appellant claimed capital cost allowances on the property which it had acquired from Jacob Mayer and also on property acquired during 1950. We are not concerned here with the additional property. The appellant based its claim for an allowance on the garage building and building fixtures on $24,539 as undepreciated capital cost at the beginning of the year and the cost of additions during the year. The first figure is the amount of a valuation of the building made for the appellant by the Royal Trust Company, as appears from a letter dated January 23, 1950. The claim for an allowance on the machinery and equipment was based on $6,793.13 as undepreciated capital cost at the beginning of the year and the cost of additions during the year. The claim for an allowance on the furniture and fixtures was based on $3,000 as undepreciated capital cost at the beginning of the year. The figures of $6,793.13 and $3,000 were valuations made by Jacob Mayer and his sons.

The Minister in re-assessing the appellant took the position that the transaction between it and Jacob Mayer by which it acquired his property was not an arms length transaction between them and that it was consequently entitled only to capital cost allowances based on the capital cost of the assets to their former owner Jacob Mayer. He consequently cut down the allowances claimed by it and based them on the undepreciated cost of the assets to their former owner. These he put at $4,787.76 for the building, $1,790.07 for the machinery and equipment and $189.21 for the furniture and fixtures. The amounts of the claims for capital cost allowance which he thus disallowed were added to the amount of taxable income reported by the appellant on its return, as appears from notices of reassessment, dated February 2, 1952, and October 21, 1952. The details of the claims made by the appellant and the amounts allowed by the Department are set out in Exhibit 16.

In taking this action the Minister relied upon sections 20(2)(*a*) and 127(5)(*a*) of The Income Tax Act, Statutes of Canada, 1947-48, chapter 52. Section 20(2)(*a*) provides as follows:

> 20(2). Where depreciable property did, at any time after the commencement of 1949, belong to a person (hereinafter referred to as the original owner) and has, by one or more transactions between persons not dealing at arms-length, become vested in a taxpayer, the following rules are, notwithstanding section 17, applicable for the purposes of this section and regulations made under paragraph (*a*) of subsection (1) of section 11:
>
> (*a*) the capital cost of the property to the taxpayer shall be deemed to be the amount that was the capital cost of the property to the original owner;

And Section 127(5)(*a*) deals with what is meant by arms-length as follows:

> 127(5). For the purposes of this Act,
>
> (*a*) a corporation and a person or one of several persons by whom it is directly or indirectly controlled,
>
> * * *
>
> shall, without extending the meaning of the expression "to deal with each other at arms-length", be deemed not to deal with each other at arms length.

The Minister considered that Jacob Mayer was "a person or one of several persons" by whom the appellant was directly or indirectly controlled and that the transaction between him and the appellant was, therefore, a transaction between persons not dealing at arms-length, from which it followed that the capital cost of the property to the appellant must be deemed to be the amount that was the capital cost of it to its original owner, Jacob Mayer.

The appellant objected to the assessment and appealed to the Income Tax Appeal Board. The appeal was heard by the chairman of the Board, Mr. F. Monet, Q.C., who dismissed it. From this decision the present appeal is brought.

The only question in the appeal is whether the transaction between Jacob Mayer and the appellant by which it acquired his property was a transaction between a corporation and a person or one of several persons by whom it was directly or indirectly controlled within the meaning of section 127(5)(*a*) of the Act. And the narrow issue is whether Jacob Mayer was one of several persons by whom the appellant was directly or indirectly controlled.

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In my opinion, there is no difficulty in the case. Jacob Mayer was clearly one of several persons by whom the appellant was directly or indirectly controlled. I do not see how there can be any doubt about it.

The word "several" has a great many meanings but we are here concerned only with its meaning in the context in which it is used, which is clearly numerical in character. In this sense, the New English Dictionary, Vol. VIII, page 568, defines "several" as follows:

A. 4. As a vague numeral: Of an indefinite (but not large) number exceeding two or three; more than two or three but not very many. (The chief current sense.)

Webster's New International Dictionary, Second Edition, gives this definition:

4. a More than one;—so construed in legal use. b Consisting of an indefinite number more than two, but not very many; divers; sundry; as, *several* persons were present. c Dial. Quite a large number.

And Funk & Wagnall's New Standard Dicitionary puts it as:

1. Being of an indefinite number, more than one or two, yet not large; divers; as, several visitors called today.

While the precise limits of the application of the word "several" may not be possible to define it is clear that it means more than two or three but not many. It is limitative in its effect. It is, therefore, not necessary to go as far in the application of section 127(5)(*a*) as the Income Tax Appeal Board appeared to think possible in *No. 112* v. *Minister of National Revenue* (1). In this view I am confirmed by the recent judgment of Fournier J. in *Miron & Frères Limitée* v. *Minister of National Revenue* (2).

But whatever may be the extent of the limitation implied in the word "several" it is plain that four persons would not be outside its range.

Counsel for the appellant argued that section 127(5)(*a*) should not apply in this case because there had never been any agreement between Jacob Mayer and his sons that they should vote together. I do not agree. It is not a necessary condition of the applicability of section 127(5)(*a*) of the Act that there should be an agreement between the

(1) (1953) 9 Tax A.B.C. 14. (2) [1954] Ex. C.R. 100.

several persons referred to in it that they should act in concert in directly or indirectly controlling the corporation. There is no such requirement in the section.

If section 127(5)(*a*) does not apply in the present case it is difficult to see where it could apply. Here, Jacob Mayer was the largest shareholder and had the largest salary: *vide* Exhibit 11. He was not a figure head. Mr. Bryan said that he was prepared to take 49 per cent of the stock, because, while he did not want two sons to out vote him, he was quite prepared to fall in if all his sons voted against him. But the fact is that while there have been differences of opinion Jacob Mayer always went along with his sons. They never out voted him or did anything that he did not agree with and they never made any major decision against his will. The fact is that they always worked together in harmony. There were four persons who controlled the appellant and Jacob Mayer was one of them. He was, therefore, one of several persons by whom the appellant was controlled within the meaning of section 127(5)(*a*). The transaction between him and the appellant was, therefore, not a dealing at arms-length, so that section 20.(2)(*a*) applied and the Minister was right in basing capital cost allowances on the capital cost of the assets to Jacob Mayer, their previous owner.

The appeal herein must, therefore, be dismissed with costs.

Judgment accordingly.

BETWEEN:

NORALTA HOTEL LIMITED ..... APPELLANT;

AND

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

Revenue—Income Tax—The Income Tax Act, S. of C. 1948, c. 52, s. 11(1)(a)—Capital cost allowances—Capital cost a question of fact—Onus on taxpayer to prove assessment erroneous in fact.

The appellant claimed capital cost allowances on its furniture and equipment based on the alleged cost of the assets at $100,000. The Minister allowed claims based on a capital cost of $35,000 and in assessing the

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appellant added the disallowed amounts of its claims to the amounts of taxable income reported by it. The appellant appealed from the assessment directly to this Court.

Held: That the assessments carry a statutory presumption of their validity and stand until they have been shown to be erroneous either in fact or in law. To succeed in the appeal from them the appellant must prove that the finding of the Minister on the capital cost of the depreciable property in question was erroneous. If it fails to discharge the onus of proof that the law casts on it its appeal must be dismissed.

2. That the appellant was not entitled to a larger amount on which to base its capital cost allowances than that found by the Minister.

APPEAL under The Income Tax Act.

The appeal was heard before the President of the Court at Edmonton.

E. W. Sully for appellant.

D. B. MacKenzie Q.C. and *J. D. C. Boland* for respondent.

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

THE PRESIDENT, on the conclusion of the hearing, delivered the following judgment:

The appellant appeals directly to this Court from its income tax assessments for the taxation years ending September 30, 1950, and September 30, 1951.

In its income tax returns for these years the appellant claimed capital cost allowances on its furniture and equipment in the amounts of $11,633.98 for 1950 and $9,823.96 for 1951. The Minister allowed claims of only $5,058.15 for 1950 and $4,563.29 for 1951. He disallowed $6,578.83 for 1950 and $5,260.67 for 1951 and in re-assessing the appellant for the said years added the disallowed amounts to the amounts of taxable income reported by it in its returns.

The appellant objected to the assessments on the ground that the cost of the furniture and equipment had been $100,000 and that it was entitled to capital cost allowances based on this amount and gave notices of objection accordingly. The Minister had determined that the capital cost of the depreciable property had been $35,000 instead of

$100,000, as claimed, and disallowed the appellant's claims accordingly. In reply to its objections to the assessments he notified it as follows:

> The Honourable the Minister of National Revenue having reconsidered the assessments and having considered the facts and reasons set forth in the Notices of Objection hereby confirms the said assessments as having been made in accordance with the provisions of the Act and in particular on the ground that for the purposes of paragraph (*a*) of subsection (1) of section 11 of the Act and The Income Tax Regulations made thereunder, of the assets acquired by the taxpayer from St. Regis Hotel, Edmonton, Limited, the capital cost of the depreciable property has been correctly determined to be $35,000 at the time of purchase.

The appellant then brought its appeal to this Court.

The issue in the appeal is thus entirely one of fact. Here there is no question of a transaction not at arms length and no exercise of discretion was involved. The only matter for consideration is what was the amount of the capital cost of the depreciable property in respect of which the claims for capital cost allowances were made. The appellant alleges that it was $100,000. The Minister found that it was $35,000.

The assessments carry a statutory presumption of their validity and stand until they have been shown to be erroneous either in fact or in law. To succeed in the appeal from them the appellant must prove that the finding of the Minister that the capital cost of the depreciable property in question was $35,000 was erroneous. If it fails to discharge the onus of proof that the law casts on it its appeal must be dismissed: *vide Dezura* v. *Minister of National Revenue* (1); *Johnston* v. *Minister of National Revenue* (2); *Goldman* v. *Minister of National Revenue* (3).

In support of its contention that the capital cost of the furniture and equipment was $100,000 the appellant relied upon a conditional sale agreement between St. Regis Hotel Edmonton Limited and the appellant, dated September 17, 1946, by which it acquired the furniture and equipment in question. Prior to that date there had been negotiations between the persons who subsequently became shareholders of the appellant and St. Regis Hotel Edmonton Limited for the purchase of the contents of the St. Regis Hotel and a lease of the hotel premises. After the appellant had been

(1) [1948] Ex. C.R. 10 at 15.
(2) [1947] Ex. C.R. 483; [1948] S.C.R. 486 at 489.
(3) [1951] Ex. C.R. 274 at 281; [1953] S.C.R. 211.

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incorporated and it had been ascertained that it would be likely to get the desired beer license the agreement was signed and subsequently it took possession of the St. Regis Hotel premises. But while the purchase price in the agreement is stated as $100,000 it is plain from the agreement itself and the evidence of Earl Cooper, the appellant's vice-president, and Peter Sachkiw, its managing director, both of whom were called as witnesses for the appellant, that this price of $100,000 covered not only the goods and chattels specified in the agreement but also a lease of the St. Regis Hotel premises for a period of five years with an option of renewal for a further three years. Both Mr. Cooper and Mr. Sachkiw admitted that the lease of the hotel premises was worth more than the goods and chattels. Under the circumstances, the agreement is not proof that the capital cost of the furniture and equipment in question was $100,000, as alleged by the appellant, and it does not prove that its capital cost was more than $35,000, as found by the Minister. On this ground alone, since the appellant has not proved that the Minister's finding was erroneous in fact, its appeal would have had to be dismissed.

But the evidence does not stop with the agreement. It was established to the satisfaction of the Court that the capital cost of the furniture and equipment to St. Regis Hotel Edmonton Limited, from which the appellant acquired it on September 17, 1946, was $27,500 and that since then the appellant had bought replacements to the extent of $10,278.58. It was also shown that when the appellant had to leave the hotel premises in 1951 after it had failed to exercise its option to renew the lease, it sold the furniture and equipment for $38,750. By that time prices were higher than they had been in 1946. There was also the evidence of Mr. A. R. Lily, an insurance adjuster of long experience, who made an appraisal of the equipment and contents of the St. Regis Hotel building on September 18, 1946. He put their value at $34,500 after taking into consideration the usual depreciation for the length of time the property had been in use. While Mr. Lily's valuation was made for insurance purposes he expressed the opinion that the amount of his valuation was the cash value of the property at the time. I am satisfied that it was not greater than this amount.

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I pass over the opinion evidence of Mr. P. Herring, with which I was not impressed, and refer to the information given by Mr. P. A. Fairbrother. He had ascertained that the original cost of the furniture and equipment to St. Regis Hotel Edmonton Limited had been $27,525.08, some of it going back to the 1930's, and that its book value at the time of the sale and lease to the appellant was $5,962.16.

Under the circumstances, I am satisfied that the appellant was not entitled to a larger amount on which to base its capital cost allowances than that of $35,000 found by the Minister. It was more than ample.

That being so, there was no error in the assessments appealed against and the appeal herein must be dismissed with costs.

Judgment accordingly.

BETWEEN:

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

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Jan. 26

April 12

AND

BARBARA A. ROBERTSON ..... RESPONDENT.

Revenue—Income—Income Tax—The Income Tax Act, S. of C. 1948, c. 52, ss. 4, 13(1)(2)(3)(a)(b) and (4), 127(1)(av), as amended by S. of C. 1951, c. 51, s. 4—Chief source of income of a taxpayer—Farming—Combination of farming and other source of income—Determination of the Minister subject to review on appeal to Exchequer Court—Appeal from Income Tax Appeal Board allowed.

In her income tax return for the year 1949, respondent who owned a farm property showed a loss on farming operations of $12,702.44 and income from investments of $11,993.99 or a net loss of $708.45 and claimed depreciation on fixed assets amounting to $4,842.97. By the Minister's assessment one half of her farming loss was disallowed on the ground that her chief source of income for that year was neither farming nor a combination of farming and some other source of income and, as a result, she was assessed to income tax in the sum of $809.79. From the assessment an appeal was taken to the Income Tax Appeal Board which allowed the appeal and from the decision the Minister appealed to this Court.

Held: That the repeal by the Income Tax Act, c. 52, S. of C. 1948 of the provision to the effect that the determination of the Minister as to what constitutes the taxpayer's chief source of income in a year

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should be final and conclusive indicates that it was Parliament's intention that the decision of the Minister under s. 13(2) of the Act as amended by S. of C. 1951, c. 51, s. 4, is to be reviewed on an appeal to this Court.

2. The only income which respondent had in 1949 was from investments and the only source of that income was the securities in which that portion of her capital was invested. There was no income from farming either from an accounting point of view or within the definition of income in the Act.

3. The taxpayer's farming operations not being a source of income the Minister could not combine something which was non-existent with her only source of income viz. her investments—and decide that the result was income from a combination of farming and some other source of income.

4. That the Minister's determination that respondent's chief source of income for the taxation year of 1949 was neither farming nor a combination of farming and some other source of income was correct.

APPEAL from a decision of the Income Tax Appeal Board.

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

Peter Wright, Q.C. and *T. Z. Boles* for appellant.

Stuart Thom for respondent.

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

POTTER J. now (April 12, 1954) delivered the following judgment:

This is an appeal by the Minister of National Revenue, hereinafter called the appellant, from a decision of the Income Tax Appeal Board dated the 19th day of November, 1952, and mailed on the 15th day of December, 1952, allowing an appeal from an assessment by the appellant dated the 23rd day of October, 1951, whereby the appellant assessed the respondent to income tax for the taxation year of 1949 in the sum of $809.79 based upon a taxable income determined in the amount of $6,464.83 which was arrived at by deducting from the revised net income of $8,294.26, items of $1,000 by way of personal exemption and $829.43 being charitable donations of the respondent equal to ten per cent of the said revised net income.

The respondent was born in New Zealand, the daughter of the owner and operator of a large farm and during her

early years received considerable training in general farming practices including the raising of animals and agriculture.

After training as a nurse and midwife she came to Canada in the year 1923 and married in 1927; her husband died in January 1932, leaving her with a substantial income.

In the year 1948 she purchased a farm property in the Province of Ontario of about three hundred acres and the following year one hundred acres more. She described the four hundred acres as very dirty, scrub and swale or chiefly woods with very little arable land at all and the first year she was unable to get one load of hay off of it; almost two hundred acres had to be cleared of rubbish, cedar and willow. At the time of the hearing she said that there were still about thirty acres of bush, ten of which would be useful for posts and altogether about thirty acres still to be broken up and cleared of big stones. In this connection it was objected on behalf of the appellant that the situation or condition of the property after the year 1949 was not relevant.

After some further questions, the witness stated that practically all the property is in grass now excepting fifteen or thirty acres of the land which she had been cropping for grain.

It was stated and conceded that the respondent had filed her Income Tax Returns every year since 1948 within the proper time and that the only re-assessment received by her since 1948 was with respect to her 1949 income.

In her Income Tax Return for the year 1949, the respondent showed a loss on farming operations of $12,702.44 and income from investments of $11,993.99 or a net loss of $708.45 and claimed depreciation on fixed assets amounting to $4,842.97.

By the appellant's assessment the investment income reported was adjusted as follows:—

Investment income reported	$11,993.99
Add refundable portion interest 1943 and 1944 years	100.00
Steel of Canada preferred extra February 1949	100.00
International Paper was $200 gross	30.00
	$12,223.99

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The following calculation was then made:—

Adjusted net income		$12,223.99
Farm loss as claimed	$12,702.44	
Deduct depreciation	4,842.97	
Cash farm loss	7,859.47	
Deduct fifty per cent of cash farm loss		3,929.73
Revised net income		8,294.26
Deduct Personal exemption	1,000.00	
Charitable donations ten per cent of income	829.43	
		1,829.43
Taxable income		$ 6,464.83

On this taxable income the appellant levied a tax of $809.79.

On December 21, 1951, the respondent gave Notice of Objection to the Minister of National Revenue with respect to the assessment of October 23, 1951, claiming *inter alia* that her chief source of income for the taxation year of 1949 was a combination of her farming and investment income and that the Minister should so determine pursuant to subsection (2) of section 13 of the Income Tax Act and that subsection (3) of said section 13 was not applicable to the facts and that the assessment was wrong in disallowing fifty per cent of the cash farm loss thereunder.

The relevant parts of said section 13 (as amended by section 4 of chapter 51 of the Statutes of Canada, 1951 and applicable to the 1949 and subsequent taxation years) are as follows:—

13. (1) The income of a person for a taxation year shall be deemed to be not less than his income for the year from his chief source of income.

(2) The Minister may determine which source of income or sources of income combined is a taxpayer's chief source of income for the purpose of this section.

(3) Where a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income, his income for the year shall be deemed to be not less than his income from all sources other than farming (after application of the rule in subsection one) minus the lesser of

(*a*) one-half his farming loss for the year, or

(*b*) $5,000.

(4) For the purpose of subsection (3), a 'farming loss' is a loss from farming computed by applying the provisions of this Act respecting computation of income from a business *mutatis mutandis* except that no deduction may be made under paragraph (*a*) of subsection (1) of section 11.

By notification dated April 29, 1952, the appellant, except as hereinafter stated, confirmed the said assessment and by Notice of Appeal dated July 24, 1952, the respondent appealed to the Income Tax Appeal Board against the disallowance of farming losses in the amount of $3,929.73.

The respondent's appeal was heard at Toronto in the Province of Ontario on November 19, 1952, and the said Board forthwith rendered its decision allowing the appeal and the appellant and respondent were notified of the decision of the said Board on December 15, 1952, from which decision this appeal was taken, as already stated.

Counsel for the respondent, in opening his argument after the witnesses called by him had been heard referred to the decision of the President of this Court in *Minister of National Revenue* v. *Simpson's Limited* (1), in which he reviewed his earlier decision in *Goldman* v. *Minister of National Revenue* (2), and said:—

> . . . the hearing of an appeal from a decision of the Income Tax Appeal Board to this Court is a trial *de novo* of the issues of fact and law that are involved. There cannot, I think, be any doubt that this is so where the appeal is by the taxpayer. It must equally be so when the Minister is the appellant. In either event the hearing in this Court must proceed without regard to the case made before the Board or the Board's decision. Consequently, where the Minister appeals from the decision of the Board allowing an appeal from the assessment the fact that the Board found the assessment to be erroneous must be disregarded. To do otherwise would be tantamount to giving effect to the Board's decision which would be inconsistent with the view that the hearing of the appeal from it is a trial *de novo*. Consequently, it was incorrect to say that because the Board found the assessment erroneous the Minister does not come to this Court with any presumption of its validity in his favour and that the onus is on him to establish its correctness. On the contrary, the true position is that on an appeal to this Court from a decision of the Income Tax Appeal Board, whether the taxpayer or the Minister is the appellant, the assessment under consideration carries with it a presumption of its validity until the taxpayer establishes that it is incorrect either in fact or in law. Thus, the onus of proving that it is incorrect is on the taxpayer, notwithstanding the fact that the Income Tax Appeal Board may have allowed an appeal from it. It follows, under the circumstances, that while the Minister, being the appellant, may be called upon to begin he may rest on the assessment so far as the facts are concerned without adducing any evidence. The onus of proving the assessment to be erroneous in fact is on the taxpayer.

Counsel for the respondent submitted that the effect of this decision was that the filing of a Notice of Appeal completely destroyed the findings of the Income Tax Appeal

(1) [1953] Ex. C.R. 93 at 96, 97. (2) [1951] Ex. C.R. 274 at 282.

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Board, which could not have been the intention of Parliament; that the decision was not binding on other judges of this Court and that there should, in this case, be a ruling as to where the onus rests. In reply, counsel for the appellant said he relied on the authority of the *Simpson* case and therefore did not propose to deal with the merits of the argument for the respondent in that connection.

In my opinion that part of the judgment in the Simpson case quoted was a decision on a question of practice, in that it was not in itself a final judgment in the technical sense of those words and the foregoing arguments are not sufficiently exhaustive to warrant a review of the same.

As it stands, the decision referred to gives certainty to the practice on appeals to this Court from the Income Tax Appeal Board and should be followed until the question is fully argued before, and determined by, a higher tribunal.

As much was intimated at the commencement of the hearing and the trial proceeded with a view to deciding the real issues between the parties and on the understanding that neither side would be prejudiced by the procedure followed.

Counsel for the Crown, after outlining the proceedings, filed as exhibits a copy of the respondent's Income Tax Return for the year 1949, the Notice of Assessment, the Notice of Objection, the Notification by the Minister, Notice of Appeal to the Income Tax Appeal Board, reply to Notice of Appeal, certified copy from minute book of Income Tax Appeal Board and, at the request of counsel for the respondent, judgment of the Income Tax Appeal Board, Notice of Appeal to this Court and Reply to Notice of Appeal and after making some explanatory observations stated that such was the case for the appellant.

Counsel for the respondent was then called on and, reserving his rights to argue the question as to where the onus rested, called witnesses and the hearing proceeded.

As already stated, the respondent filed her Income Tax Return for the year 1949 dated March 30, 1950, and by the same showed a loss from farming operations of $12,702.44 and income from investments of $11,993.99, or a net loss of $708.45.

Accompanying the assessment, already referred to, was a letter which stated:—

> In reviewing your return for the year indicated above (31 December 1949), it was found necessary to make certain changes in order that the assessment might be in accordance with the provisions of the Income War Tax Act, and, for your information, these changes are indicated below.

Then followed a statement indicating how the revised net income of $8,294.26 was arrived at, that is before a personal exemption of $1,000 and charitable donations amounting to $829.43 or together $1,829.43 were deducted, which left a taxable income of $6,464.83. Then followed:—

> *FARM LOSS*
>
> Section 13 of the Income Tax Act, subsections 3 and 4 permit the deduction of 50 per cent of the Cash farm loss with a limitation of $5,000. In your case $3,929.73.

This reference to the provisions of section 13 was an indication that the Minister had determined which source of income or sources of income combined was the respondent's chief source of income for the purpose of the section.

Attached to the respondent's Notice of Objection of December 21, 1951, was a memorandum which in effect stated that at all relevant times in the 1949 taxation year the respondent was the proprietor of a farm; that she operated the farm as a business venture with a view to earning profits; that she expended substantially all her time and effort throughout the whole year in active physical farming operations; had no other occupation, trade or business and had no other income except from investments. and gave as reasons for the objection that her chief source of income for the 1949 taxation year was a combination of her farming and investment income and, upon the facts, the Minister should have so determined pursuant to subsection (2) of section 13 of the Income Tax Act; that subsection (3) of section 13 of the Act was not applicable to the facts and that the assessment was wrong in disallowing $3,929.73 of the cash farm loss. The memorandum also contained objections to the pro-rating and reducing of a dividend credit and complained of the pro-rating and reducing of the amount of United States dividends received and the resulting United States tax credit.

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By the Notification by the Minister of April 29, 1952, it was stated that having considered the facts and the reasons set forth in the Notice of Objection he agreed to some amendment of the tax credits:—

> And hereby confirms the said assessment in other respects as having been made in accordance with the provisions of the Act and in particular on the ground that the taxpayers' chief source of income in the taxation year was neither farming nor a combination of farming and some other source of income within the meaning of subsection (3) of section 13 of the Act.

This was further notice of the Minister's determination under subsection (2) of section 13 of the Act.

The questions for determination are therefore:—

1. Is the Minister's determination under subsection (2) of section 13 of the Income Tax Act open to review?

2. Was the Minister correct in determining that for the taxation year 1949,

(*a*) the respondent's chief source of income was not farming, or

(*b*) the respondent's chief source of income was not a combination of farming and some other source of income?

Beginning with the Income War Tax Act, 1917, the history of section 13 as applicable to the 1949 taxation year, already quoted, is as follows:—

The Income War Tax Act, 1917, chapter 28 of the Statutes of Canada of that year, by section 3 defined income and by subsections (1),(*a*),(*b*),(*c*),(*d*) permitted certain exemptions and deductions therefrom.

Chapter 25 of the Statutes of Canada, 1918, by section 2 made certain amendments and additions to said section 3 which are not relevant to this decision.

Chapter 55 of the Statutes of Canada, 1919, by section 2 made certain additions to said section 3 including the following:—

> (*f*) deficits or losses sustained in transactions entered into for profit but not connected with the chief business, trade, profession or occupation of the taxpayer shall not be deducted from income derived from the chief business, trade, profession or occupation of the taxpayer in determining his taxable income.

By chapter 49, section 2 of the Statutes of 1919 (Second Session) an addition was made to paragraph (*f*) of subsection (1) of section 3 of the original Act which was as follows:—

and the Minister shall have power to determine what deficits or losses sustained in transactions entered into for profit are connected with the chief business, trade, profession or occupation of the taxpayer, and his decision shall be final and conclusive.

By chapter 52 of the Statutes of 1923, paragraph (*f*) of subsection (1) of section 3 was repealed and the following substituted therefor:—

(*f*) In any case the income of a taxpayer shall be deemed to be not less than the income derived from his chief position, occupation, trade, business or calling, and for the purpose of this Act the Minister shall have full power to determine the chief position, occupation, trade, buiness or calling of the taxpayer. Where a taxpayer has income from more than one source by virtue of filling or exercising more than one position, occupation, trade, business or calling, then the Minister shall have full power to determine which one or more, or which combination thereof shall, for the purpose of this Act, constitute the taxpayer's chief position, occupation, trade, business or calling, and the income therefrom shall be taxed accordingly and the determination of the Minister exercised pursuant hereto shall be final and conclusive.

By chapter 97, R.S.C. 1927, these provisions were, in effect, reenacted by section 10 of that Act which was as follows:—

10. In any case the income of a taxpayer shall be deemed to be not less than the income derived from his chief position, occupation, trade, business or calling.

2. Where a taxpayer has income from more than one source by virtue of filling or exercising more than one position, occupation, trade, business or calling, the Minister shall have full power to determine which one or more, or which combination thereof shall, for the purpose of this Act, constitute the taxpayer's chief position, occupation, trade, business or calling, and the income therefrom shall be taxed accordingly.

3. The determination of the Minister exercised pursuant hereto shall be final and conclusive.

On the passing of the Income Tax Act, 1948, chapter 52 of the Statutes of that year, certain of the foregoing provisions were not reenacted and those that remained, with some changes, appeared as section 13 thereof, which was as follows:—

13. (1) The income of a person for a taxation year shall be deemed to be not less than his income for the year from his chief source of income.

(2) The Minister may determine which source of income or sources of income combined is a taxpayer's chief source of income for the purpose of this section.

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By section 4 of chapter 51 of the Statutes of 1951, additions were made to section 13, said section 4 being as follows:—

4. (1) Section 13 of the said Act is amended by adding the following subsections thereto:

(3) Where a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income, his income for the year shall be deemed to be not less than his income from all sources other than farming (after application of the rule in subsection one) minus the lesser of

(*a*) one-half his farming loss for the year; or

(*b*) $5,000.

(4) For the purpose of subsection (3) a 'farming loss' is a loss from farming computed by applying the provisions of this Act respecting computation of income from a business *mutatis mutandis* except that no deduction may be made under paragraph (*a*) of subsection (1) of section 11.

(2) This section is applicable to the 1949 and subsequent taxation years.

It will be noted that beginning with the amendment made by chapter 55 of the Statutes of 1919 consideration was to be given to the taxpayer's chief business, trade, profession or occupation and that deficits or losses sustained in transactions entered into for profit, but not connected with the same, were not to be deducted; that beginning with the amendment made by chapter 49 of the Statutes of 1919 (Second Session) the Minister should have power to determine what deficits or losses sustained were connected with the taxpayer's chief business, trade, profession or occupation and that his decision should be final and conclusive; that by the amendment made by chapter 52 of the Statutes of 1923, the income of a taxpayer should be deemed to be not less than that derived from his chief position, occupation, trade, business or calling and where a taxpayer had income from more than one source by virtue of filling or exercising more than one position, occupation, trade, business or calling, the Minister should have full power to determine which one or more or combination thereof constituted the taxpayer's chief position, occupation, trade, business or calling and that his determination was final and conclusive.

Analogous provisions were carried through the revision of 1927 and were contained in section 10 of chapter 97 of the same.

It will also be noted that with the enactment of the Income Tax Act, 1948, consideration was to be given to the taxpayer's chief source of income instead of his chief position, occupation, trade, business or calling and that the provision to the effect that the determination of the Minister should be final and conclusive was not reenacted.

With regard to the first question. It was not objected in the Notification by the Minister; in the appellant's Reply to Notice of Appeal to the Income Tax Appeal Board; in the appellant's Notice of Appeal to this Court or by counsel for the appellant at the hearing that the determination of the Minister under subsection (2) of section 13 was not open to review. And while there may have been decisions to the effect that if there is nothing to indicate that the exercise of a discretionary power has been based on inadequate or inadmissible material or on an erroneous view of the law, a Court is without authority to scrutinize it, the repeal by the Income Tax Act, 1948 of the provision to the effect that the determination of the Minister should be final and conclusive indicates that it was Parliament's intention that the decision of the Minister under subsection (2) of section 13 is to be reviewed on an appeal to this Court.

To proceed to the determination of the second question.

Briefly stated, the legislation began in the year 1917 with a general definition of income; then followed the disallowance of the deduction of losses incurred in transactions not connected with the taxpayer's chief occupation, the Minister's determination of the same to be final; and beginning with section 13 of the Income Tax Act, 1948, a taxpayer's income was to be deemed to be not less than his income from his chief source of income.

It is clear, however, that whether the taxpayer's chief occupation or chief source of income was the governing factor, deductions for losses sustained in transactions not connected therewith were not allowed, and it was only by virtue of the amendment to section 13 made by section 4 of chapter 29 of the Statutes of 1951, that a taxpayer whose chief source of income was other than farming, or a combination of farming and some other source, was entitled to deduct from his income any losses arising out of his farming activities.

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The Minister has determined that the respondent's chief source of income was neither farming nor a combination of farming and some other source of income and an examination of his determination requires a consideration of the meaning of the words "income" and "source" as used in the Act.

Section 4 of the Income Tax Act, 1948 is as follows:—

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

Section 127, subsection (1)(*av*) of the Act is as follows:—

127(1)(*av*) a taxpayer's income from a business, employment, property or other source of income or from sources in a particular place means the taxpayer's income computed in accordance with this Act on the assumption that he had during the taxation year no income except from that source or those sources of income and was entitled to no deductions except those related to that source or those sources;

The Shorter Oxford English Dictionary gives the following meanings of the word "source" viz.—

1. A support or underprop. 3. The fountain-head or origin of a river or stream; the spring or place from which a flow of water takes its beginning. 4. The chief or prime cause of something, of a non-material or abstract character; the quarter whence something of this kind originates. *c.* The originating cause or substance of some material thing or physical agency.

The following is found in volume 58, Corpus Juris, page 811:—

Source. First cause; first or primary cause; first producer; head; origin; original; the originator; that from which anything comes forth, regarded as its cause or origin; the person from whom anything originates.

In *Nathan* v. *Federal Commissioner of Taxation* (N.S. Wales), (1), Isaacs J. said:—

The legislature in using the word 'source' meant, not a legal concept, but something which a practical man would regard as a real source of income.

The word "source" as used in the Act is a correlative term and there can no more be, at its inception, income without a source of income than there can be a child without a mother, and the converse. There can, of course, be a potential source of income and, it is conceivable that a taxpayer may ordinarily have a chief source of income which is farming but in a particular year suffer losses in his farming operations instead of profits and consequently have no income therefrom in that year.

(1) 25 Austr. C.L.R. 183 at 189.

In the case under consideration the only income which the respondent had was from her investments and the only source of that income was the securities in which that portion of her capital was invested.

Section 127, subsection (1)(*av*), in effect, requires that a taxpayer's income from a source of income shall be computed in accordance with the Act on the assumption that he had during the taxation year no income except from that source and was entitled to no deductions except those related to that source.

In the memorandum attached to her Notice of Objection, and in her Notice of Appeal to the Income Tax Appeal Board, the respondent stated that her chief source of income for the 1949 taxation year was a combination of her farming and investment income and in her Reply to the appellant's Notice of Appeal to this Court that her sources of income were a farming business and property and securities for money and specifically, in the year 1949, her chief source of income was a combination of the business and property aforesaid. But she does not expressly refer to her income from farming for, in fact, there was none either from an accounting point of view or within the definition of income contained in the Act.

The respondent's farming operations not being a source of income the Minister could not combine something which was non-existent with her only source of income, viz.—her investments, and decide that the result was income from a combination of farming and some other source of income.

The respondent suggested no such combination of farming and some other source of income as probably could be done, for example, in the case of a farmer who owns a large acreage of land, part of which is under cultivation and part under growing timber, and who carries on his farming operations seasonably and his lumbering operations in some part or parts of a year, and no evidence was given that the respondent's farming operations were in any way related to the only source of income which she had, viz.—her investments.

While the respondent's expenditures of monies in the development of her farm may have been made in the course of the creation of a potential source of income, they may be considered to be capital expenditures analogous to

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expenditures made in the erection of a factory or the development of a mine and, notwithstanding that in the course of their construction or their development some products thereof may be sold, cannot be considered sources of income until their receipts exceed their operating and fixed charges and profits are made. That question is, however, not before the Court.

Consideration has been given to the cases cited on behalf of the respondent, viz.—*Hatch* v. *M.N.R.* (1); *Low* v. *M.N.R.* (2); *Partridge* v. *M.N.R.* (3) and *McLaughlin (Executor of)* v. *M.N.R.* (4).

The first three of these cases are decisions on circumstances which arose before the enactment of the Income Tax Act, 1948, the last being a decision as to whether farming losses were prohibited deductions as being personal and living expenses and they are therefore not applicable.

For the foregoing reasons it must follow that the Minister's determination that the respondent's chief source of income for the taxation year of 1949 was neither farming nor a combination of farming and some other source of income was correct.

The appeal will therefore be allowed and, subject to the agreements contained in the Notification by the Minister of the 29th of April, 1952, the assessment restored, and the appellant will have his costs.

Judgment accordingly.

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(1) [1938] Ex. C.R. 208.
(2) (1950) 2 Tax A.B.C. 131.
(3) (1951) 4 Tax A.B.C. 99.
(4) [1952] Ex. C.R. 225.

EXCHEQUER COURT OF CANADA

BRITISH COLUMBIA ADMIRALTY DISTRICT

1954

February 1
May 21

June 8

BETWEEN:

NABOB FOODS LIMITED.....PLAINTIFF;

AND

THE *CAPE CORSO*.....DEFENDANT.

Shipping—Action for damage to cargo—Clause in bill of lading limiting liability is void—R. 8, Art. III of Schedule to English Carriage of Goods by Sea Act 1924.

Held: That a provision in a bill of lading lessening the liability of a carrier for loss or damage to goods is void as contravening R. 8 of Article III of the Schedule to the English Carriage of Goods by Sea Act 1924.

ACTION for damage to a shipment of goods.

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

F. H. H. Parkes for plaintiff.

G. B. McIntosh for defendant.

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

SIDNEY SMITH D. J. A. now (June 8, 1954) delivered the following judgment:

This is an action by the holder of a Bill of Lading against a shipowner for damage to a shipment of black pepper in the course of a voyage from Liverpool to Vancouver, B.C. The Bill of Lading was issued in England, and it is common ground that the English Carriage of Goods by Sea Act 1924 applies. The Schedule to that Act governs Bills of Lading and R. 8 of Art. III of the Schedule provides—

8. Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

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The Bill of Lading (Clause 9) provides that the value of the cargo:

> . . . in the calculation and adjustment of claims for which the Carrier may be liable shall for the purpose of avoiding uncertainties and difficulties in fixing value be deemed to be the invoice value, plus freight and insurance if paid, irrespective of whether any other value is greater or less, but so that the Carrier's liability shall in no case exceed £100 per package or other freight unit or pro rata in case of partial loss or damage,

and the neat question in this case is whether this clause governs or whether it is void as contravening R. 8 of Art. III of the Schedule to the Act.

I may mention here, though its relevance is in dispute, that R. 5 of Art. IV of the Schedule to the Act provides:

> 5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding five hundred dollars per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.
>
> This declaration if embodied in the bill of lading shall be prima facie evidence, but shall not be binding or conclusive on the carrier.
>
> By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.
>
> Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods if the nature or value thereof has been knowlingly misstated by the shipper in the bill of lading.

It is agreed that the value of the goods in question is less than £100 per package, and that the sound market value of the goods was greater than their invoice value plus freight and insurance. It seems to be also agreed that the rule, apart from contractual modifications, is that the measure of compensation for goods damaged in transit is the arrived sound market value. The question then is whether Clause 9 of the Bill of Lading effectively modifies this rule.

There is no English or Canadian decision directly in point; but there are at least two English decisions and many American decisions on the American Harter Act which have resemblances to the 1924 English Act, and there is a decision of the Australian Supreme Court on the Australian Sea Carriage of Goods Act, 1904, which is founded on the Harter Act. More recently, both the United States and Australia have Acts which incorporate the same

provisions as the Schedule to the English Act; and on these there is a decision by the Supreme Court of Australia, decisions by American Federal Courts, and a dictum in point by the American Supreme Court. There is no direct decision.

The relevant parts of the Harter Act read:

> Sec. 1. It shall not be lawful . . . to insert in any bill of lading . . . any clause, covenant or agreement whereby (the manager, agent, master or owner of any vessel) shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, etc. Any and all words or clauses of such import inserted in bills of lading . . . shall be null and void and of no effect.
>
> Sec. 2. It shall not be lawful to insert in any bill of lading . . . any covenant or agreement whereby the obligations of the owner or owners of (the) vessel to exercise due diligence etc. . . . or whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo . . . shall in any wise be lessened, weakened, or avoided.

And one matter for consideration is whether the differences between that Act and the English Act of 1924 are material enough to make decisions on the Harter Act distinguishable. A number of decisions under the Harter Act and the decision of the Supreme Court of Australia in *Australasian United Steam Navigation Company Limited* v. *Hiskens* (1) held that a clause agreeing on the value of the cargo did not "relieve" the shipper "from liability" and should be upheld. In the Australian case and in several of the earlier cases in the United States Supreme Court, valuation clauses were upheld largely because the valuation declared by the shipper was made the basis for computing the freight payable. Apart from any express agreement that the declared value should govern damage claim, it would be difficult to see how the shipper could avoid an estoppel and claim a larger amount after inducing the carrier to act on the agreed value to his detriment.

But apart from this the United States Supreme Court held that an agreement as to value was not an agreement that the carrier should "be relieved from liability". It was pointed out that the carrier's liability might be modified, but was not removed, and that if prices fell during the voyage the liability might be increased rather than lessened. This principle was carried so far that in *Smith* v. *The Ferncliff* (2), the United States Supreme Court held that a

(1) (1914) 18 Com. L.R. 646. (2) (1939) 306 U.S. 444.

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clause almost identical with Clause 9 in the present case should be upheld, even though the declared value in that case had no bearing on the freight payable. I was at first inclined to doubt the validity of this conclusion, but further reflection has persuaded me that there is much to be said for it, having regard to the language of the Harter Act. I do not however agree with one reason suggested, namely, that the clause here was a "valuation" clause. The true reason would seem to be that the clause did not purport to "relieve" the carrier from liability.

The Harter Act, it may be noted, did forbid the "lessening" of the carrier's "obligations", but these obligations were confined to obligations to carefully handle and stow cargo, and did not extend to the general obligation to pay for damage to cargo. The importance of the phraseology is shown by the case of *Chicago Milwaukee & St. Paul Railway Co.* v. *McCaull Dinsmore Company* (1). This was a decision on the Cummins Amendment Act of 1915, which dealt with interstate railway traffic. Before the amendment the governing Act was construed to permit a clause like that upheld in *Smith* v. *The Ferncliff, supra,* i.e., one fixing the value of the goods for adjustment purposes. The amendment made carriers liable for the actual loss, notwithstanding any agreement. Under this Act a clause similar to our Clause 9 was held to be invalid, and the Court would not support the clause merely because it was reasonable or on the further ground that it did not necessarily lessen the carrier's liability but might even increase it. The Cummins Amendment, it is true, expressly invalidated an "agreement as to value" which would affect liability for actual loss; whereas the 1924 Act does not do this in terms. However the *McCaull-Dinsmore* case is still important as showing that any clause within the literal prohibition of the statute cannot be supported merely because it is reasonable. Moreover the statute is not to be construed as forbidding only clauses that *necessarily* lessen liability; a clause is bad whenever in the particular case it operates against the language of the statute.

The Statute of 1924 goes considerably further than the Harter Act. Unlike the Harter Act, it not only nullifies any clause that "relieves" the carrier "from liability", but

(1) (1920) 253 U.S. 97.

also any clause "lessening such liability". This covers liability to pay, as well as obligations to handle goods properly. Such language, I think, makes the *McCaull-Dinsmore* decision applicable. That is, a clause such as we have in Clause 9 is void whenever it would operate to lessen what would otherwise be the carrier's liability, regardless of the fact that under other circumstances the effect would be to increase the liability. That, I think, is the effect of the American decisions on the new Act, which is essentially the same as the English Act. I refer to *"The Steel Inventor"* (1), and *Pan-Am. Trade & Credit Corporation et al.* v. *The Campfire et al* (2). Even *Smith* v. *The Ferncliff, (supra)* which is the most favourable case to the defendant, is small comfort, because the Supreme Court indicated quite plainly that the clause upheld under the Harter Act would have been bad under the new Act.

The defendant argued that it would be unreasonable to prevent a pre-estimate of damage when the parties (say, two minutes after a claim for damages had arisen) had it in their power to make an agreement as to the valuation, which should form the basis of an adjustment of the loss.

But the *McCaull-Dinsmore* case shows that the mere reasonableness of a clause is not enough to support it if it goes against the language of the statute. Furthermore, after a loss the parties are on a parity; but at the time of shipment the carrier is often in a position to dictate to the shipper what terms the Bill of Lading shall contain. The Act presumably strikes at such potential dictation.

But all that aside and apart from authority, looking at Clause 9 of our Bill of Lading, I find it impossible to say that this clause is not directed to liability; and, moreover, is not a clause that in this particular case lessens liability. As I have pointed out, except under special agreement, liability is for the arrived sound market value. It may be, though I need not decide the point, that if this Bill of Lading declared that the arrived sound market value was to be taken at £900, that would govern, even though I might conclude that the real market value was £1000. However, this Clause 9 does not say anything like that. It purports to substitute for the arrived market value something

(1) (1940) 35 Fed. Supp. 986. (2) (1946) 156 Fed. (2nd) 603.

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entirely different; in other words, an entirely new measure of damages for the common law measure. In this case that measure lessens the carrier's liability, and so in my view the clause cannot be given effect to.

Rule 5 of Art. IV of the Schedule seems to have no bearing here, since the plaintiff is not claiming $500.00 for any package. If the declared value had been less than $500.00 and the arrived market value more than that sum, a nice question might have arisen.

The damages will go to the learned Registrar for assessment, the measure being the difference between the arrived sound market value and the arrived damaged market value.

Judgment accordingly.

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Feb. 1, 2

May 8

BETWEEN:

GENERAL SUPPLY COMPANY OF CANADA, LIMITED ..... APPELLANT;

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE, AND DOMINION HOIST AND SHOVEL COMPANY, AND DOMINION RUBBER COMPANY ..... RESPONDENTS.

Revenue—Customs and Excise—Goods subject to duty—The Customs Tariff Act, R.S.C. 1927, c. 44, s. 2(2), Schedule A, Tariff items 427, 431 and 438a—The Customs Act, R.S.C. 1927, c. 42, as amended, ss. 2(1)(r), 20(a), 48(2) and 50—Tariff Board—Question of law on appeal from Tariff Board—Crawler machine—Power shovel essentially different from ordinary concept of shovel—"Shovel" means a hand shovel—Power shovel not a "motor vehicle"—"Other conveyance of what kind soever" in s. 2(1)(r) of the Customs Act to be construed with some limitation—Material before Tariff Board—Court not to interfere with decision of Tariff Board if reasonably made—Appeal from Tariff Board dismissed.

In 1951 appellant imported from the United States "one New Bay City Model 45 Power Shovel equipped with 24" crawler shoes, 19 ft. Boom 14 ft. handle and ¾ yard dipper; also trench hoe attachment including 19' trench hoe boom, trench hoe mast and 36" trench hoe bucket, powered by General Motors Diesel Engine", which the Deputy Minister of National Revenue ruled as dutiable under tariff item 427 of the Customs Tariff Act, R.S.C. 1927, c. 44, namely "all machinery composed wholly or in part of iron or steel n.o.p. and complete parts thereof". From that ruling appellant appealed to the Tariff Board, contending that the imported article was within the term "shovel" in tariff item 431, or that it fell within tariff item 438a as being a conveyance and therefore within the definition of "vehicle" found in s. 2(r) of the Customs Act, R.S.C. 1927, c. 42, and further, and inasmuch it was powered by a motor, it was a motor vehicle. The Board without giving any reason for its finding held that the machinery at issue was properly classifiable as machinery of iron or steel. An application by appellant, under the provisions of s. 50 of the Customs Act, for leave to appeal to this Court from the Board's decision on a question of law was granted. *General Supply Co. of Canada Ltd.* v. *Deputy Minister of National Revenue, Customs and Excise* [1953] Ex. C. R. 185. On the appeal the question to be answered by the Court was "Did the Tariff Board err as a matter of law in deciding that the goods imported were not properly classifiable either (*a*) as a 'shovel' under tariff item 431; or (*b*) as a 'vehicle' under tariff item 438a".

Held: That what appellant purchased was a crawler called *the base machine* plus two front-end attachments, namely (*a*) a boom handle and dipper which, when attached to the base machine enabled the whole to be used as a power shovel; and (*b*) a boom mast and trench hoe bucket which, when attached to the base machine enabled the whole to be used as a trench hoe.

2. That assuming that what was imported was a power shovel only, a power shovel consisting of a very complicated piece of machinery, and costing nearly $20,000.00, is essentially different from the ordinary concept of a shovel—a small hand tool having a value of only a few dollars. To the public at large "shovel" means only a hand shovel. "Shovels" in item tariff 431 of the Customs Tariff Act, R.S.C. 1927, c. 44 does not include a power shovel.

3. That assuming again that the imported article is a power shovel only, no one in or out of the motor vehicle trade would consider a power shovel to be a motor vehicle. "Motor vehicle" to the public has a special and definite significance and it refers to such things as self-propelled vehicles equipped with facilities either in the form of a body or seats for use in the transportation of goods or persons from one location to another. The power shovel does not normally transport material by moving itself with its load from one place to another on its crawler mounting but its main purpose is digging and dropping its load in one location. It is not a "motor vehicle" and does not fall within tariff item 438a of the Customs Tariff Act, R.S.C. 1927, c. 44.

4. That in view of the context of s. 2(r) of the Customs Act, 1927, c. 42, as amended, "conveyance" as used therein is limited to a vehicle which is not only capable as a whole of moving from one location to another, but is designed for that purpose and whose function, while

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so moving, is the carrying or transporting of goods or passengers. "To convey" means more than the capacity to move from place to place; it involves the carrying or transporting of persons or of things other than its own component parts. A power shovel does not fulfill any of these requirements. Its chief function is that of excavation and not that of conveyance. It does not fall within any of the particular vehicles named in s. 2(r) of the Act.

5. That the Tariff Board was right in its conclusions that the imported article fell within tariff item 427—machinery composed wholly or in part of iron or steel n.o.p. If there was material before it from which it could reasonably decide as it did, the Court should not interfere with its decision, even if it might have reached a different conclusion if the matter had been originally before it. *Deputy Minister of National Revenue for Customs and Excise* v. *Parke, Davis Co. Ltd.* [1954] Ex. C.R. 1 referred to and followed.

6. There was material before the Board on which it could reasonably reach the conclusion it did and on the evidence it is not possible to see how it could have come to any other conclusion.

APPEAL under the Customs Act from a decision of the Tariff Board.

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

G. F. Henderson, Q.C. and *Paul Hewitt* for appellant.

W. R. Jackett, Q.C. and *George Rogers* for Deputy Minister of National Revenue.

Hugh E. O'Donnell, Q.C. for Dominion Rubber Company.

André Forget, Q.C. for Dominion Hoist and Shovel Company.

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

CAMERON J. now (May 8, 1954) delivered the following judgment:

This is an appeal from a decision of the Tariff Board dated September 16, 1952, and is brought under the provisions of s. 50 of The Customs Act, R.S.C. 1927, c. 42 as amended. All references herein to The Customs Act will refer to that Act and not to The Customs Act, R.S.C. 1952, c. 58.

Briefly, the facts are as follows. The appellant on February 13, 1951, imported certain goods from the United States, and at Montreal—the port of entry—the goods

were given Entry No. Z108570. There the port assessor classified a diesel engine, which formed part of the goods imported, under Tariff Item 428e and the balance under Tariff Item 427. In 1952 Mr. Gordon Hooper—a tariff consultant and agent of the appellant—requested a review of the appraiser's tariff classification (Tariff Item 427). Under the provisions of s. 48(2) of The Customs Act, the Deputy Minister of National Revenue—Customs and Excise—reviewed the appraiser's decision in regard to the entry, and by letter dated April 9, 1952 (Exhibit A-1) notified Mr. Hooper as follows:

From information before the department, the Model 45 Power Shovel of ¾ cubic yard capacity, as illustrated and described in Bulletin 45D of the manufacturers, cleared on Montreal Entry No. Z-108570, February, 1951, together with complete parts thereof including the propulsion motor, is dutiable under Tariff Item 427 at 25% ad valorem, Most Favoured Nation Tariff, this rate of duty being in effect at time of importation.

From that decision of the Deputy Minister, the appellant, under the provisions of s. 49, appealed to the Tariff Board. The respondents herein, namely Dominion Hoist and Shovel Company and Dominion Rubber Company, entered appearances with the Secretary of the Tariff Board and were represented at the hearing before the Board, as well as on this appeal. The appellant's submission to the Board—which was the same as that made to the Deputy Minister—was that the goods imported should not have been classified under Tariff Item 437, but under Tariff Item 431 of The Customs Tariff Act (R.S.C. 1927, c. 44 as amended) as a "shovel"; or, alternatively, under Tariff Item 438*a* of that Act as a "vehicle".

The Tariff Board rejected the submissions of the appellant, its decision being as follows:

The Power Shovel at issue, Model 45, is not properly classifiable under either tariff item 431 or tariff item 438*a*, but is properly classifiable as Machinery of Iron or Steel.

Under the provisions of s. 50 of The Customs Act the appellant applied for and was granted leave to appeal to this Court. Under that section the right of appeal is limited to "any question that in the opinion of the Court or judge is a question of law". The points of law raised by the appellant were:

1. Are the words "or other conveyance of what kind so ever" appearing in Section 2(r) of the said the Customs Act words limited in scope

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or are they words of enlargement to include anything that conveys and therefore the Power Shovel Model 45 constituting the subject matter of the Customs Import Entry herein.

2. Is the word "shovels" appearing in tariff item 431 of the Customs Tariff Act, R.S.C. 1927, c. 44, which reads "shovels and spades of iron or steel, n.o.p." used in its generic sense and therefore including the Power Shovel Model 45 constituting the subject matter of the tariff entry herein or in the restricted sense of a hand shovel.

On the application for leave to appeal, the questions submitted were not given as serious consideration as I now think should have been done. In his judgment in the case of *The Deputy Minister of National Revenue for Customs and Excise* v. *Parke, Davis and Company, Limited* (1), the President of this Court set out the form in which a question of law should be submitted to this Court on an appeal from the Tariff Board. Following the precedent there stated, I think that from a practical point of view, the question to be decided by me is this:

Did the Tariff Board err as a matter of law in deciding that the goods imported by the appellant under Entry Z108570 were not properly classifiable either (a) as a "shovel" under Tariff Item 431; or (b) as a "vehicle" under Tariff Item 438*a*.

No oral evidence was submitted to the Tariff Board. Submissions were made to it on behalf of the appellant and the Deputy Minister and certain exhibits were filed in support. The parties have agreed that those submissions and exhibits would constitute the record before me. Later, by consent, one further exhibit—a cultivator shovel (Exhibit D-13)—was put in evidence.

At the hearing of this appeal there was some uncertainty as to whether the appeal had to do with all or only a portion of the goods described in Entry No. Z108570, and I think it advisable to state at once my conclusions on that point. Exhibit A-2 is the invoice submitted by or on behalf of the appellant to the appraiser at port of entry, pursuant to s. 20 (a) of The Customs Act. Therein the goods imported are said to be "one crawler crane—$\frac{3}{4}$ yard" and purchased by the appellant from Bay City Shovels Inc. of Bay City, Michigan. The quantities and description of goods is stated as follows:

One (1) New Bay City Model 45 Power Shovel equipped with 24" crawler shoes, 19 ft. Boom 14 ft. handle and $\frac{3}{4}$ yd. dipper; also trench hoe attachment including 19' trench hoe boom, trench hoe mast and 36" trench hoe bucket.

Powered by General Motors Diesel Engine.

(1) [1954] Ex. C.R. 1

The fair market value of the entry less the diesel engine was stated to be $19,370.00 and that of the diesel engine $2,000.00—a total of $21,370.00 After allowance was made for agency and cash discounts, the net cash price was stated at $18,271.35. The approximate weight was given as 55,000 lbs.

I have examined the record carefully and am quite satisfied that the Deputy Minister reviewed the classification to be given to all of the goods referred to in the invoice and in Entry Z108570; and that in his letter of April 9, 1952, to Mr. Hooper, he made it quite clear that he had classified the entry as a whole and as falling within tariff Item 427. At the hearing a certified copy of the notice of appeal dated June 6, 1952, was added to the record by consent. In that letter, which was signed by Mr. Hooper, it is stated that the appeal is from the decision of the Deputy Minister dated April 9, 1952, a copy of which was enclosed; and although the letter refers to "the Model 45 Power Shovel of $\frac{3}{4}$ cy. yd. capacity", I think that there can be no doubt whatever that the appeal was intended to be and was, in fact, from the Deputy Minister's decision as a whole. There is no suggestion in the letter that the importer accepted the decision as to a portion of the goods imported or that the appeal had to do with other than the entire entry. In my opinion, therefore, the appeal now before me relates to all the goods set out in the invoice and summarized in the entry.

As I have stated, the goods imported were classified under Tariff Item 427, which is as follows:

> Tariff Item 427: All machinery composed wholly or in part of iron or steel, n.o.p., and complete parts thereof.

The first and main contention of the appellant is that the goods should have been classified under Tariff 431, which is "Shovels and Spades, of iron and steel, n.o.p." It becomes necessary, therefore, to state in some greater detail the nature of the goods as illustrated and described in the illustrated bulletins supplied by the manufacturers and which form part of the record—Exhibits A-3, D-8 and D-12. As I have said, the invoice refers to the shipment as a Crawler

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Crane. In the bulletin it is referred to as a Crawler or Crawler Equipment, or as a Crawling Machine. In Exhibit 3 the following general description is given:

> The Model 45 is a heavy-duty full revolving crawler machine having a nominal crane rating of 14 tons at 10 foot radius with 35 foot boom and with bucket capacity of ¾ Cu. Yd. It is fully convertible and may be used as Shovel Hoe Crane Clamshell Dragline and Pile Driver.

The basic part of the equipment consists of a steel cab mounted on two wide crawlers, the cab enclosing and protecting the diesel engine and the operating machinery. It is called *the base machine,* and while there is no evidence on the point, I think I may assume that it is by far the most expensive part of the equipment. It is fully convertible, that is to say, that by changing the front-end attachments, the equipment may be used as a shovel, hoe, crane, clamshell, pile driver or dragline. In this case, the equipment purchased with it indicates that it could be used either as a shovel or as a trench hoe. There is no evidence as to whether at the time of importation it was assembled so as to operate as a shovel or as a trench hoe, or whether it was assembled at all, but I do not consider that to be of any great importance. The standard single speed of the crawler, forward or reverse, is ¾ m.p.h.

What the appellant purchased was, I think, the crawler or base machine, plus two front-end attachments, namely (*a*) a boom handle and dipper which, when attached to the base machine enabled the whole to be used as a power shovel; and (*b*) a boom mast and trench hoe bucket which, when attached to the base machine enabled the whole to be used as a trench hoe. I consider this finding to be of special significance because of the argument of appellant's counsel that what was imported was a power shovel—an argument with which I cannot agree. His entire argument on this point is based on that submission and on the further submission that the word "shovels" in Item 431 is broad enough to include all types of shovels, including a power shovel. It is true that the invoice—which, of course, was prepared by or on behalf of the appellant—uses the expression "Model 45 Power Shovel", and that later in the correspondence and Notice of Appeal that expression was

continued. With equal inaccuracy it might have been called a Model 45 Power Trench Hoe, or—if the purchase had included a pile driver—a Model 45 Pile Driver.

Notwithstanding this finding as to the true nature of the imported goods, I am prepared to dispose of the appeal on the assumption that what was imported was a power shovel only—that is, the base machine equipped with boom handle and dipper. I am of the opinion that "shovels" in Item 431 does not include a power shovel.

An ingenious and somewhat technical argument is put forward by the appellant and is based on the "n.o.p." phrase which appears at the end of Item 431. Counsel submits that as "shovels" are not classified *eo nomine* elsewhere in The Customs Tariff Act, all shovels, including power shovels, are included in Item 431. He points out that that item first appeared in its present form in c. 13, Statutes of Canada, 1930. At the same time, "shovels" appeared as one of the many articles set out in Item 422a and it is manifest from the context that "shovels" therein meant only "power shovels". That being the case, he argues that as of that date "shovels n.o.p." in Item 431 did not include "power shovels" which were otherwise provided for in Item 422a. Item 422a, however, was amended by c. 30, Statutes of Canada, 1931, and as so amended (it is still in the same form) did not include the word "shovels". He argues, therefore, that since that amendment "shovels" ceased to be otherwise provided for and therefore Item 431 included all types of shovels, including power shovels.

The answer to that argument is to be found, I think, in the statement of Mr. Hind, a customs officer who appeared before the Board. He was asked as to the effect of the "n.o.p." provision and stated that it could include not only *eo nomine* classifications, but also end use tariff items. He refers specifically to one example which then occurred to him, namely, Item 663b, which provides for articles which enter into the cost of manufacturing fertilizer, and stated that if a fertilizer manufacturer wanted to buy a hand shovel for exclusive use in the manufacture of fertilizers, it would be allowed in free under Item 663b. From that instance alone it is clear that not all shovels—or even all

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hand shovels—fall within Item 431 since they are "otherwise provided for". Exhibit D-13 is also called a shovel and is designed for use on a cultivator. As such it would be free of duty under Item 409b as "cultivators and complete parts thereof".

Since Item 431 was first incorporated in the tariff it has been uniformly and without exception administered as applying to hand tools and not to power-operated machines. As early as 1887 there was an item "shovels and spades and spade blanks", the rate of duty being $1.00 per dozen and 25 per cent. As late as 1924 the item was precisely the same as at present, but included also "shovel or spade blanks of iron or steel cut to shape for the same". It is clear that both these items refer exclusively to hand shovels.

Then there are a number of other matters, no one of which perhaps would be quite conclusive, but all of which combined point to the conclusion that power shovels are not within Item 431. First may be noted the fact that "shovels" is associated with "spades"—the latter being a hand tool that performs much the same function and is within the same price range as a hand shovel. Then Item 431 is the first of a series of items ending at 431f, made up almost altogether, if not entirely, of hand tools of one sort or another. Other tariff items refer directly or indirectly to shovels and assist in throwing some light on the meaning of that word. Item 502c refers to "wood handles or stems for handles, not further manufactured than turned, when imported by manufacturers of goods enumerated in tariff items . . . and 431 for use exclusively in the manufacture of goods enumerated in said items". Again, Item 501 is "D shovel handles, wholly of wood." Item 379c is "bars, when imported by manufacturers of shovels for use exclusively in the manufacture of shovels, in their own factories". Item 386(*e*) is "sheets, hoop, band or strip, hot or cold rolled, when imported by manufacturers of shovels for use exclusively in the manufacture of shovels, in their own factories". All of these items in their reference to "shovels" clearly mean hand shovels only.

As I have said, the Department has consistently construed "shovels" as being limited to hand shovels and in doing so I think they were right. There can be no doubt

that that is the primary meaning of the word. The word was used in the tariff long before there were any power shovels. The primary meaning and the meaning which I think would be normally attributed to the word is that found in the Shorter Oxford English Dictionary, as follows:

> A spade-like implement, consisting of a broad blade of metal or other material (more or less hollow and with upturned sides), attached to a handle and used for raising and removing quantities of earth, grain, coal or other loose material. (In some dialects applied to a spade.)

That dictionary makes no mention of a power-operated shovel and the definition is not wide enough to include anything operated other than by hand.

The French text of Item 431 is also of some assistance in determining the meaning of the word "shovels". There the word used is "pelles" and counsel for the appellant referred to the definition of that word in Nouveau Petit Larousse Illustré, 1952 Edition. I think, however, that the definition there supports the respondent's argument rather than the appellant's. It may be translated as follows:

> A tool which is made up of one part which is wide and flat, and a handle of various lengths, which may be put to a number of uses.

The appended four illustrations are all of hand shovels of various shapes. The definition there does not suggest that "pelle" includes a power-operated shovel, but it does refer to phrases in which it is used in combination with other words, including "pelle à vapeur"—a steam shovel. In the French text "pelles", in my opinion, is referable only to hand shovels.

In Funk & Wagnall's New Standard Dictionary, 1945, the first meaning of shovel is "A flattened scoop with a handle used to lift and throw earth, coal or other loose substance or for digging." Again, several instances are given in which "shovel" is used in combination with other words, including "steam shovel", an illustration of which is given. But it is not suggested that steam shovel is included in the definition of shovel.

In Webster's New International Dictionary, 2nd Ed., 1953, the primary meaning of shovel is "a broad scoop or a more or less hollow blade with a handle used to lift and

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throw earth, coal, grain, etc." The three illustrations provided are all of hand shovels. Reference is made to a "power shovel" which is defined and illustrated elsewhere under its own heading.

In my view, a power shovel consisting of a very complicated piece of machinery, and costing perhaps $20,000.00, is essentially different from the ordinary concept of a shovel—a small hand tool having a value of only a few dollars. To the public at large "shovel", I think, means only a hand shovel. It is apparent from the exhibits that even in the trade power shovels are not uniformly referred to as such, but as excavators, cranes, crawlers or crawler machines.

I have reached the conclusion, therefore, that the imported goods do not fall within Tariff Item 431.

The appellant in the alternative submits that if the goods imported are not "shovels", then they are "motor vehicles" and so fall within Tariff Item 438*a*, which is as follows:

> 438*a*. Automobiles and motor vehicles of all kinds, n.o.p.; electric trackless trolley buses; chassis for all the foregoing . . . Provided, that machines or other articles mounted on the foregoing or attached thereto for purposes other than loading or unloading the vehicle shall be valued separately and duty assessed under the tariff items regularly applicable thereto.

The submission is as follows: By section 2(2) of The Customs Tariff Act, R.S.C. 1927, c. 44 as amended, The expressions mentioned in section two of The Customs Act, whenever they occur herein or in any Act relating to the Customs, unless the context otherwise requires, have the meaning assigned to them respectively by the said section two. By s. 2.1.(*r*) of The Customs Act, "vehicle" is defined as follows:

> 2. In this Act, or in any other law relating to the Customs, unless the context otherwise requires,
>
> (*r*) "vehicle" means any cart, car, wagon, carriage, barrow, sleigh, aircraft or other conveyance of what kind soever, whether drawn or propelled by steam, by animal, or by hand or other power, and includes the harness or tackle of the animals, and the fittings, furnishings and appurtenances of the vehicle;

Counsel for the appellant emphasizes the broad terms which define "vehicle" and particularly the phrase "or other conveyance of what kind soever". He says that a motor vehicle is a vehicle powered by a motor; that the goods

imported are designed to and do in fact "convey" and are therefore within the broad term "conveyance of what kind soever".

In considering this submission I shall assume that we are dealing with the imported goods when set up as a power shovel. Now the Tariff Item refers to "motor vehicle" and in my opinion no one, in or out of the trade in which "motor vehicles" are dealt with, would consider a power shovel to be a motor vehicle. That term to the public has a special and definite significance and without attempting to define it precisely, I think it refers to such things as motorized trucks, buses, ambulances, hearses and other self-propelled vehicles equipped with facilities either in the form of a body or seats for use in the transportation of goods or persons from one location to another. In doing so the device moves on its own wheels with its load from one place to another. The power shovel, however, does not normally transport material by moving itself with its load from one place to another on its crawler mounting. In performing its normal function the base of the machine remains in a stationary position. The front-end attachment—the shovel—digs out the earth or stones, the materials being carried by the bucket in a horizontal arc within a radius of 360 degrees of the base machine and a distance not exceeding the length of the boom and dipper stick which in this case is 28 feet. It is possible, of course, that on some occasions it may be necessary for the base machine to move backward or forward a very short distance, with a full bucket, before dropping the load. But when one considers that its top speed over the ground is $\frac{3}{4}$ of a mile per hour, it is obvious that its main purpose is digging and dropping its load in one location and not that of transporting goods from place to place. None of the exhibits refer to it as a "motor vehicle" and I do not think that any one would consider it as such.

Quite obviously a power shovel does not fall within any of the particular vehicles named in subsection (*r*). It must be conceded that the phrase "other conveyance of what kind soever" is very broad. I think, however, that it must be construed with some limitation, particularly in view of its context, the opening words of s. 2 being: "Unless the context otherwise requires". Obviously the context excludes from the term "conveyance" many things which fall within

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the dictionary definitions of that term and which do, in fact, convey. For example, a deed of land is a conveyance of property; a fire hose conveys water; a spoon or fork conveys food; a hand shovel conveys earth. But none of these articles are "conveyances" within the definition and so are not vehicles or motor vehicles.

In view of the context, I think that "conveyance" as here used is limited to a vehicle which is not only capable as a whole of moving from one location to a different location, but is designed for that purpose and whose function, while so moving, is the carrying or transporting of goods or passengers. "To convey" means more than the capacity to move from place to place; it involves the carrying or transporting of persons or of things other than its own component parts. I do not think that a power shovel fulfills any of these requirements. The crawler and its crawler shoes are no doubt designed to provide not only stability while the machine is in operation, but also a limited amount of movement—a manoeuvreability which is essential to the operation. Normally its movement is confined to the scene of operations—an excavation for a foundation, a quarry or the like. It is not designed to move from one location to another distant location. I think I may assume that when it is moved from one location to a substantially different location, it does not move there under its own power, but is, in fact, transported on a carrier.

Moreover, the function of a power shovel is not to convey goods from one place to another except within the very limited area which I have stated. Its function is to work in a fixed location, to excavate material and to drop it; and when the material excavated is not left in the immediate area, it is placed in trucks which in turn transport it to some other location. Its chief function is that of excavation (in fact, it is frequently referred to as an excavator) and not that of conveyance.

In my view, the power shovel does not fall within the term "motor vehicles of all sorts".

I think, also, that the Board was right in its conclusion that the goods imported fell within Item 427—machinery composed wholly or in part of iron or steel n.o.p. The main and essential part of the equipment was the

base machine which comprised valuable and complicated machinery. In the exhibits the whole is repeatedly referred to as "machinery" and that is what it is in fact. I can see no reason whatever for classifying the goods imported by reference only to one of the front-end attachments or to one of several uses to which they might be put. If such a principle were followed, difficulties and unfairness would follow. One importer might bring in a base machine equipped with a shovel front-end; another with a pile driver front-end; and still another with a hoe attachment. Under the principle suggested, one importer would pay duty on his goods as a shovel, another as a pile driver and a third as a hoe; and in each case the imported goods, except for the front end—a very inexpensive part—would be the same.

The issue in this appeal is not whether the article imported by the appellant was a "shovel" within the meaning of that term in Tariff Item 431, or a "motor vehicle" under Tariff Item 438*a*; but whether the Tariff Board erred as a matter of law in deciding that they were in neither of those classes. If there was material before the Board from which it could reasonably decide as it did, this Court should not interfere with its decision, even if it might have reached a different conclusion if the matter had been originally before it (*Deputy Minister of National Revenue* v. *Parke, Davis Co. Ltd. (supra)*). There was material before the Board on which it could reasonably reach the conclusion it did. Indeed, on the evidence I do not see how it could have come to any other conclusion. I am therefore of the opinion that the Tariff Board did not err as a matter of law in deciding as it did.

It follows, therefore, that the appeal herein must be dismissed with costs.

Judgment accordingly.

1954
Feb. 24
May 10

BETWEEN:

THE ROYAL TRUST COMPANY AND DR. J. R. FRASER in their quality as executors and trustees of the late WALTER WILLIAM CHIPMAN .. APPELLANTS;

AND

MINISTER OF NATIONAL REVENUE..RESPONDENT.

Revenue—Succession Duty—The Dominion Succession Duty Act, S. of C. 1940-41, as amended, c. 14, ss. 3(1)(i), 3(4), 4(1) and (2)—Power to draw from capital of an estate—Competency to dispose of property—Meaning of the word "disposition" in s. 3(1)(i) of the Act—Failure by donee to exercise power to dispose of property—Taking of beneficial interest in the property as a result of donee's failure to exercise power to dispose of it deemed to be succession—Appeal from Minister's assessment allowed.

The Dominion Succession Duty Act, S. of C. 1940-41, c. 14, as amended, ss. 3(1)(i) and (4), 4(1) and (2) provided then 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;

(i) property of which the person dying was at the time of his death competent to dispose.

3.(4) Where, upon the death of a person having a general power to appoint or dispose of property a person takes a beneficial interest in the property as a result of the failure of the deceased to exercise the power, the taking of the interest in the property shall be deemed to be the "successor" and "predecessor" respectively in relation to the property.

4.(1) A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were *sui juris,* enable him to dispose of the property and the expression "general power" includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument *inter vivos* or by will, or both, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself, or exercisable as mortgagee;

(2) A disposition taking effect out of the interest of the deceased shall be deemed to have been made by him whether the concurrence of any other person was or was not required.

By her will Mrs. Maude M. Chipman who died in 1946 left her estate to her trustees to pay her husband, Dr. W. W. Chipman, during his lifetime the income from the residue and "in addition thereto to pay to my said husband from time to time and at any time such portion of the capital of my estate as he may wish or require and upon his simple demand, my said husband to be the sole judge as to the amount of capital to be withdrawn by him and the times and manner

of withdrawing the same, and neither my said husband nor my executors and trustees shall be obliged to account further for any capital sums so paid to my said husband". Upon the death of Dr. Chipman the trustees were to dispose of what was left of the capital among designated legatees. The will also provided that all the bequests were intended as an alimentary provision and exempt from seizure for debts except in certain cases and that while in the hands of the Executors they may not be assigned by the beneficiaries. Following the death of his wife Dr. Chipman received the net interest and revenues from the residue of her estate and he demanded and received payments out of the capital thereof. Dr. Chipman died in 1950 and the appellant company and Dr. J. R. Fraser are the executors and trustees of his estate. To the net value of Dr. Chipman's estate at the time of his death the Minister, in his assessment, added the residue of Mrs. Chipman's estate as an asset of her husband's estate on the ground that Dr. Chipman was at the time of his death competent to dispose of property which he was given power to appropriate by the will of his wife and this property was dutiable under the provisions of the Dominion Succession Duty Act. From the assessment appellants appealed to this Court contending that s. 3(1)(i) and (4) of the Act do not apply to the facts of the case and that there is no provision in the Act which authorizes the inclusion of the residue of Mrs. Chipman's estate as an asset of her husband's estate.

Held: That Dr. Chipman at the time of his death was competent to dispose of the capital of his wife's estate. Under clause 3(f) of her Will, he at any time up to the moment of his death could have made the capital his own. *Parson's case* [1942] 2 A.E.R. 496 at 497; *In re Penrose, Penrose* v. *Penrose* [1933] 1 Ch. 793 at 807 referred to.

2. That "disposition" in s. 3(1) of the Dominion Succession Duty Act means a disposition by the deceased—here Dr. Chipman. The word cannot be disregarded. It involves the action of disposing. There is no succession under s. 3(1)(i) unless there has been a disposition by the deceased. This is further evidenced by a consideration of the provisions of s. 3(4) of the Act which seem to have been designed to apply where there was no "disposition" by the deceased. If mere "competency to dispose" resulted in a "succession" without an actual *disposition* by the deceased, there would have been no necessity for enacting s. 3(4). Here, Dr. Chipman made no disposition whatever of the principal of the residue of Mrs. Chipman's estate. Therefore, there was no "succession" in respect to that residue under s. 3(1)(i) so far as Dr. Chipman's estate is concerned.

3. That s. 4(1) of the Dominion Succession Duty Act does not purport to create a statutory succession in all cases in which the donee of the general power to appoint or dispose of property fails to exercise that power. It is only in cases "where . . . *a person takes a beneficial interest in the property as a result of the failure to exercise,* that the taking of that interest in the property is deemed to be a succession". The majority decision in *Wanklyn et al* v. *Minister of National Revenue* [1953] S.C.R. 58 indicates that the beneficiaries of the principal of the residue of Mrs. Chipman's estate did not *take* beneficial interests in the property *as a result* of the failure of Dr. Chipman to exercise the power, but took them directly from the provisions of Mrs. Chipman's will.

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4. That the inclusion of the words "the taking of the interest in the property as a result of the failure of the deceased to exercise the power" creates a condition which must be found to exist before there is deemed to be a succession; there must be a *taking* of a beneficial interest by the successor and that taking must follow as a result of the donee of the power failing to exercise it. Here the beneficiaries took the beneficial interests in the property at the death of Mrs. Chipman. They took no beneficial interest on Dr. Chipman's death, but merely retained what they already had, namely, a vested remainder in the capital, relieved by Dr. Chipman's death of the possibility of being divested thereof which had existed during his lifetime. *A. G.* v. *Lloyd's Bank Ltd.* [1935] A.C. 382; *Scott et al* v. *C.I.R.* [1937] A.C. 174 referred to.

APPEAL under the Dominion Succession Duty Act, S. of C. 1940-41, Geo. VI. c. 14.

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

James A. Mitchell Q.C. for appellants.

Antoine Geoffrion and *Raymond Décary* for respondent.

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

CAMERON J. now (May 10, 1954) delivered the following judgment:

This is an appeal taken under the provisions of Part VI of the Dominion Succession Duty Act (Statutes of Canada, 1940-41, ch. 14 as amended) from an assessment dated February 13, 1951, in respect of the estate of Dr. Walter William Chipman (hereinafter to be called "the Testator") who died on April 4, 1950, domiciled in the City of Montreal, having duly executed his will in notarial form dated March 21, 1950.

The appellants, the Royal Trust Company and Dr. J. R. Fraser, are the surviving executors and trustees of the Testator's estate. By his will the Testator gave the whole of the property which he possessed and to which he was entitled, to his executors upon trust: (*a*) to pay his debts, testamentary expenses, succession duties and the like; (b) to pay certain specific bequests; (*c*) to provide certain annuities for the appellants, Miss J. G. Sime and John Bath; and (*d*) to deliver the capital of the residue of his estate to his cousin, the appellant, Agnes MacMillan McLaughlin.

It is now agreed that the aggregate net value of the property of which the Testator was the owner at the time of his death was $132,045.16. In his assessment, however, the Minister placed the aggregate net value at $531,391.12 and assessed the duties payable at $81,371.50, and interest. The respondent's reason for increasing the aggregate net value of the estate as set out in his decision, following the Notice of Appeal, was as follows:

The Honourable the Minister of National Revenue having duly considered the facts and reasons set forth in the Notice of Appeal and matters thereto relating hereby affirms the said assessment as having been in accordance with the provisions of the Act and in particular on the ground that the said Walter William Chipman was at the time of his death competent to dispose of property which he was given power to appropriate by the Will of the late Maude M. Chipman and the said property has been properly subjected to duty under the provisions of paragraph (i) of subsection (1) of section 3 and subsection (4) of the said section 3 of the Act.

The said Maude M. Chipman, who died on January 14, 1946, domiciled in the City of Montreal, was the wife of the Testator. In her last will and codicil, made in notarial form and dated respectively February 7, 1940, and May 26, 1943, and after reciting that she was the wife, separate as to property, of Dr. W. W. Chipman, by Clause "Thirdly" she gave the whole of her estate to her executors and trustees on trust:

"(*a*) To pay all my just debts, funeral and testamentary expenses as soon as possible after my death and to pay all succession duties, inheritance taxes, court fees and similar taxation on my Estate out of the capital of the residue of my Estate without charging same to my respective legatees and without the intervention of any of my legatees."

(*b*) is a bequest to a niece;

(*c*) and (*d*) give the use of her residence and its contents to Dr. Chipman for his lifetime;

(*e*) is a legacy to employees.

The will continues:—

"(*f*) To pay my husband, the said Walter William Chipman, during the remainder of his lifetime, the net interest and revenues from the residue of my Estate and in addition thereto to pay to my said husband from time to time and at any time such portion of the capital of my Estate as he may wish or require and upon his simple demand, my said husband to be the sole judge as to the amount of capital to be withdrawn by him and the times and manner of withdrawing the same, and neither my said husband nor my Executors and Trustees shall be obliged to account further for any capital sums so paid to my said husband.

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(*g*) Upon the death of my said husband or upon my death should he have predeceased me to dispose of my Estate as it may then exist as follows, namely:—

1. My jewellery, pictures, household furniture and household effects shall be disposed of in accordance with any memorandum I may leave with respect to the same and failing any such memorandum then the same shall be divided among my residuary legatees hereinafter named in the same manner as the residue of my Estate.

2. To pay to The Royal Institution for the Advancement of Learning (McGill University) of Montreal, the sum of fifty thousand dollars as a special legacy.

3. To pay to the Royal Victoria Hospital, Montreal, the sum of fifty thousand dollars as a special legacy.

4. To pay to The Art Gallery, presently situate at the corner of Ontario Avenue and Sherbrooke Street West, Montreal, the sum of fifty thousand dollars as a special legacy.

5. To pay to The Church of St. Andrew and St. Paul, presently on Sherbrooke Street West, Montreal, the sum of Twenty-five thousand dollars.

The receipt of the treasurer for the time being of each of the foregoing institutions shall be a good and valid discharge to my Executors and Trustees.

6. To divide the capital of the residue of my Estate between my brothers, sisters, niece and nephews as follows:—One-sixth thereto to my brother, D. Forbes Angus, of the City of Montreal; one-sixth thereof to my brother William Forrest Angus of the City of Montreal; one-sixth thereof to my brother, David James Angus, presently of Victoria, British Columbia; one-sixth thereof to my sister, Margaret Angus, wife of Dr. Charles Ferdinand Martin of the City of Montreal; one-sixth thereof to my sister, Dame Bertha Angus, widow of Robert MacDougall Paterson of the City of Montreal; one-eighteenth thereof to my niece, Gyneth Wanklyn, widow of Durie McLennan, of the City of Montreal; one-eighteenth thereof to my nephew, David A. Wanklyn, of the City of Montreal; and one-eighteenth thereof to my nephew, Frederick A. Wanklyn, presently of Nassau, Bahamas; and I hereby constitute my said brothers, sisters, niece and nephews my universal residuary legatees in the aforesaid proportions."

The will then provides for the possibilities of brothers, sisters, nephews or the niece of the testatrix predeceasing her and defines the powers of the executors and trustees. The only provision of the will or codicil other than those quoted above which it is suggested may have relevance to the inquiry before me is the clause entitled "Fifthly", reading as follows:—

"The requests herein made whether of capital or revenue are intended as an alimentary provision for my legatees and shall be exempt from seizure for their debts except as a result of express hypothecation or pledge. I direct, moreover, that the bequests herein made while in the hands of my Executors and Trustees shall not be capable of being assigned by the beneficiaries."

Following the death of his wife, the Testator received the net interest and revenues from the residue of her estate as provided for in the opening words of Clause 3(*f*) of her Will; and under the remaining provisions of the said clause, he demanded and received payment of $33,164.41 out of the capital of the residue of her estate. It is agreed that at the Testator's death the aggregate value of the residue of the estate of Mrs. Chipman in the hands of her trustees was $517,140.21. After making certain deductions, exemptions and corrections in respect thereof, the Minister added to the aggregate net value of the Testator's estate the sum of $393,533.11, relying, as he now does also, on s. 3(1)(i) and s. 3(4) of the Dominion Succession Duty Act, which were then 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;

(i) property of which the person dying was at the time of his death competent to dispose.

3.(4) Where, upon the death of a person having a general power to appoint or dispose of property a person takes a beneficial interest in the property as a result of the failure of the deceased to exercise the power, the taking of the interest in the property shall be deemed to be a succession and the beneficiary and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to the property.

Then s. 4 is in part as follows:

4.(1) A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property and the expression "general power" includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument *inter vivos* or by will, or both, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself, or exercisable as mortgagee;

(2) A disposition taking effect out of the interest of the deceased shall be deemed to have been made by him whether the concurrence of any other person was or was not required.

The appellants, among whom are included the beneficiaries in the residue of Mrs. Chipman's estate or their legal representatives, ask that the assessment be declared invalid on the ground that s. 3(1)(i) and s. 3(4) do not apply to the facts of this case and that there is no provision in the Act which authorizes the inclusion of the residue of Mrs. Chipman's estate as an asset of the estate of the Testator. They ask for an order directing the respondent to fix the

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aggregate net value of the successions derived from the Testator at the sum of $132,045.16, the agreed net aggregate value of the Testator's own assets.

At the hearing, counsel for the respondent conceded that the residuary beneficiaries of the principal of the residue of Mrs. Chipman's estate took their legacies under her will and not from the Testator's estate. He also admitted that as to these legacies, there was no "succession" within the definition of that word in s. 2(m) of the Act in the Testator's estate.

I shall first consider the applicability of s. 3(1)(i) to the facts of this case. Counsel for the appellants submits that in order to uphold the assessment under this subsection, it must be shown that the Testator was competent to dispose of the principal of the residue of Mrs. Chipman's estate and that he did, in fact, dispose of it. I am in agreement with that submission. Then he says that the Testator was not competent to dispose of that principal and that even if he were so competent, he did not in fact dispose of it.

In my opinion, the Testator at the time of his death was competent to dispose of the capital of his wife's estate. Under Clause 3(f) of her will, the Testator at any time up to the moment of his death could have made the capital his own. On this point it is not necessary to consider whether her will gave him a general power of appointment or to refer to the extended meaning of "competent to dispose" in s. 4(1). As pointed out by Lord Greene, M.R. in *Parson's case* (1):

> The phrase "competent to dispose" is not a phrase of art, and, taken by itself and quite apart from the definition clause in the Acts, conveys to my mind the ability to dispose, including, of course, the ability to make a thing your own. The husband, in the present case, from the moment of death was able to make the legacy his own; in fact, if he had done nothing but had proceeded to die, his executors would have been entitled to that legacy from the mere fact that he had not disclaimed it. During the period between death and disclaimer, he was unquestionably to my mind "competent to dispose" within the meaning of those words, which I think are wide and in a sense popular in meaning.

Reference may also be made to *In re Penrose, Penrose* v. *Penrose* (2).

(1) [1942] 2 A.E.R. 496 at 497. (2) [1933] 1 Ch. 793 at 807.

That, however, does not conclude the matter. Under The Finance Act, 1894 (Eng.), it would probably not be necessary to go further. Under that Act, estate duty is levied on the value of property "which passes on the death" (s. 1); by s. 2 property passing on the death of the deceased is deemed to include property of which the deceased was competent to dispose; and by s. 22(2)(a) "competent to dispose" and "general powers" are defined, that subsection being almost identical with s. 4(1) of The Dominion Act. Under the English Act, therefore, an estate duty is levied on the value of property of which the deceased was competent to dispose.

S. 3(1)(i) of our Act does not purport to do that. Here it is the "*disposition* of property of which the deceased was at the time of his death competent to dispose" that is deemed to be a succession and therefore subject to duty. (I think that "disposition" as used in the opening words of s. 3(1) means a disposition by the deceased—in this case the Testator.) It is suggested by counsel for the respondent that to restrict the meaning of "disposition" in that way would be to render s. 3(1)(i) completely ineffectual, for if the deceased had disposed of it, then at his death there would be nothing of which he was still "competent to dispose". One answer to that—and there are many others—is, of course, a case in which he had a general power of appointment over the corpus by will and had disposed of it by his will.

The word "dispositions" cannot be disregarded. It involves the action of disposing. In Hanson's Death Duties, 9th Ed., p. 31-2, the author points out that to create a succession there must be a transfer, the effect of which is to make some person beneficially entitled upon the death, and that the transfer may be either by disposition or by devolution. At p. 32 he states:

> A disposition comprises any sort of conveyance, will, assignment, covenant, undertaking, contract, act, or obligation by which one person confers a beneficial interest in property on another, otherwise than for money or money's worth.

I am strengthened in my opinion that there is no succession under s. 3(1)(i), unless there has been a disposition by the deceased (in this case—the Testator), by considering the provisions of s. 3(4) which seem to have been designed

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to apply to certain situations in which the donee of a general power to appoint or dispose of property, has in fact failed to exercise the power—where there was no "disposition" by the deceased. If mere "competency to dispose" resulted in a "succession" without an actual *disposition* by the deceased, there would have been no necessity for enacting s. 3(4).

Now, in the instant case, Dr. Chipman made no disposition whatever of the principal of the residue of Mrs. Chipman's estate. For the reasons which I have stated, I am of the opinion, therefore, that there was no "succession" in respect to that residue under s. 3(1)(i) so far as the Testator's estate is concerned.

Counsel for the appellant further submits that s. 3(4) (*supra*) has here no application, his submission being that the Testator had no general power to appoint or dispose of the residue of Mrs. Chipman's estate within the meaning of the Act or of the general law; and in any event because even if he had such alleged general power, the residuary legatees of Mrs. Chipman's estate *took no beneficial interest* in the residue thereof upon Dr. Chipman's death *as a result of his failure to exercise any power*. Ss. (4) was added to s. 3 by Statutes of Canada, 1944-5, c. 37, s. 2. It would seem that the general intention of the draftsman may have been to provide that in certain cases where the donee of a general power to appoint or dispose of property (the meaning of "general power" being amplified in s. 4(1)) died, without having exercised the power and a person took a beneficial interest in the property, the taking of the interest in the property would be deemed to be a succession. It could be assumed, perhaps, that a person holding such a general power of appointment over property is in effect in the same position as the actual owner, as he could at any time exercise the power in his own favour and make the property his own. Upon his death, therefore, it might be logical to regard him as being the predecessor of the persons thus benefiting. If he had exercised the power, I think it would have been such a disposition as to come within s. 3(1)(i). Such a provision as I have suggested may have been in the mind of the draftsman, would have filled in the gap where there

was a failure to exercise the power and therefore no disposition. The power of Parliament to so provide is not challenged and the question is whether on a proper construction of the section it has done so.

Now the subsection is limited to cases in which the person dying has a general power to appoint or dispose. As I have said, counsel for the appellant submits that there was here no such power. It becomes necessary at this point to refer to certain other proceedings in which the provisions of Mrs. Chipman's will and the nature of the interests thereby conferred on Dr. Chipman and on the residuary beneficiaries in her will were under consideration.

Following Mrs. Chipman's death, an assessment to succession duties was made upon her estate on the basis that under her will a general power of appointment over the principal of the residue thereof was given to Dr. Chipman, and that duties were assessable as if the capital of the residue had been given to him outright. Upon appeal to this Court, Saint Pierre, D.J. affirmed the assessment (1). A further appeal was taken to the Supreme Court of Canada (*Wanklyn et al* v. *Minister of National Revenue* (2)), and by a majority the appeal was allowed. It was held:

That the appeal should be allowed and the assessment set aside; the dutiable value of the succession to the husband in respect of the residuary estate of the testatrix was the value as of the date of her death and the estimated net revenues from such residuary estate and the residuary legatees were assessable as having on the death of the testatrix become beneficially entitled to the capital of the residue in remainder expectant upon the death of the husband, subject to the appropriate adjustment due to his having received a certain amount from the capital.

(It should perhaps be noted here that at the time the assessment was made in Mrs. Chipman's estate, Dr. Chipman was still living; but at the time the appeal was heard in the Supreme Court of Canada he had died. It is agreed that succession duties in Mrs. Chipman's estate have been paid on the basis of the judgment of the Supreme Court of Canada.)

The majority judgments were delivered by Cartwright and Fauteux, JJ. and by Estey, J. They did not find it necessary to reach a concluded opinion as to whether the

(1) [1952] Ex. C.R. 219. (2) [1953] S.C.R. 58.

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power conferred on Dr. Chipman was or was not a general power, being of the opinion that in either case the appeal must succeed.

Estey, J. said:

> There is much to be said in principle for the contention that a power of appointment that permits one to appoint only to himself is not a general power of appointment.

Cartwright and Fauteux, JJ. stated that they regarded this question as difficult and doubtful, and added:

> If it were necessary to decide this question, careful consideration would first have to be given to the appellant's argument that the wide terms in which the power given to Dr. Chipman is expressed in clause 3(*f*) are modified and restricted by clause 'Fifthly' quoted above. Even if the respondent's contention that Dr. Chipman was entitled to take the whole capital be accepted, the power given to him does not at first sight appear to fall within the text-book definitions of a general power. See, for example, Halsbury, 2nd Ed., Vol. 25 at p. 211:
>
> > "A general power is such as the donee can exercise in favour of such person or persons as he pleases, including himself or his executors or administrators."

Had I to reach a conclusion on this point, it would be necessary to give careful consideration to the terms of the will. It is clear that the power conferred on the Testator was to appoint to himself. Clause "Fifthly" states that all bequests are intended as an alimentary provision, that they are exempted from seizure for debts except in certain cases and that while in the hands of the executors they may not be assigned by the beneficiaries.

In the instant case I am also of the opinion that it is unnecessary to determine that question, since I have reached the conclusion that the appeal, must succeed, even if it were held that a general power to appoint or dispose of property was conferred on the Testator.

S. 4(1), as I interpret it, does not purport to create a statutory succession in all cases in which the donee of the general power fails to exercise that power. It is only in cases "where . . . *a person takes a beneficial interest in the property as a result of the failure to exercise the power,* that the taking of that interest in the property is deemed to be a succession." The majority decisions of the Supreme Court of Canada in the *Wanklyn* case, it seems to me, indicates that the beneficiaries of the principal of the residue did not *take* beneficial interests in the property *as a result* of the failure of the Testator to exercise the power, but took them directly from the provisions of Mrs. Chipman's will.

In construing the relevant clauses of the will, Cartwright and Fauteux, JJ. stated at p. 71:

The first question is as to the proper construction of the relevant clauses of the will. Under the rules of the law of Quebec, which do not appear to differ in this regard from those of the common law, it seems clear that Dr. Chipman was entitled to the income from the residue for life and that on his death the capital was divisible among the residuary legatees, pursuant to clause 3(g) of the will, subject to the possibility of part or all of the capital having been paid to Dr. Chipman during his lifetime; and the shares received by the residuary legatees passed to them from Mrs. Chipman and not from Dr. Chipman. The provisions of the Dominion Succession Duty Act do not purport to alter this result, but in the submission of the respondent they have the effect of providing that duties shall be levied as if (i) the whole residue had been given outright to Dr. Chipman by the will of Mrs. Chipman, and (ii) the shares of Mrs. Chipman's estate received by the residuary legatees on Dr. Chipman's death had passed to them from him and not from her. It is with the first only of these two questions that we are directly concerned on this appeal. The power of Parliament to so provide is not challenged: the question is whether on a proper construction of the Statute it has done so.

Then, after quoting the definition of "succession" as found in s. 2(m) of the Act, the judgment continues:

Applying these words to the case at bar, the "disposition" with which we are concerned is the will of Mrs. Chipman, the "property" is the capital of the residue, the "death of the deceased person" is the death of Mrs. Chipman, and the question is therefore whether under her will, upon her death, Dr. Chipman became beneficially entitled to that capital "either immediately or after any interval either certainly or contingently and either originally or by way of substitutive limitation." It appears to me that he did not. I am of opinion that upon the death of Mrs. Chipman, Dr. Chipman became beneficially entitled to the income from the residue and the residuary legatees became beneficially entitled to the capital thereof in remainder. I have already indicated my view that the legal effect of the relevant provisions of the will of Mrs. Chipman is the same under the law of Quebec as under the common law, and using the terminology of the latter, the residuary legatees immediately on the death of Mrs. Chipman took not a contingent but a vested remainder in the capital, expectant on the death of Dr. Chipman, subject to be divested in whole or in part by his exercise of the power to take during his lifetime such portion or portions of the capital as he might wish. So far as the capital of the residue was concerned no part of it became vested in Dr. Chipman upon Mrs. Chipman's death or under any disposition made by her. No doubt upon his exercising the power Dr. Chipman became entitled to the part of the capital of the residue in respect of which he exercised it, and became so entitled under Mrs. Chipman's will by the operation of the rule of law that "whatever is done in pursuance of a power is to be referred to the instrument by which the power is created, and not to that by which it is executed as the origin of the gift" (*vide* Farwell on Powers, 3rd Edition at page 318); but it was only to the extent that he exercised the power that he became beneficially

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entitled to any portion of such capital and it was conceded that he was liable to pay duty in respect of such portion. The respondent's argument depends upon the proposition that a person who is given a power over property thereby becomes beneficially entitled to such property but in my view this is not the law and no words in the Statute so provide. As is pointed out in Halsbury, 2nd Edition, Vol. 25, page 515:

> "The creation of a power over property does not in any way vest the property in the donee, though the exercise of the power may do so; and it is often difficult to say whether the intention was to give property or only a power over property."

I have already indicated my view that as a matter of construction it is clear that Mrs. Chipman's will gave Dr. Chipman no property in the capital of the residue but only a power over it.

During the argument the terms of sections 3(4) and 4(1) of the Act were fully discussed but they appear to deal with the question of what duties are payable upon the death of the donee of a power rather than with the question of the duties payable upon the death of the donor of a power, and their relevance to the question before us is limited to the bearing which they may have upon the proper construction of section 31.

Then, after considering the provisions of s. 31 of the Act and reaching the conclusion that it could not be construed as levying any duty or defining any succession, and that there was no other provision which had the effect contended for by the Minister, the judgment continued:

for the above reasons, I would allow the appeal, set aside the assessment and order that the matter be referred back to the Minister in order that an assessment may be made upon the basis that the dutiable value of the succession to Dr. Chipman in respect of the residuary estate of Mrs. Chipman was the value as of the date of her death of the estimated net revenues from such residuary estate during the remainder of his lifetime and that the residuary legatees were assessable as having on the death of Mrs. Chipman become beneficially entitled to the capital of the residue in remainder expectant upon the death of Dr. Chipman, subject to the appropriate adjustment made necessary by the fact of Dr. Chipman having received $33,164.41 from such capital. The appellants are entitled to their costs in the Exchequer Court and in this Court.

In a separate judgment Estey, J. reached the same conclusion and for substantially the same reasons. In allowing the appeal, he directed "that the matter be referred back to the Minister for a reassessment on the basis that upon the death of the testatrix the capital in the residue of her estate passed to the parties named in the will, subject to the amount received by Dr. Chipman in the sum of $30,164.41."

The opinion of the majority of the judges in the *Wanklyn* case indicates that in relation to the principal of the residue of Mrs. Chipman's estate (excluding, of course, that part which his Testator had appropriated to himself):—

(1) there was no "succession" under the Act to Dr. Chipman;

(2) that under the rules of the law of Quebec and of the common law the shares received by the residuary legatees passed to them from Mrs. Chipman and not from the Testator;

(3) the residuary legatees immediately on the death of Mrs. Chipman took not a contingent but a vested remainder in the capital expectant on the death of Dr. Chipman subject to be divested in whole or in part by his exercise of the power to take during his lifetime such portion or portions of the capital as he might wish;

(4) that no part of it became vested in Dr. Chipman upon Mrs. Chipman's death or under any disposition made by her;

(5) that it was only to the extent that Dr. Chipman exercised the power that he became benecially entitled to any portion of such capital; and

(6) that Mrs. Chipman's will gave Dr. Chipman no property therein but only a power over it.

It seems to me that the inclusion of the words "the taking of the interest in the property as a result of the failure of the deceased to exercise the power" creates a condition which must be found to exist before there is deemed to be a succession; there must be a *taking* of a beneficial interest by the successor and that taking must follow as a result of the donee of the power failing to exercise it. Here the beneficiaries took the beneficial interests in the property at the death of Mrs. Chipman. They took no beneficial interest on the Testator's death, but merely retained what they already had, namely, a vested remainder in the capital, relieved, it is true, by the Testator's death, of the possibility of being divested thereof which had existed during his lifetime.

It is of interest to refer to the judgment in *A. G.* v. *Lloyd's Bank, Ltd.* (1), as explained by Lord Russell of Killowen in *Scott et al* v. *C.I.R.* (2). In the latter case he said at p. 183 in referring to the former case:

I would like, however, as one of the majority in that case, and in view of observations recurring (if not concurring) elsewhere, to state in fuller detail the foundation of that decision. The fund under consideration was the fund as it existed at the moment of the settlor's death —namely, the original capital increased by accumulations of so much of the income as had not been paid or applied under clause 4 of the settlement, but less so much capital as had been applied under clause 3 of the settlement. The question to be answered was had *that* fund passed on the death of the settlor. To answer that question a comparison must be made between the persons beneficially interested in *that* fund the moment before the death, and the persons so interested the moment after the

(1) [1935] A.C. 382. (2) [1937] A.C. 174.

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death. The only persons beneficially interested in *that* fund immediately before the death were the son and the daughters, though their interests were liable to be altered or defeated by some act of the settlor, or by the happening of some event in his lifetime. His death merely rendered any such act or event an impossibility. The son and daughters remained beneficially interested in the same shares and to the same extent as before, but their interests were no longer subject to alteration or defeat. They claimed under the same title as before. There was no changing hands. Therefore the fund in question did not pass on the death.

The question under consideration there was whether there was a passing on the death and that judgment, of course, is not directly applicable to the instant case. The explanation, however, does establish that the mere cesser of the possibility of the alteration or defeat of beneficial interests does not result in a changing of hands, that the parties beneficially entitled remain beneficially interested in the same property and to the same extent as before; and that they claim under the same title as before. It would seem to follow, therefore, that in the instant case there was no taking of any beneficial interest as a result of the failure to exercise the power.

Counsel for the respondent submits that the provisions of ss. (4) should not be interpreted in any technical or strictly legal manner. He suggested that while the section may have been poorly drawn, the intention was to create a succession in every case where there was a general power of appointment which had not been exercised. To interpret the subsection in that way would be to disregard entirely the clear words of the subsection itself which, as I have said, import a necessary condition—the taking of the interest in the property—a condition which I find does not here exist. The appeal must succeed on this ground also.

It may be noted that subsection (4) as it existed at the death of the Testator was repealed by s. 2(3) of c. 24, Statutes of 1952, and a new subsection substituted therefor. It is unnecessary to consider its provisions, the parties hereto being in agreement that it has no bearing on the instant case.

For these reasons the appeal will be allowed, the assessment will be set aside and the matter referred back to the respondent to reassess the duties in the estate of the Testator, omitting therefrom all entries relating to the residue of

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the estate of Mrs. Chipman and to her residuary legatees and fixing the aggregate net value of the successions derived from the Testator at $132,045.16.

The appellants are also entitled to their costs after taxation.

Judgment accordingly.

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May 10, 11, 12

May 13

BETWEEN:

PAUL-HENRI LABERGE ..... SUPPLIANT,

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Crown—Petition of Right—Claim for damages—Construction by the Crown of a retaining wall abutting to suppliant's property—Accumulation of substances behind the wall allegedly bringing pressure on suppliant's property—The Exchequer Court Act, R.S.C. 1927, c. 34, ss. 19(b) and 19(c)—Liability of the Crown under s. 19(c) of the Act a vicarious liability—Essentials of actionable negligence.

Some years ago the Crown built a retaining wall along Little Champlain Street in Quebec City, below a cliff, the wall abutting on an old building owned by suppliant. In the course of time earth, stones and other substances from the cliff accumulated behind the wall with the result that this accumulation brought, as claimed by the action, some pressure on the south wall of the building. Alleging in his action that his property was injuriously affected by the construction of the retaining wall and that this accumulation of substances was the result of the negligence of officers or servants of the Crown, while acting within the scope of their duties or employment, who should have removed the substances in order to prevent their accumulation, suppliant sought to recover from the Crown damages consisting of repairs to the building and loss of rent.

Held: That suppliant has failed to establish that the retaining wall had shifted and caused splits in the wall of the building.

2. That in order to succeed in his claim against the Crown under s. 19(c) of the Exchequer Court Act, R.S.C. 1927, c. 34, suppliant should have established that the accumulation of substances behind the retaining wall was done by some officers or employees of the Crown while acting within the scope of their duties or employment. There was no allegation or evidence that an appointed officer or employee of the Crown had received instructions or had the duty to remove those substances. *City of Quebec* v. *The Queen* (1892) 3 Ex. C.R. 164 referred to.

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3. That under s. 19(c) of the Exchequer Court Act the Crown is liable to others for damages resulting from the negligence of its servant while acting within the scope of his employment, only inasmuch as the servant was guilty of such negligence as to make himself personally liable to the third person. *Magda* v. *The Queen* [1953] Ex. C.R. 22 referred to and followed. It must be shown that the damages sustained are imputable to that servant's negligence. Here nothing to that effect was alleged or proved.

PETITION OF RIGHT to recover damages allegedly sustained by suppliant because of the construction of a retaining wall and negligence of respondent to remove substances accumulated behind it.

The action was tried before the Honourable Mr. Justice Fournier at Quebec.

Charles Cannon, Q.C. and *François Fournier* for suppliant.

Paul Fontaine, Q.C. and *Georges Pelletier* for respondent.

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

FOURNIER J. now (May 13, 1954) delivered the following judgment:

Il s'agit d'une pétition de droit par laquelle le requérant cherche à recouvrer de la Couronne des dommages pour pertes subies à la suite de la construction par l'intimée d'un mur de soutènement sur la propriété voisine de celle du requérant et d'une accumulation considérable de terre, de pierres et autres matières en arrières de ce mur. Cette accumulation résulterait de la négligence des employés et représentants de l'intimée agissant dans l'exercice de leurs fonctions et emploi.

La preuve est à l'effet que le requérant est propriétaire du lot no 2262 situé dans le quartier Champlain de la Cité de Québec, avec maison et autres bâtisses dessus construites, la maison ayant front sur la rue Petit Champlain et portant les numéros civiques 102, 104 et 106. Il a acquis cette propriété de L.-P. Bégin le 6 septembre 1945 pour la somme de $2,500. L'intimée est propriétaire du lot voisin, lequel est contigu, du côté sud, à la propriété du requérant et porte le no 2263, pour en avoir fait l'acquisition le 18 septembre 1882.

Le mur sud de la maison du requérant est sur la ligne divisant les lots 2262 et 2263. Peu de temps après l'acquisition de ce dernier lot de terre, l'intimée a construit un mur de soutien en bordure de la rue Petit Champlain, mur aboutissant à la maison du requérant. Au cours des années, de la terre, des pierres et autres matières se sont accumulées à l'arrière de ce mur et le long du mur sud de la maison.

Le requérant et ses témoins prétendent et affirment que cette accumulation de différentes matières a fait pression sur le mur et a eu pour effet de reculer de deux à cinq pouces à certains endroits le mur sud de le maison et de briser les liens retenant le mur sud au mur de façade ou mur est. Le requérant a allégué que le mur de soutien s'était déplacé du côté nord et avait causé des fissures ou lézardes dans le mur sud de la maison. Ses témoins n'ont pas supporté cette prétention dans leur témoignage.

A l'encontre de cette preuve, l'intimée a fait entendre un entrepreneur en construction et un ingénieur civil. Les deux affirment que ni le mur de soutien ni l'accumulation de terre et pierres à l'arrière du mur n'ont pu causer les dommages mentionnés et constatés par les témoins. Il s'agit ici d'une vieille maison. Dans l'Atlas de la Cité de Québec de l'année 1879, une maison dont le mur sud est situé sur la ligne de division des lots nos 2262 et 2263 paraît sur le lot 2262. Personne n'a pu établir que cette maison est la même que celle qui existe aujourd'hui, mais les photographies qui ont été produites de part et d'autre comme pièces démontrent que le style d'architecture et les matériaux employés pour sa construction sont les mêmes que ceux en vogue à l'époque de l'érection du mur de soutènement. La preuve testimoniale et les pièces produites au dossier établissent qua la maison était dans un état de délabrement avancé. Les murs extérieurs étaient détériorés et l'intérieur n'était pas fini.

Pendant tout le temps de son existence, elle a été affectée non seulement par les intempéries des saisons: neige, pluie, gel et dégel, mais aussi par des éboulements de la falaise. Il n'y a pas de doute que, lorsque le requérant en 1947 a vu la fissure ou lézarde marquant le mur sud, la maison était dans un état de vétusté avancée. Son apparence extérieure indiquait un manque d'entretien; les briques s'étaient

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désagrégées et manquaient même à plusieurs endroits. De ces faits, certains témoins ont conclu que les dommages ont été causés par la vétusté, le défaut de réparations et aussi par suite du fait qu'un étage avait été ajouté à la maison et constituait une charge plus lourde sur les fondations.

A tout événement, en 1947 il a été constaté que la maison était endommagée. La réparation des dommages, d'après le témoin expert du requérant, aurait coûté $13,500. Il est d'autre part en preuve que les murs auraient pu être réparés pour $2,400. La propriété avait été payée $2,500. en 1945. En 1952, la valeur de remplacement était de $8,131.20. La dépréciation a été évaluée à soixante-dix pour cent (70%) ou $5,961.84, ce qui fixerait la valeur réelle de la maison en 1952 à $1,967.36.

La réclamation pour perte de loyer ne me semble pas justifiée. Le fait que le requérant n'a pas fait les réparations et que la maison n'a pu être louée à cause de ce manque de réparations ne peut être imputable à l'intimée. Si l'intimée était tenue responsable des dommages causés, je crois que la somme de $1,500 serait une compensation adéquate.

Le requérant a d'abord basé sa réclamation sur le paragraphe *b*) de l'article 19 du chapitre 34 des Statuts Revisés du Canada, 1927.

L'article 19(*b*) décrète ce qui suit:

La cour de l'Échiquier a aussi juridiction exclusive en première instance pour entendre et juger les matières suivantes:

b) Toute réclamation contre la Couronne pour dommages à des propriétés causés par l'exécution de travaux publics;

Au cours de l'enquête, s'apercevant que ses témoins ne soutenaient pas cette prétention, le requérant, par ses procureurs, a fait motion pour amender sa pétition de droit en ajoutant les paragraphes suivants:

10. *a*) Depuis la construction du mur de soutien en question, les roches et d'autres matières se sont accumulées derrière ce mur et ont exercé une forte pression sur le mur de la maison du pétitionnaire;

10. *b*) Cette accumulation de roches, de terre et d'autres matières s'est faite comme conséquence de la négligence et de la faute des employés et représentants de l'intimée, pendant qu'ils agissaient dans l'exercice de leurs fonctions, qui auraient dû les enlever de manière à empêcher leur accumulation comme suite de la construction dudit mur de soutien;

10. *c*) Les dommages dont se plaint le pétitionnaire sont bien causés par la pression des roches et autres matières accumulées sur le terrain voisin appartenant à l'intimée et retenues par le mur de soutien;

Ces amendements avaient pour but de permettre au requérant d'alléguer dans sa pétition de droit les causes donnant ouverture à un droit d'action en dommage contre la Couronne conformément aux dispositions du paragraphe (*c*) de l'article 19 du chapitre 34 de la Loi de la Cour de l'Échiquier.

L'article 19(*c*) se lit ainsi:

Toute réclamation contre la Couronne provenant de la mort de quelqu'un ou de blessures à la personne ou de dommages à la propriété, résultant de la négligence de tout employé ou serviteur de la Couronne pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi . . .

La motion fut accordée sans objection de la part de l'intimée, les parties devant produire au dossier une pétition de droit, une défense et une réponse amendées.

Le requérant avait maintenant deux moyens d'action— d'abord établir que les dommages à sa propriété avaient été causés par la construction de travaux publics et ensuite que les dommages résultaient de la négligence d'un officier ou employé de la Couronne, agissant dans l'exercice de ses fonctions.

Quant au premier moyen, le requérant a totalement failli d'établir que le mur de soutènement s'était déplacé vers le nord et avait affecté le mur sud de sa maison. Le mur était et est encore en bonne condition; les joints ne se sont pas dilatés et les pierres sont dans leur position normale, et ce bien que l'érection du mur date d'il y a nombre d'années.

J'examinerai maintenant la question de prescription.

L'article 32 de la Loi de la Cour de l'Échiquier est ainsi conçu:

Les lois relatives à la prescription et à la limitation des actions, en vigueur dans toute province entre particuliers, s'appliquent, subordonnément aux dispositions de toute loi du Parlement du Canada, aux procédures instituées contre la Couronne à l'égard de toute cause d'action qui prend naissance dans cette province.

L'article 2261 du Code Civil décrète:

L'action se prescrit par deux ans dans les cas suivants:

(2) Pour dommages résultant de délits et quasi-délits.

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Les dommages causés par l'exécution de travaux publics comportent l'idée de négligence. Or la négligence étant un élément du délit et quasi-délit, je suis d'opinion que la prescription de deux ans s'appliquerait dans ce cas.

Sur ce moyen le requérant faillirait et par défaut de preuve et par prescription.

Quant au deuxième moyen, examinons ce qui est devant la Cour.

Pour réussir dans une poursuite de cette nature contre la Couronne, il faut alléguer et prouver que les dommages causés sont attribuables à la négligence d'un officier ou employé de la Couronne, commise pendant que cet officier ou employé agissait dans l'exercice de ses fonctions ou de son emploi. Un ou des allégués de la pétition aurait dû mentionner ces différents éléments donnant ouverture au droit d'action.

Relativement aux dommages le requérant se contente d'alléguer qu'ils ont été causés par la pression de roches et autres matières accumulées sur le terrain voisin appartenant à l'intimée et retenues par le mur de soutien. Il n'allègue nulle part que les dommages sont attribuables à la négligence d'un employé ou serviteur de la Couronne, agissant dans l'exercice de ses fonctions. Il est vrai qu'il allègue que l'accumulation de pierres et autres matières s'est faite en conséquence de la négligence des employés de l'intimée pendant qu'ils agissaient dans l'exercice de leurs fonctions—non que l'accumulation ait été faite par eux. Il est allégué qu'ils auraient dû les enlever afin d'empêcher leur accumulation. Rien n'est allégué pour permettre la preuve qu'un officier ou employé spécifié avait reçu des instructions ou avait le devoir de faire ce travail.

Dans la cause de *The Corporation of the City of Quebec and Her Majesty the Queen* (1) il a été jugé, *inter alia,* ce qui suit (p. 164):

> It is not the duty of an officer of the Crown to repair or add to a public work at his own expense, nor unless the Crown has placed at his disposal money or credit with instructions to execute the same. . . .

En vertu de l'article 19 (c) de la Loi de la Cour de l'Echiquier la Couronne ne peut être tenue responsable de dommages résultant de la négligence de son serviteur

(1) (1892) 3 Ex. C.R. 164.

agissant dans l'exercice de ses fonctions qu'en autant que ce dernier lui-même a commis un acte causant des dommages, pour lequel acte il pourrait être personnellement tenu responsable. La Couronne assume la responsabilité pour les actes de négligence de son employé qui ont eu comme résultat des dommages à autrui mais il faut alléguer et prouver que les dommages subis sont attribuables à la négligence de cet employé. Rien de semblable n'est allégué ou prouvé dans la présente cause.

Dans la cause de *Magda* v. *The Queen* (1) le savant Président de cette Cour expose en termes clairs et précis les conditions nécessaires pour engager la responsabilité de la Couronne dans les poursuites de la nature de la présente pétition de droit. Je cite (pp. 31 et 32):

> . . . To engage the responsibility of the Crown to a suppliant under section 19(c) it must be shown that an officer or servant of the Crown, while acting within the scope of his duties or employment, was guilty of such negligence as to make himself personally liable to the suppliant, for the Crown's liability under section 19(c), if the term liability is a precise one to apply to the Crown, is only a vicarious one. Consequently, the suppliant must allege facts from which negligence on the part of an officer or servant of the Crown may be found, that is to say, facts showing that the officer or servant of the Crown owed a legal duty, whether imposed by statute or arising otherwise, to the suppliant to take care to avoid injury to him, that there was a breach of such duty while the officer or servant was acting within the scope of his duties or employment and that injury to the suppliant resulted therefrom: *vide Lochgelly Iron and Coal Co.* v. *McMullan* [1934] A.C. 1; *Hay* or *Bourhill* v. *Young* [1943] A.C. 92; *The King* v. *Anthony* [1946] S.C.R. 569.

Le jugé dans la cause de *Magda* v. *The Queen* précitée se lit en partie comme suit:

> That to come within the ambit of actionable negligence within the meaning of section 19 (c) of the Exchequer Court Act there must be circumstances giving rise to a duty to take care owing to the suppliant, failure to attain the standard of care prescribed by law for the fulfilment of that duty and actual damage suffered by the suppliant, and that the necessary allegations to warrant a claim for such actionable negligence do not appear in the suppliant's petition.

Dans la cause qui nous occupe je suis d'opinion que la requérant n'a ni allégué ni prouvé que les dommages dont il se plaint résultant de la négligence d'un officier ou serviteur de la Couronne agissant dans l'exercice de ses fonctions

(1) [1953] Ex. C.R. 22.

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ou de son emploi. Je crois plutôt que les dommages causés à sa maison sont imputables au manque d'entretien et de réparations et à l'état de vétusté de son immeuble.

Par ces motifs la Cour renvoie la pétition de droit du requérant et maintient la défense de l'intimée, avec dépens.

Jugement en conséquence.

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Apr. 20, 21

May 21

BETWEEN:

MONTSHIP LINES LIMITED.....APPELLANT,

AND

MINISTER OF NATIONAL REVENUE..RESPONDENT.

Revenue—Income—Income Tax—The Income Tax Act, S. of C. 1948, c. 52, s. 12(1)(a) and (b)—Deductions not allowed from income—Deductions not incurred by taxpayer for the purpose of earning income—Expenses incurred to comply with requirements of agreement of sale of property—Appeal from Income Tax Appeal Board dismissed.

In 1948 the appellant company which operates a number of freight vessels sold two vessels while they were undertaking a voyage on its behalf. Under the agreements of sale both vessels were to be delivered to the purchasers in Lloyd's 100 A-1 class. Upon completion of their respective voyages the vessels went into dry-dock and there certain repairs were made before their delivery. The amounts of those repairs were claimed as deductions by appellant in its 1949 income tax return as ordinary expenses incurred in the course of its business but disallowed by the Minister on the ground that they were made pursuant to the terms of the agreements of sale and not for the purpose of earning the income. From the assessment an appeal was taken to the Income Tax Appeal Board which dismissed it and from the decision appellant appealed to this Court. On the facts the Court found that the repairs were maintenance repairs and none of them incurred for improvements or alterations and that the annual inspection of the vessels, as required by the Canada Shipping Act, S. of C. 1934, c. 44, s. 387, was not made in 1948 by a steamship inspector, prior to their delivery to the purchasers.

Held: That s. 12(1)(a) of the Income Tax Act being a positive enactment and excluding deductions which were not made or incurred by the taxpayer *for the purpose* of gaining or producing income from his property or business, it is not enough to establish that the dilapidations which occasioned the expenditures arose out of or in the course of the business, but that the *purpose* of the taxpayer in making the outlays was that of gaining or producing income from the business.

Here that was not the purpose of the taxpayer. The outlays were incurred at the time each vessel entered the drydock, and it was then known that they would no longer be operated by appellant, but, following the inspection by Lloyds' surveyor would be delivered to the purchasers. The sole purpose of appellant in incurring the expenses was to comply with the requirements of the agreements of sale.

APPEAL from a decision of the Income Tax Appeal Board.

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

Léon Lalonde for appellant.

Raymond Décary and *W. R. Latimer* for respondent.

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

CAMERON J. now (May 21, 1954) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board dated April 28, 1953 (8 T.A.B.C. 247), dismissing the appellant's appeal from an assessment to income tax in respect of the appellant's taxation year ending February 28, 1948. The assessment was dated May 7, 1951, and therein the respondent deducted from the declared net income of the appellant the sum of $255,103.34 as "1949 loss applied". The appellant submits that this deduction should be increased by $22,780.07, that amount being made up of certain disbursements made by the appellant in its taxation year ending February 28, 1949, which were not allowed by the respondent as proper deductions in that year.

There is no dispute whatever as to the facts. The appellant company is a shipping company operating a number of freight vessels, some of which it owns and others of which it operates under charter. In 1946 it purchased from War Assets Corporation two vessels of the Canadian Victory type (10,000 ton dry cargo class) namely, the *Mont Clair* and the *Mont Sorrel*. Thereafter, the vessels were used mainly in freight service from Eastern Canada to North European and Mediterranean ports.

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By agreement in writing dated April 28, 1948 (Exhibit 5), the appellant agreed to sell the *Mont Clair* to Mihammadi Steamship Co. Ltd., of Pakistan, for $740,000.00. Clause 5 of that agreement was as follows:

5. The vessel shall be delivered safely afloat in a seaworthy condition, tight, staunch and strong, and in Lloyd's 100 A-1 class, without reservation, and in every way satisfactory for normal service of a vessel of her type, size and description, and, to ascertain the fulfillment of these requirements, the Seller agrees to have the vessel inspected and examined in a dry-dock in Canada, without the tailshaft being drawn and without opening up the main engines, boilers and auxiliaries, by a surveyor of Lloyd's, and to give notice of such inspection to the Purchaser by letter, telegram or cable, at his address at least three (3) days before such inspection takes place. The Seller hereby undertakes to promptly carry out at his expense any repairs ordered to be carried out by Lloyd's Surveyor to enable him to issue a Certificate maintaining the classification of the vessel 100 A-1 without reservation; dry-docking and other expenses incidental to the inspections to be paid by the Purchaser if the Vessel does not require any repairs or does require repairs, the cost of which shall be less than FIVE HUNDRED DOLLARS ($500.00), but said expenses to be paid by the Seller if the vessel requires repairs other than painting, the cost of which will be in excess of the sum of FIVE HUNDRED DOLLARS ($500.00); the cost of painting to be borne by the Purchaser except for the painting of those parts which needed repairs. Vessel to be delivered with all holds cleanswept.

On the date of the agreement, the *Mont Clair* was loading a cargo at Port Sulphur, Louisiana, its voyage thereto from Montreal having commenced on April 18. That cargo was delivered to ports in Eastern Canada, the voyage having earned a substantial amount of revenue for the appellant. Immediately on completing the delivery of the cargo, it went into dry-dock in Canada on May 25 and there certain repairs were made at a cost of $17,934.44 (certain other expenses were incurred but were not claimed as deductions). Exhibit 1 is a list of the repairs and the cost thereof. Exhibit 2 is a summary thereof divided into: voyage repairs—$1,057.20; annual repairs—$14,970.02; and deferable or quadrennial repairs—$1,907.22.

The uncontradicted evidence establishes that all these repairs so claimed as deductions by the appellant in his 1949 income tax return were maintenance repairs, occasioned by ordinary wear and tear and that none of the expenses were incurred for improvements or alterations.

Delivery of the *Mont Clair* was made to the purchaser immediately upon leaving dry-dock, on May 31, 1948.

Similarly, the appellant on April 30, 1948, entered into an agreement to sell the *Mont Sorrel* to the Kingdom of the Netherlands for $743,250.00 (Exhibit 6). Clause 5 of that Agreement for Sale was practically identical with Clause 5 of the Agreement of Sale of the *Mont Clair* (*supra*). On the date of that agreement, the vessel was on a voyage which had commenced on April 27 and which was completed on June 11. Then followed two other voyages made on behalf of the appellant company. About July 23, 1948, and upon completion of the last of these voyages, the *Mont Sorrel* went into dry-dock and underwent a survey. Certain repairs aggregating $4,854.63 were made, the details of which are shown in Exhibit 3 and summarized in Exhibit 4. These repairs fell within the same categories as those made to the *Mont Clair,* all being in the nature of maintenance repairs occasioned by ordinary wear and tear. The *Mont Sorrel* was delivered to the purchasers immediately after leaving dry-dock, namely on July 26.

It is the aggregate of these two amounts, namely $22,780.07, which the respondent disallowed as deduction for the taxation year 1949 and which, as I have pointed out, were not added to the amount of the 1949 losses of the appellant which were allowed as a deduction for its 1948 taxation year.

It is not necessary to go into the details of these amounts in view of the admissions made by counsel for the respondent at the hearing. He conceded that they fell within the category of maintenance repairs and that had the vessels not been sold and had the appellant continued thereafter to operate them in its business, all of the expenses so incurred would have been treated as deductible expenses in the taxation year ending February 28, 1949.

Briefly, the contention of the appellant is that these expenses were ordinary expenses incurred in the course of the appellant's business; that the repairs were made necessary by the continuous operation of the vessels while earning income for the appellant; that they were incurred for the purpose of earning the income of the appellant and were therefore deductible. Counsel for the respondent submits, on the other hand, that the repairs were made pursuant to

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the terms of Clause 5 of the two Agreements of Sale (*supra*) and in order that the appellant might deliver the vessels in Lloyds' 100 A-1 Class and not for the purpose of gaining or producing income from the business of the appellant; that they are therefore barred by the provisions of s. 12(1)(a) of the Income Tax Act. He submits, also, that they were outlays on account of capital and are therefore barred by s. 12(1)(b) of the said Act.

These subsections are as follows:

> 12.(1) In computing income, no deduction shall be made in respect of
> (*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer,
> (*b*) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part.

It is of particular importance to note that neither of the vessels, following completion of the repairs, was used in the business of the appellant, and that at the time the expenses were incurred the appellant had entered into agreements to dispose of the vessels and knew that thereafter they would not be used to earn income for the appellant.

Counsel for the appellant emphasized the fact that the repairs were occasioned by the continuous operation of the vessels in the ordinary course of its business. I accept the evidence that such was the fact. Then he submits that under the provisions of s. 387 of the Canada Shipping Act, Statutes of Canada, 1934, c. 44, the hull, equipment and machinery of every steamship registered in Canada was required to undergo an inspection by a steamship inspector at least once in each year and that a certificate under the Act could not be granted unless and until all the repairs required by the steamship inspector to be made had actually been completed. He points to the fact that the last annual inspection of the vessels had been made in the summer of 1947 and that the annual inspection for 1948 would be required at or about the time when these repairs were undertaken.

The fact is that no such inspection was made under the Act in 1948 by a steamship inspector, prior to delivery of the vessels to the purchasers. Under the circumstances here existing, it was not necessary for the appellant to have such an inspection as it had no intention of operating the vessels

after they left dry-dock. S. 387(2) of the Canada Shipping Act provided that no vessel (which goes from any place in Canada) shall be so used unless such a certificate is on board and penalties are provided for cases in which a voyage is made without such a certificate. Under the circumstances, it was wholly unnecessary for the appellant to comply with the provisions of s. 387(1) inasmuch as no further voyages were to be undertaken by either vessel on its behalf.

S. 12(1)(a) of the Income Tax Act is a positive enactment and excludes deductions which were not made or incurred by the taxpayer *for the purpose* of gaining or producing income from his property or business, subject, of course, to the specific deductions allowed under s. 11. It is not enough to establish that the dilapidations which occasioned the expenditures arose out of or in the course of the business. It must be established that the *purpose* of the taxpayer in making the outlays was that of gaining or producing income from the business. In the present case I am unable to find that that was the purpose of the officers of the appellant. The outlays, in the particular circumstances, could not in any way affect the income of the company either in its past or future operations. The business of the company was the operation (and not the sale) of vessels. The outlays were incurred at the time each vessel entered the drydock, and it was then known that they would no longer be operated by the appellant, but, following the inspections by Lloyds' surveyor and the completion of the repairs he might require to be made in order to place the vessels within Lloyds' 100 A-1 Class, would be delivered immediately to the purchasers. In my view, the sole purpose of the appellant in incurring the expenses was to comply wtih the requirements of Clause 5 of the agreements, namely, to meet the terms of its contract to have the vessels put into Lloyds' 100 A-1 Class.

It is reasonable to assume that these outlays were not lost to the appellant. I have no doubt that in entering into the contracts of sale and before agreeing to the requirement that the vessels should be repaired as required by a Lloyds' surveyor so as to bring them into Lloyds' 100 A-1 Class, the appellant took into consideration the estimated cost of such repairs and that the sale values were based on the values of the ships after such prospective repairs were made.

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The evidence is that a purchaser would offer more for a vessel when the contract of sale included such a covenant by the vendor as is found in Clause 5, than he would otherwise do.

For these reasons the appeal will be dismissed and the assessment affirmed. The respondent is entitled to his costs after taxation.

Judgment accordingly.

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June 16, 17 & 18

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May 21

BETWEEN:

CANADIAN ADMIRAL CORPORATION LTD. ..... } PLAINTIFF,

AND

REDIFFUSION, INC., ...DEFENDANT.

Copyright—Action for infringement of copyright—Live telecasts and film telecasts of football games—Whether copyright subsists in such telecasts—The Copyright Act, R.S.C. 1927, c. 32, ss. 2(b)(d)(g)(n)(p)(q)(r)(u), 3(1)(e)(f), 4, 9, 17, 20(3), 36, 40(4) and 45—Copyright purely statutory—Nature of copyright—Meaning of "original" in the law of copyright—Protection afforded only to a series of photographs—Rediffusion by defendant of film telecasts a "performance" of plaintiff's work—Whether performance was "in public"—Character of the audience—Right to communicate a "work" by radio communication.

Having acquired from the Montreal football club, "The Alouettes", the exclusive right (*a*) to telecast the football games to be played by the team in Montreal during the 1952 football season and (*b*) to televise *films* of the games to be played by the team away from Montreal, plaintiff entered into an agreement with the Canadian Broadcasting Corporation whereby the latter (*a*) agreed to furnish its personnel, facilities and equipment to telecast over its Montreal station CBFT the games played in Montreal and its facilities and station time to telecast *films* provided by plaintiff of the games played out of Montreal, and (*b*) assigned and transferred to plaintiff all of its right, title and interest in the copyright in the *live* telecast productions of the games. By a further agreement with Dow Breweries, the owner of the rights to make movie films of the league games to be played by "The Alouettes" away from Montreal in 1952, plaintiff acquired (*a*) all the owner's rights to televise over station CBFT films of such games including those received through the ether, *by wire service or rediffusion*, and (*b*) whatever copyright Dow Breweries had in the films. Plaintiff then registered in the Copyright Office the telecast productions of the games played in Montreal and the cinematograph films of those played out of Montreal. Four of the home games and

films of the four out of town games were televised over station CBFT and on each occasion the programmes were picked out of the ether by defendant, whose business consists in part in maintaining an antenna in or near Montreal which enables its subscribers to receive *by wire* in their homes telecast programmes emitted by station CBFT, and were distributed to them and to its sales and showroom in Montreal. The action is one for infringement of copyright in both the live and film telecasts, defendant denying that copyright subsists in any of the telecasts sponsored by plaintiff and that if copyright did exist therein, no infringement resulted from its operations.

Held: That no matter how "piratical" the taking by one person of the work of another may appear to be, such taking cannot be an infringement of the rights of the latter unless copyright exists in that "work" under the provisions of section 3 of The Copyright Act. Copyright is, in fact, only a negative right to prevent the appropriation of the labours of an author by another.

2. That for copyright to subsist in a "work" it must be expressed to some extent at least in some material form, capable of identification and having a more or less permanent endurance. All the works included in the definitions of "artistic work" and "literary work" in s. 2(b) and (n) of The Copyright Act, R.S.C. 1927, c. 32 have a material existence; "musical works" by s. 2(p) must be printed, reduced to writing or otherwise graphically produced or reproduced. Likewise, in regard to "dramatic works" there is the requirement that the scenic arrangements or acting form must be fixed in writing or otherwise. "Cinematographic productions" which are also dramatic works are obviously "fixed otherwise", since they involve the making of films. Here, neither the producer nor any of his assistants, while producing the live telecasting of the games played in Montreal had *fixed* anything in writing or otherwise, or had anything whatever to do with the scenic arrangements of the acting form of the players participating in the football match. By the very nature of the spectacle, nothing of that sort could have been planned in advance or fixed in writing or in any other manner whatsoever. The live telecasts (or live radio broadcasts) of a football game as described in the evidence do not fall within the opening words of s. 2(u) of the Act—"every original literary, dramatic, musical and artistic work . . ."

3. That neither the process nor result of telecasting is analogous in any way to that of photography or cinematography. Even if the "work" was found to be a cinematographic production, it would not be a dramatic work within the meaning of s. 2(g) of the Act inasmuch as the arrangement or acting form, or the combination of incidents represented, do not give the work an original character.

4. That the image produced on the receiving set in the case of live telecasts is not a photograph as that word is ordinarily understood. A photograph is something concrete, something in a material form that cannot only be seen but handled and involves the creation of a negative. The image is not an artistic work under s. 2(b) of the Act.

5. That to be "original" a work must originate from the author; it must be the product of his labour and skill and it must be the expression of his thoughts. *University of London Press Ltd.* v. *University*

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Tutorial Press Ltd. [1916] 2 Ch. 601 referred to. There is no copyright in mere conception or ideas and here the producer had nothing to do with the arrangements of the pictures shown. *Frank Smythson* v. *Cramp and Sons Ltd.* [1944] A.C. 329 referred to. All that he did was to choose the particular play in the game—a play in which he took no part whatsoever—and by means of the equipment provided communicate that play so that it could be seen by any one within the range of the telecast who desired to see it and had the necessary equipment for its reception. In the picture so seen there was no expression of his thoughts, but merely a view of what was seen by thousands of others at the playing field.

6. That the live telecasting of sporting events such as those here in question cannot create a work in which copyright can subsist.

7. That the *film* telecasts of the games having been made from cinematograph films were cinematographic productions. Such a production is a "dramatic work" only if the arrangement or acting form or the combination of incidents represented has given the work an original character. In the absence of evidence here as to how the films were made or even that was any degree of selection, but assuming that their preparation and presentation were similar to those of the live telecasts, it cannot be said that they were given "an original" character by their author. However, if the production consists of a series of photographs—as it does here—it is protected as a photograph; and photographs are within the definition of "artistic work" in s. 2(b) of the Act. The plaintiff here is entitled only to the protection afforded to an artistic work.

8. That the principles laid down in the cases of *Performing Right Society Ltd.* v. *Hammond's Bradford Brewery Co.* [1934] 1 Ch. 121; *Performing Right Society* v. *Gillett Industries Ltd.* [1943] 1 A.E.R. 228 and 413; and in Canada in the case of *Canadian Performing Right Society* v. *Ford Hotel* [1935] 2 D.L.R. 391, which had to do with acoustic representations, are of equal application to a visual representation which is also included in the definition of "performance" in s. 2(q) of the Act (Canada). The rediffusion of the film telecasts by defendant by means of the process described in the evidence constitute a "performance" of plaintiff's work.

9. That mere performance however, is not enough; in order to find that plaintiff's right was infringed, the Court must find that the performance was "in public". The test to be applied is "What is the character of the audience?" Here there is no evidence whatever except that the telecasts of the films in the homes and apartments of the subscribers of defendant were seen by them, presumably only the householders. The character of the audience was therefore a purely domestic one and the performance in each case was not a performance "in public".

10. That the situation, however, is different in regard to defendant's sales and showroom in Montreal. It was open to the public and on various occasions members of that public saw there film telecasts of plaintiff's broadcast on Station CBFT. There was nothing there of a domestic or quasi-domestic nature and it was a performance "in public" and an infringement by defendant of plaintiff's right in the cinematograph films.

11. That defendant has not infringed plaintiff's copyright by communicating the work *by radio communication*. Radio is a communication of messages by means of electro-magnetic or Herzian waves through the ether. Here defendant communicated the work by use of co-axial cables to its subscribers and to its show and sales room in Montreal. The communication was not *by radio*.

ACTION for infringement of copyright taken under the provisions of The Copyright Act, R.S.C. 1927, c. 32, as amended.

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

J. J. Robinette, Q.C., Samuel Rogers, Q.C. and *J. M. Godfrey* for plaintiff.

Phillipe Brais, Q.C., H. Gerin-Lajoie, Q.C. and *E. Gordon Gowling, Q.C.* for defendant.

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

CAMERON J. now (May 21, 1954) delivered the following judgment:

This is an action for infringement of copyright, taken under the provisions of The Copyright Act, R.S.C. 1927, c. 32, as amended. In its Statement of Claim, the plaintiff also claimed an injunction and damages under the Unfair Competition Act, but at the opening of the trial these claims were dropped. By its Statement of Defence, the defendant in para. 22 alleged that for the reasons therein stated, the plaintiff had deprived itself of any right to relief in the action, but, at the trial, that paragraph, by consent, was struck out.

At the trial there was filed an agreement (Exhibit 5) in which, for the purposes of this action, the parties agreed on a substantial number of matters; there is little dispute as to the remaining facts.

The plaintiff is a company incorporated under the Dominion Companies Act, having its principal place of business at the Township of Toronto, in Ontario. It is engaged in the manufacture of television receiving sets, some of which are sold by dealers throughout the Province of Quebec. For the purpose of advertising its wares, the plaintiff decided to sponsor the telecast of the football

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games to be played in the Autumn of 1952 by the Montreal Football Club Inc., which operates a rugby football team called "The Alouettes" in the Inter-Provincial Football Union.

Accordingly, the plaintiff entered into an agreement with that football club (which I shall hereafter refer to as "The Alouettes") on August, 1952 (Exhibit 1) and thereby, for the consideration mentioned, it was agreed that the plaintiff should have (*a*) the exclusive right to *live* telecasts of the six football games to be played by the Alouettes in Montreal; and (*b*) an option to purchase the exclusive right to televise films in Montreal of the six games to be played by the Alouettes away from Montreal. The parties hereto have agreed that that agreement was duly executed and delivered by the parties thereto, that it was carried out according to its tenor, and that the option was taken up.

By an agreement dated August 27, 1952, between the Canadian Broadcasting Corporation and the plaintiff, the former for the consideration specified (*a*) agreed to furnish the personnel and all the facilities and equipment necessary to produce and telecast from Delorimier Stadium, Montreal over its television station CBFT Montreal the football games to be played by the Alouettes in Montreal during the 1952 season; (*b*) assigned and transferred to the plaintiff exclusively all of its right, title and interest in the copyright and any other property rights in the *live* telecast productions of the said games; and (*c*) agreed to supply the necessary facilities and the station time to telecast *films* provided by the plaintiff of the six games to be played by the Alouettes away from Montreal, such facilities to be available on the dates specified, namely, six days after the games were actually played. It was also agreed that the Broadcasting Corporation would not make available such telecast productions and film telecasts by direct wire to any other person, firm or corporation.

Dow Brewery Ltd. had acquired certain rights entitling it to make movie films of the league games to be played by the Alouettes away from Montreal in 1952. By an agreement dated September 11, 1952 (Exhibit 3) Dow transferred and assigned to the plaintiff exclusively, all its rights

to televise over station CBFT or to distribute by wire service within the Province of Quebec, films or any part thereof of such games, such films, however, not to be televised by the plaintiff until the Friday following the dates when the games were played. The plaintiff was authorized to obtain from Dow's supplier one black-and-white copy of the film of each such game. By a supplementary agreement between the said parties dated October 17, 1952 (Exhibit 3) it was agreed that the rights granted to the plaintiff by the agreement of September 12 should include "the exclusive right to distribute and perform the television broadcasts of such films after receiving the same through the ether, *by wire service or rediffusion*".

The agreement between the plaintiff and the Broadcasting Corporation was duly carried out. The plaintiff sponsored the live telecast over station CBFT of the first four games played at Montreal. The plaintiff also obtained from Dow a cinematographic film of each of the first four games played by the Alouettes away from Montreal, furnished them to the Broadcasting Corporation, and telecasts thereof, without the assistance of a commentator, took place over station CBFT on the agreed dates. It is established that prior to the first of the four live telecasts and again prior to the first of the four film telecasts, the plaintiff, in writing, notified the defendant or its solicitors, of the rights which the plaintiff had acquired and forbade the defendant to rediffuse any of such telecasts. The defendant's solicitors, in each case, replied that their client could not agree that the relaying of the telecast programmes over their rediffusion circuits, in any way infringed the legal rights of the plaintiff.

By the agreement filed at the trial (Exhibit 5) it is admitted that the effect of the two agreements between the plaintiff and Dow Breweries was to vest in the plaintiff whatever copyright the latter had in the films of the games played by the Alouettes away from Montreal; that such cinematographic films were produced for valuable consideration by Briston Films Ltd. for Dow, and were taken by employees of Briston Films Ltd.; and that the plaintiff by virtue of its agreement with Dow was entitled to and

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did obtain a black-and-white film of each of such games from Briston Films Ltd. to be used for telecast over station CBFT.

It is alleged that the defendant took each of the said telecasts off the ether and rediffused the same to its various subscribers and to its showroom and sales office at 1650 Berri Street, Montreal, and that thereby the defendant has infringed the copyright of the plaintiff in both the live and film telecasts. On October 24 these proceedings were commenced, the plaintiff claiming an injunction and damages, which by amendment at the trial it fixed at $600.00.

On October 18, 1952, the plaintiff registered the telecast productions of the games played at Montreal and the cinematograph films reproducing the four games played out of Montreal in the Copyright office, all as unpublished artistic works; certified copies thereof are filed as Exhibit 4.

The defendant is a company incorporated under the Quebec Companies Act having its principal place of business at Montreal. It admits that its business consists in part in providing and maintaining equipment including an antenna in or near Montreal, which enables its subscribers to receive in private, *by wire,* in their homes and on their own and sole volition, and by wire only insofar as the defendant is concerned, telecast programmes emitted by the CBFT television transmitter. It alleges that its premises at 1650 Berri Street are used by it for private business purposes to demonstrate its services to potential subscribers, as is customary in all similar trades, and that for that purpose it there received the television programmes emitted by station CBFT. It denies that copyright subsists in any of the telecasts so sponsored by the plaintiff, and that if copyright did exist therein, no infringement resulted from the defendant's operations.

In the agreement filed (Exhibit 5) the defendant admitted that the four home games of the Alouettes were televised and that the films of the four out of town games were televised over station CBFT and that on each occasion the programmes were picked up from the ether by it and distributed by wire to its various subscribers and to its sales and showroom at Berri Street; that the said programmes were seen by members of the public on a terminal

unit at the Berri Street room, except on four stated Sundays when the room was closed; and were also seen on terminal units in the homes of their subscribers, after having been picked up by the defendant's equipment and distributed by wire to such subscribers. It is also admitted that there were "over 100" such subscribers to the defendant's services.

Such copyright as the plaintiff may have must be found in the provisions of The Copyright Act (s. 45). It is provided by s. 20(3) thereof that in an infringement action, when the defendant puts in issue either the existence of copyright, or the title of the plaintiff therein (and both are here in issue), that the work shall, unless the contrary is proved, be presumed to be a work in which copyright subsists; and that the author of the work shall, unless the contrary is proved, be presumed to be the owner of the copyright. By s. 36 of the Act, it is provided that every register of copyrights shall be *prima facie* evidence of the particulars entered therein and that the certificates of registration of copyright in a work shall be *prima facie* evidence that copyright subsists in the work and that the person registered is the owner of the work.

Copyright subsists in Canada in every original literary, dramatic, musical and artistic work, subject to certain limitations (s. 4). The copyright claimed is said to be in either an artistic or in a dramatic work, or both, those terms being defined in s. 2 of the Act as follows:

> 2. In this Act, unless the context otherwise requires,
>
> (*b*) "artistic work" includes works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art and engravings and photographs;
>
> (*g*) "dramatic work" includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character;
>
> (*u*) "every original literary, dramatic, musical and artistic work" shall include every original production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets, and other writings, lectures, dramatic or dramatico-musical works, musical works or compositions with or without words, illustrations, sketches, and plastic works relative to geography, topography, architecture or science.

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S. 2 also defines "cinematograph" and "photograph" as follows:

(*d*) "cinematograph" includes any work produced by any process analogous to cinematography;

(*r*) "photograph" includes photo-lithograph and any work produced by any process analogous to photography.

Then s. 3(1) defines "copyright", those parts thereof which are here relevant being as follows:

3. (1) For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; and shall include the sole right

(*e*) In the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present such work by cinematograph; provided that the author has given such work an original character; and provided also that if such original character is absent the cinematographic production shall be protected as a photograph;

(*f*) In case of any literary, dramatic, musical or artistic work, to communicate such work by radio communication,

and to authorize any such acts as aforesaid.

Then s. 45 makes it clear that no person is entitled to copyright otherwise than under and in accordance with the provisions of the Act. The right is therefore purely statutory. Then s. 3 defines "copyright" as the sole right to do or to authorize the acts there specified in relation to the "work". S. 17(1) provides that copyright in a work shall be deemed to be infringed by any person who without the consent of the owner of the copyright does anything the sole right to which is by the Act conferred on the owner of the copyright. Sub-s. (2) and (3) of s. 17 constitute certain other acts as infringements of copyright, but are not here of importance. It follows, therefore, that no matter how "piratical" the taking by one person of the work of another may appear to be, such taking cannot be an infringement of the rights of the latter unless copyright exists in that "work" under the provisions of s. 3. Copyright is, in fact, only a negative right to prevent the appropriation of the labours of an author by another. I mention these matters inasmuch as the conclusions which I may reach will of necessity depend on an interpretation of the provisions of the Act—an interpretation which will to some extent be quite technical.

From what has been stated above, it will be noted that the telecasts by or on behalf of the plaintiff of the games played at Montreal were *live* telecasts; and by that I mean that no films were taken, the image as seen by the camera being transmitted through the ether to the receiving set, where it was again made visible by the operation of that set. On the other hand, films were made of the games played out of Montreal and the telecast of the films is referred to as "film telecasts." In considering whether copyright subsists, it is necessary, therefore, to draw a distinction between the two categories. I shall first consider the question as to whether there is copyright in the "live" telecasts.

It is a principle of copyright that it must be an original production and that production may be in any mode or form of expression (s. 2(u)). It is not contended that there is copyright in any spectacle itself, such as a football match or a procession (*Sports & General Press Agency Ltd.* v. *Our Dogs Publishing Co.* (1)). The submission is that the originality is to be found in the conception, selection and arrangement of the production which in this case, goes on the air. Thus, while there is no copyright in any news event as such, it is said that there is copyright in the particular and original form in which that news event is reported in a newspaper.

The live telecasting of the games played in Montreal was planned and carried out under the supervision of the witness Renaud, who is a television producer in the employ of the Canadian Broadcasting Corporation. He was formerly a sports writer and had a somewhat limited training in television production. He was in charge of these particular productions and all those engaged in the telecast were also employed by the Broadcasting Corporation.

He described the operation as follows: Before the commencement of each game he gave instructions to the three cameramen, placing them at what he considered to be strategic spots in the field; one was to take long shots and the others "close-ups" of the players. The producer sat in a mobile unit or miniature control room situated outside the park and he was in telephone communication with the cameramen, who acted under his orders. During the game,

(1) [1916] 2 K.B. 880.

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the "pictures" taken by the cameramen are passed by wire to the mobile unit, all three appearing on separate monitors or small screens there. The producer watches the three monitors and selects the one which he desires to send over the air, instructing the technical producer (who is in the same mobile unit) to proceed accordingly. From time to time the producer instructs the cameramen to change from long shots to close-ups, and vice versa, according to what the producer desires, and they act only on his instructions. There is also a commentator whose duty it is to provide a running oral description of the game as it is shown on the actual telecast sent over the air and whose broadcast is concurrent with the telecast. The latter has a full view of the field and is provided with an "out-put monitor" in which he sees the picture that is being shown to the public on their receiving sets. He is under the control of the production manager who instructs him from time to time through the floor manager, with whom he is in direct communication. Mr. Renaud pointed out that his experience as a sports writer was of great help to him in selecting particular pictures to be telecast and in anticipating likely plays which he could instruct the cameramen to prepare for and "take".

The course taken by the live telecast picture was therefore as follows: It came first through the cameras on the field to the mobile unit, then was transmitted by microwaves (or, in some cases, partly with the use of coaxial cables) to the transmitter in Station CBFT, from where it was transmitted through the ether to the television receiving sets, by the operation of which it was then shown as a picture on the screen. As I have said, no films were taken of these games and when the telecasting was completed, there was no record of any sort remaining.

It will be seen, therefore, that the "telecast productions" of these games taken as a whole consisted of broadcasts by radio of the observations made by the commentator and the telecasting or broadcasting of pictures by electro-magnetic waves through the ether. Counsel for the plaintiff submitted that there was copyright in both the radio broadcast and the television broadcast, whether considered separately or as a combination. I am of the opinion, however, that it is not necessary to give consideration specifically to the

radio broadcast—the observations made by the commentator—although for the reasons which I shall endeavour to set out in regard to the live telecasts of the pictures, I think it would be found that there was no copyright in such oral broadcasts.

The plaintiff does claim a declaration of ownership in the live "telecast productions"—a term which may be broad enough to include the oral broadcasts as well as the telecast of pictures. There is no evidence, however, that such oral broadcasts were heard by any of the subscribers of the defendant in their homes or by any member of the public in the Berri Street showrooms, and it is now admitted, also, that the film broadcasts were without oral commentary—that they were made from silent films. Moreover, para. 15 of the agreement (Exhibit 5) provides that, " 'Telecast' and/or 'telecasting' for the purposes of this agreement mean the broadcasting of *pictures* by electro-magnetic waves through the ether." The other admissions in Exhibit 5 that the programs of the home games were *televised* and as so *televised* were picked up from the ether by the defendant and distributed by wire to its various subscribers and to the sales and showrooms of Berri Street on the dates specified, that members of the public *saw* the programs in Berri Street and that the programs were *seen* on terminal units in the homes of defendant's subscribers, clearly limit such admissions to what was *seen*—that is, the telecast of pictures.

The first submission on this point is that the live telecasts (or live radio broadcasts) of a football game, as described by the witness Renaud, is a "work", and falls within the opening words of s. 2(u)—"Every original literary, dramatic, musical and artistic work shall include every original production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression." It is not contended that it is either a literary or musical work. It is said that the total work done by Renaud and his fellow employees was to create a visual expression for the public—a dramatic or artistic work—and that the requirement of originality is satisfied by the process of conception, selection and arrangement as described by Renaud. In my view, it is not within the definition of "artistic work" (s.2(b)), except possibly to the extent that

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it may be considered as a "photograph"; and as I shall be giving consideration to that question in disposing of the next submission of the appellant, I shall for the moment confine my inquiry to ascertaining whether this "work" is a "dramatic work".

S.2(g) (*supra*) defines "dramatic work" and one of the requirements is that "the scenic arrangements or acting form of the work is fixed in writing or otherwise". In Copinger and James' work on Law of Copyright, 8th Ed., it is said at p. 24:

> The "making" of a work is *prima facie* the production of a material thing—a manuscript, a picture or negative, and, in the case of a lecture or speech, of the literary work which is the subject-matter of copyright from which the lecture or speech was delivered.

In the same work the author, in discussing the "nature of copyright", states at p. 2:

> When, however, any material has embodied those ideas, then the ideas, through that corporeity, can be recognized as a species of property by the common law. The claim is not to ideas, but to the order of words, and this order has a marked identity and a permanent endurance.

I have given careful consideration to the terms of The Copyright Act and more particularly to the provisions of s. 2 and 3, and the conclusion seems inescapable—at least to me—that for copyright to subsist in a "work" it must be expressed to some extent at least in some material form, capable of identification and having a more or less permanent endurance. All the works included in the definitions of "artistic work" and "literary work" (s. 2(b) and (n)) have a material existence; "musical works" by s. 2(p) must be printed, reduced to writing or otherwise graphically produced or reproduced. Likewise, in regard to "dramatic works" there is the requirement which I have noted, namely, that the scenic arrangements or acting form must be fixed in writing or otherwise. "Cinematographic production" which are also dramatic works are obviously "fixed otherwise", since, as will be noted later, they involve the making of films.

Now on this point it is not necessary to consider to what extent the scenic arrangement or acting form must be *fixed* in writing or otherwise. It is sufficient to say that in the present case neither Renaud nor any of his associates had fixed anything in writing or otherwise, or had anything

whatever to do with the scenic arrangements of the acting form of the players participating in the football match. By the very nature of the spectacle, nothing of that sort could have been planned in advance or fixed in writing or in any other manner whatsoever. Renaud stated that very clearly at the conclusion of his cross-examination when in referring to the live telecasts of the football matches, he said: "It is an 'ad lib' production, because you can't prepare it, you can't control your subject at all; you have no authority over a football player."

In commenting on s. 35 of the English Copyright Act, 1911, Russell-Clarke in his work on Copyright and Industrial Designs (1951), said in reference to these words, at p. 39:

> Writing is the method mentioned in the definition, and is the most obvious method, as by this means the nature of the work can be readily ascertained by a series of directions to be followed by those taking part. Another possible method of fixing would be by photographic means, or by a series of verbal directions embodied in some form of record. Mere spoken words, however, such as oral directions by a stage manager or producer, not reduced to a definite ascertainable form, which can be referred to at any time, cannot be sufficient to create a copyright. Quite apart from the above statutory requirements as to fixing created by the words of the definition, from a practical point of view, the law will not intervene to protect something which is not definite and ascertainable.

As authority for that proposition, the author relies on the case of *Tate* v. *Thomas* (1).

For these reasons, I think that the plaintiff must fail on this point.

Alternatively, counsel for the plaintiff submits that quite apart from the matters which I have just discussed, the live telecast production is a work in which copyright subsists inasmuch as it is a production by a process analogous to cinematography or photography.

The submission is that it is a "dramatic work" as being a cinematograph production (s. 2(g)) and that if it is not a cinematograph production inasmuch as no films were made, it was nevertheless a work produced by a process analogous to cinematography; and finally, that if it lacked the original character which s. 2(g) and s. 3(e) require of a cinematograph production, it is entitled to protection as a photograph or as a work produced by a process analogous

(1) [1921] 1 Ch. 503.

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to photography (s. 2(r)) and therefore qualifies as an artistic work under s. 2(b)—"photographs" being specifically mentioned in that definition. It is said that by the television process a picture is created which may be observed visually and the scene is translated into a picture; that similarly in photography or cinematography the scene is translated into a picture and from a practical point of view the results are the same to a viewer.

In my opinion, however, the process which produces a photograph or cinematograph film by photography is in no way analogous to the process by which telecasting produces pictures or images on the screen where it is projected. In an ordinary camera, light from the scene to be photographed is focused by means of a lens on a sensitive emulsified surface of a film or plate. A change is produced in the emulsion by the impact of the light, a latent image is created in the emulsion which can be developed by the proper chemicals into a reproduction of the scene in negative form; and by reprinting from the negative a positive picture is produced. Cinematograph films are produced in much the same way. The result in each case is a negative and photograph, or a series of negatives and photographs, in material form having a more or less permanent endurance.

The function of a television camera is quite different, namely, to convert a picture—which is light—into an electrical signal which can be transmitted or radiated as electromagnetic waves (Herzian waves) through the ether. The process of television, including the action of the television camera and the television receiving set, was described by the witness Douglas as follows:

> The scene to be televised, which consists of light and dark areas . . . is focused by means of a lens on a sensitive surface in the television camera, the pick-up tube. This sensitive surface emits electrons; it has the effect of an emissive surface in that light and dark causes the electrons to be emitted therefrom. These electrons emitted correspond to the picture information and are electrically focussed by a target in the tube. This target is scanned, which means that we look at a small portion of it at a time and the information, the electrical signal, produced there is transmitted by means of wires and cables in much the same way as the sound or the electrical signal from the microphone in sound broadcasting, which is applied to a transmitter and broadcast, in the case of the North American standards, by amplitude modulation . . .

Then, referring to the reception by the receiving set, he said:

> Briefly again the antenna intercepts a small portion of the broadcast signal, the voltage there is amplified in the television receiver, is passed to a detector, the electrical signal corresponding to the camera pick-up tube output is recovered and this electrical signal is applied to control the beam intensity of the cathode ray tube or television picture tube. This electron beam is made to scan the picture tube screen in step with the camera scanning of the picture and the picture is reproduced on the television screen because the electrons in this beam excite the fluorescent material in the screen.
>
> The picture tube is a means of converting this electrical energy back into a pictorial form which the eye can see. The electrons in the scanning beam excite the phosphor, permitting the light in proportion to the amount of the signal striking it.

Then he described the manner in which the image on the screen was created, as follows:

> It is a change in the state of the atoms of this fluorescent material. I suppose the electrons in the orbit of the atom move from one level to another, and in the process of moving back to where they were in the first place, emit energy in the form of light. By the way, these phosphors have different decaying times so that you could have a picture which is persistent for several minutes, if necessary, by the choice of materials in the phosphor on this picture tube.

The televised image or picture as seen by the viewer lasts for but a small fraction of a second. It may be, as stated by Douglas, that it is possible to prolong the time by a change in the materials, but that, of course, is not normally done in television. The original image vanishes without trace when succeeded by the following picture or when the receiving set is turned off and nothing whatever remains.

These facts alone are sufficient to warrant the conclusion which I have reached, namely, that neither the process nor result of telecasting is analogous in any way to that of photography or cinematography.

Even if I am wrong in that conclusion and the "work" was found to be a cinematograph production, it would not be a dramatic work within the meaning of s. 2(g) inasmuch as the arrangement or acting form, or the combination of incidents represented, do not give the work an original character.

Before considering the question as to what is meant by "original" in the law of copyright, I think I should state my conclusion as to whether the image produced on the receiving set in the case of the live telecasts was a photograph and

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therefore an artistic work under s. 2(b), particularly as special considerations may be applicable to the word "original" as applied to films. In my opinion, it is not a photograph as that word is ordinarily understood. It is defined in the Act as including "photo-lithograph and any work produced by any process analogous to photography". In the Shorter Oxford English Dictionary, "photograph" is defined as "a picture, likeness, or facsimile obtained by photography", and that, I think, is the generally accepted meaning of the word. Then "photography" is defined in the same dictionary as "the process or art of producing pictures by means of the chemical action of light on a sensitive film on a basis of paper, glass, metal, etc." In my view, a photograph is something concrete, something in a material form that cannot only be seen but handled, and involves the creation of a negative. That view of the matter is strengthened by a consideration of the provisions of s. 9 of the Act which provides for the terms of copyright in "photographs" in these words:

> The term for which copyright shall subsist in photographs shall be fifty years from the making of the original *negative* from which the photograph was directly or indirectly derived, and the person who was owner of such *negative* at the time when such *negative* was made shall be deemed to be the author of the photograph so derived . . .

The question of what is meant by "original" in the law of copyright is one which has frequently given rise to considerable difficulty. The meaning of the word was discussed in a judgment of Petersen, J. in the case of *University of London Press Ltd.* v. *University Tutorial Press Ltd.* (1), and has been frequently cited with approval in many cases. At p. 608 he said.

> The word "original" does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and in the case of "literary work" with the expression of thought in print or writing. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author.

For a work to be "original" it must originate from the author; it must be the product of his labour and skill and it must be the expression of his thoughts. Thus, if an artist

(1) [1916] 2 Ch. 601.

were to sketch a particular view, the painting is the result of his labours and skill and is an expression of his thoughts. On the other hand, a mere amanuensis who does no more than take down what is dictated to him does not exercise labour or skill of the required character—that is no expression of his thoughts therein and he is not entitled to copyright. See *Donaghue* v. *Allied Newspapers Ltd.* (1).

In the present case, how has Renaud—whom I shall consider as the author—expressed his thoughts? If he has expressed them at all it could only be in the quickly fading image seen on the television receiving set. It could not be in the equipment he used or in the planning or placing of the photographers or anything of that sort.

Counsel for the plaintiff says that the originality is to be found in the conception, arrangement and selection of the pictures to be shown. There is no copyright in mere conception or ideas and Renaud had nothing to do with the arrangements of the pictures shown. All that he did in my opinion was to choose the particular play in the game—a play in which he took no part whatsoever—and by means of the equipment provided communicate that play so that it could be seen by any one within the range of the telecast who desired to see it and had the necessary equipment for its reception. In the picture so seen there was no expression of his thoughts, but merely a view of what was seen by thousands of others at the playing field.

In *Frank Smythson* v. *Cramp & Sons Ltd.* (2), it was held that a selection of a number of well-known tables including a calendar, a list of postal rates and lighting-up times, etc., and their arrangement at the beginning of a diary, was not an "original" compilation in which copyright could exist. Lord Macmillan, after pointing out that the ground was cleared by the admission that no claim was made to copyright in any one of the seven tables, or to their order, but only to the selection of the tables, continued:

> Now I do not doubt that, as the annals of literature show, a high degree of skill and knowledge may be displayed, and much labour and judgment expended in gathering from the wide fields of non-copyright material at the disposal of the public specialized collections of extracts designed to meet particular needs or particular tastes, but it must always be a question of degree. Not every compilation can claim to be original literary work, even in the pedestrian sense attributed to these words by

(1) [1938] Ch. 106. (2) [1944] A. C. 329.

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the law . . . In my opinion the respondents in selecting the seven tables in question for inclusion in their diary, did not bring into existence a copyright work.

Mere selection is not enough to create copyright. Supposing, for example, that A says to a friend B who is ill, "I have access to a book which cannot be brought to you. I will, however, cut out pages or copy pages therein which I think might be of special interest to you and bring them to you so that you can see them." That would perhaps be a selection but it could not be imagined that A, who had done nothing except to make the selection, should be thought to have copyright in that selection. It would not be an expression of his thoughts. That, in my opinion, is quite similar to what happened in the instant case.

In Copinger & James, 8th Ed., the authors comment as follows on p. 159:

> It is understood that methods of television at present in use do not necessarily involve any record on film or otherwise of the work performed, so that there is not necessarily any exercise of the right to make mechanical contrivances, though, if any record is preserved, an exercise of the right will be involved.
>
> Television cannot be an infringement of copyright unless there is a copyright work involved. Consequently television of sporting events cannot, it is thought, involve any infringement; television, in these circumstances, amounts to no more than providing the public with an electrical telescope and would appear neither to create nor to infringe any right in which copyright can subsist.

No authority is stated for the propositions so advanced, but for the reasons which I have stated I am in agreement with the author that the live telecasting of sporting events such as those now under consideration, cannot create a work in which copyright can subsist.

I must find, therefore, that the plaintiff had no copyright in any of the live telecasts here in question.

I turn now to the film telecasts and must first consider whether and to what extent copyright subsists therein. They were made, as I have stated, from cinematograph films and were therefore cinematograph productions. By s. 2(g), such a production is a "dramatic work" only if the arrangement or acting form or the combination of incidents represented has given the work an original character. Now there is no evidence before me as to how these films were prepared or even that there was any degree of selection. Assuming, however, that they were prepared

in the same manner as Renaud prepared and presented the live telecasts—and I cannot assume anything more than that—I would have to find that they had not been given "an original character" and for the same reasons as I have stated in regard to the live telecasts. The concluding part of s. 3(e), however, provides that if the author has not given the cinematographic production an original character, it shall be protected as a photograph; and photographs, as I have said, are within the definition of "artistic work" (s. 2(b)).

The matter is discussed in Copinger and James at p. 221 where the authors state:

> Turning now to the protection which is accorded to the film itself, we do not find the Act to be very clear upon the point. The difficulty arises from the fact that the film may be regarded from two points of view: it consists of a series of photographs, and from this point of view it is an "artistic work" (*Pathé Freres* v. *Bancroft* (1933)); but where scenes are arranged for the purpose of being filmed there may be copyright in these arrangements as a dramatic work, for dramatic work is defined (s. 35(1)) as including "any cinematograph production where the arrangement or acting form, or the combination of incidents represented give the work an original character". It seems fairly clear that the cinematographing of a series of events in real life is not a "production" within the meaning of the definition since there is no acting form or arrangement. Even where the work is a "production" it must have an original character; this would seem to be so apart from the definition since copyright only subsists in original dramatic works, but the effect of the definition is no doubt to point out where the originality in a cinematograph production must subsist.

I must reach the conclusion, therefore, that the plaintiff is not entitled to the protection afforded to a cinematograph production but only to the same protection as a series of photographs—an artistic work. I turn now to the question as to whether the defendant has infringed the plaintiff's right therein.

As I have said, the plaintiff alleges that the defendant took its telecasts off the ether and "rediffused" the same to its subscribers and to its showrooms and sales office. It becomes necessary to describe in some detail just what the defendant does in this regard in order to understand what is meant by the process referred to as "rediffusion". I should note here that in addition to picking up the telecasts from Station CBFT, the defendant also initiates certain television programs of its own, all of which are also transmitted through co-axial cables to the "terminal units"

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(that is the name given by the defendant to the receiving sets which are leased to its subscribers) in the homes of its subscribers.

Exhibit 8 is a diagram of the defendant's studio setup. By means of an antenna which it provides and maintains, the defendant picks up from the ether the telecasts from Station CBFT which are then passed to a group of television receivers. These receivers are said to be a modification of the ordinary R.C.A. receivers, the modification enabling the video signal—which is the television picture information—to be transmitted through wires to the rest of the equipment. It then passes to a line clamp amplifier, the purpose of which is to clean up the signal within certain limits. The composite video signal is then passed to a selector switch bank and there it is possible to bring in other picture sources if desired. The output is then fed to a wired wireless transmitter which imposes the rediffusion signal on the outgoing coaxial cable, together with such other programs as may have been added. The rediffusion signals are transmitted on a number of different frequencies (lower than those of the Station CBFT) so that they can be separated out again at the terminal unit. By means of the cable, the signals are conveyed to the subscribers' terminal units. These units include the same type of picture tube as is used in ordinary standard television receivers. There the process of amplification and detection, and the production of the image or picture, are much the same as in the ordinary television receiver. The defendant supplies radio and television programs to its subscribers by means of the equipment which I have described and leases to the subscribers a loudspeaker and a complete terminal unit "to give full Rediffusion service". Exhibit 10 is a sample of the contract entered into with its subscribers.

The defendant says that in so rediffusing the telecasts of the plaintiff, there was no performance by them and that the only performance which took place was the one by Station CBFT at the football stadium. They say that all that happened afterwards was merely an extension of the audience for that performance and a continuation of that performance. It follows, the defendants say, that the listeners saw the original performance put out by or on

behalf of the plaintiff and that therefore nothing they did could constitute an infringement of the plaintiffs copyright.

Much the same submission were advanced and rejected in the case of *Performing Right Society, Ltd.* v. *Hammond's Bradford Brewery Co.* (1). That was a case under The Copyright Act, 1911 (England), involving a consideration of the terms of s. 35(1) defining "performance", which is identical to the definition of that word found in s. 2(q) of our Act, which is as follows:

2. In this Act, unless the context otherwise requires

(*q*) "performance" means any acoustic representation of a work or any visual representation of any dramatic action in a work, including a representation made by means of any mechanical instrument or by radio communication;

The headnote in that case is as follows:

On October 1, 1932, three songs of which the copyright was vested in the plaintiffs were performed with their consent at a cinema and the performance was broadcast by the British Broadcasting Corporation. By an agreement dated February 8, 1932, the plaintiffs had licensed the Corporation to broadcast songs from time to time in their repertoire, but the licence authorized and covered "the audition or reception of copyright musical works by means of broadcasting for domestic and private use only". By means of a receiving set and loud-speaker at a hotel belonging to the defendants the songs were made audible to visitors to the hotel. It was admitted that if what the defendants had done amounted to a performance, it was a performance to the public.

Held, by the Court of Appeal (affirming the decision of Maugham J.), that by rendering the songs audible through their receiving set, the defendants had given or authorized a "performance" within s. 35, sub-s. 1, of the Copyright Act, 1911; that, as the licence to the Corporation did not authorize the reception of the songs by means of broadcasting otherwise than for domestic and private use, the performance, being admittedly a performance to the public, was given without the plaintiffs' consent; and therefore that the performance constituted an infringement of the plaintiffs' copyright.

Lord Hanworth, M. R., after referring to the applicable sections of the Act, said at p. 133:

Bearing those sections in mind, what did the defendants do? By the use of what I have called an installation, they made this performance at Hammersmith audible to a larger number of persons than would otherwise have heard it and to persons outside the domestic circle of the George Hotel. It was at the instance of the management that steps were taken to provide this entertainment. It appears to me that that act on the part of the management constituted on their part either a performance or the authorization of a performance.

Maugham J. said in his judgment that the process employed was "a reproduction and is not similar to the mere step of making distant sounds audible by some magnifying device. The sounds are produced

(1) [1934] 1 Ch. 121.

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by an instrument under the direct control of the hotel proprietor", and it seems to me, as it did to Maugham J., that the act done at the volition of the hotel proprietor constituted an invasion of the rights of performance, or authorization of performance, which are granted to the owner of a copyright by s. 1, and is by virtue of s. 2 to be deemed to be an infringement unless consent can be proved. That it was a performance seems clear, because it was an acoustic representation of a work.

In the same case, Lawrence L. J. said at p. 137:

> I find it impossible to escape from the conclusion that the owner of a receiving set who puts it into operation causes an acoustic representation of a musical work which is being broadcast to be given at the place where the receiving set is installed and is therefore himself performing or authorizing the performance of the musical work within the meaning of the Copyright Act, 1911.

On the same page Romer L. J., as he then was, said:

> In my opinion a man performs a musical composition when he causes it to be heard.

That decision was referred to and followed in *Performing Right Society* v. *Gillett Industries, Ltd.* (1); and in Canada in the case of *Canadian Performing Right Society* v. *Ford Hotel* (2).

The cases cited had to do with acoustic representations, but the principles there laid down on this point are in my opinion of equal application to a visual representation which is also included in the definition of "performance". I have no hesitation, therefore, in reaching the conclusion that the rediffusion of the film telecasts in question by the defendant in the manner which I have described constituted a "performance" of the plaintiff's work.

That, however, does not conclude the matter; mere performance is not enough; in order to find that the defendant infringed the plaintiff's right, I must find that the performance was "in public". The Act does not define "in public" and it would be undesirable for me to attempt to do so except to state that I regard it as the antithesis of "in private". Each case must depend on its own particular facts.

I have read the cases referred to by counsel and it seems to me that the test to be applied is, "What is the character of the audience?"

(1) [1943] 1 A.E.R. 228 and 413. (2) [1935] 2 D.L.R. 391.

In *Duck* v. *Bates* (1), a dramatic representation was given to the nurses and attendants of Guy's Hospital, together with the medical men and students and some of their families. Brett, M.R. and Bowen, L. J. held that the performance was a domestic or quasi-domestic and not a public performance, possibly because the audience was composed in the main of nurses who lived together at the hospital. Bowen, L. J. said in the course of his judgment:

> Some domestic or quasi-domestic entertainments may not come within the Act. Suppose a club of persons united for the purposes of good fellowship gave a dramatic entertainment to its members; I do not say that the entertainment will necessarily fall within the prohibition of the statute.

In *Harms Inc. and Chappell & Co.* v. *Martan's Club* (2), there was a performance at the Embassy Club at which club members and some guests were present. It was held that the plaintiff's copyright was infringed. In that case Sargant L. J. said at p. 537:

> There has been an invitation to the members of the public capable of becoming members of the Club upon the terms of getting in return for their subscription the performance of music, so that you do really get an invitation to the public, and an invitation to the public to listen at a price or at a payment, though the payment is an annual one. Beyond that, there is, of course this, that the members of the public who have become members of the Club by passing through the not very severe test which is imposed, have also the privilege of bringing in other members of the public upon whom no test is imposed, who happen to be their friends and are invited on any particular evening.

In *Performing Right Society Ltd.* v. *Hawthorn's Hotel (Bournemouth) Ltd.* (3), an orchestral trio played in the lounge of the defendant's hotel, there being present several guests of the hotel, among others. Bennett, J. held that the performance by the hotel orchestra was a performance "in public" because it was open to any members of the public who cared to be guests of the hotel either by sleeping or dining there.

Again, the question was fully considered by the Court of Appeal in *Jennings* v. *Stephens* (4), which reversed Crossman, J. (5). Romer, L. J. in discussing the general question as to whether a performance was "in public", said at p. 416 ff.:

> No one, for instance, can doubt that the concerts given at the Albert Hall are, in general, performances "in public", or that music provided by

(1) (1884) 13 Q.B.D. 843.
(2) [1927] 1 Ch. 526.
(3) [1933] 1 Ch. 856.
(4) [1936] 1 All E. R. 409.
(5) [1935] 1 Ch. 703.

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a man for the entertainment of his guests after dinner or at a reception is performed "in private"; and I think that the meaning of the two phrases can best be ascertained by considering what is the essential difference between the two performances. The difference material for the present purpose lies, it seems to me, in this. In the latter case the entertainment forms part of the domestic or home life of the person who provides it, and none the less because of the presence of his guests. They are for the time being members of his home circle. In the former case, however, the entertainment is in no sense part of the domestic or home life of the members of the audience. It forms part of what may be called in contradistinction their non-domestic or outside life. In the one case the audience are present in their capacity as members of the particular home circle. In the other they are present in their capacity as members of the music-loving section of the public. The home circle may, of course, in some cases be a large one. The section of the public forming the audience may in some cases be a small one. But this can make no difference, though it may sometimes be difficult to decide whether a particular collection of persons can properly be regarded as constituting a domestic circle. In *Duck* v. *Bates*, (1884) 13 Q. B. D. 843, the Court of Appeal seem to have regarded the nurses and medical staff of Guy's Hospital as forming a domestic circle, and a dramatic entertainment given before them and their guests as a private performance. Bennett, J., on the other hand, in *Performing Right Society* v. *Hawthorn's Hotel*, (1933) 1 Ch. 855, treated, and in my opinion rightly treated, a musical entertainment given to the residents in an hotel, to which any respectable member of the public could obtain admission merely by payment, as a performance in public. Nor, with all deference to those who think otherwise, can I agree that it makes any difference whether the actual performers are paid for their services or give them gratuitously, or whether the performers are stangers or members of the domestic circle. The performers at what is unquestionably a private performance are frequently paid. The performers at what is unquestionably a public performance frequently give their services for nothing. Nor can an entertainment that is private when given by the members of the home circle cease to be private when given by strangers.

I also find some difficulty in seeing why it is material to consider the nature of and the place where the entertainment is given. A private entertainment may be given in a public room. A public entertainment may be given in a private house. The question whether an entertainment is given in public or in private depends, in my opinion, solely upon the character of the audience. Suppose, for instance, that a number of people who are interested in the drama, band themselves together in a society or club for the purpose of providing by means of their subscription the performance before themselves from time to time of dramatic works. This would be something entirely outside their domestic lives, and they would, in my opinion, attend the performances merely as members of the public, and none the less because the section of the public which they represent may be limited by election, the social status of the members, or their capacity to pay a large subscription. I should regard any dramatic performance given before that society as a performance in public . . .

The teaching staff and pupils of a boarding school might, on the other hand, properly be regarded during the school term as forming a domestic circle, and a dramatic performance given before them might well be held to be a private performance, even though the parents or other

relations of the pupils were present as guests. I cannot, indeed, think that a performance which would otherwise have been a performance in private could be turned into a performance in public by the mere presence of some guests. Guests were present at the entertainment that was the subject matter of the inquiry in *Duck* v. *Bates* (supra), to which I have already referred—a case which it must be confessed was somewhat near the line. It is easy to imagine other cases in which it is difficult to say whether they fall on the private or public side of the line. But the present case seems to me quite plainly to fall upon the public side.

The matter was again considered in *Performing Right Society, Ltd.* v. *Gillett Industries, Ltd.* (1). There the defendants installed in their factory a number of loud-speakers from which broadcast music was heard in various departments of the factory and about six hundred workers heard the broadcast, but all strangers were excluded from the factory. At the trial, Bennett, J. pointed out the difficulty of obtaining from the authorities any real principle which could be said to govern every case and to lay down any general rule for defining what is meant by performance in public. He distinguished the case from *Duck* v. *Bates (supra),* holding that the performance of the music by the defendant could not be said to be for domestic purposes, and followed *Jennings* v. *Stephens (supra).* On appeal, Lord Greene, M. R. affirmed the judgment of Bennett, J., basing his judgment on the authority of the Court of Appeal in *Jennings* v. *Stephens,* citing with approval the words of Lord Wright, M. R. that, "The true criterion seems to be the character of the audience". In that case, the Master of the Rolls stated:

> The owner of the copyright is entitled to be paid for the use of his property unless and until the Legislature otherwise determines, and he is entitled to be paid for it even if the use that is made of it is a use which concerns the public welfare to a very considerable extent . . . When the Legislature under The Copyright Act conferred upon the owner of copyright a monopoly, it no doubt intended that the monopoly should be a real and not an illusory right of property, and it is, therefore, in my opinion, important to consider whether a particular performance, the character of which is in question, is of a kind calculated to whittle down that monopoly to any substantial extent.

I think it may be said with some truth that the more recent cases have indicated a tendency to extend somewhat the protection afforded to the owners of copyright, since the case of *Duck* v. *Bates.* In none of these cases, however, can I find a suggestion that a performance in a private home

(1) [1943] 1 All E. R. 228 and 413.

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where the performance is given, heard or seen by only members of the immediate household, could be considered as a performance in public.

As to the character of the audience in homes and apartments to which the telecasts of the live films were "rediffused" by the defendant, there is no evidence whatever except that they were seen by the defendant's subscribers, presumably only the householders. The character of the audience was therefore a purely domestic one and the performance in each case was not a performance in public. Counsel for the plaintiff, however, submits that even if one such "view" in the privacy of the owner's home does not constitute a performance in public, that in cases where a large number of people, each having a terminal unit in his home, performs the work by operating the terminal units, that such would constitute a performance in public. He says that from the point of view of the owner, a large number of such performances would constitute an interference with the owner's right of making copies of his work and might cause him to lose part of his potential market. I am unable to agree with that submission. I cannot see that even a large number of private performances, solely because of their numbers, can become public performances. The character of the individual audiences remains exactly the same; each is private and domestic, and therefore not "in public". Moreover, in telecasting the films, I think the plaintiff desired to have the telecasts seen by as many people as were within range and possessed the necessary receiving equipment in order that they might be informed of its product; so that I do not think that what was done by the defendant in so far as the private homes and apartments are concerned, interfered with his potential market in any way. It was stated and not denied that the films, including the commercial announcements of the plaintiff, were rediffused as a whole.

I find, therefore, that the performances in the homes and apartments of the subscribers of the defendant company were not performances "in public".

The situation, however, is quite different in regard to the defendant's Berri Street showroom. The evidence is that the showroom was operated by the defendant for the purpose of demonstrating and selling its services which

included the leasing of its terminal units. The showroom was open to the public, and members of the public there on various occasions saw the film telecasts of the plaintiff broadcast on Station CBFT. There was nothing there of a domestic or quasi-domestic nature and in my opinion it was a performance in public and an infringement of the copyright of the plaintiff in the cinematograph films. It was suggested by counsel for the defendant that a finding to that effect might seriously interfere with the operations of store salesmen of any type of television receiving sets, and that may be so. If, however, the plaintiff has established its right to copyright, it is entitled to the protection afforded by the Act for such right and to restrain the defendant from infringing that right no matter what the consequences to others might be.

My conclusion on this point, therefore, as regards the showing of the film telecasts by the defendant in its Berri Street showroom, is that there was an infringement by the defendant of the plaintiff's copyright in such cinematograph films.

One more matter, however, remains for consideration. The plaintiff submits that the defendant has also infringed its copyright by communicating the work by radio communication (s. 3(f)). Essentially, the right of copyright is an exclusive right to make copies of the work and that may be done not only by production or reproduction, but also by presentation in various ways, including presentation by cinematography (s. 3 (e)). A further right is given by s. 3(f), namely, to communicate the work by *radio* communication, and here it is alleged that by rediffusing the telecasts the defendant communicated the work by radio. Under the subsection, of course, it makes no difference whether the performance be in public or in private. It is the sole right to communicate *by radio* which is given to the owner of copyright.

I am unable to agree that the defendant did anything of the sort. Earlier herein I stated that the monopoly conferred on the owner of copyright is purely a statutory one and the right is as defined therein and not otherwise. Here the right is to communicate a work *by radio communication.*

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Now radio is a communication of messages by means of electro-magnetic or Herzian waves through the ether. It is perhaps not necessary to decide whether the term "radio" is broad enough to include "telecasts", although the latter does transmit pictures through the ether by use of electro-magnetic waves also. But in this case the defendant communicated the work not by the use of electro-magnetic waves, but by the use of co-axial cables to its subscribers and to its Berri Street showroom. It is true that it picked up the telecasts of the plaintiff from the ether and that the pictures were seen on the terminal units. But the communication by the defendant was not, in my opinion, *by radio.*

I think that there is no question that the title to the copyright in the cinematograph films was in the plaintiff. The films were made by Briston on the order of Dow for valuable consideration, and there being no agreement between Briston and Dow to the contrary, Dow was the first owner. As I have stated above, the parties have agreed that such copyright as Dow had therein became vested in the plaintiff.

In the Statement of Defence, the defendant alleged that the registrations made by the plaintiff in the copyright office on October 18, 1952, both of the telecast productions of the games played at Montreal (i.e. the live telecasts) and of the cinematograph films, reproducing the games played away from Montreal, were improperly registered, lacking subject-matter of copyright and were invalid; they asked that the registrations be expunged from the Register of Copyright.

By s. 40(4) power is given to this Court to order the rectification of the Register by the expunging of any entry wrongly made in or remaining on the Register. Inasmuch as I have found that the live telecast productions of the football games lacked subject-matter of copyright, the defendant is entitled to an order that the registrations in regard thereto be expunged from the Register. In view of my finding that copyright subsisted in the cinematograph films, the registrations in regard thereto will remain.

The plaintiff claimed damages in the sum of $600.00 for infringement of its copyright, both in the live and film telecasts. Damages have not been proven and would be difficult of ascertainment with any degree of certainty. The parties are desirous of having the damages fixed rather than to have the question referred to the Registrar. Taking all relevant matters into consideration, I fix the damages for infringement at $300.00. The plaintiff is also entitled to an injunction in respect of the infringed matter.

There will therefore be judgment as follows:

(*a*) A declaration that the plaintiff is the owner with respect to the televising over Station CBFT, Montreal, or the distribution by wire service within the territorial limits of the Province of Quebec (including the distribution and performance after receiving the same through the ether by wire service and rediffusion), of the copyright in the films referred to in the Statement of Claim, and that the defendant has infringed such copyright by reproducing the said films and/or television pictures by performing and/or presenting the said works in public in its Berri Street showroom and sales office, without the consent of the plaintiff;

(*b*) That the plaintiff is entitled to damages from the defendant for infringement of the plaintiff's copyright therein in the sum of $300.00;

(*c*) An injunction restraining the reproduction, presentation or performance by the defendant, its officers, servants and agents, in public by rediffusion of the telecast programs by means of films of the football games played during the regular 1952 Big Four season by the Alouettes away from Montreal;

(*d*) That the registrations made by the plaintiff in the copyright office on October 18, 1952, of the telecast productions of football games played by the Montreal Alouettes at Delorimier Stadium on August 27, September 28, October 5 and October 12, 1952, and registered as Serial Nos. 99150-1-2-3 in Register of Copyright No. 27, be expunged from the Register, such rectification of the Register to be as and from October 18, 1952.

The plaintiff is also entitled to its costs after taxation.

Judgment accordingly.

1954
May 17
May 25

BETWEEN:

PAUL-EMILE DORE .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Collision between motor vehicles—Negligence —The Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(c)—Servant of the Crown using motor vehicle for his own purposes—Act of negligence done "à l'occasion" of his employment but not in the performance of his duties—Action dismissed.

One L., a civilian employee of the Department of National Defence, had received written instructions from his superior officer to take an army chaplain in one of respondent's motor vehicles from Montreal to the "Bouchard plant", north of Ste. Therese, P.Q., and to bring him back to Montreal after a religious ceremony that the padre was to attend on that morning. Once arrived at the plant L. asked the padre if he could drive to Ste. Therese and have his breakfast. He was permitted to do so on the condition that he would return by noon. It was on the way from the plant to Ste. Therese that a collision happened between suppliant's motor vehicle and the car driven by L. One of respondent's defences was that at the time of the collision L. was not acting within the scope of his duties. On the evidence the Court found that L's negligence was the sole cause of the collision and dismissed respondent's counterclaim for damages to its own vehicle.

Held: That the military chaplain had no authority for allowing L. to make use of the Crown's motor vehicle; his duties and prerogatives then and there were of a totally different nature.

2. That when L. left the padre to proceed to Ste. Therese he was using the vehicle for his own purposes and not in the performance of his duties. The possession of the vehicle that was given to him by respondent to perform a specific and definite duty was then interrupted and discontinued. From that moment L's action could not bind the Crown, that is to say until the time of his return to the plant to take the padre back to Montreal.

3. That it was not essential or even necessary for the performance of his duties that on that morning L. went to Ste. Therese to have breakfast there.

4. That the act of negligence of respondent's servant may have been done *à l'occasion* of his employment but not *dans l'exercice des fonctions* or in the performance of the work for which he was employed. *Curley* v. *Latreille* (1919) 60 S.C.R. 131; *The Governor and Company of Gentlemen Adventurers of England* v. *Vaillancourt* [1923] S.C.R. 414; *Moreau* v. *Labelle* [1933] S.C.R. 201 referred to.

PETITION OF RIGHT to recover damages from the Crown allegedly caused by the negligence of its servant.

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

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Rodolphe Paré and *Marcel Pigeon* for suppliant.

François Auclair for respondent.

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

FOURNIER J. now (May 25, 1954) delivered the following judgment:

Par sa pétition de droit le requérant cherche à recouvrer de la Couronne des dommages pour pertes subies à la suite d'une collision entre son véhicule moteur (automobile) conduit par lui-même et un véhicule moteur appartenant au ministère de la Défense nationale conduit par Roger Leboeuf, un serviteur de l'intimée là et alors agissant dans l'exercice de ses fonctions. D'autre part, l'intimée réclame du requérant par demande reconventionnelle les dommages causés à son propre véhicule moteur lors de ladite collision par la faute, négligence et imprudence du requérant.

A l'enquête les parties ont admis que les dommages au véhicule moteur du requérant s'élevaient à la somme de $735 et que les dommages causés au véhicule moteur de l'intimée s'élevaient à la somme de $776.67. De plus le requérant a établi que son habit et son chapeau avaient été endommagés et il évalue ces dommages à la somme de $30. Le total de ses pertes s'établit donc à la somme de $765.

Examinons d'abord les faits relatifs à la collision. Comme dans la plupart des causes où il s'agit d'une collision entre véhicules moteurs, la preuve offre certaines contradictions; la présente instance ne fait pas exception.

Le 11 novembre 1951 le requérant conduisait son automobile Mercury Coach modèle 1948 dans une direction sud-nord sur le boulevard Curé Labelle. Ce boulevard comprend trois voies, une pour les automobilistes se dirigeant vers le nord, une allée centrale et une pour les automobilistes se dirigeant vers le sud. La vitesse du requérant a été établie par lui-même et un témoin à environ 30 milles à l'heure. A quelque distance au nord de Ste-Thérèse, il vit sortir une automobile d'une entrée privée et se diriger vers le nord. Cette automobile procédait à une vitesse de 18 à 20 milles à l'heure. Après avoir vérifié s'il y avait des automobiles circulant en sens contraire et

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avoir vu un véhicule à une distance de près d'un demi-mille, il décida d'augmenter sa vitesse et de dépasser le véhicule qu'il suivait. Il se rangea à gauche sur l'allée centrale de la route et effectua son dépassement sans encombre. Alors qu'il était à environ 100 pieds en avant du véhicule qu'il venait de dépasser et qu'il obliquait à sa droite, le devant de son automobile étant sur l'allée droite et l'arrière sur l'allée centrale, le véhicule de l'intimée frappa son automobile à la partie gauche arrière et lui fit faire un demi-tour, de sorte qu'après la collision le devant de son vehicule était dans la direction sud. Ces faits ont été relatés par le témoin Charron et le requérant.

Les autres témoins établissent que le véhicule de l'intimée était conduit à une vitesse vertigineuse, à savoir de 70 à 80 milles à l'heure. Le conducteur lui-même dit qu'il allait à une vitesse de 50 à 55 milles à l'heure.

Quant à l'endroit de la collision, le conducteur du véhicule de l'intimée est le seul à dire que l'accident a eu lieu sur l'allée centrale et l'allée gauche par rapport à la direction suivie par le requérant.

Après la collision, le véhicule de l'intimée continua sur une distance de 400 à 500 pieds, pris le fossé à sa droite et laissa, suivant l'expression des témoins, des traces de "labourage" dans le fossé sur une distance de quelque vingt pieds. Le tout après avoir démoli sur son parcours deux porteaux supportant des boîtes à lettres.

L'un des témoins rapporte, et il n'est pas contredit, que, marchant avec un compagnon sur le côté gauche du chemin (partie non pavée) en direction nord, il vit venir l'automobile de l'intimée à grande vitesse et le conducteur donna un coup de roue qui fit dévier son véhicule dans leur direction, comme s'il voulait les effrayer ou qu'il avait perdu le contrôle de l'automobile. Il est inutile de répéter les remarques qu'ils firent à cette occasion.

Pour défense l'intimée fit entendre le conducteur de son automobile. Il allait à une vitesse de 50 à 55 milles à l'heure sur le boulevard Labelle, se dirigeant vers le sud à quelque distance au nord de Ste-Thérèse. Il conduisait à sa droite de la route lorsqu'il vit le requérant tenter de dépasser une automobile qui le précédait. En voulant effectuer le dépassement, il obliqua à son extrême gauche

mais n'eut pas le temps nécessaire pour reprendre sa droite et fut frappé par le véhicule de l'intimée alors que son automobile était partie sur l'allée de gauche et partie sur l'allée centrale. Cette version de l'accident n'est supportée par aucun des autres témoins.

En analysant la preuve, j'en suis venu à la conclusion que la version du requérant et de ses témoins est la plus plausible, voire même la seule qui semble être justifiée par la vitesse du véhicule de l'intimée, la conduite négligente du conducteur, qui dévia la course de l'automobile vers le bord du chemin quelques instants avant la collision, soit dans le but d'effrayer les piétons ou parce qu'il avait perdu le contrôle du véhicule. Il me semble bien que ces faits sont les causes déterminantes de la collision. Par contre, je n'ai pu trouver quoi que ce soit de fautif, négligent ou imprudent dans la conduite du requérant lorsqu'il fit le dépassement de l'automobile qu'il suivait.

En vertu de l'article 41, paragraphe 1, de la Loi des véhicules automobiles de la province de Québec (S.R.Q. 1941, chap. 142, et ses amendements) il est dit que toute vitesse et toute action imprudente susceptibles de mettre en péril la vie ou la propriété sont prohibées sur tous les chemins de la province.

Je suis convaincu que la collision est due à la négligence du conducteur de l'automobile de l'intimée. L'intimée n'a pas établi que les dommages et pertes subies à la suite de la collision sont attribuables à la faute et négligence du requérant; par conséquent, sa réclamation par demande reconventionnelle ne peut être maintenue.

Le poids de la preuve établit clairement que la négligence du conducteur de l'automobile de l'intimée est la seule cause de la collision.

Nous devons maintenant considérer, quant au requérant, l'aspect légal du litige.

Le requérant base sa pétition de droit sur l'article 19 (c) de la Loi de la Cour de l'Echiquier du Canada, S.R.C. 1927, chap. 34, qui se lit comme suit:

19. La cour de l'Echiquier a aussi juridiction exclusive en première instance pour entendre et juger les matières suivantes:

c) Toute réclamation contre la Couronne provenant de la mort de quelqu'un ou de blessures à la personne ou de dommages à la

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propriété, résultant de la négligence de tout employé ou serviteur de la Couronne pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi.

Au paragraphe 3 de sa pétition de droit il allègue qu'au moment du dit accident le véhicule moteur du ministère de la Défense nationale était conduit par Roger Leboeuf, préposé et employé du ministère de la Défense nationale, lequel là et alors agissait dans l'exécution et l'exercice de ses fonctions.

Dans sa défense, l'intimée admet que c'est bien son véhicule qui a été mêlé à la collision mentionnée dans la pétition du requérant. Nulle contestation à ce sujet.

Le requérant a établi par le témoin Roger Leboeuf qu'il était un employé civil du ministère de la Défense nationale et que ses fonctions consistaient à conduire des véhicules du ministère. Malgré l'objection à la preuve telle que faite par le procureur de l'intimée, cette preuve fut permise étant donné que l'intimée admet tacitement dans sa défense que le conducteur de son véhicule était son employé ou serviteur.

Au paragraphe 2 de la défense il est allégué qu'au moment de l'accident le véhicule était conduit par une personne qui n'agissait pas dans l'exercice de ses fonctions et qui n'était pas autorisée par ses supérieurs à en faire l'usage qu'il en faisait à ce moment. Plus loin il est répété que le chauffeur du véhicule de Sa Majesté n'était pas, au moment de la collision, dans l'exercice de ses fonctions.

La preuve est donc à l'effet que le véhicule de l'intimée était conduit par son serviteur au moment de la collision du 11 novembre 1951.

Il s'agit de savoir maintenant si cet employé de l'intimée, au moment de l'accident, conduisait le véhicule dans l'exercice de ses fonctions ou à l'occasion seulement de ses fonctions. Dans le premier cas, il n'y a pas de doute que l'intimée devrait être tenue responsable des actes dommageables de son serviteur; dans le second cas, il n'y aurait pas de responsabilité de la part de l'intimée.

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D'après l'article 19 (c) de la Loi de la Cour de l'Echiquier, la Couronne est responsable des dommages causés par la négligence de ses serviteurs agissant dans l'exécution de leurs fonctions ou de leur emploi, et rien d'autre.

Les remarques du juge Mignault dans le cause de *Curley* v. *Latreille* (1) méritent d'être notées en considérant la cause actuelle. Je cite (p. 175):

. . . L'article 1054 C.C. me paraît clairement exclure la responsabilité du maître pour un fait accompli par le domestique ou ouvrier à l'occasion seulement de ses fonctions, si on ne peut dire que ce fait s'est produit dans l'exécution de ses fonctions.

Dans la cause de *Moreau* v. *Labelle* (2) le juge en chef de la Cour suprême du Canada, dans ses conclusions, en parlant du préposé de l'appelant, dit (p. 217):

. . . il se trouvait à un endroit où il n'avait aucune affaire à aller pour accomplir la mission que l'appelant lui avait confiée et pour rester dans l'exécution de ses fonctions.

Pour être dans l'exécution de ses fonctions, il faut que la possession de l'automobile par le serviteur soit pour les fins des fonctions auxquelles il (le préposé) était employé. S'il s'en sert pour ses propres fins il ne possède plus pour son maître et ne peut rendre ce dernier responsable de ses négligences.

Dans la cause de *The Governor and Company of Gentlemen Adventurers of England* v. *Vaillancourt* (3) le juge Duff, plus tard juge en chef, fait ces observations (p. 417):

. . . if the act of the servant causing the injury complained of is an act having no relation to the duties of his employment as, for example, where two servants momentarily discontinue their work to engage in some sort of a frolic, then, although it might not improperly be said that the injurious act is something done *à l'occasion* of their employment, it would appear to be an abuse of language to describe it as done *dans l'exécution des fonctions* or in the performance of the work for which they were employed.

Ayant ces principes en mémoire, demandons-nous quels étaient les devoirs de Leboeuf le jour de la collision (11 novembre 1951).

Dans la matinée Roger Leboeuf fut autorisé par écrit par son supérieur de conduire dans une automobile de l'intimée un aumônier militaire de Montréal à l'usine ou "plant"

(1) (1919) 60 S.C.R. 131. (2) [1933] S.C.R. 201.
(3) [1923] S.C.R. 414.

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Bouchard au nord de la ville de Ste-Thérèse, comté de Terrebonne. L'aumônier militaire se rendait à cet endroit pour assister ou prendre part à des cérémonies religieuses. C'était le jour de l'armistice. Bien que la preuve eût été plus complète si l'officier autorisant le voyage avait été entendu, je crois que le témoignage non contredit de Leboeuf suffit pour établir qu'il était, ce jour-là, en possession légale du véhicule de l'intimée, mais pour un voyage spécifié et déterminé. Il dit lui-même qu'il avait été autorisé à conduire l'aumônier de Montréal au "plant Bouchard" et de le ramener à Montréal après la cérémonie.

Il conduisit donc l'aumônier à l'endroit de sa destination. C'est là qu'il demanda à l'aumônier s'il pouvait aller déjeûner à Ste-Thérèse. Ce dernier lui en donna la permission pourvu qu'il fût de retour pour midi. C'est au cours du trajet du "plant Bouchard" à Ste-Thérèse que la collision eut lieu. S'il avait été autorisé par son supérieur à faire ce trajet particulier, pourquoi en aurait-il demandé la permission à l'aumônier? J'ai lieu de croire qu'il savait qu'il n'avait pas la permission de se servir du véhicule pour ses fins personnelles.

Les questions à déterminer sont les suivantes: *a*) L'aumônier avait-il l'autorité nécessaire pour permettre à Roger Leboeuf de se servir de l'automobile de l'intimée pour aller déjeûner à Ste-Thérèse? *b*) S'il avait cette autorité, Leboeuf était-il dans l'exercice de ses fonctions lorsqu'il conduisit ledit véhicule pour aller déjeûner?

Il ne faut pas oublier que l'article 19 (c) de la Loi de la Cour de l'Échiquier est de droit strict et qu'aucune présomption n'existe contre la Couronne. Il incombe au requérant d'établir que les dispositions de la loi créant le responsabilité de la Couronne et donnant un droit d'action au requérant s'appliquent aux faits et circonstances de la présente cause.

Le requérant a-t-il établi que l'aumônier avait le pouvoir de donner des ordres concernant l'usage de l'automobile de l'intimée? Aucune preuve n'a été faite à cet effet devant la Cour. Tout ce qui a été prouvé c'est que Roger Leboeuf avait été autorisé à conduire l'aumônier à un endroit spécifié et de le ramener à Montréal; c'est tout. Je comprends que

si la collision avait eu lieu pendant qu'il conduisait l'aumônier à son lieu de destination ou pendant le voyage de retour la question ne se poserait pas.

La collision a eu lieu alors que Leboeuf se rendait du "Plant Bouchard" à Ste-Thérèse, où il allait déjeûner. Je ne puis admettre que le trajet ci-dessus et le fait de déjeûner à Ste-Thérèse puissent être compris dans les cadres du texte de l'article 19 (c) de la Loi de la Cour de l'Échiquier. Je ne puis croire non plus qu'il était essentiel ou même nécessaire à l'exécution de ses fonctions, qu'à onze heures de la matinée (heure de la collision), ce jour-là, il aille déjeûner à Ste-Thérèse.

Je suis d'opinion que l'aumônier militaire n'avait aucune autorité pour permettre à Leboeuf de se servir de l'automobile de la Couronne; ses fonctions et ses prérogatives étaient d'une tout autre nature.

Lorsque Leboeuf a laissé l'aumônier pour se rendre à Ste-Thérèse, il se servait de l'automobile de l'intimée pour ses fins personnelles et non dans l'exécution de ses fonctions. La possession de l'automobile que l'intimée lui avait donnée pour remplir un devoir spécifié et déterminé se trouvait interrompue et discontinuée. Dès ce moment, je suis d'avis que ses actes ne pouvaient engager la responsabilité de l'intimée, du moins jusqu'au moment de son retour pour rejoindre l'aumônier pour le ramener à Montréal.

Le requérant doit faillir dans sa pétition de droit parce qu'il n'a pas établi que le serviteur de l'intimée avait été autorisé légalement de faire le trajet de l'endroit où il a laissé l'aumônier militaire à Ste-Thérèse, où il voulait déjeûner. De plus il n'y a aucune preuve que l'aumônier avait autorité pour donner la permission de se servir de l'automobile pour ce voyage, non compris dans les instructions données à Leboeuf.

La négligence du serviteur de l'intimée a eu lieu peut-être à l'occasion de ses fonctions mais non dans l'exécution de ses fonctions et l'intimée ne peut être tenue responsable des dommages causés.

La Cour renvoie la pétition de droit du requérant avec dépens et renvoie la demande reconventionnelle de l'intimée, avec dépens.

Judgment accordingly.

1954
Jan. 24
May 28

BETWEEN:

HOSPITAL FOR SICK CHILDREN.....APPELLANT,

AND

MINISTER OF NATIONAL REVENUE..RESPONDENT,

AND BETWEEN:

ISABELLA ARLOW ET AL. .....APPELLANTS,

AND

MINISTER OF NATIONAL REVENUE...RESPONDENT.

Revenue—Succession duty—Dominion Succession Duty Act, R.S.C. 1952, c. 89, s. 2(a)(k)(m), 6(1)(a)(b), 10(1), 11, 13(1), 15—"Succession"—Bequest duty free—Dutiable gifts and duty thereon taxable but the total does not constitute a succession—No duty on duty.

A testator bequeathed to his widow certain gifts free of succession duty. The respondent assessed the succession duties payable on the basis that such devise and the duty payable thereon together constituted a succession within the meaning of the Dominion Succession Duty Act. An appeal from said assessment was taken to this Court.

Held: That a gift free of duty is two gifts, one of the property given and the other a legacy of the sum required to pay the duty.

2. That the dutiable succession to the widow are the total amount of the values at the death of the testator of the devises and bequests to her free of duty and also the amount of money required to pay such duty, and that duty is assessable on the sum of the two as one succession but the Act does not authorize further calculations of duty upon duty.

3. That while the amount of money required to pay the duty on the dutiable gifts given duty free was a succession and together with such gifts dutiable, the duty payable on the sum of the two was not a succession within the meaning of the Act.

APPEAL under the Dominion Succession Duty Act.

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

A. S. Pattillo, Q.C. and *A. J. MacIntosh* for Hospital for Sick Children.

Terence Sheard, Q.C. and *G. E. Hill, Q.C.* for other appellants.

Russell Whitely, Q.C. and *A. L. DeWolfe* for respondent.

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

POTTER J. now (May 28, 1954) delivered the following judgment:

These are appeals from decisions of the Minister of National Revenue under section 38 of the Dominion Succession Duty Act, chapter 89, R.S.C. 1952, whereby he, following Notices of Appeal from his assessment of the amounts of duties upon or in respect to successions to property under the last will and testament of George James Arlow, deceased, affirmed the said assessment.

Both the above-named matters arose out of the succession to property under the will of George James Arlow, deceased, and when they came on for hearing before this Court at Toronto, in the Province of Ontario, on the 29th day of January, 1954, Mr. Terence Sheard, Q.C., counsel for the appellants in the second-named matter, moved for an order that the above-named matters be consolidated and tried together to which Mr. A. S. Pattillo, Q.C., counsel for the appellant in the first-named matter agreed, as did Mr. Russell Whitely, Q.C., counsel for the respondent in both matters.

As neither the Exchequer Court Act, chapter 98, R.S.C. 1952 nor the rules of the Court contain any applicable provisions, the procedure in Her Majesty's High Court of Justice in England on the 1st day of January, 1928 applies. According to Order 49, Rule 8 of the Rules of the Supreme Court, 1883 and in force on the 1st day of January, 1928:—

> Causes or matters pending in the same division may be consolidated by order of the Court or a Judge in the manner in use immediately before November 1, 1875 in the Superior Courts of Common Law.

There appearing to be no reason why the two above-named matters should not be consolidated and tried together it was so ordered.

George James Arlow, late of the city of Toronto, in the county of York and province of Ontario, died on or about the 5th day of June, 1952, having duly made his last will and testament of which Letters Probate were issued to the executors therein named, out of the Surrogate Court of the County of York on the 29th day of August, 1952.

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At the date of his death the aggregate net value of the estate of the deceased was $995,670.02.

The will of the deceased contained the following relevant provisions:—

II. I nominate, constitute and appoint my wife Isabella Arlow, my Solicitor, Arthur Wellesley Holmested, of the said City of Toronto, and National Trust Company Limited, hereinafter called "my trustees", to be the executors of and trustees under this my will.

III. All my estate both real and personal, of whatsoever kind or nature and wheresoever situate of which I may be seized, possessed or entitled to or over which I may have any power of appointment at the time of my decease, I give, devise, requeath and appoint unto and in favour of my trustees upon the following trusts, namely:

(*a*) To pay out of the capital of my general estate my just debts, funeral and testamentary expenses and all succession duties and inheritance and death taxes that may be payable in connection with any insurance on my life or any gift or benefit given by me either in my lifetime or by survivorship or by this my will or any codicil thereto, and whether such duties and taxes be payable in respect of estates or interests which fall into possession at my death or at any subsequent time; and I hereby authorize my trustees to commute the duty or tax on any interest in expectancy.

Then followed directions with reference to the realization of his estate with power to his trustees to sell, call in and convert into money, in their discretion, any part or parts thereof or to postpone such conversion etc., and Clauses III(c) and (d) were as follows:—

(*c*) So soon as conveniently may be after my decease to pay to my wife Isabella Arlow the sum of One Hundred Thousand Dollars ($100,000.00) for her own use absolutely.

(*d*) To pay to my wife Isabella Arlow from the date of my decease the sum of Twenty-five Thousand Dollars ($25,000.00) per annum in four equal quarterly instalments during her lifetime.

Then followed directions to deliver to his wife for her sole use and benefit his household furniture, etc., and to convey to her for her sole use and benefit the residence which he occupied in the City of Toronto, and Clause III(g) was as follows:—

(*g*) Upon the decease of my wife Isabella Arlow to take all steps necessary to wind up my estate and to pay and/or convey the assets then remaining to the Hospital for Sick Children which conducts a hospital in the said City of Toronto.

On August 12, 1952, the executors filed Succession Duty returns as follows:—

1. Statement of Value and Relationship, Form S.D. 1.
2. Schedule of Debts, Form S.D. 14.

3. Copy of Last Will and Testament of George James Arlow, dated February 10, 1947.

Forms S.D. 1 showed the following totals:—

A—Real Estate		$ 48,000.00
C—Stocks		504,107.76
E—Cash ($144,542.76 plus $9.38)		144,552.14
F—Interest in business (Purity Milk Cap Company estimated value)		220,000.00
J—Life Insurance		108,526.00
K—Miscellaneous property		44,379.00
	$ 1,069,564.90	
Debts as per Form S.D. 14 attached	68,427.03	
Aggregate net value		$ 1,001,137.87

As will appear by statements attached to the Notice of Assessments, this amount was, after making the following additions and deductions reduced to $995,670.02 viz.—

Aggregate net value as per S.D. 1 filed		$ 1,001,137.87
Add increase value of assets	10,162.15	
	$ 1,011,300.02	
Deduct claim of Purity Milk Cap Company (Export) Limited	15,630.00	
		$ 995,670.02

On May 12, 1953, the Minister of National Revenue mailed Notice of Assessments showing the amount of duty payable as $376,315.97, made up as follows:—

Successor	—	Combined Rate	Amount of Duty
Charitable Donations	$ 277.33		
ARLOW, Isabella—			
Exempt Section 7(1) (a)	20,000.00		
Gifts—exempt	3,000.00		
Dutiable Portion	972,392.69	38.7	$ 376,315.97

The Notice of Assessments also carried the following:—

N.B. Further successions have been added to the widow's share of the additional benefits which she enjoys by reason of the Succession Duty Free clause in the Will. In the final analysis, it was determined that the whole Estate, apart from the gifts to charities made in the deceased's lifetime, was a succession to the widow.

The method by which the duty claimed was calculated was set out in four statements attached to the Notice of Assessments.

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Statement No. 1 was headed "To Determine Dominion Succession Duty as Additional Succession to Widow" and was as follows:—

Aggregate Net Value	$1,010,982.20	District	TORONTO	Initial Rate 12·9
Assets per S.D.1				$ 1,069,564.90
Increase per S.D.1D				10,162.15
				$ 1,079,727.05
Debts per S.D.14			$ 68,427.03	
Deduct *re* error in totalling Debts on S.D.14 .....$	100.00			
Claim of Purity Milk Cap Co. (Export) Ltd.	15,530.00		15,630.00	84,057.03
AGGREGATE NET VALUE				$ 995,670.02

Successor	Succession	—	Add Rate	Total Rate	Duty
Charitable Donations within (3) years prior to death.....	.....	277.33	.....	.....	N/C
Isabella Arlow—Widow "A" (67) Gifts (Exempt Sec. 7 (1) (f)..	.....	3,000.00	.....	.....	N/C
Insurance.....	108,526.00				
Joint Bank Acts.....	144,542.76				
Legacy.....	100,000.00				
H. H. Gds. Effects & Cars...	39,779.00				
21 Whitney Ave.....	35,000.00				
Annuity (25,000.00 x 9.10063)..	227,515.75				
	655,363.51	635,363.51	23.2	36.1	229,366.23
Exempt Sec. 7 (1) (a).....	.....	20,000.00			
The Hospital for Sick Children Residue (Exempt Sec.	7 (1) (d)....	337,029.18	.....	.....	N/C
		995,670.02	.....	.....	229,366.23

Statement No. 2 began with the same figures in the heading as Statement No. 1, but to the six items making up the total value of the succession to the widow of $655,363.51 were added two items shown as Dominion Succession Duties $120,371.92 and Ontario Succession Duties amounting to $109,214.25, making a total of $884,949.68 from which was deducted the $20,000.00 gift to the widow exempt under section 7(1)(a), leaving a dutiable value of the succession to the widow of $864,949.68 to which an additional rate of duty of 25 per cent or a total rate of 37·9 per cent was applied resulting in the duty claimed being $327,815.93.

It will be noted that the total of the two items added to the widow's succession of $655,363.51 does not equal exactly the duty claimed by Statement No. 1 of $229,366.23, the difference being $219.94, which difference was explained by a statement filed at the request of the Court on May 4, 1954, as follows:—

The Dominion Duty claimed on Statement No. 1 was calculated before allowance for duties paid the Province of Ontario, in accordance with section 12 of the Act, and without taking into account the provisions of the will for the payment of duties. The total Ontario Duty assessed was $109,214.25, as set out on Statement No. 2, but full credit for that amount was not given against the Dominion Duties since the Ontario Duties assessed included a duty on a gift of $2,000.00 which was excluded in assessing the Dominion Duty as the gift was made more than three years prior to death. The credit allowed against the Dominion Duties for the Ontario Duty was therefore $108,994.31 which sum when subtracted from the Dominion Duty claimed by Statement No. 1 of $229,366.23, left the figure of $120,371.92 which is the amount shown as Dominion Succession Duties on Statement No. 2.

This difference between the total of the Dominion and Ontario Succession Duties shown on Statement No. 2 and the Dominion Duty claimed on Statement No. 1 is $219.94 and is carried through the various calculations except for an error of ·31 made in transferring the amount of the Dominion Duties to Statement No. 3, which should have been $218,821.62 instead of $218,821.93.

According to Statement No. 2, after treating the duty calculated on Statement No. 1 as an additional succession to the widow, and before deducting the duty calculated on Statement No. 2, the value of the residue going to the Hospital for Sick Children was $107,443.01.

Statement No. 3 again showed the succession to the widow of $655,363.51, and to that was added Ontario Succession Duties of $109,214.25 and $218,821.93 (.62) being

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the balance of the Dominion Duties after deducting therefrom the allowed credit for Ontario Duties of $108,994.31 and again the total of the Dominion and Ontario Duties differed from the duty claimed by Statement No. 2 by $219.94. By the calculation on Statement No. 3, the succession to the widow was increased from $655,363.51 to $983,399.69, or a dutiable amount of $963,399.69, after allowing the exemption of $20,000.00, and the value of the residue to the Hospital for Sick Children was reduced to $8,993.00. To the dutiable succession to the widow was applied an additional rate of 25·8 per cent or a total rate of 38·7 per cent which produced a duty of $372,835.68.

By Statement No. 4 the calculation again began with the succession to the widow of $655,363.51, but to that was not added the Succession Duty claimed by Statement No. 3 of $372,835.68 less the credit of $108,994.31 for duties paid to the Province of Ontario but the sum of $337,029.18, described as Dominion and Ontario Duties, which was obviously a figure taken to balance the statement so that the aggregate of the specific gifts, the gifts exempt from duty and the amount claimed for Dominion and Ontario Succession Duties would not exceed the net aggregate value of the estate, although on this statement an additional rate of 25·8 per cent or a total rate of 38·7 per cent was applied and a duty of $376,315.97 calculated, which is the amount of duty claimed according to the Notice of Assessments. This amount of duty with the specific gifts totalling $658,640.84 equal $1,034,956.81, exceeding the net aggregate value of the estate by $39,286.79, and if this amount of duty were paid out the net aggregate value of the estate, the amount divisible among all beneficiaries would be reduced to $619,354.05.

If the full amount of duty of $372,835.68 calculated on Statement No. 3 had been carried forward to Statement No. 4 and added to the specific gifts to the widow the result would have exceeded the net aggregate value of the estate by $36,026.44 with final duty still to be calculated, as follows:—

Successor		Succession		Add'l Rate %	Total Rate %	Duty
Charitable Donations			$ 277.33			
Widow—						
Gifts—exempt			3,000.00			
Specifics, etc.		655,363.51				
Dominion Duty, as per Statement No. 3	$372,835.68					
Less credit for Ontario Duties	108,994.31					
		263,841.37				
Ontario Duties as assessed		109,214.25				
		$1,028,419.13	20,000.00			
			1,008,419.13			
				26.0	38.9	$392,275.04
			$1,031,696.46			
Net aggregate value			995,670.02			
			$ 36,026.44			

If duty upon the dutiable portion of the estate of $1,008,419.13, at a total rate of 38·9 per cent, had then been calculated, it would have been $392,275.04, which, with the adjusted credit for Ontario duties, if added to the specific gifts, would have exceeded the aggregate net value of the estate by $55,465.80, and the amount divisible among the beneficiaries would have been reduced to $603,175.04.

The result of a general application of this method of calculation is illustrated by the following, the actual calculations involved in which are filed herewith:—

Example 1. Assume an estate with a net aggregate value of $450,000.00 and gifts to a widow of $320,100.00 free of duty, of which $20,000.00 would be exempt from duty under section 7(1)(a), with residue to a charitable organization within section 7(1)(d). The initial rate would be 10·4 per cent, the additional rate 18 per cent, or a combined rate of 28·4 per cent and the duty by a first calculation would be $85,228.40.

If this duty is treated as an additional legacy and added to the widow's dutiable succession of $300,100.00 and duty again calculated on $385,228.40 the additional rate becomes 19·6 per cent or a combined rate of 30 per cent and the duty becomes $115,598.52.

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If the method is continued, on the fourth calculation the duty free succession to the widow of $300,100.00 plus $20,000.00 exempt from duty plus duty on the succession of $300,100.00 which has become $129,900.34, and which is treated as a further gift to the widow, exceed the net aggregate value of the estate by .34.

As it is conceivable that the gift of $320,100.00 free of duty might go to a successor who would not be entitled to the full exemption of $20,000.00 or that the difference between the total gifts to a successor free of duty and the net aggregate value of the estate might be greater than in this illustration, it might be necessary to continue such calculations to a point at which there is no further appreciable increase in the duty with still some residue to go to the charitable organization.

If this method of calculation is continued in this example, on the fifteenth calculation the duty becomes $134,827.53 and on the sixteenth calculation the duty is the same amount, the result at this stage being that the gifts to the widow of $300,100.00, plus the $20,000.00 exempt from duty, plus the duty of $134,827.53 equal $454,927.53, exceeding the net aggregate value of the estate by $4,927.53.

If the amount of this duty of $134,827.53 is a first claim on the net aggregate value of the estate of $450,000.00, the widow's gifts would have to abate from $320,100.00 to $315,172.47 in accordance with the rule laid down by Bacon, V.C. in *Wilson* v. *O'Leary,* (1), in which he held:—

> That there being in fact no residue, the gift of the legacies free of legacy duty to be paid out of the residuary estate failed *pro tanto,* and that the Defendant Hughes, and the other persons whose legacies were similarly given, must bear the legacy duty thereon to the extent to which the estate was insufficient to provide for it.

Example 2. Assume an estate with a net aggregate value of $400,000.00 and gifts to a widow of $320,100.00 free of duty, of which $20,000.00 would be exempt from duty under section 7(1)(a), with residue to a charitable organization within section 7(1)(d). The initial rate would be 10 per cent and the additional rate 18 per cent, or a combined rate of 28 per cent and the duty by a first calculation would be $84,028.00.

(1) (1874) L. R. 17 Eq. 419 at 420.

The dutiable successions to the widow of $300,100.00, which are given free of duty, plus $20,000.00 which is exempt from duty under section 7(1)(a), plus the duty of $84,028.00 claimed by the first calculation, together equal $404,128.00, exceeding the net aggregate value of the estate by $4,128.00.

Once again, will the gifts to the widow be obliged to abate by that amount in accordance with the rule in *Wilson* v. *O'Leary* (*supra*) and further calculations discontinued, or should the calculations be continued to the point where they do not increase the duty?

In this example, on the sixteenth calculation, the duty is $132,320.75 and on the seventeenth calculation it is the same amount, ignoring for practical purposes the fractions of one cent.

At this stage the calculated duty of $132,320.75 plus the gifts to the widow of $300,100.00 free of duty, plus the $20,000.00 exempt of duty, equal $452,420.75, exceeding the net aggregate value of the estate by $52,420.75.

If the duty of $132,320.75 is a first claim on the net aggregate value of the estate, do the gifts to the widow have to abate to $267,679.25, and, if so, could the widow claim that there could not possibly be a duty of $132,320.75 on bequests which netted $267,679.25?

The questions which arise out of the method of calculation set out in the four statements attached to the Notice of Assessments in this case, and to which there appear to be no satisfactory answers, are as follows:—

1. Are such calculations to be continued to the point where the specific gifts free of duty, plus gifts exempt from duty, plus the duty on duty exceed the net aggregate value of the estate; and, if so, is the resulting duty not to be claimed in full but reduced so that the total of the items mentioned shall exactly equal the net aggregate value of the estate, and then a final calculation of duty made?
2. Where the difference between the specific gifts free of duty, plus gifts exempt from duty, and the net aggregate value of the estate, is sufficiently large to enable the calculations to be continued to the point where the duty is no longer increased by a further calculation

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and there is still something left for the residuary legatee, should the calculations be continued to that point?

3. Are the calculations to be continued until the duty on duty is no longer increased by a further calculation and if that amount plus the duty free gifts and exemptions exceed the net aggregate value of the estate must the specific gifts which were given free of duty abate, and, if so, can those receiving such abated gifts object that the amounts received by them could not possibly be the net after applying the initial rate plus the proper additional rate of duty, and demand a new calculation?

The cardinal rules applicable to the interpretation of taxing statutes, which have been many times stated in judicial decisions, are as follows:—

> Statutes which impose pecuniary burdens, also, are subject to the same rule of strict construction. It is a well-settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties. The subject is not to be taxed unless the language of the statute clearly imposes the obligation. Maxwell on the Interpretation of Statutes, Tenth edition, p. 288.
>
> Statutes which encroach on the rights of the subject, whether as regards person or property, are similarly subject to a strict construction in the sense before explained. It is a recognized rule that they should be interpreted, if possible, so as to respect such rights . . . It is presumed, where the objects of the Act do not obviously imply such an intention, that the Legislature does not desire to confiscate the property, or to encroach upon the right of persons; and it is therefore expected that, if such be its intention, it will manifest it plainly, if not in express words at least by clear implication and beyond reasonable doubt. Ibid, pp. 285 and 286.
>
> While the court approaches the Act with the idea that the legislature will not readily be presumed to have enacted a glaring injustice, it cannot consider what is fair and what is oppressive in taxation. If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear: on the other hand, if he is not within the letter of the law, he is free, however much within the spirit of the law the case otherwise appears to be. Green's Death Duties, Third edition, page 5.

And with regard to the powers of disposition of a testator the following are relevant:—

> To the extent of his powers of disposition, a testator or other disponer may effectually prescribe the manner in which, as between the beneficiaries, any duties are to be borne, the commonest provisions being that specified property shall be free of duty or that duties generally shall be paid out of a specified fund. 13 Halsbury, page 299, para. 312.

A testator may effectually prescribe the manner in which as between the beneficiaries, any duties payable under his will are to be borne, and his intention may be gathered from any direction in the will. Ibid, page 337, para. 370. See also Ibid, page 390, para. 439.

Any testator, settlor or other disponer may effectually prescribe, so far as his powers of disposition extend and without prejudice to the rights of the Crown, the manner in which, as between the beneficiaries, any duty is to be paid or borne. Green's Death Duties, Third edition, page 512.

With these statements of the law taken from recognized textbooks, and with the decisions on which they are based, in mind, the questions for decision in this case may be approached.

The Dominion Succession Duty Act, chapter 89, R.S.C. 1952, contains the following provisions relevant to this enquiry:—

2. In this Act,

(*a*) "aggregate net value" means the fair market value as at the date of death, of all the property of the deceased, wherever situated, . . .

2(*k*) "property" includes property, real or personal, movable or immovable, of every description, and every estate and interest therein or income therefrom capable of being devised or bequeathed by will or of passing on the death, and any right or benefit mentioned in section 3;

2(*m*) "succession" means every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any deceased person, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any such deceased person, to any other person in possession or expectancy, and also includes any disposition of property deemed by this Act to be included in a succession;

Section 3 defines what dispositions shall be deemed to be included in a succession, but it was stated by counsel for the respondent that no part of that section was being invoked on behalf of the Crown. Then follow certain taxing sections .

6.(1) Subject to the exemptions mentioned in section 7, there shall be assessed, levied and paid at the rates provided for in the First Schedule duties upon or in respect of the following successions, that is to say,

(*a*) where the deceased was at the time of his death domiciled in a province of Canada, upon or in respect of the succession to all real or immovable property situated in Canada, and all personal property wheresoever situated; and

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(*b*) where the deceased was at the time of his death domiciled outside of Canada, upon or in respect of the succession to all property situated in Canada.

Section 10 provides in part:—

10.(1) There shall be assessed, levied and paid to the Receiver General of Canada, upon or in respect of each succession mentioned and described in section 6 an initial duty at the rate set forth under the heading "Initial rates dependent on aggregate net value" in the First Schedule that corresponds to the aggregate net value in the said Schedule, and the duty so levied shall be payable by each successor in respect of his succession.

Section 11 provides in part as follows:—

11. In addition to the duty imposed by section 10, there shall be assessed, levied and paid upon or in respect of each succession mentioned and described in section 6 a duty at the rate set forth in the First Schedule that corresponds to the dutiable value in the said Schedule—

Section 13 provides in part as follows:—

13.(1) Every successor is liable for the duty by this Act levied upon or in respect of the succession to him, and the duty in respect of any gift or disposition *inter vivos* to a successor is also payable by and may be recovered from the executor of the property of the deceased.

Subsection (2) of this section provides that all duties assessed and levied under the Act shall be payable by and may be recovered from the executor of the property of the deceased, etc.

Section 15 is as follows:—

15. Every executor who is required to pay duty upon or in respect of the succession to property that is being administered by him is entitled to deduct from the amount paid over by him the amount of the duty paid by him or, in the event of the successor being satisfied otherwise than in money paid over by him, to recover from the successor the amount of the duty so paid.

It will be noted by section 6(1)(a) that the duty is to be assessed, levied and paid upon or in respect of the succession to all real or immovable property situated in Canada, and all personal property wheresoever situated; that by section 10 an initial duty at the rate set forth in the First Schedule is imposed according to the aggregate net value of the estate and is payable by each successor in respect of his succession; that by section 11 an additional duty at the rate set forth in the First Schedule is assessed, levied and paid upon or in respect of each succession and that by section 13 every successor is liable for the duty in respect of the

succession to him and that the executor of the estate is also liable and he may deduct the duty from each succession paid over by him.

"'Succession' means every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property" and "'property' includes property, real or personal, movable or immovable, of every description, and every estate and interest therein . . . capable of being devised or bequeathed by will or of passing on the death. . ."

It was contended for the appellants that the duty of $229,366.23 on the specific gifts to the widow of $655,363.51, less the exemption of $20,000.00, was not itself subject to duty, or, in the alternative, if the first amount of duty of $229,366.23 was itself subject to duty, there was no authority to again calculate duty on the dutiable part of the specific gifts plus duty thereon and continue such calculations, because such duty was not a succession; i.e., a disposition of property by reason whereof the widow of the testator became beneficially entitled to any property real or personal, movable or immovable, or any estate or interest therein.

It was contended on behalf of the respondent that a gift free of duty amounted to two gifts, the gift itself and a gift of the amount of money required to pay the duty on the gift; that the dutiable part of the gift and such duty should be added together, duty calculated on the total at the authorized rates, and that such calculations should be continued until the dutiable part of the specific gifts plus the first duty and duty thereon nearly equalled the net aggregate value of the estate; that if the result of the last calculation produced an amount of duty which, when added to the specific gifts, exceeded the net aggregate value of the estate, the duty ascertained by the last calculation could be arbitrarily reduced so that the specific gifts, plus such portion of the duty, would not exceed the net aggregate value of the estate, though the residue was completely exhausted; the final result being that the widow was deemed to have succeeded to the whole estate with duty to be assessed and levied accordingly even though her duty free gifts would abate.

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According to Statement No. 1 attached to the Notice of Assessment, the total value of the specific gifts to the widow was $655,363.51 of which, after deducting the $20,000.00 exempt from duty under section 7(1)(a), $635,363.51 was dutiable at a combined rate of 36·1 per cent. and on which the resulting duty was calculated to be $229,366.23.

The first question is, was the amount of $229,366.23, claimed as duty by the respondent, a succession to the widow?

It is well-settled that a gift free of duty is in law two gifts: one of the property given and the other a legacy of the sum required to pay the duty. Editorial Note in *Re King, Barclay's Bank Limited* v. *King and Others* [1942] 2 All E. R. 182.

In this case, Luxmoore, L. J. at page 185, after outlining the circumstances under which the case arose and the clauses of the will, said:—

It is admitted that the direction at the beginning of cl. 3 that the benefits given by that clause are to be duty free exonerates the widow from all liability for estate duty, succession duty and legacy duty. It is also admitted that all sums required to comply with such direction must be treated as additional legacies.

This principle has long been followed by the Courts of England and Scotland.

Beginning with the Stamp Duties Act, 1779, 20 George 3, chapter 28, receipts or other discharges for any legacies left by any will or testamentary instrument or for any share or part of personal estate divided by force of the Statute of Distributions, should carry certain stamps.

By the Stamp Duties Act of 1783, 23 Geo. 3, chapter 58, additional stamp duties were imposed, as was done by the Stamp Duties Act, 1789, 29 Geo. 3, chapter 51.

The Legacy Duty Act, 1796, 36 Geo. 3, chapter 52 recited that it was expedient that the said Acts should be repealed and that new duties be granted by this Act in lieu of the duties repealed, excepting that the provisions made by the said several Acts for collecting the duties thereby imposed should be further enforced as to the duties not repealed by this Act.

Then followed provisions imposing duties on legacies and upon every part of the clear residue of the personal estate of every person who should die, whether testate or intestate,

and leave personal effects of the clear value of one hundred pounds or upwards, the rates of duty depending on the relationship of the beneficiaries to the deceased, with certain exceptions being made in the cases of husbands or wives of the Royal family.

Section XXI, however, was as follows:—

XXI. Provided always, and be it further enacted, that if any direction shall be given, by any will or testamentary instrument, for payment of the duty chargeable upon any legacy or bequest out of some other fund, so that such legacy or bequest may pass to the person or persons to whom or for whose benefit the same shall be given, free of duty, no duty shall be chargeable upon the money to be applied for the payment of such duty, notwithstanding the same may be deemed a legacy, to or for the benefit of the person or persons who would otherwise pay such duty.

It is clear that at the time of the enactment of this Statute, therefore, it was anticipated that money to be applied to the payment of legacy-duty on a duty-free bequest would be deemed an additional legacy to or for the benefit of the person or persons who would otherwise pay such duty.

In *Noel* v. *Henley* (1), Lord Chief Baron Richards in the Exchequer Chamber said at page 253:—

The legacy duty is a charge upon the legacy, not upon the estate; but where the legacy is given free of duty, it is an increase of the legacy itself, and ought therefore to be paid out of the same fund.

While the section itself refers to a direction for the payment of the duty out of some other fund, the legacy in this case was to be paid out of the rents and profits and the produce of the sale of real estate devised to be sold, yet the Lord Chief Baron considered the balance of the fund out of which the legacy was paid to be some other fund.

In *Farrer* v. *Saint Catherine's College, Cambrige,* (2), Lord Selborne, L. C. said:—

A gift of legacy duty on a specific or pecuniary legacy was a common pecuniary legacy for the benefit of the specific legatee in the one case, and of the pecuniary legatee in the other; and in the event of the general estate being insufficient the gifts of legacy duty must abate along with other pecuniary legacies.

In *The Lord Advocate and Miller's Trustees,* (3), the Lord Ordinary (Fraser) whose opinion is given in the report of the hearing on appeal to the First Division, is reported

(1) (1819) 7 Price 241. (2) (1873) L. R. 16 Eq. Cas. 19 at 25.
(3) (1884) 11R. (Ct. of Sess.) 1046.

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to have said in the note at page 1052, in discussing section XXI of the Legacy Act, 1796:—

> What is the meaning of the words that if any direction shall be given for payment of the duty "out of some other fund"? It plainly means some fund other than the legacy or bequest, and it is a fund over which the testator has power to deal, for the clause assumes that he can dispose of it by will or testamentary instrument. Now, that fund can only mean the residue or the real estate, something, in short, apart from the legacy itself.

He then quotes from the decision of Chief Baron Richards in *Noel* v. *Henley* (*supra*).

In giving the judgment of the Court on the appeal the Lord President said at page 1055 after quoting section XXI of 36 Geo. 3, chapter 52:—

> Now, there can be very little doubt that but for this enactment, in every case where a legacy is given free of legacy-duty by the will of the testator, and the executry estate can afford to relieve and does relieve the legatee of the amount of the duty by paying the duty out of the executry estate, that portion of the executry estate so applied would itself be subject to legacy-duty. But in the case supposed, this enactment provides that that portion of the executry estate which is so applied to relieve the legatee is not itself to be subject to legacy-duty. *And the reason for the enactment is plain enough.*

Lord Adam said at page 1059:—

> If there be a direction by the testator to pay the duty out of the residue, the statute of Geo. III comes into play, and provides that no duty shall be payable on the £10 or £3 paid to relieve the legatee from the payment of the duty. It is in that case only that the statute comes into play. In this case there was no direction to pay out of any particular fund, and though that may be inferred as being a direction to pay out of residue, there was here no residue; and therefore, in my opinion, the case does not fall within the 21st section of the Act of Geo. III. I do not think that it has any application to the case, and the Crown, as in the case I put, would just take its ten or three per cent.

He proceeded further and held that the Crown was entitled to treat the amount required to pay the legacy-duty on the legacy as an additional legacy and to require payment of duty on the sum of the two amounts.

In *Re Turnbull, Skipper* v. *Wade,* (1), a testatrix who made her will in 1893 and died in 1903 bequeathed numerous pecuniary legacies and directed that all the legacies should be paid "free from duty". Her estate was insufficient to pay all the legacies in full.

(1) [1905] 1 Ch. 726.

Beginning at page 728, Farwell, J. reviewed the authorities, including those already cited, and, after quoting from the same, said at page 730:—

> It follows that the legacy duty must be treated as an addition to each legacy, and then all the legacies will abate rateably, and each of the abated legacies will bear its own duty.

In *Re Hadley, Johnson* v. *Hadley,* (1), Parker, J. said at page 25:—

> A direction to pay out of residue a duty which but for such direction would be payable out of the appointed fund is in effect a pecuniary legacy to the appointees of the amount of the duty.

On the authorities, therefore, a gift free of duty is a gift of the subject matter of the gift itself and of the amount of money necessary to pay the duty on the gift.

It was, however, submitted on behalf of the appellants in one of the above-named matters that the sum of $229,366.23 shown on Statement No. 1 as duty on the dutiable gifts to the widow was not a succession to the widow and should not have been carried forward, after an adjustment of the amount credited for duty paid the province of Ontario, and added to the succession to the widow on Statement No. 2 because it was not property to which she became beneficially entitled within the meanings of the definitions contained in section 2(m) and (k), and that the English and Scottish cases to the effect that a gift of a legacy free of duty was a gift of the legacy itself and of an amount of money sufficient to pay the duty did not apply as they were authorities to the effect that legacies given duty-free must abate if there was insufficient in the residue or some other designated fund to pay the duty.

In this connection the cases of *In Re Miller's Agreement, Uniacke* v. *Attorney General,* (2), and *Re Flavelle Estate,* (3), were cited.

In *Re Miller's Agreement,* by the terms of an agreement of dissolution of partnership, two continuing partners covenanted with the retiring partner to pay, as from his death, to his three daughters certain annuities for their respective lives. No trust in favour of the daughters was created and the annuities were expressly chargeable on the partnership assets. On the death of the retiring partner

(1) [1909] 1 Ch. 20. (2) [1947] Ch. 615.
(3) [1943] O. R. 167.

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the revenue claimed that his daughters were liable to pay both estate duty under the Finance Act of 1894 and succession duty under the Succession Duty Act of 1853 with respect to the annuities which became payable to them.

Wynn-Parry, J., after deciding that the annuities were property under section 2 of the Succession Duty Act of 1853, decided that they were not property to which the daughters became beneficially entitled. At page 619 he said:—

> In my view, the word "interest" in the sub-section means such an interest in property as would be protected in a court of law or equity.

At page 623:—

> Upon its true construction I cannot find—and this is really admitted —that the deed confers upon any of the plaintiffs 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.

At page 624:—

> 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.

At pages 624 and 625, disregarding the word "beneficially", he said:—

> The word "entitled" as used in this section, appears to me necessarily to carry the implication that for a person to be entitled to property under this section it must be capable of being postulated of him that he has a right to sue for and recover such property.

The *ratio decidendi* of this case may be deduced from the foregoing quotations which will be further considered.

In *Re Flavelle Estate* (*supra*) Rose, C.J. H. C. held that where a testator directed his executors to pay succession duties out of his general estate, no duty was payable under the Succession Duty Act, 1937, of Ontario. At page 194 he distinguished the English and Scottish cases, already quoted from, by finding that the Ontario Act applicable to the case which he had under consideration did not impose legacy duties properly so called and at page 196 held that, as the duty was imposed upon so much of the property that passed to a beneficiary, as the duty never reached the beneficiary but went to the Treasurer, no duty was leviable upon it.

As the definition of "succession" in the Dominion Succession Duty Act includes all testamentary gifts and devolutions and the Act imposes a duty on successions and not expressly on property passing, the distinctions made by Rose, J. are, in my opinion, not relevant to this inquiry.

The definition of "succession" contained in section 2(m) of the Dominion Succession Duty Act, as already stated, is as follows:—

> 2(m) "succession" means every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property . . .

It has been recognized as well-settled from the time the Legacy Duty Act of 1796 was enacted down to the case of *Re King, Barclay's Bank Limited* v. *King and Others* (1), that:—

> . . . a gift free of duty is in law two gifts: one of the property given and the other a legacy of the sum required to pay the duty.

In Canada the principle was applied by the Court of Appeal of Saskatchewan in *Re Anderson, Canada Permanent Trust Company* v. *McAdam* (2).

The amount of money required to pay the duty on a gift given free of duty being a legacy, the right of a legatee or beneficiary to sue for the same in equity was well established.

In *Wilcox* v. *Smith* (3), Vice Chancellor Kindersley said:—

> Becoming entitled means, therefore, entering into the state of being entitled from the state of not being entitled. In other words to "become entitled" means to acquire a right or title.

In the article on legatees' suits contained in 13 Halsbury, page 38, para. 34, the following is stated:—

> At first a legatee could sue for his own legacy solely, but the proceedings came to be enlarged in their scope as in the case of a creditor's action. If the executor admitted assets, the legatee continued to be entitled to a decree for payment. But otherwise an account of all legacies was directed, with an order for payment rateably. The action involved an account of the personal estate, and also, since debts had priority over legacies, an account of debts, and hence a creditor could make his claim in the action.

(1) [1942] 2 All E. R. 182. (2) [1928] 4 D. L. R. 51.
(3) (1857) 4 Drewery 40 at 51.

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As authority for these propositions, Halsbury cites Mitford Pleadings in Chancery, Fifth edition, page 194, which is to the same effect with a number of authorities cited.

As a legatee had the right to sue for a legacy in equity, or, as Wynn-Parry, J. said in *Re Miller's Agreement* (*supra*), at page 619, "had such an interest as would be protected in a court of law or equity", he must have been "entitled" to the same within the definition of that word also given by Wynn-Parry, J. in that case, and although the procedure in some jurisdictions may have been varied by statutes or rules, the right would still be there regardless of the method by which it is enforced or protected.

I therefore conclude that the succession to the widow was $655,363.51, of which $635,363.51 was dutiable, plus the duty on the same of $229,366.23 or together, after adjusting the credit for succession duties claimed by the Province of Ontario, $884,949.68; that duty was properly calculated on that amount, less $20,000 or $864,949.68, and that such duty amounted to $327,815.93.

The result of this calculation after adjusting the credit for duty claimed by the Province of Ontario is shown in the columns headed "Successor" and "Succession" in Statement No. 3 (Exhibit 1c) as follows:—

Successor		Succession
Charitable Donations		$ 277.33
Widow—		
Gifts—Exempt		3,000.00
Specifics, etc.	$655,363.51	
Dominion Duties	218,821.93	
Ontario Duties	109,214.25	
	983,399.69	
Exempt		20,000.00
Dutiable (subject to this judgment)		963,399.69
Hospital for Sick Children		8,993.00
		$995,670.02

The next question is, are further calculations of duty upon duty authorized by the Act?

In order to determine the duty on the dutiable part of the succession to the widow of $655,363.51, the initial rate of 12·9 per cent, plus the additional rate of 23·2 per cent, or together a rate of 36·1 per cent, was applied, the

amount of which, when found, was a second legacy to the widow and which the testator must be deemed to have intended when he gave her, free of duty, the various items making up the succession to her.

Once that amount was ascertained and added to the specific gifts to the widow, the total value of the succession to her was fixed, and it was correct to apply the increased additional rate in order to find the duty on the total succession so ascertained, which amounted to $327,815.93.

In my opinion, however, the Act contains no authority to continue the process and increase the additional rate of duty at every calculation for the authority to fix rates of duty ceased when the original value of the dutiable succession to the widow plus the duty on the same and duty on such combined total succession was ascertained.

As already pointed out, no basic principle was established on which such further calculations could be based and which would be applicable, with certainty, to all estates in which gifts are given free of duty with residues to charitable organizations or other beneficiaries.

The method was, however, continued, and according to Statement No. 3, the calculated duty was $372,835.68. If the method used was correct, that amount of duty is a debt to the Crown and should be paid whether or not there is sufficient in the residue when carried forward to Statement No. 4 to pay it and specific gifts, for on the authority already cited if there is insufficient in the residue to pay the duty lawfully due, the specific gifts must abate even though they were given free of duty.

On the other hand, if the difference between the aggregate duty-free gifts and the net aggregate value of the estate is sufficiently great, it is possible to carry on the calculations until the point is reached where a calculation no longer increases the duty over the next preceding amount ascertained, and there may still be some residue for the residuary beneficiaries, whether they are charitable organizations or others.

If that method is sound it should be applied to all such estates with the result, in many instances, that not only would the residue be completely exhausted, but part of the specific gifts, which had been given duty free, would be claimed as duty.

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These two suggested methods are incompatible and no provisions in the Act were relied on to support either, nor were sound reasons advanced for their use.

Very little assistance can be obtained from decided cases, although the Lord President in giving judgment on the appeal in *The Lord Advocate* v. *Millers' Trustees* (*supra*), commenting on the provision contained in section XXI of the Legacy Act of 1796, did say at page 1056:—

> But in the case supposed, this enactment provides that that portion of the executry estate which is so applied to relieve the legatee is not itself to be subject to legacy-duty. *And the reason for the enactment is plain enough.*

In the same case, Lord Adam, speaking of a direction by a testator to pay duty out of the residue, said at page 1059:—

> It is in that case only that the statute comes into play.

While it is difficult to indicate the fallacy in the method of calculation of duty upon duty, thereby increasing the succession to the widow, applying increasing additional rates and exhausting the residue, as used in this estate, the basic error appears to be in the assumption:—

That the duty calculated upon the total of the succession to the widow of $635,363.51 plus the amount of $229,366.23 (the first duty calculated) is a succession within the meaning of the Act.

It has already been decided that the money required to pay the duty on the amount of the gifts given free of duty is an additional succession and that duty is payable on the total of those two amounts, but it does not follow that the duty upon these two amounts, calculated and shown as such on statement No. 2 and amounting to $327,815.93, is also a succession.

The charging sections of the Act, viz. sections 6, 10, and 11, and the relevant definitions have already been quoted.

> The identification of the subject matter of the tax is naturally to be found in the charging section of the statute, and it will only be in the case of some ambiguity in the terms of the charging section that recourse to other sections is proper or necessary. Per Lord Thankerton in *Provincial Treasurer of Alberta* v. *Kerr* [1933] A. C. 710 at 720 and 721.

In all these sections, 6, 10 and 11, it is the "succession" upon which the duty is assessed and levied and the succession, for the purposes of the question under consideration,

by sections 2(m) and (k) means briefly a disposition of property capable of being devised and every estate and interest therein by reason whereof any person shall become beneficially entitled thereto upon the death of any person.

The meaning of the words "become beneficially entitled" has also already been discussed, and while it follows from the authorities that the amount of money required to pay the duty on the dutiable gifts given duty free was a succession and, together with such gifts, dutiable, the duty payable on the sum of the two was, in my opinion, not a succession.

Such last-mentioned duty was not a disposition of property to which the widow became "beneficially entitled". She will benefit by the payment of the same by the executors, out of the residue, but to use, *mutatis mutandis,* the words of Wynn-Parry in *Re Miller's Agreement, Uniacke* v. *Attorney General (supra),* at p. 625, it is not capable of being postulated of her that she has a right to sue for and recover such property.

While, by making gifts free of duty, the testator must be deemed to have intended that such duty, when ascertained, would be an additional gift and would be payable out of the residue of his estate, that the only method of ascertaining the amount of such duty as an additional gift would be by applying the appropriate rates set out in the Schedule to the Act, and that the two gifts would together be subject to duty, if he had known what the exact net value of his estate would be he could have, within a near figure, given his wife sufficient so that after the payment of duty the net to her would have been the total of the specific gifts shown on Statement No. 1 and in the first six items of the columns headed "Successor" and "Succession" on Statement No. 2, with the residue to the Hospital for Sick Children, as shown on Statement No. 3 attached to the Notice of Assessments.

In accordance with the principles of law already quoted, the right of a testator to prescribe the manner in which, as between beneficiaries, duties are to be borne, should not be abridged, and the residue of the estate should not be confiscated unless authority to do so is clearly expressed or implied by the Act.

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Furthermore, the method of calculation used beyond Statement No. 2, the result of which is shown in the columns headed "Successor" and "Succession" on Statement No. 3, has no rational strength as demonstrated by the examples given.

I therefore hold that the Act does not authorize calculations of duty beyond that made on Statement No. 2, which amounted to $327,815.93.

Two other questions were raised by the appellants, viz., first, that the respondent was bound by the practice set out in the explanatory Brochure (Revised to March, 1947) and marked exhibit 3, for the purpose of identification, and, second, that by reason of admissions contained in paragraph 10 of the respondent's defence the appeal should be allowed in any event.

It is unnecessary and therefore improper for me to express an opinion on the second question for it would be *obiter*.

With regard to the practice set out in the Brochure and its admissibility in evidence, while I hold that the Brochure would be admissible as some evidence of the accepted meaning of some words in the Act, the respondent is not bound by the instructions or suggestions contained in the same.

In *The Lord Advocate* v. *Miller's Trustees (supra)*, the Lord Ordinary (Fraser) stated the rule to the effect that the Crown is not bound by the acts or omissions of its officers and that it was needless to inquire what was the reason or origin of this privilege.

To recapitulate; the dutiable successions to the widow, Isabella Arlow, are, first, the total amount of the market values at the death of the testator of the devises and bequests to her free of duty, and, second, the amount of money required to pay such duty. And duty is payable on the sum of those amounts only.

The appeals of the appellants in both the above-named matters will be allowed, and the assessment varied by reducing the duties assessed from $376,315.97 to $327,815.93 as calculated and set out on Statement No. 2 (Exhibit 1b) attached to the Notice of Assessments (Exhibit 1), and the said appellants will have their costs.

Judgment accordingly.

BETWEEN:

1954
Feb. 2
June 2

NATIONAL TRUST COMPANY, LIMITED, BESSIE P. D. WESTON, HELEN SMITH and SADIE WESTON ..... } APPELLANTS,

AND

MINISTER OF NATIONAL REVENUE.. RESPONDENT.

Revenue—Succession Duty—Bequest duty free—No duty on duty.

Held: That a gift free of duty is two gifts and that duty is assessable on the sum of the two as one succession but the act does not authorize further calculation of duty upon duty.

APPEAL under the Dominion Succession Duty Act.

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

R. T. Payton, Q.C. for appellants.

Russell Whiteley, Q.C. and *A. L. DeWolfe* for respondent.

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

POTTER J. now (June 2, 1954) delivered the following judgment:

This is an appeal from a decision of the Minister of National Revenue under section 38 of the Dominion Succession Duty Act, Chapter 89, R.S.C. 1952, whereby he, following a notice of appeal from his assessment of the amounts of duties upon or in respect to successions to property under the last will and testament of James Francis Weston, deceased, affirmed the said assessment.

James Francis Weston, late of the City of Toronto, in the County of York and Province of Ontario, died on or about the 3rd day of August, 1950, having duly made his last will and testament, of which letters probate were issued to the executors therein named, out of the Surrogate Court of the said County of York on the 4th day of October, 1950.

At the date of his death the aggregate net value of the estate of the deceased, as determined by the respondent, was $302,521.57.

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The will of the deceased contained the following relevant provisions:—

II. I appoint National Trust Company, Limited to be the executor of my will and trustee of my estate, and I hereinafter refer to them as my trustees.

IV. I give, devise and bequeath all of my property, both real and personal and wheresoever situate, including any property over which I may have any power of appointment, to my trustees to hold upon the following trusts:

(*a*) To deliver to my wife, Bessie P. D. Weston, for her own use absolutely all articles of personal, domestic and household use or ornament belonging to me, all my furniture, books, plate, pictures, provisions, consumable stores and household effects of every kind, and any or all automobiles and accessories thereto which at the time of my death shall belong to me and be in or about or belonging to or used in connection with my home.

Then followed directions with reference to the provision of a home for his wife as in their absolute and uncontrolled discretion his trustees might consider advisable from time to time and directions with reference to the realization of his estate, with power to his trustees to sell, call in, and convert into money in their discretion any part or parts thereof, or to postpone such conversion, etc., and clauses IV (*d*) and (*e*) were as follows:—

(*d*) Out of my general estate to pay all my just debts, funeral and testamentary expenses, and all succession duties and inheritance and death taxes that may be payable in connection with any insurance or any gift or benefit given by me to any person either in my lifetime or by survivorship, or by this my will or any codicil thereto, to the intent that the respective beneficiaries of any such gift or benefit shall receive, hold and enjoy the same free from payment of any succession duties or death taxes, except to the extent that payment of succession duties or inheritance or death taxes as aforesaid will reduce the residue of my estate to be dealt with as hereinafter set forth. I authorize and empower my trustees to commute any duties or taxes which may be payable in respect of any interest in expectancy.

(*e*) To pay to Helen Smith the sum of twenty-five hundred dollars ($2,500.00) if at the time of my death she is employed as a member of my household staff.

Clause IV (f) directed his trustees to invest the residue of his estate in investments permitted for trust funds and to pay the income from all of the said residue to his wife during her natural life with power to apply in their discretion such part of the capital of the estate as they might

deem advisable for the maintenance or general benefit of his wife. Then followed:—

Upon the death of my wife or upon my death if my wife shall have predeceased me to divide the residue of my estate then remaining into ten (10) equal shares and to deal with the said shares as follows:

(i) Five of such equal shares to be held for Claire Weston Clark, daughter of his deceased niece Marion Clark.

(ii) One of such equal shares to be held for Mary Weston, daughter of Lottie and the late J. Francis Weston.

(iii) One of such equal shares to be paid to his nephew Bruce V. Weston.

(iv) One of such equal shares to be paid to his nephew Charles Weston.

(v) One of such equal shares to be paid to his niece Ethel Hamilton.

(vi) One of such equal shares to be paid to Lottie Weston, widow of his nephew J. Francis Weston.

In the cases of Claire Weston Clark and Mary Weston provision was made for the investment of their shares and the payment of the income therefrom to them in monthly or periodic instalments until they attain the age of thirty years, when the capital of such shares is to be paid over to them with power to make advances from the corpus in each case. Provisions were also made to take effect in the event of the deaths of the beneficiaries if they should predecease the testator or his wife, leaving issue, etc.

On October 3, 1950, the executors filed succession duty returns as follows:—

(1) Statement of Value and Relationship; Form SD 1 and attached schedules;

(2) Statement of Debts; Form SD 14;

(3) Last Will and Testament of James Francis Weston, dated the 22nd day of December, A.D. 1949.

An estimate or tentative assessment, form SD 1-C, mailed by the respondent September 19, 1951, was marked Exhibit 2 and showed in its heading the following:—

Aggregate Net Value $302,521.57 District of Toronto.

	Initial Rate 9%
Aggregate Net Value	$297,349.01
Add: Refund on Fishing Licence	180.00
Value of Real Estate in New Brunswick	800.00
	$298,329.01
Less Cost of Monument	487.44
	$297,841.57

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Add: Gifts Inter-Vivos		
Bruce V. Weston	$ 400.00	
Sadie Weston	3,230.00	
Mary Weston	650.00	
Lottie Weston	200.00	
C. W. Clark	200.00	4,680.00
Revised Aggregate Net Value		$302,521.57

Then followed the values of the successions to the widow, Bessie P. D. Weston, of Class "A", totalling $164,754.53, of which $20,000.00 was exempt from duty, leaving a dutiable succession to her of $144,754.53, to which an additional rate of 14·4, or a total rate of 23·4 per cent. was applied, resulting in a duty of $33,872.56.

In the case of the legacy of $2,500.00 to the appellant Miss Helen Smith, a stranger in blood shown as Class "D", an additional rate of 5·2 per cent. or a total rate of 14·2 per cent. was applied, resulting in a duty of $355.00.

Then followed statements of the gifts inter-vivos and the shares of the remainder held in abeyance.

In the case of the gift inter-vivos of $3,230.00 to the appellant Sadie Weston, sister-in-law, Class "D", an additional rate of 5·4 per cent. or a total rate of 14·4 per cent. was applied, resulting in a duty of $465.12.

The total duty claimed by this document, as an estimate only, was $34,692.68.

On January 15, 1952, a second SD 1-C was made and sent by the respondent to the executors, which showed adjustments in the successions to the widow by which the total value of the same was reduced to $154,850.39, but to which were added the following amounts:—

Ontario Duties	$ 16,846.37
Dominion Duties	17,454.75
	$ 34,301.12

This was an increase of $428.56 over the duty shown on the statement of September 19, 1951, chargeable on the succession to the widow, of $33,872.56.

By these calculations the value of the successions to the widow was increased from $164,754.53 to $189,151.51, of which $20,000.00 was exempt from duty, leaving a dutiable

IN THE EXCHEQUER COURT OF CANADA

General Rules and Orders

Under section 87 of the Exchequer Court Act (R.S.C. 1952, chapter 98) it is ordered that the General Rules and Orders of the Court be amended as follows:

All that portion of Tariff B in the Appendix to the said Rules between the heading "Sheriff" and the heading "Coroners", as amended on August 28, 1951, is repealed and the following substituted therefor:

(1) A sheriff may take and receive for a service rendered by him the fee or allowance permitted by law for a like service in the Superior Court of the Province in which the service was rendered.

(2) In the Provinces where the law does not provide for fees for realization on execution, or "poundage", a sheriff may also take and receive the following:

Poundage on executions and on writs in the nature of executions on the sum made; up to and including $1,000, five per cent; excess over $1,000 and up to and including $4,000, two and one-half per cent; and on excess over $4,000, one and one-half per cent (exclusive of mileage for going to seize and sell and of all reasonable and necessary actual disbursements incurred in the care and removal of property).

(3) Notwithstanding paragraphs (1) and (2) the fee or allowance or fee for realization on execution, or "poundage", that may be taken and received by a sheriff may be increased or decreased in the discretion of the Court or a Judge on the application thereto of any interested party.

DATED at Ottawa, this 9th day of June, A.D. 1954.

J. T. THORSON,
President.

J. CHAS. A. CAMERON,
JOHN D. KEARNEY,
ALPHONSE FOURNIER,
W. P. POTTER,
Puisne Judges.

amount of $169,151.51, to which was applied the additional rate of 15·4 per cent. or a total rate of 24·4 per cent., resulting in a duty on the widow's succession of $41,272.97.

To the succession to Miss Helen Smith, Class "D", were added Ontario duties of $693.00 and Dominion duties of $182.94, increasing the value of her succession to $3,375.94, to which an additional rate of 5·4 per cent, or a total rate of 14·4 per cent. was applied, resulting in a duty of $486.14.

The values of the shares in the remainder held in abeyance were reduced accordingly.

The gift to Sadie Weston, Class "D", of $3,230.00 was increased by the addition of Dominion duty amounting to $239.67, making a dutiable succession of $3,469.67, to which an additional rate of 5·6 per cent or a total rate of 14·6 per cent was applied, resulting in a duty of $506.57.

The total duty claimed by this document was $42,265.68, which is the amount of duty claimed by the Notice of Assessments mailed February 12, 1952.

It was submitted on behalf of the appellants that the amount of money required to pay succession duty on a gift given free of duty is not a succession and that, therefore, the Act does not authorize the respondent to add to a duty-free gift the amount of money required to pay that duty and calculate, at an increased additional rate, duty on the sum of the two.

In the consolidated appeals of *Hospital for Sick Children of the City of Toronto* v. *Minister of National Revenue* and *Executors and Trustees under the Will of George James Arlow, Deceased,* v. *Minister of National Revenue* in which judgment was filed on May 28, 1954 (1), it was held that a gift free of duty is two gifts, one, the subject matter of the gift and the other, a legacy of the sum required to pay the duty thereon, and that duty is assessable on the sum of the two as one succession, but that the Act does not authorize further calculations of duty upon duty.

In the case now under consideration the values of the duty-free gifts were determined by the respondent, the amounts of money required to pay the duty thereon calculated and added to the determined values of the successions and duty calculated on the totals, but the respondent

(1) [1954] Ex. C.R. 420.

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Potter J.

made no further calculations of duty on duty. The assessment is, therefore, in accordance with the judgment in the appeals arising out of the will of the said George James Arlow.

The additional cases cited and the distinctions made between the provisions of the English statutes and the Dominion Succession Duty Act have been considered and the authorities reviewed in the judgment in the appeals arising out of the will of George James Arlow reconsidered in the light of arguments of counsel, but I have been unable to reach different conclusions.

The appeal must therefore be dismissed with costs.

Judgment accordingly.

1954

June 26

June 30

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

DAVID McNAIR & CO. LTD.....PLAINTIFF;

AND

THE SHIP *TRADE WIND*.....DEFENDANT.

Shipping—Damage to cargo—Measure of damages.

Held: That the measure of damages recoverable for damage to cargo is the difference between the sound wholesale market value of the shipment and the damaged wholesale market value at the date and place of the breach.

ACTION for damage to cargo.

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

C. C. I. Merritt for plaintiff.

Vernon R. Hill and *John R. Cunningham* for defendant.

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

SIDNEY SMITH D. J. A. now (June 30, 1954) delivered the following judgment:

This is a case of damage to cargo. The defendant admits liability. The only question for determination is as to the measure of damages. The cargo consisted of a shipment of 57,500 bundles of Mandarin oranges loaded on board the defendant ship in Japan, and destined as to 40,000 bundles to Vancouver, and 17,500 to Victoria. The shipment was delivered in a seriously damaged condition.

Mr. Hill for the defendant, with his usual frankness, admitted that the plaintiffs were the holders in due course of the bills of lading covering the shipment, that they were at all material times the owners of the shipment, that they had taken all reasonable steps to mitigate the loss consequent on the breach of the bill of lading contract, and that such steps did in fact "minimize and restrict the damage to the said shipment". These admissions go far to simplify the sole issue before me. The only evidence given was that of Mr. McNair, President and Manager of the plaintiff company.

The defendant's case was that the damages should be based on the principle of indemnity; that the plaintiffs were entitled to a complete indemnity but to nothing beyond that. The argument was not put quite in such form, but this seemed to be the effect of defendant's submissions. They were based on an examination of plaintiff's books and documents. The plaintiffs, on the other hand, say that the true measure of the damages recoverable by them is the difference between the sound, wholesale, market value of the shipment, and the damaged, wholesale, market value at the date and place of the breach; and moreover that any further dealings they may have had with the shipment are irrelevant to the matter of quantum of damages; *a fortiori* since such dealings met with defendant's approval.

That this is the correct view seems to be established by the authorities to which reference was made. I think the one nearest the present case is *William Brothers* v. *Agius, Limited* (1), where the Lords again stamp their approval on *Rodocanachi* v. *Milburn* (2), which holds that in a situation such as we have here "the market value of the goods was the value in the market, independently of any circumstance peculiar to the plaintiff (the buyer)".

(1) [1914] A.C. 510. (2) (1887) 18 Q.B.D. 67.

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McNAIR & CO. LTD. v. THE SHIP *Trade Wind*

Sidney Smith D.J.A.

It may be useful to refer to two passages from the *Williams* case, one from the speech of Lord Haldane, at p. 520:

> In that case it was held that in estimating the damages for non-delivery of goods under a contract the market value at the date of the breach was the decisive element. In the judgment delivered by Lord Esher he laid down that the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance a contract entered into by the plaintiff with a third party. He said that if the plaintiff had sold the goods before the breach for more than the market price at that date he could not recover on that footing, and that it would therefore be unjust if the market price did not govern when he had sold for less;

and the other from that of Lord Moulton, at p. 530:

> If these were the only facts of the case the contention of the respondents would be precisely that view of the damages in the case of an article purchasable in the market which was negatived by the decision in *Rodocanachi* v. *Milburn*—18 Q.B.D. 67. That case rests on the sound ground that it is immaterial what the buyer is intending to do with the purchased goods. He is entitled to recover the expense of putting himself into the position of having these goods, and this he can do by going into the market and purchasing them at the market price. To do so he must pay a sum which is larger than that which he would have had to pay under the contract by the difference between the two prices. This difference is, therefore, the true measure of his loss from the breach, for it is that which it will cost him to put himself in the same position as if the contract had been fulfilled.

I accordingly hold with the plaintiff's view. Apart from the principle involved, there would seem to be only a few differences on minor items between the parties. It may well be that they can agree on these, but if not, the learned Registrar will assess the damages.

Judgment accordingly.

BETWEEN:

HER MAJESTY THE QUEEN .....PLAINTIFF;

AND

THE HULL SCHOOL COMMISSIONERS, RESPONDENT.

1954

May 25, 26
28, 31
June 1

June 3

Expropriation—Expropriation Act, R.S.C. 1927, c. 64, s. 9—Principle of re-instatement applicable to public school

The plaintiff expropriated property in the City of Hull on which there was a Roman Catholic public school. The action was taken to have the amount of compensation payable to the owner determined by the Court.

Held: That the expropriated property was of an exceptional character warranting the application of the principle of reinstatement.

2. That the defendant should receive such a sum of money as will enable it to replace the expropriated property by property which will be of equal value to it, that is to say, that the sum to be paid should be sufficient to cover the realizable money value of the land, the replacement value of the school building, being its reconstruction cost less its depreciation, these values being computed as of the date of expropriation, the value of the fixtures, the cost of moving to a new school and a sum equal to the increased cost of constructing a new school after the date of the expropriation.

3. That the estimation of the amount of compensation involves sufficient difficulty and uncertainty to bring the case within the ambit of the rule in *The King* v. *Lavoie* for an additional allowance for compulsory taking.

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 President of the Court at Ottawa.

F. B. Major, Q.C. and *R. Farley* for plaintiff.

Hon. A. Taché, Q.C. and *J. Ste-Marie, Q.C.* for defendant.

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

THE PRESIDENT now (June 3, 1954) delivered the following judgment.

The information exhibited herein shows that the lands of the defendant, described in paragraph 3 thereof, together with other lands, were taken by His late Majesty The King for the purpose of a public work under the Expropriation

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Act, R.S.C. 1927, chapter 64, and that the expropriation was completed by filing a plan and description of the lands of record in the office of the Registrar of Deeds for the Registration Division of Hull, in which the lands are situate, on March 19, 1947, pursuant to section 9 of the Act. Thereupon the lands were vested in His late Majesty and the defendant ceased to have any right, title or interest therein or thereto.

The parties have not been able to agree on the amount of compensation money to which the defendant is entitled and these proceedings were brought for an adjudication thereof. The plaintiff by its information offered the sum of $68,247.90 but the defendant by its statement of defence claimed $180,000. At the trial this claim was raised to $250,000, pursuant to leave given.

The expropriated property is on the west side of Maisonneuve Street in Hull, 99 feet north of Boulevard Sacré-Coeur and carries municipal number 311. It has a frontage of 132 feet on Maisonneuve Street and a depth of 194′ 7″. On the property there is a three-storey brick and stone school building known as the Reboul School, of eight class rooms with a manual training room in the basement, maintained by the defendant as a public Catholic school.

The defendant purchased the front half of the land from the Marston Estate on May 22, 1903, for $650. This covered an area of 132′ by 99′ or 13,068 square feet. The back half extending to a projected street was acquired from the City of Hull on August 5, 1942, for the nominal consideration of $1. The area of this portion, including a 10′3″ lane, was 95′ 7″ by 134′ 6″ or 12,858 square feet. The total area of the land comes to approximately 25,926 square feet.

The school building was constructed in three stages. The original portion, approximately half of the total, facing on Maisonneuve Street and consisting of four class rooms and the janitor's quarters, was built in June, 1903, at a cost of $7,400. In May, 1915, there was an addition of two class rooms costing $7,875 and in June, 1923, there was a further addition of two rooms at a cost of $14,023. The average age of the sections as at the date of the expropriation, due regard being had to the fact that half the school was approximately 44 years old, was thus about 36 years.

In my judgment, the expropriated property is of an exceptional character warranting the application of the principle of re-instatement. While Mr. E. Pitt, who gave evidence of the value of the property, stated that he had sold school buildings, similar to the Reboul School, in Montreal for commercial purposes he did not think that he could have sold the Reboul School either for school or for commercial purposes. Under the circumstances, I am of the view that it would be proper to deal with the Reboul School property in the same way as I dealt with the Sacred Heart Hospital property in *The Queen* v. *Sisters of Charity of Providence* (1) and apply the principle of re-instatement as I did in that case. This means that the defendant should receive such a sum of money as will enable it to replace the expropriated property by property which will be of equal value to it, that is to say, that the sum to be paid should be sufficient to cover the realizable money value of the land, the replacement value of the school building, being its reconstruction cost less its depreciation, these values being computed as of the date of expropriation, the value of the fixtures, the cost of moving to a new school and a sum equal to the increased cost of constructing a new school after the date of the expropriation.

[The President then proceeded to consideration of the various items involved in the application of the principle of re-instatement and, after reviewing the evidence, continued.]

The total of the amounts which I have allowed, $9,100 for the land, $70,000 for the building, $4,500 for the desks, $300 for moving and $33,400 for the additional cost of construction comes to $117,300, which I put in round figures at $120,000. On the application of the principle of reinstatement I estimate the value of the expropriated property to the defendant at this amount. In my judgment, this is amply sufficient to cover all the factors of value to the owner that ought to be taken into account and, but for the recent decisions of the Supreme Court of Canada dealing with an additional allowance for compulsory taking, it would be the amount of compensation money, to which I would find the defendant entitled.

(1) [1952] Ex. C.R. 113 at 116.

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It was strongly urged upon me that this was a case in which an additional allowance of 10 per cent for compulsory taking should be made. I dealt with this vexatious question at length in *The Queen* v. *Sisters of Charity of Providence* (1). There I referred to the latest decision of the Supreme Court of Canada on the subject, *The King* v. *Lavoie* (2), where Taschereau J, delivering the unanimous judgment of the Court, laid down the governing rule as follows:

> Le contre-appellant soumet en second lieu, qu'il a droit à un montant supplémentaire de 10% de la compensation accordée, pour dépossession forcée. Ce montant additionnel de 10% n'est pas accordé dans tous les cas d'expropriation, et ce n'est que dans les causes où il est difficile par suite de certaines incertitudes dans l'appréciation du montant de la compensation, qu'il y a lieu de l'ajouter à l'indemnité. (*Irving Oil Co.* v. *The King* [1946] S.C.R. 551; *Diggon-Hibben Ltd.* v. *The King* [1949] S.C.R. 712). Ici, on ne rencontre pas les circonstances qui existaient dans les deux causes que je viens de citer, et qui alors ont justifié l'application de la règle. Il n'a pas été démontré qu'il existait des éventualités inappréciables et incertaines, impossibles à évaluer au moment du procès.

I must now decide whether the allowance should be granted in this case. The question is one of difficulty. The circumstances are, strictly speaking, not of the same nature as those in the cases to which Taschereau J. referred in the passage which I have cited, but they are unusual. The defendant is under a legal duty to maintain public Catholic Schools. The Reboul School was adequate for its purpose in the area which it served and there was no thought of disposing of it or erecting a new school. By the expropriation the defendant has been forced into an immediate expenditure for a new school which it would not otherwise have incurred at that time. On the whole, but not without doubt, I have concluded that the estimation of the amount of compensation involves sufficient difficulty and uncertainty to bring the case within the ambit of the rule in the *Lavoie* case (*supra*) and I make an additional allowance of $12,000 accordingly. This makes my total award come to $132,000. In granting the additional allowance I repeat what I have said in other cases that, in my opinion, the additional allowance of 10 per cent for forcible taking is an unwarranted bonus and that the granting of it should be prohibited.

(1) [1952] Ex. C.R. 113 at 131. (2) December 18, 1950, unreported.

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There remains the matter of interest. The defendant has been in undisturbed possession of the expropriated property ever since it was taken without payment of any rent. Consequently, in accordance with the long established practice of this Court, it is not entitled to any interest.

There will, therefore, be judgment declaring that the property described in paragraph 3 of the Information is vested in Her Majesty as from March 19, 1947; 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 $132,000 without interest; and that the defendant is entitled to costs to be taxed in the usual way.

Judgment accordingly.

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Mar. 22, 23 & 24

June 7

BETWEEN:

DAME ANTOINETTE HOULE.....SUPPLIANT,

AND

HER MAJESTY THE QUEEN.....RESPONDENT,

AND

JOSEPH ALBERT ARCAND AND LOUIS PHILIPPE LACROIX,... } THIRD PARTIES.

Crown—Petition of right—Action by a widow to recover damages from the Crown for her husband's death—Negligence of a servant of the Crown while acting within the scope of his duties—The Exchequer Court Act, R.S.C. 1927, c. 34, ss. 19(c) and 50A—Pensions awarded by the Canadian Pension Commission to widow and her minor children—The Pension Act, R.S.C. 1927, c. 157, s. 11(2)—Receipt of pension under provisions of The Pension Act not a bar to proceedings against the Crown under s. 19(c) of The Exchequer Court Act—Provisions of s. 207(8) of the Pay and Allowance Regulations for the Canadian Army not a bar to right of action under s. 19(c) of the Exchequer Court Act—Funeral expenses of a person killed by negligence of another not recoverable under article 1056 c.c. of Quebec—Plaintiff entitled to costs in action based on negligence despite the fact claim may have been reduced by reason of concurrent negligence.

On December 11, 1950, suppliant's husband, then a member of Canadian Army and on duty, was killed while a passenger in a motor vehicle owned and driven by one A, also a member of the Canadian Army,

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and which collided with another vehicle driven by one L. The Canadian Pension Commission ruled that the death of suppliant's husband was attributable to military service and pensions were awarded to her and her two minor children. Alleging that the said collision occurred as a result of A's negligence while the latter was acting within the scope of his duties, suppliant, by her petition of right, sought to recover damages from the Crown for the death of her husband. Third party proceedings were filed by respondent and served on A and L who filed defences and took part in the trial. On the facts the Court found that at the time of the accident A, while driving his own automobile, was acting within the scope of his duties and employment and that both drivers were negligent. Having fixed L's share of responsibility at 70 per cent and that of A at 30 per cent the Court declared that respondent was entitled to recover from A and L, as third parties, the amount awarded by the judgment to suppliant in proportion to the degree of that responsibility.

Held: That the Pension Act, R.S.C. 1927, c. 157, creates a right of action for compensation for injury or death arising out of and attributable to his military service. The Exchequer Court Act, R.S.C. 1927, c. 34, imposes a liability on the Crown and gives a general right of action for damages for death or injuries resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties. The first liability the Crown accepts is the protection of the members of the armed forces and of the wife and children when the injuries or death is attributable to military service. The second liability arises out of the damages caused by the negligence of an employee on duty. The suppliant has two causes of action, one based on the statutory provisions of the Pension Act, the other based on negligence as provided under section 19(c) of the Exchequer Court Act. *Bender* v. *The King* [1946] Ex. C.R. 529; [1947] S.C.R. 172; *Oakes* v. *The King* [1951] Ex. C.R. 133 referred to and followed. *Meloche* v. *The King* [1948] Ex. C.R. 321 disapproved.

2. That s. 207(8) of the "Pay and Allowance Regulations for the Canadian Army" by which the Crown does not assume any liability or responsibility for any accident, injury or damage to any person or property which may occur while a private motor vehicle is being used by an officer or soldier, is not a bar to the right of action contemplated by s. 19(c) of the Exchequer Court Act. If s. 207(8) did affect the liability of the Crown for damages caused by its servant through negligence while acting within the scope of his duties or employment, it would be limiting the liability to cases where the car involved in a collision belonged to the Crown. This can be hardly reconciled with the statutory liability assumed by the Crown and the statutory right of action provided by s. 19(c) of the Exchequer Court Act.

3. That the funeral expenses of a person who has been killed by the negligence of another are not recoverable from the latter under the provisions of article 1056 c.c. of the Province of Quebec. *Bahen* v. *O'Brien* (1938) 65 K.B. 64 referred to and followed.

4. That the plaintiff who succeeds in an action for damages based on negligence is entitled to his costs, irrespective of the fact that the claim may have been reduced by reason of concurrent negligence on the part of the defendant or his servant. *The King* v. *Lightheart* [1952] Ex. C.R. 12 at 19 referred to and followed.

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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 Fournier at Montreal.

Pierre Décary for suppliant.

John Ahern, Q.C., Paul Trépanier and *Paul Ollivier* for respondent.

Archibald J. MacDonald for third party Lacroix.

Jules Deschenes for third party Arcand.

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

FOURNIER J. now (June 7, 1954) delivered the following judgment:

In this petition of right the suppliant seeks to recover damages from the respondent for the death of her husband, killed as the result of a collision between two motor vehicles. On December 11, 1950, Henry James Kenny, then a member of the Canadian Army and on duty, was a passenger in a motor vehicle operated by Lieutenant Joseph Albert Arcand, also a member of the Canadian Army, alleged to have been then acting within the scope of his military duties, and that the said collision occurred because of the fault and negligence of the said Arcand.

The suppliant is the widow of the said H. J. Kenny, having married him on September 12, 1936. Two children were born of their marriage, namely, Joan Annette, born August 26, 1938, and Carol Marie Antoinette, born September 8, 1942, who are both living. On November 2, 1951, the suppliant was duly appointed tutrix of the above mentioned two minor children. On November 9, 1951, she filed this petition of right claiming damages for the death of the said H. J. Kenny, both in her own behalf and in her quality of tutrix to the two minor children.

The respondent denies responsibility on the grounds 1) that the suppliant and her two minor children being in receipt of a pension under the provisions of the Pension Act,

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R.S.C. 1927, chap. 157, she was barred from proceeding by petition of right under sections 19(c) and 50A of the Exchequer Court Act, R.S.C. 1927, chap. 34; 2) that Lieutenant J. A. Arcand, driving his own automobile, was not acting within the scope of his duties and employment; 3) that even if he were and the collision *was caused by his negligence,* the Crown could not be held liable for the damages claimed according to the Pay and Allowance Regulations of the Canadian Army, 1946, section 207, subsection (8); 4) that the collision was caused by the fault, negligence and false movement of Louis Philippe Lacroix, owner and driver of the other motor vehicle involved in the collision.

A third party notice was filed herein by the respondent on August 19, 1952, and served on L. P. Lacroix and J. A. Arcand, third parties. By order made on February 4, 1954, it was directed that the question of liability as between the third parties and the respondent be tried at the trial of the action; that the third parties be at liberty to defend the action, to appear at the trial, to plead and to take part therein and that the third parties be bound or made liable by judgment in the action in the manner and to the extent as may be determined by the judge before whom the action shall be heard. Both third parties appeared at the trial, filed pleas and took part in the trial.

Before considering the facts which caused the collision and the amount, if any, of the damages sustained by the widow and minor children, the main issues between the parties must be determined.

The suppliant's petition of right is taken under subsection (c) of section 19 and section 50A of the Exchequer Court Act, R.S.C. 1927, chap. 34, as amended.

The material part of section 19 reads as follows:—

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.

Section 50A is thus worded:—

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.

Counsel for the respondent submits first that the suppliant and her two minor children being in receipt of a pension under the provisions of the Pension Act, R.S.C. 1927, chap. 157, as amended, she has no right of action under the above sections of the Exchequer Court Act.

The pension awarded and payable to the suppliant and her two minor children was paid under the provisions of section 11 (2) which read:

11. 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.

2. In respect of military service rendered after the war, pensions shall be awarded to or in respect of members of the forces who have suffered disability, in accordance with the rates set out in Schedule A of this Act, and in respect of members of the forces who have died, in accordance with the rates set out in Schedule B of this Act, when the injury or disease or aggravation thereof resulting in disability or death in respect of which the application for pension is made was attributable to military service as such.

The Pension Commission ruled that H. J. Kenny was a member of the armed forces and that his death was attributable to military service. Upon the application of the suppliant, pensions were awarded to her and the two children at current rates.

Has the suppliant, widow of a service man, and receiving the benefits of the Pension Act, the right to claim damages from the respondent under section 19(c) of the Exchequer Court Act? This is the first question to be determined.

In the case of *Oakes* v. *The King* (1) Cameron J. held "that the receipt of pension under the provisions of the Pension Act, R.S.C. 1927, chap. 157, is not a bar to proceedings against the Crown under section 19 (c) of the Exchequer Court Act, R.S.C. 1927, chap. 34". He based his finding on the principles laid down by the learned President of this Court in *Bender* v. *The King* (2) where it was held "that an employee of the Crown who has claimed and received compensation for injuries arising from and out of the course of his employment under the Government

(1) [1951] Ex. C.R. 133. (2) [1946] Ex. C.R. 529.

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Employees Compensation Act is not thereby barred from pursuing his claim for damages for such injuries under section 19 (c) of the Exchequer Court Act."

An appeal was taken by the Crown to the Supreme Court, which affirmed the judgment of the learned President (1). The head-note reads in part:

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 anyone's part is proved; the right thereunder arises, not out of tort, but out of the workman's statutory contract.

The only other case brought to my attention by counsel for the respondent was that of *Meloche* v. *The King* (2) in which Angers J. held:

1. That a soldier of the Canadian Army who is wounded or killed on active service and his dependents have no claim against the Crown on account of injuries or death under ss. 19 (c) and 50A of the Exchequer Court Act since Parliament has in their favour created a special remedy by way of a pension under the Militia and the Pension Acts.

2. That where a special remedy is created by a statute it prevails over that provided by the general law.

It was argued that this last decision should apply to the present case because the remedy by way of pension by the Pension Act to the wife and minor children of a member of the forces killed under certain circumstances prevails over the provisions of sections 19 (c) and 50A of the Exchequer Court Act. I cannot agree with this principle.

The pension granted and paid to the suppliant and her children was for the death of her husband killed while on duty and whose death was attributable to his military service.

In this petition she claims damages for the death of her husband killed through the negligence of a servant of the Crown while acting within the scope of his duties.

The Pension Act creates a right of action for compensation for injury or death arising out of and attributable to his military service. The Exchequer Court Act imposes a

(1) [1947] S.C.R. 172. (2) [1948] Ex. C.R. 321.

liability on the Crown and gives a general right of action for damages for death or injuries resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties. The first liability the Crown accepts is the protection of the members of the armed forces and of the wife and children when the injuries or death is attributable to military service. The second liability arises out of the damages caused by the negligence of an employee on duty.

As the President of the Court says in the case of *Bender* v. *The King (supra),* the two enactments deal with entirely different matters and separate and distinct rights are conferred. The suppliant has two causes of action, one based on the statutory provisions of the Pension Act, the other based on negligence as provided under section 19 (c) of the Exchequer Court Act.

The Supreme Court of Canada in re *Bender* v. *The King* decided that the enactments were not repugnant to each other and that they dealt with entirely different matters.

This decision, in my mind, applies as to the enactments of the Pension Act and the Exchequer Court Act applicable to the facts of the present case.

For the above reasons, I have come to the conclusion that the suppliant herein, though in receipt of a pension under the Pension Act, has a right of action against the Crown under section 19 (c) and section 50A of the Exchequer Court Act.

It was then submitted that at the time of the collision Lieutenant J. A. Arcand was driving his own car and was not acting within the scope of his duties or employment.

He had been ordered to proceed to Sherbrooke on December 11, 1950, with Sergeant Major Kenny and Sapper St. Aubin, to do some inspection work.

On August 8, 1950, his superior officer, Major J. D. Hazen, R.C.E., A/Command Engineer Officer, Quebec Command, had requested from the D.A.Q.M.G., under paragraph 207 (2) (a) of the Pay and Allowance Regulations, that Lieutenant Arcand be authorized to use his own car while carrying out his duties. On August 9, 1950, he was granted this authority to use his car and claim reimbursement under the provisions of the Pay and Allowance Regulations (see

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Exhibit 2). Being thus authorized, he proceeded in his own car to Sherbrooke with his associates, as ordered. En route, the collision occurred.

At the trial the respondent filed as Exhibit D a form entitled "Route Directions and Claim for Travelling Expenses and Subsistence". This document was put in evidence to establish the procedure followed by the National Defence Department in the settlement of claims for travelling expenses when a private car was used. It carries a certificate that the car was used in the public interest while on military duty and with the proper authorization. The same procedure was followed in the present instance, but the claim was not pressed because the Department, on hearing of the collision, sent a military vehicle to take care of the transportation of their three men. Lieutenant Arcand, now a captain, was a member of the Royal Canadian Engineer Corps and was going to Sherbrooke to act as a member of a Board of Officers for the taking over of property which had been purchased by the Department. He was authorized to use his car as a means of transportation for the carrying out of his duties. He was on duty on that trip and the driving of his vehicle was within the scope of his duties. I cannot agree with the submission of the respondent on this point.

Then it was argued that the Crown was not liable or responsible for any accident, injury or damage to any person or property which may occur while a private motor car is being used by an officer or soldier under section 207 (8) of the Pay and Allowance Regulations and that the suppliant had no right to action against the respondent in this instance.

When section 50A of the Exchequer Court Act was enacted it had the effect of imposing a liability on the Crown and creating a right of action which had not previously existed. Members of the armed forces then became, as all other officers or employees, for all purposes of the Act, servants of the Crown.

This section of the regulations may establish the relationship between the Department and the members of the armed forces when injuries and damages to persons and property are caused by members of the forces driving their own vehicle on duty, but would not affect the liability of

the Crown for damages caused by their servant through negligence while acting within the scope of his duties or employment. If it had, it would be limiting the liability to cases where the vehicle involved in a collision belonged to the Crown. This conclusion, in my mind, can hardly be reconciled with the statutory liability assumed by the Crown and the statutory right of action provided by section 19 (c) of the Exchequer Court Act.

The Crown may well, as regards its own servant, not assume responsibility and reserve its recourse to recover amounts paid for damages resulting from its servants' wrongful acts, as was done in this case, by giving a third party notice to Lieutenant Arcand, but this regulation is certainly not a bar to the right of action contemplated by the section of the Act above mentioned.

Having arrived at the conclusion that the suppliant and her children, though they came under the provisions of the Pension Act and were in receipt of a pension, are not deprived of their right of action and that Lieutenant Arcand, who was driving his own vehicle with proper authority at the time of the collision, was a servant of the Crown within the meaning of section 50A and acting within the scope of his duties and that furthermore section 207 (8) of the Pay and Allowance Regulations was no bar to the suppliant's claim, it follows that they were entitled to invoke the provisions of section 19 (1) (c) of the Exchequer Court Act and to recover damages if they were the result, in part or in whole, of the negligence of the respondent's servant.

Now here is a summary of the facts relating to the collision. L. P. Lacroix, one of the third parties, on December 11, 1950, between one and one thirty p.m., left Sherbrooke for Montreal. He was driving his own automobile, a Plymouth, model 1948. He was accompanied by his wife and his sister-in-law, who were seated with him on the front seat. He was travelling east-west on No. 1 highway, a thoroughfare comprising three traffic lanes. The weather was clear and the visibility was good. The road from Sherbrooke to Granby was in perfect condition. From Granby on, the highway was covered by five or six inches of snow which had fallen the previous day. The

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passage of traffic had created two sets of ruts on the road. One, on the north side, was used by vehicles going from Granby to Montreal; the other, on the south side, was used for the traffic from Montreal to Granby. Though the witnesses did not look at the speedometer they state that they were travelling at 30 to 35 miles an hour.

Some short distance after leaving St. Paul d'Abbotsford they passed a truck and to do so Lacroix increased somewhat his speed. The driver of the truck, though he paid no attention to his speedometer, says he was travelling at a rate of from 25 to 30 miles an hour. He followed the other vehicle for eight or ten minutes. He was then trailing the Lacroix automobile by five or six arpents or about 1,000 feet. He had seen another car coming in the opposite direction some five or six arpents ahead of the car he was following, so he saw the other some 2,000 feet ahead. The car had just turned a curve when it started to skid from right to left, then from left to right. This happened two or three times. The last time, this automobile came right over on its left side of the road but pulled immediately to its right. During all this time, Lacroix was travelling on his right side of the road. Seeing the other car coming head-on at quite some distance, he applied his brakes but they had no effect, there being ice under the snow, and he veered to the left to let the other car pass him on his right. That is when the collision occurred. It was then about 2.30 p.m. The collision took place some sixty miles west of Sherbrooke.

Lieutenant J. A. Arcand left Montreal to go to Sherbrooke some time in the forenoon on the same day. He was driving his own automobile, a two-door Ford, model 1950. He had three passengers, his father, who was seated in front with him, and Sergeant Major Kenny and Sapper St. Aubin, who were seated on the rear seat. He was travelling west-east on the same highway. The road, from Montreal to the place of the collision, was covered with five or six inches of snow, with ruts forming two lanes of traffic. Being in no particular hurry or rush, witnesses say that he was travelling at a speed of from 30 to 35 miles an hour, though nobody looked at the speedometer. The day was bright and there was nothing to obstruct his vision. He was travelling on his right side of the road. He had

just passed a slight curve when his car started skidding. The rear end of his car swerved to its left. He does not know what caused the skidding but thinks that probably there was ice under the snow. He turned his wheel to straighten the car out, but then it swerved to the right. He crossed partially across the road into the tracks to his left. At that time, it appeared that he was going to go right across the highway, but he turned his wheel to the right and came back to his right side. The rear of his car was partially on the right side of the centre of the road and the front on his right side when the back left side of his car was struck by the other car.

One fact is certain, the road from Granby going west was in a very bad condition. There was ice under the snow. Lacroix, when he saw the oncoming vehicle, applied his brakes but without any effect. He said the road was slippery and at his speed could not have stopped before covering one to two arpents, which is to say from 180 to 360 feet. Arcand did not apply his brakes but decreased his speed by giving less gas and still could not control his vehicle. His car continued to skid on account, in my mind, of its speed and the slippery pavement. When the roads are in such a condition, it is compulsory that drivers limit their speed. The general principle laid down in the Quebec Motor Vehicles Act, R.S.Q. 1941, chap. 142, and amendments thereto, reads as follows:

41. Any speed or imprudent action which might endanger life or property is prohibited on all the roads of the Province.

In my opinion both Lacroix and Arcand were driving their vehicles at a dangerous rate of speed at the time of or immediately preceding the collision.

I have no doubt that the speed at which both vehicles were driven was dangerous and illegal considering the circumstances. Lacroix, having left Sherbrooke between 1 and 1.30 p.m. and arrived at the place of the collision at 2.30, covered some sixty miles in less than one hour and thirty minutes. Then, when he saw an oncoming vehicle, at quite a distance, the driver of which had lost control of his car, his speed was such that he could not stop in time to avoid the accident. Faced with that fact, he had two alternatives, veer to his right or to his left. Had he turned

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to his right, he could have avoided the collision, because there was sufficient space on the paved portion of the highway and on the shoulder of the road, on that side, to pass the other car without incident. But instead, he veered to the left and struck the rear left side of the other car which was then anglewise on the centre and on its right side of the road. To say that in the agony of collision he should not be blamed for making this wrong decision is not justified. He put himself in this position by driving at an excessive rate of speed, as the physical results of the impact on both vehicles would indicate. If he himself had done nothing to bring about the emergency with which he was faced and if the imminence of the collision was wholly due to the other automobile he would not have been at fault. In my opinion, his own negligence contributed to a large extent to create the emergency. When seeing the other car coming from the opposite direction and skidding from one side of the road to the other, his duty was to stop or slow down. His failure to do that can only be explained by his excessive speed.

As to Arcand, he was driving on a snowy and icy road. His speed was such that when his car started skidding he lost control thereof and could not avoid the collision. The distance covered while skidding indicates that his speed was excessive under the circumstances.

I have come to the conclusion that both drivers were negligent and at fault. The excessive speed at which they were driving their vehicles before and at the time of the accident was the *causa causans* of the collision. I am, therefore, of the view that there was "faute commune" of both third parties, with the greater portion of the blame attached to L. P. Lacroix. I fix his share of responsibility at 70 per cent and that of J. A. Arcand at 30 per cent.

The suppliant personally claims $66,640 for damages "as a result of the loss of her husband and the support to which she was entitled" and as tutrix to her two minor children she claims a further sum of $10,000 for each as a result of the loss of their father. The suppliant's husband was thirty-nine years and some months at the time of his death and she was a few years younger. The two children were then approximately eight and twelve years of age.

At the time of his death Kenny was in perfect health. He had been a member of the Canadian Army for twenty years. During the two years preceding his death (1949 and 1950) he received in pay and allowances the sum of $6,857.67. In December 1950, his pay and allowances had been increased to $333 per month.

His life expectancy at the time of his death and that of his wife was over thirty years. For some years to come, the suppliant and her husband would have normally been in receipt of nearly $4,000 a year. Her evidence is that at the present time it costs her $342 a month to maintain herself and her two children. This would include all the ordinary expenses for the upkeep of the family.

The suppliant's right to recover compensation for the death of her husband, killed through negligence, should be the pecuniary benefit which the family could have enjoyed had the head of the family not been killed. The determination of the compensation cannot be mathematical, because the basis upon which the amount will be determined will be estimated on probabilities difficult to foresee.

In fixing the amount of damages sustained, I have taken into consideration the life expectancy of the suppliant and her husband, the ages of the two children and the probable amount which the deceased would have contributed to their support had he lived. I was also mindful of the fact that the suppliant and her two minor children were in receipt of a pension under the provisions of the Pension Act. Inasmuch as it was possible, I have taken into account all the ordinary events that may happen in one's life, during a certain number of years, which may increase or decrease productive capacity and the financial aid that may be normally expected by one's dependents. After doing so, I have reached the conclusion that the sum of $20,000 over and above any amount received by the suppliant and her children from the respondent as pension or otherwise would be a fair compensation for the damages sustained. This amount should be divided as follows: to the widow, in her personal capacity, the sum of $15,000; to Carol Marie Antoinette Kenny, the youngest daughter, the sum of $3,000; to Joan Annette Kenny, the sum of $2,000.

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The suppliant also claims the amounts disbursed for funeral expenses and mourning apparel. I do not think that the respondent is liable for this claim: see *Halsbury's Laws of England,* second edition, vol. 3, p. 459, No. 864, where the author says:

> 864. The funeral expenses of a person who has been killed by the negligence of another appear to be in no case recoverable from the latter either under the Fatal Accidents Act, 1846, or at common law.

See also *Bahen* v. *O'Brien* (1). The head-note is in part as follows:

> La veuve qui exerce le recours de l'article 1056 C.C. ne saurait réclamer les frais funéraires à l'auteur d'un quasi-délit qui a causé la mort de son mari.
>
> Le deuil de la veuve doit être acquitté par la succession; celui des filles reste à la charge de celles-ci.

In this case the suppliant seeks remedy as the widow of the victim J. H. Kenny and not as one of his heirs. This claim is disallowed.

The Court found that the respondent was liable for the damages caused to the suppliant and H. J. Kenny's two minor children by the negligence of its servant J. A. Arcand, while acting within the scope of his duties and employment, to the extent of 30 per cent. The suppliant having exercised her right of action against the respondent, as was her privilege, and the respondent being one of two or more persons responsible jointly and severally for the damages caused by the negligence of its servant, the respondent is held liable for the total amount awarded. This is in accordance with the principle enunciated in article 1106 of the Civil Code which reads as follows:

> 1106. The obligation arising from the common offence or quasi-offence of two or more persons is joint and several.

It is settled by the practice of this Court that the suppliant who succeeds in an action for damages based on negligence is entitled to his costs, irrespective of the fact that his claim may have been reduced by reason of concurrent negligence on the part of the respondent or his servant: *vide The King and Wilfred Lightheart* (2).

In accordance with the general rules and orders of this Court, the respondent gave a third party notice to L. P. Lacroix and J. A. Arcand. They appeared, filed their

(1) (1938) 65 K.B. 64 et seq. (2) [1952] Ex. C.R. 19.

defence and took part in the trial. The question of liability as between the third parties and the respondent was tried at the trial of the action.

It was found that both third parties were to blame for the damages caused to the suppliant and her minor children and that the greater portion is attached to L. P. Lacroix. His responsibility was fixed at 70 per cent and that of J. A. Arcand at 30 per cent. The respondent is entitled to recover from the third parties the amount awarded by this judgment to the suppliant and her costs in proportion to the degree of their responsibility above stated. The respondent is also entitled to the costs of the third party proceeding, recoverable from the third parties in the same proportion.

There will, therefore, be judgment declaring that the suppliant is entitled to recover from the respondent the sum of $20,000 without any deduction therefrom of any amounts heretofore paid to her by the respondent either on her own behalf or on behalf of the minor children; the said amount to be divided as follows: to the suppliant in her personal capacity, $15,000, as tutrix to Carol Marie Antoinette Kenny, the youngest daughter, the sum of $3,000 and as tutrix to Joan Annette Kenny, the sum of $2,000. The suppliant will also have her costs.

The respondent is entitled to recover:

1. from L. P. Lacroix, third party, $14,000, or 70 per cent of the amount awarded, plus 70 per cent of the costs of the action and third party proceedings;
2. from J. A. Arcand, third party, $6,000, or 30 per cent of the amount awarded, plus 30 per cent of the costs of the action and third party proceedings.

Judgment accordingly.

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Jan. 27, 28
June 17

BETWEEN:

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

AND

CONSOLIDATED GLASS LIMITED ....RESPONDENT.

Revenue—Income—Deduction of capital loss—The Income Tax Act S. of C. 1948, c. 52 as amended, s. 73A(1)(a)(iii), 95A(1) (c. 40, S. of C. 1950)—"Undistributed income on hand"—Computation of undistributed income—Capital loss sustained before 1950—Loss incurred over several years—"Capital losses sustained" do not have to be realized.

Respondent company held shares in another company which shares depreciated in value over a period of years. Respondent claimed deduction from income for capital losses accrued over a period of years prior to 1950 due to such depreciation in value. The Income Tax Appeal Board allowed an appeal from the assessment which had disallowed such deduction. From that decision the Minister of National Revenue appealed to this Court.

Held: That "capital losses sustained" in s. 73A(1)(a)(iii) of the Act do not have to be realized and the depreciation in value of the shares held by respondent over a period of years are capital losses sustained by respondent in those years prior to the 1950 taxation year.

APPEAL from a decision of the Income Tax Appeal Board.

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

Peter Wright, Q.C. and *T. Z. Boles* for appellant.

J. G. Edison for respondent.

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

POTTER J. now (June 17, 1954) delivered the following judgment:

This is an appeal by The Minister of National Revenue, hereinafter called the appellant, from a decision of the Income Tax Appeal Board dated March 26, 1953, and mailed March 31, 1953, allowing an appeal from an assessment by the appellant dated May 22, 1951, whereby the appellant disallowed a deduction of $114,510.25 claimed by the Consolidated Glass Limited, hereinafter called the respondent, in its statement of undistributed income on

hand at the end of the 1949 taxation year, as a capital loss arising out of an alleged depreciation in the value of 1,550 preference shares and 19,944 common shares of Canadian Libby-Owens Sheet Glass Company, Limited, purchased by the respondent in the years 1920, 1921, and 1922, for a total amount of $154,510.25 and which had been written down in the year 1948, in accordance with a resolution of the directors of October 5 of that year, to $40,000.

The respondent was incorporated under the name of The Consolidated Plate Glass Company of Canada, Limited by Letters Patent issued June 20, 1893, under The Companies Act, Chapter 119, R.S.C., 1886, with head office at Toronto in the Province of Ontario, and with a capital divided into 2,500 shares of a par value of $100 each.

There were some changes in the capital structure of the respondent and at the time of filing its income tax return for the year ending December 31, 1948, it consisted of 10,000 shares of a par value of $100, of which 4,500 shares were issued and fully paid up.

On January 2, 1947, the respondent's name was changed to Consolidated Glass Limited.

Canadian Libby-Owens Sheet Glass Company, Limited was incorporated by Letters Patent issued October 16, 1920, under The Companies Act, Chapter 79, R.S.C., 1907, as a subsidiary of Libby-Owens-Ford Glass Company of Toledo, Ohio, with a capital divided into 15,000 eight per cent cumulative preference shares of a par value of $100 each, and 36,000 common shares of no par value, and it erected a manufacturing plant in Hamilton in the Province of Ontario.

This latter company began business in the year 1921, and its first financial statement covered the period October 16, 1921, to September 30, 1922. It operated as a manufacturing company for about eighteen months only and its plant was closed down in April of the year 1923. With the exception of rentals received from time to time from the city of Hamilton for the use of its buildings, it for a period, received no other revenue. According to the evidence, competition from foreign manufacturers of glass, particularly those of Belgium, the franc of which had

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depreciated to about two cents in Canadian money, had become so great that it was unprofitable to continue manufacturing operations.

On February 1, 1925, the Canadian Libby-Owens Sheet Glass Company and the Libby-Owens Sheet Glass Company, as its name then was, of Ohio, United States of America, entered into an agreement with Compagnie Internationale Pour La Fabrication Mécanique Du Verre, a corporation of the Kingdom of Belgium, referred to as "Mecaniver", whereby the Belgian company agreed to furnish polished and unpolished glass to Canadian Libby-Owens Sheet Glass Company, Limited to fill orders obtained by it in Canada, at a commission of 7½ per cent, f.o.b. Antwerp, which agreement was to continue in force for a period of ten years from the date thereof and which was from time to time extended until Belgium was occupied by the German armies in 1940, when shipments of glass from Belgium were discontinued until they were resumed in the year 1945. Some commissions were, however, collected by the said company in the year 1941.

In the year 1941 the plant and buildings of the Canadian Libby-Owens Sheet Glass Company were sold to the Crown in the right of Canada, when proper entries were made in the accounts of that company.

According to copy of a ledger sheet of the respondent, it made purchases of the preferred shares of the Canadian Libby-Owens Sheet Glass Company, Limited as follows: December 7, 1920, $150,000; January 28, 1921, $5,000; January 12-13, 1922, $9,510.25; making a total of $164,510.25, but $10,000 worth of the first lot of stock, purchased on December 7, 1920, was sold on January 28, 1921, for $10,000, leaving the respondent with an investment of $154,510.25 in the preference stock of the said company. A number of common shares were acquired with the said preferred shares.

With the exception of the years 1927, 1928, 1929, and 1930, the Canadian Libby-Owens Sheet Glass Company, Limited operated at losses up to the year 1942, when there were some small profits arising out of operations, as also for the years 1942 to 1949 inclusive, but the manufacturing plant of this company had been sold, as already stated, to

the Crown in the right of Canada in 1941, and its revenue was from commissions on sales of glass manufactured elsewhere.

At a meeting of the directors of the respondent held October 5, 1948, the Board gave its approval to writing up the then book value of Montreal property from $45,000 to an appraised value of $164,423.82, or an increase of $119,423.82, and to the transfer of $113,785.21 from depreciation and property reserve account to the credit of the respondent's investment in Canadian Libby-Owens Sheet Glass Company, Limited, the effect of which would leave the value of the respondent's investment in that company at $40,000.

It will be noted that the difference between $40,000 and the figure at which the shares were carried on the ledger of the respondent, according to Exhibit C, was $114,510.25, a difference of $725.04 more than the amount mentioned in the minutes of the directors' meeting, which difference was explained by counsel, who said that there was a deficiency of a few dollars in the directors' minutes because they did not have the financial statements in front of them at the time.

The matter was evidently noticed by the auditors for, in their report dated April 30, 1949, attached to the income tax return for the fiscal period ending December 31, 1948, they say:—

> The real estate and buildings were appraised during the year by the Dominion Appraisal Company, Limited at depreciated replacement value of $414,199.75. The book value of these assets has been increased by $217,309.22 to give effect to this appraisal. Of this sum $114,510.25 has been applied to the book value of the investment in Canadian Libby-Owens Sheet Glass Company, Limited, reducing this account to $40,000.

The values of real estate and buildings given in this section of the auditors' report evidently cover all real estate and buildings held by the respondent.

In the year 1949 the respondent had also acquired 16,296 common shares of the Libby-Owens Company at a nominal amount of ten cents a share or sixteen hundred-odd dollars, because there had been a discussion from time to time with a view of reducing the capital stock of that company and putting it on a basis whereby a small dividend might be declared.

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By section 32 of chapter 40 of the Statutes of 1950, assented to June 30, 1950, it was provided in part as follows:—

32. The said Act is further amended by inserting immediately after Part I thereof the following:

"Part IA

"Tax on Undistributed Income.

"95A. (1) A private company may elect, in prescribed manner and in prescribed form, to be assessed and to pay a tax of 15 per cent on an account equal to its undistributed income on hand at the end of the 1949 taxation year minus its tax-paid undistributed income as of that time."

Then followed provisions with reference to the class of companies entitled to take advantage of these provisions and the method by which the election should be made, etc.

Before this amendment became law a meeting of the directors of the respondent was held on June 6, 1950, the minutes of which contained the following:—

The Chairman pointed out that Part 1-A of the "Income Tax Act" presently being enacted by Parliament of Canada would permit the Company to elect to pay a tax of 15 per cent on its undistributed income on hand at December 31, 1949, with the result that the balance of the said undistributed income would be "tax-free undistributed income". After discussion a motion duly made, seconded and carried unanimously.

IT WAS RESOLVED THAT

(1) the Company does hereby elect to be assessed and to pay a tax of 15 per cent on an amount equal to its undistributed income on hand as at December 31, 1949.

(2) Mr. A. G. Hayes and Mr. J. M. Hobbs be and they are hereby authorized to execute all documents and do all things which are required to make the foregoing election on behalf of the Company, and to pay the amount of the tax estimated to be due to the Minister of National Revenue, including the execution of all forms evidencing the election of the Company in the manner prescribed by, in regulations, issued under the provisions of the "Income Tax Act".

Subsequently, the respondent prepared a form PC2—1949, together with schedules thereto, which was described by counsel for the appellant as "a return in lieu of a return called PC-2 which is made by a company which is electing to pay these taxes and in fact the return, which will be Exhibit 1 which I am submitting, is not actually in the form of the PC-2, but it has all the substance of it, and it has been accepted on that basis and no question raised with regard to it".

This document was received by the appellant on July 31, 1950, and in Schedule 2 thereof, entitled "Capital Losses Sustained", was shown an item, "1948 Loss on Canadian Libby-Owens Sheet Glass Company, Limited Shares, $114,510.25", and the net undistributed income shown was $79,439.07, on which the respondent paid or forwarded the amount of $11,915.86, being 15 per cent of the same, according to its calculation.

By Notice of Assessment by the appellant dated May 22, 1951, the following was shown:—

Undistributed Income Declared	79,439.07
ADD: Per Attached	142,099.05
	221,538.12
DEDUCT:	57,484.07
	$164,054.05

In the sheet attached to the Notice of Assessment the appellant disallowed as a deduction and added to the respondent's declared undistributed income the following item:—

Canadian Libby-Owens $114,510.25

On July 12, 1951, the respondent filed Notice of Objection, reiterating its claim to be entitled to deduct the sum of $114,510.25 from its undistributed income as a capital loss sustained.

Notification by the Minister dated November 13, 1951, was duly sent to the respondent, confirming the said assessment

as having been made in accordance with the provisions of the Act and in particular on the ground that in determining the undistributed income on hand at 31st December, 1949, under the provisions of subsection (1) of section 73A of the Act the loss sustained in the 1950 taxation year is not deductible.

It will be noted that the notification by the Minister refers to the loss as having been sustained in the 1950 taxation year, although the loss is shown on said Schedule 2 as having occurred in the year 1948, and the resolution of the Board of Directors authorizing that $113,785.21 be applied to the investment account was passed on October 5, 1948. The reply to the Notice of Appeal to the Income Tax Appeal Board, however, refers to the amount of $114,510.25 as not being a loss sustained by the appellant

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(respondent) in the course of the years involved. This difference between the two documents was not mentioned in the arguments of counsel.

Following the receipt of the notification by the Minister, the respondent appealed on February 1, 1952, to the Income Tax Appeal Board, which appeal was heard on November 17, 1952, and judgment given on March 26, 1953, allowing the appeal of the respondent, vacating the assessment, and referring the matter back to the Minister for re-assessment.

From the judgment of the Income Tax Appeal Board the appellant herein appealed, and the matter was heard before this Court on the 27th and 28th days of January, 1954.

The sections of the Income Tax Act relevant to this appeal are as follows:—

73A. (1) In this Act

(*a*) "undistributed income on hand" of a corporation at the end of, or at any time in, a specified taxation year means the aggregate of the incomes of the corporation for the taxation years beginning with the taxation year that ended in 1917 and ending with the specified taxation year minus the aggregate of the following amounts for each of those years:

(iii) the amount by which all capital losses sustained by the corporation in those years before the 1950 taxation year exceeds all capital profits or gains made by the corporation in those years before the 1950 taxation year,

95A.(1) A corporation (formerly a private company) may elect, in prescribed manner and in prescribed form, to be assessed and to pay a tax of 15 per cent on an amount equal to its undistributed income on hand at the end of the 1949 taxation year minus its tax-paid undistributed income as of that time.

It was contended on behalf of the respondent herein that there was a loss with respect to the Canadian Libby-Owens Sheet Glass Company, Limited shares which was sustained prior to the end of the 1949 taxation year; that the deduction claimed does not represent a calculation of an apprehended future loss but represents an actual ascertained loss set up in its books, confirmed by its auditors, and shown in its balance sheet in accordance with good accounting practice; that the contention of the appellant herein that the respondent's loss cannot be taken into account because the shares were not sold or disposed of before the 31st of December, 1949, is wrong in law and that whether or not a capital loss was sustained is in each case a question of fact.

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On behalf of the appellant it was submitted among other things that the words "capital losses sustained" are to be interpreted with the aid of the definition of "loss" contained in section 127(1)(*w*), formerly section 139(1)(*x*), which is as follows:—

127. (1) In this Act,

(*w*) "loss" means a loss computed by applying the provisions of this Act respecting computation of income from a business mutatis mutandis (but not including in the computation a dividend or part of a dividend the amount whereof would be deductible under section 27 in computing taxable income) minus any amount by which a loss operated to reduce the taxpayer's income from other sources for purpose of income tax for the year in which it was sustained;

It was also submitted by the appellant that no deductions for "capital losses sustained" were permitted unless the losses had actually been realized by the sale or destruction of the portion of the capital in question; that to permit a deduction as a capital loss sustained the depreciation in the value of the shares in question, which occurred over a period of years but claimed in a certain year, would in effect be permitting a taxpayer to use his own discretion as to when he would claim a loss, or in other words permit a taxpayer to put against actual ascertained receipts from his business in one period a loss which was neither suffered nor incurred in that period and that there is no authority for deducting anticipated losses or contingent liabilities.

Counsel for the appellant admitted that the cases on which he relied dealt with the computation of income and not capital losses as such, but he urged that the principle involved was that it was the actual loss and not the anticipated or inevitable loss expected to be suffered, that a taxpayer was permitted to deduct.

Counsel on both sides admitted that there was some dearth of authority on what are "capital losses sustained" as those words are used in section 73A(i)(iii).

The sections of the Income Tax Act under consideration deal exclusively with corporations, and section 127(1)(*h*) defines "corporation" as follows:—

(*h*) "corporation" includes an incorporated company and a "corporation incorporated in Canada" includes a corporation incorporated in any part of Canada before or after it became part of Canada.

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It can be assumed that, in enacting these sections, Parliament had knowledge of the provisions of The Companies Act, chapter 27, R.S.C., 1927, and the Companies Acts of the various provinces of Canada.

Several of such statutes provide for the reduction of share capital by companies under certain circumstances and for certain reasons, one of which is by the cancellation of paid-up share capital which is lost.

The English Companies Act, 1948 (11 & 12 Geo. VI, Ch. 28) by section 66 provides as follows:—

66. (1) Subject to confirmation by the court, a company limited by shares or a company limited by guarantee and having a share capital may, if so authorized by its articles, by special resolution reduce its share capital in any way, and in particular, without prejudice to the generality of the foregoing power, may—

(*b*) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share *capital which is lost* or *unrepresented by available assets;*

The English Companies Act, 1877 (40 & 41 Vict., Ch. 26) provided by section 3 as follows:—

3. The word "capital" as used in the Companies Act, 1867, shall include paid-up capital; and the power to reduce capital conferred by that Act shall include a power to cancel any *lost capital,* or any *capital unrepresented by available assets,* or to pay off any capital which may be in excess of the wants of the company; and paid-up capital may be reduced either with or without extinguishing or reducing the liability (if any) remaining on the shares of the company, and to the extent to which such liability is not extinguished or reduced it shall be deemed to be preserved, notwithstanding anything contained in the Companies Act, 1867.

The Companies Act, chapter 27, R.S.C., 1927, by section 61 provides as follows:—

61. Subject to confirmation by supplementary letters patent, a company may by by-law reduce its share capital in any way, and in particular, without prejudice to the generality of the foregoing power, may

(*b*) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share *capital which is lost* or *unrepresented by available assets;*

A number of English cases decided on petitions to the Court to approve resolutions reducing the capital of companies, all of which were made under the Companies Act, 1877, are of assistance.

In *Re Barrow Haematite Steel Company* (1), Cozens-Hardy, J., had dismissed a petition for the confirmation by the Court of special resolutions for the reduction of capital

(1) [1901] 2 Ch. 746.

on the ground that the evidence given by valuers did not prove a loss of capital to the extent alleged in the petition.

On appeal to the Chancery Division, Vaughan Williams, L. J., at page 749 said:—

> It must not be assumed that, if I had been hearing this case by myself, I should have thought that the evidence of the loss was insufficient, and I feel some doubt whether Cozens-Hardy, J., really decided the case on that ground. Indeed, I doubt whether he had quite made up his mind as to what conclusion he ought to draw from the evidence. Be that as it may, my brethren think that the evidence is insufficient, and under those circumstances it is not for me to differ from them.

In *Re Hoare and Company Limited and Reduced* (1), it was proposed to reduce the capital of a company which had recently caused a valuation to be made of its brewery premises, public houses and loans, and had ascertained that these items were of less value than the amounts at which they stood in the company's balance sheet by the sum of £591,707 13s. 7d., and it was proposed to deal with the loss as follows: £396,000 to be written off by extinguishing a corresponding amount of the preferred ordinary shares and deferred ordinary shares, and £195,707 13s. 10d. to be met by writing off the like amount part of the reserve fund of the company. Vaughan Williams, L. J., at page 216 said:—

> We have to see whether there is any lost capital, and to what extent.

He then discussed the circumstances and, after dealing with the propriety of using part of the reserve fund, said:—

> . . . Unless the company by a proper resolution determined to do otherwise with it, I should have said that under such circumstances, in the event of a loss arising such as has occurred in this case, namely, by the reduction of the market value of the tied houses, the whole of that loss was a loss which for the purpose of this statute ought to be written off capital properly so called entirely.

And at page 218:—

> Under those circumstances, inasmuch as there has been an undoubted loss of capital in this case, and we think that loss has been properly allocated as a commercial matter between the share capital and the reserve fund, we may sanction this scheme.

Cozens-Hardy, L. J., after discussing the decision of Buckley, J., in the court below, said:—

> We have to deal here with a large loss—that is to say, the net assets, after payment of debts, which represent the share capital and the reserve fund, are insufficient.

(1) [1904] 2 Ch. 208.

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and, after discussing the proposal of the directors, said:—

That being so, it seems to me we are entitled to say it has been established in the present case that capital has been lost, and lost to the extent to which it is proposed to be written off by this order.

He then referred to his decision in *Re Barrow Haematite Steel Company (supra)*, and said that he had meant that in considering the loss of capital you must have regard to the fact that the assets include a reserve fund.

In *Re Rowland and Marwood's Steamship Company (Limited and Reduced)* (1), the petition said that the company was carrying on a profitable business and the loss (of capital) was entirely due to the depreciation in value of the company's ships. The amount of the reduction (of capital) which was sought to be effected was the amount by which the present real value of the fleet (of ships) was less than that shown in the last balance sheet of the company.

Having regard to the decision of the Court of Appeal in *Re Hoare and Company* His Lordship (Warrington, J.) thought he was justified in sanctioning the proposed reduction although no part of the reserve funds was touched.

In *Poole and Others* v. *National Bank of China, Limited* (2), the respondent, the National Bank of China, Limited, petitioned the Court for approval of a resolution reducing its capital on the ground that capital had been lost. The company had been incorporated in 1862 with a capital of one million pounds, divided into 750 founders' shares of £1 each, and 99,925 ordinary shares of £10 each. All founders' shares had been issued and fully paid up and 40,453 of the ordinary shares had been issued, upon which £8 per share had been paid. The remainder of the shares were not taken. The capital of the company had been taken to Hong Kong and converted into Hong Kong dollars at the rate of three shillings per dollar. It was established that the Hong Kong dollar had been steadily falling for some years and was not likely to exceed, in the future, 1s. 8d. English money. Based on this information, the financial statement showed a loss of £142,866 which it was proposed to write off.

(1) (1906) 51 Sol. Jo. 131. (2) [1907] A. C. 229.

Farwell, J., who heard the petition, was of the opinion that the company had lost the amount of capital stated in the petition and made an order that the resolution be confirmed, and the Court of Appeal affirmed that decision. On appeal to the House of Lords, Lord MacNaughton at page 240 spoke of the loss actually proved, saying:—

> So far as loss is actually proved, the case is one of those cases specially mentioned in the Act of 1877.

The House of Lords dismissed the appeal.

In none of these cases was it necessary to establish that the loss had been realized. In *Re Barrow Haematite Steel Company* (*supra*) the evidence was that its iron ore mines and plant had depreciated in value. The petition was not granted because the Court was of opinion that the loss had not been actually proved to the amount set out in the petition. In *Re Hoare and Company Limited* (*supra*) the facts were that brewery premises, public houses, and loans had recently been valued and found to be of less value than the amounts at which they stood on the company's balance sheet by over half a million pounds, but the loss had not been realized. In *Rowland and Marwood's Steamship Company* (*supra*) the company was carrying on a profitable business, and the alleged loss was entirely due to the depreciation in value of the company's ships, but the loss had not been realized. In *Poole and Others* v. *National Bank of China* (*supra*) the Hong Kong dollar had depreciated in value, but the holdings of such dollars had not been converted into sterling, and the loss thereby realized.

If I am right in assuming that the words "capital which is lost", as used in the several Companies Acts, have the same meaning as "capital losses sustained" in section 73A(1)(iii) and that it can be deduced from the cases cited that such capital losses do not have to be "realized", it follows that the depreciation in the value of the shares in Canadian Libby-Owens Sheet Glass Company, Limited held by the respondent, and which occurred over a period of years, were capital losses sustained by the respondent in those years before the 1950 taxation year.

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It was strongly urged on behalf of the appellant that the definition of "loss" contained in section 127(1)(*w*) should be applied in determining what is a "capital loss sustained".

Section 12 (1) is as follows:—

12. (1) In computing income, no deduction shall be made in respect of

(*b*) an outlay, loss or replacement of capital, a payment on account of capital on allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this part.

In other words, loss of capital, or capital losses sustained, are entirely different from losses incurred in earning and computing income.

Section 2, subsection (3), is as follows:—

(3) The taxable income of a taxpayer for a taxation year is his income for the year minus the deductions permitted by Division C.

Section 11 by its various subsections allows certain deductions, and Division C, which includes sections 25 to 29 inclusive, provides for certain exemptions and deductions in computing income, but none allow deductions for capital losses.

According to section 127(1)(*w*), "loss" means a loss computed by applying the provisions of this Act respecting computation of income from a business *mutatis mutandis*—.

It is difficult to understand how, in a case such as the one under consideration, the definition of "loss" contained in section 127(1)(*w*) can be applied in determining a capital loss sustained, unless the section is taken to mean that, in determining whether or not capital which is made up of the shares in another corporation such as the Canadian Libby-Owens Sheet Glass Company, Limited has actually depreciated in value from $154,510.25 to $40,000, the provisions of the Act are to be applied to the financial statements of such a company.

In this case it must be assumed that was done, for it is not denied by the appellant that the shares of Canadian Libby-Owens Sheet Glass Company, Limited which represented an investment made in the years 1920, 1921, and 1922, of $154,510.25, had fallen in value to $40,000 in 1948. The evidence adduced by the respondent established that in fact, and no evidence was offered by the appellant to the contrary.

The only question in this connection is, therefore, whether or not the respondent is entitled to deduct that amount as a capital loss sustained before the end of the 1949 taxation year.

In addition to the rulings in the cases already cited, there is an additional reason for not accepting the assessment of the appellant by which the undistributed income of the respondent was determined to be $164,054.05, including $114,510.25 which the respondent had deducted as the loss in value of the shares held by it in the Canadian Libby-Owens Sheet Glass Company, Limited.

It is common practice for companies having tax-paid undistributed income on hand to capitalize the same and increase the capital of the company accordingly, if necessary, or to issue shares not already issued in that amount and allot them to shareholders in proportion to their then holdings as fully paid shares. If, in the case of the respondent, it were decided to capitalize the undistributed income of $164,054.05 determined by the appellant and to issue redeemable preference shares having a total value of $164,054.05, the assets which such shares would represent would be over-valued by $114,510.25, the amount by which the shares in Canadian Libby-Owens Sheet Glass Company, Limited had fallen in value.

If, within a few months or years after the preference shares were issued to the then shareholders, the company decided to redeem the issue, it is quite evident that the respondent would not be in a position to pay $164,054.05 without using resources other than those represented by its supposed undistributed income.

By paragraph A13 of the amended Notice of Appeal the appellant claims that if the amount of $114,510.25 is held to be a capital loss sustained by the respondent up to December 31, 1949, then the respondent made capital profits or gains in the value of its share ownership of Bennett Glass Company, Limited, and in the value of its fixed assets, and paragraph 18 claims in the alternative that, according to the books of the respondent, profits or gains made by it exceed all capital losses sustained and there is no amount by reason of these capital losses, profits or gains which can be deducted from the undistributed income on hand.

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On July 31, 1950, the appellant received the respondent's statement of undistributed income on hand at the end of the 1949 taxation year, which by Schedule 2 showed its capital losses sustained, including its said loss on the Canadian Libby-Owens Sheet Glass Company, Limited shares, to be $243,835.81 and its capital gains realized to be $14,142.18. The appellant dealt with those figures and, in his assessment of May 22, 1951, deducted $114,510.25, claimed as capital loss sustained by the respondent on its Canadian Libby-Owens Sheet Glass Company, Limited shares, to which the respondent objected and filed a Notice of Objection. Notification by the Minister, dated the 13th of November, 1951, was given, confirming the assessment.

On February 1, 1952, the respondent appealed to the Income Tax Appeal Board, and on October 21, 1952, the appellant delivered a reply to that notice of appeal which dealt with the claim of the respondent that the $114,510.25 had been improperly disallowed as a deduction, but raised no issue with regard to alleged capital gains, and in that position the matter went before the Income Tax Appeal Board.

In other words, the question of being allowed to increase the capital profits or gains made by the respondent in the years in question above those set out in the Notice of Assessment was first raised in the amended notice of appeal dated October 14, 1953.

While I express no opinion on the merits of this claim of the appellant, I do not think that the assessment can be varied or a new assessment made by such procedure.

For the reasons given, I hold that the amount of $114,510.25 was properly deducted by the respondent in its statement of undistributed income as capital losses sustained by it in those years before the end of the 1949 taxation year, within the provisions of section 73A(1)(iii) of the Act.

The appeal will, therefore, be dismissed and the assessment varied by deducting from the undistributed income of $164,054.05, assessed by the appellant, the sum of $114,510.25, and by reducing accordingly the tax of 15 per cent payable, and the respondent will have its costs.

Judgment accordingly.

BETWEEN:

CANADIAN LIFT TRUCK COMPANY LIMITED ..... APPELLANT;

1954
May 3
June 15

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE ..... RESPONDENT.

Revenue—Customs and Excise—Goods subject to duty—Whether or not "Fork Lift Trucks" imported from U.S.A. are "of a class or kind not made in Canada"—The Customs Tariff Act, R.S.C. 1927, c. 44, Schedule A, Tariff items 427 and 427a—The Customs Act, R.S.C. 1927, c. 42 as amended, ss. 48(2) and 50(1)—Tariff Board—Question of law on appeal from Tariff Board—Material before Tariff Board—Whether Tariff Board as a matter of law erred in its finding—Court not to interfere with finding of Tariff Board if reasonably made—Appeal from Tariff Board dismissed.

In 1951 appellant imported from the United States "one Towmotor Fork Lift Truck" equipped with "Full-Apron Upender for Rolls up to 40" in Diameter and Weighing 2,200 lbs.", which respondent ruled dutiable under item 427 of the Customs Tariff Act, R.S.C. 1927, c. 44, namely "all machinery composed wholly or in part of iron or steel, n.o.p. and complete parts thereof." From that ruling appellant appealed to the Tariff Board contending that the imported article was classifiable under Tariff item 427a, namely "all machinery composed wholly or in part of iron or steel, n.o.p. *of a class or kind not made in Canada;* complete parts of the foregoing". The Board dismissed the appeal on the basis of an earlier decision in which it held that the rated capacity set at a load centre of 24" from the face of the fork as the common and most satisfactory way of measuring capacity, and then found that gas-powered Fork Lift Trucks having a rated lifting capacity of 4,000 to 15,000 pounds with a load centre of 24" from the face of the fork, were " of a class made in Canada". Leave to appeal to this Court from the decision of the Board, as provided by the Customs Act, R.S.C. 1927, c. 42, s. 50(1), was granted upon the following point of law: "Did the Tariff Board err as a matter of law in not deciding that Towmotor Lift Truck Serial Number 48511034 entered under Montreal customs entry No. 103418G (1951-52) was machinery of a class or kind not made in Canada and therefore classifiable under Tariff Item 427a".

Held: That if there was material before the Tariff Board from which it could reasonably decide as it did, the Court should not interfere with its decision even if it might have reached a different conclusion if the matter had been originally before it. *Deputy Minister of National Revenue* v. *Parke, Davis and Co.* [1954] Ex. C.R. 1; *General Supply Co. of Canada* v. *Deputy Minister of National Revenue* [1954] Ex C.R. 340 referred to and followed.

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2. That there was here evidence before the Tariff Board to enable it to reach the conclusion that appellant had failed to establish "Upenders" as a class or kind and that the goods imported, notwithstanding the special added function of "upending", were within what the trade generally considered to be the class of "Fork Lift Trucks".

3. That the Tariff Board's approval of the formula adopted by the Department of National Revenue in differentiating between kinds and classes of Fork Lift Trucks on the basis of motive power and of capacity, was entirely a matter of exercising its discretion in the light of the evidence adduced before it.

4. That in reaching those conclusions the Tariff Board did not err as a matter of law.

APPEAL under the Customs Act from a decision of the Tariff Board.

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

Gordon F. Henderson, Q.C. for appellant.

K. E. Eaton and *C. R. O. Munro* for respondent.

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

CAMERON J. now (June 15, 1954) delivered the following judgment:

This is an appeal from a decision of the Tariff Board (No. 286) dated May 19, 1953. By s. 50(1) of The Customs Act, R.S.C., 1927, ch. 42, as amended, provision is made for such an appeal "upon any question that in the opinion of the Court or judge is a question of law" upon leave being obtained. Such leave to appeal was granted by the President of this Court on June 25, 1953, upon the following point of law:

> Did the Tariff Board err as a matter of law in not deciding that Towmotor Lift Truck Serial Number 48511034 entered under Montreal customs entry No. 103418G (1951-52) was machinery of a class or kind not made in Canada and therefore classifiable under Tariff Item 427A.

On December 20, 1951, the appellant imported into Canada what was described in the entry form as "1 Truck Towmotor Fork Lift Truck as—Towmotor Fork Lift Truck (less than 2 tons) Machinery and Parts of Iron or Steel". The goods were purchased by the appellant from the manufacturer, Towmotor Corporation of Cleveland, Ohio, and were described in the invoice by that exporter as "1 LT-48 Towmotor Fork Lift Truck". Certain specifications

were given and then it was stated that the truck was equipped with certain things, including "Full-Apron Upender for Rolls up to 40" in Diameter and Weighing 2,200 lbs". The goods were classified by the port appraiser as being of a class or kind made in Canada and were entered under Tariff Item 427. That classification was confirmed by the Dominion Customs appraiser on August 26, 1952. Mr. Hooper, as agent for the appellant and under s. 48(2) of The Customs Act, requested the Deputy Minister to review the decision of the appraiser as to the tariff classification and to classify the entry under Item 427(a). By his letter of December 9, 1952, the respondent upheld the classification of the appraiser that the goods were of a class or kind made in Canada and were dutiable under Item 427.

An appeal was taken to the Tariff Board and after taking evidence and hearing argument the Board unanimously dismissed the appeal, its decision being as follows:

> In bringing down its finding in an earlier Appeal (No. 246) *re* certain Fork-Lift Trucks, the Tariff Board recorded its view that the criterion used by the Department of National Revenue in determining whether or not an imported truck was "of a class or kind made in Canada" was "the most common and the most satisfactory" method as yet devised. That a perfect method—one giving due and proper weight and proportion to several varying criteria—has not as yet been discovered, no one familiar with the complexities of the problem would deny. This, indeed, was the consideration which led the Board, in earlier declarations regarding equipment of this nature, to suggest to the Minister of Finance that perhaps the time had come to give *eo nomine* classification in the Tariff to lift-trucks, in order that "class or kind" decisions might no longer be necessary.
>
> Therefore, in accord with the finding of the Board in Appeal No. 246, the present Appeal is dismissed.

The dispute is as to whether the imported goods are or are not "of a class or kind not made in Canada". If the former, they are properly classifiable under Item 427a; if the latter they are within Item 427. These tariff items are as follows:

> 427. All machinery composed wholly or in part of iron or steel n.o.p., and complete parts thereof.
>
> 427a. All machinery composed wholly or in part of iron or steel, n.o.p., of a class or kind not made in Canada; complete parts of the foregoing.

The duty imposed on goods classified under Item 427a is substantially less than on those classified under Item 427.

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The greater part of the evidence before the Board consisted of illustrated pamphlets put out by the manufacturer. The Towmotor Corporation manufactures Fork Lift Trucks and Tractors and numerous accessories. The basic parts of the equipment which are common to all the vehicles are (*a*) a gasoline-powered truck on wheels and which comprises the motive power, a seat for the operator and all the controls; and (*b*) a steel mast in front of the truck on which the load to be carried is raised or lowered.

Page 1 of Exhibit D-8 gives an illustration of what I think may be regarded as the standard fork lift truck, Model LT-48, the initials "LT" meaning "Lift Truck". It shows the truck and mast, and also the fork lift attachment mounted on a carriage which moves up and down with its load on the mast. The fork consists of two or more angle irons, the forward ends of which are placed under the load and support it in transit or in lifting. The rated capacity of Model LT-48, equipped with forks, is 4,000 pounds with the load centre 24" from face of lifting carriage; and its maximum capacity is 5,000 pounds with a load centre of 17" or less.

Exhibit D-9 is another circular issued by Towmotor and headed "Towmotor Accessory Data—Extra Arms and Hands for the One-Man-Gang". It describes and illustrates two types of "Upenders" which are front end attachments used for picking up heavy rolls of paper from either the horizontal or vertical position, transporting the rolls, and "upending" them to either a vertical or horizontal position for stacking. In the partial-apron Upender, the load is picked up on two forks and rests against the partial apron. The full-apron Upender has no forks and the full-apron is inserted under the load and the apron supports and cradles the load. Each type is equipped at one end with a removable steel blade at right angles to the apron to support the rolls vertically. The Upender is hydraulically operated and rotates the load 90 degrees from the horizontal to the vertical and vice versa. It is mounted on an auxiliary carriage in front of the usual carriage which is raised and lowered on the mast.

The Upenders are used especially in the pulp and paper industry for moving and stacking rolls of paper. The article imported by the appellant was the full-apron Upender. It had no forks and no other lifting accessories were imported with it.

Exhibit D-9 states as follows:

On both types of Upenders the apron and blade assemblies are readily detachable if the truck is also to be used as a regular fork lift truck. With the partial-apron Upender, the apron and blade are removed, leaving the forks on the carriage. With the full-apron Upender, the apron and blade are removed and forks must be attached to the carriage. (Forks are not included with the full-apron Upender, but can be furnished at additional cost.) If a truck equipped with an Upender carriage is used with forks, the standard capacity of the truck is reduced to some extent because of the increase in load center with the Upender carriage (see table of capacities on back of this sheet).

Exhibit D-10 is another illustrated pamphlet of the manufacturer entitled "Towmotor Standard Accessories". It describes and illustrates fourteen such accessories, most of which consist of special forms of lifters which may be used instead of the forks for special purposes, and they are described as "Crane Arm, Scoop, Bale Clamp, Cotton Truck for Handling Bales, a Bale Clamp, etc." and included in these accessories is the full-apron Upender such as was imported by the appellant. Exhibit D-11 is a similar pamphlet entitled "Towmotor Special Engineering". It describes and illustrates some additional 25 or 30 special lifting devices to be used with the standard truck and mast, all of which are custom engineered by Towmotor for specific jobs. Included in these is an illustration of the Upender with an adjustable apron.

As has been noted, the Board dismissed the appeal on the basis of its finding in Appeal No. 246. In order to appreciate the submissions now made on behalf of the appellant, it is necessary to refer to that finding which is dated May 29, 1952, and is as follows:

The Department of National Revenue in its ruling published in Memo. Series D No. 51 MCR 120 differentiated between kinds and classes of fork-lift trucks on the basis of the kind of motive power and on the basis of capacity. At the hearings, there was no suggestion from any quarter that divisions on the above bases were improper. The main point at issue between the various parties was simply as to the correct method of measuring capacity.

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The Board considers that the rated capacity set at a load centre of 24 inches from the face of the fork is the most common and the most satisfactory way of measuring capacity. The Board finds that gas-powered fork-lift trucks having a rated lifting capacity of 4,000 pounds to 15,000 pounds with a load centre 24 inches from the face of the fork were at the time of importation made in Canada in sufficient numbers to be deemed to be of a "class made in Canada". All other capacities of gas-powered fork-lift trucks constitute classes which at that time were not made in Canada.

Accordingly, the Clark gas-powered fork-lift truck Model 4024, imported under Windsor Entry No. 15231E, is dutiable under Tariff item 427 and the Towmotor Model LT-44, entered under Fort Erie Entry No. 9408A, is dutiable under Tariff item 427a.

It will be noted that the Board approved the method adopted by the department in differentiating between kinds and classes of Fork Lift Trucks on the basis of motive power and of capacity. The Board held that the rated capacity set at a load centre of 24″ from the face of the fork as the common and most satisfactory way of measuring capacity. Then it found that gas-powered Fork Lift Trucks having a rated lifting capacity of 4,000 to 15,000 pounds with a load centre 24″ from the face of the fork, were "of a class made in Canada" (the evidence in the instant case indicates that such is still the fact). They held, also, that all other capacities of gas-powered Fork Lift Trucks constituted classes which at that time were not made in Canada.

No objection is taken by the appellant to the principles established by the Board in Appeal No. 246. It was one of the parties to that appeal and its Towmotor Model LT-44 was found to be of a class not made in Canada.

The first point taken by counsel for the appellant is that the Board erred in finding that the imported machine fell within the class or kind known as "Fork Lift Trucks". He points to the fact that it had no forks, that the lifting was done either by an apron or by the blade, and that it performed not merely the function of lifting rolls of paper, but also that of upending them through 90 degrees. He stresses the fact that no fork attachments were purchased with the machine and that to convert it from an "Upender" to one equipped with forks, it would be necessary to remove the second carriage with all its upending equipment and attach the forks to the first carriage, an

operation which would perhaps take some hours to complete. Then he submits that the particular "Upender" imported, together with three or four other types of equipment which are suitable for upending other types of goods (and which are illustrated in the manufacturer's literature) constitute a class quite distinct from Fork Lift Trucks, a class which might be called as a group "the Upenders". From that he said that as the evidence established that "Upenders" were not made in Canada, the machine should have been classified under Item 427a.

Before the Board, the representative of the appellant invited the Board to establish a class to be called "Upenders" as distinct from Fork Lift Trucks. Undoubtedly the Board had power to do so and there was some slight evidence which might have led them to accede to that invitation. On the other hand, there was a great deal of evidence which indicated that in the trade there was no class known as "Upenders" and that the "Upender" such as was imported by the appellant was merely an attachment to the class of machine known in the trade as "Fork Lift Trucks". As I have stated above, the manufacturer in both the entry form and in the invoice, described the machine as "1 LT-48 Towmotor Fork Lift Truck", and in the latter it was stated that the truck was *equipped* with a "full-apron Upender for Rolls". In Exhibit A-5—a letter from the manufacturer to the department dated April 2, 1953—reference was made to the precise machine imported, in these words: "in connection with the capacity rating for towmotor *Fork* Lift Truck, Serial No. 48511034". In Exhibit D-10, the "Upender" is referred to as one of many "standard accessories" and in Exhibit D-9 it is stated that the apron and blade assemblies of both types of Upenders are readily detachable if the truck is also to be used as a regular Fork Lift Truck.

I think it may be assumed that lift trucks were originally equipped with forks and therefore in the trade acquired the name of Fork Lift Trucks. Later, as occasion required, various other interchangeable front end accessories—including the "Upender"—were manufactured to meet the requirements of lifting special types of containers, but the general name "Fork Lift Trucks" seems to have been

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retained and applied to all regardless of the type or function of the special accessory and whether the accessory operated with forks or some other device, such as a Ram, Upender, Scoop or Clamp. The basic machine which comprised the truck, engine and mast, and which was the most costly part of the equipment, remained the same. That view of the matter is strongly supported by a perusal of Exhibit D-12 which is a trade magazine, "Handling Library Series—Study No. 1", and dated October, 1952, the particular issue being entitled "Fork Truck Attachments—Specifications, Recommended Uses, Costs, Savings, and Other Helpful Data on the Main Classes of *Attachments*". The assistant editor commences his comment with these paragraphs:

> Since World War II the fork truck has changed from a rarity to industry's most prominent materials handling tool. In the last few years, there's been a new factor in the fork truck field—a factor that is expanding fork truck usage and cost-saving potentialities in amazing ways. This is the tremendous development of attachments to perform special handling functions. The basic popularity of the fork truck is easily explained . . .
>
> Now, attachments are increasing the fork truck's versatility to the stage where it is truly "many machines in one".
>
> With an appropriate attachment, the fork truck can scoop up and transport all kinds of bulk material; handle rapidly and often without pallets, common objects such as barrels, crates, drums, cartons, pipe reels, boxes, bales and rolls; or perform special actions such as rapidly inverting whole pallet loads of goods. It can serve as a portable crane, plow, powered sweeper or elevator.
>
> In fact, the fork truck-plus-attachment combination can handle just about any material you can think of, and do practically anything with it. It sounds fantastic. It is. For with attachments like those described in the following pages, the fork truck becomes a mechanical bull gang, which you can direct to work handling miracles in your operation.

Included in that exhibit are a great number of attachments, one of which is an "Upender". A substantial number of these attachments, such as an Arm Clamp, Scoop, Clam Shell, Bucket, etc., are not equipped with forks, but all are referred to as fork truck attachments.

The Board reached the conclusion on this evidence that the appellant had not made out a case for establishing "Upenders" as a class or kind and that the goods imported, notwithstanding the special added function of "upending", were within what the trade generally considered to be the class of "Fork Lift Trucks". That was essentially a matter

for the Board to determine in the light of the evidence before them and I am unable to find that the Board as a matter of law erred in deciding as they did.

The second point raised by counsel for the appellant is that if the imported "Upender" is a Fork Lift Truck, the Board should have found that it was a Fork Lift Truck of a class or kind not made in Canada. As I have said, the Board dismissed the appeal on the basis of its finding in Appeal No. 246 (*supra*). In that appeal the Board ruled that all gas-powered Fork Lift Trucks, other than those having a rated lifting capacity of 4,000 to 15,000 pounds, with a load centre 24" from the face of the fork, constituted classes which at that time were not made in Canada. It is submitted that the "Upender" imported had a rated lifting capacity of less than 4,000 pounds with a load centre 24" from the face, and that therefore it was of a class or kind not made in Canada.

Counsel for the respondent suggested that the appellant had not proven that at the time the "Upender" was imported, Fork Lift Trucks of less than 4,000 pounds capacity, with a load centre 24" from the face, were not manufactured in Canada, but as I read the evidence, there seems to have been a tacit understanding that such was the case and I think the Board proceeded on that assumption.

The dispute on this point centres around the fact that in ascertaining the rated capacity the appellant and the department are not rating the same thing. The appellant determined the capacity by reference to the precise article imported, namely, the LT-48 equipped with a full-apron Upender. By reason of the fact that the weight of the upender equipment substantially exceeded the weight of the standard fork equipment, the lifting capacity of the "Upender" was less than that of a truck equipped with forks. Exhibit 4 is a metal plate which was attached or to be attached to the imported article and was prepared by the manufacturer. It rates the lifting capacity at 2,100 pounds when not over 20" from the face of the carriage, and the evidence is that its capacity when 24" from the face would be about 1,750 pounds. There is no dispute that the lifting capacity of the "Upender" was approximately as stated.

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That being so, the appellant says that the Board should have adhered to its ruling in Appeal No. 246 and have placed the machine in Tariff Item 427a.

The department carried into practice the Board's ruling in Appeal No. 246, applying it to all machinery popularly known as Fork Lift Trucks. In ascertaining the lifting capacity of any particular machine which fell within that category, it looked to the rated lifting capacity of the basic machine when equipped with forks, with a load centre 24" from the face, and not to the lifting capacity of the imported machine when equipped with any other particular device such as an Upender, Clamp, Scoop or Ram. It took the position that the tariff status of all Fork Lift Trucks depended upon the rated lifting capacity of the machine as a lift truck equipped with forks. They considered that to be a formula which was fair and equitable and that the capacity should not be ascertained by taking into account the lifting capacity of the basic machine when equipped with different attachments such as the Upender, Clamp, Arm, etc., some of which would lessen while others would increase the lifting capacity by reason of their varying weight and position. It recognized also the practical difficulties which would follow if the basic machine—the truck—were imported with two or more attachments of varying weights which would affect the lifting capacity of the machine. In Appeal No. 246, the Board expressed its approval of that formula; and again in this appeal, while recognizing that it is not a perfect formula, the Board considered it to be the most common and most satisfactory system yet devised. It is established by the evidence that the basic machine which was here imported was a Model LT-48 with a rated lifting capacity of 4,000 pounds, with a load centre 24" from the face and a maximum capacity of 5,000 pounds at a load centre of 17" or less.

Counsel for the appellant says that the department's method of rating "capacity" is wrong in that it is not a rating of the actual machine which was imported, but is based on something which the appellant never had—a truck equipped with forks. He says that it was the duty of the department to classify the entry according to the nature and capacity of the goods actually imported and

not on some general formula which for the convenience of the department had been adopted so as to apply to all Fork Lift Trucks.

It may be noted here that general formulas of this nature have been applied by the department in other cases where there are a great number of front end attachments which may be affixed to various basic machines. One instance is that of power cranes or shovels when the basic machine may be equipped with many attachments such as Shovel, Clamp, Hoe, Dragline, etc. There the status of the imported article is dependent upon the nominal dipper capacity of the machine when operating as a shovel. The Board, in Appeal No. 272, found that such a criterion was a defensible one.

Now, as I have said, the Board approved the application of the formula adopted by the Department. They recognized the complexities arising in cases of this sort and that no perfect system had been devised which would take into consideration and give due weight to all the various criteria which might be considered in classifying machinery which consisted of one basic or standard machine but could be equipped with a variety of attachments. Then they concluded that the formula of the department was the most satisfactory yet devised and approved it. Inasmuch as the rated lifting capacity of the Fork Lift Truck imported, when equipped with forks was shown to be 4,000 pounds at a distance of 24″ from the face, the Board found that it came within the formula laid down by it in Appeal No. 246 as being of a class or kind made in Canada.

Again, the question is not whether their conclusion was right or wrong, but whether in reaching that conclusion they erred as a matter of law. Various alternatives were presented to them and of these they selected the one which to them seemed the most practical and feasible. It was entirely a matter of exercising their discretion in the light of the evidence adduced. They reached the conclusion that the main consideration should be given to the basic machine—the truck—and to its ascertained lifting power under certain conditions, namely, when equipped with forks. I am unable to perceive that in reaching that conclusion there was any error in law.

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Reference may be made to *Deputy Minister of National Revenue* v. *Parke Davis & Co.* (1), in which the President of this Court stated that if there was material before the Board from which it could reasonably decide as it did, the Court should not interfere with its decision even if it might have reached a different conclusion if the matter had been originally before it. I am of the opinion in this case that there was evidence before the Board on which it could reasonably reach the conclusion arrived at.

For these reasons my answer to the question of law submitted is "No". The appeal therefore fails and will be dismissed with costs.

Judgment accordingly.

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Feb. 1

June 17

BETWEEN:

BECKFORD LITHOGRAPHERS LIMITED ..... APPELLANT;

AND

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

Revenue—Income Tax—The Income Tax Act R.S.C. 1952, c. 148, s. 11(1)(a)(c), 12(1)(b)—Money paid for use of collateral—"Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income".

Appellant deducted from its gross income for the taxation years 1949 and 1950 certain sums of money as being "a service charge for use of collateral". The Minister of National Revenue disallowed such deductions and an appeal from his assessments for the years named was dismissed by the Income Tax Appeal Board. The appellant appealed to this Court.

Held: That the deductions claimed were not disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income of appellant within the meaning of s. 12(1)(*a*) of the Income Tax Act, nor were they interest on borrowed money within the meaning of s. 11(1)(*c*) of the Act but were payments on account of capital within the meaning of s. 12(1)(*b*) of the Act.

APPEAL from the decision of the Income Tax Appeal Board.

(1) [1954] Ex. C.R. 1.

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

Stuart Thom for appellant.

Peter Wright, Q.C. and *T. Z. Boles* for respondent.

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

POTTER J. now (June 17, 1954) delivered the following judgment:

This is an appeal by Beckford Lithographers Limited, hereinafter called the appellant, from a decision of the Income Tax Appeal Board dated the 19th day of February, 1953, and mailed on the 23rd day of February, 1953, dismissing an appeal from assessments by the Minister of National Revenue, hereinafter called the respondent, whereby he disallowed a deduction of $5,160.07 from the appellant's declared income for the taxation year of 1949 and a deduction of $7,147.42 for the taxation year of 1950, both of which amounts had been shown in the appellant's returns as having been paid to a Mrs. F. Schmukler of Brooklyn, New York, as a "service charge for use of collateral" and deducted from its gross incomes for those years as interest paid or payable.

At the instance of Mr. Moe Becker of Mount Vernon, New York, the appellant was incorporated by letters patent issued under the Companies Act of the Province of Ontario on the 29th day of November, 1946, with head office in the City of Toronto in that Province, and with a capital divided into

100 Class "A" 5 per cent Cumulative, Redeemable Preference Shares at a par value of	$ 5,000.00
15,000 Class "B" Preference Shares of No Par Value	15,000.00
30,000 Common Shares of No Par Value	30,000.00
	$50,000.00

The 100 shares of Class "A" preferred stock were issued for cash considerations in the following proportions: Lorne Sandiford, 20%; Memory Lane Limited (a Canadian corporation controlled by Moe Becker and his associates), 20%; Moe Becker, 60%.

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Mr. Moe Becker, president of the company, was called as a witness and, while his evidence with reference to the distribution of the shares of the company and his personal undertakings with the Industrial Development Bank and the Dominion Bank was vague and in some respects contradictory, the following appear to be the facts:—

The only amount of cash put into the capital of the appellant was $5,000.00, the amount paid for the Class "A" preferred stock, and the 15,000 Class "B" preferred shares and the 30,000 common shares were issued for considerations other than cash, viz. the assignment of reproduction rights, franchises and good will.

Arrangements were made with the Industrial Development Bank to finance the purchase of equipment and with the Dominion Bank to finance the activities of the appellant.

While he first said that he gave his personal notes to one of the banks to obtain credit for the appellant, he later withdrew that statement and said that he gave a guarantee of the company's overdraft.

United States bonds to the total value of $50,000.00 were obtained by Becker from his father-in-law, Harry Schmukler, since deceased, and his mother-in-law, Mrs. Fay Schmukler, to be used as collateral security for his guarantee or guarantees to the two banks, but it finally became evident that $15,000.00 of these bonds, which were obtained from Mrs. Fay Schmukler and were payable to bearer, were used as collateral security for his guarantee of the credit of the appellant.

There was no agreement in writing made with Mrs. Fay Schmukler when, in March, 1947, she furnished him with $15,000.00 in United States bearer bonds.

Q. . . . What was your understanding with Mrs. Schmukler as to the return of her property to her?

A. The original understanding was strictly an oral one that we would use the bonds and return them to her at our earliest convenience, or possibility of returning them to her. *There was really no formal understanding at the time.*

Mr. Becker's evidence with reference to the clipping of the coupons from these bonds was also contradictory.

According to Mr. Becker, Mr. Harry Schmukler having died in 1946, Mrs. Fay Schmukler, the widow, felt that the bonds were not bringing in sufficient income, and she required them for her own use, but he, Becker, was unable to arrange for their release by the bank.

As a result of discussions with Mrs. Fay Schmukler or her advisors, an agreement was entered into on December 5, 1947, and filed as Exhibit 14, which was in part as follows:—

THIS AGREEMENT made in duplicate this 5th day of December, 1947.

BETWEEN:

FAY SCHMUKLER, of the City of Brooklyn in the State of New York, Widow, hereinafter called the Party

OF THE FIRST PART

AND

BECKFORD LITHOGRAPHERS LIMITED, a corporation organized and existing under the laws of the Province of Ontario, hereinafter called the "Company"

OF THE SECOND PART

WHEREAS the Party of the First Part has heretofore loaned certain securities of the par value of Fifteen Thousand Dollars ($15,000.00), as listed in Schedule "A" attached hereto, to one Moe Becker, President of the Company, to lodge with the Dominion Bank as collateral security to his personal guarantee of the Company's indebtedness to the said Bank;

AND WHEREAS it was contemplated and intended that the said securities would be released and returned to the Party of the First Part on or before the date of this Agreement;

AND WHEREAS the said securities have been hypothecated for the purposes of the Company to The Dominion Bank and The Industrial Development Bank and the Company is presently unable to have the same released and returned to the Party of the First Part;

WITNESSETH that in consideration of the premises and the agreements herein contained, the parties hereto covenant and agree as follows:

1. The Company shall use its best endeavours to have the said securities released and returned to the Party of the First Part as quickly as possible.

2. As from the 1st day of January, 1948 and continuing until all of the said recited securities shall have been released and returned to the Party of the First Part, the Company shall pay to the Party of the First Part annual sums equivalent to one per centum (1%) of its net sales, exclusive of any sales to Memory Lane Limited, computed on a calendar year basis. Such annual sums shall be due and payable on the 15th day of February next following the close of each calendar year respectively

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during the currency of this Agreement. In the event of the said securities being released and returned before the end of any calendar year, the net sales in respect of such calendar year shall be apportioned to the date of the release and return of the said securities to the Party of the First Part and the amount payable in respect thereto shall be due and payable within forty-five (45) days thereafter.

3. Nothing herein contained shall prejudice or alter the rights of the Party of the First Part in and to the said securities or operate to prevent her from demanding the return thereof at any time.

The agreement was executed by Fay Schmukler and by Beckford Lithographers Limited, Moe Becker president, and L. J. Sandiford secretary-treasurer, and was under seal.

Schedule "A" showed 3 x $5,000.00 United States of America Treasury Bonds, 2½ per cent, due December 15, 1972-67, serial No. 1888 1A, No. 78881 1A, and No. 89987 H.

It will be noted that the recitals and terms of this agreement do not agree with the evidence of Moe Becker previously quoted to the effect that the original understanding was strictly oral, that the bonds would be returned at their earliest convenience, and that "there was really no formal understanding at that time".

It is to be noted that Becker said in cross-examination as follows:—

Q. Now I believe you made this clear, but I want it to be perfectly clear, the advances—I understand that but I wish you to confirm it—that the advances on these bonds was a personal advance to you?

A. Yes.

Q. And that you gave them to the Bank to support your guarantee?

A. Yes.

Q. And the Bank held them as your bonds?

A. Yes.

In the allegations of fact set out in the appellant's notice of appeal from the decision of the Income Tax Appeal Board and dated June 3, 1953, it was alleged in paragraph B as follows:—

1. The aforesaid amounts were paid by the Appellant for the use of property necessarily required and used in the conduct of its business and where an outlay or an expense made and incurred for the purpose of gaining or producing income from the Appellant's business.

2. The said payments were not an outlay of or payment on account of capital.

In the respondent's reply to the notice of appeal dated August 21, 1953, the following was alleged:—

B. 5. The Respondent relies upon sections 11 and 12 of The Income Tax Act.

6. The Respondent says that, if the amounts of $5,160.07 and $7,147.42 were paid by the Appellant as alleged by the Notice of Appeal, which is not admitted, such amounts were not outlays or expenses incurred by the taxpayer for the purpose of gaining or producing income within the meaning of paragraph (*a*) of subsection (1) of section 12 of The Income Tax Act.

7. The Respondent further says that if the said amounts were expended by the Appellant, as alleged in the Notice of Appeal, which is not admitted, such amounts were outlays on account of capital within the meaning of paragraph (*b*) of subsection 1 of section 12 of the said Act.

8. The Respondent further says that if the said amounts were expended, as alleged in the Notice of Appeal, which is not admitted, they were not interest on borrowed money used for the purpose of earning income within the meaning of paragraph (*c*) of subsection 1 of section 11 of the said Act.

In its trading profit and loss statement for the year ended December 31, 1949, attached to its income tax return for that year covering the fiscal period ending the 31st of December, 1949, the appellant showed as an item of interest and exchange $11,321.02, which was broken down in item 25 (*a*)—Interest Paid or Payable as follows:—

Dominion Bank, Toronto	$ 2,252.31
Industrial Development Bank, Toronto	2,649.74
Industrial Acceptance Corp., Toronto	187.72
Harris-Seybold (Canada) Limited, Toronto	321.16
Mrs. F. Schmukler, 1800 Bay Parkway, Brooklyn, N.Y., U.S.A. Service Charge for Use of Collateral	5,910.09
	$11,321.02

As a result of representations made by the appellant, the respondent amended his assessment for the 1949 taxation year by reducing the amount of $5,910.09, disallowed, to $5,160.07, as set out in the notification by the Minister dated March 24, 1952.

In its trading profit and loss statement for the fiscal period ending the 31st of December, 1950, the appellant showed as an item of interest and exchange $14,090.64,

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which was broken down under item 2 (*h*)—Interest Paid To:—

On loans from shareholders—			
L. J. Sandiford	$475.00		
M. Becker	275.00	$750.00	
Less Accrued 1st January, 1950	565.08		
Accrued 31st December, 1950	493.75	71.33	$ 678.67
Industrial Development Bank			2,968.35
The Dominion Bank, Toronto			3,296.20
Mrs. F. Schmukler, 1800 Bay Parkway, Brooklyn, N.Y., U.S.A.			
Service Charge for Use of Collateral			7,147.42
			$14,090.64

In other words, the appellant has shown and deducted from income interest paid to the Industrial Development Bank and the Dominion Bank as interest on loans from those corporations and then has also claimed the amounts paid to Mrs. Schmukler of $5,160.07 and $7,147.42 for the use of $15,000.00 in bonds used by Moe Becker as collateral security to obtain from those institutions the loans on which the interest shown was paid to them.

If the appellant had paid to Mrs. Fay Schmukler six per cent per annum for the use of the bonds which she had furnished to Moe Becker, the company would have been paying double interest on some parts of its borrowings from the Industrial Development Bank and the Dominion Bank.

The relevant sections of the Income Tax Act, Chapter 148, R.S.C. 1952, are as follows:—

11. (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year:

(*c*) an amount paid in the year or payable in respect of the year (depending upon the method regularly followed by the taxpayer in computing his income), pursuant to a legal obligation to pay interest on

(i) borrowed money used for the purpose of earning income from a business or property (other than property the income from which would be exempt), or

(ii) an amount payable for property acquired for the purpose of gaining or producing income therefrom or for the purpose of gaining or producing income from a business (other than property the income from which would be exempt),

or a reasonable amount in respect thereof, whichever is the lesser;

12. (1) In computing income, no deduction shall be made in respect of

(*a*) an outlay or expense except to the extent that it is made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer,

(*b*) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part,

Section 12 (1) (*a*) is derived from section 6 (*a*) and (*e*) of the Income War Tax Act, Chapter 97, R.S.C. 1927, as amended, which was as follows:—

6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of

(*a*) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income;

(*e*) carrying charges or expenses of unproductive property or assets not acquired for the purposes of a trade, business or calling or of a liability not incurred in connection with a trade, business or calling;

In *Bennett and White Construction Company Limited* v. *The Minister of National Revenue* (1), the appellant company had paid large amounts to the guarantors of its bank loans and in the fiscal year ending October 31, 1941, $20,969.34 were paid to the guarantors, and for the year following, $23,984.15, and these were disallowed by the Department. The matter eventually came before this Court, and the late Mr. Justice O'Connor dismissed the appeal of the company with costs and affirmed the assessment.

On appeal to the Supreme Court of Canada, Mr. Justice Locke said at pages 289 and 290:—

While the amounts paid to the guarantors were described as interest in the various resolutions which authorized their payment, this was clearly inaccurate. Interest is paid by a borrower to a lender: a sum paid to a third person as the consideration for guaranteeing a loan cannot be so described. Section 6(*a*) prohibits the deduction of disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income and the first matter to be determined is whether amounts such as these, paid to enable the company to obtain the necessary working capital for its operations by way of loans from the bank, are properly so described.

(1) [1949] S.C.R. 287.

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BECKFORD LITHOGRAPHERS LTD. v. MINISTER OF NATIONAL REVENUE

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The learned judge then reviewed all the authorities and at page 291 said:—

They were, in my opinion, simply expenditures incurred in obtaining the capital to make the large deposits required, to purchase equipment and generally to finance the operations. A sum expended as interest for the use of capital is clearly to be distinguished from expenditures such as these, being the cost of obtaining guarantees without which the loans would not have been made by the bank, expenditures of the same character as the cost of floating issues of bonds or debentures or of selling shares for the purpose of obtaining capital.

Mr. Justice Rand, after stating the facts, said at page 293.

Now the Crown has allowed the deduction of interest paid to the bank, and it must have been either on the footing that the day-to-day use of the funds was embraced within the business that produced the profit, or that the interest was within section 5, paragraph (*b*). But setting up that credit right or providing the banking facilities is quite another thing from paying interest; it is preparatory to earning the income and is no more part of the business carried on than would be the work involved in a bond issue. . . .

Within the meaning of the Act, the premiums create part of the capital structure and are a capital payment; *Watney* v. *Musgrave* (1880) 5 Ex. D. 241. They furnish a credit apparatus to enable the business to be carried on, and although they affect the distributable earnings of the company, they do not affect the net return from the business. That was the view of O'Connor, J., below, and I agree with it.

Kellock, J. concurred with Locke, J.

Estey, J. said at page 298:—

The disbursements of the guarantors here in question were made not as interest on the money borrowed but as the purchase price for the guarantee that made borrowing under the line of credit possible. The appellant, upon obtaining this line of credit, was enabled to complete its financial arrangements at the bank, which enabled it to undertake the larger volume of business. Sums borrowed under such circumstances are capital and the sums paid are not deductible under the provisions of 6(1)(*a*).

In my opinion, the judgments in *Bennett and White Construction Company Limited* v. *The Minister of National Revenue* (*supra*) apply to this case, and therefore hold that the sums of $5,160.07 and $7,147.42, paid by the appellant to Mrs. Fay Schmukler and disallowed as deductions by the respondent from the taxable income of the appellant for the 1949 and 1950 taxation years, were not outlays or expenses incurred by the taxpayer for the purpose of gaining or producing income within the meaning of section 12 (1) (*a*) and were not interest on borrowed

money used for the purpose of earning income within the meaning of section 11 (1) (*c*), but were payments on account of capital within section 12 (1) (*b*) of the Income Tax Act.

The appeal will therefore be dismissed with costs.

Judgment accordingly.

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BECKFORD LITHOGRAPHERS LTD *v.* MINISTER OF NATIONAL REVENUE

Potter J.

BETWEEN:

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

AND

SHELDONS ENGINEERING LIMITED.. RESPONDENT.

1954

Feb. 3

June 17

Revenue—Income Tax—Deduction claimed for capital cost allowance—The Income Tax Act, 1948, c. 52, s. 20(2), s. 127(5)—Controlling interest—Corporations not dealing at arm's length—Corporations not controlled by same persons nor by each other.

Respondent was incorporated for the purpose of acquiring the assets and carrying on the business of the Sheldons company. An agreement was concluded making effective the transfer of the undertaking, property and assets of the Sheldons company to the respondent. In its income tax return for the taxation year 1951 respondent claimed a deduction in respect of capital cost allowance on the assets purchased by it from the Sheldons company and on certain additions made to its depreciable assets since it commenced business. This deduction was disallowed by the Minister of National Revenue and on appeal to the Income Tax Appeal Board his assessment was set aside. The Minister appealed to this Court.

No one person held a majority of the common shares of respondent company at the time the agreement with the Sheldons company was ratified and confirmed, and neither did respondent company hold any shares in the Sheldons company when its shareholders authorized the execution of the agreement, nor did the Sheldons company hold any shares in the respondent company at the time its shareholders ratified the agreement.

Held: That the Sheldons company and the respondent company were not controlled directly or indirectly by the same person at the times the agreement of sale and purchase was approved and its execution on their behalf authorized by their respective general meetings, or at the time the assets of the Sheldons company vested in the respondent company or at any other relevant time within s. 127(5) or s. 20(2) of the Income Tax Act.

2. That it is the total of the voting power or shares in the hands of those persons who own the shares that gives control of a company and it is the holding of the majority of these shares by which one

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company controls another and because the company holding the majority of shares in another names proxies to vote them the company is not controlled by the proxy holders.

APPEAL from a decision of the Income Tax Appeal Board.

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

E. O. Hickey and *F. J. Dubrule* for appellant.

Donald Guthrie, Q.C. for respondent.

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

POTTER J. now (June 17, 1954) delivered the following judgment:

This is an appeal by the Minister of National Revenue, hereinafter called the appellant, from a decision of the Income Tax Appeal Board dated December 23, 1952, allowing an appeal from an assessment by the appellant dated January 18, 1951, whereby the appellant disallowed the sum of $6,672.14, being part of a deduction claimed in respect of capital cost allowance on assets purchased by Sheldons Engineering Limited, hereinafter called the respondent new company, shortly after its incorporation from another company known as Sheldons Limited, hereinafter called the old company, and on certain additions made to its depreciable assets since its commencement of business.

The old company was incorporated under the Ontario Companies Act and for many years had carried on a manufacturing business at Galt, Ontario. Its capital was divided into common shares, of which 4,009 shares had been issued.

As of June 1, 1949, three lots of over 1,000 shares each were held by the following:

S. E. Nicholson	1,024 shares
J. P. Stuart	1,153 shares
W. D. Sheldons, Sr.	1,168 shares

Any two of these shareholders, by combining the voting power of their shares, could control the old company, and the evidence was that J.P. Stuart and S. E. Nicholson, who together held 2,177 shares, for some time did control it and dictate its policies.

The old company had for many years made profits, but no dividends had been declared or paid.

Some time prior to June, 1949, it came to the knowledge of some of the employees of the old company that Mr. Stuart and Mr. Nicholson were endeavouring to dispose of their controlling interests, and four of them, viz. W. D. Sheldon, Jr., who at that time held two shares, George Murray Egoff, Harold William Mogg, and William Clark Caldwell, none of whom held shares in the old company, discussed the situation and, as a result of negotiations carried on by W. D. Sheldon, Jr. with Mr. Nicholson and Mr. Stuart and the Royal Bank of Canada, he arranged for a loan of $359,205.00 to enable him to purchase the 2,177 shares held by Mr. Nicholson and Mr. Stuart at $165.00 per share on the understanding that eighty per cent of the shares in the old company would be lodged with the Royal Bank of Canada as collateral to secure its loan to W. D. Sheldon, Jr.

It was further arranged that a new company would be formed for the purpose of acquiring the assets of the old company, which new company would issue and sell bonds in the amount of $300,000.00 to repay the bank loan, with the expectation that the minority shareholders of the old company would agree to take either preferred or common shares in the new company in exchange for their holdings in the old company.

Two alternative proposals were to be made to minority shareholders, viz. to take 75 common shares in the new company for one common share in the old company, or five preferred shares in the new company for one common share in the old company.

In negotiating with a bond broker, he agreed to underwrite the bonds to be issued by the proposed new company, provided $50,000.00 in new capital was brought into the new company in cash.

Sheldons Engineering Limited, the respondent herein, which is referred to as the respondent new company, was incorporated by Letters Patent issued June 15, 1949, under

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the Dominion Companies Act, with an authorized capital of $400,000.00, divided into 16,000 preferred shares of a par value of $25.00 each and 80,000 common shares without nominal or par value, the principal objects of the respondent new company being:—

To manufacture and install heating and ventilating machines and equipment, blowers and exhausters, mechanical draft fans, axial flow fans, steam engines and steam specialties, drying systems and equipment, conditioning and dust control systems and equipment and vacuum cleaners of all kinds and all the appurtenances to the foregoing.

The principal reason for the formation of the respondent new company was, of course, to acquire the assets and undertaking of, and to carry on the business carried on by, Sheldons Limited, the old company.

By an agreement dated July 4, 1949, and made between Sheldons Limited, the old company, called the vendor of the first part, and Sheldons Engineering Limited, the respondent new company, called the purchaser of the second part, the old company sold and the respondent new company purchased, free of all liens, charges, and encumbrances, the business, undertaking property and assets of the old company as a going concern, as of June 21, 1949, for the sum of $1,267,904.44, and paragraph 7 of the agreement was as follows:—

7. This Agreement is intended to operate as an actual transfer to the Purchaser of the business, undertaking, property and assets of the Vendor, but the Vendor shall forthwith on demand execute or cause to be executed or procure for the Purchaser, all necessary conveyances, transfers, assignments, agreements and consents that may be required or as counsel may advise to vest the said business, undertaking, property and assets in the Purchaser, free and clear of all liens, charges and encumbrances.

In its income tax return for the taxation year 1949, the respondent new company claimed capital cost allowance upon the cost of the assets acquired from the old company and upon the cost of additions to such assets, the total of such allowances claimed being $21,169.04.

The following tabulation illustrates the differences between the amounts claimed by the respondent new company as capital cost allowances and the amounts allowed, added or deducted by the appellant.

	Claimed	Allowed or Deducted
Class (3)— 5%	$ 2,603.11	$ 2,834.93
Class (8)—20%	17,435.09	9,681.44
Class (10)—30%	99.48	210.40
Class (11)—50%	1,031.36	1,770.13
	$21,169.04	$14,496.90
Net Disallowances		6,672.14
	$21,169.04	$21,169.04

By his Notice of Assessment dated January 18, 1951, the appellant assessed the taxable income of the respondent new company at $62,510.16, increasing to that amount its declared income of $47,585.31 as follows:—

Adjustments of Income Declared

Net Income Declared	$47,585.31
Capital Cost Disallowance *re* Section 20 (2)	6,672.14
Bond Interest Disallowance *re* Section 11 (1) (c) and Section 12 (1) (c)	6,678.10
Bank Interest Disallowance *re* Section 11 (1) (c)	1,574.61
	$62,510.16

The income tax levied was $19,412.19, to which was added interest amounting to $144.52, making the total amount payable $19,556.71, against which was credited the amount remitted by the respondent new company with its income tax return of $15,552.46, leaving a balance due of $4,004.25.

On March 12, 1951, the respondent new company gave Notice of Objection to the assessment and particularly to the disallowance of the capital cost allowance claimed, amounting to $6,672.14, the item and amount involved in this appeal.

On June 12, 1951, the Notification by the Minister was given, confirming the assessment on the ground that

> the capital cost allowance has been determined under the Income Tax Act and the income tax regulations based on capital cost in accordance with the provisions of subsection (2) of section 20 of the Act.

The respondent new company on July 9, 1951, gave Notice of Appeal to the Income Tax Appeal Board, and on December 23, 1952, judgment was delivered, allowing the appeal.

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On April 30, 1953, the appellant appealed to this Court. By his Notice of Appeal to this Court the appellant, among other things, alleged that at the time the agreement of sale of the assets by the old company to the respondent new company was executed both corporations were controlled directly or indirectly by the same person, within the meaning of subsection (5) of section 127 of the Act.

And further that, even if subsection (5) of section 127 of the Act is not applicable, the transaction by which the respondent new company acquired the assets of the old company was one between persons not dealing at arm's length, to which the provisions of subsection (2) of section 20 of the Act are applicable.

Section 127 (5) of the Income Tax Act, 1948, (section 139 (5)) as it was re-enacted by Chapter 148 of the Revised Statutes of Canada, 1952, is as follows:—

(5) For the purposes of this Act,

(*a*) a corporation and a person or one of several persons by whom it is directly or indirectly controlled,

(*b*) corporations controlled directly or indirectly by the same person, or

(*c*) persons connected by blood relationship, marriage or adoption,

shall, without extending the meaning of the expression "to deal with each other at arm's length", be deemed not to deal with each other at arm's length.

Subsection (2) of section 20 of the Income Tax Act, 1948, as amended by section 7 (1) of Chapter 25 of the Statutes of 1949 (2nd Sess.), is as follows:—

(2) Where depreciable property did, at any time after the commencement of 1949, belong to one person (hereinafter referred to as the original owner) and has, by one or more transactions between persons not dealing at arm's length, become vested in a taxpayer, the following rules are, notwithstanding section 17, applicable for the purposes of this section and regulations made under paragraph (*a*) of subsection (1) of section 11:

(*a*) the capital cost of the property to the taxpayer shall be deemed to be the amount that was the capital cost of the property to the original owner;

(*b*) where the capital cost of the property to the original owner exceeds the actual capital cost of the property to the taxpayer, the excess shall be deemed to have been allowed to the taxpayer in respect of the property under regulations made under paragraph (*a*) of subsection (1) of section 11 in computing income for taxation years before the acquisition thereof by the taxpayer.

By section 32 of Chapter 29 of the Statutes of 1952 (assented to June 18, 1952), paragraph (*j*) of subsection 1 of section 31 of the Interpretation Act was made applicable

to the expression "one person", where it appears in that part of subsection 2 of section 20, preceding paragraph (*a*) thereof (as amended by section 7 of Chapter 25 of the Statutes of 1949), and that expression was deleted and the expression "a person" substituted therefor, but such amendment was not to apply to any matter in respect of which any appeal was pending before the Income Tax Appeal Board or a court when such amendment came into force.

The appeal in this matter to the Income Tax Appeal Board was commenced by Notice of Appeal to that Board dated July 9, 1951; judgment was not given therein until December 23, 1952, and the Notice of Appeal to this Court was filed May 1, 1953. For these and other reasons, hereinafter given, the definition of "person" contained in paragraph (*j*) of subsection 1 of section 31 of the Interpretation Act does not apply to this appeal.

Although the Notice of Appeal of the appellant pleads several sections of the Act, argument was in effect directed to the application of the provisions of subsection (5) of section 127 of the Income Tax Act, 1948, and the decision in this appeal depends upon the interpretation and application of that section.

Paragraph (*a*) of subsection (5) of section 127 refers to transactions between a corporation of the one part, and a person or one of several persons by whom it is directly or indirectly controlled of the other part, and as the transaction under consideration was between two corporations, viz. the respondent new company and the old company, paragraph (*a*) has no application.

Paragraph (*c*) of subsection (5) of section 127 refers to transactions between persons connected by blood relationship, marriage or adoption, and is not applicable.

The question for decision then is whether or not under paragraph (*b*) of subsection (5) of section 127 the two corporations, that is, the old company as vendor and the respondent new company as purchaser, were controlled directly or indirectly by the same person at the time the agreement of July 4, 1949, was approved and its execution authorized by the general meetings of the shareholders of the two companies.

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The meaning of control of, or controlling interests in, corporations has been considered several times by the courts of England and recently by the Supreme Court of Canada in the following cases.

Noble (B. W.) Limited v. *Inland Revenue Commissioners* (1). Section 53 (2) (*c*) of the Finance Act, 1920 (10 & 11 Geo. V) applied to certain deductions from profits allowed in respect to the remuneration of any director, manager, or other person concerned in the management of a company who had a controlling interest in the company, and whether directly or indirectly and whether solely or jointly with any other persons, and the Crown alleged that Mr. B. W. Noble had a controlling interest in the appellant company.

Rowlatt, J., at page 926 said, speaking of the argument of counsel for the company:—

> It seems to me that "controlling interest" is a phrase that has a certain well known meaning; it means the man whose shareholding in the company is such that he is the shareholder who is more powerful than all the other shareholders put together in General Meeting. That is really what it comes to. Now, this gentleman has just half the number of shares, but those shares, in the circumstances of this case, are reinforced by the position that he occupies of Chairman, a position which he occupies not merely by the votes of the other shareholders or of his directors elected by the shareholders but by contract; and, so reinforced, inasmuch as he has a casting vote, he does control the General Meetings —there is no question about that—and inasmuch as he does possess at least half of the shares he can prevent any modifications taking place in the constitution of the Company which would undermine his position as Chairman.
>
> Therefore, on the whole, giving what I think is the most obvious meaning to these words in the sub-section and having regard to the object of the section, I think the contention of the Crown is right, and that the one appeal must be allowed and the other dismissed with costs.

British American Tobacco Company, Limited v. *Inland Revenue Commissioners* (2). The appellant company itself controlled more than fifty per cent of the votes in four companies. In seven companies more than fifty per cent of the votes were controlled by the appellant company in conjunction with a company or companies in which the appellant company controlled more than fifty per cent of

(1) (1926) 12 T. C. 911. (2) [1943] 1 All E. R. 13.

the votes. The question was whether the appellant company had a controlling interest in all the companies within the meaning of the Finance Act, 1937, Schedule IV, paragraph 7 (*b*), and whether the dividends received by the appellant company from those companies should be included in its income and liable to National Defence contribution. Viscount Simon, L. C., at 14 and 15 said:—

> The case turns on the meaning of the words "controlling interest" in the context in which they are used. The word "interest", however, as pointed out by Lawrence, J., is a word of wide connotation, and I think the conception of "controlling interest" may well cover the relationship of one company towards another, the requisite majority of whose shares are, as regards their voting power, subject, whether directly or indirectly, to the will and ordering of the first-mentioned company. If, for example, the appellant company owns one-third of the shares in company X, and the remaining two-thirds are owned by company Y, the appellant company will nonetheless have a controlling interest in company X if it owns enough shares in company Y to control the latter.
>
> As to what may be the requisite proportion of voting power, I think a bare majority is sufficient. The appellant company has, in respect of each of the foreign companies referred to in the case, the control of the majority vote. I agree with the interpretation of "controlling interest" adopted by Rowlatt, J., in *Noble* v. *Commissioners of Inland Revenue* (*supra*) in construing that phrase in the Finance Act, 1920, s. 53 (2) (c).

In *Wrights' Canadian Ropes Limited* v. *Minister of National Revenue* (1), the question was whether or not the appellant company was directly or indirectly controlled by a company outside of Canada, within the meaning of section 6 (1) (i) of the Income War Tax Act.

Of the shares in the Canadian company 49·86 per cent were admitted to be held by a certain English company, and one question was whether or not the Canadian company was controlled by the English company.

Rinfret, C. J., said at 145:—

> There is . . . in the record a consent signed on behalf of both parties whereby they agreed that at all times pertinent to the issues in this appeal, Wrights' Ropes Limited held 49·86 per cent of the shares and not 50 per cent of the shares of the appellant.

And at page 147:—

> . . . the appellant has been proved and indeed admitted not to be controlled by the English company . . .

(1) [1946] S.C.R. 139.

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On appeal to the Privy Council, *Minister of National Revenue* v. *Wrights' Canadian Ropes Limited* (1), Lord Greene, M. R., said at 726 and 727:—

Two incidental questions were raised in connection with this argument. One was as to whether the required control of the respondents by Wrights existed in fact. As to this their Lordships are of opinion that the admission signed on behalf of both parties on June 1, 1945, and printed on page 57 of the Record to the effect that Wrights held only 49·86% of the shares of the respondents is conclusive that it did not.

In *Army and Navy Department Store Limited* v. *Minister of National Revenue* and *Army and Navy Department Store (Western) Limited* v. *Minister of National Revenue* (2), the question was whether certain companies were taxable as related corporations under section 36 of the Income Tax Act, 1948, as amended, subsection (4) of the section being as follows:—

36. (4) For the purpose of this section, one corporation is related to another in a taxation year if, at any time in the year,

(*a*) one of them owned directly or indirectly 70% or more of all the issued common shares of the capital stock of the other, or

(*b*) 70% or more of all the issued common shares of the capital stock of each of them is owned directly or indirectly by

(i) one person,

(ii) two or more persons jointly, or

(iii) persons not dealing with each other at arms length, one of whom owned directly or indirectly one or more shares of the capital stock of each of the corporations.

Section 127 (5), as applicable, was in the same words as section 127 (5) already quoted.

Cartwright, J., at page 190, speaking of an argument to the effect that, as two of the companies concerned were both controlled by the same two individuals, they were controlled directly or indirectly by the same person, said:—

If the statute were silent as to the circumstances in which corporations shall be deemed not to deal with each other at arm's length this submission would have great force, but when s. 127 by ss. (5) (b) provides that corporations controlled directly or indirectly by the same person shall be deemed not to deal with each other at arm's length it appears to me to negative the view that corporations are to be deemed not to deal with each other at arm's length when controlled not by the same person but by the same group of persons. *Expressio unius est exclusio alterius.* When the wording of cl. (b) of s. 127 (5) is contrasted with that of cl. (a) it seems to me impossible to read the word "person" in cl. (b) as including the plural. While the Alberta company and the

(1) [1947] 1 D.L.R. 721; [1947] C.T.C. 1.

(2) [1954] 1 D.L.R. 177.

Saskatchewan company may well be said to be controlled by the same persons they are not controlled by the same person and in my opinion they cannot on this ground be deemed for the purposes of the Act not to deal with each other at arm's length.

When the learned judge spoke of contrasting the wording of clause (*b*) with that of clause (*a*) of subsection (5) of section 127, he was evidently referring to the fact that clause (*a*) is as follows:—

(*a*) a corporation and a person or *one of several persons* by whom it is directly or indirectly controlled,

whereas clause (*b*) is:—

(*b*) corporations controlled directly or indirectly by the *same person,*

If Parliament had intended to mean that a corporation controlled by a group of persons was to be included within clause (*b*), it could have added to it the necessary words so that it would read as follows:—

(*b*) corporations controlled directly or indirectly by the same person solely or jointly with other persons,

The appellant's Notice of Appeal refers to paragraph (*k*) of subsection 1 of section 31 of the Interpretation Act, but it must have been intended to refer to paragraph (*j*) of subsection 1 of section 31 of Chapter 1, R.S.C., 1927, which is as follows:—

31. (1) In every Act, unless the contrary intention appears,

(*j*) words in the singular include the plural, and words in the plural include the singular;

It is clear that in section 127 (5) (*b*) the contrary intention does appear when, as Mr. Justice Cartwright said, it is contrasted with the wording of clause (*a*) of the said subsection (5).

Were the respondent new company and the old company controlled directly or indirectly by the same person at the time of the transaction between them, when the property of the old company became vested in the respondent new company?

The agreement of July 4, 1949, provided by paragraph 1 that:—

The Vendor sells and the Purchaser purchases, free of all liens, charges and encumbrances, all the business, undertaking and assets of the Vendor as a going concern

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and paragraph 7 provided:—

> This agreement is intended to operate as an actual transfer to the Purchaser of the business, undertaking, property and assets of the Vendor, but the Vendor shall forthwith on demand execute or cause to be executed, etc., all necessary conveyances, transfers, assignments, etc.

By paragraph 4 it was provided:—

> The sale and purchase shall take effect as from the 21st of June, 1949, from which date the Vendor shall be deemed to have carried on its undertaking and business for and on behalf of the Purchaser . . .

If the agreement amounted to a transfer of the depreciable assets, as of its execution by the respondent new company, and under the circumstances I am of opinion that it did, it is only necessary to examine the registers of shareholders of the respondent new company and the old company at that time.

As of June 21, 1949, the following was the distribution of shares in the old company and, according to the evidence, no further transfers of shares took place until after the general meeting at which the execution of the agreement was authorized by the shareholders of the old company.

A. S. MacKay and S. M. Baird		
transferred from S. E. Nicholson	1,024	
transferred from J. P. Stuart	1,153	
transferred from W. D. Sheldon, Sr.	1,167	
transferred from B. B. Sheldon	77	
transferred from W. D. Sheldon, Jr.	15	3,436
Mrs. N. Sneyd		30
Mrs. M. O. Sheldon		130
Miss M. Taylor		161
E. J. Coate Estate		37
Mrs. Jennie H. McGill		77
Mrs. Lottie B. Baker		77
Mrs. Elsie Isabelle Shields		49
W. D. Sheldon, Jr.		2
G. M. Egoff		1
W. D. Sheldon, Sr.		1
J. S. Roberts		1
A. K. Spotton		1
Theodore F. McHenry		2
Miss Rebecca Hilda Gregory		2
Miss Jean L. Richmond		2
		4,009

It was established by the evidence that A. S. MacKay and S. M. Baird were employees of the Royal Bank of Canada to which the shares in question had been hypothecated as collateral security for the loan of $359,205.00, and while it is true that at the general meeting of the shareholders of the old company of July 4, 1949, when the execution of the agreement was authorized, W. D. Sheldon, Jr. and G. M. Egoff appeared as proxies for A. S. MacKay and S. M. Baird, as well as proxies for some other shareholders, they were there as the nominees of A. S. MacKay and S. M. Baird, who were holding the shares in question on behalf of their employer, the Royal Bank of Canada.

No authorities were cited by either side relative to the legal effect of control of a meeting of a company by proxies, and the weight of authority is that it is the total of the voting power or shares in the hands of those persons who own the shares that gives control.

A company which holds shares in another company must vote at meetings of such other company by the use of proxies. Nevertheless, on the authorities, particularly the statement of the law by Viscount Simon, L. C., in *British American Tobacco Company* v. *Inland Revenue Commissioners* (*supra*) it is the holding of the majority of the shares by which one company controls another, and it was not suggested that, because the company holding the majority of shares in another named proxies to vote them, the company was controlled by the proxy holders.

I therefore hold that neither W. D. Sheldon, Jr., George Murray Egoff, Harold William Mogg, nor William Clark Caldwell was a person who controlled directly or indirectly the old company at the time approval was given to the agreement of July 4, 1949, and its execution authorized on behalf of the old company.

At a meeting of the directors of the respondent new company held on July 4, 1949, applications for 24,001 common shares were read and a by-law passed allotting the same to the applicants, remittances totalling $48,000.00 at the price of $2.00 per share having been received.

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Of these 24,001 shares, W. D. Sheldon, Jr. was allotted 9,000; G. M. Egoff, 2,500; W. C. Caldwell, 1,500; and H. W. Mogg, 5,000.

In addition thereto, 100 preferred shares of a par value of $25.00 each were applied for and allotted.

By by-law number 5 the purchase by the respondent new company of the business and undertaking of the old company as a going concern was approved, and the president and secretary of the company were authorized, upon the confirmation of the by-law by the shareholders of the company, to execute the agreement.

At a general meeting of the shareholders held subsequently the same day, by-law number 5 of the directors was unanimously ratified, approved and confirmed by the shareholders.

No one person held more than 9,000 of the 24,001 common shares of the respondent new company at the time the agreement of July 4, with the old company was ratified and confirmed, and neither did the respondent new company hold any shares in the old company when its shareholders authorized the execution of the agreement, nor did the old company hold any shares in the respondent new company at the time its shareholders ratified the agreement.

It follows that the old company, Sheldons Limited, and the respondent new company, Sheldons Engineering Limited, were not controlled directly or indirectly by the same person at the times the agreement of sale and purchase was approved and its execution on their behalf authorized by their respective general meetings, or at the time the assets of the old company vested in the respondent new company or at any other relevant time, within subsection (5) of section 127 or subsection (2) of section 20 of the Income Tax Act, 1948, as amended.

The appeal must, therefore, be dismissed and the assessment varied by adding to the capital cost allowance to the respondent new company the sum of $6,672.14, disallowed by the said assessment, and by reducing the respondent new company's taxable income and the tax thereon accordingly, and the respondent new company will have its costs.

Judgment accordingly.

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May 27

June 17

BETWEEN:

MINISTER OF NATIONAL REVENUE ..APPELLANT;

AND

ALFRED OWEN TORRANCE BEARDMORE .....RESPONDENT.

Revenue—Income—The Income Tax Act S. of C. 1948, 11-12 Geo. VI, c. 52, s. 11(1)(j)—No deduction allowed for payments to adult child except as provided in the Act.

Respondent in compliance with the terms of a separation agreement entered into between him and his wife paid, after the wife's death, the sum of $375 to a daughter of their marriage who was an adult at the time the separation agreement was entered into. Respondent claims such payment as a deduction from income for the year it was paid. This was disallowed and on appeal to the Income Tax Appeal Board the assessment was set aside. The Minister appealed to this Court.

Held: That there is no provision in the Income Tax Act which entitles a taxpayer to deduct from his income amounts paid for the support of his children who are over the age of 21 years unless they are dependent upon him by reason of bodily or mental infirmity with the exception of the provision made for wholly dependent children over the age of 21 years who are in full-time attendance at school or university.

2. That the sum of $375 was properly added to respondent's income and the appeal must be allowed.

APPEAL from the Income Tax Appeal Board.

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

D. W. Mundell, Q.C., J. D. C. Boland and *J. C. Couture* for appellant.

J. S. Boeck for respondent.

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

POTTER J. now (June 17, 1954) delivered the following judgment:

This is an appeal by the Minister of National Revenue, hereinafter called the appellant, from a decision of the Income Tax Appeal Board, dated November 6, 1953, and mailed on November 13, 1953, allowing an appeal from an assessment by the appellant dated November 18, 1952,

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whereby the appellant added to the income of the respondent for the taxation year of 1950 the sum of $375.00, which had been deducted by the respondent from his income for that year as a payment made to his second daughter, Nora Margaret Torrance Beardmore, allegedly, pursuant to a written separation agreement dated the 17th day of November, 1939, and made between the respondent of the first part, Laura Beardmore, his wife, of the second part, and National Trust Company, Limited of the third part, and which the respondent claimed to be entitled to deduct under the provisions of section 11 (1) (*j*), formerly section 11 (1) (*l*), of the Income Tax Act, hereinafter set forth.

The agreement recited that the husband and wife had agreed to live separately from each other in the future; that there were two surviving children of their marriage, namely Mary Frances Torrance Beardmore, born January 5, 1912, then an adult, and Nora Margaret Torrance Beardmore, born July 18, 1925, then an infant under the age of 21 years, and provided *inter alia* that the respondent would pay to his wife the sum of $625.00 on the execution of the agreement, plus the sum of $300.00 for her legal expenses in connection therewith, and thereafter the sum of $7,500.00 annually in twelve equal monthly instalments of $625.00 each on the first day of each month during their joint lives, the wife to have the custody of the infant daughter until she attained her majority, the respondent to pay her maintenance and expenses if she attended a boarding school approved by him and, subject to such provision, the wife would support and maintain herself and the said children and keep the husband indemnified against all debts and liabilities thereafter contracted or incurred by her.

Paragraph 9 of the agreement was as follows:—

> 9. And that the husband shall, in the event of the wife predeceasing him or remarrying, pay thereafter to each said child, Mary Frances Torrance and Nora Margaret Torrance, during his lifetime a sum annually of fifteen hundred dollars ($1,500.00) in equal monthly instalments of one hundred and twenty-five dollars ($125.00) each.

Paragraph 15 of the said agreement contained provisions to the effect that the respondent made thereby certain grants, conveyances and assignments to the National Trust

Company, Limited, as trustee, to the amount of three-fifths of his estate, to take effect only on his death, to insure certain payments would be made to the wife and/or the said daughters, but counsel for both parties conceded that the whole of such paragraph had, after the death of the wife, been declared void by the court after a hearing at which all parties were represented.

The agreement contained no other provision creating any trust for the payment of the said, or any, sums to the daughters.

The wife died September 4, 1950, and beginning shortly after her death the respondent paid to his second daughter, Nora Margaret Torrance, sums totalling $375.00 during that year.

In his income tax return for the taxation year 1950, dated March 13, 1951, the respondent included in deductions made by him the sum of $375.00 paid to his daughter Nora Margaret Torrance during the taxation year 1950 as deductible in pursuance of the said agreement.

By his notice of re-assessment mailed November 18, 1952, the appellant added to the declared income of the respondent the said sum of $375.00.

The respondent gave Notice of Objection dated December 31, 1952, to which was attached a statement giving, among other things, his reasons as follows:—

> The assessment is objected to because in computing my income for the taxation year 1950 no deduction was made in respect of $375.00 paid by me in the year 1950 pursuant to a written separation agreement dated November 17, 1939, as an allowance payable on a periodic basis for the maintenance of a child of the marriage to which the agreement relates, namely, Nora Margaret Torrance Beardmore.

Section 11 (1) (*j*) of the Income Tax Act is as follows:—

> 11. (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year:
>
> (*j*) an amount paid by the taxpayer in the year pursuant to a decree, order or judgment of a competent tribunal in an action or proceeding for divorce or judicial separation or pursuant to a written separation agreement as alimony or other allowance payable on a periodic basis for the maintenance of the recipient thereof, children of the marriage, or both the recipient and children of the marriage, if he is living apart from the spouse or former spouse to whom he is required to make the payment.

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The Notification by the Minister dated April 20, 1953, confirmed the assessment on the ground that the amount of $375.00, shown as paid in the year 1950, did not come within the provisions of paragraph (*j*) of subsection (1) of section 11 of the Act.

On June 16, 1953, the respondent appealed to the Income Tax Appeal Board, before which the appeal was heard on October 29, 1953, and by which judgment was given on November 6, 1953, allowing the appeal.

The appellant herein appealed to this Court.

The question for decision in this case is whether or not payments made, after the death of a wife, to a child of a marriage who was then 25 years of age, are deductible under the provisions of section 11 (1) (*j*), as payments made pursuant to a written separation agreement.

Alimony, strictly speaking, is a provision made by a husband for his wife while the relation continues to exist, but it is commonly understood to mean the allowance which a husband, by order of a court, pays to his wife, living separate from him, for her maintenance. In cases in which the wife has the custody of minor children it may include an amount sufficient to enable her to maintain them.

Interim alimony is a provision made *pendente lite* whether in a suit for divorce, judicial separation, or otherwise.

Permanent alimony is a provision made after a judicial separation.

Maintenance is a provision made by a man for a woman formerly his wife, following a decree of dissolution of the marriage.

It has been held as a matter of law that maintenance follows custody and, as custody must be limited to the years of minority, maintenance cannot be awarded by a court beyond that time.

Section 11 (1) (*j*) permits a deduction in computing the income of a taxpayer of:—

1. an amount paid by the taxpayer in the year.
2. pursuant to:
   (*a*) a decree, order or judgment of a competent tribunal in an action or proceeding for divorce or judicial separation or;
   (*b*) a written separation agreement.

3. as alimony or other allowance.
4. payable on a periodic basis.
5. for the maintenance of:
   (*a*) the recipient thereof;
   (*b*) children of the marriage, or
   (*c*) both the recipient and children of the marriage.
6. if he is living apart from the spouse or former spouse to whom he is required to make the payment.

It is clear that the amount which the taxpayer is entitled to deduct from his income, if living apart from his spouse, must be paid by him (*a*) by reason of a legal obligation imposed upon him by a competent tribunal in an action or proceeding for divorce or judicial separation, or (*b*) by reason of a legal obligation undertaken by him upon his signing a written separation agreement.

In my opinion the word "pursuant", as used in section 11 (1) (*j*), means "by reason of" a legal obligation so imposed or undertaken.

If the obligation to pay is imposed upon him by a decree, order or judgment of a court, it is commonly called alimony if payable to his wife or former wife, but it may be some other allowance, and if the payment is made as a result of a legal obligation to support his children undertaken by him by signing a written separation agreement, it is not alimony but some other allowance payable on a periodic basis, and in neither case is he entitled to make a deduction unless he is living apart from the spouse to whom he is required to make the payment.

Under section 6 (*d*) of the Act, the respondent's wife, during the time she was in receipt of the payments amounting to $7,500.00 a year, was obliged to include the same in computing her income. The section is as follows:—

6. Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year

(*d*) amounts received by the taxpayer in the year pursuant to a decree, order or judgment of a competent tribunal in an action or proceeding for divorce or judicial separation or pursuant to a written separation agreement as alimony or other allowance payable on a periodic basis for the maintenance of the recipient thereof, children of the marriage, or both the recipient and children of the marriage, if the recipient is living apart from the spouse or former spouse required to make the payments.

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The wife of the respondent would have been unable to claim, under section 25 (1) (*c*), exemption for the younger daughter after she attained her majority on the 18th day of July, 1946, and she was never able to claim exemption for the elder daughter, for she was over the age of 21 years at the time the agreement was signed.

The agreement of November 17, 1939, as already stated, does not create any trust in favour of the daughters; they are not parties to it and it confers no right for them to sue for such payments. The payments were, therefore, not made pursuant to the agreement in the sense that the word is used in section 11 (1) (*j*).

In *Re Miller's Agreement, Uniacke* v. *Attorney General* (1), a retiring partner had entered into an agreement with two continuing partners who covenanted, on the death of the retiring partner, to pay certain annuities to his three daughters for their respective lives, but no trust was created in their favour. While the purpose of the proceeding was to determine another question, Wynn-Parry, J., held that the daughters had no right to sue for the annuities under the agreement.

The Act, in making special provisions for deductions in the event of expenditures made for the maintenance or education of children, either expressly or by implication refers to a child under the age of 21 years or, if over the age of 21 years, who is dependent by reason of mental or physical infirmity, or in one case in full-time attendance at a school or university.

Section 25 (1) (*c*) is as follows:—

25. (1) For the purpose of computing the taxable income of an individual for a taxation year, there may be deducted from his income for the year such of the following amounts as are applicable:

(*c*) for each child or grandchild of the taxpayer who, during the year, was wholly dependent upon him for support and was

(i) under 21 years of age,

(ii) 21 years of age or over and dependent by reason of mental or physical infirmity, or

(iii) 21 years of age or over and in full-time attendance at a school or university,

$150.00 if the child or grandchild was a child qualified for family allowance and $400.00 if the child or grandchild was not so qualified;

(1) [1947] 1 Ch. 615.

There is no provision in the Act which entitles a taxpayer to deduct from his income amounts paid for the support of his children who are over the age of 21 years unless they are dependent upon him by reason of bodily or mental infirmity, with the exception of the provision made for wholly dependent children over the age of 21 years who are in full-time attendance at a school or university.

To give effect to the respondent's submission that, because of the existence of a separation agreement made with his wife, since deceased, he is entitled to deduct from his income tax greater amounts than he would be permitted to deduct if his children were under the age of 21 years and dependent, would be to place him in a better position than his wife was in at the time of her death and to permit deductions for children over the age of 21 years, which is not authorized by the Act.

It is unnecessary to consider whether or not the respondent was living apart from his spouse to whom he was required to make the payments, for at the death of his wife he ceased to have a spouse from whom he could live apart or to whom he could be required to make payments.

I therefore hold that the sum of $375.00 was properly added to the income of the respondent by the appellant.

The appeal will be allowed, the assessment restored, and the appellant will have his costs.

Judgment accordingly.

This is an appeal by the Minister of National Revenue, hereinafter called the appellant, from a decision of the Income Tax Appeal Board dated November 6, 1953, allowing an appeal from an assessment by the appellant, dated November 10, 1952, whereby the appellant added to the income of the respondent for the taxation year of 1951 the sum of $3,000.00, which had been deducted by the respondent from his income for that year as payments made to his daughters, viz. Nora Margaret Torrance Beardmore and Mary Frances Torrance Beardmore (Mrs. William Steele) during the year 1951, allegedly, pursuant to a written separation agreement dated November 17, 1939, and made between the respondent of the first part, Laura

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Beardmore, his wife, of the second part, and National Trust Company, Limited of the third part, and which the respondent claimed to be entitled to deduct under the provisions of section 11 (1) (*j*) of the Income Tax Act, formerly section 11 (1) (*l*) thereof.

The agreement, which is more fully set out and discussed in the judgment in the previous appeal between the same parties, hereinafter referred to, provided for an annual payment to the wife of $7,500.00 in twelve equal monthly instalments of $625.00 each, and paragraph 9 provided that, in the event of the wife predeceasing the respondent, he would thereafter pay to each of the said daughters, during his lifetime, a sum annually of $1,500.00 in equal monthly instalments of $125.00 each.

The wife died September 4, 1950, and during the year 1951 the respondent paid to his daughters sums totalling $1,500.00 each, or together $3,000.00, and claimed to be entitled to deduct that amount from his taxable income for that year.

Following the assessment by the appellant, the respondent, in accordance with the procedure laid down by the Income Tax Act, appealed to the Income Tax Appeal Board, which on November 6, 1953, allowed the appeal and directed that the assessment be referred back to the appellant for re-assessment by allowing the amount of $3,000.00 as a deduction in computing the respondent's taxable income.

An appeal from the judgment of the Income Tax Appeal Board came on for hearing before this Court at Toronto on May 27, 1954, at the same time as the appellant's appeal in another matter, numbered 84251, and between the appellant and the respondent, who were represented in both appeals by the same counsel, and as the same points of law were involved in both appeals it was agreed by counsel for both parties that the arguments in the first-mentioned appeal, No. 84251, would be used as the arguments in this appeal and that the judgment in the first appeal would, *mutatis mutandis,* be taken as the judgment in this appeal.

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For the reasons given in the judgment in appeal No. 84251, I hold that the sum of $3,000.00, the total of the payments made by the respondent to his said daughters, were not payments deductible from the respondent's income for the taxation year of 1951 under section 11 (1) (*j*) of the Income Tax Act.

The appeal will be allowed and the assessment restored, and the appellant will have his costs.

Judgment accordingly.

1954

May 27

June 17

BETWEEN:

MINISTER OF NATIONAL REVENUE ..APPELLANT;

AND

JOHN JAMES ARMSTRONG .....RESPONDENT.

Revenue—Income—The Income Tax Act, c. 42, Statutes of 1948, s. 11(1)(j) —Payments made "pursuant" to decree nisi—Payments made by "reason of a legal obligation so imposed or undertaken"—"Alimony or other allowance payable on a periodic basis"—Payment made in full satisfaction or discharge of the legal obligation imposed by decree is deductible from income.

By a decree nisi the marriage solemnized between the respondent and his former wife was dissolved and respondent was ordered to pay to the wife the sum of one hundred dollars each month for the maintenance of the infant child of the marriage until she should attain the age of sixteen years or until otherwise ordered. When the child had attained an age of eleven years less four months respondent agreed to pay and his former wife agreed to accept the sum of four thousand dollars in full satisfaction of all her claims under the decree nisi. The money was paid by respondent and his former wife executed a release under seal of any further liability on the part of respondent. Respondent's claim for deduction of the four thousand dollars from income for the taxation year in which it was paid was disallowed and on appeal to the Income Tax Appeal Board that assessment was set aside. The Minister appealed to this Court.

Held: That the word "pursuant" as used in s. 11(1) (*j*) of the Income Tax Act, c. 42, Statutes of 1948, means "by reason of" a legal obligation so imposed or undertaken and the words "alimony or other allowance payable on a periodic basis" can be taken as being descriptive of the decree or separation agreement and not necessarily as requiring strict compliance with the terms of the decree or agreement to be entitled to deduct payments, and a lump sum payment may be made in full satisfaction or discharge of the legal obligation imposed by it and still be pursuant to such decree.

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2. That the sum of four thousand dollars was properly deducted by the respondent from his income for the taxation year concerned within the provisions of s. 11(1)(*j*) of the Act.

APPEAL from the Income Tax Appeal Board.

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

D. W. Mundell, Q.C. and *J. D. C. Boland* for appellant.

J. W. Swackhamer for respondent.

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

POTTER J. now (June 17, 1954) delivered the following judgment:

This is an appeal by the Minister of National Revenue, hereinafter called the appellant, from a decision of the Income Tax Appeal Board dated November 20, 1952, allowing an appeal from an assessment by the appellant dated January 10, 1952, whereby the appellant added to the income of the respondent for the taxation year of 1950 the sum of $4,000.00 which had been deducted by the respondent from his income for that year as a payment made to his former wife, Jean Isobel Armstrong, on June 30, 1950, allegedly pursuant to a decree nisi of a judge of the Supreme Court of Ontario in an action or proceeding for divorce, for the maintenance of Jane Isobel Armstrong, a child of his marriage to the said Jean Isobel Armstrong, which decree was granted the 28th day of September, 1948, and which amount the respondent claimed to be entitled to deduct under the provisions of section 11 (1) (*j*) of the Income Tax Act, formerly section 11 (1) (*l*) thereof.

The said decree nisi ordered and adjudged that the marriage solemnized between the respondent and his former wife, Jean Isobel Armstrong, at the City of Toronto in the Province of Ontario on the 25th day of February, 1933, be dissolved unless sufficient cause be shown to the Court within six months from the date thereof why the judgment should not be made absolute, and contained the following provision:—

> And this Court doth further order and adjudge that the Defendant John James Armstrong, do pay to the Plaintiff the sum of One Hundred Dollars ($100.00), each and every month for the maintenance of Jane

Isobel Armstrong the infant child of the Plaintiff and the Defendant John James Armstrong, until the said child attains the age of sixteen years, or until this court doth otherwise order, the first of such payments to become due and payable on the 1st day of October, A.D. 1948.

The decree was made absolute on May 9, 1949.

Payments were made by the respondent under the decree nisi until on or before the 30th day of June, 1950, when, following negotiations between the respondent and the solicitor for his former wife, she agreed to accept a cash payment of $4,000.00 in full satisfaction of all her claims under the said decree nisi.

The sum of $4,000.00 was paid by the respondent, and his former wife executed under seal the following document:—

June 30, 1950.

I hereby acknowledge receipt of the sum of Four Thousand Dollars ($4,000.00) from John James Armstrong in full settlement of all payments now due or which shall hereafter become due under the Judgment of the Honourable Mr. Justice Treleaven, dated the 21st day of September, 1948, whereby the sum of One Hundred Dollars ($100.00) a month was required to be paid to me for the maintenance of Jane Armstrong and I hereby release the said John James Armstrong from any further liability under the said Judgment.

(Sgd.) Arlene Martin (Sgd.) Isobel Armstrong L. S.

By his Notice of Assessment dated January 10, 1952, the appellant disallowed the payment of $4,000.00 as "Alimony Disallowed, $4,000.00" and endorsed on the back of the said notice were the words "Lump Sum Payments of alimony not an allowable Expense."

The respondent gave Notice of Objection on January 15, 1952, and the appellant by Notification by the Minister dated April 29, 1952, agreed to reduce the interest on the instalment payments from $102.20 to $97.51 but confirmed the said assessment in other respects as having been made in accordance with the provisions of the Act and in particular on the ground that the amount of $4,000.00 paid by the taxpayer was not a payment on a periodic basis within the meaning of paragraph (*j*) of subsection (1) of section 11 of the Act; that interest of $97.51 has been levied in accordance with the provisions of the Act.

On May 9, 1952, the respondent appealed to the Income Tax Appeal Board, which appeal was heard November 18, 1952, and the judgment of the Board was delivered on November 20, 1952, allowing the appeal.

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The appellant appealed to this Court.

Section 11 (1) (*j*) of the Income Tax Act is as follows:—

11. (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year:

(*j*) an amount paid by the taxpayer in the year pursuant to a decree, order or judgment of a competent tribunal in an action or proceeding for divorce or judicial separation or pursuant to a written separation agreement as alimony or other allowance payable on a periodic basis for the maintenance of the recipient thereof, children of the marriage, or both the recipient and children of the marriage, if he is living apart from the spouse or former spouse to whom he is required to make the payment.

Reasons for judgment in appeals numbers 84251 and 84252, both between the Minister of National Revenue, appellant, and Alfred Owen Torrance Beardmore, respondent, have recently been filed (1), and in the judgment in the first-mentioned appeal section 11 (1) (*j*) was set out as follows:—

Section 11 (1) (*j*) permits a deduction in computing the income of a taxpayer of:—

1. an amount paid by the taxpayer in the year
2. pursuant to
   (*a*) a decree, order or judgment of a competent tribunal in an action or proceeding for divorce or judicial separation or
   (*b*) a written separation agreement.
3. as alimony or other allowance
4. payable on a periodic basis
5. for the maintenance of
   (*a*) the recipient thereof
   (*b*) children of the marriage, or
   (*c*) both the recipient and children of the marriage
6. if he is living apart from the spouse or former spouse to whom he is required to make the payment.

By the decree nisi of the Supreme Court of Ontario a legal obligation was imposed on the respondent to pay to his former wife the sum of $100.00 per month for the maintenance of Jane Isobel Armstrong, the infant child of the respondent and his former wife, until the child attains the age of 16 years or until the Court should otherwise order. It was not decreed as alimony but as an allowance payable on a periodic basis.

The infant child was, as stated in the said decree, born October 12, 1939, and at the time of the granting of the said decree was within two weeks of nine years of age, and

(1) [1954] Ex. C.R. 521.

by the said decree the respondent's former wife was awarded the sole custody and control of the said child. At the time the sum of $4,000.00 was paid and the receipt and release executed by the respondent's former wife on June 30, 1950, the child was within about four months of her 11th birthday.

As the child will attain the age of 16 years on the 12th of October, 1955, the respondent was, at the time of payment of the sum of $4,000.00, bound to make monthly payments of $100.00 each under the decree nisi for a further period of five years, four and a half months, and while the sum of $4,000.00 would be the equivalent of forty monthly payments it exceeded at the time it was paid the then-present value of that number of payments, and the uncertainty of the lives of both the respondent and the child were no doubt matters considered.

It is clear that the amount a taxpayer is entitled to deduct from his income under section 11 (1) (*j*) of the Act must be paid by him either (*a*) by reason of a legal obligation imposed upon him by a competent tribunal acting in an action or proceeding for divorce or judicial separation, or (*b*) by reason of a legal obligation undertaken by him upon signing a written separation agreement.

In my opinion, the word "pursuant", as used in section 11 (1) (*j*), means "by reason of" a legal obligation so imposed or undertaken. The payments must be made either as alimony or other allowance, payable on a periodic basis, but the section does not say that, to be entitled to deduct the payments, they must be made at the exact times and in the exact amounts specified in the decree of the competent tribunal or the written separation agreement.

The words "alimony or other allowance payable on a periodic basis" can be taken as being descriptive of the decree or separation agreement, that is, a decree awarding alimony or other allowance payable on a periodic basis or a separation agreement providing for the payment of an allowance on a periodic basis, and not necessarily as requiring strict compliance with the terms of the decree or agreement to be entitled to deduct payments, and a

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lump sum payment may be made in full satisfaction or discharge of the legal obligation imposed by it and still be pursuant to such decree.

The respondent, without doubt, otherwise comes within all the other provisions of the subsection. The decree of a competent tribunal was made in an action or proceeding for divorce, providing for the payment of an allowance for the support of the infant child of the marriage on a periodic basis, and the respondent was living apart from the spouse to whom he was required to make the payments.

While the revenue may suffer to some extent in the year in which the payment of $4,000.00 was made, yet if the respondent lives for the period during which he would otherwise be bound to make payments, he will for the years subsequent to 1950 be unable to deduct from his income the sum of $1,200.00 each year for the maintenance of the child.

I therefore hold that the sum of $4,000.00 was properly deducted by the respondent from his income for the taxation year 1950, within the provisions of section 11 (1) (*j*) of the Act.

The appeal will, therefore, be dismissed and the assessment varied by deducting from the assessed income of the respondent of $10,628.10 for the taxation year 1950 the sum of $4,000.00 and by reducing the tax payable accordingly, and the respondent will have his costs.

Judgment accordingly.

BETWEEN:

1954

Mar. 19

June 22

HER MAJESTY THE QUEEN ON THE INFORMATION OF THE DEPUTY ATTORNEY GENERAL OF CANADA ..... PLAINTIFF,

AND

SPECIALTIES DISTRIBUTORS LIMITED ..... DEFENDANT.

Revenue—Sales Tax—Excise Tax Act, R.S.C. 1927, c. 179, ss. 86, 89, Sch. III, Customs Tariff, R.S.C. 1927, c. 44, as amended, Tariff item 409 f—Meaning of "agricultural implements" in Tariff item 409 f—Friction disc sharpeners considered agricultural implements.

The plaintiff claimed sales tax and penalties on the sale by the defendant of its friction disc sharpeners. The defendant denied liability on the ground that the friction disc sharpeners were agricultural implements within the meaning of tariff item 409 f of the Customs Tariff and exempt from sales tax by reason of section 89 of the Excise Tax Act and Schedule III thereof.

Held: That, in the absence of a clear expression to the contrary, words in the Customs Tariff should receive their ordinary meaning.

2. That it is not permissible to construe an Act to which the Interpretation Act applies by reference to a subsequent Act unless such subsequent Act directs how the prior Act is to be interpreted.

3. That the defendant's friction disc sharpeners were "agricultural implements, n.o.p." within the meaning of Tariff Item 409 f and exempt from sales tax accordingly.

Information to recover sales tax and penalties under the Excise Tax Act.

R. D. Guy Q.C. and *H. A. Huppe* for plaintiff.

C. V. MacArthur Q.C. for defendant.

The action was tried before the President of the Court at Winnipeg.

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

THE PRESIDENT now (June 22, 1954) delivered the following judgment:

The information exhibited herein shows that the defendant has over a period of years manufactured and sold certain articles known as friction disc sharpeners and that the plaintiff claims sales tax and penalties in the sum of

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$1,165.77 on the sales of such articles made by the defendant during the period from November 1, 1950, to December 31, 1952, and penalties in the sum of $84.22 up to June 30, 1953.

The defendant denies liability. At the trial it was admitted that if sales tax were payable as alleged in the information the amounts claimed by the Crown were correct. There is thus no dispute about the sales or the computation of amounts, the only question being whether the sales made by the defendant attracted sales tax at all.

The claim for the tax is made under section 86 of the Excise Tax Act, formerly the Special War Revenue Act, R.S.C. 1927, Chapter 179. But section 89 provides that section 86 shall not apply to the sale or importation of the articles mentioned in Schedule III of the Act, and the defendant's contention, although not disclosed by the pleadings, is that its friction disc sharpeners are exempt from sales tax by reason of being included in Schedule III under the heading Goods Enumerated in Customs Tariff Items, one of which is Tariff Item 409 f of the Customs Tariff, R.S.C. 1927, Chapter 44, as amended, which item read in part as follows:

> 409 f. . . . and all other agricultural implements or agricultural machinery, n.o.p., . . .

The defendant's contention is that its friction disc sharpeners are "agricultural implements or agricultural machinery, n.o.p.," within the meaning of this Tariff Item. If they are then they are exempt from sales tax by reason of section 89 of the Excise Tax Act and Schedule III thereof.

In *Deputy Minister of National Revenue for Customs and Excise* v. *Parke Davis & Company Limited* (1) I expressed the opinion that, in the absence of a clear expression to the contrary, words in the Customs Tariff should receive their ordinary meaning. Cameron J. had a similar view of the meaning of words in the Excise Tax Act: *vide The King* v. *Planters Nut and Chocolate Company Limited* (2) and *The King* v. *Planters Nut & Chocolate Co. Ltd.* (3).

It is, therefore, important to ascertain the ordinary meaning of the term "agricultural implements". If the defendant's friction disc sharpeners come within such meaning it

(1) [1954] Ex. C.R. 1 at 15. (2) [1951] Ex. C.R. 122 at 126.
(3) [1952] Ex. C.R. 91 at 92.

is not necessary to consider the ambit of the term "agricultural machinery". The word "agriculture" is defined in the New English Dictionary, Vol. I, as follows:

> The science and art of cultivating the soil; including the allied pursuits of gathering in the crops and rearing live stock; tillage, husbandry, farming (in the widest sense).

and "agricultural" is defined as:

> Of or pertaining to agriculture; connected with husbandry or tillage of the ground.

Webster's New International Dictionary, Second Edition, gives a somewhat wider meaning to the word "agriculture":

> The art or science of cultivating the ground, and raising and harvesting crops, often including also feeding, breeding, and management of livestock; tillage; husbandry; farming; in a broader sense, the science and art of the production of plants and animals useful to man, including to a variable extent the preparation of these products for man's use and their disposal by marketing or otherwise. In this broad use it includes farming, horticulture, forestry, dairying, sugar making, etc.

and the meaning of "agricultural" is given as:

> Of, pertaining to, or dealing with, agriculture; as, *agricultural* implements, wages, education; . . .

And Funk and Wagnall New Standard Dictionary gives this definition of "agriculture":

> 1. The cultivation of the soil for food-products or any other useful or valuable growths of the field or garden; tillage; husbandry; also, by extension, farming, including any industry practised by a cultivator of the soil in connection with such cultivation, as forestry, fruit-raising, breeding and rearing of stock, dairying, market-gardening, etc.

and "agricultural" means:

> Of, pertaining to, or engaged in agriculture; Thus the word "agricultural" has a wide meaning. The same is true of the word "implements". The new English Dictionary, Vol. V, gives this definition of it:

> 2. *pl.* The apparatus, or set of utensils, instruments, etc. employed in any trade or in executing any piece of work; now chiefly in *agricultural implements,* or as a synonym of "tools"; frequent as a generic term for the tools, weapons, etc. used by savage or primitive man, as *flint implements*. In *sing.* A tool, instrument.

Webster's New International Dictionary, Second Edition, defines "implement" as follows:

> 1. An article, as of apparel or furniture, serving to equip; also, a tool, utensil, etc., forming part of equipment for work; chiefly in *pl.;* as, *implements* of the Mass; the *implements* of trade, of husbandry, of war.

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And Funk and Wagnalls New Standard Dictionary gives this definition:

> 1. An instrument used in work, especially manual work; a tool or a utensil; as, the *implements* of husbandry; the *implements* of warfare.

Thus the ambit of the term "agricultural implements" is a very wide one.

I must now determine whether the defendant's friction disc sharpeners come within this ambit. Decision on this requires consideration of the use to which they are put. Detailed operating instructions for the use of the sharpener are given in the defendant's pamphlet, Exhibit 2, and Professor G. L. Shanks of the Department of Agricultural Engineering in the University of Manitoba gave evidence of the manner of its use. The disc sharpener is set on the ground behind the discs of the disc tiller or disc harrow. These discs are circular and concave and must have a cutting edge in order to serve their purpose of turning over the soil. They are arranged in a series called a gang. A disc tiller or a disc harrow may have more than one gang of discs but, ordinarily, there is only one gang. After the sharpener has been put into position all the discs in the gang are revolved by means of a belt which is crossed and runs on the surface of one of the discs at one end and on the pulley of a farm tractor at the other. The tractor supplies the power by which the gang of discs is revolved. The grinding wheel on the disc sharpener is then pressed closely against one of the discs as they are being revolved and the resulting friction grinds the surface of the disc and sharpens it to the desired degree of cutting keenness. This was a radical departure from previous processes whereby the disc was pressed against the grinding or cutting element. When the disc has been sharpened the process is repeated for the other discs until they have all been sharpened. This method of sharpening discs has replaced several other methods where other devices were used, such as a lathe in a blacksmith's shop with a cutting tool forced against the edge of the disc to cut it away, a portable grinder operated by a gasoline engine, a blacksmith shop machine driven with a belt from an engine which by pressure rolled the edge of the disc out thin and, finally, an ordinary grinding stand. The use of several of these methods involved the dismantling of the discs, which meant a great loss of time to the farmer. The

friction discs sharpener can be used without dismantling the discs. This fact and the ease of its operation made it very useful to the farmer in tilling the soil for he could maintain the discs of his disc tiller or disc harrow in the desired capacity for cutting the soil without any serious loss of time. The disc sharpener can be used wherever the disc tiller or disc harrow may happen to be provided that there is a belt and a tractor. But it has no power of its own and is not useful for any purpose other than that of sharpening the discs of a disc tiller or a disc harrow. Professor Shanks had never seen the disc sharpener in use except on a farm.

It is also important to consider how the friction disc sharpener is regarded by the various classes of persons who deal with it or use it. Professor Shanks considered that it is an agricultural implement. In his view, discs could not be used long without sharpening them and, consequently, the disc sharpener was essential to the operation of the tilling the soil. This might also be true of emery stones and other sharpeners generally. Professor Shanks realized this and based his opinion that the defendant's friction disc sharpener was an agricultural implement on the fact that its use was limited to use on a farm for the purpose of sharpening the discs of a disc tiller or a disc harrow and had no use otherwise. It was this limitation of use that made him consider that the friction disc sharpener was a farm implement. Professor Shanks also stated that the disc sharpener would be shown at a Fair as a farm implement.

Mr. D. F. Langrell, a farmer at Woodlands in Manitoba, when asked what farm implements he and his brothers had on their farm, included a friction disc sharpener of the kind made by the defendant. He used it on the farm but not elsewhere. He used it in his ordinary farming operations to sharpen his discs when necessary and did not use it for any other purpose. He did not know of any other use to which it could be put. Speaking as a farmer he regarded it as a farm implement.

Mr. H. A. Lasker, the president of the defendant, said that its friction disc sharpener was marketed and described and known to the trade and users of it as a farm implement. It is distributed to farm implement dealers and advertised in farm implement magazines such as The Farm Implement

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Dealer. It cannot be used except for sharpening the discs of a disc tiller or disc harrow and has not been sold for other than farm use. Only farmers would have any use for it. As a result of his experience in manufacturing and selling the friction disc sharpeners and the use to which they are put he would describe them as farm implements and he regarded "farm implements" and "agricultural implements" as synonymous terms.

Counsel for the plaintiff directed attention to the fact that friction disc sharpeners were expressly included in Schedule III of the Excise Tax Act under the heading Farm and Forest by an amendment of the Excise Tax Act made by section 27 of the Statutes of Canada 1952-53, Chapter 35. but the fact that they were expressly made exempt from sales tax by such amendment cannot be regarded as any indication that they were not exempt previously under Schedule III and Tariff Item 409 f. It must now be taken as settled it is not permissible to construe an Act to which the Interpretation Act applies by reference to a subsequent Act unless such subsequent Act directs how the prior Act is to be interpreted: *vide Morch* v. *Minister of National Revenue* (1); *Luscar Coals Ltd.* v. *Minister of National Revenue* (2) and *Mountain Park Coals Limited* v. *Minister of National Revenue* (3). Consequently, resort may not be had to the amendment of Schedule III made in 1952 in aid of the interpretation of Tariff Item 409 f as it stood prior to the amendment.

It was also urged for the plaintiff that the term "agricultural implements" meant only implements that were actually used in tilling the soil or in such agricultural operations as seeding, harvesting or the like but did not include articles that were merely ancillary to such implements, such as the defendant's friction disc sharpener. In my judgment, there is no such limitation in the ordinary meaning of the term and, certainly, the various classes of persons who dealt with or used the sharpeners did not consider that there was any such restriction of meaning. They had no doubt that the sharpeners were farm implements and, therefore, agricultural implements. In my opinion, they were right.

(1) [1949] Ex. C.R. 327 at 338. (2) [1949] Ex. C.R. 83 at 90.
(3) [1952] Ex. C.R. 560 at 565

Consequently, I find that the defendant's friction disc sharpeners were "agricultural implements, n.o.p." within the meaning of Tariff Item 409 f and exempt from sales tax accordingly. It follows that the plaintiff's action must be dismissed with costs.

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Judgment accordingly.

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May 27,

June 17

Aug. 23

BETWEEN:

CANADIAN HORTICULTURAL COUNCIL, CANADIAN FOOD PROCESSORS ASSOCIATION AND DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE ..... APPELLANTS,

AND

J. FREEDMAN & SON LIMITED .....RESPONDENT.

Revenue—Customs Duty—Customs Act, R.S.C. 1952, c. 58, s. 45(1)—Fruit Cocktail, Fruits and Salad—Customs Tariff, R.S.C. 1952, c. 60, Tariff Items 105 f, 105 (g), 106, 711—Applications for leave to appeal from decision of Tariff Board—Leave to appeal a matter of judicial discretion.

The appellants applied for leave to appeal from the declaration of the Tariff Board that the products described as Fruit Cocktail and Fruits for Salad were classifiable under sub-item (d) of Tariff Item 106 of the Customs Tariff.

Held: That in an application under section 45 of the Customs Act the Court or judge before whom the application is made must not only form an opinion on whether there is a question of law involved in the order, finding or declaration of the Tariff Board but also, if in its or his opinion there is such a question, exercise judicial discretion in determining whether, in the circumstances of the case, leave to appeal on such question should be granted or refused.

2. That if it appears to the Court or judge hearing an application for leave to appeal under section 45 of the Customs Act that the order, finding or declaration of the Tariff Board from which leave to appeal is sought was plainly right or sound or that there was no reason to doubt its correctness or that the applicant would not have a fairly arguable case to submit to the Court leave to appeal should be refused.

Applications for leave to appeal under section 45 of the Customs Act.

The applications were heard before the President of the Court at Ottawa.

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J. M. Coyne for appellants Canadian Horticultural Council and Canadian Food Processors Association.

W. R. Jackett Q.C. for Appellant Deputy Minister of National Revenue for Customs and Excise.

G. F. Henderson Q.C. for respondent.

M. E. Corlett for Canadian Importers and Traders Association.

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

THE PRESIDENT now (August 23, 1954) delivered the following judgment:

Two separate applications for leave to appeal from the declaration of the Tariff Board in Appeal No. 314, dated April 28, 1954, were made before me, the first on behalf of the Canadian Horticultural Council and the Canadian Food Processors Association and the second on behalf of the Deputy Minister of National Revenue for Customs and Excise.

The applications were made under section 45 of the Customs Act, R.S.C. 1952, Chapter 58, of which subsection 1 reads as follows:

> 45. (1) Any of the parties to an appeal under section 44, namely,
>
> (*a*) the person who appealed,
>
> (*b*) the Deputy Minister, or
>
> (*c*) any person who entered an appearance with the secretary of the Tariff Board in accordance with subsection (2) of section 44,
>
> may, upon leave being obtained from the Exchequer Court of Canada or a judge thereof, upon application made within thirty days from the making of the order, finding or declaration sought to be appealed, or within such further time as the Court or judge may allow, appeal to the Exchequer Court upon any question that in the opinion of the Court or judge is a question of law.

And the question in respect of which leave to appeal was sought was in each case stated as follows:

> Did the Tariff Board err as a matter of law in deciding that the products described as Fruit Cocktail and Fruits for Salad and imported under Ottawa Customs Entry No. 38872 of February 25, 1953, and Montreal Customs Entry No. C-78458 of October 9, 1953, and Montreal Customs Entry No. C-10328 of April 23, 1953, were classifiable under sub-item (*d*) of Tariff Item 106 of the Customs Tariff?

A copy of the declaration of the Tariff Board from which leave to appeal was sought was attached as an exhibit to the affidavit of G. A. Rogers, filed in support of the second application. It is also to be found in the issue of the Canada Gazette, dated May 8, 1954: *vide* Volume 88, page 1556.

It appears from Mr. Hooper's affidavit that the products in issue were all prepared in air-tight cans or other air-tight containers and that the labels on the cans described their respective contents. Thus, the contents of the Del Monte Fruit Cocktail were "diced peaches, diced pears, pineapple tidbits, seedless grapes, halved cherries" with a 40% sugar syrup; those of the Del Monte Fruits for Salad "sliced peaches, sliced pears, halved apricots, pineapple tidbits, whole cherries artificially coloured" with a 40% sugar syrup; those of the Dainty-Mix Fruit Cocktail "diced yellow peaches, diced pears, seedless grapes, pineapple tidbits, halved cherries, the fruit cocktail being "artificially flavoured" and with a 35% sugar syrup; and those of the All Good Fruit Cocktail "diced peaches, diced pears, pineapple tidbits, seedless grapes, halved cherries", the cherries being "artifically coloured red and artifically flavoured" with a 40% sugar syrup.

The Deputy Minister decided that the Del Monte Fruit Cocktail, the Del Monte Fruits for Salad and the All Good Fancy Fruit Cocktail were dutiable under tariff item 106 (a) and that the Dainty-Mix Brand Fruit Cocktail was dutiable under tariff item 105 g. From this decision the respondent herein appealed to the Tariff Board.

It appears from the decision of the Tariff Board that on the hearing before it it was contended for the appellant (the respondent herein) that the products were entitled to entry under tariff item 106 (d), and for the Deputy Minister that they could not properly be classified under tariff item 106 (or any subitem thereof) but must be classified as preserves under tariff item 105 f or as goods not enumerated in the Customs Tariff and, therefore, under tariff item 711.

It is, I think, desirable to set out the several tariff items referred to. They appear in the Customs Tariff, R.S.C. 1952, Chapter 60, as follows:

105 f Jellies, jams, marmalades, preserves, fruit, butters and condensed mincemeats.

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105(*g*) Fruits and peels, crystallized, glacé, candied or drained; cherries and other fruits of crème de menthe, maraschino or other flavour.

106 Fruits, prepared, in air-tight cans or other air-tight containers, the weight of the containers to be included in the weight for duty:—

(*a*) Peaches

(*b*) Apricots and pears

(*c*) Pineapples

(*d*) N.o.p.

711 All goods not enumerated in this schedule as subject to any other rate of duty, and not otherwise declared free of duty, and not being goods the importation whereof is by law prohibited.

In each case the rate of duty under the applicable heading is set out.

The Tariff Board, after referring to the contentions made before it, concluded its decision with the following statements:

It is our opinion that the final subitem (*d*) of tariff item 106, reading "N.o.p.", covers and must be deemed to have been intended to cover, such fruits, prepared, in air-tight cans or other air-tight containers, as are not separately named in subitems (*a*), (*b*) or (*c*) of the said tariff item 106. Subitems (*a*), (*b*) and (*c*) of tariff item 106 do not restrict the general coverage of tariff item 106 but simply provide, at appropriate rates of duty, for certain products within the general coverage.

The four mixed fruits under appeal are "Fruits, prepared, in air-tight cans or other air-tight containers". They are not provided for under the subitems (*a*), (*b*) or (*c*) and hence must be classified under subitem (*d*).

Accordingly, the appeal is allowed and the four products at issue are declared to be properly classifiable for duty purposes under tariff item 106 (*d*) at the rate of duty appertaining thereto.

It was from this declaration that the two applications for leave to appeal were made to me.

On the hearing of the first application on May 27, 1954, I was of the opinion that there was a question of law involved in the declaration of the Tariff Board. I thereupon stopped counsel for the applicant and called on counsel for the respondent. He objected to leave to appeal being granted on grounds which I shall summarize briefly. He submitted that if the construction of words in the items of the Customs Tariff was always a question of law, as appeared from the decisions of Cameron J. in *General Supply Co. Ltd.* v. *Deputy Minister of National Revenue, Customs and Excise,*

et al (1) and *Deputy Minister of National Revenue for Customs and Excise* v. *Rediffusion Inc.* (2), then it would follow that almost every decision of the Tariff Board involved a question of law, that if leave to appeal were to be granted in every case where a question of law was involved it would follow that leave would be granted in almost every case, that, in view of the language used in section 45 of the Customs Act, Parliament could not have intended such a situation, that, consequently, the applicant for leave to appeal must show not only that there is a question of law involved but also that there is some sound reason for granting leave to appeal on such question, that it was established by the Supreme Court of Canada in *The Royal Templars of Temperance* v. *Hargrove* (3) that in a case which raises no question of public importance and the judgment appealed from appears to be sound an application for leave to appeal should be refused, that these grounds for refusing leave existed in the present case and that, accordingly, leave to appeal should be refused.

After hearing counsel for the appellant Canadian Horticultural Council and also counsel for the appellant Deputy Minister as well as counsel for Canadian Importers and Traders Association, who opposed the application, I delivered judgment orally stating that while there was a question of law involved in the decision of the Tariff Board I agreed with the submission of counsel for the respondent that some sound reason must be shown for granting leave to appeal, that it had been decided in *The Royal Templars of Temperance* case *(supra)* that if there was no question of public importance and the decision appealed from appeared well founded leave to appeal should be refused, that it was not necessary to decide whether there was a question of public importance in view of my opinion that the decision appealed from appeared to be well founded and that for this reason I refused leave to appeal.

On the same date, on the application of counsel for the Deputy Minister of National Revenue for Customs and Excise, I granted an extension of time within which an application for leave to appeal might be made on his behalf

(1) [1953] Ex. C.R. 185. (2) [1953] Ex. C.R. 221.
(3) (1901) 31 Can. S.C.R. 385.

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and this application came before me on June 17, 1954, with the same counsel appearing as had appeared on the first application.

Counsel for the respondent objected to argument being heard and submitted, pursuant to a notice of motion to that effect, that the application should be dismissed, urging that its subject matter was *res judicata* by reason of my decision on the first application and that I was bound by it. It was my view that the importance of the questions involved warranted further argument and that the application should be considered on its merits, saving to the respondent, if it should be necessary, whatever rights, if any, it might have to judgment dismissing the application on the ground that its subject matter was *res judicata*. On that basis the argument proceeded *de novo* and several questions of interest and importance were raised.

The first was whether any question of law was involved in the Tariff Board's declaration. It was contended by counsel for the respondent that no question of law was involved in the meaning of the word "fruits" in Tariff Item 106, that it was a common word and that its meaning was a question of fact. In support of this view he relied on the decision of the House of Lords in *Girls' Public Day School Trust* v. *Ereautl* (1) that the term "public school", as used in Schedule A of the Income Tax Act, 1918, was not a term of art and that the question of its common understanding was a question of fact for the Commissioners. But counsel for the Deputy Minister did not put his argument on the basis that the meaning of the word "fruits" *per se* was a question of law. It was the meaning of the whole Tariff Item that was involved. While there is much to be said for the contention of counsel for the respondent that the meaning of common words is a question of fact rather than of law I am of the opinion that a question of law was involved in the Tariff Board's declaration in this case.

That being so, counsel for the respondent objected to the granting of leave in this case for reasons similar to those which he had advanced on the first application. In doing so he broke new ground. Previously, the judge hearing an application for leave to appeal from a decision of the Tariff

(1) [1931] A.C. 12.

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Board was concerned only with the formulation of an opinion whether there was a question of law involved in the order, finding or declaration sought to be appealed from. If, in his opinion, there was such a question leave to appeal on it was granted as a matter of course. There was no enquiry whether the question of law was such as to warrant the granting of leave to appeal. I must confess that until counsel for the respondent raised the question on the first application the judges of this Court did not consider it. In my opinion, they must hereafter do so. This was conceded by counsel for the Deputy Minister. It now seems obvious that section 45 of the Customs Act does not give a right of appeal merely because in the opinion of the Court or judge there is a question of law involved in the order, finding or declaration of the Tariff Board. The right of appeal is dependent on leave to appeal being granted. This connotes the exercise of judicial discretion in determining whether leave should be granted, even although a question of law is involved: *vide Lake Erie and Detroit River Rway. Co.* v. *Marsh* (1); *In re Ontario Sugar Co. McKinnon's Case* (2). Consequently, on an application under section 45 of the Customs Act the Court or judge before whom the application is made must not only form an opinion on whether there is a question of law involved in the order, finding or declaration of the Tariff Board but also, if in its or his opinion there is such a question, exercise judicial discretion in determining whether, in the circumstances of the case, leave to appeal on such question should be granted or refused. Since the exercise of this discretion may seriously affect the extent of such right of appeal as is now conferred by section 45 of the Customs Act it is desirable to consider, as far as it may be possible to do so, the principles to be applied in such exercise.

While, of course, there are no direct decisions on the question there is guidance in decisions of the Supreme Court of Canada on applications for leave or special leave to appeal to it. It is natural that these should more clearly indicate the circumstances in which leave should be refused than those in which it should be granted. Indeed, it is recognized that it would not be possible to define the cir-

(1) (1904) 35 Can. S.C.R. 197 at 200.

(2) (1911) 44 Can. S.C.R. 659 at 662.

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cumstances in which leave should be granted. This was clearly stated by Nesbitt J. in *Lake Erie and Detroit River Rway. Co.* v. *Marsh* (1), where he said:

> In applications to this court for special leave, it is bound to apply judicial discretion to the particular facts and circumstances of each case as presented. Cases vary so widely in their circumstances that the principles upon which an appeal ought to be allowed do not admit of anything approaching to exhaustive definition. No rule can be laid down which would not necessarily be subject to future qualification, and any attempt to formulate any such rule might, therefore, prove misleading. The court may indicate certain particulars the absence of which will have a strong influence in inducing it to refuse leave, but it by no means follows that leave will be given in all cases where these features occur.

Then Nesbitt J. indicated some of the circumstances in which leave to appeal might be granted, as follows:

> Where, however, the case involves matters of public interest or some important question of law or the construction of Imperial or Dominion statutes or a conflict of provincial and Dominion authority or questions of law applicable to the whole Dominion, leave may well be given.

In *Calgary & Edmonton Land Co.* v. *Attorney General of Alberta* (2) special leave to appeal was granted because of the magnitude of the interests involved. And in *In re Hotel Dunlop Ltd.; Quinn* v. *Guernsey* (3) Anglin C.J. allowed special leave to appeal because of the general importance of the questions involved and the doubt involved in the conflicting judgments below.

But the decisions are fairly consistent in deciding when leave to appeal should be refused. For example, in *Fisher* v. *Fisher* (4) it was held that under the circumstances disclosed it did not appear that the questions at issue in the case were of sufficient importance to justify the court in making an order granting special leave to appeal. And in *The Royal Templars of Temperance* v. *Hargrove (supra)* Sir Henry Strong C.J. stated that if a case raises no question of public importance and the judgment appealed from appears to be sound an application for leave to appeal should be refused. In *Lake Erie and Detroit River Rway. Co.* v. *Marsh (supra)* Nesbitt J. went further. After referring to the difficulty involved in any attempt to define the circumstances in which leave to appeal should be granted he pointed out that even although a case is of great public

(1) (1904) 35 Can. S.C.R. 197 at 199.
(2) (1911) 45 Can. S.C.R. 170.
(3) [1927] S.C.R. 134.
(4) (1898) 28 Can. S.C.R. 494.

interest and raises important questions of law it does not follow automatically that leave to appeal will be granted. There may be an overriding consideration to be taken into account, namely, that the judgment appealed from is plainly right. This very important statement is put in the following terms, at page 200:

> If a case is of great public interest and raises important questions of law and, yet, the judgment is plainly right, no leave should be granted.

In *In re Ontario Sugar Co. McKinnon's Case* (1) Anglin J. refused leave to appeal on the ground that he saw no reason to doubt the correctness of the judgment against which it was sought to appeal and, later, that it seemed to him to be plainly right and, still later, that the proposed appeal raised no question of public importance. In *Schaefer* v. *The King* (2) Anglin J. refused special leave to inscribe an appeal on the ground that the judgment appealed from was so clearly right that an appeal from it would be hopeless. In *Riley* v. *Curtis's and Harvey and Apedaile* (3) Mignault J. refused leave to appeal on the ground that no important principle of law nor the construction of a public act nor any question of public interest was involved. And in *Canadian Credit Men's Trust Association Ltd.* v. *Hoffar Ltd.* (4) Mignault J. refused leave to appeal from a judgment which in his opinion was clearly right on the ground that the applicant for leave would not have a fairly arguable case to submit to the Court.

It was urged by counsel for the Deputy Minister that in applications for leave to appeal under section 45 of the Customs Act a somewhat different view should be taken of the judicial discretion to be exercised. The submission, put shortly, was that in such cases it could not be said that no question of public importance was involved since customs cases, involving as they do the public revenue and in some cases international trade, are always of public importance, that, consequently, leave to appeal should ordinarily be granted, that the requirement of leave was intended only to operate as a brake on frivolous or improper appeals and that all that was necessary for the granting of leave was that the question of law should be one of substance and seriously arguable.

(1) (1911) 44 Can. S.C.R. 659.
(2) (1919) 58 Can. S.C.R. 43.
(3) (1919) 59 Can. S.C.R. 206.
(4) [1929] S.C.R. 180.

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Counsel then contended that there was a seriously arguable question of law in the present case and, in effect, proceeded with his submission that the declaration of the Tariff Board was wrong. Substantially, his argument was that the use of the word "fruits" in Tariff Item 106 rather than the word "fruit" showed an intention to deal with individual fruits, each in its own juice with sugar, such as peaches in subsection (a), pears or apricots in subsection (b) and pineapples in subsection (c), that, consequently, subsection (d) was intended to cover only individual fruits, not otherwise provided for in subsections (a), (b) and (c), and was not intended to cover mixed pieces of various fruits in the mixed juices of such several fruits and that, consequently, the fruit cocktail and fruits for salad in issue, not being individual fruits, were wrongly classified under Tariff Item 106 (d).

While it may be conceded that since an item in the Customs Tariff is involved leave to appeal should not be refused on the ground that no question of public importance is involved, I am of the view that, as in the case of applications for leave or special leave to appeal to the Supreme Court of Canada, it is not possible to lay down specific and all-embracing rules for the granting of leave to appeal under section 45 of the Customs Act. But I see no reason why the grounds for refusing leave to appeal should not be similar to those taken by the Supreme Court of Canada in dealing with applications for leave to appeal to it. Consequently, in my opinion, if it appears to the Court or judge hearing an application for leave to appeal under section 45 of the Customs Act that the order, finding or declaration of the Tariff Board from which leave to appeal is sought was plainly right or sound or that there was no reason to doubt its correctness or that the applicant would not have a fairly arguable case to submit to the Court leave to appeal should be refused.

In my judgment, that is the situation in the present case. I am unable to accept the argument that the use of the word "fruits" in Tariff Item 106 instead of the word "fruit" had the effect submitted for it of excluding from the ambit of the Item mixed fruits such as the products in issue. The selection of the plural rather than the singular might easily have been an accident of draftsmanship. Moreover, I see no

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reason for doubting the correctness of the Tariff Board's decision. Indeed, in my opinion, it appears sound and right and should be accepted as final.

Leave to appeal is, therefore, refused in the second application as it was in the first.

In view of this conclusion it is unnecessary to deal with the question whether the subject matter of the second application was *res judicata* by reason of my refusal of leave in the first application.

These reasons for judgment, being to the same effect as those given orally in refusing leave to appeal on the first application, are as applicable to such refusal as to the refusal in the second application.

In each case the refusal of leave is with costs to the successful parties as against the applicant for leave.

Judgment accordingly.

N.B. An appeal from the above decision to the Supreme Court of Canada was quashed by order of the Court on October 18, 1954.

1954

Apr. 8

June 30

BETWEEN:

CANADIAN FRUIT DISTRIBUTORS LIMITED ..... APPELLANT,

AND

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

AND BETWEEN:

CANADIAN FRUIT DISTRIBUTORS LIMITED ..... APPELLANT,

AND

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

Revenue—Income tax—Excess profits tax—The Income War Tax Act, R.S.C. 1927, c. 97, s. 3—No right in Minister to allocate portion of expenses against portion of receipts—Accountable advances not income.

The appellant acted as broker for its parent company B.C. Tree Fruits Limited in the sale of fruit and vegetable products of members of

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B.C. Fruit Growers Association and also handled outside business acting as broker for customers other than B.C. Tree Fruits Limited in the sale of products not produced by members of B.C. Fruit Growers Association. The Minister sought to hold the appellant liable to tax only on the net income received by it from its outside business subsequently to the end of 1946 by allocating part of its total expenses to that portion of its receipts that came from its outside business and assessing it on the balance. The appellant appealed against the assessments for 1947 and 1948 thus made to the Income Tax Appeal Board which dismissed its appeals. From this decision the appellant appealed to this Court. It also appealed directly to this Court from its excess profits tax assessments for the same years.

Held: that the Minister had no right to separate the appellant's receipts from its outside business, from its receipts, from its parent company and charge the former with a portion of its operating expenses. The appellant did not conduct two separate businesses. It had only one business and one gross income and the expenses of its business were indivisible.

2. That the receipts which came to the appellant from B.C. Tree Fruits Limited were accountable advances and did not have the essential quality of income, namely, that the appellant's right to them was absolute and under no restriction, contractual or otherwise, as to their disposition, use or enjoyment. *Robertson Limited* v. *Minister of National Revenue* [1944] Ex. C. R. 170 followed.

3. That under the agreement between the appellant and its parent the only amount which it was entitled to keep as its own was the difference between the total amount of the advances and the excess of its total receipts over its total expenses and that in each of the years in question this amount plus the amount which it received from its outside business exactly equalled its operating expenses leaving it with no net income.

APPEAL from decision of Income Tax Appeal Board and appeal under Income War Tax Act.

The appeals were heard together before the President of the Court at Vancouver.

W. Murphy Q.C. and *D. C. Fillmore* for appellant.

J. L. Farris Q.C. and *F. J. Cross* for respondent.

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

THE PRESIDENT now (June 30, 1954) delivered the following judgment.

In the first of these causes the appellant appeals against the decision of the Income Tax Appeal Board (1), dated February 12, 1953, dismissing its appeal against its income

(1) (1953) 8 Tax A.B.C. 51.

tax assessments for its 1947 and 1948 taxation years. In the second it appeals directly to this Court against its excess profits tax assessments for the same taxation periods. At the hearing it was order that the appeals be heard together.

The facts are not in controversy. The appellant is an important cog in the marketing machinery of the fruit and vegetable growers of the Okanagan and Kootenay Valleys in British Columbia. As early as 1890 the growers in these valleys had organized themselves into the B.C. Fruit Growers Association. After many years of difficulty in marketing the products of its members the Association finally in 1939 organized B.C. Tree Fruits Limited as a collective bargaining or central selling agency. This entity was a non-profit organization. Only ten shares of its capital stock were ever issued, one to each of its directors who all held their qualifying shares in trust for the Association. Soon after its incorporation B.C. Tree Fruits Limited found it necessary to have brokers or agents in the several markets in which the products of the members of the Association were sold and to that end it acquired the appellant, which had been incorporated in 1925, from its prior owner. Thereupon the appellant became the wholly owned subsidiary of B.C. Tree Fruits Limited and subject to its direction.

The appellant has branches and carries on business in six cities of Western Canada, namely, Winnipeg, Regina, Saskatoon, Calgary, Edmonton and Vancouver. In these branches it does two classes of business. Primarily, it acts as broker for B.C. Tree Fruits Limited in the sale of the products of the members of the Association controlled by it. It does this portion of its business, which is the main reason for its existence, under the direction of its parent B.C. Tree Fruits Limited pursuant to an agreement between it and its parent, dated April 1, 1944, to which further reference will be made. Secondarily, it handles what may be described as outside business, that is to say, business that comes to it from customers other than B.C. Tree Fruits Limited. It acts as broker for these customers in the sale of products that are not produced in the Okanagan or Kootenay Valleys and are not under the control of B.C. Tree Fruits Limited, such as, for example, citrus fruits and other imported fruits and vegetables. Mr. A. K. Loyd, the appellant's president and general manager, gave three reasons why the appellant

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took on this outside business. In the first place, it had to be able to provide a complete service to purchasers from it. It was also valuable to be conversant with prices and conditions in other markets. And with such knowledge it was able to advise buyers when B.C. fruits and vegetables of the same kind would probably be available. Thus, while the appellant's primary objective was to sell the fruit and vegetables produced in the Okanagan and Kootenay Valleys, its outside business was complementary to its primary business and helped it in its main purpose.

The agreement to which I have referred, which was in full force and effect in the years in question, sets out the conditions under which the appellant acted as a broker for B.C. Tree Fruits Limited. The appellant is referred to therein as the Party of the First Part and B.C. Tree Fruits Limited as the Party of the Second Part. The recitals in the agreement and its first five paragraphs are as follows:

WHEREAS the party of the Second Part is a shipper of fruit and vegetables grown in the Okanagan Valley and adjacent areas in the Province of British Columbia and has agreed to utilize the services of the Party of the First Part upon the terms hereinafter mentioned.

AND WHEREAS the Party of the First Part carries on business as fruit and vegetable brokers with branch offices at the City of Winnipeg in the Province of Manitoba, the Cities of Regina and Saskatoon, in the Province of Saskatchewan, the cities of Calgary and Edmonton in the Province of Alberta, and the City of Vancouver in the Province of British Columbia.

AND WHEREAS it has been agreed that the Party of the First Part shall permit the direction of the operation of its business during the currency of this Agreement by the Party of the Second Part, on the terms and conditions hereinafter mentioned.

AND WHEREAS the Party of the Second Part will during the term hereof be put to considerable expense through expenses incurred and the time of a number of its officials and employees occupied in the interests of the business of the Party of the First Part.

NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of the premises the Parties hereto agree as follows:

1. The Party of the First Part agrees to conduct its said business solely as directed by and subject to the instructions of the Party of the Second Part during the currency of this Agreement. It is hereby declared, without limiting the generality of the foregoing agreement, that such instructions shall include the following:

(a) The Party of the First Part shall furnish to the Party of the Second Part before the 15th day of each and every month during the said period, a statement of the revenues and expenses of each branch during the preceding calendar month.

(*b*) Each of the said branch offices shall every ten days during the currency hereof furnish to the Party of the Second Part a statement of all products sold, and the persons or firms for whom sold, by such office during the preceding ten days.

(*c*) All accounts other than the Party of the Second Part represented by the Party of the First Part during such period shall be represented only subject to the approval of the Party of the Second Part.

(*d*) The Party of the First Part will, during such period, promptly follow and carry into effect any selling policies required of it by the Party of the Second Part.

(*e*) The staff, salaries, bonuses and operations of the Party of the First Part during each fiscal year shall be continued on the same basis as in the previous fiscal year except for such reasonable adjustment therein as may be approved or requested by the Party of the Second Part.

2. The party of the Second Part agrees during such period to utilize exclusively the services of the Party of the First Part as broker for the sale in the Provinces of Manitoba, Saskatchewan, and Alberta, and in the said City of Vancouver, of fruits and vegetables marketed by it, except as to fruit and vegetables marketed through A. Harvey Limited, of Vancouver aforesaid.

3. Subject to the determination of charges in the manner hereinafter mentioned, the Party of the Second Part agrees to pay to the Party of the First Part as an estimated charge for its services as broker during such period, in accordance with the scale of fees and charges set forth in the Schedule hereto annexed, with such variations or additions therein (if any) as may be agreed from time to time by the Parties hereto.

4. The Party of the First Part agrees that in each fiscal year during the currency hereof its estimated charges to the Party of the Second Part for its services shall be reduced by the amount by which its receipts during such fiscal year exceed its operating expenses (which shall include such sum for head office expenses as may from time to time be agreed) for such fiscal year, and such excess of receipts over operating expenses shall be repaid to the Party of the Second Part.

5. In the event that the receipts of the Party of the First Part during any fiscal year during the currency hereof are not sufficient to take care of operating expenses in such fiscal year, the Party of the Second Part agrees forthwith to pay to the Party of the First Part the amount of any such deficiency.

It is plain from the agreement that the appellant was to operate its business under the direction of B.C. Tree Fruits Limited. It is also apparent from paragraph 1. (c) that it was contemplated that the appellant should handle outside business to the extent that it was approved by B.C. Tree Fruits Limited. And paragraphs 3, 4 and 5 make it clear that B.C. Tree Fruits Limited was to make advances to the appellant from time to time to cover its expenses, that the

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appellant was to refund any excess of receipts over operating expenses to B.C. Tree Fruits Limited and that B.C. Tree Fruits Limited was to guarantee the appellant against loss.

Attached to the agreement is a schedule of brokerage rates. These were for the purpose of enabling the managers of the branches to know how they stood in the matter of their remuneration since it depended on a salary plus a bonus based on the volume of sales. They were also useful for the purpose of enabling B.C. Tree Fruits Limited to determine from time to time whether its advances to the appellant, having regard to the volume of sales made, were excessive.

The manner in which the arrangements between the appellant and B.C. Tree Fruits Limited were carried out was explained by Mr. F. W. Darroch, the appellant's secretary-treasurer. It was the usual practice for the appellant's branch offices to compile a statement each month of its brokerage amounts. This was really its statement of what it considered was due to it under the agreement. The amounts were checked by B.C. Tree Fruits Limited and cheques for them sent to the branches. The branches also sent financial statements to the appellant's head office at Kelowna. Whenever it saw that a branch had more working capital than was required it asked the branch to return the excess to it and it then returned such excess to B.C. Tree Fruits Limited.

The manner in which the assessments appealed against were arrived at may now be considered. The appellant's fiscal year ended on February 28 of each year. There was no suggestion that it should be subject to tax on any of the income received by it from B.C. Tree Fruits Limited. This was considered exempt from taxation. But the Minister did seek to hold it liable to tax on the net income received by it from its outside business. Even in respect of such income it was considered that the appellant was exempt from tax up to the end of 1946 by reason of section 4(p) of the Income War Tax Act, R.S.C. 1927, Chapter 97. Consequently, it was assessed on its net income from its outside business only from January 1, 1947. This meant that for its 1947 taxation year it was assessed only on such net income from

January 1, 1947, to February 28, 1947, and for its 1948 taxation year on such net income from March 1, 1947, to February 29, 1948.

The method adopted by the Minister in calculating the appellant's net income from its outside business was explained in a memorandum, Exhibit A, prepared by Mr. D. A. Wickett, an assessor in the Income Tax Office at Vancouver. This reads as follows:

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1947 and 1948 Assessments

The 1947 and 1948 Assessments were prepared in such a manner as to tax only that income which was deemed to have been earned by the appellant company from outside sources. By "outside sources" we mean all sources of brokerage income other than B.C. Tree Fruits Limited.

The appellant submitted the amount of total brokerage income received from outside sources during the periods in question but did not show amounts of expense laid out to earn that particular income. We had details of total expenses incurred but these expenses related to dealings both with B.C. Tree Fruits Limited and with others. Since an expense allocation was not available our only alternative was to apportion the total expenses in the 1947 fiscal period on an arbitrary basis. Because revenue from outside sources was 32·49 per cent of total revenue, we considered the expenses applicable to earning that revenue from outside sources to be 32·49 per cent of the total expense.

Applying this percentage to the total expenses of $143,120.12, an amount of $46,510.09 was allocated to revenue derived from outside sources. The profit from outside sources was thus computed at $81,787.52 or 32·49 per cent of total revenue; less $46,510.09 or 32·49 per cent of total expenses. This calculation produced an amount of $35,277.43 deemed to be profit from outside brokerage. From this latter figure was deducted bad debts of $75.00 leaving a net profit on outside business for the eleven months ended February 28, 1947 of $35,202.43. A similar calculation produced the amount of $34,393.22 as net profit from outside brokerage for the year 1948.

One further calculation remains to be explained. Under the provisions of Section 4(*p*) of I.W.T.A. as it existed in 1946 and prior, this company was considered to be exempt from taxation; therefore the profits of the 1947 fiscal period as determined by our calculation to be $35,277.43 could be taxed only to the extent that it had been earned after December 31, 1946. Canadian Fruit Distributor's 1947 fiscal period was 334 days of which 59 were in the 1947 calendar year. The taxable income was therefore $\frac{59}{334}$ of $35,277.43, or $6,218.39.

The striking feature of these assessments is the Minister's arbitrary allocation of part of the appellant's total expenses to that portion of its receipts that came from its outside business. Because the receipts from the outside business, which for the taxation year ending February 28, 1947, came to $81,787.52, represented 32·49% of its total receipts,

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including the receipts from B.C. Tree Fruits Limited, the Minister decided that 32·49% of its expenses, which amount to $143,198.12, should be allocated to such outside business. The Minister made a similar arbitrary assumption for the taxation year ending February 28, 1948. Because the receipts from the outside business, which for that year came to $87,328.21, represented 34·5% of its total receipts the Minister decided that 34·5% of its expenses, which amounted to $153,119.35, should be allocated to its outside business. In the net result, the appellant was assessed for income tax and excess profits tax on an income of $6,218.39 for the taxation year ending February 28, 1947, and $34,393.22 for the taxation year ending February 28, 1948. The details of how these amounts were arrived at appear from the notices of assessments for the said taxation years, dated November 3, 1950.

The appellant gave notice of objection to the income tax assessments and filed notices of appeal against the excess profits tax assessments. It then appealed against the income tax assessments to the Income Tax Appeal Board which dismissed its appeal. From this decision the present appeal to this Court is taken. The appellant also appeals to this Court against its excess profits tax assessments for the taxation years in question.

Since the appeal to this Court from a decision of the Income Tax Appeal Board is a trial *de novo* of the issues involved it follows that this Court should deal with them as if there had never been any appeal to the Board. It is, therefore, not concerned with any findings of fact made by it or the reasons for judgment given by it.

Here the issue is whether the appellant had any taxable income in the years under review. The appellant does not take the position that it could not ever make a profit within the meaning of section 3 of the Income War Tax Act. If the amounts which it received from B.C. Tree Fruits Limited were its only receipts they would not be subject to tax. That is conceded. But if its receipts from its outside business exceeded its operating expenses so that it did not require any payments from B.C. Tree Fruits Limited then it would clearly, to the extent of such excess, have a profit that would be taxable income.

But that is not the position in the present case. It is the appellant's submission that in each of the years for which it was assessed it had no taxable income but broke exactly even in its operations neither sustaining a loss nor making a profit.

I have come to the conclusion that this submission is well founded and that the assessments appealed against cannot stand. I have no hesitation in saying, in the first place, that the Minister had no authority for his method of arriving at the assessments appealed against. He had no right to separate part of the appellant's receipts, namely, its receipts from its outside business, from the rest of its receipts, namely, those that come from its parent company and then charge such part with a portion of its operating expenses. That is not consistent with the manner in which it conducted its business and is not in accord with its income position. The appellant did not conduct two separate businesses. While its business came to it from two sources, one being B.C. Tree Fruits Limited and the other its outside customers, it had only one business and only one gross income. Nor did it have two sets of operating expenses. The expenses of its business were indivisible. Consequently, if it had any net income it could only be by reason of its gross income from all its business exceeding its total operating expenses.

What was the real position? In the first place, it must, I think, be conceded that not all the receipts which came to the appellant from B.C. Tree Fruits Limited were income in its hands at the moment of their receipt. It was always considered that they were accountable advances made by B.C. Tree Fruits Limited to the appellant on the basis of its estimated charges and subject to refund to the extent that the charges were subject to determination under the agreement. The receipts, therefore, did not have the essential quality of income, namely, that the appellant's right to them was absolute and under no restriction, contractual or otherwise, as to their disposition, use or enjoyment. I had occasion in *Robertson Limited* v. *Minister of National Revenue* (1) to consider the test to be applied in determining whether a sum of money received by a person has the quality of income in his hands. There I referred to a

(1) [1944] Ex. C.R. 170.

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statement made by Mr. Justice Brandeis in delivering the opinion of the Supreme Court of the United States in *Brown* v. *Helvering* (1) where he said of certain overriding commissions in respect of which the taxpayer had sought to deduct certain reserves for contingent obligations to return part of the commissions:

> The overriding commissions were gross income of the year in which they were receivable. As to each such commission there arose the obligation—a contingent liability—to return a proportionate part in case of cancellation. But the mere fact that some portion of it might have to be refunded in some future year in the event of cancellation or reinsurance did not affect its quality as income . . . When received, the general agent's right to it was absolute. It was under no restriction, contractual or otherwise, as to its disposition, use or enjoyment.

I adopted the test of income thus laid down by Mr. Justice Brandeis. At page 182, I said:

> In my judgment, the language used by him, to which I have already referred, lays down an important test as to whether an amount received by a taxpayer has the quality of income. Is his right to it absolute and under no restriction, contractual or otherwise, as to its disposition, use or enjoyment? To put it in another way, can an amount in a taxpayer's hands be regarded as an item of profit or gain from his business, as long as he holds it subject to specific and unfulfilled conditions and his right to retain it and apply it to his own use has not yet accrued, and may never accrue?

These remarks are applicable in the present case. It was provided in paragraph 3 of the agreement that B.C. Tree Fruits Limited should pay the appellant "an estimated charge" for its services in accordance with the scale of fees and charges set forth in the schedule annexed to the agreement but this was subject to the determination of charges in the manner provided in the agreement. There is, therefore, justification in holding that the sums which B.C. Tree Fruits Limited paid to the appellant were, in the first place, really advances and that the right of the appellant to keep them was subject to determination in accordance with the agreement. Then paragraph 4 provided that the appellant's estimated charges, in respect of which the advances by B.C. Fruit Trees Limited were made, should be reduced by the amount by which its receipts during the fiscal year exceeded its operating expenses. Thus the only amount which it was entitled to keep as its own was the difference between the total amount of the advances and the excess of its total receipts over its total expenses. This was the only part of

(1) (1933) 291 U.S. 193 at 199.

the appellant's receipts from B.C. Tree Fruits Limited that had acquired the quality of income in its hands according to the test laid down by Mr. Justice Brandeis in *Brown* v. *Helvering (supra)* and adopted by this Court in the *Robertson* case *(supra)*.

On this basis the appellant's true income position may now be ascertained. Its total receipts for the year ending February 28, 1947, is shown on its profit and loss account as $251,675.28, which amount was accepted by the Minister on his notice of assessment. Mr. Darroch gave its receipts from its outside business as $81,787.52, which left $169,887.76 as the total amount received from B.C. Tree Fruits Limited. Mr. Darroch said that the total expenses amounted to $143,198.12. Thus the appellant's receipts exceeded its operating expenses by $108,477.16. If the formula provided for in paragraph 4 is applied it follows that the amount of $169,887.76 paid by B.C. Tree Fruits Limited must be reduced by $108,477.16, leaving $61,410.60 as the amount that the appellant was entitled to keep as its income. This amount and the $81,787.52 which it received from its outside business came to a total of $143,198.12, which exactly equalled its operating expenses, leaving it with no net income for the year. A similar compilation for the year ending February 29, 1948, leads to a similar result. The appellant's profit and loss statement shows total receipts of $252,879.39, which amount was adopted by the Minister on his notice of assessment. Mr. Darroch's evidence is that the outside business brought in $87,328.21, which left $165,551.18 as the amount advanced by B.C. Tree Fruits Limited. Mr. Darroch stated that the total expenses came to $153,119.35. Thus the appellant's total receipts exceeded its operating expenses by $99,760.04. Consequently, by application of the agreement formula, the amount of $165,551.18 advanced by B.C. Tree Fruits Limited must be reduced by $99,760.04, leaving only $65,791.14 as the amount that the appellant was entitled to keep as its income. This amount and the $87,328.21 which it received from its outside business came to a total of $153,119.35, which exactly equalled its operating expenses, leaving it with no net income for the year.

Counsel for the respondent urged that the agreement contemplated that the amount which B.C. Tree Fruits Limited

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was to pay the appellant should exactly equal the expense of doing its business. Put otherwise, the submission was that the term receipts in paragraph 4 of the agreement was confined to the appellant's receipts from B.C. Tree Fruits Limited and did not include any receipts from its outside business and that, consequently, all that was to be refunded to B.C. Tree Fruits Limited was the excess of the receipts from it over the operating expenses of doing its business. I am unable to agree. There is no justification for reading this limitation of meaning into the word receipts. It was contemplated that the appellant would do outside business and I am satisfied that the receipts referred to in paragraph 4 were not limited to those that came from B.C. Tree Fruits Limited but included the receipts from outside business as well.

If follows from what I have said that the Minister was in error in assessing the appellant as he did. The appeal from the decision of the Income Tax Appeal Board must, therefore, be allowed and the income tax assessments appealed against set aside. Likewise, the appeals against the excess profits tax assessments will be allowed and such assessments set aside. In each case the allowance of the appeal will be with costs but since the appeals were heard together there will be only one set of counsel fees.

Judgment accordingly.

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June 8

June 30

BETWEEN:

HARRIETTE ROSELLA MILLET .....SUPPLIANT,

AND

HER MAJESTY THE QUEEN .....RESPONDENT,

Crown—Petition of Right—Contract of insurance—The Veterans Insurance Act, S. of C. 1944-45, 8 Geo. VI, c. 49 and amendments thereto—The Veterans Insurance Regulations, Regulations 4(2)(3) and 14—Payment of premiums—Failure to pay premiums as they become due—Acceptance of cheque later dishonoured not an absolute payment of premium—Crown not bound by estoppel by reason of action of its officers or servants.

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On November 29, 1950, an insurance policy was issued by the Crown to suppliant's husband under the Veterans Insurance Act, S. of C. 1944-45, 8 Geo. VI, c. 49, and amendments thereto, the amount thereof payable in the event of the insured's death, to suppliant. By the Veterans Insurance Regulations the premiums were payable monthly to the Department of Veterans' Affairs, at Ottawa, with an allowance of a grace period of one month for the payment of any premium after the first, after which period the policy would not be maintained in force beyond the due date of the next premium. From the date of issuance of the policy to the date of the insured's death on February 10, 1952, all the payments were made within the period of grace, except on one occasion and no protest on behalf of the Department was then made for the delay, and on another occasion when a cheque received eight days after the expiration of the said period was returned later marked "N.S.F.". The amount of the cheque was deducted from the insured's insurance credit leaving the account paid to November 30, 1951, and the insured advised accordingly. A last payment made on January 15, 1952, was received at Ottawa on February 7, 1952. The defence was that as a result of the insured's failure to pay the last two premiums as they became due, the policy had lapsed.

Held: That the acceptance by the Department of the cheque dated December 26, 1951, though later dishonoured, did not constitute an absolute payment of the premium due December 1, 1951, nor was it intended to be so. The cheque was not honoured when presented for payment. *London and Lancashire Life Insurance Co.* v. *Fleming* [1897] A.C. 499; *Hutchings* v. *National Life Assurance Co.* (1906) 37 S.C.R. 124 referred to and followed.

2. That even though the departmental officers would not have themselves complied with the provisions of the insurance contract, the action of these officers could not bind the Crown. The acts of the Crown's officers or servants cannot bind the Crown by estoppel. *Attorney-General of Canada* v. *C. C. Fields and Co.* [1943] 1 D.L.R. 434 referred to and followed. Where a particular obligation or duty is imposed by statute or by regulation validly made thereunder and embodied in a contract, no estoppel should be allowed to give relief from the said obligation.

3. That the last payment made by the insured was for the premium due on November 1, 1951, and the policy was maintained in force up to the due date of the next premium, namely, December 1, 1951. From that date onward the policy was not in force, had no effect and suppliant has no claim thereunder against respondent.

PETITION OF RIGHT to recover an amount alleged payable to suppliant under a policy of insurance issued by the Crown pursuant to the Veterans Insurance Act.

The action was tried before the Honourable Mr. Justice Fournier at Moncton.

R. M. Palmer, Q.C. for suppliant.

D. J. Friel and *K. E. Eaton* for respondent.

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

FOURNIER J. now (June 30, 1954) delivered the following judgment:

This is a claim by petition of right for the amount payable to the suppliant under a contract or policy of insurance made and issued by the Crown to Richard Edward Millet pursuant to the Veterans Insurance Act, Statutes of Canada (8 George VI), 1944-45, chap. 49, and amendments thereto.

The facts leading up to these proceedings are hereinafter summarized.

On November 29, 1950, Richard Edward Millet signed an application for insurance under the Veterans Insurance Act. In consideration of this application and the payment of the premiums provided in the contract and subject to the provisions and conditions set forth in the policy or attached thereto and to the provisions of the said Act and any amendments thereto and the regulations made thereunder, an insurance policy for $5,000 and bearing No. V-27706 was issued to the applicant. In the event of his death, the amount of the insurance became payable to the suppliant as follows: $1,000 in cash and the balance of $4,000 to be applied to purchase an annuity certain payable quarterly for a term of ten years.

The premiums were payable monthly. From the date of the issuance of the contract to the date of his death on February 10, 1952, the insured paid all the premiums by cheques drawn on the Bank of Montreal, Moncton, N.B., except the last payment which was made by a Bank Money Order. The first premium was paid by cheque at the time of the application and bears the date of November 29, 1950. All the other cheques—twelve in number and filed as Exhibits 5 to 16 inclusive—are dated within the period of grace. The dates of receipt of these cheques, payable to the Receiver General of Canada, as they appear on Exhibit 18 (Statement of remittances on policy No. V-27706), with the exception of the cheque dated July 28, 1951, and the cheque dated December 26, 1951, are also dates within the period of grace.

This last cheque dated December 26, 1951, and issued in payment of the premium due December 1, 1951, appears to have been received by the Department of Veterans Affairs, Insurance Division, on January 9, 1952. It was deposited with the Bank of Canada on that date. On January 11, 1952, it was presented for payment to the Bank of Montreal, Moncton, N.B., but was returned unpaid to Ottawa a few days later, with the notation "N.S.F." By letter dated January 18, 1952, the insured was notified that this cheque had not been honoured. The letter reads as follows: "The enclosed cheque for $16.25 has been returned by the bank marked 'not sufficient funds'. This amount, therefore, has been removed from your insurance credit, leaving the account paid to November 30, 1951." The last payment made by the insured was a Bank Money Order dated January 15, 1952, and received in Ottawa on February 7, 1952.

The official receipts, twelve in number, filed as Exhibits 20 to 31 inclusive, bear only the date on which the cheques were deposited with the Bank of Canada, with the exception of Exhibit 31 (cheque dated December 26, 1951), which has no date.

As above stated, the policy was issued pursuant to the Veterans Insurance Act which, by its section 16, empowers the Governor in Council to make regulations.

Section 16 and the subsections thereof applicable to this case read thus:—

16. The Governor in Council may make regulations,—

(*a*) prescribing the form of contracts and such other forms as he may consider necessary under this Act;

(*c*) prescribing the mode of paying money under contracts of insurance;

(*l*) for any other purpose for which it is deemed expedient to make regulations in order to carry this Act into effect.

The Veterans Insurance Regulations to be considered in relation to the dispute in this case are the following:—

Regulation 4. All money due under any policy shall be payable in the City of Ottawa in the Province of Ontario;

And under the heading—"Provisions and conditions":—

(2) Payment of premiums.

All premiums are payable on or before their due dates to the Receiver General of Canada and may be sent to the chief treasury officer of the Department of Veterans Affairs, Ottawa, Canada. Premiums

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may be paid monthly, quarterly, semi-annually or annually in advance but to effect a change in the frequency of premium payment, request therefor must be made to the superintendent of Veterans Insurance, Ottawa; except as expressly provided herein, the payment of a premium shall not maintain the policy in force beyond the due date of the next premium.

(3) A grace period of one month shall be allowed for the payment of any premium after the first, without interest charge, during which period the policy shall continue in force, but if the insured dies during such period, the premium, if then unpaid, shall be deducted from the insurance money payable hereunder.

(14) If any premium due hereunder is not paid within the period of grace, and if the cash surrender value or reduced paid up insurance has not been granted, the insured may, with the consent of the Minister and subject to such evidence of insurability as the Minister may require, reinstate the policy in full force at any time within five years from the due date of the first premium in default by payment of the arrears of premiums with interest at the rate of five per cent per annum compounded annually.

The contract or policy of insurance was issued to the insured subject to the above conditions which are all written into the terms, conditions and provisions of the policy. By accepting this policy, the insured became obligated to all its terms and conditions. Every cheque and the money order sent in as payment of the premiums were dated during the period of grace, which would indicate that he was aware that if the remittance was not made during that period he would be in default in his payments. There does not seem to have been any misunderstanding on this point. The suppliant in her evidence states that when the insured received a form comprising a receipt and a notice of payment he then or soon thereafter would sign a cheque, enclose it in an envelope with the receipt part of the form, address and stamp the envelope. On certain occasions, she saw the insured mail the envelope, but she could not remember the dates on which the envelopes were mailed.

It is contended for the suppliant that the "N.S.F." cheque of December 26, 1951, was accepted as absolute payment of the premium of December 1, 1951. At the time it was received and deposited in the Bank of Canada and an official receipt was issued and the amount of the cheque credited to the deceased's account on the Department's books. In support of this contention, it is in evidence that at the time the deceased wrote the cheque his account at the Bank was in funds and remained in funds until the time of his death

with the exception of a period of ten days in the month of January 1952, during which period the cheque was presented for payment to the deceased's Bank in Moncton, N.B.

The fact that the insured had sufficient funds in the Bank to cover the cheque at the time it was issued, in my view, is not a valid reason to support the conclusion that its receipt and acceptance was an absolute payment of the premium. The necessary funds should have been at all times or during a reasonable period in the deceased's Bank account, if the prescriptions of the regulation were to be met. All the moneys due under the policy were to be paid in Ottawa. It was the insured's obligation to see that he had the necessary funds to cover the cheque when it was presented to his Bank for payment. I do not believe that the receipt and acceptance of the cheque or the fact that an official receipt was issued and the amount of the cheque credited to his account are sufficient to establish that it was accepted as absolute payment of the premium. It lacked the essential prerequisite, the payment of money, the cheque having been dishonoured.

To support the argument that the cheque was given as absolute payment, the opinion of the Ontario Court of Appeal in *Nesbitt* v. *Redican* (1) was cited. At page 379, Mowat J., whose judgment was confirmed, says:—

> Though the general effect of giving and taking a bill or note is that the debt is conditionally paid, there is nothing to prevent its being given and taken as an absolute payment if the parties so intend. It is a question of fact what the intention of the parties was.
>
> If the seller takes a negotiable security in preference to payment in cash, whether cash has been offered or not, the security is deemed to be taken as an absolute, not a conditional, payment.

In the present case, the intention of the parties was that the policy would only be in force and effect if the amounts of the premiums were paid on specified dates and the moneys due would be paid in Ottawa. If the moneys were not paid in Ottawa on the due dates or within the period of grace, the policy would not be maintained in force beyond the due date of the next premium.

The only evidence before the Court is that the above mentioned cheque in payment of the permium of December 1, 1951, was received in Ottawa on January 9, 1952. That

(1) (1923) 24 O.W.N., 378, 588.

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would be eight days after the expiration of the period of grace. I cannot agree with the proposition that the acceptance of the cheque, though later dishonoured, should be considered as an absolute payment of the premium due or that it was intended to be so.

In *London & Lancashire Life Insurance Co.* v. *Fleming* (1) it was held that, though the notes were accepted by the agent in payment of the premiums, the condition applied in their non-payment and the policies became void.

In *Hutchings* v. *National Life Assurance Co.* (2) it was decided that the transactions that took place between the assured and the agent did not constitute a payment of the premium and that the policy had lapsed on default to meet the note when it became due.

In my view these decisions can readily be applied to the present issue. In the above cases, notes were accepted in payment of premiums, but the notes were not honoured when presented for payment on maturity. In this instance, the cheque was not cashed, but returned for lack of funds in the insured's Bank account.

It is also urged on behalf of the suppliant that on several occasions premium payments were received at Ottawa after the expiration of the grace period allowed and that these overdue payments were accepted, official receipts issued and consequent payments accepted. This, it was argued, would indicate a course of conduct arrived at by at least implied agreement between the insured and the Department which estops the respondent from now claiming that the policy became forfeited for failure to make payments on the appointed day.

The documentary evidence establishes that all the negotiable instruments received in payment of premiums were dated during the grace period and that only two were received by the Department after the due date. I think counsel is in error when he contends that the cheques received on the first day of the month were paid after the expiration of the appointed delay, because clause 2 of the contract says that the payment of a premium shall not maintain the policy in force beyond the due date of the next premium. I take this to mean that the policy would

(1) [1897] A.C. 499. (2) (1906) 37 S.C.R. 124.

remain in force till the last minute of the day on which the premium was due and if the next premium was payable on the first day of the month the policy would not lapse.

There remain the two cheques dated one on July 28, 1951, and received on August 2, 1951, and the other on December 26, 1951. As to the first cheque received on August 2, 1951, it appears that nobody protested the delay. The only explanation I can find in the evidence is that the entries of remittances on account of premiums received are not always made on the day of their receipt. When the mail is extremely heavy it may be necessary to carry over. This may mean one or more days' delay, especially if the heavy mail is on the eve of one or more days of holidays. At all events, one occasion would not indicate a course of action which would imply that delays in payments would be overlooked. As to the second, it is useless to repeat at length what has been already said. It was received after the appointed date, not covered and returned.

In her reply to the respondent's defence, the suppliant alleges that the respondent, acting by and through its proper officers, waived the right to insist upon the literal performance of the conditions of the policy because these officers did not themselves comply with the provisions of the contract. Therefore, the respondent is estopped from now alleging that they either lapsed or became null and void or ceased to be in force.

The suppliant takes the position that the rule of estoppel applies as against the Crown and refers the Court to the following cases.

In the case of *The King* v. *The Canadian Pacific Railway Company* (1) Audette J. stated (p. 37):

> . . . while it may be readily conceded that the Crown is not bound by estoppel by deed . . ., yet it is held in the case of *Attorney-General* v. *Collom,* (1916) L.R. 2 K.B. 193, at 204, that the Crown is bound by estoppel in pais. See also *Queen Victoria Niagara Falls Park Commissioners* v. *International Railway Co.,* 63 Ont. L.R. 49, 66, 67; *City of Montreal* v. *Harbour of Montreal,* (1926) A.C. 299, 313; *Attorney-General* v. *Holt & Co. Ltd.* (1915) A.C. 599.

Other decisions indicate that while the doctrine of estoppel by deed does not apply as against the Crown, yet

(1) [1930] Ex. C.R. 26.

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estoppel *in pais* does so operate. I will refer only to *The King* v. *Gooderham & Worts Ltd.* (1) where Grant J. A. said (p. 133):

> Although it may be considered as well settled that the defence of estoppel in pais may be effectual even as against the Crown, yet, upon the facts as I find them, there is no sufficient basis for applying that doctrine in the present case.

The law of estoppel operates, said Lord Denman C.J. in *Pickard* v. *Sears* (2) at page 474:

> When one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.

See also *Mew's Digest of England Case Law to 1924*, vol. 8, 2nd ed., p. 747; *Halsbury's Laws of England*, vol. 13, 2nd ed., p. 167.

To entitle the suppliant to the benefit of the rule of estoppel it must be established that the acceptance of the insured's cheques after the due date of the payment of the premiums, the issuance of the official receipts, the demands for subsequent premiums and the crediting of the proceeds of the remittances to his account had been done to lead the insured to believe and had in fact led him to believe that the provisions and the conditions of his contract of insurance had been changed and that he had acted according to that belief. Even at that I have serious doubts that the rule of estoppel would apply as against the Crown.

The Veterans Insurance Act and its regulations, in my opinion, is the law of the land applicable to this contract of insurance. The contention that these regulations did not bind the parties or have force of law is not based on any sound reason. They are not repugnant to or beyond the reasonable contemplation or purview of the terms of the Act. This being the case, I would be inclined to follow the principle laid down in *Phipson on Evidence*, 8th ed., p. 667, in fine, viz.:—

> 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.

This principle has been upheld in many cases.

(1) [1928] 3 D.L.R. 109. (2) (1837) 6 A. & E. 469.

In *The King* v. *The Royal Bank of Canada* (1) Cameron J. made the following observations (p. 304):

> It appears from the authorities that the King is not bound by estoppels, though he can take advantage of them.
>
> This rule has been frequently applied in Canada, and I am not aware that it has ever been rescinded or relaxed.

In *The Bank of Montreal and The King* (2) three judges held that estoppel could not be invoked against the Crown.

In *Gillies Bros. Limited* v. *The King* (3) Cameron J. stated (p. 223):

> My finding, therefore, is that in this case the doctrine of estoppel cannot be raised so as to prevent the Crown from proving the true nature of the transaction between the parties.

Similar decisions were rendered in *Maritime Electric Company Limited* v. *General Dairies, Limited* (4) and *St. Ann's Island Shooting and Fishing Club Limited* v. *The King* (5).

In the present case, the Crown, under the provisions of a statute, the Veterans Insurance Act and its amendments and regulations, issued a contract of insurance to the insured. The contract embodies the terms, conditions and provisions enacted by law. The insured accepted these terms, conditions and provisions. He failed to comply with the conditions set forth in clauses 2, 3 and 14 of the policy. Specially, he failed to pay the two last premiums due before his death in the manner and at the time stipulated in the contract. The Crown bases its defence on these defaults, because in accordance with clauses 2, 3 and 14 of the Veterans Insurance Act regulations, if the insured defaulted in the payment of the premiums, the policy could not be maintained in force. It could be reinstated only with the consent of the Minister. This consent was never requested nor granted.

There is no evidence to show that the insured was deceived and acted because he was induced to believe that the premiums could be legally paid after the due date or within the period of grace.

(1) (1920) 50 D.L.R. 293.
(2) (1907) 38 S.C.R. 258.
(3) [1947] Ex. C.R. 210.
(4) [1937] A.C. 610.
(5) [1950] S.C.R. 211, at 220.

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Even though statements would have been made by a Crown departmental official, these statements could not bind the Crown. The acts of the Crown's servants or agents cannot bind the Crown by estoppel.

In the case of *Attorney-General of Canada* v. *C. C. Fields & Co.* (1) it was held that the Crown cannot be estopped, by reason of the action of its officials, from insisting on strict compliance with regulations, validly made under s. 60 of the Special War Revenue Act, R.S.C. 1927, c. 179, providing for the collection by stockbrokers of excise taxes payable upon sales of securities.

In my view, where a particular obligation or duty is imposed by statute or by regulations validly made thereunder and embodied in a contract no estoppel should be allowed to give relief from the said obligation.

I do not believe that the rule of estoppel can be invoked to prevent the Crown from establishing the conditions of a contract between the parties and the facts pertinent to the dispute.

My finding is that the last payment made by the insured was for the premium due on November 1, 1951, and that the policy was maintained in force up to the due date of the next premium, namely, December 1, 1951. From that date onward the policy was not in force, had no effect and the suppliant had no claim thereunder against the respondent.

Therefore, the petition of right is dismissed, with costs.

Judgment accordingly.

BETWEEN:

1952

Apr. 28

1954

June 29

July 30

ELIZABETH CORNELL OAKES .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—The Exchequer Court Act, R.S.C. 1927, c. 34, s. 19 (c)—Pension Act, R.S.C. 1927, c. 157, ss. 5, 18, 18B—Civil Code of Quebec, Art. 1056—General Rules and Orders, Rule 104—An Act respecting debts due to the Crown, S. of C. 1932, c. 18—Order in Council P.C. 14/6288, dated Nov. 21, 1951—No right under Pension Act to recover properly paid pensions—Principles to be applied in assessing damages in claim based on Art. 1056 of Civil Code.

(1) [1943] 1 D.L.R. 434.

The suppliant for herself and her children brought a petition of right to recover the balance of a judgment of this Court in her favor for damages for the death of her husband. The Crown withheld part of such balance on the ground that the suppliant and her children had received pensions under the Pension Act, that after the judgment the Canadian Pension Commission had cancelled the pensions from their commencement so that their amount was an overpayment which the Crown had a right to recover from her and set off against the judgment in her favor.

Held: That since there is no provision in the Pension Act clearly and expressly empowering the Canadian Pension Commission to cancel a properly paid pension retroactively to its commencement in such a way as to make its amount an overpayment and recoverable as such, the decision of the Commission of October 12, 1951, did not have the effect it purported to have and the Crown has no right to recover from the suppliant the amount of the pensions paid to her and her children.

2. That the Crown's attempt to recover the amount of the pensions paid to the suppliant and her children is an indirect attack on the principle underlying the judgment in their favor, namely, that they were entitled to damages under section 19(c) of the Exchequer Court Act notwithstanding the fact that they had been awarded pensions under the Pension Act.

3. That if the servant of the Crown whose negligence caused the death of the suppliant's husband had been sued personally he could have insisted that the amount of the pecuniary benefit which the suppliant and her children had received or might reasonably have expected by way of pension under the Pension Act should be taken into account and the amount so taken into account deducted from the amount of damages for which he would otherwise have been liable, and the Crown's liability under section 19(c) of the Exchequer Court Act could not have been greater than his would have been.

4. That the amount of the award in the judgment of this Court in favor of the suppliant and her children should be regarded as the amount of damages to which they were entitled notwithstanding the amount which they had received by way of pension under the Pension Act and, consequently, over and above such amount.

PETITION OF RIGHT to recover the balance of a judgment.

The action was tried before the President of the Court at Ottawa.

S. L. Mendelsohn, Q.C. and *S. Goldner* for suppliant.

W. R. Jackett, Q.C. and *J. Desrochers* for respondent.

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

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THE PRESIDENT now (July 30, 1954) delivered the following judgment:

The facts from which this petition of right arises may be stated briefly. By a judgment, dated May 17, 1951 (1), this Court did order and adjudge that the suppliant in her personal capacity was entitled to recover from His late Majesty The King 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, together with her costs of the action which were taxed at $865.40. This judgment was rendered in a petition of right brought by the suppliant in her personal capacity and in her capacity as tutrix of her two children for damages for the death of her husband George Walsh Oakes, the father of the children. The claim was made under section 19(*c*) of the Exchequer Court Act, R.S.C. 1927, Chapter 34, on the ground that the death of the deceased was the result of the negligence of LAC R. E. Hitsman, a member of His late Majesty's Royal Canadian Air Force, while acting within the scope of his duties.

Prior to launching this petition the suppliant and her children had been awarded pensions under the Pension Act, R.S.C. 1927, Chapter 157. The facts relating to this award may be put briefly. The suppliant's husband was killed on June 5, 1945. At the time of his death he was a member of His late Majesty's Royal Canadian Air Force and was on duty. On August 10, 1945, the Canadian Pension Commission ruled that his death was directly connected with Air Force service and awarded a pension to the suppliant and her children at the current rates with effect from the date following her husband's death, and on August 17, 1945, the suppliant was advised accordingly. Her pension was at the rate of $60 per month, that of her first child at $15 and that of her second at $12, making a total of $87 per month. Subsequently, the amounts of these pensions were raised. On November 1, 1947, the suppliant's rate was increased to $75 per month, that of her first child to $19 and that of her second to $15, making a total of $109 per month. These rates continued until

(1) [1951] Ex. C.R. 133.

June 30, 1951, when the suppliant's rate was still $75 per month but the first child's rate was at $38 and the second child's at $30, making a total of $153 per month.

In view of the fact that pensions under the Pension Act had been awarded to the suppliant and her two children the claim under section 19(*c*) of the Exchequer Court Act was strongly opposed. It was pleaded by way of defence to the petition of right, *inter alia*, that the respondent was not under any responsibility to the suppliant other than the obligation to pay the pensions awarded under the Pension Act. When the petition came on for trial counsel for the respondent, in support of this plea, relied upon the decision of Angers J. in *Meloche* v. *The King* (1). There the suppliant brought a petition of right to recover damages for the death of his son, who was a member of His Majesty's Canadian Armed forces and was being taken in a military ambulance to a military hospital. The death was alleged to be the result of negligence on the part of the driver of the military ambulance who was also a member of the Canadian Armed forces. Angers J. held that since the dependents of the deceased soldier were entitled to pension under the Pension Act they were not entitled to any relief under the Exchequer Court Act. The reasoning was that since a special remedy was created by statute, namely, the Pension Act, it displaced the remedy provided by the general Act, namely, the Exchequer Court Act. Accordingly, Angers J. held that the suppliant was not entitled to any of the relief sought by him. But Cameron J. declined, quite rightly, in my opinion, to follow the *Meloche* case (*supra*) and applied instead the principles laid down in *Bender* v. *The King* (2).

After the judgment of May 17, 1951, the Canadian Pension Commission, on representations made by the suppliant's solicitor, continued the pensions under the Pension Act pending decision whether an appeal should be taken from the judgment. On June 26, 1951, the Department of Justice advised the Department of National Defence that it had decided not to appeal. Previously, as it appears, the Canadian Pension Commission had required the suppliant

(1) [1948] Ex. C.R. 321.

(1) [1946] Ex. C.R. 529; [1947] S.C.R. 172

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to elect whether she would pay to His Majesty the capitalized value of each of the pensions formerly awarded and have pension continued for herself and her children without deduction or retain the damages secured and forego her right to pension for herself and her children in which case she would have to refund the total amount of the pensions paid to her and her children from June 6, 1945, to May 31, 1951, which then amounted to $7,217.50. The suppliant took the position that she was not obliged to make any such election or refund. On July 19, 1951, the Canadian Pension Commission, after certain recitals, decided as follows:

1. Continue pension on behalf of widow and two children pending action with respect to payment of damages awarded by Exchequer Court judgment of May 17, 1951, in this case.

2. If the amount of damages paid is "greater than the capitalized value of pension", no further pension shall be paid.

3. Following any payment of damages, this case will be further reviewed by the Commission.

The Commission then continued the payment of pension to July 31, 1951, by which time the total amount of the pensions paid to the suppliant and her children came to $7,470.63.

The next step taken in the matter was on August 6, 1951, when the respondent paid the suppliant the sum of $22,000 on account of the judgment. Then on September 25, 1951, the Canadian Pension Commission informed the suppliant that it had under consideration the question whether the pensions awarded to her and her two children on August 17, 1945, should be cancelled from the commencement thereof and whether the amount already paid to her in the sum of $7,470.63 should be recovered from her, and that the Commission would be glad to consider any representations in writing that she desired to make or have made on her behalf. To this communication the suppliant's solicitor replied on October 2, 1951, Exhibit C. Finally, the Canadian Pension Commission, on October 12, 1951, made the following decision:

WHEREAS, on August 17th, 1945, a pension was awarded under the Pension Act to Mrs. George Walsh Oakes on her own behalf and that of her two infant children effective from the date following her husband's death which occurred on June 5th, 1945, and such pension has been paid to her in respect of a period ending July 31st, 1951;

AND WHEREAS the aggregate of the amounts so paid to Mrs. Oakes is $7,470.63;

AND WHEREAS the Canadian Pension Commission has been informed that George Walsh Oakes' death was caused under circumstances creating a legal liability upon His Majesty in right of Canada to pay damages therefor, that Mrs. Oakes did, on May 17th, 1951, obtain a judgment of the Exchequer Court of Canada (in her personal capacity and in her capacity as tutrix to her two infant children) in the sum of $30,000.00 and costs in respect of the death of her husband and that on August 6th, 1951, Mrs. Oakes did collect $22,000.00 on account of the said judgment;

AND WHEREAS the amount so recovered and collected is greater than the capitalized value of the pension so awarded;

AND WHEREAS the Canadian Pension Commission has to determine whether the provisions of Sections 5, 18, and 18B of the Pension Act require and authorize the Commission to cancel the aforesaid pension from the commencement thereof;

AND WHEREAS the Commission has determined pursuant to subsection (3) of section 5 of the said Act, that it is, by the said sections 5, 18, and 18B, required and authorized to cancel the aforesaid pension from the commencement thereof and to direct the recovery of the overpayment that has been made.

NOW, THEREFORE, The Canadian Pension Commission hereby adjudges

1. that the pension awarded on August 17th, 1945, to Mrs. George Walsh Oakes and her two children effective from June 6th, 1945, be, and is hereby, cancelled from the commencement thereof; and
2. that the overpayment of pension to the said Mrs. George Walsh Oakes in the sum of $7,470.63 be recovered from her, and directs that the Secretary of the Canadian Pension Commission arrange for such action as may be necessary to effect the said recovery.

The suppliant then filed the present petition of right claiming $8,000 as the balance of the judgment and $865.40 as her taxed costs on the ground that these amounts were still owing to her.

Under Rule 104 of the General Rules and Orders of this Court the Attorney General of Canada in the statement of defence herein confessed that the suppliant was entitled to judgment declaring that she was entitled in her personal capacity and in her capacity as tutrix to her two children to be paid the sum of $1,394.77, being the amount of $8,865.40 claimed in the petition of right less the amount of $7,470.63. Regardless of the dispositon of the balance of her claim the suppliant is, therefore, in her two capacities entitled to recover the sum of $1,394.77 together with her costs of the petition up to delivery of the statement of defence.

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As to the balance of the claim it is contended that the decision of the Canadian Pension Commission, dated October 12, 1951, made the sum of $7,470.63 which the suppliant had received by way of pension for herself and her children an overpayment to her and that the respondent was entitled to recover this amount from her. By Order in Council P.C. 14/6288, dated November 21, 1951, made under an Act respecting debts due to the Crown, Statutes of Canada, 1932, Chapter 18, the Minister of Finance was authorized to retain this amount from the amount of the award made by Cameron J. I should perhaps note that counsel for the respondent did not stand on the letter of the Act referred to, a most astonishing one, if taken literally, but relied upon it as providing for a right of set-off, if there was a debt due to the Crown. It is then contended that the respondent was entitled to set off the amount of $7,470.63 against the amount of the suppliant's claim. In the alternative, the respondent counterclaims against the suppliant for the said amount of $7,470.63 as an overpayment of pensions which she has not repaid.

The sole issue in the case is thus whether the respondent is entitled to recover from the suppliant the amount of $7,470.63 which the Canadian Pension Commission paid to her by way of pension for herself and her children up to the end of July 31, 1951.

In the support of the contention that the respondent has such a right of recovery reliance is put on the decision of the Canadian Pension Commission, dated October 12, 1951, and it is contended that this decision is valid under the authority of Sections 5, 18 and 18B of the Pension Act. These sections, so far as relevant, provide as follows:

5. (1) Subject to the provisions of this Act and of any regulations made thereunder, the Commission shall have full and unrestricted power and authority and exclusive jurisdiction to deal with and adjudicate upon all matters and questions relating to the award, increase, decrease, suspension or cancellation of any pension under this Act and to the recovery of any overpayment which may have been made; and effect shall be given by the Department and the Comptroller of the Treasury to the decisions of the Commission: Provided that the power vested in the Commission to cancel any award of entitlement shall not extend to any award of entitlement granted by the Federal Appeal Board, the Pension Tribunal, a quorum of the Commission, an Appeal Board of the Commission or the Court: Provided also that before any pension is cancelled or reduced,

due to a change in the basis of entitlement, the pensioner shall be afforded an opportunity of appearing before an Appeal Board of the Commission.

(2) In any case in which the Commission finds that a pension has been awarded by the Commission or by the Board of Pension Commissioners for Canada as a result of an error and not as a result of fraud or misrepresentation or concealment of material facts on the part of the applicant, if such pension has been paid for not less than five years and its cancellation or reduction would, in the opinion of the Commission, result in undue hardship to the pensioner, the Commission, in its discretion, may ratify the payment already made and may continue payment in whole or in part.

(3) The Commission shall determine any question of interpretation of this Act and the decision of the Commission on any such question shall be final.

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.

18B. (1) Where any amount so recoverable and collected . . . 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 . . . 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 . . . 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.

It was contended by counsel for the suppliant that, even if the Canadian Pension Commission had the right to cancel the pensions of the suppliant and her children after the sum of $22,000 had been paid to her, there was no provision in the Pension Act whereby the amounts of the pensions paid to her and her children could be made overpayments and recoverable as such. This was the main submission for the respondent. It follows, of course, that if there was no right of recovery there could be no right of set-off with the result that the suppliant's claim would have to be maintained and the respondent's counterclaim dismissed.

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It was argued on behalf of the respondent that when the sum of $22,000 was collected by the suppliant the direction in section 18B(1) of the Act that no pension should be paid came into operation and that sections 5, 18 and 18B of the Act empowered and authorized the Canadian Pension Commission to do what it did by its decision of October 12, 1951, and made the amounts of the pensions which it then cancelled overpayments to the suppliant and recoverable from her. I shall briefly set out the process of reasoning by which this conclusion was reached. There was no right of action to a pension under the Pension Act. Historically, the payment of pensions of this sort was an exercise of executive discretion and the fact that the administration of the Pension Act was turned over to the Canadian Pension Commission did not fundamentally change the nature of the discretion except to make it administrative rather than executive. The Act gave the Commission wide powers. Subject to the provisions of the Act, section 5(1) gave it full and unrestricted power and authority and exclusive jurisdiction to do certain things, including the cancellation of any pension under the Act and the recovery of any overpayment which might have been made. Section 5(2) contemplated that under section 5(1) there was power to make orders with retroactive effect so that section 5(1) should be read in the light of section 5(2) and construed as giving power to cancel pensions retroactively to their commencement. Then section 5(3) gave the Commission power to interpret the Act in such a way as to oust the jurisdiction of the Court to challenge the correctness of its interpretation. Under this power the Commission could construe the direction contained in section 18B(1) as not operating until the facts which gave rise to its operation were established. If it were otherwise, so the argument went, it would not be possible for the Commission to award any pension in any case where the applicant might have a claim against a third person until after the issue between them was determined whereas, under the argument put forward, the Commission could award a pension immediately with full knowledge that if it should develop that the recipient subsequently recovered and collected from a third person an amount greater than the capitalized value of the pension the Commission could

then carry out the direction of section 18B(1) that, under such circumstances, no pension should be paid by the exercise of its power under section 5(1) to cancel the pension retroactively to its commencement and make the amounts paid to the recipient recoverable as overpayments and thus put itself in the same position as it would have been in if the applicant for pension had recovered and collected such sum prior to any award of pension in which case the Commission would be bound by the direction in section 18B(1) that no pension should be paid.

I must confess that I have found this case a difficult one. But, while the careful argument of counsel for the respondent carries much weight, I have come to the conclusion that the contention on behalf of the respondent ought not to be adopted.

When the Canadian Pension Commission awarded pensions to the suppliant and her two children it did so with full knowledge that the suppliant's husband had been killed as the result of the negligence of LAC Hitsman and it must be assumed, as a matter of law, that it knew that she and her children had a cause of action against him and could, consequently, bring a petition of right against the Crown under section 19(*c*) of the Exchequer Court Act because of the responsibility of the Crown for the negligence of its servant. The pensions paid to the suppliant and her children were thus properly paid and received. There was no fraud or misrepresentation or concealment of material facts on the part of the suppliant such as would bring the case within section 60 of the Act. Nor were the pensions awarded as a result of error. In every respect the payments were validly made. Moreover, they continued to be so made for approximately six years. Under the circumstances, it seems anomalous to me that amounts that were validly and properly paid to the suppliant with full knowledge of her rights and those of her children should, by reason of a subsequent event that was forseeable, be turned into overpayments to her, that is to say, amounts which she was not entitled to retain but was obliged to repay as if they had been improperly paid to her. The

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possibility of such a conversion of proper and valid payments into overpayments with a statutory right of recovery of them should not be accepted unless there is clear and express statutory authority for it.

In my judgment, there is no provision in the Pension Act whereby the Canadian Pension Commission is empowered to convert a payment of pension into an overpayment that was not basically an overpayment when it was made. Proper payments of pension under the Pension Act cannot retroactively become overpayments. It was, of course, within the competence of the Commission, after the suppliant had been paid $22,000, to take this amount into account and decide that no more pension should be paid. But, even if it should be conceded that when the suppliant had collected the said sum section 18B(1) came into operation with its direction that no pension should be paid, it does not follow that the amount of pensions already paid came retroactively within the prohibition or negative direction of the section.

Nor am I prepared to accept the view that section 5(2) indicates that section 5(1) empowers the Commission generally to make orders with retroactive effect but, even if it should be conceded that it has power to cancel pensions retroactively, such power should not, in the absence of clear and express terms, be construed as extending to the cancellation of pensions that were properly paid and received in such a way as to make their amounts overpayments, and to that extent improper payments, and recoverable as debts.

And while the Commission is given wide powers of interpretation of the Pension Act they ought not, in the absence of clear and express terms, to be construed as empowering the Commission to give retroactive effect to section 18B(1) as if the facts giving rise to its operation had been in existence prior to the award of pension and so authorizing the Commission to decide that the pensions which it had paid ought not to have been paid and that their amounts must be repaid by the suppliant. A power of interpretation leading to such extraordinary results ought not to be read into the Pension Act unless the Act clearly makes such a reading compulsory.

Moreover, if it had been intended that the Canadian Pension Commission should be able to cancel proper pensions retroactively to their commencement and make their amounts recoverable as overpayments Parliament should have conferred such a power expressly and clearly. It has conferred a power of a similar nature under section 60 of the Act which provides as follows:

> 60. Should the Commission consider that an award of entitlement granted by the Federal Appeal Board, the Pension Tribunal, a quorum of the Commission, an Appeal Board of the Commission, or the Court should, on the ground of fraud or misrepresentation or the concealment of material facts, be cancelled, it shall refer the case, with all relevant information to an Appeal Broad of the Commission for investigation after notification to the pensioner that he shall be given an opportunity to be heard, and if such Appeal Board of the Commission is satisfied that the award should be cancelled, it may order cancellation and the recovery of any overpayment which may have been made.

If the Commission had the power of retroactive cancellation submitted on behalf of the respondent section 60 would not have been necessary. The fact that Parliament conferred this power of retroactive cancellation with its concomitant recovery of overpayments expressly in the cases covered by section 60 is some indication that in cases outside of section 60 there is no such power: *expressio unius est exclusio alterius.*

I am, therefore, of the opinion that, since there is no provision in the Pension Act clearly and expressly empowering the Canadian Pension Commission to cancel a properly paid pension retroactively to its commencement in such a way as to make its amount an overpayment and recoverable as such, the decision of the Commission of October 12, 1951, did not have the effect it purported to have and that the Crown has no right to recover from the suppliant the amount of the pensions paid to her and her children.

While this finding is, in my opinion, sufficient to dispose of these proceedings in favor of the suppliant there is another reason for holding that the Crown's attempt to recover the amount of the pensions should not be allowed to succeed. In a sense, it is a denial of the suppliant's right and the rights of her children to the relief to which Cameron J. found them entitled and an indirect attack on the principle underlying his judgment, namely, that the suppliant and her children were entitled to damages under

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section 19(c) of the Exchequer Court Act notwithstanding the fact that they had been awarded pensions under the Pension Act. There may be a difference of opinion on the wisdom of a policy that permitted such a situation. Indeed, Parliament put an end to it in 1952 when by section 3 of chapter 47 of the Statutes of Canada, 1952, it amended the Pension Act by adding section 69 in the following terms:

> 69. No action or other proceeding lies against Her Majesty or against any officer, servant or agent of Her Majesty in respect of an injury or disease or aggravation thereof resulting in disability or death in any case where a pension is awarded or awardable by the Commission under or by virtue of this or any other Act in respect of such disability or death.

It is obvious that since this amendment, which might well, under certain circumstances, work an injustice to the dependents of a deceased member of the forces, there cannot be another case like the present one. But the rights of the suppliant and her children must be dealt with under the law as it stood prior to this amendment. They were so dealt with by Cameron J. in his judgment of May 17, 1951. He properly rejected the decision of Angers J. in the Meloche case (*supra*), which was, in my judgment, contrary to authority, and applied principles similar to those laid down in the *Bender* case (*supra*) and held that the fact that the suppliant and her children had been awarded pensions under the Pension Act did not bar their right to recover damages under section 19(c) of the Exchequer Court Act. In the course of his judgment he made the following statement, at page 144 of the report of the case:

> 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.

This statement was stressed by counsel for the suppliant as having been an adjudication by Cameron J. that the suppliant and her children were entitled to pensions under the Pension Act and it was submitted in effect, that their rights to such pensions were a matter of *res judicata*. I do not accept this submission. The question of their entitlement to pension was not before Cameron J. for adjudication. Indeed, it was not within his jurisdiction to make any adjudication thereon, that being a matter exclusively for the authorities

established for the purpose under the Pension Act. I am satisfied that all that he meant by the statement was that notwithstanding the fact that the suppliant and her children had been awarded pensions under the Pension Act—and were, consequently, entitled to them—they were entitled to damages under section 19(c) of the Exchequer Court Act. He thereupon proceeded to assess such damages and awarded them the sum of $30,000. Under these circumstances, it was a natural reaction to his judgment that his award was, although not specifically so stated, over and above the amount of the pensions to which by the fact of their award he had assumed the suppliant and her children to be entitled. That was the reaction of the Minister of Justice, as the solicitor for the suppliant pointed out in his letter to the Canadian Pension Commission, dated October 2, 1951, Exhibit C, when, referring to the judgment of Cameron J., he stated in the House of Commons on May 29 1951:

> . . . he awarded Mrs. Oakes, the wife of the airman killed in the course of duty as a result of admitted negligence, the sum of $20,000 in addition to any rights she might have in regard to pension and the like.

Vide Hansard, May 29, 1951, pages 3503-4. The amount of the award meant to be stated was, of course, $30,000. I have already expressed the opinion that this reaction was a natural one. In any event, it is clear from his reasons for judgment that Cameron J. certainly did not contemplate that the Crown would be able to recover the amount of the pensions which had been properly awarded to the suppliant and her children and then cut down the amount of his award by setting off against it the amount so recovered. The Crown's attempt to do so is thus, in a sense, tantamount to an indirect attack on the principle underlying the judgment, namely, that the suppliant and her children were entitled to damages under section 19(c) of the Exchequer Court Act notwithstanding their receipt of pensions under the Pension Act. If there had been any intention to challenge this principle an appeal should have been taken from the judgment. The indirect attack on it which is now made should not be sanctioned.

Moreover, it would be inconsistent with the principles governing the assessment of damages in a case such as Cameron J. had to deal with to allow the deduction now

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sought to be made. It should be noted that the suppliant's husband was killed in the Province of Quebec. Consequently, while her claim against the Crown for herself and her children was made under section 19(*c*) of the Exchequer Court Act the law to be applied was Article 1056 of the Civil Code of Quebec which reads in part as follows:

> 1056. In all cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and decendant relations have a right, but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death.

This article is the Quebec counterpart or equivalent of Lord Campbell's Act: *vide* Mignault-Droit Civil Canadien, Volume 5, page 339. And it would be fair to say that the principles to be applied in the assessment of damages in a claim based on it are similar to those laid down in England in cases under Lord Campbell's Act and in the common law provinces in cases under its various counterparts.

It is, of course, well established that where there is liability under a Fatal Accidents Act, as Article 1056 may be styled, the measure of compensation to the dependents of the deceased is the loss of pecuniary benefit or advantage to them as the result of his death, and not otherwise. This is, likewise, the limit of the liability of the person responsible for the death of the deceased. He is thus entitled to have any monetary benefit coming to the dependents of the deceased by reason of his death taken into account in the assessment of the damages chargeable to him.

This was an important consideration in the case before Cameron J. It is, therefore, necessary to keep in mind what would have been the extent of the liability for damages of LAC Hitsman, for the Crown's liability, being only a vicarious one, could not be greater than his would have been if he had been sued personally. He could have insisted that the amount of the pecuniary benefit which the suppliant and her children had received or might reasonably have expected by way of pension under the Pension Act should be taken into account and the amount so taken into account deducted from the amount of damages for which

he would otherwise have been liable. It would have been no answer to his insistence to say that the suppliant and her children had no legal right of action for pensions and that their award depended on the exercise by the Canadian Pension Commission of its administrative discretion. The fact of the receipt of the pensions would have been sufficient. This was settled by the Court of Appeal in England in *Baker* v. *Dalgleish Steam Shipping Co.* (1). This was an action brought by the plaintiff, the widow of one Philip Baker, under the Fatal Accidents Act, 1846, on behalf of herself and her four children to recover compensation for her husband's death. He had been a chief petty officer in the service of the Navy at the time of his death and subsequently the plaintiff was awarded a pension for herself and her children. The action was brought as a test action for the purpose of getting a decision as to whether in assessing the damages the fact that the plaintiff was receiving a pension from the Crown was to be taken into account. The trial judge held that it could not be but the Court of Appeal was unanimously of the view that he had been in error in so holding. The soundness of this decision has never been questioned. There was a similar decision in *Lory* v. *Great Western Railway Company* (2). There the plaintiff claimed damages in respect of the death of her husband for herself and her children. Her husband had been a policeman. On his death she received a gratuitous payment from a charitable fund, a pension for herself and her children from a statutory pension fund and pensions for the children from a voluntary pension fund. It was held that these pensions had to be taken into account in the assessment of damages. The principle involved in this holding was also applied in *Smith* v. *British European Airways Corpn.* (3).

These cases warrant the opinion that in considering the liability in damages of LAC Hitsman if he had been sued personally the fact that the suppliant and her children had been awarded and were receiving pensions under the Pension Act would have had to be taken into account. Thus the damages for which he would have been liable would

(1) [1922] 1 K.B. 361. (2) [1942] 1 All E.R. 230.
(3) [1951] 2 All E.R. 737.

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have been those that would have been assessed after deducting the amount taken into account for the pensions already paid to the suppliant and her children, such continuation of pension as they might reasonably have expected and, in counter balance, the likelihood of cessation of their pensions under the circumstances set out in sections 18 and 18B.

That being so, it follows that the amount of damages for which the respondent was responsible to the suppliant and her children under section 19(c) of the Exchequer Court Act must have been the same as that for which LAC Hitsman would have been liable if he had been sued personally. While Cameron J. did not specifically state that in arriving at the amount of his award he had applied the principle to which I have particularly referred its application is implied in his reasons for judgment when read as a whole and particularly in the light of his reference to the pensions paid to the suppliant and her children and their assumed entitlement to them. Viewed in this light, as I think it fairly should be, his award of $30,000 represented the amount of damages for which the respondent was responsible to the suppliant and her children after taking into account by way of diminution of damages the pecuniary benefits which they had received and might reasonably have expected by way of pension under the Pension Act. This means that his award should be regarded as an award of $30,000 notwithstanding the amount which the suppliant and her children had received by way of pension under the Pension Act and, consequently, over and above such amount. An award on such a basis was called for in a case such as the one before him and it ought to be assumed, in the absence of a clearly expressed intention to the contrary, particularly in view of the fact that his judgment was not challenged by the Crown, that his award was made in accordance with the principles properly applicable in arriving at it. It was not his function to fix a total amount from which the amount of the pensions paid to the suppliants were to be deducted but to assess the damages to which they were entitled under section 19(c) of the Exchequer Court Act. This he did. And, certainly, he did not intend that the amount of his award should be reduced by the amount of the pensions properly paid to the

suppliant and her children. On the contrary, it is clear that he assumed that they were entitled to the pensions which had been awarded to them.

In this view of the award the attempt of the Crown to deduct the amount of the pension payments from the amount of the award is really an attempt to deduct the amount twice, for it was already taken into account by way of diminution of damages in the assessment of the damages for which the Crown was vicariously liable.

There remains only one other comment. There was a question in my mind whether on August 6, 1951, when the Crown paid the suppliant the sum of $22,000 this amount was greater than the capitalized value of the pensions that might otherwise have been payable to her and her children and I considered it advisable that evidence bearing on this question should be adduced. There was a conflict in the point of view of the experts on the basis of calculation to be used. While I am in some doubt whether, as at August 6, 1951, the amount which the suppliant had recovered and collected, namely, $22,000, was greater than the capitalized value of the pensions that might otherwise have been payable under the Act in such a way as to make the direction in section 18B(1) that no pension should be paid then operative, I have come to the conclusion that this question has only an indirect bearing on the real issues involved. I, therefore, need not consider it.

For the reasons which I have given I have come to the conclusion that the respondent has no right to recover from the suppliant the amount of the pensions paid to her and her children. It follows that there will be judgment declaring that the suppliant is entitled in her two capacities to the relief sought in this petition of right and costs and that the respondent's counterclaim is dismissed with costs.

Judgment accordingly.

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Nov. 16, 17 & 18
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Aug. 4

BETWEEN:

LOUIS FRANCIS .....SUPPLIANT,

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Goods imported into Canada from U.S.A. by an Indian—Indian claiming exemption from duty and taxes—The Jay Treaty—Article III of the Treaty conferring certain rights upon Indians —Authority of Legislatures of Lower Canada and Upper Canada to implement, alter, amend or annul part of Article III of the Treaty— No legislation in force in Canada implementing part of Article III of the Treaty at time of importation of the goods by suppliant—The War of 1812—Part of Article III of the Treaty terminated by War of 1812—An Act to amend the Income Tax Act and the Income War Tax Act, S. of C. 1949, 2nd Session, c. 25, s. 49—Provisions of s. 49 of the Act a bar to any right of exemption from duty or tax—The Indian Act, R.S.C. 1952, c. 149, ss. 2(1) (g), 86(1) (b), 88 and 89—S. 86(1) of the Act of no application to payment of customs duties or excise taxes.

Article III of the Treaty of Amity, Commerce and Navigation, between His Britannic Majesty and the United States of America, signed on November 19, 1794, commonly known as the Jay Treaty, is in part as follows:

> "No duty of entry shall ever be levied by either party on peltries brought by land, or inland navigation into the said territories respectively, nor shall the Indians passing or repassing with their own proper goods and effects of whatever nature, pay for the same any impost or duty whatever. But goods in bales or other large packages unusual among Indians shall not be considered as goods belonging *bona fide* to Indians."

Suppliant is an Indian within the definition of that term in the Indian Act, S. of C. 1951, c. 29, s. 2(1) (g), and resides on an Indian reserve in the Province of Quebec adjoining an American Indian reserve in the State of New York, U.S.A. In 1948, 1950 and 1951, suppliant brought from the United States into Canada certain articles acquired by him in the U.S.A., without reporting to the nearest customs house, declaring the goods or paying the duties in respect thereto. Following their seizure by the Crown suppliant claimed exemption from duty and taxes by reason of the provisions of that part of Article III of the Jay Treaty, which claim was rejected by the Crown and demand for payment of the amount owing made. Payment under protest was effected, the goods released and then a Petition of Right filed in which suppliant asks for a declaration of this Court that as an Indian he is entitled to transport by land and inland navigation into Canada his own proper goods and effects of whatever nature, free of any impost or duty whatsoever; and also the return of the amount paid to respondent for certain customs and excise duties in respect of said goods. On the evidence the Court found that that part of Article III of the Jay Treaty in favour of Indians was implemented in Canada in 1796 by the Legislature of Lower Canada and, in 1801, by the Legislature of Upper Canada; that those legislative enactments either lapsed or

were repealed more than 125 years ago; and there is no evidence that for that length of time, any Indian in Canada has claimed or been allowed the exemption conferred by the treaty.

Held: That notwithstanding the fact that the legislatures of Lower and Upper Canada did for a time implement that part of Article III of the Jay Treaty, those legislatures had full authority to alter or amend or annul such legislation, as was in fact done. *Hoani Te Heu Heu Tukino* v. *Aotea District Maori Land Board* [1941] A.C. 308 referred to.

2. That as there was no legislation in effect at the time of the importation of the goods into Canada which sanctioned or implemented that part of Article III of the Jay Treaty, suppliant is not entitled to exemption from the duties claimed by reason of the provisions of that treaty. *Arrow River and Tributaries Slide and Boom Co. Ltd.* v. *Pigeon Timber Co. Ltd.* [1932] S.C.R. 495; *Attorney- General for Canada* v. *Attorney-General for Ontario* [1937] A.C. 326; *Albany Packing Co.* v. *Registrar of Trade Marks* [1940] Ex. C.R. 256 referred to and followed.

3. That in any event that part of Article III of the Jay Treaty which so conferred an exemption upon Indians from payment of duties while passing and repassing the border with their own proper goods and effects, was abrogated by the War of 1812. The privilege necessarily ceases to operate in a state of war, since the passing and repassing of subjects of one sovereignty into territory of another is inconsistent with a condition of hostility. *Karnuth* v. *United States* (1928) 279 U.S. 221; *United States* v. *Garrow* 88 Fed. Rep. (2d) 318 referred to and followed.

4. That the provisions of s. 49 of "An Act to amend the Income Tax Act and the Income War Tax Act", S. of C. 1949, 2nd Session, c. 25, are sufficient to bar any right of exemption from duty or tax unless the exemption is provided by some Act of the Parliament of Canada. The duties here were levied under the provisions of the Customs Tariff Act and the Excise Tax Act and neither of these Acts confer any exemption upon Indians as such.

5. That the exemptions from taxation provided in the Indian Act, R.S.C. 1952, c. 149, s. 86(1) are intended to apply equally to the property of all Indians on all reserves. The section cannot be construed as conferring special benefits only on Indians who reside on a reserve adjacent to the Canadian border. The exemption from taxation therein provided relates to personal property of an Indian or band *situated on a reserve,* and not elsewhere. Section 86(1) has no application whatever to the payment of customs duties or excise taxes.

PETITION OF RIGHT by suppliant seeking a declaration of the Court that as an Indian he is entitled to the benefit of certain provisions in Article III of the Jay Treaty.

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

Gordon F. Henderson, Q.C., A. T. Hewitt and *John MacDonald* for suppliant.

D. H. W. Henry, for respondent.

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

CAMERON J. now (August 4, 1954) delivered the following judgment:

In this Petition of Right the suppliant asks for a declaration of this Court that as an Indian, subject to the provisions of the Indian Act, Statutes of Canada, 1951, c. 29, he is entitled to transport by land or inland navigation into the Dominion of Canada his own proper goods and effects of whatever nature, free of any impost or duty whatsoever; and also for the return of the sum of $123.66 paid by him to the respondent, under protest, for certain Customs and Excise Duties in respect of goods imported by him into Canada.

This is a test case and in the main the facts are not in dispute. The suppliant is an Indian within the definition of that term in section 2(1)(g) of the Indian Act and at all relevant times resided on the St. Regis Indian Reserve in St. Regis village. That village is situated on the south side of the St. Lawrence River, about opposite Cornwall, Ontario, but is in the most westerly tip of the Province of Quebec and adjacent to the State of New York. It adjoins an American Indian reserve, the members of which are also part of the St. Regis tribe of Indians. Like some other residents of the St. Regis Indian Reserve of Canada, the suppliant's employment has been mainly in the United States and he served for some years with the American Army in the Second World War. Following his discharge from the American Army in 1946, he returned to his home in St. Regis and has since resided there. For the purpose of this case only, certain admissions were agreed to by the parties hereto and duly filed. Thereby it was agreed that on or about October 19, 1951, the suppliant imported from the United States into Canada one washing machine, one oil heater, and one electric refrigerator, being his own property acquired by him in the United States. No duty was paid by him on the importation of the said articles either under the Customs Tariff Act or the Excise Tax Act. The three articles were seized while on the premises and in the possession of the suppliant and detained on behalf of His Late Majesty under the provisions of the Customs Act for

failure to pay duty and taxes on the importation into Canada of the said goods under the Customs Tariff Act and the Excise Tax Act. Following the seizure, the suppliant claimed exemption from duty and taxes with respect to the said articles by reason of the provisions of Article III of the Treaty of Amity, Commerce and Navigation, between His Britannic Majesty and the United States of America, signed on the 19th day of November, 1794, and which is commonly known, and will be hereinafter referred to as the Jay Treaty.

The claim for exemption of duty and taxes was not recognized and the Crown demanded payment of the sum of $132.66 for duty and taxes. The suppliant thereupon under protest paid the said sum and the goods were released to him; he then filed this Petition of Right.

The evidence at the trial indicated that the date of entry of the said goods was not on October 19, 1951, as stated in the agreement of the parties. It showed that the suppliant imported them on the following dates—the washing machine in December, 1948; the refrigerator on April 24, 1950; and the oil heater on September 7, 1951. The Petition of Right was amended accordingly but the change in the date of importation, however, is not of importance in determining the main issue between the parties. It is shown by the evidence, also, that each of the articles when imported was taken directly to the home of the suppliant and was not taken to a Custom-house at a port of entry, or reported to any collector or other customs officer.

The main case put forward on behalf of the suppliant is that as an Indian he is entitled to the benefit of certain provisions contained in Article III of the Jay Treaty (Exhibit 2), the relevant part being as follows:

> No duty of entry shall ever be levied by either party on peltries brought by land, or inland navigation into the said territories respectively, nor shall the Indians passing or repassing with their own proper goods and effects of whatever nature, pay for the same any impost or duty whatever. But goods in bales or other large packages unusual among Indians shall not be considered as goods belonging *bona fide* to Indians.

At the trial the suppliant relied also on the provisions of section 86 of the Indian Act, R.S.C. 1952, c. 149. Notwithstanding the fact that that Act had not been referred to in the pleadings, counsel for the respondent made no objection to its being considered, and the scope of the argument is regularized by his approval.

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For the respondent it is submitted that the suppliant is not entitled to the exemptions claimed on any ground. First it is said that the Jay Treaty—or at least the relevant provisions of Article III—was terminated by the War of 1812. If it were not so terminated, then it is contended that it is enforceable by the courts only when the Treaty has been implemented or sanctioned by legislation rendering it binding upon the subject, and that at the time the goods here in question were imported, there was no such legislation in effect in Canada. Then it is submitted as a further alternative that even if the Treaty was in full force and effect at the relevant times, the nature of the goods imported is not such as to be within the purview of the goods mentioned in Article III. The respondent also submits that section 86 of the Indian Act does not assist the suppliant. Finally, the respondent relies on the provisions of section 49 of the Income Tax Act and the Income War Tax Act, Statutes of Canada, 1949, 2nd Session, chapter 25, as barring any right to exemption which the suppliant might otherwise have had.

The first question for consideration is this. Is the suppliant entitled to an exemption from the duties claimed by reason of that part of Article III of the Jay Treaty which I have cited above? Here I should emphasize the fact that in this opinion, my comments and conclusions—unless otherwise stated—are referable only to that part of Article III and to no other part of the Treaty.

I have given this matter the most careful consideration and after referring to the authorities cited to me, I have reached the conclusion that this question must be answered in the negative. Briefly, the reason for so finding is that at the time the goods were imported into Canada by the suppliant there was in force in Canada no legislation sanctioning or implementing that term of the Treaty.

The first authority to which I would like to refer on this point is the case of *Arrow River & Tributaries Slide & Boom Co., Ltd.* v. *Pigeon Timber Co. Ltd.* (1). The facts in that case were as follows: The appellant, which had constructed certain works upon that part of the Pigeon River which was in Ontario (the remaining part being in the United States) was desirous of charging tolls upon timber passing

(1) [1932] S.C.R. 495.

through such works, under the authority of the Lakes and Rivers Improvement Act, R.S.O., 1927, chapter 43. The respondent applied for an injunction restraining the District Judge from acting on the appellant's application to fix the tolls on the ground that the Pigeon River being an international stream, its use under the Ashburton Treaty is free and open to the use of the citizens of both the United States and Canada and that Part V of the Lakes and Rivers Improvement Act, in so far as it purports to authorize the appellant company to charge tolls for the use of improvements on that river, is *ultra vires* of the Ontario Legislature. Application for an injunction was refused by Wright, J. on the ground that in British countries treaties to which Great Britain is a party are not as such binding on the individual subject in the absence of legislation. The Appellate Division of Ontario agreed with that principle and apparently would have upheld the decision of Wright, J. had there been, in their view, legislation in Ontario that authorized the construction of the works in question. In the Supreme Court of Canada, the appeal was allowed and the judgment of Wright, J. restored. At p. 510, Lamont, J. speaking also for Cannon, J. said:

> The Act must, therefore, be held to be valid unless the existence of the Treaty of itself imposes a limitation upon the provincial legislative power. In my opinion, the treaty alone cannot be considered as having that effect. The treaty in itself is not equivalent to an Imperial Act and, without the sanction of Parliament, the Crown cannot alter the existing law by entering into a contract with a foreign power. For a breach of a treaty a nation is responsible only to the other contracting nation and its own sense of right and justice. Where, as here, a treaty provides that certain rights or privileges are to be enjoyed by the subjects of both contracting parties, these rights and privileges are, under our law, enforceable by the courts only where the treaty has been implemented or sanctioned by legislation rendering it binding upon the subject. Upon this point I agree with the view expressed by both courts below:
>
> > that, in British countries, treaties to which Great Britain is a party are not as such binding upon the individual subjects, but are only contracts binding in honour upon the contracting States.
>
> In this respect our law would seem to differ from that prevailing in the United States, where, by an express provision of the constitution, treaties duly made are "the supreme law of the land" equally with Acts of Congress duly passed. They are thus cognizable in both the federal and state courts. In the case before us it is not suggested that any legislation, Imperial or Canadian, was ever passed implementing or sanctioning the provision of the treaty that the water communications above referred to should be free and open to the subjects of both countries. That provision, therefore, has only the force of a contract between Great Britain and the United States which is ineffectual to impose any limitation upon the legislative

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power exclusively bestowed by the Imperial Parliament upon the legislature of a province. In the absence of affirming legislation this provision of the treaty cannot be enforced by any of our courts whose authority is derived from municipal law. *Walker* v. *Baird*, [1892] A.C. 491; *In re The Carter Medicine Co's Trade Mark*, (1892) 61 L.J. Ch. 716; *United States* v. *Schooner "Peggy"*, (1801) 1 Cranch, 103; *The Chinese Exclusion Case, Chae Chan Ping* v. *United States*, (1889) 130 U.S.R. 581; *Oppenheim's International Law*, 4th ed., 733-4.

I am, therefore, of opinion that section 52, in question in this appeal, must be considered to be a valid enactment until the Treaty is implemented by Imperial or Dominion legislation.

Reference may also be made to *Albany Packing Co.* v. *Registrar of Trade Marks* (1), in which the late President of the Court said at p. 265:

Before proceeding to do so, however, I should perhaps here add that, I think, it is correct to say that the terms of the Convention of The Hague may be referred to by the Court as a matter of history, in order to understand the scope and intent of the terms of that Convention, and under what circumstances any of the provisions of the Unfair Competition Act were enacted, in order to give legislative effect to the same. But the terms of the Convention cannot, I think, be employed as a guide in construing any of such provisions so enacted, for the reason that in Canada a treaty or convention with a foreign state binds the subject of the Crown only in so far as it has been embodied in legislation passed into law in the ordinary way.

And in the case of *Attorney-General for Canada* v. *Attorney-General for Ontario* (2), Lord Atkin said at p. 347:

It will be essential to keep in mind the distinction between (1.) the formation, and (2.) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secured as possible they will often in such cases before final ratification seek to obtain from Parliament on expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament, or any subsequent Parliament, from refusing to give its sanction to any legislative proposals that may subsequently be brought before it. Parliament, no doubt, as the Chief Justice points out, has a constitutional control over the executive: but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone. Once they are created,

(1) [1940] Ex.C.R. 256. (2) [1937] A.C. 326.

while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default. In a unitary State whose Legislature possesses unlimited powers the problem is simple. Parliament will either fulfil or not treaty obligations imposed upon the State by its executive. The nature of the obligations does not affect the complete authority of the Legislature to make them law if it so chooses. But in a State where the Legislature does not possess absolute authority, in a federal State where legislative authority is limited by a constitutional document, or is divided up between different Legislatures in accordance with the classes of subject-matter submitted for legislation, the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several Legislatures; and the executive have the task of obtaining the legislative assent not of the one Parliament to whom they may be responsible, but possibly of several Parliaments to whom they stand in no direct relation. The question is not how is the obligation formed, that is the function of the executive; but how is the obligation to be performed, and that depends upon the authority of the competent Legislature or Legislatures.

Following the signing of the Jay Treaty, the relevant part of Article III was in fact implemented in Canada. In 1796, the legislature of Lower Canada by c. VII of its Statutes passed "an Act for making a Temporary Provision for the Regulation of Trade between this Province and the United States of America, by Land or by Inland Navigation".

Thereby power was conferred on the Government with the advice and consent of the Executive Council to give directions and make orders with respect to importation and duties, for carrying on trade between the province and the United States. Section II of the Act was as follows:

And be it further enacted by the authority aforesaid, that this Act shall be in force and have effect from and after the passing thereof, until the first day of January, one thousand, seven hundred and ninety-seven, and from thence to the end of the then next session of the Provincial Parliament, and no longer.

Pursuant to that authority and in conformity with the terms of the Jay Treaty, a regulation was passed and duly gazetted on July 7, 1796 (Exhibit 4), such regulation putting into effect the same exemption in respect to the goods of Indians passing between the two countries as is found in the Jay Treaty, the language used being practically identical with that in the Jay Treaty itself.

As I have said, the Act of 1796 was of a temporary nature; the regulation appears to have been renewed from time to time, the last renewal being found in the Statutes of 1812, c. 5, by virtue of which it expired on June 1, 1813.

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That part of the Jay Treaty was first implemented in Upper Canada in 1801 by s. VI of c. V of the Statutes of that year (Exhibit 6), the relevant part thereof being as follows:

> VI. And be it enacted by the authority aforesaid. That no duty of entry shall be payable, or levied, or demanded by any Collector or deputy on any Peltries brought by land or inland navigation into this Province, and that Indians passing or repassing with their proper goods and effects, of whatever nature, shall not be liable to pay for such goods and effects any impost or duty whatever, unless the same shall be goods in bales or other packages unusual among Indians for their necessary use, which shall not be considered as goods belonging *bona fide* to Indians, or as goods entitled to the foregoing exemption from duties and imposts;

It will be noted that the wording is similar to but not precisely the same as that found in Article III. That Act remained in force until 1824, when it was repealed by c. XI, 4th George IV—4th Session. The Jay Treaty was also implemented in part by the Imperial Act of 1797, chapter 97. It would seem that thereby no attempt was made to implement those parts of the Treaty which concerned only the Province of Canada, and in particular that the Act did not implement that part of Article III relating to Indians which is here in question.

In so far as I am aware, there has been no legislative enactment in Canada implementing in any way this particular provision in favour of Indians other than those in Upper and Lower Canada to which I have referred, and those statutes either lapsed or were repealed more than 125 years ago. Moreover, there is nothing to indicate that by usage, practice or custom, any Indian in Canada for that length of time has claimed or been allowed the exemption conferred by the Jay Treaty. The suppliant did give evidence that for a few years after taking up residence on the Reserve in 1946, he did bring certain small articles such as food and clothing into Canada from the United States without paying any duty. The fact, however, is that on those occasions he neglected to report the matters to any customs officer, and it is not shown that he was at any time authorized to import anything without declaring the goods and paying proper duties in respect thereto.

I am of the opinion, also, that notwithstanding the fact that the legislatures of Upper and Lower Canada did for a time implement that part of Article III now under consideration, those legislatures had full authority to alter or

amend or annul such legislation at any later time, as was in fact done. Reference may be made to the case of *Hoani Te Hou Heu Tukino* v. *Aotea District Maori Land Board* (1), in which the following statement appears at p. 327:

> If then, as appears clear, the Imperial Parliament has conferred on the New Zealand legislature power to legislate with regard to the native lands, it necessarily follows that the New Zealand legislature has the same power as the Imperial Parliament had to alter and amend its legislation at any time. In fact, as pointed out by the learned Chief Justice, s. 73 of the Act of 1852 was repealed by the New Zealand legislature by the Native Land Act, 1873. As regards the appellant's argument that the New Zealand legislature has recognized and adopted the Treaty of Waitangi as part of the municipal law of New Zealand, it is true that there have been references to the treaty in the statutes, but these appear to have invariably had reference to further legislation in relation to the native lands, and, in any event, even the statutory incorporation of the second article of the treaty in the municipal law would not deprive the legislature of its power to alter or amend such a statute by later enactments.

My conclusion on this point, therefore, is that, as there was no legislation in effect at the time of the importation of the goods into Canada which sanctioned or implemented the particular terms of the Jay Treaty which are here under consideration, the suppliant is not entitled to exemption from the duties claimed by reason of the terms of that Treaty.

Counsel for the respondent submitted also that in any event the relevant provision of the Jay Treaty was terminated by the War of 1812, and for the following reasons I am of the opinion that that contention must be upheld.

It is not altogether settled what treaties are annulled or suspended by war and what treaties remain in force during its continuance or revive at its conclusion. The diversity of opinion in regard thereto is very substantial as will be seen by reference to such texts as Pitt Cobbett's Leading Cases on International Law (Walker), Vol II, 5th Ed., p. 50 ff., and Hall's International Law, 8th Edition, p. 453 ff. In 5 Moore's Digest of International Law, s. 779, p. 383, it is stated that the view now commonly accepted is that "Whether the stipulations of the treaty are annulled by war depends upon their intrinsic character".

(1) [1941] A.C. 308.

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Counsel for the suppliant stresses the provision of Article 28 of the Treaty as indicating that the terms of Article III were to be "permanent" and that therefore they remained unaffected by the outbreak of war in 1812. The relevant part of that article is as follows:

> Art. 28. It is agreed that the first ten articles of this Treaty shall be permanent, and that the subsequent articles except the twelfth, shall be limited in their duration to twelve years, to be computed from the date on which he ratification of this Treaty shall be exchanged . . .

Reference was made to *Sutton* v. *Sutton* (1). That was a decision of the Master of the Rolls in 1830 in which it was declared that under the Jay Treaty and the Act of 37, Geo. III, ch. 97, American citizens who held lands in Great Britain on the 28th of October, 1795, and their heirs and assigns, are at all times to be considered, so far as regards these lands, not as aliens but as native subjects of Great Britain.

The Act referred to provided for carrying into effect certain of the terms of the Jay Treaty, as section 24 thereof incorporated the provisions of Article IX of the Treaty relating to the rights of American citizens who then held lands in the British Dominions, and of British subjects holding lands in the United States to continue to hold and dispose of them as if they were natives and not aliens. By section 27 it was provided that the Act would remain in force so long only as the Jay Treaty remained in effect. The Act was continued by 45 Geo. III, ch. 35, in which it is interesting to note that both in the recital and in the enactment, it is stated that "The said Treaty has ceased and determined". The Act was further continued, and finally by 48 Geo. III, ch. 6, it was extended to the end of that Session of Parliament and it would appear that thereafter no Act was passed to revive or prolong the operation of the Treaty. The judgment of the Master of the Rolls in that case was as follows:

> The relations, which had subsisted between Great Britain and America, when they formed one empire, led to the introduction of the ninth section of the treaty of 1794, and made it highly reasonable that the subjects of the two parts of the divided empire should, notwithstanding the separation, be protected in the mutual enjoyment of their landed property; and, the privileges of natives being reciprocally given, not only to the actual possessors of lands, but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should be permanent, and not depend upon the continuance of a state of peace.

(1) I Russ. & M. 663.

The act of the 37 G. 3, gives full effect to this article of the treaty in the strongest and clearest terms; and if it be, as I consider it, the true construction of this article, that it was to be permanent, and independent of a state of peace or war, then the act of parliament must be held, in the twenty-fourth section, to declare this permanency; and when a subsequent section provides that the act is to continue in force, so long only as a state of peace shall subsist, it cannot be construed to be directly repugnant and opposed to the twenty-fourth section, but is to be understood as referring to such provisions of the act only as would in their nature depend upon a state of peace.

Similarly, in the case of *The Society for the Propagation of the Gospel in Foreign Parts* v. *New Haven* (1) the Supreme Court of the United States upheld the right of a British corporation to continue to hold lands in Vermont. It was held that the title to the property of the Society was protected by the 6th Article of the Treaty of 1783; was confirmed by Article IX of the Jay Treaty, and was not affected by the War of 1812. The applicable rule was stated at p. 494 in the following words :

But we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto*, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms in relation to this subject, we are satisfied, that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial, and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning.

We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.

Both these cases were considered by the Supreme Court of the United States in *Karnuth* v. *United States* (2). That case arose under section 3 of the Immigration Act of 1924, ch. 190. Two persons resident in Canada sought to enter the United States either to continue or to secure work, and

(1) 8 Wheat. 464. (2) (1928) 279 U.S. 221.

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both were denied admission by the immigration authorities. In habeas corpus proceedings, the Federal District Court sustained the action of the immigration officials and dismissed the writ, but that judgment was reversed by the Circuit Court of Appeals. In reaching its conclusion, that Court seemed to be of the opinion that if the Immigration Act were so construed as to exclude the aliens, it would be in conflict with the opening words of Article III of the Jay Treaty, which result it thought should be avoided if it could reasonably be done. By *certiorari* the matter was brought to the Supreme Court. There the Court considered the pertinent provisions of Article III of the Jay Treaty, which is as follows:

> It is agreed that it shall at all times be free to his Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson's bay Company only excepted) and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other . . .

The main point for consideration by the Court was the contention made by the Government that the treaty provision relied on was abrogated by the War of 1812. The Court reached the conclusion that the view now commonly accepted was that "whether the stipulations of a Treaty are annulled by war depends upon their intrinsic character".

Then, after referring to the cases of *Sutton* v. *Sutton (supra)* and *Society, etc.* v. *New Haven (supra)*, the Court said at p. 239:

> These cases are cited by respondents and relied upon as determinative of the effect of the War of 1812 upon Article III of the treaty. This view we are unable to accept. Article IX and Article III relate to fundamentally different things. Article IX aims at perpetuity and deals with existing rights, vested and permanent in character, in respect of which, by express provision, neither the owners nor their heirs or assigns are to be regarded as aliens. These are rights which, by their very nature, are fixed and continuing, regardless of war or peace. But the privilege accorded by Article III is one created by the treaty, having no obligatory existence apart from that instrument, dictated by considerations of mutual trust and confidence, and resting upon the presumption that the privilege will not be exercised to unneighborly ends. It is, in no sense, a vested right. It is not permanent in its nature. It is wholly promissory and prospective and necessarily ceases to operate in a state of war, since the passing and repassing of citizens or subjects of one sovereignty into the territory of another is inconsistent with a condition of hostility. See 7 Moore's Digest of International Law, s. 1135; 2 Hyde, International

Law, s. 606. The reasons for the conclusion are obvious—among them, that otherwise the door would be open for treasonable intercourse. And it is easy to see that such freedom of intercourse also may be incompatible with conditions following the termination of the war. Disturbance of peaceful relations between countries occasioned by war, is often so profound that the accompanying bitterness, distrust and hate indefinitely survive the coming of peace. The causes, conduct or result of the war may be such as to render a revival of the privilege inconsistent with a new or altered state of affairs. The grant of the privilege connotes the existence of normal peaceful relations. When these are broken by war, it is wholly problematic whether the ensuing peace will be of such character as to justify the neighborly freedom of intercourse which prevailed before the rupture. It follows that the provision belongs to the class of treaties which does not survive war between the high contracting parties, in respect of which, we quote, as apposite, the words of a careful writer on the subject: . . .

Reference was then made to Hall, International Law (5th Ed.), pp. 389-390; Westlake International Law, Part II, pp. 29-32, and to Fauchille, Traité de Droit International Public, 1921, Vol. II, p. 55, and the judgment continued at p. 241:

These expressions and others of similar import which might be added, confirm our conclusion that the provision of the Jay Treaty now under consideration was brought to an end by the War of 1812, leaving the contracting powers discharged from all obligation in respect thereto, and, in the absence of a renewal, free to deal with the matter as their views of national policy, respectively, might from time to time dictate.

We are not unmindful of the agreement in Article XXVIII of the Treaty "that the first ten articles of this treaty shall be permanent, and that the subsequent articles, except the twelfth, shall be limited in their duration to twelve years. It is quite apparent that the word "permanent" as applied to the first ten articles was used to differentiate them from the subsequent articles—that is to say, it was not employed as a synonym for "perpetual" or "everlasting", but in the sense that those articles were not limited to a specific period of time, as was the case in respect of the remaining articles. Having regard to the context, such an interpretation of the word "permanent" is neither strained nor unusual. See *Texas, etc. Railway Co.* v. *Marshall,* 136 U.S. 393, 403; *Bassett* v. *Johnson,* 2 N.J. Eq. 154, 162.

The finding in that case, it is true, was limited to "the provision of the Jay Treaty now under consideration", which, as noted, was the opening part of Article III relating to the rights of the subjects of both contracting parties and of Indians dwelling on either side of the boundary line freely to pass and repass into the territories of the two contracting parties. It seems to me, however, that the *ratio decidendi* in that case is of equal application to the other part of Article III now under consideration. It involves the right of free entry of peltries *brought* by land or inland

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navigation and the particular rights of Indians when *passing* or *repassing* from one country to the other with their proper goods and effects. If such rights were not abrogated by war and the rights of passing and repassing were to continue during war, the door would likewise be open for treasonable intercourse.

However, the precise part of Article III with which we are here concerned has also been considered in the American courts. In *United States* v. *Garrow* (1), the second headnote is as follows:

> Provision of article 3 of Jay Treaty of 1794 permitting Indians to import their own proper goods and effects free of duty *held* terminated by War of 1812, as regards rights of Indians residing in Canada, and hence Canadian Indians' right subsequently to import goods free of duty depended on statutes rather than treaty.

In that case, which was decided in 1937, an Indian woman, also of the Canadian St. Regis Tribe and residing in Canada near the international border, entered the United States carrying twenty-four baskets which she had manufactured in Canada and intended to sell in the United States. The Collector at the port of entry imposed a duty under the existing Tariff Act. She filed a protest, claiming the baskets to be free under Article III of the Jay Treaty. She alleged also that those provisions were in substance carried into the various Tariff Acts from 1799 to August 28, 1894, and that, while that provision was repealed by the Tariff Act of 1897, such repeal in effect abrogated that part of the Jay Treaty and was therefore invalid. The United States Customs Court sustained her protest, holding that the case was controlled by *McCandless* v. *United States,* (2), a decision of the Circuit Court of Appeals for the Third Circuit. The Government then appealed to the Court of Customs and Patent Appeals on the following grounds.

1. Article 3 of the Jay Treaty of 1794 was annulled by the War of 1812.
2. Alternatively, if article 3 of the Jay Treaty was not abrogated by the War of 1812, it is, nevertheless, in conflict with the subsequent statute. It is well settled that when a Treaty and a Statute are in conflict, that which is later in date prevails.
3. Assuming, for the sake of argument, that article 3 was not abrogated but is still in force and effect, the importation is not within the purview of the language of said article 3.

(1) 88 Fed. Rep. (2*d*) 318. (2) 25 Fed. Rep. (2*d*) 71.

The Court, after pointing out that these terms of the Treaty were at that time self-executing, referred to the fact that they were also incorporated in an Act of Congress in 1799, and in substance were continued by various later amendments and revisions; that, however, in the Session of 1897, that provision was omitted and has not been carried into any later revision; that both by that Act and any succeeding Acts duties have been imposed upon similar goods. The Court then considered the *McCandless* case *(supra)* in which the United States District Court in 1928 held that the declaration of the War of 1812 did not end the Treaty rights secured to the Indians through the Jay Treaty so long as they remained neutral; that their rights were permanent and were at most only suspended during the instance of the war; and that therefore the petitioner, a fullblooded Indian, might pass and repass freely under and by virtue of Article III. The Court of Customs and Patent Appeals pointed out, however, that that case had not been appealed to the Supreme Court of the United States, possibly because of an Act of Congress in 1928 which provided that the Immigration Act of 1924 should not apply to Indians crossing the international border.

The Court then considered and followed the *Karnuth* case *(supra)*, concluding its opinion on this point as follows:

> The view of the Supreme Court on this interesting question, expressed in the case last cited, was confirmatory of views held by that court from the initiation of our government. See *Society for Propagation of Gospel in Foreign Parts* v. *Town of New Haven and William Wheeler,* 8 Wheat. 464, 494, 5 L. Ed. 662.
>
> It was also obviously in conformity with the current of authority both in the United States and England. Moore's International Law Digest, vol. 5, par. 779.

The Court then proceeded to consider the submission that the *Karnuth* case was not applicable to Indians and stated its conclusion in these words:

> It is contended by the appellee that some distinction should be made between the members of an Indian tribe and the immigrants in the Karnuth Case, supra. We know of no authority which states or indicates that any such distinction exists, especially as to Indians domiciled in a foreign country. There is no such line of demarcation indicated in the opinion of Mr. Justice Sutherland, hereinbefore quoted. If article 3 of the Jay Treaty was nullified by the War of 1812, as to Canadian citizens or subjects, it certainly was nullified, so far as Indians residing in Canada were concerned, for, although wards of the Canadian government, they were certainly within the category of citizens or subjects.

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> We think, therefore, it must be said that so far as the provision under which the appellee here claims is concerned, the War of 1812 ended the right which the appellee now claims of bringing her goods across the border and into the United States without the payment of duty.

Finally, the Court came to the conclusion that at least since 1812 the rights of the Indians of Canada to bring their peltries and goods into the United States free of duty were granted by Statute and not by Treaty; and that as the right of exemption was dropped from the Revising Act of 1897 and duties imposed thereafter, the appeal should be allowed, there being at the time of importation no treaty or statutory exemption in regard thereto.

Counsel for the suppliant herein laid considerable stress on the fact that the goods imported in the *Garrow* case were goods intended to be sold, whereas the goods imported by the suppliant herein were for his own personal use. In the *Garrow* case, however, the protestant relied entirely on the particular part of Article III which is here in question—the general right conferred on Indians to pass or repass with their own proper goods and effects; and the Court clearly held that that part of the article in the Treaty was terminated by the War of 1812. As I read the judgment, it is not based on the fact that the goods there imported were or were not for sale, but on a general consideration of the words of the provision itself.

The Supreme Court of the United State in the *Karnuth* case has held that the outbreak of the War of 1812 annulled the provisions of the opening part of Article III of the Treaty, which conferred the right upon citizens (including Indians) on either side of the boundary to pass and repass freely across the border. The reasons in that case would seem to be relevant also to that part of Article III now under consideration, which conferred an exemption upon Indians from payment of duties while passing and repassing the border with their own proper goods and effects. The Court of Customs and Patent Appeals in the *Garrow* case reached a similar conclusion. While it is true that these cases are not binding upon me, the reasons given in each case commend themselves to me and with respect I shall adopt them in this case. My conclusion, therefore, is that the particular provision of the Jay Treaty on which the suppliant relies was annulled by the War of 1812. In view

of that finding, it becomes unnecessary to consider the further submission made on behalf of the respondent that in any event the nature of the goods imported by the suppliant is not such as to be within the purview of the goods mentioned in Article III.

Counsel for the Crown also relies on the provisions of section 49 of the Statutes of Canada, 1949, 2nd Session, ch. 25, which is as follows:

> 49. For greater certainty it is hereby declared and enacted that, notwithstanding any other law heretofore enacted by a legislative authority other than the Parliament of Canada (including a law of Newfoundland enacted prior to the first day of April, nineteen hundred and forty-nine), no person is entitled to
>
> (*a*) any deduction, exemption or immunity from, or any privilege in respect of,
>
> (i) any duty or tax imposed by an Act of the Parliament of Canada, or
>
> (ii) any obligation under an Act of the Parliament of Canada imposing any duty or tax, or
>
> (*b*) any exemption or immunity from any provision in an Act of the Parliament of Canada requiring a licence, permit or certificate for the export or import of goods,
>
> unless provision for such deduction, exemption, immunity or privilege is expressly made by the Parliament of Canada.

I have thought it advisable to set out the section in full although counsel relies only on para. (a) (i).

That Act is entitled "An Act to amend The Income Tax Act and the Income War Tax Act" and was assented to on December 10, 1949. Most of the sections have to do with income tax throughout the whole of Canada. Counsel for the suppliant suggests that inasmuch as this section appears between sections 48 and 50 which have to do specifically with Newfoundland, and as the enactment was made just prior to the entry of Newfoundland into Confederation, section 49 should be read as applicable to the province of Newfoundland only. I am quite unable to agree with that submission. Were I to do so, I would be disregarding the clear meaning of the words of the section itself which are general in their application and relate to "any other law heretofore enacted by a legislative authority other than the Dominion of Canada". The words "including a law of Newfoundland" could not be construed so as to exclude all other laws.

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Now the clear effect of that part of the section when applied to the facts of this case is this—that thereafter no person is entitled to an exemption or immunity from any duty or tax imposed by an Act of the Parliament of Canada unless provision for such exemption or immunity is expressly made *by* the Parliament of Canada, notwithstanding any other law theretofore enacted by any other legislative authority which might have granted such exemption or immunity. The exemption must now be found in the Acts of the Parliament of Canada. All such exemptions, for example, as may have been made prior to 1867 by any of the previous legislative bodies such as those of Lower or Upper Canada, even if continued in practice, would, after the enactment of section 49 and in the absence of an Act of the Parliament of Canada conferring the exemption, be of no effect.

This section, as I have said, was assented to on December 10, 1949. It was therefore in effect at the time the suppliant imported the refrigerator and oil heater, but not in effect when the washing machine was imported in 1948. So far as the first two articles are concerned, the provisions of section 49 *(supra)* are sufficient in my opinion to bar any right of exemption from duty or tax unless by some Act of the Parliament of Canada the exemption is provided. The duties here in question were levied under the provisions of the Customs Tariff Act and the Excise Tax Act and it is common ground that neither of these Acts confers any exemption upon Indians as such.

Counsel for the suppliant, however, claims that such an exemption is to be found in s. 86 (1) of the Indian Act, R.S.C. 1952, ch. 149, which reads in part as follows:

> 86. (1) Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to subsection (2) and to section 82, the following property is exempt from taxation, namely,
>
> (*a*) the interest of an Indian or a band in reserve or surrendered lands, and
>
> (*b*) the personal property of an Indian or band situated on a reserve,
>
> and no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (*a*) or (*b*) or is otherwise subject to taxation in respect of any such property . . .

This provision first appeared in that form in the Indian Act, Statutes of Canada, 1951 ch. 29, s. 86; prior thereto a somewhat similar right was provided in a different form in

the Indian Act, R.S.C. 1927, ch. 98, s. 102. I am of the opinion that subsection (11) (b) is of no assistance to the suppliant in this case. The exemption from taxation therein provided relates to personal property of an Indian or band *situated on a reserve,* and not elsewhere. The importance of that limitation is seen also from a consideration of sections 88 and 89.

Whatever be the extent of the exemption from taxation granted to Indians in respect of their personal property on a reserve, it does not in my view extend to an exemption from customs duties and excise taxes payable on the importation of goods into Canada. Indians, when they buy imported goods subject to such duties, must, like the others, pay a higher price.

Section 9 of the Customs Act provides:

> All goods imported into Canada, whether by sea, land, coastwise, or by inland navigation, whether dutiable or not, shall be brought in at a port of entry where a Custom-house is lawfully established.

Now the suppliant did not comply with the provisions of that section, which is imperative in its terms and applicable to everyone, including Indians. The evidence is that there was no custom-house on the St. Regis Reserve at the time the goods were imported, and it was therefore the duty of the suppliant to report at the nearest custom-house, declare the goods, and pay all duties in respect thereto before taking them to his home. In effect, the contention of the suppliant is this: "The reserve on which I live is adjacent to the American border. I brought the goods directly from the United States to the reserve, and, while I may have been guilty of non-compliance with the provisions of the Customs Act in that I failed to report the entries at a custom-house and there pay the proper duties, such duties cannot now be collected from me because, as an Indian, my goods are exempt from taxation as they are on a reserve."

It seems to me, however, that the suppliant is not entitled to take advantage of his own illegal actions to obtain an exemption in this manner. Were he permitted to do so, the result would be that the relatively few Indians who happen to reside on a reserve adjacent to the American border would be able to secure an exemption from duties and taxes not available to Indians residing on a reserve remote from the border. The latter, of course, would be required to

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comply with the Customs Act, report the goods, and pay the duties before there was any possibility of getting the imported goods to the reserve on which they lived. As I read the provisions of section 86 (1) of the Indian Act, the clear intention is that the exemptions from taxation therein provided are intended to apply equally to the property of all Indians on all reserves. I am quite unable to construe that section as conferring special benefits only on Indians who reside on a reserve adjacent to our borders. In my opinion, the section has no application whatever to the payment of customs duties or excise taxes.

For the reasons which I have stated, the claim must fail on all grounds. There will, therefore, be judgment declaring that the suppliant is not entitled to any of the relief claimed in the Petition of Right and dismissing his petition with costs payable to the respondent.

Judgment accordingly.

1953

Oct. 14, 15

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Aug. 18

BETWEEN:

JULIUS BARTH .....(PLAINTIFF) APPELLANT,

AND

B.C. WATER TRANSPORT CO. LTD. .....(DEFENDANT) RESPONDENT.

Shipping—Collision between vessel and moored boom of logs—Failure to display proper lights on boom sole cause of collision—Vessel not "at anchor"—Article 11—Damages—Appeal allowed.

Appellant's fishing vessel sank and was a total loss following a collision with a moored boom of logs in charge of respondent's vessel. The trial judge found that the negligence of both the master and the mate of appellant's vessel caused the loss. On appeal this Court found no negligence on the part of the officers in charge of appellant's vessel and also found that respondent's vessel and the boom of logs were not properly lighted.

Held: That the failure of the master of respondent's vessel to display a suitable warning light, properly located and clearly visible from vessels approaching from the east, was the sole and effective cause of the collision.

2. That since the respondent's vessel was attached to the boom of logs and the boom attached to the shore, neither being attached to the ground, the vessel was not at anchor within the meaning of Article 11 of the Rules of the Road.

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APPEAL from the judgment of the District Judge in Admiralty for the British Columbia Admiralty District.

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

G. F. McMaster and *F. H. H. Parkes* for appellant.

J. L. Farris, Q.C. and *A. D. Pool* for respondent.

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

CAMERON J. now (August 18, 1954) delivered the following judgment:

This is an appeal from the judgment of Mr. Justice Sidney Smith, Deputy Judge in Admiralty of the British Columbia Admiralty District, dated April 27, 1953, by which he dismissed the appellant's claim for damages arising out of a collision on October 8, 1950. Briefly, the circumstances were that the appellant's fishing vessel *Hummingbird No. 2,* at about 1:30 a.m. on that date was proceeding up the west coast of British Columbia and in Thulin Passage collided with a moored boom of logs in charge of the respondent's vessel, the tug *Hecate Straits.* The fishing vessel was holed, took water rapidly, sank shortly thereafter and became a total loss. The appellant claimed damages in the sum of $13,651.00, or in the alternative, damages occasioned by the failure of the Master of the respondent's vessel to perform his duty subsequent to the said collision, as required by the provisions of the Canada Shipping Act.

Many of the facts are not in dispute. On the preceding day the defendant's tug, the *Hecate Straits,* was proceeding from Port MacNichol to Victoria, towing a boom of logs. The weather was bad and the Master of the tug, Captain H. P. Ebbie, decided to put into Thulin Passage and to remain there until the weather improved. Thulin Passage is shown on the chart (Exhibit 2). It lies between Copeland Islands (commonly known as Ragged Islands) and the mainland. It will be convenient for the purposes of this case to assume that Thulin Passage runs east and west; it is approximately two miles in length. The tow consisted of three booms of logs, each approximately 65 feet in width, which were towed abreast. On reaching the position marked

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A to B on Exhibit 2, the boom was tied up to the north shore by means of chains attached to rocks on the shore, which chains had been placed there for that purpose. The boom consisted of 18 sections, each section being about 66 feet in length so that the overall length of the boom was about 1,200 feet. The tug, facing east, was then tied up to the outer side of the boom and about two sections from the head-end, this operation being completed by 6 p.m. on October 7. It is agreed that the head-end of the boom was approximately 198 feet in overall width. Captain Ebbie said that as he was prepared for towing, he had placed two coal oil lamps of standard equipment on the boom, one in the centre of the head-end and one in the centre of the tail. He had also placed a similar type of coal oil lantern on the stanchion below the flying bridge on the tug. Later herein it will be necessary to state more particularly the exact position of that light and the extent to which it was visible from vessels approaching it from the east.

The fairway through Thulin Passage at that point was stated by Captain Ebbie to be approximately 400 feet wide and, except possibly for a few rocks on either shore, the fairway comprised the full width of the channel; there is no evidence to the contrary. In his judgment, the learned trial Judge stated that the channel at that point was 600 feet in width and he therefore concluded that two-thirds of the fairway was left free. In fact, however, and taking into consideration the width of the tug itself, less than half of the fairway was left free. Captain Ebbie agreed that at that point it is a "narrow channel" within the rules.

The plaintiff's fishing vessel, 43 feet long, 11 feet beam and 17 tons gross tonnage, at about 1:30 a.m. on October 8 was at the easterly end of the passage on its way to the north and was manned by the plaintiff as Master and by one Vincent Williams as Mate. It had left Vancouver at 4 p.m. on October 7 and was proceeding northerly. The Master had no papers but had been fishing up and down the coast for fourteen years and was familiar with Thulin Passage. The weather was not good on account of rain and mist and a slight sea was running. The vessel was travelling at a speed of about 7 knots, or slightly less, and when about one mile easterly of the boom, both the Master and Mate observed a single white light ahead on the starboard side.

The Master then went below to make a routine check of the engine, leaving the Mate at the wheel. No special instructions were given to the Mate to reduce speed or to take any special precautions because of the light which had been observed, and at that point neither the Master nor the Mate knew what the light indicated. Speed was not reduced thereafter to any appreciable extent, but the Mate steered the vessel so as to pass the light about 70 feet to the south thereof. About 10 minutes after the Mate had taken charge, the vessel struck the boom head-on at a point about 10 feet from its southerly limit. The Master, who had remained below, came on deck and both he and the Mate jumped on the boom. As I have said, the vessel was holed, took water rapidly, and in about one and one-half hours sank. Unsuccessful efforts were made later to salvage the vessel, but it could not be located. Both Master and Mate stated that they had not seen the tug or the boom itself until after the collision, that they saw no warning light on the tug at any time and that the only light which they saw prior to the collision was that on the fore end of the boom itself.

The contention of the appellant was that the boom light should have been at the southeast corner to mark its extreme limit in the fairway, but that view was not upheld by the learned trial Judge. The appellant also contends that there should have been a light on the tug clearly visible around the horizon and that it had no such light. The learned trial Judge found the Master (appellant) negligent in leaving the Mate alone in the wheelhouse at the entrance to the "dangerous channel", having seen a light whose meaning he failed to identify. He also found the Mate negligent in that he should have realized the likelihood of the light marking a boom, the precise position of which was obscure, and that he should have reduced speed in ample time until the position was clarified. He found that both the Master and Mate were experienced coasting men but was of the opinion that their experience bred a casual overconfidence which led to disaster.

Both the Master and Mate were familiar with Thulin Passage and knew that tugs frequently tied up tows of logs therein. Further to the west of the point where the collision occurred, there is a bight and the channel widens appreciably. Williams, the Mate, had at times seen three booms

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of logs tied up abreast in the wider area, but had never seen as many as three tied up abreast in the narrow part of the channel where the collision occurred. He knew that when a boom of logs was in tow, it was customary to have one white light centrally located in the fore-end and one similarly placed in the tail, and that a single boom is normally about 65 feet in width. On the evidence, I think it must be found that while he did not actually see the boom until the collision occurred, he assumed that the single light which he had observed was located on a single boom and therefore steered his vessel 70 to 75 feet to the south thereof so as to entirely clear it.

His evidence was that as rain was collecting on the window of the pilot house, he had opened it and was steering with his head out of the window. The learned trial Judge made no finding that Williams was not keeping a proper lookout from the time the light was first observed until the impact and on the evidence I think it is clear that he was keeping a proper lookout at all relevant times. At no time prior to the collision, did he see any warning light other than the one on the fore-end of the boom.

It becomes necessary now to consider the position of the single light on the tug itself. The finding of the trial Judge was that "the tug was exhibiting a white light on her starboard railing opposite the fore-end of the house". He also found that the lights of both tug and boom were the ordinary coal oil lanterns, that they were properly placed, and at material times were burning brightly. Exhibit 3 is a photograph of the starboard side of the tug, and at the trial I asked counsel to agree as to the precise location of the light on the tug and to mark its position on the photograph. That was done and it appears thereon as a red dot. Its position as so marked is in accordance with the evidence of the tug captain that it was placed on the starboard rail and lashed to the rear stanchion which supports the flying bridge. Captain Ebbie also stated that it was about 10 feet above the water, that the house extended from 6 to 8 feet forward of the light, that there were a couple of ventilator pipes also (I assume that he means forward of the light), and that the railing rises as it goes forward. He also agreed that vessels approaching from the east, as was the appellant's vessel, would approach the tug from its (the tug's) port side. At

first Captain Ebbie said that none of the house was ahead of the light and "there is nothing there that can obscure the light whatsoever". When shown the photograph Exhibit 3, however, he admitted that the house extended 8 or 10 feet forward of the light, that the rise in the railing tended to obscure the light from the vision of the person approaching from the port side "if he got real close", and finally he agreed that if a vessel were approaching on the port side of the centre line of the tug, the light could not be seen from that vessel. He stated, also, that to the east of the point of collision "the channel bends to port, quite a lot, and widens". Moreover, an inspection of the photograph Exhibit 3 also leads to the conclusion that the light on the tug was placed in such a position that it would not be visible from a vessel on the course taken by the *Hummingbird No. 2*—a small fishing vessel low in the water. It was placed on the level of the railing at that point, but forward the railing rises noticeably and at the bow it is apparently 2 or 3 feet above the level of the light.

In view of the evidence that the fishing vessel was approaching the tug on the tug's port side, these admissions of Captain Ebbie, coupled with the evidence of Williams that he was keeping a careful lookout and saw no light on the tug, and that of Barth that he did not see the tug light but did see the light on the boom, are sufficient in my opinion to establish that the light on the tug was so placed that it could not be seen by vessels approaching from the east and which were keeping to the starboard side of the narrow channel as they were required to do (Art. 25).

The appellant submits that under the circumstances disclosed, the tug was "at anchor" and that therefore it was bound to carry the light required in Art. 11, the applicable part of which is as follows:

> A vessel under 150 feet in length, when at anchor, shall carry forward, where it can best be seen, but at a height not exceeding 20 feet above the hull, a white light in a lantern so constructed as to show a clear, uniform, and unbroken light visible all round the horizon at a distance of at least 1 mile.

At the trial, counsel for the appellant introduced as part of his case certain portions of the examination for discovery of Captain Ebbie, including the following:

> Q. 128. Now, did you consider that you were at anchor?
> A. Yes.

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Over the objection of counsel for the respondent that the opinion of the Master was irrelevant, the learned trial Judge allowed the question and answer to be read. At the appeal, counsel for the appellant referred to that question, but counsel for the respondent again objected to its admissibility on similar grounds, and also on the ground that the question as to whether the ship was or was not "at anchor" was a question of law to be determined by the Court in the light of the evidence adduced.

The question, however, was not whether the ship was at anchor—a question of law to be determined by the Court—but rather whether the witness considered it to be at anchor, as indicative of his state of mind as to the existing conditions and what, in view of those conditions, he actually did to comply with the regulations. In that view of the matter, I think it was admissible. Captain Ebbie agreed that an anchor light would be visible all round the horizon, which obviously and admittedly was not the case with the tug light.

The exact meaning to be attached to the words "at anchor" has been the subject of controversy, *Marsden's Collisions at Sea,* 10th Ed., p. 460. For example, a tug lying moored to a pontoon landing-stage in a river, *The Turquoise* (1), and a trawler moored outside another trawler at a quay, *The Esk and the Gitana* (2), have been held not to be "at anchor". In Marsden the following appears at p. 461:

> It is submitted, that in the light of these cases, the true meaning to be attached to the words "at anchor", is the meaning which they would appear naturally to bear, and that a vessel "at anchor" is a vessel which is in fact being held to an anchor, such an anchor being effectively, even if unwillingly owing to its having fouled an obstruction, employed for its normal purpose, that is, of keeping the ship in a fixed relation to the ground, or else fast to moorings which are themselves attached to the ground by an anchor or the equivalent of an anchor.

Now, in the present case the tug was attached to the boom and the boom was attached to the shore; neither was attached to the ground. Applying the principles set forth in the above cases, I am of the opinion that the tug was not then "at anchor" within the meaning of that expression in Article 11 of the Regulations.

(1) (1908) P.D. 148.

(2) L. R. 2 Adm. Ecc. 350.

On p. 461 of the same text, the author, in a footnote, submits that when a vessel is made fast in a fairway, although she may not be "at anchor" within the Rules, good seamanship may demand the exhibition of an anchor light, and reference is made to the *City of Seattle* (1).

Counsel for the respondent submits that the tug master would have been wrong in placing an anchor light on the tug; that such a light would have been deceptive as indicating that an approaching vessel could have assumed that it could pass on either side of the tug, which, of course, it could not do in safety under these circumstances. I do not think, however, that I have to decide that particular point.

Article 29 of the 1910 Regulations is as follows:

> Nothing in these Rules shall exonerate any vessel, or the owner, or Master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper-lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Now there is evidence as to the precautions which are taken by tugs with tows sheltering in the narrow channel to give warning of the position of the tug and booms. Certain questions put to Captain Ebbie in his examination for discovery formed part of the appellant's case at the trial, and are as follows:

82. Q. Now, in that particular position have you ever seen the booms that are moored there with lights on them?
A. Yes. Generally we had lights.
87. Q. I was referring to the width of the booms.
A. Yes. The boat—the tug is generally moored outside of the booms; so the width is more indicated by the tug more than by the boom itself, that might have a light on it, but the tug always has a light on it.
88. Q. But you have seen booms with lights on them?
A. Yes.
89. Q. Now, has that light been on the outside boom?
A. Yes.
90. Q. And would you agree with me that if there was more than one boom that it would be safer to place the light on the outside boom?
A. Yes. Well, there is a lot of tugs there and we had a boom in a sort of exposed position. We always put a light right on the extreme corner so as to avoid accidents.
91. Q. The purpose of putting a light on would be to warn ships passing through?
A. That is right.

(1) (1904) 9 Ex. C.R. 146.

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92. Q. Of the presence of the boom?
A. Yes.

93. Q. So you think the safer position is on the outside corner?
A. Yes, that is right.

100. Q. Was there no light at all on the boom on the outside corner?
A. No.

That evidence indicates that the ordinary and proper practice of seamen in the particular circumstances of this case, where three booms of logs were moored abreast and projected into the centre of the fairway was to place at least one warning light on the boom itself and another similar warning light either on the extreme south corner of the fore-end of the boom, or, when the tug was lashed to the outer edge of the boom, then on a suitable place on the tug itself, thereby marking the limit to which the boom, or the tug and boom, extended into the fairway. Common prudence demands that tugs and tows appropriating one-half of a channel should use care to employ adequate means to make their presence and position known.

I think Captain Ebbie fully realized the necessity of giving adequate warning of the position of the tug and boom in the narrow and dangerous channel and that he was—to use his own words—"in an exposed position". Moreover, I think he intended to comply with what he knew was required by the ordinary practice of seamen in the special circumstances of the case by placing lights in the centre of the fore-end and tail of the boom, and also on his tug. Unfortunately, however, the location which he chose for the light on the tug was wholly unsuitable for the purpose for which it was intended; obscured as it was by the house and the railing it was wholly useless as a warning to vessels such as that of the plaintiff approaching from the east on the north side of the fairway. There is evidence, also, that on the same occasion another tug and tow of logs also operated by the respondent company, was similarly moored in the channel immediately to the west, and that that tug carried a riding light in the rigging, and a white light on the outside of the boom itself.

In my opinion, the failure to exhibit a light suitably located, either on the extreme south corner of the fore-end of the boom or on the tug itself, or on both, was under these circumstances, negligence on the part of the Master of the

tug. In my opinion, also, the conclusion is inescapable that his negligence in that regard caused or contributed to the collision. Had the light on the tug been properly placed, the position of the obstruction in the channel would undoubtedly have been observed by Williams and he would have been able to alter his course so as to avoid it.

There remains the question as to whether there was any negligence on the part of the Captain or Mate of the *Hummingbird*. The learned trial Judge found that both were negligent in the manner I have stated above. At the trial some effort was made to establish that Williams—the mate—was unable to keep a proper lookout on the ground that he was blinded by the light in the pilot house. The trial Judge made no finding on that point and it was not stressed before me. On the evidence as I read it, that contention cannot be supported.

With the greatest respect, I find myself unable to agree with these findings of the learned trial Judge whose very great experience in these matters is well known. He found that the appellant was negligent in leaving the Mate alone in the wheelhouse at the entrance to a dangerous channel when he had seen a light whose meaning he failed to identify. Now the evidence is that both the Master and Mate were fully acquainted with Thulin Passage and knew that tugs with booms of logs took shelter there in bad weather. There is nothing to suggest that had the Master remained at the wheel or in the wheelhouse he would have been more observant or would have followed a course other than that taken by the Mate. Each knew from the position of the light which they had observed, that the light was in the fairway, and since that was the only light observed, each was entitled to assume that whatever it represented was not underway. From past experience, each knew that it was either on a vessel or on a boom of logs. Each was entitled to assume that whether it was a vessel, a boom, or a tug and boom, its position and the extent to which it projected into the fairway would be marked by a warning light. I am quite unable to find that the result would have been otherwise than it was had the Master not gone below to attend to the engine.

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The learned trial Judge found the Mate—Williams—to have been negligent in failing to realize the likelihood of the light marking a boom, the precise position of which was obscure. I think the evidence is clear that the Mate did realize that possibility and that if it were not a boom it was probably a tug or other vessel moored in some way to the shore. But as I have said above, I think he was entitled to assume that no matter what it was, its position and the extent to which it projected into and blocked the fairway would be suitably marked by a warning light properly displayed. The Mate was also found to have been negligent in not having reduced speed in ample time until the position was clarified. The speed, as I have said, was about 7 knots or perhaps somewhat less over the ground as the vessel was "bucking the tide". I do not consider that speed to have been excessive for a vessel of that type, under the circumstances. It was a small craft capable of being rapidly manoeuvred and under all the circumstances I think the speed must be considered to have been moderate.

In my opinion, the failure of the tug Master to display a suitable warning light, properly located and clearly visible from vessels approaching from the east, was the sole and effective cause of the collision, and the respondent is therefore liable for such loss as the appellant has sustained by reason of the loss of his vessel, all apparel, gear and stores.

It is not necessary, therefore, to consider the other submissions advanced on behalf of the appellant, namely, that the respondent had failed to comply with the provisions of sections 2 and 4 of the Navigable Waters Protection Act, R.S.C. 1927, c. 140; and that the damage sustained by the appellant resulted from the failure of the respondent, its servants or agents to render assistance following the collision.

The appeal will therefore be allowed and the judgment below set aside. There will be a declaration that the appellant is entitled to recover from the respondent such damages as he has sustained by the loss of his vessel *Hummingbird No. 2*, its apparel, gear and stores, together with his costs below and on this appeal, as well as such costs as may be occasioned in the Court below in the ascertainment of the damages to be awarded to the appellant. The matter will

be referred back to the District Judge of the British Columbia Admiralty District to ascertain and fix the amount of such damages, either personally or by a reference as he may direct, or as the parties may agree.

Judgment accordingly.

Reasons for judgment of Sidney Smith, D.J.A.:—

The plaintiff's fishing vessel *Humming Bird No. 2*, 41 feet long, 11 feet beam, and 17 tons gross tonnage, at about 1.30 a.m. on 8th October, 1950, was at the southerly entrance to Thulin Passage between Copeland Islands (commonly known as Ragged Islands) and the mainland on her way through the passage on a voyage to the northward. She was proceeding at the rate of 7 knots (her registered speed), and was manned by the plaintiff as Master and one, Vincent Williams, as Mate. At this time the latter relieved the Master at the wheel, and both saw a white light on the starboard side of the channel, a mile or so away. The channel is 2 miles long, and varies in width from half a mile to 600 feet. The weather was hazy, rainy, and the visibility poor. Logs in the water could not be seen till close by. The Master went below to have a look at the engine (which required no special attention other than a check of oil and water) and remained there till after the collision some 10 minutes later. He apparently gave no instructions to the Mate who proceeded without reducing speed, heedless of what the light indicated. It was in fact attached to the fore end of a boom which had been brought thither that day by defendant's tug *Hecate Straits* seeking shelter from a southeasterly wind and sea, then prevailing. The boom was tied up snugly along the shore of the mainland, in the narrow part of the channel. It consisted of 54 sections fastened three abreast, and so about 1200 feet long. The total width was about 200 feet. This left a free passage of 400 feet. The head of the boom was to the eastward, and the tug was made fast alongside, heading in the same direction, and almost 130 feet from that end of the boom. The tug was exhibiting a white light on her starboard railing, opposite the fore end of the house. I find the lights on both tug and boom were the ordinary standard coal-oil lanterns, were properly placed and at material times burning brightly. The tug light was seen by neither the plaintiff nor his Mate. I find there was nothing unusual or improper in the position of the boom from the point of view of traffic up and down.

In these circumstances the *Humming Bird No. 2* crashed into the corner of the boom, and shortly thereafter sank. The men saved their lives by jumping on the boom. The light seen by the Master and Mate was attached to the centre of the boom at the fore end. There was a similar, and similarly placed, light at the after end. The plaintiff and his Mate conceded this was the orthodox way of placing lights on booms, whether under way or sheltering from the weather. They both conceded, too, that Thulin Passage was a recognized shelter area in storms, and made constant use of by tugs with tows. Their complaint was that the boom light should have been at the corner of the boom and not half way across the width of it. But the evidence, including their own, fails to bear this out.

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I find the Master negligent in leaving the Mate alone in the wheel-house at the entrance to this dangerous channel, having seen a light whose meaning he failed to identify. I also find the Mate negligent. He should have realized the likelihood of the light marking a boom, the precise position of which was obscure, and should have reduced speed in ample time until the situation was clarified. As it was, he saw nothing of the boom till the crash. They were both experienced coasting men, but I think their experience bred a casual over-confidence which in this instance led to disaster.

Two other points were raised: one that the placing of the boom there was an infringement of the provisions of the Navigable Waters Protection Act; I am of opinion that Act has no application in the circumstances here. The other, that those on the tug failed to render assistance when called upon to do so; but I accept the evidence of the tug's Master and Mate and find that this plea was not made good.

Plaintiff's counsel, Mr. Parkes, said all that could be said for his case; and, while natural sympathy makes the inclination lean towards a desire to compensate a fisherman who thus loses his vessel and thereby his means of livelihood, I must find that the claim fails and the action must be dismissed with costs.

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Mar. 25

Aug. 27

BETWEEN:

HOME OIL COMPANY LIMITED ..... APPELLANT,

AND

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

Revenue—Income tax—The Income Tax Act, S. of C. 1948, c. 52, s. 11 (1)(b)—Income Tax Regulations, s. 1201—The Income Tax Amendment Act, S. of C. 1949 (2nd S.), c. 25, s. 53 (1)—Allowance in respect of an oil or gas well—Appeal from Income Tax Appeal Board a trial de novo—Act not to be construed by reference to subsequent Act—Meaning of word "well" in s. 11(1)(b) of The Income Tax Act, s. 1201 of the Income Tax Regulations and s. 53 (1) of the Income Tax Amendment Act, 1949—Construction of section permitting deduction—Onus on taxpayer to show entitlement to deduction—Amount of allowance under s-s. (1) of s. 1201 of the Income Tax Regulations fixed by s-s. (4)—"Profits" under s. 1201 of the Income Tax Regulations means aggregate profits from all of taxpayer's wells.

The appellant claimed allowances for 1949 and 1950 under section 11(1)(*b*) of The Income Tax Act and section 1201 of the Income Tax Regulations based on the profits of the oil and gas wells which it operated at a profit on an individual well basis without deducting its exploration, development and other expenditures not related to its profit producing wells, but deducted these expenditures from its gross income under section 53(1) of the Income Tax Amendment Act, 1949 in computing its income for the purposes of The Income Tax Act. The Minister in computing the appellant's profits for the purpose of section 1201 of the Regulations deducted the expenditures which it had not deducted and cut down its allowances accordingly. In assessing

it for 1949 and 1950 the Minister added the amounts which he had disallowed to the amounts of taxable income reported by it on its returns. The appellant appealed to the Income Tax Appeal Board which dismissed its appeals and the appellant appealed from this decision.

Held: That the appeal to this Court from a decision of the Income Tax Appeal Board is a trial *de novo* of the issues involved and it should hear and determine them without regard to the proceedings before the Board and without being affected by any findings made by it. It is not the correctness or otherwise of the decision of the Board or of its reasons for judgment that is before this Court for determination but rather the validity of the assessment appealed against. Consequently, this Court is concerned only with the validity of such assessment and should deal with that question as if there had never been any proceedings before the Board.

2. That in Canada it is not permissible to construe an Act to which the Interpretation Act applies by reference to a subsequent Act unless such subsequent Act directs how the prior Act is to be interpreted.

3. That the word "well" in Section 11(1)(*b*) of The Income Tax Act, section 1201 of the Income Tax Regulations and section 53 (1) of the Income Tax Amendment Act, 1949 should be read as including "wells" and there is no justification for assuming that it was applicable only to wells operated at a profit.

4. That a taxpayer cannot succeed in claiming a deduction from what would otherwise be taxable income unless his claim comes clearly within the terms of the enactment permitting the deduction: he must show that every constituent element necessary to the right of deduction is present in his case and that every condition required by the permitting enactment has been complied with. If he cannot bring his claim within the express terms of the enactment confining the right of deduction he is not entitled to it.

5. That the amount of the allowance to which the appellant was entitled under subsection (1) of section 1201 of the Income Tax Regulations was fixed under subsection (4) by the amount of the expenditures which it deducted under section 53 of the Income Tax Amendment Act, 1949 and that, since it deducted all its exploration and development expenditures under that section, subsection (4) of section 1201 of the Regulations required that the same amount of expenditures must be deducted in computing its profits for the purpose of subsection (1).

6. That the profits contemplated by subsection (1) of section 1201 of the Regulations are the aggregate, over-all profits from the production of oil and gas from all the taxpayer's wells.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the President of the Court at Calgary.

R. A. MacKimmie for appellant.

H. W. Riley Q.C. and *J. D. C. Boland* for respondent.

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

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THE PRESIDENT now (August 27, 1954) delivered the following judgment:

This is an appeal from the decision of the Income Tax Appeal Board (1), dated February 3, 1954, dismissing the appellant's appeals from its income tax assessments for 1949 and 1950.

The appellant's complaint against the assessments is that in each one the Minister cut down its claim for an allowance under section 11(1) (b) of The Income Tax Act, Statutes of Canada 1948, Chapter 52, and section 1201 of The Income Tax Regulations, as enacted by Order in Council P.C. 6471, dated December 22, 1949. Since the dispute arises from a difference of opinion on the construction of these enactments their precise terms require careful consideration. Section 11 (1) (b) of the Act, as amended in 1949, read as follows:

11. (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a tax-payer for a taxation year:

(*b*) such amount as an allowance in respect of an oil or gas well, mine or timber limit, if any, as is allowed to the taxpayer by regulation;

The applicable regulation referred to in this section is set out in section 1201 of the Regulations. The relevant subsections of this section, as it was in force for the years in question, provided as follows:

1201. (1) Where the taxpayer operates an oil or gas well . . ., the deduction allowed for a taxation year is 33⅓ per cent of the profits of the taxpayer for the year reasonably attributable to the production of oil or gas from the well.

(4) In computing the profits reasonably attributable to the production of oil or gas for the purpose of this section a deduction shall be made equal to the amounts, if any, deducted from income under the provisions of section 53 of Chapter 25 of the Statutes of 1949, Second Session, in respect of the well.

The section referred to is section 53 of An Act to Amend The Income Tax Act and the Income War Tax Act, hereinafter called the Income Tax Amendment Act, 1949, or the 1949 Act, Statutes of Canada 1949, Second Session, Chapter 25, of which subsection 1, as amended by section 46 of Chapter 40 of the Statutes of Canada, 1950, read as follows:

53. (1) A corporation whose principal business is production, refining or marketing of petroleum, petroleum products or natural gas or exploring or drilling for petroleum or natural gas may deduct in computing its income, for the purposes of *The Income Tax Act,* the lesser of

(1) (1954) 10 Tax A.B. c. 61.

(*a*) the aggregate of the drilling and exploration costs, including all general geological and geophysical expenses, incurred by it, directly or indirectly, on or in respect of exploring or drilling for oil and natural gas in Canada
(i) during the taxation year, and
(ii) during previous taxation years, to the extent that they were not deductible in computing income for a previous taxation year, or

(*b*) of that aggregate an amount equal to its income for the taxation year
(i) if no deduction were allowed under paragraph (*b*) of subsection one of section eleven of the said Act, and
(ii) if no deduction were allowed under this subsection,
minus the deduction allowed by section twenty-seven of the said Act.

In the notice of appeal herein as well as during the hearing before me the allowance claimed by the appellant was called a depletion allowance but it should be noted that neither in the Act nor in Regulations is there any reference to it as a depletion allowance. The use of the expression is a loose one.

The parties are in agreement on the facts. The appellant, which has its head office in Calgary, was at all relevant times principally engaged in exploring for and producing petroleum and natural gas and operated oil and gas wells. During the years 1949 and 1950, as well as in other years, it made expenditures in its exploration for oil and natural gas, with some "dry holes" resulting. A "dry hole" meant a hole or excavation in the ground drilled by or on behalf of the appellant in the hope of finding oil or natural gas but where either no oil or natural gas was found or it was not found in sufficient quantities for profitable production.

In its income tax return for 1949 the appellant claimed an allowance under section 1201 of the Regulations of $796,023.22, being 33⅓ per cent of $2,388,069.65, which it considered as its net profits for the year reasonably attributable to the production of oil and gas from the wells operated by it at a profit. In computing these profits it did not deduct its exploration and development expenditures not related to its profit producing wells, including its expenditures on dry holes, a proportion of its general and administrative expenses which it claimed was related to its unproductive wells and its losses from wells operated by it at a loss. The amount of the expenditures which it did not deduct came to $1,424,040.06. The details of how this

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amount was arrived at are given in a statement forming part of the agreement as to facts filed as Exhibit 1. In its income tax return for 1950 the appellant claimed an allowance of $981,738.41, being 33⅓ per cent of $2,945,215.23, which it considered as its net profits for the year reasonably attributable to the production of oil and gas from the wells operated by it at a profit. In computing these profits it did not deduct its exploration and development expenses not related to its profit producing wells, including its expenditures on dry holes. The amount of the expenditures which it did not deduct came to $132,324.94.

It should be noted, however, that, although the appellant did not deduct the exploration and development expenditures referred to in computing its profits for the purposes of section 1201 of the Regulations it did deduct these expenditures from its income under section 53 of The Income Tax Amendment Act, 1949 in computing its income for the purposes of The Income Tax Act.

The Minister, on the other hand, in computing the appellant's profits for the purpose of determining the allowance to which it was entitled deducted the expenditures which it had not deducted and found that it was entitled to an allowance of $321,343.20 for 1949, instead of $796,023.22, and of $937,630.10 for 1950, instead of $981,738.41. In assessing the appellant for the said years the Minister added the amounts which he had disallowed to the amounts of taxable income reported by it on its returns.

The appellant objected to the assessments and appealed to the Income Tax Appeal Board which dismissed its appeals. It is from this decision that the appeal to this Court is brought.

The issue in the appeal turns on how the profits on which the allowance permitted by section 1201 of the Regulations should be computed and, more particularly, what expenditures should be deducted in computing such profits.

Before I deal with the actual dispute herein I have some preliminary remarks to make. In *Goldman* v. *Minister of National Revenue* (1) I held that the appeal to this Court from a decision of the Income Tax Appeal Board is a trial *de novo* of the issues involved. In that case I dealt at length with the reasons which led me to this conclusion and

(1) [1951] Ex. C.R. 274 at 281.

need not repeat them here. There is, I think, general acceptance of this opinion notwithstanding the anomaly that in this Court the parties may put forward a different case from that presented to the Income Tax Appeal Board. *Vide* also *Minister of National Revenue* v. *Simpson's Limited* (1). The hearing before this Court being thus a trial *de novo,* it should hear and determine the issues without regard to the proceedings before the Board and without being affected by any findings made by it. It is not the correctness or otherwise of the decision of the Board or of its reasons for judgment that is before this Court for determination but rather the validity of the assessment appealed against. Consequently, this Court is concerned only with the validity of such assessment and should deal with that question as if there had never been any proceedings before the Board. It seems to me that this must follow from the finding that the appeal to this Court is a trial *de novo.*

There is one other preliminary observation to make. It appeared in the course of the argument that section 1201 of the Regulations was amended in 1951. But we are here concerned with the section as it was in force in 1949 and 1950 and it is not permissible to interpret it in the light of its amendment. I have had occasion to consider this question in a number of cases and am firmly of the opinion that, whatever may be the rule in other countries, in Canada it is not permissible to construe an Act to which the Interpretation Act applies by reference to a subsequent Act unless such subsequent Act directs how the prior Act is to be interpreted: *vide Morch* v. *Minister of National Revenue* (2); *Luscar Coals Ltd.* v. *Minister of National Revenue* (3); *Mountain Park Coals Limited* v. *Minister of National Revenue* (4) and *The Queen* v. *Specialties Distributors Limited* (5). In this case, therefore, section 1201 of the Regulations must be read without regard to its amendment in 1951.

I now come to the specific issue in the present case. Counsel for the appellant argued that it was entitled to an allowance based on the profits of the wells which it operated at a profit on an individual well basis. He built his whole

(1) [1953] Ex. C.R. 93.
(2) [1949] Ex. C.R. 327 at 338.
(3) [1949] Ex. C.R. 83 at 90.
(4) [1952] Ex. C.R. 560 at 565.
(5) [1954] Ex. C.R. 535.

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case on the use of the word "well" in the singular in the relevant enactments. In section 11 (1) (b) the allowance was described as an allowance in respect of *an oil or gas well.* In section 1201 (1) of the Regulations it was provided that the deduction was allowed where the taxpayer operates *an oil or gas well* and the amount of the allowance was 33⅓ per cent of the profits reasonably attributable to the production of oil or gas from *the well.* And in section 1201 (4) there was a reference to the amounts deducted under section 53 of the Income Tax Amendment Act, 1949 in respect of *the well.* The submission was that by the use of the word "well" in the singular Parliament intended that the allowance should be based on the profits reasonably attributable to the production from each well, that, consequently, the only wells to be considered were those that the appellant operated at a profit, that in the case of each of such wells the profits reasonably attributable to the production of oil or gas from it should be computed by charging against the gross receipts from it the expenditures attributable to it, that the appellant was entitled to an allowance for each well based on the profits so ascertained and that the same procedure should be followed for each well operated at a profit. It was urged that if Parliament had intended that the profits should be those of the taxpayer's whole operations in oil and gas production and exploration it could easily have said so by using the word "wells" in the plural, that its deliberate use of the word "well" in the singular made it clear that the profits were to be computed on an individual well basis. It was also argued that the grant of the allowance in cases "where the taxpayer operates an oil or gas well" clearly excluded from the computation of the profits "reasonably attributable to the production of oil or gas from the well" all expenditures attributable to "dry holes" since it could not be said that the taxpayer operated such holes. Consequently, it was said, the appellant was justified in computing its profits for the purpose of section 1201 of the Regulations in excluding from its deduction of expenditures all expenditures that were attributable to dry holes or wells that were not operated at a profit. On this basis the appellant arrived at its profits of $2,388,069.65 for 1949 and $2,945,215.23 for 1950 and its claims for an allowance of $796,023.22 for 1949 and $981,738.41 for 1950.

The Minister, on the other hand, took the position that the profits of the appellant contemplated by section 1201 of the Regulations were its profits reasonably attributable to the production of gas and oil from all its wells, that in computing such profits all its development and exploration expenditures, even those attributable to dry holes, and its losses on unprofitable wells should be deducted and that, in any event, the amount of the expenditures to be deducted should be equal to the amount of the expenditures deducted by it under section 53 of the Income Tax Amendment Act, 1949 in computing its income for the purposes of The Income Tax Act. On this basis the profits of the appellant as claimed by it were reduced by deducting therefrom the amounts of the expenditures which it had not deducted, namely, $1,424,040.06 for 1949 and $132,324.94 for 1950 and the allowances claimed by it were correspondingly reduced by 33⅓ per cent of these amounts.

While the argument advanced for the appellant seems at first to be plausible I have no hesitation in rejecting it.

There is no substance in the contention that because Parliament used the word "well" in the singular it intended that a taxpayer should be able to claim an allowance under section 1201 of the Regulations on the basis submitted by the appellant. The use of the word in the singular does not settle the matter in favor of the appellant for it is provided by section 31 (j) of the Interpretation Act, R.S.C. 1927, Chapter 1, that in every Act, unless the contrary intention appears, words in the singular include the plural and words in the plural include the singular. There are numerous instances in The Income Tax Act where this rule applies and it is, in my opinion, applicable in the present case. Indeed, the appellant's construction of the enactments assumes that the word "well" includes "wells", but only the wells operated at a profit. When section 11 (1) (b) of the Act refers to the allowance as being "in respect of an oil or gas well" it is plain that it is not confined to one well and the expression means "in respect of an oil or gas well or oil or gas wells". Nor was it contemplated by section 1201 of the Regulations that the expression "where the taxpayer operates an oil or gas well" should confine its benefit to the operator of a single well. The expression was merely descriptive of the kind of taxpayer who was entitled to the

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allowance regardless of whether he operated one well or more than one. Nor does the reference in section 1201 to the profits as being those reasonably attributable to the production of oil or gas from the well support the appellant's case. The word "well" in the singular was used because it was grammatically consequential to the use of the singular in the earlier part of the section but the purpose of the expression was to make sure that there should be no allowance on profits that were not attributable to oil or gas production such as, for example, profits from bonds or investments or other sources apart from oil production. The allowance was to be 33⅓ per cent of the profits of oil production. The use of the expression "in respect of the well" in subsection (4) of section 1201 of the Regulations was for a similar purpose in respect of the income there referred to. There was, in my opinion, nothing in any of the enactments to justify the construction placed on them by the appellant. In my judgment, the word "well" in section 11 (1) (b) of The Income Tax Act, section 1201 of the Income Tax Regulations and section 53 (1) of the Income Tax Amendment Act, 1949 should be read as including "wells" and there is no justification for assuming that it was applicable only to wells operated at a profit.

But there is a much stronger reason for rejecting the appellant's submission. Counsel urged that effect should be given to the plain words of section 1201 of the Regulations and that the appellant's tax liability should be limited accordingly. But section 1201 is not a charging section so that the admonition that there is no tax liability unless the tax is imposed by clear and express terms has no application. On the contrary, the section confers a benefit on the taxpayer to which he would not be entitled apart from it. Such a section should be construed in the same way as an exempting provision of a taxing act. In *Lumbers* v. *Minister of National Revenue* (1) I put the rule of construction of an exempting provision of the Income Tax Act in the following terms:

> A taxpayer cannot succeed in claiming an exemption from income tax unless his claim comes clearly within the provisions of some exempting section of the Income War Tax Act: he must show that every constituent element necessary to the exemption is present in his case and that every condition required by the exempting section has been complied with.

(1) [1943] Ex. C.R. 202 at 211.

Similarly, a taxpayer cannot succeed in claiming a deduction from what would otherwise be taxable income unless his claim comes clearly within the terms of the enactment permitting the deduction: he must show that every constituent element necessary to the right of deduction is present in his case and that every condition required by the permitting enactment has been complied with. If he cannot bring his claim within the express terms of the enactment conferring the right of deduction he is not entitled to it: *vide W. A. Sheaffer Pen Company Limited* v. *Minister of National Revenue* (1).

The onus is thus on the appellant to show that its claim comes clearly within the terms of section 1201 of the Regulations. It is not enough to look at subsection (1) by itself and rely exclusively on the use of the word "well" in the singular in support of the appellant's contention. The amount of the allowance to which it was entitled must be considered in the light of the section read as a whole. When it is so read it becomes clear that the appellant cannot bring its claims within the ambit of section 1201 for subsection (4) defines what deduction of expenditures must be made in computing the profits referred to in subsection (1) and the appellant has not made the required deduction. Subsection (4) specified that in computing the profits referred to in subsection (1) the deduction that was to be made should be equal to the amount of the expenditures deducted from income under section 53 of the Income Tax Amendment Act, 1949. The amount of the allowance to which the appellant was entitled was thus fixed by the amount of the expenditures which it deducted under section 53 of the 1949 Act. Since it took advantage of the right of deduction conferred by this section and in computing its income for the purposes of The Income Tax Act deducted all its exploration and development expenditures, including the amounts of $1,424,040.06 for 1949 and $132,324.94 for 1950, which it did not deduct in computing its profits for the purpose of subsection (1) of section 1201, subsection (4) required that the same amount of expenditures must be deducted in computing its profits for the purpose of subsection (1). The appellant was certainly not entitled to have the benefit of the deduction permitted by section 53 of

(1) [1953] Ex. C.R. 251 at 255.

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the 1949 Act in computing its income for the purposes of The Income Tax Act and at the same time ignore the requirement of subsection (4) of section 1201 of the Regulations in computing the profits on which its allowance was to be based.

Two observations remain to be made. The requirement of subsection (4) of section 1201 that the deduction of expenditures must equal the amount of the deduction under section 53 of the 1949 Act rejects the idea of computation of profits under subsection (1) on an individual well basis for there is no machinery under section 53 of the 1949 Act for the computation of income on such a basis. Thus the profits contemplated by subsection (1) are the aggregate, over-all profits from the production of oil and gas from all the taxpayer's wells. Subsection (4) thus confirms the view that the word "well" in the singular includes the plural.

Counsel for the appellant sought comfort in the concluding words of subsection (4) of section 1201 of the Regulations, namely, "in respect of the well". But the purpose of that limitation is similar to that of the limitation in subsection (1) to which I have referred, namely, that the deduction required to be made for the purpose of determining the profits from oil production, excluding the profits from other sources, should be the same as that made in computing the income from oil production. There might be other deductions to which a taxpayer was entitled in respect of income from sources other than oil production but such deductions were to be excluded in the computation of the profits from oil production on which the allowance was to be based.

If the amounts of the expenditures which the appellant did not deduct in computing its profits under subsection (1) of section 1201 of the Regulations were deducted, as they should have been, the profits would be reduced to those on which the Minister based the allowances which he permitted. The Minister was, therefore, right in assessing the appellant as he did.

Consequently, since the appellant has failed to show any error in the assessments appealed against the assessments stand and the appeal herein must be dismissed with costs.

Judgment accordingly.

BETWEEN:

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May 18, 19 20 & 25

Sept. 3

HER MAJESTY THE QUEEN .....PLAINTIFF,

AND

KOOL VENT AWNINGS LIMITED .....DEFENDANT.

Revenue—Sales tax—The Excise Tax Act, R.S.C. 1927, c. 179 as amended, ss. 86(1) and 89(1), Schedule III—Goods claimed to be exempt from tax—Building materials—Meaning of "prepared roofings" in Schedule III of the Act—Meaning of "roof" and "roofing" in common language —Words "awning", "canopy", "marquee", "covering" not understood in common language as meaning a roof—Failure to bring claim of exemption from tax within exempting provisions of the Act.

Defendant company carries on the business of processing sheets of aluminum into a product described by it either as "Kool Vent aluminum awnings, porch roofs, patio roofs and doorway coverings" or as "Kool Vent aluminum awnings and coverings for every type of building" and which it sells and delivers throughout Canada except Ontario. As a defence to an action for the recovery of sales tax on the sale of the goods together with certain penalties defendant company claimed exemption from tax on the ground that the goods are "prepared roofings" within the meaning of those words in Schedule III of the Excise Tax Act, R.S.C. 1927, c. 179, as amended, and therefore, they fall within the exempting provisions of s. 89(1) of the Act.

Held: That the words "prepared roofings" in Schedule III of the Excise Tax Act do not apply to any particular science or art and are to be construed as they are understood in common language. *Attorney-General* v. *Winstanley* (1831) 2 D. and C. 302; *The Cargo ex Schiller* (1877) 2 P.D. 145, 161; *Dominion Press Ltd.* v. *Minister of Customs and Excise* [1928] A.C. 340; *The King* v. *Montreal Stock Exchange* [1935] S.C.R. 614; *The King* v. *Planters Nut and Chocolate Co. Ltd.* [1951] Ex. C.R. 122; *The King* v. *Planters Nut and Chocolate Co. Ltd.* [1952] Ex. C.R. 91; *The Queen* v. *Universal Fur Dressers and Dyers Ltd.* [1954] Ex. C.R. 247 referred to and followed.

2. That in ordinary language the word "roof" is related to a structure, building or house and is understood to have that meaning by the general public. The words "awning", "canopy", "marquee" or even "covering" cannot be construed to be understood in common language as meaning a roof. These words are well understood by the trade and public to be coverings over doorways, windows, stairways, balconies or patios.

3. That when a taxpayer claims the benefit of an exemption he must establish that his claim comes clearly within the provisions of the exempting section. *The Credit Protectors (Alberta) Limited* v. *Minister of National Revenue* [1947] Ex. C.R. 44; *Lumbers* v. *Minister of National Revenue* [1943] Ex. C.R. 202; *W. A. Sheaffer Pen Company of Canada Limited* v. *Minister of National Revenue* [1953] Ex. C.R. 251 referred to and followed. Here defendant company failed to prove that the processed material to make the finished articles came within the meaning of "prepared roofing" in Schedule III of the Excise Tax Act. The material employed in the processing

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of the articles, although usable as roofing material, was not prepared specially for roofing but prefabricated into awnings, canopies, marquees and umbrellas according to the specifications laid down in the order received from the customer.

INFORMATION to recover sales tax and penalties under the Excise Tax Act, R.S.C. 1927, c. 179, as amended.

Jean Martineau, Q.C. and *Paul Ollivier* for the plaintiff.

Roger Ouimet, Q.C. for the defendant.

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

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

FOURNIER J. now (September 3, 1954) delivered the following judgment:

In this information the plaintiff, under section 86(1) of the Excise Tax Act, R.S.C. 1927, c. 179, as amended, claims from the defendant the sum of $37,064.66 for sales tax said to be payable in respect of the manufacture and sale by the defendant of Kool Vent awnings, canopies, marquees and umbrellas in the period of May 1, 1950 to May 31, 1953, together with certain penalties and interest for non-payment thereof within the time limited by the Act. The proceedings are in the nature of a test case, the defendant having paid the full amount of the tax up to the time it became convinced it was not liable for said tax.

For the purposes of this action only and to cover the period of May 1, 1950 to May 31, 1953 only, the defendant admitted in writing at the trial that it produced or manufactured in Canada and sold and delivered in all the provinces of Canada, except Ontario, goods, amongst others those referred to in the plaintiff's information, and that payment in cash or on a deferred payment basis had been received for such goods. Furthermore, it was admitted that if the sales of the said goods were taxable under the provisions of the Excise Tax Act and its amendments, which is denied for the reasons given in the defendant's statement of defence, the defendant is liable for the amount of taxes claimed by the plaintiff. These admissions were made

under reserve of the defendant's plea that the manufacture, production and sale of the said goods come within the provisions of section 89 (1) of the Act and its amendments.

These admissions having been made, the only question to be determined is whether the goods mentioned in the plaintiff's information were subject to the consumption or sales tax imposed by section 86 (1) or were exempt from the said tax by section 89 (1) as they were included in Schedule III of the said Act.

Sections 86 (1) and 89 (1) of the Excise Tax Act read in part as follows:

86. (1) There shall be imposed, levied and collected a consumption or sales tax of eight per cent on the sale price of all goods

(*a*) produced or manufactured in Canada

(i) payable, in any case other than a case mentioned in subparagraph (ii), by the producer or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier, and

(ii) payable, in a case where the contract for the sale of the goods (including a hire-purchase contract and any other contract under which property in the goods passes upon satisfaction of a condition) provides that the sale price or other consideration shall be paid to the manufacturer or producer by instalments (whether the contract provides that the goods are to be delivered or property in the goods is to pass before or after payment of any or all instalments), by the producer or manufacturer pro tanto at the time each of the instalments becomes payable in accordance with the terms of the contract;

89. (1) The tax imposed by section 86 does not apply to the sale or importation of the articles mentioned in Schedule III.

Included in that Schedule, under the heading of "Certain building materials", the following are exempted: "Prepared roofings" (matériaux préparés de toiture) and "Articles and materials to be used exclusively in the manufacture or production of the said building materials."

The sole dispute between the parties is whether the Kool Vent awnings, canopies, marquees and umbrellas manufactured and sold by the defendant are "prepared roofings" within the meaning to be given to those words in Schedule III. If these goods or articles or some of them are found to be "prepared roofings" they are exempt from the tax. There is no definition of "prepared roofings" in the Excise Tax Act nor in the Schedule under the heading of "Certain building

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materials". It would seem that the meaning to be given to these words would be that which an ordinary person would readily understand.

This principle has been recognized in most cases dealing with goods listed under Schedule III of the Excise Tax Act. In *The King* v. *Planters Nut & Chocolate Co. Ltd.* (1) Cameron J. 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."

This judgment was confirmed by the Supreme Court of Canada and followed since in *The King* v. *Planters Nut & Chocolate Co. Ltd.* (2) and *The King* v. *Universal Fur Dressers & Dyers Ltd.* (3).

These decisions were based on judgments of the past in which the same principle was held. In *Attorney-General* v. *Winstanley* (4) Lord Tenterden at page 310 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." In *The Cargo ex Schiller* (5) James, L.J., expressed the same view as follows: "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."

In recent cases, the same was held in the following decisions: *Dominion Press Ltd.* v. *Minister of Customs & Excise* (6); *The King* v. *Montreal Stock Exchange* (7).

The words to be interpreted in the present case: "prepared roofings", are found in Schedule III of the Excise Tax Act, R.S.C. 1927, c. 179, and form part of the Statute. They do not apply to any particular science or art and should be construed as they are understood in common language.

The information alleges that the defendant produces and manufactures in Canada awnings, canopies, marquees and umbrellas and upon delivery by it of such goods to its purchasers was liable for the tax imposed by section 86 (1) of

(1) [1951] Ex. C.R. 122.
(2) [1952] Ex. C.R. 91.
(3) [1954] Ex. C.R. 247.
(4) (1831) 2 D. & C. 302.
(5) (1877) 2 P.D. 145, 161.
(6) [1928] A.C. 340.
(7) [1935] S.C.R. 614.

the Act and that it delivered a great quantity of these goods so produced and manufactured in Canada from May 1, 1950, to May 31, 1953.

The defendant is a corporation carrying on business in Canada and having its head office at Montreal. It has been in existence since 1949 and carries on the business of processing sheets of aluminum into a product described by it in some of its later advertisements as "Kool Vent Aluminum Awnings, porch roofs, patio roofs and doorway coverings" and in others "Kool Vent Aluminum Awnings and coverings for every type of building". At the outset in business, the defendant used advertising material prepared in the United States but as time went on it was found from experience that the American advertising was not suitable for Canadian consumption because in Canada the type of architecture was not the same as in the United States. Other illustrations were made and other words used to describe the product. The above quoted words are taken from newspaper advertisements appearing in the press in 1952 and 1953. Before that time, the advertisements carried only the words awnings or canopies as appear on Exhibits one and two. It seems that the words porch roofs, patio roofs and doorway coverings came in later. When the defendant began to manufacture the product, it had before it the experience of the American manufacturer and their advertising material. It is interesting to see what the original manufacturer said of its finished product. The only words used to describe their goods are "Kool Vent Awnings—Kool Vent ventilated awnings are adaptable to all windows, doorways, porches, patios. They admit an abundance of eye-comforting indirect light, keep out direct sun rays, rain, ice, snow and sleet, let in refreshing summer breezes, reduce room temperature in hot summer months, aid greatly in keeping building interiors warmer in winter and cooler in summer, protect household furnishings from sun and rain." This is taken from Exhibit one; all the other exhibits give the same features to the product but add to the word awnings the words roofs and coverings. I looked over carefully every advertisement filed as an exhibit to try to find differences between the designs and illustrations of the first period of advertising and the latter period, but I was unable to find any.

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Now, I should like to say one word with regard to the material used and the process employed to obtain the finished product.

The material is aluminum in strips of different widths, but generally seven inches wide, varying in length up to four hundred feet. The strips are painted mechanically in different standard colours with enamel finish. These strips, after being cut in proper lengths, are converted into what is known as "pans". The pans, when cut to the required lengths, are assembled by hooking or clasping them together. They are given the shape, form and slope as specified on the order or layout sheet. The sides, called "louvers", are processed in the same way, held together by "sawtooth" and riveted to the pans. Thus prepared, they are installed over windows, doorways, patios, balconies. If the work is to be done out of town the component parts may be sent where needed, assembled on the job and installed.

Since the defendant has started operations, it has installed its products over windows, balconies, doors, patios, verandahs, stairs and in one instance, sometime in 1953 I believe, over the roof of a house; the house belongs to the President Manager of the defendant corporation. Photographs filed as defendant's Exhibits L-1, L-2, L-4 and L-5 show the installation of the roof at its different stages. It was a new venture and a first experience. It was built over an existing roof which had become defective. By looking at the above exhibits it seems that the defendant's finished product can be used as roofing material.

In his evidence Mr. Louis Levin, the president and manager of the defendant corporation, stated that he considered as "prepared roofing" all the installations made by the defendant and called "awnings". His own words are: "I do consider them as prepared roofing, but here I say that for five years we have used the terminology 'awning' for that particular type of installation despite the fact that I consider it 'prepared roofing'." He was asked when it occurred to him to bring up this question of "prepared roofing"; he answered that he was interested in another business and, having to look up the Act, he came across the fact that "prepared roofing" was exempt from the sales tax and

realized for the first time that the defendant should not have been paying on prepared roofing in the sense it had been making them.

The defendant's expert witness considered that coverings over balconies, patios, verandahs and buildings were roofs and that Kool Vent products installed on these roofs were "prepared roofing".

Three expert witnesses were heard in support of the plaintiff's contention that the goods known as "Kool Vent Awnings, Canopies, Marquees and Umbrellas" were not "prepared roofing".

Mr. Octave Simard, superintendent of a firm of specialized tinsmiths and roofers, with a personal experience of 43 years in the trade, states that many materials may be used as roofing material, but those generally used were sheet metal, copper, zinc, aluminum, paper, felt, shingles and tiles; that when properly employed they could meet the prerequisites of a roof, that is to say that they would cover the upper part of a building in a way that it would be water, snow, sleet and air proof. He admitted that the Kool Vent product could be used for roofing a building but thought it would not be waterproof or could not resist the action of melting snow, ice or sleet. After looking over the exhibits he could not agree that the installations made by the defendant were roofs and that they are known to the trade and the public as awnings.

Mr. Clodomir Forest, professional engineer with thirty-five years' experience and director of works for a large construction firm, states that installations over doors, windows, balconies and stairs are not roofs and that they are known to the trade and the public as awnings, canopies, marquees and were only accessories to a building, generally added to a completed building for some added comfort. What the trade and public call a roof is the inner structure and the material built over it, covering buildings to protect them against all weather conditions but not to protect the sides of a structure. He does not believe that the aluminum sheets as processed by the defendant could be considered as roofing material meeting the necessary requirement to make a proper roof and were not considered as such in the ordinary sense given to the words "prepared roofings". In his opinion the words "prepared roofings" would apply to what

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was known to the public as ready roofing, which is a composition of paper or felt soaked or seeped and covered with bitumen and a mineral substance. This view of prepared or ready roofings was shared by witness Roland Fortier who represents a firm dealing in ready roofings. He says that prepared roofings are composed of a felt saturated in a mixture of asphalt and tar and covered with asphalt and very fine crushed stone on one side.

Before arriving at a conclusion as to the meaning of the words to be interpreted it may be useful to refer to the definitions of "roof" and "roofings" found in some of the recognized dictionaries. I will mention only those definitions that are pertinent to the solution of our problem.

The Imperial Dictionary of the English Language, vol. 3, p. 726.

Roof—1. The cover of any house or building, irrespective of the materials of which it is composed. Roofs are distinguished, 1st, by the materials of which they are mainly formed, stone, wood, slate, tile, thatch, iron, etc., 2nd by their form and mode of construction of which there is a great variety, as shed, curb, hip, gable, pavilion, ogee and flat roofs. The span of a roof is the width between the supports; the rise is the height in the centre above the level of the supports; the pitch is the slope or angle at which it is inclined . . .

2. That which corresponds with or resembles the covering of a house, as the arch or top of a furnace or oven, the top of a carriage, coach, car, etc.; an arch, or the interior of a vault; hence, a canopy or the like.

Shorter Oxford English Dictionary, p. 175.

Roof—1. The outside upper covering of a house or other building; also, the ceiling of a room or other covered part of a house, building.

Roofing—1. The act of covering with a roof; material used or suitable for roofs; that which forms a roof or roofs.

Webster's New International Dictionary, 2d ed., pp. 2165-2166.

Roof—1. The cover of any building, including the roofing and all the materials and construction necessary to carry and maintain the same upon the walls or other uprights.

Roofing—(*a*) Act of covering with a roof; (*b*) Materials for a roof, or forming a roof.

Encyclopaedia Britannica, 1952, volume 19, p. 527.

Roofs—A roof is the covering of a structure. Its chief purpose is to enclose the upper parts of a building as a protection against wind, rain and snow.

In my view, the meaning which is to be found in these definitions is that a roof is the cover of a house, a building or a structure. Everybody understands what a house or building is. As to a structure: according to the dictionaries above cited, a structure is a building or edifice of any kind

but chiefly a building or edifice of some considerable size and imposing appearance. It will be noted that the expert witnesses heard for the plaintiff assert that in their opinion a roof is the covering of a building or edifice. It seems to me that in ordinary language the word roof is related to a structure, building or house and that it is understood by the public to have that meaning. I do not believe that the words awning, canopy, marquee or even covering can be construed in common language to mean a roof. To say that a doorway, a window, an outside stairway or even a balcony or patio has a roof, in my mind does not give to the word roof the meaning it has in common language or the meaning given to it by the public. The words awning, canopy and marquee are well understood by the trade and public to be coverings over doorways, windows, stairways, etc., and properly so.

Having arrived at these conclusions, it now remains to determine whether the goods sold by the defendant can be considered as "prepared roofings". There is no doubt in my mind that the materials employed in the processing of the above articles may be used as roofing material. But were they prepared for roofing? The evidence is to the effect that the material is processed to make certain specific finished articles. These goods, in the ordinary course of the defendant's operations, are made out according to the specifications laid down in the order received from the customer, completed at the plant and sent to their destination, where they are installed as units or parts of units according to size by its employees. They are not prepared specially as roofing materials but prefabricated into awnings, canopies, marquees and umbrellas. In one instance only was a roof covered with these specially processed aluminum sheets. This was brought in evidence as an example to show that it could be done and that the Kool Vent product could be used in that way. It did establish that the goods could be considered as roofing material, but did not prove that the goods manufactured and sold by the defendant as mentioned in plaintiff's statement of claim were produced as "prepared roofings" within the meaning of the Act or that the articles and materials used were used exclusively in the manufacture or production of the aforementioned building materials.

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In my mind, the words "prepared roofings" were well explained by the witnesses and I believe they mean materials such as paper and felt, specially prepared for roofing. They are processed or treated in a way that makes them capable of resisting the weather. These materials are generally manufactured and sold in rolls or sheets and may be installed on roofs by an uncomplicated procedure requiring very little skill. The felt or paper ir ordinarily saturated in a bituminous preparation and when affixed is covered with asphalt or tar and sprinkled with sand or very fine crushed stone. There may be other prepared roofings with which I am not familiar, but the above will suffice to illustrate what I think is the meaning of "prepared roofings", and the defendant's goods do not fall within that meaning.

When a taxpayer claims the benefit of an exemption, to succeed he has to prove that his claim comes clearly within the provisions of the exempting section—this is a well established rule. The following decisions leave no doubt as to the principle.

The Credit Protectors (Alberta) Limited v. *Minister of National Revenue* (1). At page 279 Cameron J. states:

> The onus is on the appellant to prove that it clearly comes within the provisions of the exempting section 7A. It seeks the benefit of an exceptional provision in the Act and must comply with its context. The principles of construction to be applied are well established. In *Wylie* v. *City of Montreal* (1885) 12 S.C.R. 284 at p. 386, Sir W. J. Ritchie C.J. said:
>
> > "I am quite willing to admit that the intention to exempt must be expressed in clear, unambiguous language; that taxation is the rule and exemption the exception, and therefore to be strictly construed."

Lumbers v. *Minister of National Revenue* (2), where it is stated that the rule to be applied is as follows:

> In respect of what would otherwise be taxable income in his hands, a taxpayer cannot succeed in claiming an exemption from income tax unless his claim comes clearly within the provisions of some exempting section of the Income War Tax Act. He must show that every constituent element necessary to the exemption is present in his case, and that every condition required by the exempting section has been complied with.

(1) [1947] Ex. C.R. 44. (2) [1943] Ex. C.R. 202.

W. A. Sheaffer Pen Company of Canada Limited v. *The Minister of National Revenue* (1). At page 255 (in fine) Thorson J. says:

> In *Lumbers* v. *Minister of National Revenue* [1943] Ex. C.R. 202; [1943] C.T.C. 281, which was affirmed by the Supreme Court of Canada [1944] S.C.R. 167; [1944] C.T.C. 67, I held that it is a well established rule that the exemption provisions of a taxing Act must be construed strictly and cited the statement to that effect of Sir W. J. Ritchie, C.J., of the Supreme Court of Canada in *Wylie* v. *City of Montreal* (1885) 12 S.C.R. 384 at 386, where he said:
>
> > "I am quite willing to admit that the intention to exempt must be expressed in clear unambiguous language; that taxation is the rule and exemption the exception, and therefore to be strictly construed;"

In this case the defendant seeks the benefit of an exemption provision in the Excise Tax Act. It was his duty to prove that his goods came clearly within the provisions of section 89 (1) and Schedule III of the Act. He failed to do so.

For the reasons above, my findings are that the goods mentioned in this case as awnings, canopies, marquees and umbrellas, when installed, could not be considered in ordinary and common language as "roofs" nor that the processed materials to obtain these finished articles or products could fall within the meaning of "prepared roofings" and were subject to the consumption or sales tax provided by section 86 (1) of the Excise Tax Act, R.S.C. 1927, c. 179.

Notwithstanding the defendant's admission in writing that if the sales of the goods were taxable under the provisions of the Act the defendant would be liable for the taxes claimed by the plaintiff, a dispute arose at the trial concerning the percentage of manufacture and sale of the different articles or goods in question. This was important, because each class of items, such as awnings, canopies, marquees, etc., was taxed on a different basis and the percentage of manufacture and sale would have to be determined to establish the exact amount of taxes payable.

It was agreed by the parties and ordered by the Court that the matter of establishing the percentage of manufacture and sale of the different items mentioned in the plaintiff's statement of claim would be referred to the Registrar of the Court. The Registrar will report to the

(1) [1953] Ex. C.R. 251.

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Court the quantities of the different goods or articles, the amounts of sales tax to be paid on awnings, canopies, marquees and umbrellas, together with the amount of penalties in respect thereof up to November 30, 1953, and such additional penalties as may have accrued from November 30, 1953, to this date.

There will, therefore, be judgment that the plaintiff is entitled to be paid by the defendant the amount of the sales tax payable on the sale price of the goods sold by it in the period between May 1, 1950 to May 31, 1953, together with the amount of penalties payable in respect thereof up to November 30, 1953. The plaintiff is also entitled to be paid such additional penalties as may have accrued thereon from November 30, 1953, to this date and computed in accordance with the provisions of section 106(4) of the Excise Tax Act. In the event of the parties not agreeing to the amount of taxes and penalties reported by the Registrar to the Court, these matters may be spoken to.

The plaintiff is also entitled to costs after taxation.

Judgment accordingly.

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Mar. 29, 30, 31, April 1, 2

Sept. 10

BETWEEN:

SELLERS-GOUGH FUR COMPANY LIMITED ..... APPELLANT;

AND

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

Revenue—Income Tax—The Income Tax Act, R.S.C. 1952, c. 148, s. 14 (2) —Establishment of "market value" of inventory—Losses must be actually suffered and not merely anticipated.

Held: That in putting the market value upon the inventory of appellant's stock-in-trade for purpose of write-down in arriving at the amount of deduction to be allowed for income tax purposes the respondent should have taken into account certain additional factors to the goods being shopworn and soiled and thus lessened in value, namely, a reduction in excise tax on furs which on the evidence would be passed on to purchasers from appellant and the effect of changes in styles due to the relaxation of wartime controls and regulations.

2. That when establishing the market value of an inventory on the basis of estimated realizable value it is not permissible to take into account losses in inventory value which for the subsequent year are merely anticipated and have not in fact been suffered or sustained in the taxation year under consideration.

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APPEAL from a decision of the Income Tax Appeal Board.

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

H. G. Steen, Q.C. for appellant.

J. Singer, Q.C. for respondent.

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

CAMERON J. now (September 10, 1954) delivered the following judgment:

This is an appeal and a cross-appeal from a decision of the Income Tax Appeal Board dated August 19, 1952, which allowed in part an appeal by the appellant company in respect of its 1946 taxation year. On January 31, 1946, the close of its 1946 fiscal period, the appellant valued its inventory of merchandise at $108,631.81. In assessing the appellant, the Minister increased the inventory value by $27,039.00. The Board referred the assessment back to the Minister for reassessment by reducing the amount added back to the inventory evaluation from $27,039.00 to $22,647.76.

In *Minister of National Revenue* v. *Simpson's Ltd.* (1), the learned President held that the hearing of an appeal from a decision of the Income Tax Appeal Board to this Court is a trial de novo of the issues of facts and law that are involved and that such a hearing must proceed without regard to the case made before the Board or the Board's decision. He also held that whether the appellant be the Minister or the taxpayer the assessment under consideration carries with it a presumption of its validity until the taxpayer establishes that it is incorrect either in fact or in law, and the onus of proving that it is incorrect is on the taxpayer, notwithstanding the fact that the Board may

(1) [1953] Ex. C.R. 93.

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have allowed an appeal from it. In this case, therefore, the onus is on the appellant company to establish the invalidity of the assessment.

For many years the appellant has carried on business as a retail furrier, selling mainly ladies' fur coats, but also fur accessories such as capes, stoles, scarves, gloves and mitts. It purchases its merchandise from fur manufacturers but operates a small workroom in which fur garments are repaired or remodelled for its customers.

The assessment in question was made under the provisions of the Income War Tax Act, R.S.C. 1927, c. 97 as amended. There is nothing in that Act which specifically requires a commercial concern, in ascertaining its annual profits or gains, to take an inventory of its stock-in-trade at the end of its taxation year. It has long been recognized, however, that the right method of ascertaining and assessing profits and gains is to take into account the value of the stock-in-trade at the beginning and at the end as two of the items in the computation. In revenue matters, profits are normally the profits realized in the course of the year. The ordinary principles of commercial accounting have for many years provided what seems to be an exception where traders have purchased and still hold goods or stocks which have fallen in value. No loss has, in fact, been made, and may not occur. Nevertheless, the trader is permitted at the end of the year, in making his inventory, to enter these goods at cost or market value, whichever is the lower. That accounting practice has now found a place in the Income Tax Act, Statutes of Canada, 1948, c. 52, s. 14(2) (now R.S.C. 1952, c. 148, s. 14 (2)), which is as follows:

> 14. (2) For the purpose of computing income, the property described in an inventory shall be valued at its cost to the taxpayer or its fair market value, whichever is lower, or in such other manner as may be permitted by regulation.

In this case it is not denied that the appellant's stock-in-trade on January 31, 1946, had a market value less than its cost. In assessing the appellant, the respondent fixed the market value of the stock-in-trade at $8,500.45 less than cost, thereby placing a market value thereon of $135,770.81. Its actual cost was shown to be $144,271.26, and the appellant had written it down by $35,539.45 to a market value of $108,731.81.

The question for determination, therefore, is whether the market value put upon the inventory by the respondent is correct. In my opinion the value to be placed upon stock-in-trade at a particular time is entirely a question of fact.

There is no direct evidence as to the basis on which the Minister allowed the write-down of $8,500.45. No particulars are given in the assessment, the notification by the Minister, or in the pleadings. The assessor was not called as a witness and it is common ground that no one on behalf of the respondent examined the stock-in-trade as a preliminary to arriving at its fair market value. Indeed, such an examination would have been physically impossible as the tax return was not made until June 30, 1946, by which date a substantial percentage of the goods had been sold. From statements made by counsel for the respondent, however, I am satisfied that the allowance was solely on the basis that the merchandise included in the inventory had to some degree lessened in value because it had been in stock for some months and had become shop-worn due to handling and soiling of the lining and may have faded to some extent. In my view, however, there were other factors which on the evidence should have been taken into consideration in arriving at the market value and which, having been considered, would have led to an increased write-down.

One important factor was that in the previous December the excise tax applicable to furs had been reduced from 25 per cent to 10 per cent and the evidence of Mr. Gough, the president of the appellant company, was that that reduction would definitely have to be passed on to the customer and that the reduction occasioned thereby would have been a substantial one. Another important factor was that the fur coats carried in the inventory had all been manufactured at a time when styles were drastically limited by wartime controls which were lifted in the autumn of 1945. The result of the lifting of the controls was that the new fur coats coming on to the market were to some degree longer and fuller, and again, to some extent, the stock carried over would be in competition with the newer and more attractive styles, and therefore of less value. These matters were not taken into consideration by the

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assessor and for that reason I am satisfied that the write-down made by the Minister was somewhat less than it should have been.

I turn now to the inventory values placed upon the stock-in-trade by the appellant. The inventory was taken by Mr. R. P. Gough, the president of the appellant company. There is no question as to his ability to properly evaluate his merchandise. He has had a lengthy experience in the family business and not only buys all his goods but takes an active part in the selling. He therefore acquired an intimate knowledge of the stock-in-trade and for many years has valued the inventory. In establishing his values, he took into consideration a great many factors but made no attempt, in reducing the values of the stock below cost, to evaluate these factors in percentages and to apply such percentages to the stock as a whole. What he did was to make a personal inspection of each article on January 31, and having in mind the various factors, to some of which I shall refer, he then immediately placed an inventory value on each article, the entire matter taking up something less than one minute for each individual article. In the result, the write-down averaged 25 per cent for the whole of the inventory.

Now Mr. Gough's evidence was that he valued the inventory at its replacement value. Had he established that as a fact there would be no difficulty in upholding his valuation. It is common ground that a closing inventory is properly valued at "cost or market value" and Mr. Pettit, an accountant called on behalf of the appellant, stated that one of the accepted meanings of "market value" in accountancy is that of "replacement value", namely, the cost at which similar goods in customary quantities can then be purchased, but less, I assume, a further deduction for depreciation due to shop wear and the like. For reasons presently to be stated, the appellant failed to establish that the inventory values were taken at figures which represented "market values".

Mr. Gough, however, took into consideration two factors to which he attributed great importance. He says that he had in mind that there had been a serious break in the market for raw furs in the preceding months and that as

a result buyers in January, 1946, were paying a great deal less for furs then than they had done in the preceding year. In the Notice of Appeal he stated the reduction to be 25 to 50 per cent. The evidence does not indicate that such was the fact. I accept the evidence of Mr. Prentice, a witness for the respondent that there was no "break" in the fur market in the preceding months, but merely the normal seasonal fluctuations experienced annually. Mr. Prentice since 1947 has been general manager of the Canadian Fur Auction Sales Ltd., and while he was not in Canada in 1945 and 1946, he was at that time general manager of a subsidiary of the New York Fur Auction Co. Inc., the parent company of the Canadian firm, had full knowledge of conditions in Canada and has the records for those years. Mr. Rose, a witness for the appellant who has been a manufacturer of fur garments for many years and is now president of the Fur Manufacturers' Wholesale Association for Canada, also stated that there was no "break" in the fur skin market in 1945 but that there was a very serious one in the summer of 1946 which continued through 1947.

Another factor to which Mr. Gough attributed special importance was the advent of the "New Look" in fur coats. He said that as a buyer he knew on January 31 that the "New Look" involved styling of a radically new nature and which would render most of his stock relatively obsolete. He frankly admitted that the buying public in January or February, 1946, would have no knowledge of the "New Look" style. On the evidence as a whole, however, I am satisfied that he is mistaken as to the date on which it came into effect. As I have stated above, fur manufacturers, following the lifting of wartime controls in 1945, were free to change the style as they saw fit and minor changes did follow at once. But on the evidence as a whole I am of the opinion that the "New Look" style was introduced not earlier than 1947 and was unknown to Mr. Gough and the fur trade generally on the inventory date.

I do not know what weight was given to these factors by Mr. Gough, but undoubtedly he considered them of the greatest importance. If their existence had been established as a fact, they would have been of some importance in

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fixing inventory values, but finding as I do that there was no break in the raw fur market in the preceding months and that the "New Look" was introduced many months thereafter, these facts had no place in the computation. To that extent Mr. Gough's inventory was incorrect. Other factors of a minor nature entered into Mr. Gough's computation but I do not think it necessary to discuss them.

But there was one additional factor which Mr. Gough did take into consideration which I think on the evidence had no place in a computation based on "replacement value". As an experienced retailer in fur garments, he knew that his market was a seasonal one; that while February was a good month for sales, the demand would lessen sharply thereafter and that there would be no substantial pick-up until the following September or October, by which time the goods carried over from the preceding year would be in competition with the new merchandise which he customarily ordered in the spring and which he received throughout the summer. He knew that to then get rid of the old stock he would probably have to reduce his sales price of the inventory from time to time and that in all probability it would take many months and possibly as much as a year or more to entirely dispose of the carry-over.

He therefore considered it advisable, in establishing his inventory value, to take into consideration the length of time which it would probably take to dispose of the carry-over and the final realizable value of the stock which I have mentioned above. His purpose was to so value the inventory which he could expect to receive after later making the reductions in prices that after taking into account the anticipated realizable value of the stock and deducting therefrom the cost of sales (which in this case would be the inventory value), he would still realize his normal profit. He stated that his normal sales price was 50 to 60 per cent over cost (or inventory) and that in the result a ratio of gross profit to sales of approximately 33·3 would follow. It is clear that this was one of the substantial elements which he took into consideration, along with

many others, in arriving at an inventory based on "replacement value"; and it is interesting to note that his "forecast" turned out to be a fairly accurate one; notwithstanding the very serious break in the fur market in the fall of 1946 and in 1947, the appellant did realize a gross profit rate to sales of 31·4 on all inventory notwithstanding the fact that by January 31, 1947, only about one-half had been sold and that the remaining items were disposed of in 1947, 1948 and 1949.

On the evidence of Mr. Pettit, it appears that in accepted accounting practice it is permissible under certain conditions to take into consideration the length of time it would take to dispose of the goods, the conditions existing at such times, and their probable realization value as a method of determining inventory value. It is accepted in accounting circles, he states, that "market value" may mean not only the cost of replacement, but also the estimated realization, less costs of sale and the usual gross profit, and it is customary to take the lower of these two alternatives as "market value". In support of that statement he cited Principles of Accounting by Finney (1951 Edition), an American authority on taxation which he said was generally accepted in Canada and in which at p. 375 it states:

Realization Basis:

> For some items in the inventory, such as obsolete or repossessed merchandise, a purchase or reproduction market value may not be determinable. For such items it may be necessary to accept, as an estimate of market value, the prospective selling price minus all prospective costs to be incurred in conditioning and selling the goods, and minus a reasonable profit.

It is clear that this method is referable to those items in the inventory which are obsolete or repossessed merchandise, and where a reproduction market value cannot be determined; and that it is an alternative method to the reproduction "market value" method and not an additional factor to be taken into consideration when reproduction "market value" is the objective as it was with Mr. Gough. On the evidence, either method is acceptable in accounting practice, but not a combination of both.

Now it seems to me that in taking into account the reductions in sale prices which he would possibly or even probably have to make during the next year (or perhaps over a longer period) and thus forecasting the future, he

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was in fact taking into account losses in inventory which had not been sustained in the taxation year 1946, but which might be suffered in a subsequent year or years, thereby setting up what amounted to an inventory reserve. It is of paramount importance to keep in mind that the object of the computation in which the closing inventory values constitute one element is to determine as precisely as possible the actual balance of the profits and gains in each year of the company's operations; and that only those elements of loss or expense enter into the computation which are suffered or incurred during the taxation year in question. These principles were stressed by the Lord President (Clyde) in *Collins & Sons Ltd.* v. *Commissioners of Inland Revenue* (1), the headnote of which reads:

> Held, that, as the loss was only an apprehended future one and had not been suffered in the accounting period in question, the deduction claimed was inadmissible.

At p. 780 the Lord President said:

> It is a general principle, in the computation of the annual profits of a trade or business under the Income Tax Acts, that those elements of profit or gain, and those only, enter into the computation which are earned or ascertained in the year to which the enquiry refers; and in like manner, only those elements of loss or expense enter into the computation which are suffered or incurred during that year. There are, it is true, some elements in the computation of the profits of a business —such as repairs (under Rule 3(*d*) of Cases I and II of Schedule D)— which are matters of estimate. But that does not detract from the importance of keeping in mind that the object of the computation is to ascertain, or . . . to "determine", as nearly as may be, the actual balance of the profits and gains of the business in each year of its operations. If authority be needed for these (as I think) elementary propositions, as applying to the case of Excess Profits Duty, such authority will be found in the case of *Hall & Co.* v. *The Commissioners of Inland Revenue*, 12 T.C. 382; (1921) 3 K.B. 152.
>
> It is, however, quite consistent with this that a prudent commercial man may put part of the profits made in one year to reserve, and carry forward that reserve to the next year, in order to provide against an expected, or (it may be) an inevitable, loss which he foresees will fall upon his business during the next year. The process is a familiar one. But its adoption has no effect on the true amount of the profits actually made, and does not prevent the whole of the profits, whereof a part is put to reserve, from being taken into computation in the year in question for purposes of assessment. On the contrary, the balance of profits and gains is determined independently altogether of the way in which the trader uses that balance when he has got it; and, if he puts part of it to reserve and carries it forward into the next year, that has no effect whatever upon his taxable income for the year in which he makes the profit.

(1) 12 T.C. 773.

While it is true that the particular facts in that case differ from those in the present case (in that the prospective loss for which an allowance was there claimed was in respect of goods which had been contracted for in the taxation year but had not been executed by way of payment or receipt of the goods or otherwise during the year), I think the opinion of the Lord President above quoted was of general application. His further observations at p. 783 are also of interest:

> The Appellants put forward their claim on the footing of an estimate of the loss to be incurred. But, as it appears to me, this only serves to make it plain that what they are seeking to do is to put against the actual ascertained receipts from their business in one period a loss which is neither suffered nor incurred in that period. I know of no justification for this, either under the rules or principles of the Income Tax Acts, or in ordinary commercial accounting. We are told that the circumstances of the years in question—those of 1920 and 1921—were exceptional. I can readily believe that they were unusually difficult years for commercial undertakings. But it is not an exceptional experience to find that a commercial contract unexpectedly turns out to be unsuccessful, or that a commercial engagement undertaken in a sanguine spirit is seen to be fraught with unfavourable results long before the hour for its fulfilment arrives. After all, the problem is to determine the profits actually earned by the Appellants in their last accounting period (Finance Act, 1921, Section 35). I realize that it is hard for them that the relief which they might have got under Section 38 (3) of the Finance (No. 2) Act, 1915,—if the Excess Profits Duty had been continued—will no longer be available to them. But this does not entitle us to make bad law in order to meet what is (in this view) a hard case.

Reference may also be made to *Whimster & Co.* v. *Commissioners of Inland Revenue* (1).

Notwithstanding the evidence of Mr. Pettit that it was accepted as a sound principle in accounting circles to take into account in valuing inventory the losses which inventory might sustain in a subsequent year, I do not think that principle can be used when applying the provisions of the Income War Tax Act to the ascertainment of the profits or gains of a taxation year. It may be of interest to note that at the time the inventory was taken there was a provision in s. 6 (1) (*b*) of the Excess Profits Tax Act, 1940, as amended, which to a limited degree permitted a deduction from profits of a reserve against future depreciation in inventory values. That provision, however, was limited to the computation of the tax imposed under the Excess Profits Tax Act and was not applicable

(1) 12 T.C. 813 at 823.

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to the ascertainment of taxable income under the Income War Tax Act. The fact that its application was limited to the former would seem to indicate clearly that it had no place in the latter. It is clear, also, that an inventory reserve was not one of the reserves permitted under the Income War Tax Act.

My conclusion on this point is, therefore, that when establishing the "market value" of an inventory on the basis of estimated realizable value, it is not permissible to take into account losses in inventory value which for the subsequent year are merely anticipated and have not, in fact, been suffered or sustained in the taxation year under consideration. In other words, the estimated realizable value of the inventory must be taken as it appears to be on the date of taking the inventory and not as it might be by forecasting the future with all its uncertainties. To the extent, therefore, that these factors entered into Mr. Gough's fixation of inventory values, the inventory was undervalued.

It is urged by counsel for the appellant that the various elements which were in the mind of Mr. Gough at the time he made the inventory are of very little importance; that what is of importance is the amount of the write-down. He says, however, that when tested by the results, it is established that only the normal gross profit was in fact realized and that thus the inventory values are shown to be accurate. Mr. Pettit stated that "all things being equal", that would constitute a fair test. In this case, however, it is shown that "all things were not equal" due to the very severe break in prices in mid-summer of 1946, a break which continued in 1947 and for some time thereafter. The evidence is that for the taxation year ending January 31, 1947, the appellant's sales increased by one-third, but its ratio of gross profit to all sales (including those from the carry-over) was 17·9, or just slightly over one-half of the normal or expected ratio. That being the case, the test suggested by Mr. Pettit is not here of any validity.

It is apparent, therefore, that not only is the inventory value established by the respondent too low, but that that

of the appellant is too high. It becomes necessary, therefore, to endeavour to determine from the evidence what should have been established as the fair market value.

I have reached the conclusion that it is not possible to ascertain the replacement market value. Mr. Gough stated that his recollection was that in January he had been offered new goods similar to those in his inventory at 20 to 25 per cent less than his original cost. I have no doubt whatever that he was doing his best to recall what actually occurred, but as he was speaking of matters which had occurred some eight years previously, and could produce no documentary evidence in support of his statements, and as his recollection had been found to be faulty on other matters—I refer to the advent of the "New Look" style—I cannot accept his recollection as proof of the fact. His witness Mr. Rose also stated that it was customary for him in January of each year to clear out the few remaining goods then on hand at a discount of 25 to 30 per cent; that he was willing to "sacrifice" them in order to have no carry-over to the new season. He was unable to support that statement by the production of any documentary evidence and he made no offers to the appellant at that time.

There is another method, however, by which the accuracy of the inventory values may be tested (even if not precisely ascertained), namely, to ascertain what they should have been had the appellant used the last method suggested by Mr. Pettit, namely, to take the estimated realizable value of the stock and deduct the usual and reasonable profit, the balance representing the fair "market value" of the inventory.

Now, it is a most significant fact that notwithstanding the 25 per cent reduction in inventory values made by the appellant, the sale prices on the goods comprised in the inventory were not reduced on January 31 but remained as they had been, namely, 50 to 60 per cent above original cost. In retaining these prices Mr. Gough was, in fact, fixing his estimated realizable value as of that date. They were offered to the public in February at the same price. Those were the prices which he hoped to realize and had the demand been more active in February, he would have realized them on the whole of the inventory.

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Exhibit 3 is an analysis of the inventory and while it refers only to about 70 per cent thereof, it is agreed that it is typical of the whole of the store inventory. It contains a description of each article sold, its inventory value as at January 31, the date of sale, the selling price (and in some cases the final selling price), and final gross profit. Exhibit B is a further analysis of Exhibit 3 providing much the same information, but arranged in chronological order showing the sales in each month. Attached thereto is a further summary showing by months the selling price, the inventory value, losses due to re-sales, final selling prices, final gross profits or loss, actual profit or loss and the percentage of profit or loss to inventory value. Now while there were reductions on the sale prices after February, I think I may assume from the evidence that the sale prices throughout February (with possibly a very few exceptions) remained as they were when established by Mr. Gough at January 31.

In that month, goods carried over and having an inventory value of $19,976.00 were sold, the first selling price totalling $37,848.00; after allowing for lesser sales prices on goods which had to be resold, the final selling prices totaled $36,967.00, representing a final gross profit of $16,991.00, such profit being 85·05 per cent over inventory values, or very substantially in excess of the stated normal write-up over inventory of 50 to 60 per cent. For that month the gross profit ratio to the first selling prices was approximately 45 per cent, again a figure very substantially in excess of the normal ratio of approximately 33·3. The stated profit ratio would have been even higher had not the summary taken into consideration some losses on resales. The sales in the summary of that inventory for that month were of ninety-one articles, eighty-seven being fur coats and the balance fur scarves.

Mr. Gough stated that his customary mark-up was from 50 to 60 per cent, "but closer to 60 per cent". I shall assume that the average was 58 per cent. I think it proper, also, to apply the test to all of the first selling prices in February and as they were established on January 31. (It seems to me that it would be improper to exclude from the computation the seven coats which after being sold in February had to be re-sold in later months at lower prices.)

Since 158-100ths of the inventory equals $37,848.00 (the total of the first selling prices), the inventory valuation thereof should have been $23,954.00.

I was given to understand that the parties were not concerned with the inventory valuation placed by the appellant on its skin room and factory supplies which were respectively $5,627.90 and $2,347.21, but only with the values placed on the merchandise on hand in the store, namely, $100,656.70. Applying the formula which I have adopted for the computation of the proper inventory value of the stock sold in February to the whole of the merchandise in the store, I place upon the latter a "market value" of such inventory as of January 31, 1946, of $120,199.00. Accordingly, there should have been added back to the inventory the difference between $120,199.00 and $100,656.70, or $19,542.30. I realize the great difficulty in establishing precise inventory values in matters of this sort, and that, at best, the decision can be but little more than an approximation arrived at by applying what seems to me to be a reasonable test.

It is of some interest to note that in Federal income tax matters in the United States there is a special regulation in regard to the method of valuing an inventory of subnormal or obsolete goods. In Mertens Law of Federal Income Tax, Vol. II, p. 540-1, reference is made to Reg. 103, a portion of which is quoted as follows:

> . . . Any goods in an inventory which are unsalable at normal prices or unusable in the normal way because of damage, imperfections, shop wear, changes of style, odd or broken lots, or other similar causes, including second-hand goods taken in exchange, should be valued at bona fide selling prices less direct cost of disposition, whether basis (*a*) or (*b*) is used, or if such goods consist of raw materials or partly finished goods held for use or consumption, they shall be valued upon a reasonable basis, taking into consideration the usability and the condition of the goods, but in no case shall such value be less than the scrap value. Bona fide selling price means actual offering of goods during a period ending not later than 30 days after inventory date. The burden of proof will rest upon the taxpayer to show that such exceptional goods as are valued upon such selling basis come within the classifications indicated above, and he shall maintain such records of the disposition of the goods as will enable a verification of the inventory to be made.

The basis (*a*) there referred to is cost, and basis (*b*) is cost or market, whichever is lower. It is of special interest to note the definition of *bona fide* selling price. Thereunder

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it would seem to be improper to take the selling prices as something that might come into existence months after the date when the inventory is taken.

For these reasons, there will be judgment allowing the appellant's appeal to the extent I have mentioned and referring the matter back to the Minister for reassessment by reducing the amount added back to income in respect of inventory values from the sum of $27,039.00 to $19,542.30. The cross-appeal will be dismissed. The appellant is also entitled to the costs of the appeal, and of the cross-appeal, after taxation.

Judgment accordingly.

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Sept. 14

Sept. 16

ENTRE:

MARCEL GOSSELIN .....RÉCLAMANT,

ET

SA MAJESTÉ LA REINE .....INTIMÉE.

Revenue—Reference under the Customs Act—Seizure—Forfeiture—The Customs Act, R.S.C. 1927, c. 42, ss. 176 and 193(1)—"Subsequent transportation" of goods liable to forfeiture—Vehicle used in subsequent transportation of goods liable to forfeiture itself liable to forfeiture even if not directly associated with the importation and unshipping or landing or removal of the goods.

One G. sold and delivered to claimant at his residence in Levis, P.Q. 20,000 American cigarettes which to the latter's knowledge had been smuggled into Canada. Some days later claimant upon his brother's consent to buy 75 cartons of those cigarettes, transported them in his automobile from Levis to his brother's residence in Quebec, P.Q. where delivery was made and the amount of purchase paid. Claimant's automobile was seized by the Royal Canadian Mounted Police and, later, he was found guilty on a charge of having unlawfully imported goods in his possession. The Minister of National Revenue decided that the automobile should be forfeited and, on being advised by claimant that his decision was not accepted, referred the matter to this Court.

Held: That s. 193 of the Customs Act R.S.C. 1927, c. 42, renders liable to forfeiture all vehicles used in the transportation of goods liable to forfeiture although such vehicle had no direct connection with the importation or landing of such goods. The "subsequent transportation" of such goods as set forth in s. 193 of the Act need not be directly associated with the importation and unshipping or landing or removal of the goods. *James* v. *The Queen* [1952] Ex. C.R. 402 referred to and followed.

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REFERENCE by the Crown under Section 176 of the Customs Act.

The action was heard before the Honourable Mr. Justice Fournier at Quebec.

Henri Paul Drouin, Q.C. for claimant.

Edouard Laliberte for respondent.

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

FOURNIER J. now (September 16, 1953) delivered the following judgment:

Il s'agit d'une réclamation renvoyée à la Cour par le Ministre du Revenu National conformément à l'article 176 de la Loi des Douanes, S.R.C. 1927, Chap. 42, telle qu'amendée. Le 3 juin 1952, le Ministre a décidé que l'automobile (camionnette) marque Monarch 1950 appartenant au réclamant Marcel Gosselin soit confisquée.

Le réclamant dûment notifié de cette décision, avisa le Ministre par écrit qu'il n'acceptait pas cette décision et la cause fut référée à la Cour de l'Échiquier du Canada pour adjudication.

L'automobile (camionnette) du réclamant fut saisie par les agents de la Gendarmerie Royale Canadienne le 28 mars 1952. Subséquemment Marcel Gosselin fut trouvé coupable de l'offense décrite à l'article 217 de la Loi des Douanes et condamné à $50. d'amende et les frais ou à défaut de paiement à trois mois de prison.

Aujourd'hui, le réclamant demande à la Cour de réviser la décision du Ministre du Revenu National et de donner mainlevée de la saisie et de la confiscation de son automobile (camionnette).

La preuve révèle que, dans le mois de mars 1952, un certain Charles-Edouard Méthot aurait demandé au réclamant s'il serait intéressé à acheter des cigarettes américaines illégalement importées au Canada. Le réclamant était intéressé.

Peu de temps après, tard un soir, un nommé Gérard Guay se présenta au domicile du réclamant avec deux boîtes ou paquets contenant chacun 50 cartons de cigarettes américaines. Chaque carton contenait 10 paquets de 20 cigarettes, soit en tout un total de 20,000 cigarettes. Ces colis

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furent transportés par taxi et livrés au réclamant. Le prix était de $2.55 le carton. Le réclamant paya à Guay la somme de $255. A ce moment le réclamant devint possesseur et propriétaire de marchandises de contrebande. Il commettait une offense contre la Loi des Douanes et il le savait puisque tout au cours de son témoignage il répète que dès qu'il eut accepté livraison de ces cigarettes il voulut s'en débarrasser. Il les offrit lui-même et par l'entremise de sa femme à son frère Alphonse Gosselin, qui accepta de prendre possession de 75 cartons.

Le réclamant avoue avoir transporté ces 75 cartons de cigarettes dans son automobile (camionnette) de sa résidence à Lévis à la résidence de son frère Alphonse dans la ville de Québec, soit une distance d'environ 15 milles, et en fit livraison au fils de ce dernier. Le même soir, Alphonse Gosselin paya à son frère Marcel la somme de $191.25 pour les dites cigarettes. Ce résumé des faits ressort clairement du témoignage du réclamant et de son frère Alphonse et du témoignage de Gérard Guay quant à la livraison des cigarettes de contrebande à la résidence du réclamant.

Une partie considérable de la preuve était étrangère ou avait peu de rapport au litige. La preuve a été permise afin que les parties puissent placer devant la Cour tous les faits qu'ils croyaient utiles à leur cause. Je me suis servi de la latitude donnée à la Cour en vertu de l'article 177 de la Loi des Douanes dans la conduite de l'enquête.

Avec ces faits, nous pouvons maintenant considérer l'aspect légal de ce litige.

Les cigarettes transportées dans l'automobile (camionnette) du réclamant avaient-elles été importées illégalement au Canada? Tous les témoins semblent l'admettre et personne n'a tenté de prouver que les prescriptions de la Loi des Douanes, quant à l'admission de marchandises étrangères au pays, aient été suivies.

En vertu des articles 190 et 195 de la susdite loi, ces cigarettes étaient sujettes à saisie et confiscation. Comme question de fait, elles furent saisies et confisquées.

Que ces cigarettes aient été saisies et confisquées chez Alphonse Gosselin à Québec plutôt qu'à leur entrée illégale à la frontière ou entre les mains de Gérard Guay qui les a vendues au réclamant, ou entre les mains de ce dernier, ne

change rien à la question. De plus, vu la preuve entendue et la loi s'appliquant aux causes de cette nature et considérant que le réclamant a été trouvé coupable de l'offense décrite à l'article 217 de la Loi des Douanes, je n'ai aucune hésitation à décider que les cigarettes transportées dans l'automobile (camionnette) du réclamant avaient été importées illégalement au Canada et en vertu des articles 190 et 195 de la loi susdite étaient sujettes à saisie et confiscation.

Maintenant, le véhicule servant à transporter ces marchandises illégalement importées était-il sujet à saisie et confiscation? L'article 193 (1) de la Loi des Douanes se lit comme suit:

> 193. Tous les navires, avec leurs canons, palans, agrès apparaux et équipements, et les véhicules, harnais, gréements, chevaux et bestiaux qui ont servi à importer, décharger, débarquer ou transporter des effets frappés de confiscation en vertu de la présente loi, doivent être saisis et confisqués.

La loi dit que le véhicule servant à transporter des marchandises importées illégalement et sujettes à saisie et confiscation sera de droit saisi et confisqué. Que l'usage du véhicule soit au moment de l'importation, du déchargement, de l'atterrisage, du déplacement ou du transport subséquent de ces marchandises, il est sujet aux prescriptions de l'article 193 (1).

Pour réussir dans sa réclamation, le réclamant devait prouver que les marchandises transportées dans son véhicule avaient été importées légalement au Canada. Le fardeau de cette preuve lui incombait en vertu de l'article 262 de la Loi. Il ne l'a pas fait; il a même admis avoir transporté des marchandises de contrebande.

L'argument du procureur du réclamant à l'effet que le transport subséquent doit être associé directement avec l'importation, déchargement, atterissage ou déplacement me semble contredire l'interprétation qui doit être donnée à l'article 193(1). Le mot "ou" divise et sépare ces différentes opérations. La saisie et confiscation doivent s'appliquer au véhicule qui sert à l'une ou l'autre ou à toutes les opérations énumérées dans l'article.

La preuve me satisfait que le réclamant a voulu obtenir des marchandises étrangères sans avoir à payer les droits dus

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sur ces marchandises. Dans ces transactions illégales avec Guay et avec son frère, à un certain stage, son véhicule a servi à des fins illégales.

Dans la préparation de ces notes, j'ai consulté la preuve et la loi et pris connaissance des jugements dans les causes suivantes: *Le Roi et Krakowee et al.* (1); *James et La Reine* (2), surtout le jugé vu l'argument du procureur du réclamant; *Mayberry and The King* (3), où le savant juge Cameron a jugé:

> Held:—That the matter is in the nature of a proceeding in rem and, if it be established, as it has been done in this case, that the vehicle "had been or was being used for the purpose of transporting spirits unlawfully manufactured", the Court is vested with no discretion in the matter, but must declare the vehicle condemned as forfeited, and that is so even when the owner had no knowledge that such spirits were carried in his vehicle.

Cette loi de saisie et confiscation est sévère, mais la législature veut détruire un abus. La Cour doit juger suivant les faits et la loi.

La Cour rejette la réclamation du réclamant avec dépens et maintient la saisie et confiscation de l'automobile (camionnette) marque Monarch 1950, mentionnée dans cette cause, au bénéfice de la Couronne.

Judgment accordingly.

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Mar. 18, 19

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Sept. 22

BETWEEN:

EMILY SHPUR, by her next friend ANNIE SHPUR and JOHN SHPUR } SUPPLIANTS,

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Negligence—The Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(c)—The Vehicles and Highway Traffic Act, R.S.A. 1942, c. 275, ss. 51, 52, as amended by S. of A. 1950, c. 76, s. 11—The Petition of Right Act, R.S.C. 1927, c. 158—Right-of-way at intersection.

The suppliants claimed damages for injury and loss as a result of a collision between an automobile driven by Walter Shpur, the son of one of the suppliants, and an automobile driven by Constable W. G. Wright, a member of the Royal Canadian Mounted Police.

(1) (1952) C.S. 134. (2) [1952] Ex. C.R. 396.
(3) [1950] Ex. C.R. 402.

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The collision occurred at about 11.15 p.m. on October 26, 1952, in the intersection of 1st Street East and Railway Avenue in Vegreville, Alberta.

Held: That, while sections 51 and 52 of The Vehicles and Highway Traffic Act could not bind the Crown in right of Canada or have the effect of imposing upon it a different liability from that which was imposed by the amendment of section 19(*c*) of the Exchequer Court Act in 1938 in the light of the law of negligence in force in the several provinces of Canada on that date, the Crown may take advantage of any defence that would be open to a defendant by section 8 of the Petition of Right Act.

2. That in a claim under section 19(*c*) of the Exchequer Court Act the Crown can take the benefit of the law as it exists at the time it is called upon to file its statement of defence whereas such law may perhaps not be available in support of the suppliant's claim.

3. That section 51 of The Vehicles and Highway Traffic Act, as enacted in 1950, not only gives a statutory right-of-way to the driver of a vehicle approaching an intersection from the right of a driver approaching it from the left but also imposes a statutory duty on the latter to yield the right-of-way to the former.

4. That the prior entry into the intersection of the driver on the left does not give him the right-of-way over the driver on the right. The statutory right-of-way which the driver on the right has cannot be displaced by the prior entry into the intersection of the driver on the left, nor can such prior entry help him to escape from his statutory duty to yield the right-of-way to the driver on his right.

5. That the driver on the right has the right to assume, until the contrary becomes apparent, that the driver on the left will yield the right-of-way to him. *Walker* v. *Brownlee and Harmon* [1952] 2 D.L.R. 450 followed.

6. That Walter Shpur did not keep a proper lookout to his right and did not have his car under proper control with the result that he failed to yield the right-of-way to Constable Wright's car as he should have done.

PETITION OF RIGHT for damages under section 19(c) of the Exchequer Court Act.

The action was tried before the President of the Court at Edmonton.

E. W. Sully for suppliants.

H. S. Hurlburt Q.C. and *J. T. Gray* for respondent.

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

THE PRESIDENT now (September 22, 1954) delivered the following judgment:

In this petition of right the suppliants claim damages for injury and loss as the result of a collision between the suppliant John Shpur's automobile, a 1949 Mercury sedan,

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Thorson P.

driven by his son Walter Shpur, in which the suppliant Emily Shpur, the daughter of the suppliant John Shpur, was a passenger and the Crown's automobile, a Pontiac coach, driven by Constable William G. Wright, a member of the Royal Canadian Mounted Police. As the result of the collision the suppliant John Shpur's automobile was damaged and the suppliant Emily Shpur sustained personal injuries. The Crown's automobile was also damaged and the respondent counterclaims for this loss.

It is alleged by the suppliants that their injury and loss resulted from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment. The claim is made under section 19(c) of the Exchequer Court Act, R.S.C. 1927, chapter 34, as amended in 1938, 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;

It is established law that the onus of proof in a claim under this section rests on the suppliant. In this case it is admitted that at the time of the collision Constable Wright was a servant of the Crown and acting within the scope of his employment. The issue is thus whether there was negligence on his part and the suppliants' injury and loss resulted therefrom.

Emily Shpur was thrown against the side of the car in which she was riding and suffered bruises on her face, arms and thighs and cuts from broken glass on the right side of her face. There were three main lacerations, one long one on her forehead, another over her cheek bone and the third between her nose and upper lip. The cuts were bevelled and jagged so that when they healed there was a heavy scar formation. This was quite noticeable and the scars will likely be permanent. There was also some loss of feeling where the scars had formed. Apart from the scars and the loss of feeling the suppliant has fully recovered from her injuries. While it is not possible at this stage to say what effect the scars may have on the suppliant's appearance

when she grows up there will be some disfigurement. If I were called upon to assess her general damages I would put them at $2,500.

The suppliant John Shpur has proved damages amounting to $385.45 made up of $100 for medical services to his daughter, $25.45 for her hospital expenses and $260 for the damage to his automobile.

The collision occurred at about 11.15 p.m. on October 26, 1952, in the intersection of 1st Street East and Railway Avenue in the Town of Vegreville in Alberta. Prior to entering the intersection Walter Shpur was proceeding in a southerly direction on 1st Street East and Constable Wright was travelling in an easterly direction on Railway Avenue. The collision occurred at about the centre of the intersection and the two vehicles came to a standstill near its southeast corner. The road was of earth and gravel, quite well packed. At the time of the collision the road was dry with some loose dirt on top and the visibility was good.

At the date of the collision sections 51 and 52 of The Vehicles and Highway Traffic Act, R.S.A. 1942, Chapter 275, as amended by section 11 of chapter 76 of the Statutes of Alberta, 1950, provided as follows:

> 51. When two vehicles approach or enter an intersection at approximately the same time,—
>
> (*a*) the driver of the vehicle that is to the right of the other vehicle shall have the right-of-way; and
>
> (*b*) the driver of the vehicle that is to the left of the driver of the other vehicle shall yield the right-of-way to the other vehicle;
>
> except as provided in this Part.

In my opinion, this section not only gives a statutory right-of-way to the driver of a vehicle approaching an intersection from the right of a driver approaching it from the left but also imposes a statutory duty on the latter to yield the right-of-way to the former. The section is mandatory. The driver of the vehicle approaching or entering an intersection from the right *shall* have the right-of-way and the driver of the vehicle approaching or entering from the left *shall* yield the right-of-way.

On the conclusion of the trial I was of the opinion that Walter Shpur had failed to yield the right-of-way to Constable Wright, as section 51 of the Act required him to do, and, if counsel for the suppliants had not raised the question

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of law which he did I would, for reasons which I shall state later, have delivered judgment orally that the suppliants were not entitled to any of the relief sought by them and that the respondent was entitled to recover the amount of the counterclaim. But the questions raised were of such importance that I considered it wise to reserve judgment.

In the course of his argument counsel submitted that sections 51 and 52 of The Vehicles and Highway Traffic Act, as enacted in 1950, had no application in this case, but that the law of negligence to be applied was the law of negligence of Alberta as it stood on June 24, 1938, when Parliament by its amendment of section 19(c) of the Exchequer Court Act with effect as from that date first imposed liability on the Crown for the negligence of its officers and servants in driving an automobile, including as part of such law section 49 of The Vehicles and Highway Traffic Act, 1924, Statutes of Alberta 1924, Chapter 31, as amended by section 2 of Chapter 55 of the Statutes of Alberta, 1926, and section 6 of Chapter 62 of the Statutes of Alberta, 1934, reading as follows:

> 49 (1) Whenever any vehicle is turning from one highway into another the driver of any other vehicle approaching the intersection of the highways to the right of such vehicle shall have the right-of-way, and similarly, the driver of such first mentioned vehicle shall have the right-of-way over any vehicles approaching the intersection of the highway on his left.
>
> (1*a*) The driver of a vehicle approaching an intersection of highways or a cross-road shall yield the right-of-way to a vehicle which has entered the intersection.
>
> (1*b*) When two vehicles are upon an intersection at the same time, that vehicle shall have the right-of-way which entered the intersection from the right of the driver of the other vehicle.

This section became section 52 of The Vehicles and Highway Traffic Act, R.S.A. 1942, Chapter 275.

On this basis counsel submitted that under this state of the law the right-of-way at intersections was vested in the driver of the vehicle which had entered the intersection first, that the evidence showed that Walter Shpur had done so and that, consequently, the collision was the result of negligence on Constable Wright's part.

The contention put forward by counsel for the suppliants was an interesting one. In support of his submission he relied upon the judgment of this Court in *Tremblay* v. *The*

King (1). There I referred to the history of section 19(c) of the Exchequer Court Act, which was reviewed extensively by Supreme Court of Canada in *The King* v. *Dubois* (2) and by this Court in *McArthur* v. *The King* (3). It was clearly established by the Supreme Court of Canada in the *Dubois* case (*supra*) and in *The King* v. *Moscovitz* (4) that under the predecessor of section 19(c) of the Exchequer Court Act, prior to its amendment in 1938, there was no liability upon the Crown for the negligence of its officer or servant while driving a motor vehicle even although he was acting within the scope of his duties or employment in so doing, where the driving of such vehicle was not in any way related to or connected with a public work. It is equally clear that liability for such negligence was first imposed on the Crown by the amendment of section 19(c) of the Exchequer Court Act that was made in 1938 by the elimination from the section of the words "upon any public work".

Then, following and applying the principles enunciated by the Supreme Court of Canada in *The King* v. *Armstrong* (5) and *Gauthier* v. *The King* (6), I expressed the following opinion, at page 12:

> That in claims against the Crown made under section 19(c) of the Exchequer Court Act, as amended in 1938, where the claim is for loss or injury resulting from the negligence of an officer or servant of the Crown in driving a motor vehicle while acting within the scope of his duties or employment, the liability of the Crown is to be determined by the law of negligence of the province in which such alleged negligence occurred that was in force in such province on the 24th day of June, 1938, when the amendment by which liability for such negligence was first imposed upon the Crown came into effect, except in so far as such provincial law is repugnant to the terms of the said section or seeks to impose a liability upon the Crown different from that imposed by the section.

I then referred to the statement of Fitzpatrick C.J. in *Gauthier* v. *The King* (*supra*), at page 182:

> Provincial statutes which were in existence at the time when the Dominion accepted a liability form part of the law of the province by reference to which the Dominion has consented that such liability shall be ascertained and regulated, but any statutory modification of such law can only be enacted by Parliament in order to bind the Dominion Government.

(1) [1944] Ex. C.R. 1.
(2) [1935] S.C.R. 378.
(3) [1943] Ex. C.R. 77.
(4) [1935] S.C.R. 404.
(5) (1908) 40 Can. S.C.R. 229 at 248.
(6) (1918) 56 Can. S.C.R. 176 at 180.

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and found, accordingly, that the terms of the Motor Vehicles Act of Quebec to which I had referred, since they were in force prior to 1938, were as applicable in a claim against the Crown under section 19(c) of the Exchequer Court Act, as amended in 1938, as they would be in an ordinary action between subject and subject.

It was on this basis that counsel for the suppliants rested his submission. But, unfortunately for the suppliants, the law is in an anomalous state. It is quite clear that the suppliants could not take advantage of sections 51 and 52 of The Vehicles and Highway Traffic Act if they had the effect of imposing a liability upon the Crown different from that which existed in 1938. That is to say, if the facts had been the reverse of what they were, as I have found them later in these reasons, and Walter Shpur had had the right-of-way and Constable Wright had failed to yield it to him the suppliants could not have asserted such statutory right-of-way as against the Crown for this might have resulted in a liability upon it that was greater than that which would have rested upon it if sections 51 and 52 of The Vehicles and Highway Traffic Act, as enacted in 1950, had not been enacted and the law had remained in its previous state.

This is similar in principle to the situation in *Canadian National Ry. Co* v. *Saint John Motor Line Ltd.* (1) where it was held by the Supreme Court of Canada that the Contributory Negligence Act of New Brunswick, which came into force in 1925, had no application to the facts of the case since the law to be applied was that of October 30, 1887, when the predecessor of section 19(c) of the Exchequer Court Act first began to operate, and the application of the Contributory Negligence Act was apt to operate in such a way as to compel the Canadian National Railway Company which was in a position similar to that of the Crown to bear part of the loss, which it might otherwise have entirely escaped by reason of the other party's contributory negligence. The Court sent the case back for a new trial with instructions that the liability of the Railway Company was to be determined according to the law of New Brunswick that was in force prior to the introduction of the Contributory Negligence Act.

(1) [1930] S.C.R. 482.

But while the suppliants could not have taken any advantage as against the Crown of any provisions of The Vehicles and Highway Traffic Act enacted after June 24, 1938, that they would not have had under the legislation that was in effect on that date it does not follow that the Crown is in the same position. For while sections 51 and 52 of The Vehicles and Highway Traffic Act could not bind the Crown in right of Canada or have the effect of imposing upon it a different liability from that which was imposed by the amendment of section 19(c) of the Exchequer Court Act in 1938 in the light of the law of negligence in force in the several provinces of Canada on that date, the Crown may take advantage of any defence that would be open to a defendant in a case as between subject and subject. This is specifically provided for by section 8 of the Petition of Right Act, R.S.C. 1927, chapter 158, which provides as follows:

8. The statement of defence or demurrer may raise, besides any legal or equitable defences in fact or in law available under this Act, any legal or equitable defences which would have been available if the proceeding had been a suit or action in a competent court between subject and subject; and any grounds of defence which would be sufficient on behalf of His Majesty may be alleged on behalf of any such person as aforesaid.

It is consistent with principle that this should be so for the liability of the Crown under section 19(c) of the Exchequer Court Act is only a vicarious one: *vide The King* v. *Anthony* (1), and could not be greater than that of Constable Wright and it is clear that if he had been sued personally he could have relied upon whatever advantage sections 51 and 52 gave to him by way of defence to the action against him. Since he could have relied upon the existing law so can the Crown by reason of the vicarious nature of its liability, quite apart from the specific authority of section 8 of the Petition of Right Act. I had occasion to consider this matter in *Zakrzewski* v. *The King* (2) where the question was whether the Crown could avail itself of section 84 (1) of The Highway Traffic Act, R.S.M. 1940, chapter 93, which provided:

84. (1) No action shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of twelve months from the time when the damages were sustained.

(1) [1946] S.C.R. 569. (2) [1944] Ex. C.R. 163.

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and I held that it could, saying, at page 169:

> The Crown may clearly avail itself in a petition of right proceeding of such provincial laws of prescription and limitation of action as may be in force in the appropriate province at the time it is called upon to make its statement of defence in the same way as a subject might avail himself of such laws in a suit or action between subject and subject.

Thus we have the anomalous situation that in a claim under section 19(c) of the Exchequer Court Act the Crown can take the benefit of the law as it exists at the time it is called upon to file its statement of defence whereas such law may perhaps not be available in support of the suppliant's claim. Consequently, it may well happen that a suppliant will not have the same rights as against the Crown for damages resulting from the negligence of its officer or servant as he would have had as against an individual or a corporation under precisely similar circumstances if the damages had resulted from the negligence of a servant or officer of such individual or corporation. This anomalous state of the law follows from the principles laid down in the cases of *The King* v. *Armstrong* (*supra*), *Gauthier* v. *The King* (*supra*) and others to the same effect. The anomaly cannot be removed otherwise than by an Act of Parliament declaring that in claims under section 19(c) of the Exchequer Court Act, as amended in 1938 (now section 18(c) of the Exchequer Court Act, R.S.C. 1952, Chapter 98), the law of negligence to be applied shall be the law of the province in which the cause of action shall arise that is in force in such province at the time of such cause of action and would be applicable if the proceeding were a suit or action between subject and subject. Such a declaratory enactment would make the suppliant and the Crown equal before the law, a result which, in my opinion, is greatly to be desired.

It follows from what I have said that the respondent may rely upon sections 51 and 52 of The Vehicles and Highway Traffic Act. That being so, I need not consider the law as it stood on June 24, 1938.

Sections similar to sections 51 and 52 of the Alberta Act have been discussed in several cases. For example, in *Drapeau* v. *Boivin* (1) section 36 (7) of the Motor Vehicles

(1) (1933) 54 B.R. 133.

Act of Quebec, R.S.Q. 1941, chapter 142, which was in effect at the time of the decision, was considered. So far as relevant it read as follows:

36. (7) At bifurcations and at crossings of public highways, the driver of a vehicle on one of the roads shall give the right of way to the driver of a vehicle coming to his right on the other road.

In the Court of King's Bench the judgment of Galipeault J. of the Superior Court was confirmed. He had held that if effect was to be given to the law the driver of a vehicle could not enter an intersection with his vehicle,

Avant de s'être assuré qu'il ne venait pas sur la rue Caron, à sa droite, de voiture, à proximité de la sienne, et avant de s'être rendu compte qu'une collision n'était ni probable, ni possible.

and went on to say:

Pour se rendre ainsi compte de la situation, le conducteur doit regarder à sa droite avant de s'engager dans le croisement des chemins: si la vue lui est cachée, il doit user d'une précaution plus grande et arrêter son véhicule, si nécessaire.

Thus the section imposed a high duty of care on the part of the driver coming to an intersection to see to it that the driver coming to it from his right could pass through it safely. But this rule must be qualified by the dictates of common sense as pointed out by Hall J. in *Anderson* v. *Guardian Insurance Co. of Canada* (1): *vide* also the statement of Masten J.A. in *Hanley* v. *Hayes* (2).

In *Kennedy Lumber Company, Limited* v. *Porter* (3) the Saskatchewan Court of Appeal had to consider a similar provision, namely, section 45(2) of The Vehicles Act, R.S.S. 1930, chapter 226, which provided:

45. (2) Where a person operating a motor or other vehicle meets another vehicle at an intersection of highways the vehicle to the right shall have the right of way.

There the Court of Appeal, reversing the trial judge, held as the head note states:

Held that the fact that the car to the left is within the intersection before the car to the right enters it does not displace the latter's right to have the right of way. On the contrary, in an action resulting from a collision within an intersection the first question to be answered is: Why did not the driver to the left give way and keep out of the danger zone?

(1) (1933) 54 B.R. 407 at 410. (2) (1924) 55 O.L.R. 361 at 366.
(3) (1932) 1 W.W.R. 230.

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In that case Turgeon J.A., as he then was, rejected the contention that the plaintiff in that case had the right of way because his car was in the intersection first. At page 231, he said:

> An attempt was made in this case, and succeeded at the trial, and, I note from the decisions, has been made in other cases, so to distort the statute and to whittle away the right which it confers on the driver to the right, and the corresponding duty which it imposes on the driver to the left, that one would almost believe from some of the things said that the driver to the right is *prima facie* guilty in the case of a collision and that the onus is on him to show why he made use of his right of way. The statute contemplates no such procedure. In the ordinary case accidents of this sort could not happen if the driver to the left stopped his car, or reduced his speed, so as to give way to the man on his right and to allow him to cross the dangerous area first. This is what the Legislature intends shall happen; and when such an accident occurs it seems to me that the first question to be answered is why the driver to the left did not give way and keep out of the danger zone.

Sections of the sort under review reject the view that the right of way at an intersection belongs to the driver of the vehicle who enters it first. It plainly does not. The purpose of such sections is to prescribe a rule of the road for the purpose of eliminating collisions at intersections or lessening their number. That was the view of Duff C.J. in *Swartz* v. *Wills* (1) where the Supreme Court of Canada had before it for consideration a British Columbia statute similar to the one under review. There he said:

> I can perceive no ambiguity or obscurity in this language. The driver approaching an intercommunicating highway is to keep a lookout for drivers approaching upon the right upon that highway and to make way for them. If everybody does this a collision is not only improbable, it is hardly possible.

In *Tremblay* v. *The King* (2) I approved the decision of the Quebec Courts in *Drapeau* v. *Boivin* (*supra*) and held that its effect is that the driver of a vehicle on coming to an intersection must give right-of-way to a driver coming from his right, not only when the two vehicles are coming into the intersection at the same time but also when the driver sees a vehicle coming towards the intersection from his right even although he has himself reached the intersection first. This rule governs where the vehicles are approaching the intersection so nearly at the same time

(1) [1935] S.C.R. 628 at 629. (2) [1944] Ex. C.R. 1.

and at such a rate of speed that if both proceed, each without regard to the other, a collision is reasonably to be apprehended: *vide Hanley* v. *Hayes* (*supra*). To say that under sections such as the ones under review the driver of the vehicle who first enters an intersection has the right of way even as against a driver approaching the intersection from his right would not only be a distortion of the language of the section but would also defeat the purpose of the rule of the road which it enacts in that it would tend to an increase, rather than a decrease, in the number of collisions at intersections by inviting an increase of speed on the part of drivers of vehicles approaching an intersection and a competition between them to see who could enter the intersection first and thus acquire the right of way as against the driver of the other vehicle. In the *Tremblay* case (*supra*) I also expressed the view that compliance with the Quebec rule of the road gives rise to certain duties of care on the part of the driver of the servient vehicle, the one coming from the left, namely, that he shall keep a proper lookout to his right on coming into and passing through the intersection and also that he shall keep his vehicle under adequate control as to its speed, so that he will be able to stop in time to allow the driver of the dominant vehicle, the one coming from the right, to pass if his failure to do so would be likely to result in a collision.

But the most striking decision on the subject is that of the Supreme Court of Canada in *Walker* v. *Brownlee and Harmon* (1). There the Court had to consider section 41 (1) of the Highway Traffic Act, R.S.O. 1950, chapter 167, which provided:

> 41. (1) Where two persons in charge of vehicles or on horseback approach a cross road or intersection, or enter an intersection, at the same time, the person to the right hand of the other vehicle or horseman shall have the right-of-way.

All the judges of the Court sat on the case. The head note of the cited report gives the decision of the majority of the Court as follows:

> Where a collision between two cars occurs at an intersection when the driver of one car fails to yield the statutory right-of-way properly belonging to the driver of the other car but it appears that the latter could have seen the offending car had he looked to his left, he cannot nevertheless be held negligent unless the driver of the offending car

(1) [1952] 2 D.L.R. 450; [1952] S.C.R. ix.

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establishes that the person enjoying the right-of-way had a sufficient opportunity to avoid the collision had he acted with reasonable care after becoming aware or after he should have been aware of the other driver's disregard of his right-of-way. It is not enough that the accident would possibly have been avoided had he looked.

Cartwright J., speaking for Locke J. as well as for himself, put the *ratio decidendi* of the decision as follows, at page 461:

> While the decision of every motor vehicle collision case must depend on its particular facts, I am of the opinion that when A, the driver in the servient position, proceeds through an intersection in complete disregard of his statutory duty to yield the right-of-way and a collision results, if he seeks to cast any portion of the blame upon B, the driver having the right-of-way, A must establish that after B became aware, or by the exercise of reasonable care should have become aware, of A's disregard of the law B had in fact a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself; and I do not think that in such circumstances any doubts should be resolved in favour of A, whose unlawful conduct was *fons et origo mali.*

This decision is a most important one. It completely and emphatically rejects the view that the prior entry into the intersection of the driver on the left gives him the right-of-way over the driver on the right. It does not. To hold otherwise either directly or indirectly by suggesting that the prior entry of the driver on the left prevents the operative effect of the section would be a distortion of its plain language. The statutory right-of-way which the driver on the right has cannot be displaced by the prior entry into the intersection of the driver on the left, nor can such prior entry help him to escape from his statutory duty to yield the right-of-way to the driver on his right. But the importance of the decision rests particularly on its positive emphasis on the statutory right which the section confers on the driver on the right which includes a right to assume, until the contrary becomes apparent, that the driver on the left will yield the right-of-way to him. The decision in this case goes farther than any previous decision in recognizing the statutory right of the driver on the right and the corresponding statutory duty of the driver on the left. It is a striking declaration of the extent of the former's right and of the responsibility of the driver on the left to ensure his safe passage through the intersection.

In my opinion, the principle of the *Walker* v. *Brownlee and Harmon* case (*supra*) is plainly applicable in the present case.

There was, as is not unusual in collision cases, conflicting evidence of what happened immediately prior to the collision. I shall first summarize the evidence of Walter Shpur. He was driving the suppliant John Shpur's car with his permission. He had called for his 12 year old sister, the suppliant Emily Shpur, at their aunt's place and had proceeded south on 1st Street East for about two blocks before coming to the railway tracks. There was quite a steep grade coming up to them. He was then going at about 20 miles per hour but slowed down to check for trains to approximately 15 miles per hour. When he had crossed the tracks he looked south to see whether there was any traffic ahead of him and to the right to see whether there was any traffic coming from the west on Railway Avenue. He did not see any oncoming vehicle and proceeded south. He picked up momentum up to about 20 miles per hour. He looked to his right again when he was approximately 60 feet from the intersection of 1st Street East and Railway Avenue and saw the headlights of a car coming from the west on Railway Avenue. This car, which was Constable Wright's car, was then about 100 to 110 feet from the intersection. He immediately applied his brakes because he saw the car coming from the west and believed the cars were going to collide—the car from the west was coming fast and he just knew they were going to hit. He could not turn to his right on Railway Avenue because Constable Wright's car was on the left side of the road. He had just about come to a stop when he reached the intersection, his car then going at about $3\frac{1}{2}$ to 4 miles per hour. At that time Constable Wright's car, which had been going at possibly from 30 to 35 miles per hour on Railway Avenue, had slowed down to about 15 miles per hour. When he saw that he could not turn to his right he turned to the left but Constable Wright's car went straight on. The front part of the left side of Constable Wright's car struck his car on its right front fender and pushed it off to the left. The two cars ended up together in the south-east corner of the intersection, about 20 to 25 feet from the point of impact. The skid marks made by his car extend back for 22 feet whereas those made

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by Constable Wright's car went back for 40 feet. Walter Shpur asserted that Constable Wright could have avoided hitting his car if he had swerved about 10 feet to the right and also that he could have avoided the collision by turning to his right into Railway Avenue if Constable Wright had been on his right side of the road. He also stated that the north-west corner of 1st Street East and Railway Avenue was a partially blind corner because of some maple trees and spruce trees immediately north of Railway Avenue and near the corner, and that after he had crossed the tracks and first looked to his right he could not see Constable Wright's car on Railway Avenue because he was too close to the bushes.

On cross-examination Walter Shpur altered his evidence in some important respects. He admitted that he had told Sergeant Willan, to whom further reference will be made that he was going 20 miles per hour when he was crossing the tracks and increased his momentum after that so that he was going more than 20 miles per hour when he first saw Constable Wright's car approaching from his right. He also admitted that he had told Sergeant Willan that he saw the car to his right just as he got close to the intersection. When he was unable to tell the Court why he could not have stopped before he got to the intersection if he was 60 feet from it and going at only 20 or slightly more than 20 miles per hour he said that he put his brakes on as soon as he saw the lights of the other car and finally admitted that he was then about 35 feet from the intersection. He also admitted that he knew that he should yield the right-of-way to a car coming from his right. He also stated that a person north of the railway tracks and coming south on 1st Street East could not because of the height of the tracks see a car coming east on Railway Avenue.

I shall next summarize the evidence of Constable Wright. He was a member of the Vegreville detachment of the Royal Canadian Mounted Police. He had finished his town patrol duties and was on his way back to the R.C.M.P. barracks. He had gone north on Main Street, the first street west of 1st Street East, turned right on Railway Avenue and proceeded east on it. Because of cars parked on the south side of the street near Main Street he travelled on the left hand side of the road. He was going at about 25

miles per hour. As he approached the intersection of Railway Avenue and 1st Street East he pulled over to the centre line of the road and slowed down intending to make a left turn on 1st Street East. He had put his brakes on to do so and then slammed them on when he noticed a car coming from the left on 1st Street East and travelling south. This was Shpur's car. He was about 45 feet west of the intersection when he first saw it. It was about the same distance. He judged its speed to be about 20 to 25 miles per hour. He had been checking for a right hand approach on 1st Street East and had looked to his right before he saw the car coming from the left. When he put on his brakes he turned his wheel to the right but because his brakes were on his car did not respond. He entered the intersection approximately at the centre line of Railway Avenue. He could not tell which car entered the intersection first. He did not see the Shpur car turn to the left. As far as he could tell it was going straight. The cars collided at approximately the centre of the intersection, the left front of his car with the right front fender of Shpur's car. After they hit the back ends of the cars came together and then apart and the cars finally came to rest about 10 or 11 feet from the point of impact in the southeast corner of the intersection, the Shpur car being a little farther south than his. After Walter Shpur had left with his sister Emily Constable Wright phoned Sergeant L. F. Willan, who was in charge of the R.C.M.P. detachment at Vegreville, and helped him in taking measurements. The skid marks made by his car were on about the centre of Railway Avenue and extended back from the point of impact about 38 feet, whereas those made by Shpur's car were on 1st Street East and went back 22 feet from the point of impact.

There was very little variation in Constable Wright's evidence on his cross-examination. He admitted that he was approximately 30 feet from the west side of the intersection when he first saw the Shpur car and also that prior to coming to the intersection he might have been going more than 25 miles per hour. Just before the collision his speed was about 5 miles per hour.

There were some important statements by Walter Shpur that were proved to be untrue. After he had given his evidence Constable Wright and Sergeant Willan went back to

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Vegreville and made some tests. Constable Wright stated that the trees north of Railway Avenue near the north-west corner of that street and 1st Street East would have very little effect on the ability of a person travelling south on 1st Street East to see what was coming from the west on Railway Avenue. Such a person could see something coming quite plainly. He could see quite a distance west along Railway Avenue, approximately about 300 feet, and could see a car travelling east on Railway Avenue even if it was close to the trees. Constable Wright did not agree that the north-west corner of the two streets was altogether blind. You could see cars coming there quite plainly. Moreover, even if a person were in a car on 1st Street East at the intersection of that street north of the railway tracks he could see a car at the intersection of 1st Street East and Railway Avenue. Such a person could also see a car coming from the west on Railway Avenue for a distance of approximately 300 feet west of the intersection and could see such a car all the way while proceeding south on 1st Street East, while approaching the railway tracks, while crossing them and afterwards right to the intersection.

The evidence of Sergeant Willan was to the same effect. After identifying several photographs of the cars involved in the collision and explaining the legend attached to the plan of the intersection, filed as Exhibit 3, which he had prepared, he stated that there would have been room for Walter Shpur to turn to his right on Railway Avenue between Constable Wright's car and the north edge of the travelled portion of the road and then went on to explain the results of the tests which he and Constable Wright had made. They had first stationed a car on 1st Street East at the first intersection north of the tracks. This was 395 feet north of the intersection of 1st Street East and Railway Avenue. They then had put a car on Railway Avenue facing east and determined how far west of the intersection this car could be and still be visible to the driver of the first car. Sergeant Willan put this distance at 264 feet instead of approximately 300 feet as Constable Wright had stated. Sergeant Willan had paced the distance. Both cars, of course, had their lights on. The result of this test led to the conclusion that the driver of a car travelling south on 1st Street East could, even when he was north of the

tracks and 395 feet north of the intersection of 1st Street East and Railway Avenue, see a car going east on Railway Avenue when it was 264 feet west of the intersection and keep it in view at all times as he was proceeding south on 1st Street East towards the intersection.

The two police officers had made another interesting test. They had put one car on 1st Street East at the intersection north of the tracks with its lights on facing south and another car on 1st Street East at the intersection of Railway Avenue with its lights facing north. These cars were 395 feet apart with the railway tracks between them. By a series of measurements of the heights at which the lights of one car could be seen from the position of the other car, the details of which need not be set out, the police officers determined that the grade on 1st Street East from the north up to the railway tracks and to the south from the tracks was very slight. The level of the tracks was only 2 feet higher than that of the first intersection north of the tracks and only 3 feet higher than that of the intersection of 1st Street East and Railway Avenue. Sergeant Willan was not shaken in his cross-examination. Indeed, when he was questioned about the trees near the corner he stated that there was no obstruction.

In my opinion, the evidence is conclusive that Walter Shpur did not look to his right after he had crossed the track, as he said he did, or that he was approximately 60 feet from the intersection when he first saw Constable Wright's car. If he had looked at either of these distances he would have seen the car approaching the intersection from his right and could have stopped in plenty of time to yield the right-of-way to it as he should have done. There would then have been no collision. I do not accept his statements that he could not see a car coming from the west on Railway Avenue when he was north of the railway tracks and that he could not see Constable Wright's car after he had crossed the tracks because it was travelling too close to the bushes. The evidence of the two police officers completely disproves these statements. There was nothing to obstruct his view. Where there is nothing to obstruct the vision and there is a duty to look it is negligence not to see what is clearly visible: per Cannon J. in the *Swartz* case (*supra*). The fact is that Walter Shpur did not look to his

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right at all until he was about 35 feet from the intersection. He was then going too fast to be able to come to a stop before he reached the intersection. If he had had his car under adequate control in view of the circumstances he could have turned to his right on Railway Avenue or, failing that, he could have turned to his left. On the evidence before me I have no hesitation in finding that he did not keep a proper lookout to his right and did not have his car under proper control with the result that he failed to yield the right-of-way to Constable Wright's car as he should have done. His failure to do so was negligence on his part and the collision with its damage and hurt to the suppliant resulted therefrom.

There remains for consideration the question whether there was also negligence on Constable Wright's part. In my opinion, there was not. It is true that he was travelling partly to the left of the travelled portion of the road and may have intended to cut the corner but this had nothing to do with the collision. It would have happened even if his car had been wholly to the right of the centre of the travelled portion of the road and he had proceeded to pass to the right of the centre of the intersection before making a left turn to proceed north on 1st Street East. Moreover, it was reasonable and proper that when he had his foot on the brakes as he was nearing the intersection preparatory to making a left turn on 1st Street East he should first carefully check to his right to see whether there was any traffic coming from the south on 1st Street East before looking to his left. The south-west corner of this street and Railway Avenue was really a blind corner because of a picket fence and a high building behind it so that it was necessary to come almost up to the intersection before it was possible to see whether there was any north-bound traffic on 1st Street East. Moreover, although he did not put this forward, Constable Wright was entitled to assume that a car coming from the north on 1st Street East, being on his left, would yield the right-of-way to him. But apart from that he saw the Shpur car as soon as could be reasonably expected of a driver who would first look to his right, particularly at a dangerous corner. As soon as he saw the car coming from his left and apparently going straight on he slammed on his brakes and turned his wheel to the right. But he

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was then only 30 feet from the intersection, the slamming of the brakes prevented the car from responding to the turn of the wheel and there was nothing that he could do to avoid the collision. His position was, indeed, strikingly similar to that of the driver on the right in the *Walker* v. *Brownlee and Harmon* case (*supra*) and I find him equally free from negligence.

Under the circumstances, I find that Walter Shpur was solely to blame for the collision and its unfortunate results.

This means, of course, that the respondent is entitled to recover the amount of the counterclaim for the damage done to the Crown car. This was admitted at $388.40.

There will, therefore, be judgment that neither of the suppliants is entitled to any of the relief sought in the petition of right and that the respondent is entitled to recover the sum of $388.40 from the suppliant John Shpur. The respondent is also entitled to the costs of the claim as against the suppliants and of the counterclaim as against the suppliant John Shpur.

Judgment accordingly.

BETWEEN:

1951

Feb. 1

1954

Sept. 24

ELI LILLY & COMPANY (CANADA LIMITED ..... APPLICANT.

AND

ROSARIO MARTINEAU Trading as LA CIE CANADA DRUG COMPANY ..... RESPONDENT.

Practice—Trade Marks—Application for order for pleadings and determination of issues of fact on oral evidence—The Unfair Competition Act, 1932, S. of C. 1932, c. 38, ss. 52, 53, 54—Trade Marks Act, S. of C. 1952, c. 49, s. 58—General order for pleadings inconsistent with ss. 53 and 54—Not permissible to order all facts to be proved by oral evidence—Order for proof by oral evidence valid only in respect of specified disputes of fact—Word "requires" in s. 54 does not mean "requests"—Reasons to be shown for order.

In proceedings under section 52 of The Unfair Competition Act, 1932 instituted by the applicant to expunge the respondent's trade mark Betragen on the ground of its similarity to the applicant's trade

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mark Betalin an application was made on behalf of the respondent for an order for pleadings and the determination of the issues of fact on oral evidence.

Held: That it is inconsistent with sections 53 and 54 of the Act to make a general order for the filing of pleadings. It is plain from the sections that the object of the Act was to provide a summary method for the disposition of applications to expunge trade marks and it was not intended that it should be replaced by an action with formal pleadings.

2. That it is not permissible, in the face of the terms of section 54, to order that all the facts should be proved by oral evidence. Primarily, the application must be heard and determined summarily on evidence adduced by affidavit. It is only in respect of an issue of fact that an order for oral evidence may validly be made.

3. That when it has been ascertained what facts are in issue, if there are any, the applicant for the order must specify the particular issue or issues in respect of which he seeks an order for proof by oral evidence.

4. That the applicant must show some reason, beyond his mere request, for the order sought by him so that the Court may exercise its discretion in deciding whether the order should be made or not.

APPLICATION in proceedings under section 52 of The Unfair Competition Act, 1932 for an order for pleadings and the determination of the issues of fact on oral evidence.

The application was heard before the President of the Court at Ottawa.

Eric L. Medcalf, Q.C. for applicant.

H. Gerin-Lajoie, Q.C. for respondent.

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

THE PRESIDENT now (September 24, 1954) delivered the following judgment:

This is an application on behalf of the respondent for an order that the parties file pleadings giving particulars of the matters in issue between them and that all issues of fact raised in the pleadings be determined on oral evidence. The application is made in proceedings instituted by the applicant under section 52(1) of The Unfair Competition Act, 1932, Statutes of Canada, 1932, chapter 38, for an order that the entries in the Trade Mark Register relating to Registration No. N.S. 101/26100 of the trade mark Betagen for use in association with "produits pharmaceutiques" made in the name of the respondent be struck out on the ground that they do not accurately express or define the

existing rights of the respondent, for the reason that the said trade mark Betagen is similar to the applicant's trade mark Betalin already registered for use in connection with similar wares under No. N.S. 42/11462.

The applicant's proceedings were instituted by filing with the Registrar of the Court an originating notice of motion pursuant to section 53 of the Act which provides:

> 53. Every application under the next preceding section shall be made either by the filing with the Registrar of the Court of an originating notice of motion or by counterclaim in an action for the infringement of the mark.

The respondent's application purports to be made under the authority of section 54 of the Act which, so far as relevant, reads as follows:

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

While section 53 provides for the institution of proceedings by the filing of an originating notice of motion there is no provision in the Act requiring the respondent to disclose prior to the return of the motion whether he intends to oppose the application or not or what his defence, if any, is. He need not file any affidavits until the morning of the day of the return. This deficiency in the statutory procedure led to the adoption of a practice, where either party wished to avail himself of it, of applying for an order that pleadings be filed and that all issues of fact be heard and determined on oral evidence. This had the effect of turning the special summary proceedings contemplated by the Act into an action. The details of this practice are set out in 6 Canadian Patent Reporter, at pages 69 to 73. It was in pursuance of this practice that the respondent launched the present motion. Until this application was made the validity of the practice was never challenged. Now counsel for the applicant does so sharply and, in my opinion, successfully. There are several reasons for this conclusion.

It is inconsistent with sections 53 and 54 of the Act to make a general order for the filing of pleadings. It is plain from the sections that the object of the Act was to provide a summary method for the disposition of applications to expunge trade marks and it was not intended that it should

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be replaced by an action with formal pleadings. The essential summary character of the proceedings must be maintained.

There is a further reason for not making the general order sought by the respondent. Under the practice referred to when an order for pleadings and the determination of all issues of fact on oral evidence was made it was assumed that all the facts, regardless of whether there was any dispute in respect of them, should be proved exclusively by oral evidence. If that consequence is implied in the making of such an order there is no authority for making it for it is not permissible, in the face of the terms of section 54, to order that all the facts should be proved by oral evidence. Primarily, the application must be heard and determined summarily on evidence adduced by affidavit. This is mandatory unless, as the section provides, "either party requires some issue of fact to be determined on oral evidence." Consequently, the first thing to be determined is whether there is any issue of fact. An issue of fact denotes a dispute as to the fact in question. The Concise Oxford Dictionary gives the following as one of the meanings of the word "issue":

> Point in question, esp. (Law) between contending parties in action, as *i of fact* (when fact is denied), *i of law* (when application of the law is contested);

Thus it seems clear that if there is no issue of fact, that is to say, no dispute of fact, there is no authority for departing from the direction in section 54 that the facts are to be proved by affidavit evidence. It is only in respect of an issue of fact that an order for oral evidence may validly be made. Consequently, the applicant for such an order must show that there is a dispute of fact. Unfortunately, there is a deficiency in the statutory procedure. There is no provision for ascertaining, prior to the return of the motion, what facts, if any, are in dispute. Consequently, it is desirable, if an adjournment of the hearing on the return of the motion is to be avoided, to find some solution of the problem presented by the deficiency so that the parties may know where they stand. This can be done by requiring the respondent within a specified time to file and serve an answer to the reasons given by the applicant in its originating notice of motion and an affidavit or affidavits proving the facts relied upon by him and permitting the applicant

within a specified time to file and serve a reply thereto. While there is no specific authority, such as there is in section 58 of the Trade Marks Act, S. of C. 1952, Chapter 49, for such a course it has the merit of enabling the parties to ascertain what facts, if any, are in dispute and to decide whether an application should be made for an order that the disputed issues should be heard and determined on oral evidence.

Counsel for the respondent contended that the word "requires" in section 53 means "requests" and that on his mere request the respondent is entitled to have all the issues of fact heard and determined on oral evidence. I do not agree.

In the first place he has not shown that there are any "issues" of fact to be heard and determined. This he must do first.

Then when it has been ascertained what facts are in issue, if there are any, the applicant for the order must specify the particular issue or issues in respect of which he seeks an order for proof by oral evidence. It will then be possible for the Court after hearing the parties to settle the issues to be heard and determined by oral evidence. This was the view expressed by Cameron J. in *The Perry Knitting Company* v. *Harley Mfg. Company Ltd.* (1) with which I agree.

Finally, in my opinion, the word "requires" in section 53 does not mean "requests". The New Oxford Dictionary gives several definitions of it including:

II. 5. (*a*) To ask for (some thing or person) authoritatively or imperatively, or as a right; to demand, claim, insist on having.

(*b*) To ask for (something) as a favour; to beg, entreat, or request (of one). Now *rare*.

(*c*) To make request or demand.

(*d*) To ask or request to have, etc. Now *rare*.

and also:

II. 6. To demand as necessary or essential on general principles, or in order to comply with or satisfy some regulation.

(*b*) To demand or call for an appropriate or suitable in the particular case; to need for some end or purpose.

(*c*) To demand as a necessary help or aid; hence, to stand in need of; to need, want.

(1) [1952] Ex. C.R. 26.

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It seems to me that in the context the word "requires" has the second of these meanings rather than the first. That being so, the applicant must show some reason, beyond his mere request, for the order sought by him so that the Court may exercise its discretion in deciding whether the order should be made or not.

For the reasons given the respondent's application must be refused, with leave to renew it in respect of specific issues of fact when it has been determined what facts, if any, are disputed. For that purpose the respondent should within 30 days from the date hereof file and serve his answer to the reasons given by the applicant in its originating notice of motion and affidavits in proof of the statements of fact in such answer and the applicant should within 20 days thereafter file its reply to such answer, with leave to either party to apply for further directions.

The costs of this motion and order will be costs in the cause to the applicant in any event of the cause.

Order accordingly.

BETWEEN:

DENIS RICHARD .....SUPPLIANT;

1954
Sept. 20
Sept. 22

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Revenue—Customs and Excise—Seizure—Forfeiture—The Customs Act, R.S.C. 1952, c. 58, s. 181(1) and (2)—Petition of Right—Motor vehicle that transports persons assisting in the importation or subsequent transportation of goods liable to forfeiture—Suppliant entitled to relief sought by his Petition of Right—Sanctions contemplated by s. 181(1) and (2) of the Act—Construction to be given to words "all vehicles made use of in the subsequent transportation" in s. 181(1) of the Act—Meaning of the words "made use of in the subsequent transportation" in s. 181(1) of the Act.

Royal Canadian Mounted Police constables on duty near the American border in the vicinity of Mansonville, Quebec, one evening observed two automobiles. One was stationary and the second one crossed to the American side. Some minutes later this second automobile returned to Canada, stopped a minute and then, preceded by the first automobile, drove to Mansonville where constables at a road block stopped the first automobile and while they were questioning its driver, the suppliant herein, the second automobile following behind at a short distance turned to a side street and disappeared. It was found later abandoned with 102,000 American cigarettes in it. No cigarettes were found in suppliant's automobile and no charge was preferred against him. However, his vehicle was seized and its forfeiture ordered by the Minister of National Revenue on the ground that it was used in the importation or in the subsequent transportation of goods liable to forfeiture under the Customs Act, R.S.C. 1952, c. 58. After being notified of the Minister's decision suppliant filed a Petition of Right in which he seeks an order of this Court to set aside the seizure and forfeiture of his automobile and to grant him its release and return or the value thereof.

Held: That suppliant is entitled to the relief sought by his Petition of Right.

2. That a motor vehicle that transports persons who are then assisting in the importation or the subsequent transportation of goods liable to forfeiture under the Customs Act is not itself liable to seizure and forfeiture. *Gold* v. *The King* [1951] Ex. C.R. 104 disapproved. No such punitive sanction is contemplated by s. 181(2) of the Act as against vehicles made use of in transporting abbettors of the infraction defined therein. The penalty is directed at the person who assists in the importation or the subsequent transportation of the goods.

3. That the words "all vehicles . . . made use of in the . . . subsequent transportation" in s. 181(1) of the Act cannot be construed as to include vehicles that are not made use of in the actual and physical removal of the goods. Where an Act defines a statutory infraction the construction to be given to its text must not be such as to create a new infraction. The words "made use of in the subsequent transportation" may not be given a wider meaning than that which they actually have.

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PETITION OF RIGHT in which suppliant seeks an order of the Court to set aside the seizure and forfeiture of his automobile.

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

Henri Lizotte for suppliant.

Doris Robert for respondent.

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

FOURNIER J. now (September 22, 1954) delivered the following judgment:

Par sa pétition de droit, le requérant prie la Cour de déclarer nulle et de nul effet la saisie et confiscation de son automobile de marque Meteor, Sedan, modèle 1952, saisie par les officiers de l'intimée le 22 septembre 1953; de lui accorder mainlevée de ladite saisie et remise de son automobile ou la valeur d'icelle, soit $2,000.

L'automobile fut saisie le 22 septembre 1953 et il en fut notifié le 17 novembre suivant par le Ministre du Revenu National. La raison de la saisie était que le dit véhicule avait servi à l'importation ou au transport subséquent de marchandises passibles de confiscation aux termes de la Loi des Douanes, à savoir: des cigarettes (voir pièce 2, produite à l'enquête). La décision du Ministre que l'automobile soit confisquée fut rendue le 13 janvier 1954 et le requérant en fut avisé le 15 janvier suivant.

Le requérant ne donna pas au Ministre du Revenu National d'avis qu'il n'acceptait pas sa décision du 17 novembre 1953, parce que le même jour il faisait signifier à l'intimée ou à ses officiers et produisait chez le Registraire de cette Cour le présente pétition de droit.

Avant de traiter des questions de droit soulevées au cours du procès, je crois utile de faire un résumé de la preuve.

Le 14 septembre 1953, le requérant, pour une somme d'environ $2,000, s'était porté acquéreur de l'automobile saisie dans cette cause. Il en reçut livraison à Granby le 17 septembre 1953. Après livraison, il conduisit l'automobile de Granby à Roxton Falls, endroit de sa résidence. Peu après son arrivée chez lui, son beau-père, Omer Larivière,

lui proposa de le conduire chez Roméo Duguay qui demeure à quelque cinq milles de Mansonville, comté de Brome. Il désirait acheter du bois de construction de ce dernier.

Ils partirent de Roxton Falls après souper et arrivèrent chez Duguay vers les sept heures du soir. Duguay était dans son champ à faucher du sarrasin. Le requérant stationna son automobile sur la route vis-à-vis l'endroit où se trouvait Duguay. Larivière débarqua et Duguay vint le rejoindre à la bordure du chemin. La conversation dura environ une demi-heure. Pendant ce temps, le requérant se tenait près de sa voiture et ne prit aucune part à la conversation. Il connaissait le sujet de la conversation, mais il n'entendait pas ce qui se disait.

Après cet arrêt, ils continuèrent, sur la même route, dans la direction de la résidence de Duguay; le requérant voulait voir la maison et les bâtiments. Ils firent environ un mille dans cette direction avant de rebrousser chemin. Au retour, le requérant eut de la difficulté avec la chaufferette et le système de climatisation de sa voiture. Il arrêta à deux ou trois reprises sur la route afin de tenter de réparer ces défectuosités, mais sans succès. Il n'a pu spécifier les endroits de ces arrêts. Pendant ces arrêts, il aurait été stationné environ une demi-heure chaque fois. Pour se rendre de chez Duguay à Mansonville, soit une distance d'environ cinq milles, il aurait pris environ une heure et demie.

En arrivant à Mansonville, un peu après neuf heures, au haut de la côte des officiers de la Gendarmerie royale lui firent signe d'arrêter. Ils lui demandèrent son nom, son adresse et d'où il venait. Il leur répondit qu'il venait de chez Roméo Duguay. Un peu plus tard, un des officiers, accompagné du requérant et de son beau-père, se rendit chez Duguay pour vérifier ce fait. Des perquisitions furent faites dans l'automobile du requérant, mais les officiers ne purent trouver aucun article de contrebande. Les deux furent conduits à Sutton, au bureau de la Gendarmerie, et furent questionnés. Le requérant qui n'avait pris possession de l'automobile que ce jour-là, nia avoir transporté des marchandises illégalement importées dans ce véhicule. De plus, lui et son beau-père ignoraient, dirent-ils, que leur parent, Fernand Gendron, se trouvait dans ce voisinage ce jour-là. Duguay corrobore leur témoignage quant à leur visite chez lui.

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Quant aux témoins de l'intimée, ils sont trois membres de la Gendarmerie royale. Le 17 septembre 1953, sous la direction du caporal Richard Greffard, ils surveillaient la frontière entre le Canada et les Etats-Unis, à un endroit près de la croisée des trois chemins et de la route "La Plume Road" qui traverse la frontière non loin de l'endroit où ils étaient embusqués. Ils étaient sept voyageant dans deux automobiles, quatre dans l'une et trois dans l'autre. Ils avaient procédé de Mansonville à la croisée des trois chemins par le chemin d'en haut. Arrivés à la croisée des trois chemins, où aboutissent les routes "Creek Road", "La Plume Road" et le "Chemin d'en haut", le caporal ordonna à ses hommes de se poster aux endroits suivants: une automobile avec deux hommes sur le chemin connu sous le nom de "Lake Shore Road" et une autre automobile sur le chemin "Province Road", et d'attendre ses instructions. Le caporal Greffard et le constable Plante se postèrent sur une côte, à une élévation de six ou sept cents pieds, à peu de distance de la croisée des trois chemins et de la route "La Plume" qui conduit à la frontière. Il était vers huit heures du soir. Le temps était pluvieux, mais il n'y avait pas de brume. La caporal avait des lunettes d'approche.

Vers 8.40 p.m. il vit une automobile marque Ford, modèle 1946 ou 1947, s'engager sur la route "La Plume" en direction des Etats-Unis. En approchant de la frontière et avant de traverser les lignes, les lumières de l'automobile furent éteintes. Vers le même temps, il vit une autre automobile stationnée à la croisée des trois chemins qui n'avait que ses lumières d'arrêt. Il n'a pu identifier positivement cette voiture. Il lui a semblé que c'était une machine de marque Ford à deux tons et il est corroboré sur ce point par son compagnon. Vers 8.55 p.m. il vit revenir de la frontière le Ford qui était traversé auparavant. A l'intersection des trois chemins, les phares du Ford reflétèrent sur la voiture stationnée. Après une minute d'arrêt, la voiture stationnée s'engagea sur le chemin "Creek Road" en direction de Mansonville, suivie, à peu de distance, par le Ford qui revenait des Etats-Unis.

Le caporal donna instruction au conducteur d'une des automobiles-patrouilles de se rendre à Mansonville par le chemin d'en haut et de barrer la route aux deux véhicules

qui procédaient sur le "Creek Road" et demanda au conducteur d'une autre automobile de suivre ces véhicules sur le "Creek Road".

Comme relaté plus haut, les officiers arrêterent l'automobile du requérant à l'entrée du village de Mansonville. Pendant qu'ils questionnaient le requérant, la deuxième voiture, qui suivait à une distance d'environ 300 pieds, ralentit sa course, prit une rue à sa droite et disparut. L'automobile de la police se mit à sa poursuite et parvint à la rejoindre, après une course de vingt-cinq milles, au bout du "Lake Shore Road", près du lac. Le conducteur avait abandonné sa voiture et s'était échappé. Dans l'automobile, les officiers trouvèrent 102,000 cigarettes américaines illégalement importées. Quelques jours plus tard, le conducteur fut arrêté. C'était Fernand Gendron, beau-frère du requérant et gendre du témoin Omer Larivière.

La saisie de l'automobile du requérant a été faite en vertu des dispositions de l'article 181(1) de la Loi des douanes, S.C.R., 1952, chap. 58, et ses amendements, qui se lit comme suit:

> 181. (1) Tous les navires, avec leurs canons, palans, agrès, apparaux et équipements, et les véhicules, harnais, gréements, chevaux et bestiaux *qui ont servi* à importer, décharger, débarquer ou enlever ou à transporter subséquemment des effets passibles de confiscation en vertu de la présente loi, doivent être saisis et confisqués.

D'ailleurs, l'avis de saisie donne la description de l'infraction dans les termes suivants:

> Que le dit véhicule a servi à l'importation ou au transport subséquent de marchandises passibles de confiscation aux termes de la Loi des douanes, à savoir: des cigarettes.

Dans sa défense et au cours du procès, l'intimée, par l'entremise de son procureur, a été plus loin. Elle a prétendu que le fait par le requérant d'avoir conduit son véhicule en avant de celui de Fernand Gendron, qui transportait des cigarettes illégalement importées, de la croisée des trois chemins sur la route "Creek Road" à Mansonville, créait une présomption et établissait que son automobile avait servi au transport subséquent de marchandises de contrebande et rendait ce véhicule passible de saisie et de confiscation.

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Une autre prétention de la Couronne est que le fait par le requérant d'avoir aidé et assisté Gendron à importer, transporter et transporter subséquemment de telles marchandises alors qu'il conduisait son automobile faisait présumer et établissait aussi que le véhicule avait servi à la commission de l'infraction prévue à l'article 181(1) et le rendait passible de saisie et confiscation.

Je crois que cette dernière proposition est basée sur les dispositions de l'article 181(2) qui se lit comme suit:

> Quiconque aide ou de quelque autre manière est intéressé à l'importation, au déchargement, au débarquement, à l'enlèvement ou au transport subséquent ou au recel de ces effets ou les reçoit entre ses mains ou en sa possession sans excuse légitime dont la preuve incombe à l'accusé, doit en sus de toute autre amende, verser une somme égale à la valeur de ces effets, . . .; il est de plus passible, après déclaration sommaire de culpabilité . . . d'une amende ou de l'emprisonnement . . .

Dans cet article, la loi crée une offense personnelle pour celui qui assiste ou est intéressé d'une manière ou d'une autre dans l'importation ou le transport de telles marchandises et impose des pénalités sous forme d'amendes ou d'emprisonnement aux personnes trouvées coupables de telles infractions. Le requérant, s'il avait commis l'infraction définie dans cet article, aurait pu être accusé et, dans le cas de culpabilité, avoir été condamné à une amende ou à la prison. Aucune plainte n'a été portée contre lui. La procédure suivie a été la saisie et confiscation de son automobile. Je ne crois pas qu'une personne conduisant alors son automobile et qui commet l'infraction d'assister une autre personne à commettre l'infraction d'importer ou de transporter des articles de contrebande devient passible de saisie et de confiscation; je ne crois pas, dis-je, que la commision de l'infraction prévue à l'article 181(2) comporte un droit de saisie et de confiscation du véhicule en faveur de la Couronne. Si ce droit existait, chaque fois qu'une personne commettrait cette infraction par parole, geste ou action alors qu'elle se trouve dans un véhicule quelconque, même si ce véhicule n'a aucunement servi à importer ou transporter des articles de contrebande, elle deviendrait passible de saisie et de confiscation. Il me semble que les termes de cet article ne peuvent se prêter à une telle interprétation. Si le législateur avait eu l'intention de rendre passible de saisie et confiscation tout véhicule servant au déplacement et transport de personnes commettant des infractions à la

Loi des douanes et particulièrement l'offense d'assister dans l'importation et le transport d'articles de contrebande, il l'aurait clairement exprimée. Cette loi couvre tous les cas où des véhicules peuvent être saisis et confisqués et l'article 181(2) ne comporte pas telle sanction contre les véhicules dans lesquels les fauteurs d'infraction sont transportés.

Malgré tout le respect que j'ai pour le savant juge qui a rendu jugement dans la cause de *Gold* v. *The King* (1), la seule cause que je connaisse décidant d'un litige semblable à celui qui nous intéresse, je ne crois pas devoir suivre sa décision dans cette cause.

Il s'agissait d'un nommé Gold propriétaire d'une automobile qui avait précédé avec sa voiture un camion transportant des marchandises de contrebande et, malgré sa connaissance de ce fait, avait dirigé et piloté le camion dans le trajet à suivre pour se rendre à sa destination.

La décision du savant juge est à l'effet que Gold ayant assisté dans le transport subséquent de marchandises passibles de confiscation alors qu'il conduisait son automobile, celle-ci était passible de saisie et confiscation. Pour les raisons ci-haut données, je ne crois pas que l'article 181(2) puisse se prêter à telle interprétation.

Les raisons données pour conclure qu'une personne qui assiste dans le transport d'articles de contrebande alors qu'elle se trouve dans un véhicule, ne rend pas ce véhicule passible de confiscation, s'appliquent tout aussi bien à la première proposition de l'intimée.

L'article 181(1) contient dans son texte les mots suivants: "All vehicles made use of in the transportation" ou les mots: "Les véhicules qui ont servi au transport, etc." Ces mots peuvent-ils s'interpréter de manière à s'appliquer même aux véhicules qui n'ont pas servi au transport physique actuel des articles mêmes? La présence dans ces véhicules de personnes qui connaissent le transport illégal fait dans une autre voiture et l'aide qu'elles accordent au fauteur d'infraction, suffisent-elles pour justifier la conclusion que ces véhicules ont servi à transporter des marchandises passibles de confiscation au sens de la loi?

(1) [1951] Ex. C.R. 104, 111.

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Fournier J.

Si la réponse à ces questions était dans l'affirmative, il faudrait envisager bien des cas où l'application de ces théories aurait des conséquences non prévues par les termes du statut qui doivent être interprétés strictement.

Je crois plutôt que la réponse devrait être dans la négative. Quand une loi définit une infraction statutaire, l'interprétation à être donnée aux termes dans leur texte, à mon humble avis, ne doit pas être telle qu'elle crée une nouvelle infraction. Le Parlement dans la Loi des douanes a prévu en termes précis et clairs toutes les infractions imaginables au statut. S'il avait voulu inclure dans la liste des offenses le fait qu'un véhicule transportant un fauteur d'infraction le rendait passible de confiscation, il l'aurait dit. De plus, s'il avait eu l'intention de rendre passible de confiscation un véhicule servant à diriger et piloter un véhicule servant à importer ou transporter des articles de contrebande, il l'aurait clairement exprimée et n'aurait pas laissé à l'interprétation ce qui pouvait si facilement être décrit. Je ne crois pas devoir donner aux mots "Made use of in the transporting" ou "ont servi au transport" un sens plus étendu que celui qu'ils ont en réalité.

Dans le cas présent, même si les faits prouvés établissaient que le requérant assistait Gendron dans le transport de marchandises de contrebande ou était intéressé dans ce transport et même dirigeait et pilotait le fauteur d'infraction dans ces activités illégales alors qu'il était dans son automobile, ce dont je doute, je suis d'avis que l'article 181 (1) et (2) ne pourrait s'interpréter de manière à rendre passible de confiscation l'automobile dans laquelle le requérant circulait. Par conséquent, je ne puis accepter les prétentions du procureur de l'intimée.

La Cour déclare la saisie et confiscation de l'automobile Sedan, marque Meteor, modèle 1952, appartenant au requérant, nulles et de nul effet et accorde mainlevée de la dite saisie. Le requérant a droit à la remise de son automobile et aux frais des présentes.

Judgment accordingly.

1954

Sept. 7

Oct. 9

BETWEEN:

DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE ..... APPELLANT;

AND

FLEETWOOD LOGGING COMPANY LIMITED ..... RESPONDENT.

Revenue—Customs and Excise—Goods subject to duty—Logging operations—Logging cars used exclusively in the transportation of logs—Whether use thereof in removing logs part of the operation of logging—Whether railway cars—The Customs Tariff, R.S.C. 1952, c. 60, Schedule "A", Tariff items 411A and 438—The Customs Act, R.S.C. 1952, c. 58, ss. 2(2) and 45—Tariff Board—Question of law on appeal from Tariff Board—Whether Tariff Board as a matter of law erred in its finding—Appeal from Tariff Board dismissed.

Respondent company carries on logging operations in British Columbia. It cuts logs on its own property near Creekside, moves them by its own trucks to its railway spur there, connecting with the main line of the Pacific Great Eastern Railway, and loads them on logging cars used exclusively in the transportation of logs. The cars are then transported by the railway company locomotives, equipment and employees over its main line to Squamish where they are tracked onto a respondent spur line. There the logs are unloaded, dumped into the water and subsequently floated to respondent's mills at Vancouver, these latter operations being carried out by respondent's employees. It imported thirty-five of these railway logging cars which appellant ruled dutiable under Tariff item 438 of the Customs Tariff, R.S.C. 1952, c. 60, namely "railway cars and parts thereof, n.o.p.". On an appeal from that ruling the Tariff Board held that Tariff item 411A should be applied, namely ". . . logging cars . . . for use exclusively in the operation of logging, such operation to include the removal of the log from stump to skidway, log dump, or common or other carrier". Leave to appeal to this Court from the decision of the Board was granted upon the following question of law:

> Did the Tariff Board err as a matter of law in deciding that certain used railway logging cars, imported under Vancouver Customs Entry No. 44554-A dated November 5, 1951, were imported for use exclusively in the operation of logging and therefore classifiable under Tariff Item 411a of the Customs Tariff?

Held: That the "removal" in the manner specified in Tariff item 411A is part of the "operation of logging" for the purpose of the item. The concluding words of the item give recognition to the fact that in some cases the normal logging operations may cease when the log reaches the skidway; in others, when it reaches the log dump, and in still others when it reaches the common or other carrier. In each case the removal of the log from the stump to either of the places or carrier named, is part of the "operation of logging".

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2. That an importer who is otherwise qualified under Tariff item 411A is entitled to its benefit if he establishes that the removal of his logs from the stump is *either* to the skidway, to the log dump, or to a common or other carrier. These words are expressed in the alternative and it is sufficient if he brings himself within any one of them. Here the removal is the transportation by one means or another from the stump to the log dump at Squamish. The item does not require that the removal should be entirely by the logging operator or over his own property, or be carried out by his own employee.

3. That the use of the logging cars of respondent company in the removal of its logs from Creekside to its log dump at Squamish by using part of the facilities of the Pacific Great Eastern Railway cannot be distinguished from other cases in which similar logging cars are used by other companies in removing their logs to their log dumps over railway lines owned and operated by them. To find otherwise would be to disregard the provisions of the Customs Act, R.S.C. 1952, c. 58, s. 2(2) and to prevent the attainment of one of the purposes for which Tariff item 411A was inserted in the Act, namely, to assist those engaged in logging operations.

4. That the conveyance of respondent's logs by the Pacific Great Eastern Railway was a railroad operation within the "operation of logging".

APPEAL under the Customs Act, R.S.C. 1952, c. 58, s. 45, from a decision of the Tariff Board.

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

K. E. Eaton for appellant.

W. S. Owen, Q.C. and *J. M. Coyne* for respondent.

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

CAMERON J. now (October 9, 1954) delivered the following judgment:

This is an appeal taken under section 45 of The Customs Act, R.S.C. 1952, chapter 58, from a decision of the Tariff Board dated January 21, 1954 (Tariff Appeal No. 308). On February 19, leave to appeal was granted on the following question of law:

> Did the Tariff Board err as a matter of law in deciding that certain used railway logging cars, imported under Vancouver Customs Entry No. 44554-A dated November 5, 1951, were imported for use exclusively in the operation of logging and therefore classifiable under Tariff Item 411a of the Customs Tariff?

The facts are not in dispute. The respondent is a logging company carrying on its operations in British Columbia. Under Customs Entry No. 44554-A, it imported thirty-five

used railway logging cars described in the entry as "logging machinery—logging skeleton railroad trucks with bunks". Tariff Item 411a was applied. The Dominion Customs Appraiser, however, ruled that such cars were dutiable under Tariff Item 438 and that decision was confirmed by the Deputy Minister of National Revenue, Customs and Excise, on November 12, 1953. An appeal to the Tariff Board was allowed, the Board holding that Tariff Item 411a should be applied. It is as follows:

411a. Machinery, logging cars, cranes, blocks and tackle, wire rope, but not including wire rope to be used for guy ropes or in braking logs going down grade, and complete parts of all the foregoing, for use exclusively in the operation of logging, such operation to include the removal of the log from stump to skidway, log dump, or common or other carrier.

It is not denied that if the logging cars are not dutiable under that tariff item, they are dutiable under Item 438, which reads:

railway cars and parts thereof, n.o.p.

The respondent cuts logs on its own property in the vicinity of Creekside. The logs are then moved by the respondent's own trucks to a "cold deck" which adjoins a railway spur connecting with the line of the Pacific Great Eastern Railway at Creekside. The spur is some 2,500 feet in length and is situated on lands leased by the respondent from the Department of Indians Affairs; but the rails, spikes, switches, etc., are owned by the railway. The respondent makes up trains of these logging cars, spots them on the spur at Creekside and loads them with logs. The cars are then transported by means of Pacific Great Eastern Railway locomotives, equipment and employees over the main line of the railway from Creekside to Squamish, a distance of approximately sixty-two miles. Fleetwood employees do not accompany the cars on that trip or on the return trip when the cars are returned empty to Creekside.

When the cars arrive at Squamish they are tracked onto a Fleetwood spur line there, the logs are unloaded, dumped into the water and subsequently floated to Vancouver for use in Fleetwood's mills. The spur line at Squamish was constructed at Fleetwood's expense over land leased from the railway; the dumping area and booming grounds at Squamish are owned by Fleetwood. From the time when the cars are placed on the spur at Squamish, all subsequent

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operations there are carried out by Fleetwood employees, including the unloading, piling and placing of the logs in the log dump or booming ground.

Counsel for the appellant admits that the cars in question are logging cars and that they are used exclusively in the transportation of the appellant's logs, the contract with the Pacific Great Eastern Railway providing that they cannot be used for any other purpose. He also admits that all operations carried out by Fleetwood up to the time when the railway locomotives commence to move the cars from Creekside are logging operations; and that from the time when the loaded cars are placed on the spur at Squamish until the logs are placed in the log dump there, the operations carried out by Fleetwood are logging operations. He contends, however, that when the railway locomotives commence the transportation of the cars at Creekside, the logs have been removed to a common or other carrier, that the transportation from the Creekside spur to the Squamish spur is excluded from those operations stated by Tariff Item 411a to be included in a logging operation; and that therefore the cars are not used exclusively in the operation of logging. Briefly, he says that the logging operation, under these circumstances, is suspended while the logs are being transported from Creekside to the spur at Squamish and that such transfer is not, in fact, a "logging operation" but rather a "railroad operation". He agrees, however, that if under the same circumstances the transportation from Creekside to Squamish had been carried out by Fleetwood, using its own cars, locomotives, equipment and employees over its own line of railway and on its own property, such an operation would have been part of its logging operations and Tariff Item 411a would have been applied.

Counsel for the respondent relies on the words of Item 411a and submits that the logging cars in question were used exclusively in the operation of logging and that the section specifically provides that a logging operation includes the removal of the logs from stump to log dump, the latter in this case being the appellant's log dump at Squamish.

I think it is clear that Item 411a, taken as a whole, is intended to confer a special benefit upon loggers in respect of the machinery and named equipment to be used exclusively in logging operations, as well as to raise revenue.

It is necessary, therefore, in endeavouring to construe its meaning, to keep in mind the provisions of section 2(2) of The Customs Act, R.S.C. 1952, chapter 42, which is as follows:

2(2). All the expressions and provisions of this Act, or of any law relating to the Customs, shall receive such fair and liberal construction and interpretation as will best ensure the protection of the revenue and the attainment of the purpose for which this Act or such law was made, according to its true intent, meaning and spirit.

The parties are in agreement that the only portion of the item which needs to be considered is as follows:

. . . logging cars, . . . for use exclusively in the operation of logging, such operation to include the removal of the log from stump to skidway, log dump, or common or other carrier.

The term "operation of logging" is not defined either in the Customs Tariff Act or The Customs Act. Tariff Item 411a, in my opinion, does not attempt to define it; indeed, it might be difficult to attempt to do so, for the term as used in one part of the country might include some phase of the operation which would not be included in other areas. What the item does, I think, is to name the various articles which come within its purview (conditional upon the requirement that they must be for use exclusively in the operation of logging) and then to provide that for the purposes of the item the "operation of logging" would not terminate with those parts of the operation which normally precede the removal of the logs (such as felling and cutting logs), but would include a further step, namely, "the removal of the logs from stump to skidway, log dump or common or other carrier". These concluding words as I interpret them make it quite clear that the removal in the manner specified is part of the "operation of logging" for the purpose of the item. But they do more than that; they give recognition to the fact that in some cases the normal logging operations may cease when the log reaches the skidway; in others when it reaches the log dump, and in still others when it reaches the common or other carrier. In each case the removal of the log from the stump to either of the places or carrier named, is part of the "operation of logging".

As I have said, counsel for the appellant admits that the operations of Fleetwood at Squamish, which I have described, constitute part of its logging operations, and the

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evidence makes it clear that such is the case. Fleetwood expended some $50,000.00 in installing the necessary equipment, etc., after the railway had refused to provide the necessary facilities. It is an integral part of the operation; its log dump is there; and it is there that the logs are placed in the water, sorted, scaled, and the stumpage dues ascertained.

I think an importer who is otherwise qualified under Item 411a is entitled to its benefits if he demonstrates that the removal of his logs from the stump is *either* to the skidway, to the log dump, or to a common or other carrier. These words are expressed in the alternative and it is sufficient if he brings himself within any one of them. There is no provision that if, in the removal of the logs from the stump to the log dump, they are delivered to a common or other carrier, the operation of removal terminates or is suspended, the latter of which was suggested by counsel for the appellant. In this case the removal is the transportation by one means or another from the stump *to* the log dump at Squamish. The item does not require that the removal should be entirely by the logging operator, or over his own property, or be carried out by his own employees.

The test to be applied is this. "Is the equipment for use exclusively in the operation of logging?" In my opinion, the use of the logging cars of the respondent in the removal of its logs from Creekside to its log dump at Squamish by using in part the facilities of the Pacific Great Eastern Railway, cannot be distinguished from other cases in which similar logging cars are used by other companies in removing their logs to their log dumps over railroad lines owned and operated by them; and as I have stated above, counsel for the appellant admits that in the latter cases such user of the logging cars was a use exclusively in the operation of logging. To find otherwise, in my opinion, would be to disregard the provisions of section 2(2) of The Customs Act (*supra*) and to prevent the attainment of one of the purposes for which the item was inserted in the Act, namely, to assist those engaged in logging operations. It would also place at a disadvantage such companies as the respondent vis-a-vis other companies which are owners of logging cars

that are used to remove their logs to their log dumps over their own land and by means of their own equipment and employees.

It was stated by counsel for the respondent and not denied that on many occasions the Department has ruled that trucks owned and operated by haulage contractors, used exclusively in carrying logs for logging operators to the log dumps of the latter, and operating in part or entirely over public highways, are within Item 411a. I am unable to perceive any distinction between such a "removal" and the removal in the instant case. They are but different methods of accomplishing the same result, namely, the removal of the logs to the log dump.

I have not overlooked the submission of counsel for the appellant that the conveyance of the logs by the Pacific Great Eastern Railway constituted a railroad operation and not a logging operation. That submission may be quite true but I do not think it is of any importance in this case. The inclusion of "logging cars" in the list of equipment mentioned in Item 411a indicates in the clearest terms that their use in removing the logs is contemplated as part of the operation of logging and when so used it could quite properly be said that it was a railroad operation within the "operation of logging".

My opinion, therefore, is that the decision of the Tariff Board was right. It has been established that the imported articles were logging cars and that they were used exclusively in the operation of logging, and more particularly in the removal of the respondent's logs to its log dump. All the conditions of Item 411a have been met.

For these reasons, the question submitted will be answered in the negative. The decision of the Tariff Board is affirmed and the appeal will therefore be dismissed with costs.

Judgment accordingly.

1954
Oct. 5
Oct. 9

BETWEEN:

WALTER HERBERT BIGGS ..... APPLICANT;

AND

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

Revenue—Income tax—The Income Tax Act, R.S.C. 1952, c. 148, s. 126(3) —Search of taxpayer's premises—Motion to set aside approval granted by one of the judges of the Court upon ex parte application made under s. 126(3) of the Act—Lack of jurisdiction on the part of any judge of the Court to grant relief claimed—Judge granting approval one of the persons designated by s. 126(3) of the Act—Power of the judge to approve or disapprove of the authorization of the Minister a discretionary one—Discretion to be exercised summarily and finally—Judge functus officio once duty delegated to him by statute performed —Motion dismissed.

Section 126(3) of the Income Tax Act, R.S.C. 1952, c. 148 is as follows:

> The Minister may, for any purpose related to the administration or enforcement of this Act, with the approval of a judge of the Exchequer Court of Canada or of a superior or county court, which approval the judge is hereby empowered to give upon *ex parte* application, authorize in writing any officer of the Department of National Revenue, together with such members of the Royal Canadian Mounted Police or other peace officers as he calls on to assist him and such other persons as may be named therein, to enter and search, if necessary by force, any building, receptacle or place for documents, books, records, papers or things which may afford evidence as to the violation of any provision of this Act or a regulation and to seize and take away any such documents, books, records, papers or things and retain them until they are produced in any court proceedings.

On June 9, 1954, an application was made *ex parte* by the Deputy Minister of National Revenue to Potter J., one of the judges of this Court, for the *approval* of a judge of the Court of the issue of an authorization under that section of the Act in respect of the defendant and his residence in Hamilton. The application, supported by an affidavit of an officer of the Department of National Revenue, was approved by Potter J. in writing and, subsequently, under the authority of the Minister and that approval, the taxpayer's premises were entered and certain documents and records seized and removed. On a motion by defendant for an order rescinding that *ex parte* order made by Potter J.:

Held: That neither Potter J. nor any member of the Exchequer Court of Canada, has power to rescind the approval granted on June 9, 1954.

2. That Potter J. made no *order* of any sort. What he did was to "approve" of the authorization of the Minister pursuant to the terms of that section of the Act. In signifying his approval he acted not by virtue of the powers he possessed as a judge of the Court, but as one of the persons designated by that section. The section does not purport to confer any right of appeal from a judge who has refused or granted

his authorization, or any right on any of the other judges of the Court to review or rescind any approval so granted; nor does it confer any power on the judge who has given his approval to review or reconsider the matter or to recall his approval. No such rights or powers exist.

3. The intention of Parliament was to confer upon the judges designated a discretion to approve or to disapprove of the "authorization" of the Minister, such discretion to be exercised summarily and finally. When the duty designated to a judge by the Statute has been performed, he becomes *functus officio*.

MOTION to set aside an approval granted by one of the judges of the Court upon an *ex parte* application made under section 126(3) of the Income Tax Act.

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

M. H. Fyfe, Q.C. for the motion.

K. E. Eaton, F. J. Dubrule and *J. L. Gourlay contra.*

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

CAMERON J. now (October 9, 1954) delivered the following judgment:

This application, entitled in the Notice of Motion as above, is stated therein to be for an order

1. Rescinding the *ex parte* order made on the 9th day of June, 1954, pursuant to Section 126(3) of the Income Tax Act.

2. For the production for the inspection of this Court of all documents taken pursuant to the said *ex parte* order and not heretofore returned to the applicant.

3. For the delivery to the applicant of all of the said documents so seized and not heretofore returned to him.

4. If considered necessary, permitting the applicant to cross-examine Douglas Hamilton McAlpine on his affidavit sworn herein on the 20th day of May, 1954, and enlarging this application pending the completion of such cross-examination,

or for such further or other order as the nature of this application may require.

On June 9, 1954, an application was made *ex parte* by the Deputy Minister of National Revenue for Taxation to Mr. Justice Potter, one of the judges of the Exchequer Court

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of Canada, for the *approval* of a judge of that Court of the issue of an authorization under subsection (3) of section 126 of the Income Tax Act, in respect of the taxpayer W. H. Biggs of Hamilton, Ontario, and his residence there.

That subsection is as follows:

> 126(3) The Minister may, for any purpose related to the administration or enforcement of this Act, with the approval of a judge of the Exchequer Court of Canada or of a superior or county court, which approval the judge is hereby empowered to give upon *ex parte* application, authorize in writing any officer of the Department of National Revenue, together with such members of the Royal Canadian Mounted Police or other peace officers as he calls on to assist him and such other persons as may be named therein, to enter and search, if necessary by force, any building, receptacle or place for documents, books, records, papers or things which may afford evidence as to the violation of any provision of this Act or a regulation and to seize and take away any such documents, books, records, papers or things and retain them until they are produced in any court proceedings.

The application so made was supported by an affidavit of D. H. McAlpine, an officer of the Department of National Revenue, Taxation Division, attached to its Hamilton district office. The application so made was approved by Potter J. in writing. Subsequently, under the authority of the Minister and the approval so granted, the premises of the taxpayer were entered and certain documents and records were seized and removed, some of which have since been returned to the taxpayer.

In the absence of Potter J. through illness, the motion for the order set out above is now made before me, as a judge of the Exchequer Court of Canada.

Counsel for the Deputy Minister opposed the application on the ground that neither Potter J. nor any other judge of this Court has power to grant any part of the relief claimed. Certain material in support of the motion has been filed by counsel for the taxpayer, dealing with the merits of the case. No material was filed by or on behalf of the Deputy Minister in answer thereto, his counsel intimating that he was prepared to argue the matter only on the question of jurisdiction; and that if his contention in that regard were not upheld, he would ask leave to have the motion adjourned to enable him to file such material as he might consider necessary.

In the limited time at my disposal I have given consideration to the arguments of counsel and to the cases cited and have reached the conclusion that I must give effect to the contention put forward on behalf of the Deputy Minister that neither Potter J., nor any other member of this Court, has power to rescind the approval granted by Potter J. on June 9, 1954. The other items of relief claimed in the Notice of Motion were not pressed before me; in any event I think it is clear that if I have no power to rescind that approval, I am likewise powerless to deal with the other matters.

It is to be noted that Potter J. made no *order* of any sort. What he did was to "approve" of the authorization of the Minister pursuant to the terms of section 126(3). Even if the matter were properly before this Court, I have serious doubts as to the applicability of Rule 259 of the General Rules and Orders of this Court, on which counsel for the applicant relied.

In my opinion, Potter J., in signifying his approval, acted not by virtue of the powers he possessed as a judge of this Court, but as one of the persons designated by section 126(3) of the statute, and with the powers conferred by that Act alone. Had any person other than a judge been named, his powers would have been precisely the same as those of a judge acting under the statute. The section does not purport to confer any right of appeal from a judge who has refused or granted his authorization, or any right on any of the other judges of the Court to review or rescind any approval so granted; nor does it confer any power on the judge who has given his approval to review or reconsider the matter or to recall his approval. In my opinion, no such rights or powers exist.

In my view, the intention of Parliament was to confer upon the judges designated a discretion to approve or to disapprove of the "authorization" of the Minister, such discretion to be exercised summarily and finally. When the duty delegated to a judge by the statute has been performed, he becomes *functus officio*.

Reference may be made to *Chambers and Canadian Pacific Railway Co.* (1), and to the cases there referred to;

(1) (1910-11) 20 Manitoba Reports 277 at 279.

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and more particularly to *Canadian Pacific Railway* v. *Little Seminary Ste. Therese* (1).

For these reasons I have reached the conclusion that the motion fails and it will be dismissed with costs.

Judgment accordingly.

1949

May 16-20
23, 25, 26
June 1, 2, 7,
13, 14

1950

Jan. 16-21

1952

July 30

BETWEEN:

GORDON C. WILSON .....SUPPLIANT,

AND

HIS MAJESTY THE KING .....RESPONDENT.

Crown—Petition of right—Claim for compensation for use by Crown of an alleged invention—Board of Invention established under the War Measures Act, R.S.C. 1927, c. 206—Term "suggestion" as defined in P.C. 9750 dated December 24, 1943—Motion to strike out alternative claim in a reply—Matter of compensation to be paid to patentee for use of his patent by the Crown considered in Exchequer Court only by way of appeal from decision of Commissioner of Patents—Use of invention prior to issue of patent—The Patent Act, 1935, S. of C. 1935, ss. 19 and 56—Discretionary powers of the Board of Invention—Idea of a practice bomb disclosed by suppliant without reservation of rights thereunder—Crown not responsible for tortious acts of its servant.

Alleging that he is the inventor of a practice bomb for use in aircraft; that he disclosed the details thereof to the R.C.A.F. and to the Invention Board established under the War Measures Act, R.S.C. 1927, c. 206; that the bomb was adopted and used by the R.C.A.F. and appropriated by respondent and that having received no compensation for the use thereof he appealed to the Minister of National Defence, who denied his claim, suppliant by his Petition of Right sought a reference to the Court for an assessment of his claim for compensation. On the evidence the Court found that suppliant was not the true inventor of the invention claimed but that his concept of the bomb as disclosed to the R.C.A.F. came within the term "suggestion" as defined in Order in Council P.C. 9750 dated December 24, 1943.

Held: That a motion made before trial to strike out an alternative claim in the reply would have been granted but leave would then have been given to suppliant to amend his petition of right so as to raise the alternative claim, when both the original and alternative claims arise from the same set of facts and each is based on the same Order in Council and where there is no prejudice created. *Hansen* v. *The King* [1933] Ex. C.R. 197 referred to.

2. That a claim for compensation to be paid to a patentee for the use of his patent by the Crown as provided by the Patent Act, 1935, S. of C.

(1) 16 S.C.R. 606 at 618-19.

1935, c. 32, s. 19, cannot be considered in the Exchequer Court except by way of an appeal from the decision of the Commissioner of Patents on the matter.

3. That under the Patent Act, 1935, suppliant has no claim for any use of his invention made by the Crown prior to the issue of a patent.

4. That since under the discretionary powers conferred on it the Board of Invention declined to make any recommendation for compensation and Order in Council P.C. 9750 makes no provision for an appeal from or review of the exercise of the Board's power under s. 7(d) thereof, its decision is binding in the absence of any evidence that it was manifestly against sound and fundamental principles. *Pure Spring Co.* v. *Minister of National Revenue* [1946] Ex. C.R. 471 referred to and followed.

5. That assuming the decision in *The King* v. *Bradley* [1941] S.C.R. 270 is broad enough in its implication to apply to this case and the Court, therefore, has jurisdiction to deal with the matter and grant the relief claimed, if suppliant had property it consisted only in his idea of a practice type bomb and this idea was not acquired by the Crown under the provisions of any Orders in Council or any law of Canada or by virtue of any of its prerogatives, but was freely and voluntarily disclosed by suppliant to the R.C.A.F. without any reservation of his rights thereunder.

6. That the act of some official of the Crown in compelling suppliant to make an assignment of his "invention" to His Majesty, in the absence of any proof that the requirements of P.C. 9750, s. 15 had been fulfilled, can only be regarded as a tortious act by an officer of the Crown for which, in law, there is no remedy, the Crown not being responsible for such tortious acts.

7. In an action which is not an infringement action there is no assumption *prima facie* that the invention covered by letters patent is valid.

PETITION OF RIGHT by suppliant seeking a reference to the Court for an assessment of his claims for compensation for the use of his alleged invention by the Crown.

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

Gordon F. Henderson for suppliant.

Redmond Quain, K.C. and *T. R. Giles* for respondent.

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

CAMERON J. now (July 30, 1952) delivered the following judgment:

In this petition of right the suppliant, a consulting chemist, claims to be the inventor of a cartridge type practice bomb for use in aircraft; that he disclosed the details thereof to the Royal Canadian Air Force and to the Inventions Board, established under the War Measures Act; that

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it was adopted and used by the R.C.A.F., and that it was appropriated by His Majesty. He alleges that having received no compensation in respect thereof he appealed to the Minister of National Defence, who denied his claim, and that he now appeals therefrom. He asks:

(*a*) a declaration that the suppliant's claim be referred to the Exchequer Court of Canada for assessment;

(*b*) a declaration from the Exchequer Court of Canada that a royalty of ten cents for each bomb used by His Majesty be payable to the suppliant, or such other compensation as shall be deemed fit;

(*c*) costs.

By the amended statement of defence the respondent either does not admit or specifically denies all the allegations in the petition of right; and after pleading that the petition does not disclose any claim for which a petition of right will lie, he alleges that the subject matter of the alleged invention was not patentable, that the suppliant invented nothing, that the alleged invention was at all relevant dates in common knowledge, was not new, that the suppliant was not the inventor and that the said invention had been previously published not only in certain specified patents, but in other printed publications, as well as by specified bombs and cartridges.

Paragraph 9 of the statement of defence is as follows:

> The suppliant conceived, at some time unknown to the Respondent, certain ideas which did not constitute invention and which did not constitute property, and which did not constitute any thing which could be the subject of compensation by the Crown, in respect of improvements, in practice bombs, which in common with others he, as was his duty, as a member of the Royal Canadian Air Force, sought to improve and to have incorporated in practice bombs and to have used by the Royal Canadian Air Force, the whole under such circumstances as do not entitle the Suppliant to any compensation.

In his reply, the suppliant pleaded in the alternative that if the subject-matter disclosed by him did not constitute invention, then, under P.C. 9750, it constituted a "suggestion" for which he was entitled to be compensated. At the trial, counsel for the respondent submitted that this alternative claim was not made in the petition of right, that it constituted a new and substantive cause of action; that the Court had no power to deal with such a cause of action until a new fiat had been granted in respect thereof; and

that in any event, an alternative claim could not be set up in a reply, but could only be secured by a motion to amend the petition of right.

The respondent did not move to strike out that part of the reply which contained the alternative claim. Had such a motion been made before me, prior to the trial, it would have been granted, but I would have given the suppliant the right to amend his petition of right so as to raise the alternative claim. Both the original and alternative claims arise from the same set of facts and each is based on the same Order-in-Council—P.C. 9750. (*Hansen* v. *The King,* (1)). I think it highly desirable that the entire dispute should be disposed of at one trial. The respondent has not been prejudiced in any manner by the fact that the alternative claim has been raised in the reply. I propose, therefore, to consider the case as though the alternative claim had in fact been made in the petition of right.

It may be noted at this point that on March 29, 1949, a patent (No. 455476) issued from the Patent Office in the name of the suppliant, the application thereafter being dated November 12, 1947. While the suppliant submits that the practice bomb therein described embodies the principles of the "invention" which he claims to have disclosed to the R.C.A.F. and the Inventions Board, and while the respondent admits that it has used very large quantities of practice bombs embodying the principles stated in the patent, the suppliant advances no claim as the holder of the patent, the reasons for which will later appear. In any event, he could not do so in these proceedings by reason of the provisions of section 19 of the Patent Act, 1935, which permits the Government of Canada at any time to use any patented invention, paying to the patentee such sums as the Commissioner of Patents reports to be a reasonable compensation for the use thereof, and with a right of appeal to this Court from any such decision of the Commissioner. No application has been made by the suppliant to the Commissioner for any such compensation under the Patent Act. For that reason I am of the opinion that any claim the suppliant may have against the respondent for the use of the patented invention after at least March 29, 1949, cannot be considered in these proceedings.

(1) [1933] Ex. C.R. 197.

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Moreover, section 56 of the Patent Act clearly provides that under the circumstances of this case, the suppliant could have no claim *under that Act* for any use of the "invention" made by the respondent prior to the issue of the patent.

Before discussing those matters concerning which the parties are not in agreement—namely, the nature of the suppliant's disclosure, and the extent to which he assisted in the development of the bomb actually put into use—I think it would be useful to give a brief chronological summary of certain facts and a statement of certain conclusions which are either admitted or clearly established to my satisfaction.

[Here the learned Judge gives a brief summary of the facts that were admitted or clearly established and continues]:

In any event, it is clear that under the discretionary powers conferred on it the Board declined to make any recommendation for compensation. Now it will be noted that the Order in Council makes no provision for an appeal from or a review of the exercise of the Board's power under section 7(*d*). That being the case, I think its decision is binding in the absence of any evidence that it was manifestly against sound and fundamental principles. The principles to be applied were considered by the President of this Court in *Pure Spring Co.* v. *Minister of National Revenue* (1). Therein, he referred to many cases, including *Spackman* v. *Plumstead Board of Works* (2), where the Earl of Selborne, L.C. said at page 235:

> If the legislature says that a certain authority is to decide, and makes no provision for a repetition of the enquiry into the same matter, or for a review of the decision by another tribunal, prima facie, especially when it forms, as here, part of the definition of the case provided for, that would be binding.

In my opinion, under the circumstances I have mentioned, this Court has no power to review the decision of the Board or to substitute its opinion for that of the Board.

Has the suppliant a claim under the War Measures Act, R.S.C. 1927, chapter 206? By section 3 thereof, certain wartime powers are conferred on the Governor in Council

(1) [1946] Ex. C.R. 471. (2) [1885] A.C. 229.

to do and authorize certain acts and things and to make certain orders and regulations, including the following:

(*f*) Appropriation, control, forfeiture and disposition of property and of the use thereof.

Then under the heading "Procedure", section 7 provides:

7. Whenever any property or the use thereof has been appropriated by His Majesty under the provisions of this Act, or any order in council, order or regulation made thereunder, and compensation is to be made therefor and has not been agreed upon, the claim shall be referred by the Minister of Justice to the Exchequer Court, or to a superior or county court of the province within which the claim arises, or to a judge of any such court.

In section 11 of P.C. 9750, after providing that the appropriate Minister may authorize payment of the whole or any part of such compensation as the Board may have recommended, there are the words "subject, however, to any right the member of the Forces may have under section 7 of the War Measures Act, c. 206, Revised Statutes of Canada, 1927, to have the question of remuneration or reward determined as therein provided". That provision was doubtless added as a result of the opinion of the Supreme Court of Canada rendered in *"Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto"* (1). Inasmuch, however, as I have found that the suppliant has not brought himself within the provisions of sections 15 and 11, of P.C. 9750, I need not further consider this matter under that Order in Council.

It is submitted, however, that the suppliant's concept of the practice bomb was property, that it was acquired by the Crown and that therefore compensation is payable to the suppliant. The Minister of Justice has not referred the claim to this Court as required by section 7. But it is shown that the suppliant's solicitor, by letter dated February 10, 1947 (Exhibit 63), requested the Department of Justice to refer the matter to this Court for determination of the compensation to be paid him, and that in reply (Exhibit 64), the Deputy Minister of Justice stated that as the Department of National Defence did not admit that any invention made by Wilson had been used by the R.C.A.F., it was not a proper case for reference to the Court under the

(1) [1943] S.C.R. 1.

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War Measures Act; and he declined to make such a reference, but suggested that if Wilson considered that he had any claim, consideration should be given to proceeding by way of petition of right. Counsel for the suppliant submits that by way of a petition of right the Court may be asked for a declaration that this is the type of case which should have been referred by the Minister of Justice, and a declaration as to the amount of compensation to which the suppliant is entitled. He agrees, however, that only a declaratory order could be made and that thereafter the suppliant would have to rely on the good faith of the Crown to give effect to such declaratory order.

Counsel for the respondent, on the other hand, contends that in the absence of a reference, the Court has no jurisdiction to determine any matter arising under the War Measures Act. He submits that it is only in cases where it is admitted by the Crown that a claimant has a right to compensation because his property has been acquired under the War Measures Act (and no such admission is here made) that the provisions of section 7 apply; and that upon such a reference to the Court, the only question for determination is that of quantum, the right having been previously acknowledged. In support of that contention, he cites the opinion of Mignault, J. in *Quinlan* v. *The King* (1), as follows:

> Section 7 deals with the case where compensation is to be made but the amount has not been agreed upon. It does not create the right to compensation but provides a mode whereby the amount, where the right to compensation is admitted, may be determined. Otherwise, the imperative provision, requiring the Minister of Justice to refer the claim to the Exchequer Court or to a Superior or County Court, would not be easily comprehensible. Such a requirement, on the contrary, is quite conceivable where the Crown admits that the claimant is entitled to compensation but disputes the amount of his claim.

While the opinion of Mignault, J. is probably obiter, it is entitled to great respect and I am in accord with the views so expressed. Nevertheless, for the purposes of this case, I am prepared to assume—but without deciding the point—that the case cited by counsel for the suppliant (*The King* v. *Bradley* (2)) is broad enough in its implication to apply to the instant case. I would point out, however, that that

(1) [1924] S.C.R. 236 at 245. (2) [1941] S.C.R. 270.

decision had to do with the Patent Act and not with the War Measures Act where different considerations might apply.

Assuming, therefore, that the Court has jurisdiction to deal with the matter and to grant the relief claimed, the suppliant in order to succeed must establish that his property or the use thereof was *appropriated* by His Majesty under the provisions of the War Measures Act, or under any Order in Council, order or regulation made thereunder. Apart from the Orders in Council establishing the Inventions Board, it is abundantly clear that the respondent acquired no property of the suppliant under the War Measures Act. If the suppliant had property, it consisted only in his idea of the practice type bomb. That idea of the practice type bomb was not acquired by the respondent under the provisions of any of such Orders in Council or any law of Canada or by virtue of any prerogative of the Crown. On the contrary, such idea as he had was freely and voluntarily disclosed by the suppliant himself to the officials of the Royal Canadian Air Force on the understanding that it would be fully tested and developed, and if found suitable, would be put into use at once. In making such disclosure, the suppliant did not attempt to reserve any rights thereunder or state that his disclosure was confidential, or intimate in any way to the Royal Canadian Air Force authorities that he proposed to make any claim in respect thereof to the Inventions Board, or that he had had any contact whatever with that Board.

In my opinion, the respondent neither appropriated nor acquired any property of the suppliant under the War Measures Act or any Order in Council or order or regulation made thereunder. In reaching that conclusion, I have not overlooked the assignment of his "invention" to His Majesty on February 22, 1944 (Exhibit 54), and the drawing and explanations thereof (Exhibit 55). It is true that that assignment was said to be "pursuant to the provisions of.....P.C. 9750". I do not know why Wilson was asked to make that assignment and I can only assume that it was desired by someone that he should make no use of the concept of the practice bomb which was then in use. It was no doubt a high-handed method adopted by some official to deprive Wilson of its use. But in the absence of any proof

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that the requirements of section 15 of P.C. 9750 had been fulfilled (as I have above noted), I can only regard it as a tortious act by an official of the Crown for which in law there is no remedy, the Crown not being responsible for such tortious acts. In any event, the Crown thereby did not acquire any knowledge of Wilson's concept of a practice bomb, that having been communicated some two or three years earlier. It is not shown that any use was made of the assignment or the information then supplied; in fact it was quite unnecessary to do so for the new bomb was already in use.

There is no monopoly in any idea or suggestion, or in any invention less than a patented invention. In the absence of any contract—and there is none here—the suppliant could not recover from the Crown any compensation for any use the Crown might make of his idea or suggestion or unpatented invention except under the provisions of the various Orders in Council which I have referred to, and to the benefit of which I have found he was not entitled. The common law right to use an unpatented invention is now stated in statutory form in section 56 of the Patent Act, 1935, as follows:

> 56. Every person who, before the issuing of a patent has purchased, constructed or acquired any invention for which a patent is afterwards obtained under this Act, shall have the right of using and vending to others the specific article, machine, manufacture or composition of matter patented and so purchased, constructed or acquired before the issue of the patent therefor, without being liable to the patentee or his legal representatives for so doing; . . .

Under that section (and apart from the various Orders in Council), the suppliant could assert no claim against any person, including the Crown, for the use of his invention prior to March 29, 1949, when the patent was issued; and thereafter he would have a claim against the Crown only by invoking the provisions of section 19 of the Patent Act, which he has not done.

The above considerations are sufficient to dispose of the case. In reaching the conclusion that the petition of right must be dismissed, I have not found it necessary to consider certain other defences raised by the Crown, such as that under section 46 of the Patent Act, it being pleaded that if

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the suppliant's concept amounted to invention it was made while he was employed in the public service of Canada and on a matter relating to the nature of his employment.

In case the matter should go further, I think it advisable to state my conclusions as to whether Wilson's concept was an invention or a suggestion, or neither.

The evidence is extremely lengthy and in some cases conflicting and confusing. I shall not attempt to analyse it in great detail, but merely to refer to those portions which I consider essential in reaching my conclusions.

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

I think it is important, therefore, to look first at the patent. It is not contended that any of the elements in the patent are new, but that *in combination* the elements constitute an "invention". This is not an infringement action and I shall therefore not assume that prima facie the "invention" is valid.

[Here the learned Judge further reviews the evidence and continues:]

The suppliant's claim will therefore be dismissed and there will be a finding that he is not entitled to any of the relief claimed in the petition of right. Under all the circumstances, however, and in the exercise of my discretion, and also on the ground that at the trial certain amendments to the pleadings were made by the respondent which have affected the outcome of the case, there will be no order as to costs.

Judgment accordingly.

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Oct. 12
Oct. 13

BETWEEN:

ALBERT E. BURTON .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Negligence—Crown Liability Act, S. of C. 1952-53, c. 30, s. 3(1)(a)—The Exchequer Court Act, R.S.C. 1952, c. 98, s. 18(1)(c)—Onus of proof on suppliant—Liability of Crown only vicarious.

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The suppliant claimed damages for severe burns suffered by him while he was a patient in the Department of Veterans' Affairs Hospital near Saskatoon.

Held: That in a claim under section 3(1)(*a*) of the Crown Liability Act for damages for negligence the onus of proof that the claim is within the ambit of the section lies on the suppliant. Since the Crown's liability is purely a statutory one the suppliant must establish that every condition of liability prescribed by the statute has been met. He must, therefore, show that some servant of the Crown was guilty of negligence, that such negligence occurred while the servant was acting within the scope of his duties or employment and that the injury for which he claims resulted from such negligence. If he fails to discharge the onus of proof that the law casts on him in respect of any of these matters his claim falls.

2. That the Crown's liability is not direct but only vicarious. Before it can be engaged it must appear that some servant of the Crown would himself have been personally liable if he had been sued. *The King* v. *Anthony* [1946] S.C.R. 569 at 571 followed.

3. That there was no negligence on the part of any servant of the Crown.

4. That the suppliant came by his injury through his own carelessness.

PETITION OF RIGHT under the Crown Liability Act.

The action was tried before the President of the Court at Saskatoon.

D. E. Gauley for suppliant.

G. H. Yule, Q.C. and *D. S. Maxwell* for respondent.

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

THE PRESIDENT on the conclusion of the trial (October 13, 1954) delivered the following judgment:

The suppliant herein claims damages from the Crown for severe burns suffered by him on October 26, 1953, while he was a patient in the Department of Veterans' Affairs Hospital near Saskatoon in Saskatchewan.

The circumstances under which the suppliant, who is a veteran of the First World War, sustained his injury may be outlined briefly. While he was in the Hospital for treatment of a pensionable disability he decided to have a lump in his left hand removed. This required an operation and pre-surgical treatment. The preparatory treatment consisted of cleaning the suppliant's hand and arm and giving him what is commonly called an "alcohol soak". His arm was bandaged from his finger tips to his shoulder with cotton batting kept in place with gauze and tape and the

bandage was then heavily soaked with alcohol. The suppliant received this alcohol soak twice, first on Monday, October 25, 1953, and again on Tuesday, October 26, 1953, it being intended that the operation would take place on the following day. Both treatments were given by E. R. Gately, the charge orderly of the ward in which the suppliant was a patient. The treatments were in accordance with standard pre-surgery practice. On Tuesday, October 26, 1953, at about 6.45 p.m., the fumes of the alcohol were so strong that the suppliant thought that he would get out of bed. He picked a cigarette out of a package, picked up his lighter, struck a light for his cigarette and, as he said, "all of a sudden there was a ball of fire on my arm". He was then standing alongside his bed and leaning against it. After frantic efforts to put out the fire made by the suppliant and other patients in his cubicle the hospital orderly who was on duty that evening, B. Lesser, finally succeeded in extinguishing the fire and stripping off the bandages. By that time the suppliant's left arm was severely burned and there were also burns on his right hand and on his body. He was taken to the nurse's office where his arm was dressed. Subsequently, he was treated for his burns and finally discharged after about two months.

While the suppliant's arm has healed the skin is still tender and soft and there is no doubt that he suffered great pain and considerable shock. It is for this pain and shock that he now claims damages from the Crown.

If the suppliant has any claim it must be under section 3(1)(*a*) of the Crown Liability Act, Statutes of Canada, 1952-53, Chapter 30, which reads as follows:

3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable.

(*a*) in respect of a tort committed by a servant of the Crown, . . .

When this enactment came into effect on May 14, 1953, it imposed a liability upon the Crown for the torts of its servants generally whereas previously its liability had been only for the negligence of its officers or servants under section 18(1)(*c*) of the Exchequer Court Act, R.S.C. 1952, Chapter 98, previously section 19(*c*) of the Exchequer Court Act, R.S.C. 1927, Chapter 34, which read as follows:

18. (1) The Exchequer Court also has exclusive original jurisdiction to hear and determine the following matters:

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(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;

It was well established that in a claim under section 19(c) of the Exchequer Court Act the onus of proof that the claim was within its ambit lay on the suppliant. The law is the same under section 3(1)(a) of the Crown Liability Act. Since the Crown's liability is purely a statutory one, the suppliant must establish that every condition of liability prescribed by the statute has been met. He must, therefore, show that some servant of the Crown was guilty of negligence, that such negligence occurred while the officer or servant was acting within the scope of his duties or employment and that the injury for which he claims resulted from such negligence. If he fails to discharge the onus of proof that the law casts on him in respect of any of these matters his claim falls.

It is also established that the Crown's liability is not a direct one. It is only a vicarious liability. Before it can be engaged it must appear that some servant of the Crown would himself have been personally liable if he had been sued: *vide The King* v. *Anthony* (1) where Rand J., delivering the judgment of the majority of the Supreme Court of Canada, said with reference to the liability under section 19(c) of the Exchequer Court Act:

> I think it must be taken that what paragraph (c) does is to create a liability against the Crown through negligence under the rule of *respondeat superior*, and not to impose duties on the Crown in favour of subjects: *The King* v. *Dubois* (2); *Salmo Investments Ltd.* v. *The King* (3). It is a vicarious liability based upon a tortious act of negligence committed by a servant while acting within the scope of his employment; and its condition is that the servant shall have drawn upon himself a personal liability to the third person.

Consequently, in the present case it must appear, if the suppliant is to succeed, that some employee of the Hospital would have been held personally liable to the suppliant for the burns suffered by him if an action had been brought against such employee.

Counsel for the suppliant conceded, as was plainly apparent, that it would not be possible to establish a case of personal liability against Dr. Scott, the superintendent

(1) [1946] S.C.R. 569 at 571. (2) [1935] S.C.R. 378 at 394 and 398.
(3) [1940] S.C.R. 263 at 272 and 273.

of the Hospital, or Dr. Gill, the physician and surgeon who was looking after the suppliant, or Miss Maber, the nurse who was in charge of the ward on the evening when the suppliant suffered his burns.

The only employee against whom counsel could find any personal fault was Gately, the charge orderly who had administered the alcohol soak treatments to the suppliant. To make out a case against him the suppliant must show not only that Gately was guilty of negligence but also that his burns resulted therefrom.

The negligence charged against Gately is that he failed to give the suppliant adequate warning not to smoke and that he did not check his smoking habits.

Dr. Scott said that the staff of the Hospital was under instructions to tell patients who received pre-surgical alcohol soak treatments not to smoke. These were given because of fear of fire and for the safety of the patient. The instructions were not in writing but formed part of an orderly's teaching.

There was conflicting evidence on whether Gately warned the suppliant not to smoke. The suppliant said that when the orderly had finished soaking the bandages on his arm on Monday he asked him whether there was any danger of smoking or lighting matches and the orderly said "No. I don't think so". There is no confirmation of this statement by any of the suppliant's witnesses. F. A. Gasall, who was in the same cubicle of the ward as the suppliant, said that there was conversation between him and the orderly but he could not say what it was. A. A. H. Thomsen, another patient in the same cubicle, said that on Tuesday he heard the suppliant ask the orderly whether it was alright to smoke but he would not say what the answer was "It might have been Yes. It might have been No".

Gately, on the other hand, denied that he had told the suppliant that he did not think there was any danger in smoking or lighting matches. On the contrary, he was positive that he had warned him not to smoke. It was routine procedure in all cases of pre-surgical alcohol soak treatments to warn patients against smoking and he had followed this procedure in the suppliant's case. After the fire he recalled that he had warned the suppliant. He went on to say that

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in all probability he had told the suppliant why he should not smoke, namely, because of the inflammability of the alcohol, but of this he was not sure.

Even if I were in doubt whether I should believe the suppliant or Gately, the suppliant would fail in his charge of negligence because he would not have discharged the onus of proof that lay on him. But I am not in doubt. I believe Gately's statement that he warned the suppliant not to smoke and I do not believe the suppliant's statement that the orderly told him that he did not think there was any danger in smoking or lighting matches. In my opinion, it is inconceivable that the orderly should have made any such statement. It is significant in this connection that the suppliant never stated to anyone in the Hospital that the orderly had told him that there was no danger in smoking or lighting matches. Indeed, he never complained that there had been any fault on the part of anyone in the Hospital prior to May, 1954. Then he told one Dr. More that if he would put him back on full pension he would not say anything about his arm being burned.

On the facts, I find that there is no foundation for the allegation that Gately failed to warn the suppliant not to smoke. And I am of the view that there was no negligence on his part in failing to check the suppliant's actions. The warning not to smoke which he had given him should have been sufficient.

The fact of the matter is that the suppliant's injury was not the result of any negligence on Gately's part. The suppliant was himself the author of his injury and has only himself to blame for it. In effect, he admitted this immediately after the accident. The evidence of B. Lesser, the orderly who was in charge of the ward when the fire occurred and finally succeeded in stripping off the burning bandages, proves this. After he took the suppliant back to his bed from the nurse's office he asked him how the fire happened and the suppliant said "I was lighting up a smoke and steadied the lighter against my bandaged arm". Lesser made a report to this effect the same evening. Several days later the suppliant told him that he thought he should get a higher pension and he told the suppliant that his report had gone in that his injury was his own fault.

There is also the evidence of Miss M. D. Maber, the nurse who attended the suppliant after the fire. He was taken into her office. The suppliant told her that he had taken the lighter and held it against his shoulder that held the compresses and said "What can happen in one careless moment!" He repeated this remark several times. He never suggested any fault on the part of the orderly. On the contrary, he kept apologizing to her because he had caused her so much trouble. I accept Miss Maber's statement.

Dr. Scott's evidence is to a similar effect. He saw the suppliant in his bed the day after the fire and asked him how he happened to get burned. Dr. Scott could not remember exactly what the suppliant said but he told him that he had been lighting a cigarette when the ignition took place and more or less indicated that it was rather a foolish thing to do. Moreover, it is clear that the suppliant knew that alcohol was being used to soak his bandages and that if he brought fire to it it might ignite.

I, therefore, find that the suppliant came by his unfortunate injury through his own carelessness. He had apparently disregarded Gately's warning not to smoke for, according to the evidence, he had smoked several cigarettes after his arm had been bandaged on Monday and had suffered no injury. It was only when he steadied his lighter against his alcohol soaked bandages and struck a light on it that his arm caught on fire. It was carelessness on his part to bring fire so close to his alcohol soaked bandages. The injury to his arm was wholly the result of this carelessness on his part.

Under the circumstances, it is clear that the suppliant has failed to show any grounds for his claim of damages. The judgment of the Court must, therefore, be that he is not entitled to any of the relief sought by him in his petition of right and that the respondent is entitled to costs.

Judgment accordingly.

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COPYRIGHT—*Action for infringement of copyright—Live telecasts and film telecasts of football games—Whether copyright subsists in such telecasts—The Copyright Act, R.S.C. 1927, c. 32, ss. 2(b)(d)(g)(n)(p)(q)(r)(u), 3(1)(e)(f), 4, 9, 17, 20(3), 36, 40(4) and 45—Copyright purely statutory—Nature of copyright—Meaning of "original" in the law of copyright—Protection afforded only to a series of photographs—Rediffusion by defendant of film telecasts a "performance" of plaintiff's work—Whether performance was "in public"—Character of the audience—Right to communicate a "work" by radio communication.* Having acquired from the Montreal football club, "The Alouettes",

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the exclusive right *(a)* to telecast the football games to be played by the team in Montreal during the 1952 football season and *(b)* to televise *films* of the games to be played by the team away from Montreal, plaintiff entered into an agreement with the Canadian Broadcasting Corporation whereby the latter *(a)* agreed to furnish its personnel, facilities and equipment to telecast over its Montreal station CBFT the games played in Montreal and its facilities and station time to telecast *films* provided by plaintiff of the games played out of Montreal, and *(b)* assigned and transferred to plaintiff all of its right, title and interest in the copyright in the *live* telecast productions of the games. By a further agreement with Dow Breweries, the owner of the rights to make movie films of the league games to be played by "The Alouettes" away from Montreal in 1952, plaintiff acquired *(a)* all the owner's rights to televise over station CBFT films of such games including those received through the ether, *by wire service or rediffusion*, and *(b)* whatever copyright Dow Breweries had in the films. Plaintiff then registered in the Copyright Office the telecast productions of the games played in Montreal and the cinematograph films of those played out of Montreal. Four of the home games and films of the four out of town games were televised over station CBFT and on each occasion the programmes were picked out of the ether by defendant, whose business consists in part in maintaining an antenna in or near Montreal which enables its subscribers to receive *by wire* in their homes telecast programmes emitted by station CBFT, and were distributed to them and to its sales and showroom in Montreal. The action is one for infringement of copyright in both the live and film telecasts, defendant denying that copyright subsists in any of the telecasts sponsored by plaintiff and that if copyright did exist therein, no infringement resulted from its operations. *Held:* That no matter how "piratical" the taking by one person of the work of another may appear to be, such taking cannot be an infringement of the rights of the latter unless copyright exists in that "work" under the provisions of section 3 of The Copyright Act. Copyright is, in fact, only a negative right to prevent the appropriation of the labours of an author by another. 2. That for copyright to subsist in a "work" it must be expressed to some extent at least in some material form, capable of identification and having a more or less permanent endurance. All the works included in the definitions of "artistic work" and "literary work" in s. 2*(b)* and *(n)* of The Copyright Act, R.S.C. 1927, c. 32 have a material existence; "musical works" by s. 2*(p)* must be printed, reduced to writing or otherwise graphically produced or reproduced. Likewise, in regard to "dramatic works" there is the requirement that the scenic arrangements or acting form must be

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fixed in writing or otherwise. "Cinematographic productions" which are also dramatic works are obviously "fixed otherwise", since they involve the making of films. Here, neither the producer nor any of his assistants, while producing the live telecasting of the games played in Montreal had *fixed* anything in writing or otherwise, or had anything whatever to do with the scenic arrangements of the acting form of the players participating in the football match. By the very nature of the spectacle, nothing of that sort could have been planned in advance or fixed in writing or in any other manner whatsoever. The live telecasts (or live radio broadcasts) of a football game as described in the evidence do not fall within the opening words of s. 2*(u)* of the Act—"every original literary, dramatic, musical and artistic work . . ." 3. That neither the process nor result of telecasting is analogous in any way to that of photography or cinematography. Even if the "work" was found to be a cinematographic production, it would not be a dramatic work within the meaning of s. 2*(g)* of the Act inasmuch as the arrangement or acting form, or the combination of incidents represented, do not give the work an original character. 4. That the image produced on the receiving set in the case of live telecasts is not a photograph as that word is ordinarily understood. A photograph is something concrete, something in a material form that cannot only be seen but handled and involves the creation of a negative. The image is not an artistic work under s. 2*(b)* of the Act. 5. That to be "original" a work must originate from the author; it must be the product of his labour and skill and it must be the expression of his thoughts. *University of London Press Ltd.* v. *University Tutorial Press Ltd.* [1916] 2 Ch. 601 referred to. There is no copyright in mere conception or ideas and here the producer had nothing to do with the arrangements of the pictures shown. *Frank Smythson* v. *Cramp and Sons Ltd.* [1944] A.C. 329 referred to. All that he did was to choose the particular play in the game—a play in which he took no part whatsoever—and by means of the equipment provided communicate that play so that it could be seen by any one within the range of the telecast who desired to see it and had the necessary equipment for its reception. In the picture so seen there was no expression of his thoughts, but merely a view of what was seen by thousands of others at the playing field. 6. That the live telecasting of sporting events such as those here in question cannot create a work in which copyright can subsist. 7. That the *film* telecasts of the games having been made from cinematograph films were cinematographic productions. Such a production is a "dramatic work" only if the arrangement or acting form or the combination of incidents represented has given the work an original character. In the absence of evidence here as to how the

CROWN — *Petition of Right — Expropriation—The Expropriation Act, R.S.C. 1927, c. 64, s. 47—Expropriation of an easement over property close to an airport—Damages claimed by reason of establishment of an airport flightway over property—Article 414, Civil Code of Quebec—Article 552, Code Napoleon—Air and space not susceptible of ownership—Owner's right in air space over his property limited—Crown cannot expropriate that which is not susceptible of ownership.* Suppliant owned some vacant land close to the Dorval airport and used it intermittently for agricultural purposes. In 1942 the Crown expropriated an easement over it and adjoining lands for an underground cable and poles for the installation and maintenance of an approach lighting system to one of the runways of the airport. In his action suppliant, in addition to the claim for compensation for the expropriation of the easement over his property and the injurious affection of the remaining land as a result thereof, sought damages by reason of the establishment of what he described as a flightway over his property through which aircraft would fly to take off or land at the airport, the basis of this latter claim being that (1) the suppliant being the owner not only of the surface of his land but also of what is below

EXAMINATION FOR DISCOVERY.

See PRACTICE, No. 2.

EXCESS PROFITS TAX.

See REVENUE, No. 31.

EXCESSIVE SPEED IN DENSE FOG.

See SHIPPING, No. 1.

EXCESSIVE SPEED IN FOG BEING A STATUTORY FAULT ONUS ON VESSEL VIOLATING THE RULE TO PROVE SPEED NOT THE SOLE OR A CONTRIBUTORY CAUSE OF COLLISION.

See SHIPPING, No. 1.

EXCISE TAX.

See REVENUE, NOS. 5, 6, AND 12.

EXPENSES INCURRED TO COMPLY WITH REQUIREMENTS OF AGREEMENT OF SALE OF PROPERTY.

See REVENUE, No. 20.

EXPROPRIATION.

See CROWN, No. 1.

EXPROPRIATION.

1. ACCUMULATION OF PROFITS AND SAVINGS NOT TO BE ADDED TO MARKET VALUE. No. 1.
2. AWARD OF COMPENSATION TO BE FAIR TO CROWN AS WELL AS TO OWNER. No. 1.
3. DISADVANTAGES OF PROPERTY TO BE CONSIDERED. No. 1.
4. EXPROPRIATION NOT A TORT OR DELICT. No. 1.
5. MUNICIPAL ASSESSMENT NOT EVIDENCE OF VALUE. No. 1.
6. NEED FOR STATUTORY DEFINITION OF VALUE. No. 1.
7. PRICE AT WHICH OWNER WILLING TO SELL NOT A TEST OF VALUE. No. 1.
8. PRINCIPLE OF RE-INSTATEMENT APPLICABLE TO PUBLIC SCHOOL. No. 2.
9. RIGHT UNDER CERTAIN CIRCUMSTANCES TO TEN PER CENT ADDITIONAL ALLOWANCE FOR COMPULSORY TAKING. No. 1.
10. THE EXPROPRIATION ACT, R.S.C. 1927, c. 64, s. 9. NOS. 1 AND 2.
11. UNWILLINGNESS OF OWNER TO SELL AND URGENT NEED OF PURCHASER TO BUY TO BE DISREGARDED. No. 1.
12. VALUE OF PROPERTY TO OWNER INCLUDES RIGHT OF COMPENSATION FOR DISTURBANCE. No. 1.

EXPROPRIATION — *The Expropriation Act, R.S.C. 1927, c. 64, s. 9—Award of compensation to be fair to Crown as well as to owner—Need for statutory definition of value—Unwillingness of owner to sell and urgent need of purchaser to buy to be disregarded—Municipal assessment not evidence of value—Accumulation of profits and savings not to be added to market value—Price at which owner willing to sell not a test of value—Disadvantages of property to be considered—Value of property to owner includes right to compensation for disturbance—Expropriation not a tort or delict—Right under certain circumstances to ten per cent additional allowance for compulsory taking.* The plaintiff expropriated property in the City of Hull on which the defendant had a gasoline service station and a terminal bulk storage plant. The action was taken to have the amount of compensation payable to the defendant determined by the Court. *Held:* That in measuring the amount of money which the owner of expropriated property should receive as the equivalent in value of the property taken from him it is just as important to ensure that the Crown, which has lawfully taken the property for public purposes, is not required to pay more for it than it was worth as it is to make sure that its owner receives its fair value. The duty of determining the equivalence in money of the value of the expropriated property demands fairness to the expropriating public as well as to the owner of the property and an excessive award is a breach of this duty. 2. That it is essential to the fair administration of expropriation law that there should be a statutory definition of value. 3. That the test put by Lord Moulton in the *Pastoral Finance Association* [1914] A.C. 1083 case that 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" envisages negotiations between the owners and a prudent purchaser, each knowing the advantages of the property and the possibilities of savings and profits from its use, culminating in a sale of it to the prudent purchaser at the price beyond which, in the ordinary course and without the pressure of urgent need, he would not be willing to go. 4. That in determining the amount of the compensation "the disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy must alike be disregarded". *Vyricherla Narayana Gajapatiraju* v. *The Revenue Divisional Officer, Vizagapatam* [1939] A.C. 302 at 311 followed. 5. That the municipal assessment of expropriated property is not evidence of its value. 6. That the capitalization of anticipated savings and profits or their accumulation for a term of years must not be added to the market value of the land. What should be considered is the adaptability of the land and its advantages for the making of profits and savings. 7. That the amount for which the owner would have been willing to sell the land is

PATENTS.—*Process for manufacture of aldehyde—The Patent Act, 1935, S. of C. 1935, c. 32, s. 2(d), 12(2), 26(1), 35(2), 40—The Patent Rules, 1948, R. 53—When product old process dependent product claim invalid for lack of novelty—Process dependent product claim unnecessary.* In an application for a patent for a process for the manufacture of an aldehyde the applicant made claims for the product when prepared according to his process. The Commissioner rejected the product claims and an appeal was taken from this decision. *Held:* That where a product is old a process dependent claim for it cannot make it new and is invalid as a product claim for lack of novelty. 2. That since a process patent protects not only the process, but the thing produced by the process, a claim for the product when prepared according to the patentable process is not necessary. HOFFMAN-LAROCHE LIMITED v. THE COMMISSIONER OF PATENTS.. **52**

2.——*Motion to dismiss an appeal from order of Commissioner of Patents or in the alternative to stay same—Order of Commissioner of Patents granting a licence without settling terms thereof—The Patent Act, 1935, 25-26 Geo. V, c. 32, ss. 67(2)(a)(d), 66, 70 and 71—Words "all orders and decisions" in s. 71 of the Patent Act of very wide meaning —Licence granted without terms of no practical usefulness to applicant—Appeal from order of Commissioner of Patents premature.* On an application made by respondent the Commissioner of Patents ordered the grant of a non-exclusive licence to it to manufacture under certain Canadian patents. The terms of the licence were to be settled by the parties within three months from the date of the order or by the Commissioner should they fail to agree. From this order appellant appealed to the Court and respondent moved that the appeal be dismissed on the ground that it is premature in that the Commissioner is still seized with the application for the licence or in the alternative that it be stayed until he has settled the terms of the licence. *Held:* That the words "all orders and decisions" in s. 71 of the Patent Act, 1935, 25-26 Geo. V. c. 32, have a very wide meaning. To say that an order of the Commissioner granting a licence has to include the terms thereof to become subject to an appeal would have the effect of depriving interested parties of a right clearly stated in the section. In the absence of any restriction or proviso in the Act the right of appeal is available from orders or decisions granting a licence though the terms thereof are not embodied in same. 2. That without terms and conditions the licence granted by the Commissioner has no practical usefulness. The proceedings before the Commissioner will have to be completed to meet the respondent's demand and the requirements of s. 70 of the Act. 3. That to allow the appeal to proceed while the Commissioner is considering the terms of the licence would give rise to a multiplicity of proceedings and result in delays and increased costs and would be dealing piecemeal with matters in controversy between the parties. *In the Goods of Tharp* (1877-8) Law Rep. 3 P.D. 76; *Byrne* v. *Brown* (1889) 22 Q.B.D. 657 at 666; *Williams* v. *Hunt* [1905] 1 K.B. 512 referred to and followed. 4. That the

REVENUE—*Customs Duty—Customs Act, R.S.C. 1927, c. 42, ss. 49(1), 49(2), 49(3)—Customs Tariff, R.S.C. 1927, c. 44, item 206a—The Tariff Board Act, S. of C. 1931, c. 55, ss. 3(8), 4, 5(2), 5(7), 5(8), 9—Whether question is one of law dependent on opinion of Court or judge—Leave to appeal restricted to questions arising out of finding or order of Tariff Board—Meaning of "biological products" in Tariff Item 206a—Words in Customs Tariff to receive ordinary meaning unless context requires technical meaning—Court not to interfere with decision of Tariff Board if reasonably made.* The Tariff Board on an appeal from a decision of the Deputy Minister of National Revenue for Customs and Excise decided that two importations

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decision of the Court on this point in *Minister of National Revenue* v. *British and American Motors Toronto Ltd.* [1953] Ex. C.R. 153 is a correct application of the Income Tax Act, R.S.C. 1952, c. 148, s. 144. 2. That the intention of a corporation acting through its officers may be binding not only on its shareholders but strangers and even revenue authorities. *Bouch* v. *Sproule* (1887) A.C. 385; *Commissioners of Inland Revenue* v. *Blott* and *Commissioners of Inland Revenue* v. *Greenwood* [1920] 1 K.B. 114 and [1921] 2 A.C. 171; *Bagg* v. *Minister of National Revenue* [1948] Ex. C.R. 244; [1949] S.C.R. 574 referred to. 3. That the method in which a corporation is keeping its books is not conclusive of what is a capital profit and what is a revenue profit. *J. and M. Craig (Kilmarnock) Ltd.* v. *Inland Revenue* [1914] S.C. 338; *Doughty* v. *Commissioner of Taxes* [1927] A.C. 327 at 336; *Inland Revenue* v. *Scottish Automobile and General Insurance Company* [1932] S.C. 87; *Cowen's Ideal Stamping Co. Ltd.* v. *Inland Revenue* (1935) 19 T.C. 155 referred to. 4. That the purchase and sale by respondent of the twelve cars in question was really the carrying on of part of its business which by its Letters Patent it was authorized to carry on viz., "to buy, sell, import, export, exchange, rebuild, repair, maintain and generally deal in all kinds of automobiles . . ." 5. That the profit on the sales of the said cars was income within the meaning of the Income Tax Act 1948, c. 52, ss. 3 and 127(1)*(e)*, S. of C. 1948 (Now R.S.C. 1952, c. 148, ss. 3 and 139). MINISTER OF NATIONAL REVENUE v. J. T. LABADIE LIMITED..... **260**

14.——*Income—Income Tax—The Income Tax Act, c. 52, ss. 3 and 4, S. of C. 1948—Shipbuilding contracts—Loans from Canadian Commercial Corporation established under The Canadian Commercial Corporation Act, 10 Geo. VI, c. 40, S. of C. 1946—Trading receipts—Loss assumed by the Crown under shipbuilding contracts—Abatement of capital indebtedness—Whether a subsidy—Whether income—Appeal from Income Tax Appeal Board allowed.* Appellant, a dry dock owner and shipbuilder, got into financial and technical difficulties while building two small and three large Yangtze River freight and passenger vessels which a Chinese company had purchased with funds derived mainly from loans guaranteed by the Government of Canada. It obtained under a mortgage security advances from the Canadian Commercial Corporation—a Crown company—established under the Canadian Commercial Corporation Act, 10 Geo. VI, c. 40, S. of C. 1946, to which it was already indebted in the amount of $450,000 for previous loans. Upon completion of the shipbuilding contracts appellant's total indebtedness to the Canadian Commercial Corporation under the loan and mortgage deed amounted to $914,000. By an agreement effective November 2, 1949, between the Crown and appellant, the indebtedness of appellant was abated in respect of two amounts: the first of $284,813.83 "being the amount of a payment received by the Canadian Commercial Corporation from the Chinese company, representing the final increase in the price of the three large vessels"; the second of $450,000, "being a portion of the said advances made by the Canadian Commercial Corporation to the shipbuilder and representing the portion of the loss assumed by the Canadian Government under the shipbuilding contract". The payment of $284,813.83 by the Chinese company was taken into appellant's accounts for the year 1949 as a trading receipt but the sum of $450,000 was shown in its income tax return for the same year as an increase to its capital surplus. To appellant's declared income for that year the Minister added the said sum of $450,000 and from the assessment appellant appealed to the Income Tax Appeal Board which dismissed the appeal. An appeal was taken to this Court from the Board's decision. On the facts the Court found that the advances by the Canadian Commercial Corporation to appellant were advances on capital account and the abatement of $450,000 was an abatement of the capital indebtedness. *Held:* That the direct payment by the Chinese company to the Canadian Commercial Corporation of the sum of $284,813.83 was not a contribution to appellant's losses under the shipbuilding contracts but rather a true trading receipt. The mere fact that the two items of abatement were dealt with in one agreement does not lead to the inference that they were of the same character. They were of a totally different character. The relationship between appellant and the Chinese company was that of vendor and purchaser; whereas the relationship between appellant and the Canadian Commercial Corporation (or the Crown) was that of debtor and creditor. 2. That the benefit received by appellant by reason of the abatement cannot be considered as a subsidy since appellant's indebtedness to the Canadian Commercial Corporation secured as it was by a mortgage of all its immoveable properties was an indebtedness on capital account. While the advances made by the Canadian Commercial Corporation were used by appellant in building the ships, the Canadian Commercial Corporation itself was in the same position as a banker advancing working capital or as a lender who had advanced capital and had taken security by way of mortgage. It was not a party to the shipbuilding contracts and neither it nor its principal, the Crown, was under any legal obligation to assume or bear any part of appellant's loss. What the Crown did was to enter into a compromise of a capital debt by abating it to the extent stated. The case, therefore, falls to be decided on the

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"succession" without an actual *disposition* by the deceased, there would have been no necessity for enacting s. 3(4). Here, Dr. Chipman made no disposition whatever of the principal of the residue of Mrs. Chipman's estate. Therefore, there was no "succession" in respect to that residue under s. 3(1) (i) so far as Dr. Chipman's estate is concerned. 3. That s. 4(1) of the Dominion Succession Duty Act does not purport to create a statutory succession in all cases in which the donee of the general power to appoint or dispose of property fails to exercise that power. It is only in cases "where . . . *a person takes a beneficial interest in the property as a result of the failure to exercise*, that the taking of that interest in the property is deemed to be a succession". The majority decision in *Wanklyn et al* v. *Minister of National Revenue* [1953] S.C.R. 58 indicates that the beneficiaries of the principal of the residue of Mrs. Chipman's estate did not *take* beneficial interests in the property *as a result* of the failure of Dr. Chipman to exercise the power, but took them directly from the provisions of Mrs. Chipman's will. 4. That the inclusion of the words, "the taking of the interest in the property as a result of the failure of the deceased to exercise the power" creates a condition which must be found to exist before there is deemed to be a succession; there must be a *taking* of a beneficial interest by the successor and that taking must follow as a result of the donee of the power failing to exercise it. Here the beneficiaries took the beneficial interests in the property at the death of Mrs. Chipman. They took no beneficial interest on Dr. Chipman's death, but merely retained what they already had, namely, a vested remainder in the capital, relieved by Dr. Chipman's death of the possibility of being divested thereof which had existed during his lifetime. *A. G.* v. *Lloyd's Bank Ltd.* [1935] A.C. 382; *Scott et al* v. *C.I.R.* [1937] A.C. 174 referred to. THE ROYAL TRUST COMPANY ET AL v. MINISTER OF NATIONAL REVENUE.... **354**

20.——*Income—Income Tax—The Income Tax Act, S. of C. 1948, c. 52, s. 12(1)(a) and (b)—Deductions not allowed from income—Deductions not incurred by taxpayer for the purpose of earning income—Expenses incurred to comply with requirements of agreement of sale of property—Appeal from Income Tax Appeal Board dismissed.* In 1948 the appellant company which operates a number of freight vessels sold two vessels while they were undertaking a voyage on its behalf. Under the agreements of sale both vessels were to be delivered to the purchasers in Lloyd's 100 A-1 class. Upon completion of their respective voyages the vessels went into dry-dock and there certain repairs were made before their delivery. The amounts of those repairs were claimed as deductions by appellant in its 1949 income tax return as ordinary expenses incurred in the course of its business but disallowed by the Minister on the ground that they were made pursuant to the terms of the agreements of sale and not for the purpose of earning the income. From the assessment an appeal was taken to the Income Tax Appeal Board which dismissed it and from the decision appellant appealed to this Court. On the facts the Court found that the repairs were maintenance repairs and none of them incurred for improvements or alterations and that the annual inspection of the vessels, as required by the Canada Shipping Act, S. of C. 1934, c. 44, s. 387, was not made in 1948 by a steamship inspector, prior to their delivery to the purchasers. *Held:* That s. 12(1)*(a)* of the Income Tax Act being a positive enactment and excluding deductions which were not made or incurred by the taxpayer *for the purpose* of gaining or producing income from his property or business, it is not enough to establish that the dilapidations which occasioned the expenditures arose out of or in the course of the business, but that the *purpose* of the taxpayer in making the outlays was that of gaining or producing income from the business. Here that was not the purpose of the taxpayer. The outlays were incurred at the time each vessel entered the drydock, and it was then known that they would no longer be operated by appellant, but, following the inspection by Lloyds' surveyor would be delivered to the purchasers. The sole purpose of appellant in incurring the expenses was to comply with the requirements of the agreements of sale. MONTSHIP LINES LIMITED v. MINISTER OF NATIONAL REVENUE..... **376**

21.——*Succession duty—Dominion Succession Duty Act, R.S.C. 1952, c. 89, s. 2(a)(k)(m), 6(1)(a)(b), 10(1), 11, 13(1), 15—"Succession"—Bequest duty free—Dutiable gifts and duty thereon taxable but the total does not constitute a succession—No duty on duty.* A testator bequeathed to his widow certain gifts free of succession duty. The respondent assessed the succession duties payable on the basis that such devise and the duty payable thereon together constituted a succession within the meaning of the Dominion Succession Duty Act. An appeal from said assessment was taken to this Court. *Held:* That a gift free of duty is two gifts, one of the property given and the other a legacy of the sum required to pay the duty. 2. That the dutiable succession to the widow are the total amount of the values at the death of the testator of the devises and bequests to her free of duty and also the amount of money required to pay such duty, and that duty is assessable on the sum of the two as one succession but the Act does not authorize further calculations of duty upon duty. 3. That while the amount of money required to pay the duty on the dutiable gifts given duty free was a

provisions of s. 89(1) of the Act. *Held:* That the words "prepared roofings" in Schedule III of the Excise Tax Act do not apply to any particular science or art and are to be construed as they are understood in common language. *Attorney-General* v. *Winstanley* (1831) 2 D. and C. 302; *The Cargo ex Schiller* (1877) 2 P.D. 145, 161; *Dominion Press Ltd.* v. *Minister of Customs and Excise* [1928] A.C. 340; *The King* v. *Montreal Stock Exchange* [1935] S.C.R. 614; *The King* v. *Planters Nut and Chocolate Co. Ltd.* [1951] Ex. C.R. 122; *The King* v. *Planters Nut and Chocolate Co. Ltd.* [1952] Ex. C.R. 91; *The Queen* v. *Universal Fur Dressers and Dyers Ltd.* [1954] Ex. C.R. 247 referred to and followed. 2. That in ordinary language the word "roof" is related to a structure, building or house and is understood to have that meaning by the general public. The words "awning", "canopy", "marquee" or even "covering" cannot be construed to be understood in common language as meaning a roof. These words are well understood by the trade and public to be coverings over doorways, windows, stairways, balconies or patios. 3. That when a taxpayer claims the benefit of an exemption he must establish that his claim comes clearly within the provisions of the exempting section. *The Credit Protectors (Alberta) Limited* v. *Minister of National Revenue* [1947] Ex. C.R. 44; *Lumbers* v. *Minister of National Revenue* [1943] Ex. C.R. 202; *W. A. Sheaffer Pen Company of Canada Limited* v. *Minister of National Revenue* [1953] Ex. C.R. 251 referred to and followed. Here defendant company failed to prove that the processed material to make the finished articles came within the meaning of "prepared roofing" in Schedule III of the Excise Tax Act. The material employed in the processing of the articles, although usable as roofing material, was not prepared specially for roofing but prefabricated into awnings, canopies, marquees and umbrellas according to the specifications laid down in the order received from the customer. HER MAJESTY THE QUEEN v. KOOL VENT AWNING LIMITED..... **633**

34.——*Income Tax—The Income Tax Act, R.S.C. 1952, c. 148, s. 14 (2)—Establishment of "market value" of inventory—Losses must be actually suffered and not merely anticipated. Held:* That in putting the market value upon the inventory of appellant's stock-in-trade for purpose of write-down in arriving at the amount of deduction to be allowed for income tax purposes the respondent should have taken into account certain additional factors to the goods being shopworn and soiled and thus lessened in value, namely, a reduction in excise tax on furs which on the evidence would be passed on to purchasers from appellant and the effect of changes in styles due to the relaxation of wartime controls and regulations. 2. That when establishing the market value of an inventory on the basis of estimated realizable value it is not permissible to take into account losses in inventory value which for the subsequent year are merely anticipated and have not in fact been suffered or sustained in the taxation year under consideration. SELLERS-GOUGH FUR COMPANY LIMITED v. THE MINISTER OF NATIONAL REVENUE..... **644**

35.——*Reference under the Customs Act—Seizure — Forfeiture — The Customs Act, R.S.C. 1927, c. 42, ss. 176 and 193(1)—"Subsequent transportation" of goods liable to forfeiture—Vehicle used in subsequent transportation of goods liable to forfeiture itself liable to forfeiture even if not directly associated with the importation and unshipping or landing or removal of the goods.* One G. sold and delivered to claimant at his residence in Levis, P.Q. 20,000 American cigarettes which to the latter's knowledge had been smuggled into Canada. Some days later claimant upon his brother's consent to buy 75 cartons of those cigarettes, transported them in his automobile from Levis to his brother's residence in Quebec, P.Q. where delivery was made and the amount of purchase paid. Claimant's automobile was seized by the Royal Canadian Mounted Police and, later, he was found guilty on a charge of having unlawfully imported goods in his possession. The Minister of National Revenue decided that the automobile should be forfeited and, on being advised by claimant that his decision was not accepted, referred the matter to this Court. *Held:* That s. 193 of the Customs Act, R.S.C. 1927, c. 42, renders liable to forfeiture all vehicles used in the transportation of goods liable to forfeiture although such vehicle had no direct connection with the importation or landing of such goods. The "subsequent transportation" of such goods as set forth in s. 193 of the Act need not be directly associated with the importation and unshipping or landing or removal of the goods. *James* v. *The Queen* [1952] Ex. C.R. 402 referred to and followed. MARCEL GOSSELIN v. HER MAJESTY THE QUEEN **658**

36.——*Customs and Excise—Seizure—Forfeiture—The Customs Act, R.S.C. 1952, c. 58, s. 181(1) and (2)—Petition of Right—Motor vehicle that transports persons assisting in the importation or subsequent transportation of goods liable to forfeiture—Suppliant entitled to relief sought by his Petition of Right—Sanctions contemplated by s. 181(1) and (2) of the Act—Construction to be given to words "all vehicles made use of in the subsequent transportation" in s. 181(1) of the Act—Meaning of the words "made use of in the subsequent transportation" in s. 181(1) of the Act.* Royal Canadian Mounted Police constables on duty near the American border in the vicinity of Mansonville, Quebec, one evening observed two automobiles. One was stationary and the second one crossed to the American side. Some minutes later this second automobile returned to