1946

CANADA
LAW REPORTS

Exchequer Court of Canada

RALPH M. SPANKIE, K.C.
OFFICIAL LAW REPORTER

Published under authority by Howard R. L. Henry, K.C.
Registrar of the Court

OTTAWA
EDMOND CLOUTIER, C.M.G., B.A., L.Ph.,
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
CONTROLLER OF STATIONERY
1947

77529—1a

JUDGES

OF THE

EXCHEQUER COURT OF CANADA

During the period of these Reports:

PRESIDENT:

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

PUISINE JUDGES:

THE HONOURABLE EUGENE REAL ANGERS
(Appointed, February 1, 1932)
THE HONOURABLE C. G. O'CONNOR
(Appointed, April 19, 1945)
THE HONOURABLE J. C. A. CAMERON
(Appointed, September 4, 1946)

DISTRICT JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

DONALD MCKINNON, Esquire, K.C., Prince Edward Island Admiralty District—appointed, July 20, 1935.

The Honourable WILLIAM F. CARROLL, Nova Scotia Admiralty District—appointed, April 23, 1937.

The Honourable LUCIEN CANNON, Quebec Admiralty District—appointed, October 18, 1938.

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.

W. ARTHUR I. ANGLIN, Esquire, K.C., New Brunswick Admiralty District—appointed, June 9, 1945.

DEPUTY DISTRICT JUDGES:

The Honourable Sir JOSEPH A. CHISHOLM—Nova Scotia Admiralty District.

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

ATTORNEYS-GENERAL FOR THE DOMINION OF CANADA:

The Right Honourable LOUIS S. ST. LAURENT, K.C.
and
The Right Honourable JAMES L. ILSLEY, K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Honourable JOSEPH JEAN, K.C.

77529—1a½

TABLE OF CONTENTS

MEMORANDA RESPECTING APPEALS FROM JUDGMENTS OF THE EXCHEQUER COURT OF CANADA

A. To the Judicial Committee of the Privy Council:

1. *King, The* v. *British Columbia Electric Ry. Co. Ltd.* [1945] Ex. C.R. 82. Appeal to the Supreme Court of Canada allowed. Appeal to the Privy Council dismissed.
2. *King, The* v. *Dominion Engineering Co. Ltd.* (1943) Ex. C.R. 49. Appeal to the Supreme Court of Canada dismissed. Appeal to the Privy Council dismissed.
3. *Wright's Canadian Ropes Ltd.* v. *Minister of National Revenue* (1945) Ex. C.R. 174. Appeal to the Supreme Court of Canada allowed. Appeal to the Privy Council dismissed.

B. To the Supreme Court of Canada:

1. *Anthony, William O.* v. *The King* (1946) Ex. C.R. 30. Appeal allowed.
2. *Bender; Germain* v. *The King* (1946) Ex. C.R. 529. Appeal dismissed.
3. *Burns, Hon. Patrick et al.* v. *Minister of National Revenue* (1946) Ex. C.R. 229. Appeal allowed in part.
4. *Dominion Telegraph Securities Ltd.* v. *Minister of National Revenue* (1946) Ex. C.R. 338. Appeal dismissed.
5. *Fraser & Co. Ltd., D. R.* v. *Minister of National Revenue* (1946) Ex. C.R. 211. Appeal dismissed.
6. *King, The* v. *Canadian Pacific Ry. Co.* (1946) Ex. C.R. 375. Appeal dismissed.
7. *King, The* v. *Irving Oil Co. Ltd.* (1945) Ex. C.R. 228. Appeal allowed.
8. *King, The* v. *Toronto Transportation Commission* (1946) Ex. C.R. 604. Appeal pending.
9. *King, The* v. *Watt & Scott (Toronto)* (1945) Ex. C.R. 111. Appeal dismissed.
10. *King, The* v. *Weddell Ltd.* (1945) Ex. C.R. 97. Appeal dismissed.
11. *Laperriere, Alfred* v. *The King* (1945) Ex. C.R. 53. Appeal dismissed.
12. *Mahaffy, J. C.* v. *Minister of National Revenue* (1946) Ex. C.R. 18. Appeal dismissed.
13. *Manischewitz Co., B.* v. *Gula, Harry et al.* (1946) Ex. C.R. 570. Appeal pending.
14. *Murphy, Leonard* v. *The King* (1946) Ex. C.R. 589. Appeal pending.
15. *National Trust Co. Ltd.* v. *Minister of National Revenue* (1946) Ex. C.R. 650. Appeal pending.

16. *Pure Spring Co. Ltd.* v. *Minister of National Revenue* (1946) Ex. C.R. 471. Appeal pending.

17. *Snell, Bessie May et al* v. *The King* (1945) Ex. C.R. 250. Appeal dismissed.

18. *Standard Brands Ltd.* v. *Staley, Edwin John* (1946) Ex. C.R. 615. Appeal pending.

19. *St. John Tugboat Co. Ltd.* v. *The King* (1945) Ex. C.R. 214. Appeal allowed in part.

20. *Thompson, T. T.* v. *The King* (1946) Ex. C.R. 30. Appeal allowed.

21. *Trapp, Thomas D.* v. *Minister of National Revenue* (1946) Ex. C.R. 245. Appeal pending.

22. *Union Packing Co. Ltd.* v. *The King* (1946) Ex. C.R. 49. Appeal allowed.

23. *Wandscheer, Daniel et al.* v. *Sicard Limitée* (1946) Ex. C.R. 112. Appeal pending.

24. *Western Dominion Coal Mines Ltd.* v. *The King* (1946) Ex. C.R. 387. Appeal pending.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME

A TABLE

ON THE

NAMES OF THE CASES CITED

IN THIS VOLUME

A

B

B—*Concluded*

C

D

D—*Concluded*

E

F

G

H

H—*Concluded*

I

J

K

K—*Concluded*

L

M

Mc

N

O

P

Q

R

S

St.

T

U

V

W

Y

Z

CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

BETWEEN:

1945
Aug. 23 & 24
Nov. 13

HARRIS H. HIMMELMAN; R. L. CLARK; H. W. MOSHER; FRANK M. BACKMAN; CHARLES WEBBER; HAROLD K. CONRAD; M. M. COX; N. L. CONRAD; M. D. LOHNES; H. BIRD; G. R. G. FENTON; G. J. COOPER; ARTHUR TANNER; R. M. OGILVIE; W. B. KEAN; R. V. SARTY; F. RICHARD; M. M. BLANDFORD; C. T. ORMISTON..... SUPPLIANTS;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Crown—Petition of Right—Canada Shipping Act 24-25 Geo. V, c. 44—Exchequer Court Act R.S.C. 1927, c. 34, s. 18—Halifax Pilotage District—Pilotage Authority agent of the Crown—Halifax Pilotage Fund—Use of such fund—By-laws enacted by Pilotage Authority—Contract entered into by Pilots' Committee for purchase and insurance of vessel—Repayment of money loaned to purchase vessel for use of Pilots—Loss of vessel—Payment of proceeds of insurance policies—Proceeds of insurance policies are the property of the Crown and not of the Pilots—Allegation that Crown is a trustee—Question not one of Crown's trusteeship but of court's jurisdiction.

The action is brought by the temporary Pilots of the Halifax Pilotage District to recover from His Majesty a portion of two marine insurance policies paid to His Majesty by the insurers following the loss of the pilot vessel *Camperdown*.

By virtue of the Canada Shipping Act 24-25 Geo. V, c. 44, the Minister of Transport is the Pilotage Authority for the Halifax Pilotage District. By-laws 6, 6(*a*), and 6(*b*) enacted by him provided *inter alia* that all moneys collected by virtue of these by-laws should be

1945

HARRIS H. HIMMELMAN ET AL. v. THE KING

deposited to the credit of the Receiver General of Canada and be designated as the Halifax Pilotage Fund which should be administered by the Pilotage Authority to pay the general expenses of the Pilotage District including the purchase, charter or hire of pilot boats and their maintenance, operation and repair and after providing for other disbursements the balance to be divided among the pilots in proportion to the time worked each year by each pilot. Other by-laws set up a Pilots' Committee to be recognized by the Pilotage Authority as representing the pilots in all matters affecting them collectively and individually. By-law 7(*a*) states that "All vessels required for the use of the pilotage service shall be purchased out of the revenue of the District and be owned and registered in the name of the Pilotage Authority." By-law 7(*b*) enacts: "The handling, maintenance and jurisdiction of the vessels shall be under the immediate and exclusive control of the Pilotage Authority for the Pilotage District of Halifax, and the cost of maintenance, repairs, etc., shall come out of the earnings of the Pilotage District". All by-laws were confirmed by the Governor in Council.

In June, 1941, an agreement was executed by the Pilots' Committee whereby the pilots were to be loaned by the Pilotage Authority a sum not exceeding $65,000 for the building and equipping of an auxiliary pilot vessel to be repaid during the continuance of hostilities by yearly payments of 7 per cent of the gross revenue of the Pilotage District of Halifax and thereafter by such equal amounts as would effect repayment of the said sum within a period of ten years from the date of the first payment, the money so loaned to be a first charge against the pilots' earnings as provided by by-law 6(*a*).

The pilots also agreed to keep the vessel fully insured until fully paid for, the policy to be made payable to the Minister of Transport. The agreement provided further that the vessel was to be registered in the name of His Majesty the King represented by the Minister of Transport and to be the property of the Crown.

The money was advanced and the vessel *Camperdown* was constructed and registered after Order in Council No. 5167, July 15, 1941, authorized such action and the loan above mentioned on the part of the Minister of Transport. The vessel was insured in December, 1943, the assured being described as "Minister of Transport of Dominion of Canada and/or the Halifax Pilotage." One policy for $65,000 was the ordinary hull insurance and another for $10,000 was described as disbursement insurance. The premiums on both policies were paid out of the Halifax Pilotage Fund. The loan was repaid out of the same fund in full by March 31, 1944.

The *Camperdown* became a total loss on February 24, 1944, and the insurance money for the policy of $65,000 was paid by cheques made out to the Minister of Transport and/or the Halifax Pilotage. They were endorsed by the Chief Treasury Officer of the Department of Transport to the Receiver General of Canada, and also endorsed by the Deputy Minister of Finance and the Bank of Canada, prior to the date of the last payment of the loan made to the pilots for the construction of the vessel. The purchaser of the salvage paid direct to the Minister of Transport the sum

of $10,000. Had the deductions for the return of the money advanced not been made, the balance in the Halifax Pilotage Fund for division among all the pilots would have been increased by $65,000, and of this sum the suppliants would have received $28,100.71. The proceeds of the insurance policies were used by the Pilotage Authority for the purchase of a new vessel which the pilots agreed was necessary though objecting to the use of the insurance moneys for such purpose.

Held: That the Minister of Transport as Pilotage Authority by virtue of the Canada Shipping Act, 24-25 Geo. V, c. 44 is an agent of the Crown. *City of Halifax* v. *Halifax Harbour Commissioners* (1935) S.C.R. 215 referred to.

2. That the question before this court is not whether the Crown may be a trustee but whether the Court has jurisdiction in respect of the execution of the trust since the Exchequer Court Act R.S.C. 1927, c. 34, s. 18 confers jurisdiction upon the court where money belonging to the subject is in the possession of the Crown. *Joseph Henry et al* v. *The King* (1905) 9 Ex. C.R. 417 followed.

3. That the money advanced was to be repaid in the manner agreed upon and with the insurance premiums such payments were included in the general expenses of the Pilotage District pursuant to the by-laws and the pilots merely agreed to this increase in the general expense of the Pilotage District and did not pay either of these items and had only a right of user in the vessel.

4. That the proceeds of the insurance policies should be treated in the same way as the money in the Halifax Pilotage Fund and be made available for the purchase of a new vessel, the purchase price of which could be taken by the Pilotage Authority either out of the Halifax Pilotage Fund or the proceeds of the insurance policies or out of both.

PETITION OF RIGHT by suppliants to recover money in the possession of the Crown alleged to belong to suppliants.

The action was tried before the Honourable Mr. Justice O'Connor, at Halifax.

C. B. Smith, K.C. for the suppliants.

F. D. Smith, K.C. for the respondent.

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

O'CONNOR J. now (November 13, 1945) delivered the following judgment:

The suppliants were employed as temporary pilots in the Halifax Pilotage District and claim a portion of the proceeds of two marine insurance policies paid to the

1945

HARRIS H. HIMMELMAN ET AL. v. THE KING

O'Connor J.

respondent on the loss of the pilot vessel, *Camperdown*. The policies were effected under an agreement whereby the Minister of Transport advanced the sum of $65,000 for the construction of the said vessel. The suppliants contend that the money was loaned to all the pilots of the District and repaid in full by them out of their earnings, and that the respondent held only the bare legal title to the vessel, and that the pilots effected the insurance and paid the premiums, and the insurance was for the protection of the respondent as creditor and not as owner of the vessel, and that the respondent holds the proceeds in trust for the pilots. The respondent contends that the vessel was the property of the respondent and that the proceeds of the insurance must be used for the purposes of the Pilotage District including the purchase of a new vessel.

The permanent pilots have not joined in the action.

The claim is for "money of the subject in possession of the Crown" under section 18 of the Exchequer Court Act, R.S.C. 1927, c. 34.

The facts in the case are not in dispute.

Pilotage by-laws were originally enacted by the Pilotage Authority under the provisions of the Canada Shipping Act, R.S.C. 1927, c. 186, (now Chapter 44 of The Statutes of Canada 1934), and were confirmed by Order in Council. They have been amended from time to time and the amendments confirmed by Orders in Council.

The Halifax Pilotage Fund was established by By-law No. 6, and 6 (*a*) provides for payment of the general expenses, and 6(*b*) for the division of the balance among the pilots.

6. All moneys collected under and by virtue of these by-laws and remitted to the Department of Marine (now Transport), shall be deposited to the credit of the Receiver-General and shall be designated as the Halifax Pilotage Fund, which shall be administered by the Pilotage Authority as follows:

(*a*) The Pilotage Authority shall, out of this Fund, pay the general expenses of the Pilotage District, and without restricting the generality of the foregoing, the expenses chargeable shall include among other things, the purchase, charter or hire of pilot boats and the maintenance, operation and repair of same; the payment of necessary help other than salaries and expenses of the clerical staff at the pilotage headquarters, provision for the Superannuation Fund as hereinafter mentioned.

(*b*) After providing for expenses and Superannuation Fund, the balance shall be divided among the pilots as follows: The Pilotage Authority shall pay to each pilot monthly a certain sum estimated to be not more than his share of the balance. At the end of each fiscal year, after all expenses, salaries and Superannuation Fund have been paid, any balance remaining shall be divided equally among the pilots in proportion to the time worked during the year by each.

Provision was made for a Pilots' Committee,—

27. The pilots in the Pilotage District of Halifax shall appoint (in the month of April of each year) from among themselves a Committee of three which shall be recognized by the Pilotage Authority as representing the said pilots in all matters affecting them collectively and individually.

Pilot boats,—

7(*a*) All vessels required for the use of the pilotage service shall be purchased out of the revenue of the District and be owned by and registered in the name of the Pilotage Authority.

(*b*) The handling, maintenance and jurisdiction of the vessels shall be under the immediate and exclusive control of the Pilotage Authority for the Pilotage District of Halifax, and the cost of maintenance, repairs, etc., shall come out of the earnings of the Pilotage District.

The Minister of Transport is the Pilotage Authority for the Halifax Pilotage District.

A vessel was required for the pilotage service, and the following agreement was signed by the Pilots' Committee on the 3rd of June 1941:—

We the Committee of Pilots representing the licensed pilots of the Pilotage District of Halifax, Nova Scotia, do hereby agree with the Honourable the Minister of Transport, as the Pilotage Authority, for the Pilotage District of Halifax, Nova Scotia, to wit, that,

The pilots to be loaned a sum of money not exceeding Sixty-five thousand dollars ($65,000) for the building and equipping of one auxiliary pilot vessel complete, the plans and specifications for which have been approved by the Board of Steamship Inspection, on behalf of the said Pilotage Authority.

So long as the present hostilities continue, this loan is to be returned in yearly payments of 7 per cent of the gross revenue of the Pilotage District of Halifax. On the cessation of hostilities the yearly rate of repayment shall be such equal amounts as will return the total amount loaned within a period of ten years from the date of the first payment.

The money so loaned to be a first charge against the pilots' earnings as provided by By-law No. 6(*a*).

Further, during the period of payments the pilots, out of their revenue, also agree to keep said vessel fully insured, the policy to be made payable to the Minister of Transport. The vessel to be kept fully insured until fully paid for.

The handling, maintenance and jurisdiction of the vessel to be absolutely under the immediate control of the Superintendent of Pilots for the Pilotage District of Halifax, and the cost of maintenance, repairs, etc., to come out of the earnings of the Pilotage District, as provided by By-law No. 7.

1945

HARRIS H. HIMMELMAN ET AL. v. THE KING

O'Connor J.

The vessel to be built to requirements of the Board of Steamship Inspection of Canada.

The vessel to be registered in the name of His Majesty the King represented by the Minister of Transport as the Pilotage Authority of the District, and is to be the property of the Crown.

Further, at any time, during the course of payment, that a pilot is incapacitated from duty, or otherwise leaves the service through any cause whatsoever, the amounts paid by him will be the property of the Crown and no further amounts will be exacted from him—he will have absolutely no claim on the vessel.

Dated—Halifax, N.S.,
June 3rd, 1941.

Signed—E. DeLouchry
N. L. Power
R. M. Betts
Halifax Pilots Committee.

Witness:
Sgd. Chas. L. Waterhouse,
Supt. of Pilots,
Halifax, N.S.
Sgd. W. H. Ahern, Pilotage Clerk.

Order in Council No. 5167 was passed on the 15th of July 1941, and after reciting that the pilots of the District were not financially able to build or purchase a vessel and that the pilots had repaid all previous loans and that $65,000 was available under Certificate of Encumbrance No. 4725 against Appropriation No. 390, the Minister of Transport recommended that he be authorized to advance the pilots a sum not exceeding $65,000 on the following conditions among others:—

4. That the sum expended under this authority shall be refunded by the pilots in the following manner:

So long as the present hostilities continue, the loan shall be returned, without interest, in yearly payments at the rate of 7 per cent of the gross revenue of the Pilotage District of Halifax, and after the cessation of hostilities, the yearly payments shall be at such a rate as will provide for payment of the balance then owing within a period of ten years from the date of the first of such payments.

5. That the sum so advanced to the pilots under this authority, together with the costs of keeping the vessel insured, shall be a first charge on the earnings of the pilots, in accordance with the provisions of By-law No. 6(*a*) of the By-laws of the Pilotage District of Halifax.

6. That the said pilot vessel shall be registered in the name of His Majesty the King in right of the Dominion of Canada, represented by the Minister of Transport, as owner thereof.

The money was advanced and the *Camperdown* was constructed and registered in accordance with paragraph 6 of P.C. 5167 and was put into service.

Pursuant to the agreement, the vessel was insured. It was again insured in December 1943 with the Boston Insurance Company, and the assured was described as "Minister of Transport of Dominion of Canada and/or the Halifax Pilotage." One policy for $65,000 was the ordinary hull insurance and another policy for $10,000 was described as disbursement insurance.

The *Camperdown* was wrecked on the 24th day of February, 1944, and declared to be a total constructive loss, and the Boston Insurance Company issued cheques payable to the Minister of Transport of Dominion of Canada and/or the Halifax Pilotage for the sum of $65,000, and the purchaser of the salvage, J. P. Porter & Sons Ltd., under an arrangement with the Insurance Company and the Minister, paid the Minister the sum of $10,000. The cheques were endorsed by the Chief Treasury Officer of the Department of Transport to the Receiver-General of Canada, and bear the endorsement of the Deputy Minister of Finance and the Bank of Canada.

The Pilots' Committee by a letter dated the 18th day of October, 1944, approved the repurchase of the *Camperdown,* which was being salvaged and rebuilt. The Minister of Transport as Pilotage Authority entered into an agreement with J. P. Porter & Sons Ltd., on the 7th day of November, 1944, to repurchase the *Camperdown.* Counsel for the respondent admitted that while the pilots agreed to the purchase of a new vessel, they objected strongly to the insurance money being used for that purpose and stated that the consent and agreement were tendered for the purpose of proving only that there was need to purchase a new vessel.

The premiums on both policies were paid out of the Halifax Pilotage Fund.

The loan was repaid out of the same fund as follows:—

Repaid in first year of loan, fiscal year April 1/41-March 31/42	$33,978 82
Repaid in second year of loan, fiscal year April 1/42-March 31/43	$27,838 43
Repaid in third year of loan, fiscal year April 1/43-March 31/44	$ 3,182 75
	$65,000 00

1945

HARRIS H. HIMMELMAN ET AL. v. THE KING

O'Connor J.

The final payment was made as at the 31st March, 1944. This was subsequent to the payment of the insurance moneys to the Crown. The books and accounts of the Pilotage District of Halifax were operated on the same fiscal year as that of the Department of Transport, namely April 1st to March 31st.

If the deductions for the purpose of returning the advance had not been made, the balance in the Halifax Pilotage Fund for division among all the pilots would have been increased by $65,000 and of this sum the suppliants would have received $28,100.71.

The services of the temporary pilots can be terminated on thirty days' notice and their services have or will be shortly terminated.

The suppliants submit that the same procedure should be adopted by the Minister of Transport as was adopted, first, in regard to the insurance money collected on the pilot vessel *Hebridean* lost in 1940. This money was applied, first, to the unpaid balance on the *Hebridean,* and the balance divided among the pilots in proportion to the contribution of each to the repayment of the loan, and secondly, on the distribution of the proceeds from the sale of the *Sambro,* a pilot vessel, among the pilots.

The suppliants tendered evidence as to the procedure in these cases, and submitted that it was admissible on three grounds: (1) in order to show circumstances in which this agreement was entered into; (2) as showing a course of dealing present in the minds of the parties when this agreement was entered into; (3) to explain the expression in the agreement, "the pilots agree to keep the vessel insured", and "the vessel is to be kept fully insured until paid for", because of the ambiguity in the name of the insured in the insurance policies. I allowed the evidence to be taken subject to objection but reserved the question of its admissibility.

I hold that the evidence is admissible, but, because the agreements between the parties were not put in evidence this evidence is without any value. It may have been that the procedure followed in those cases was based on express provisions in the agreements, or that the distribution in both cases was *ex gratia.*

Based on these facts the suppliants submit that:

(1) The Crown had the bare legal title and no proprietary interest, whereas the pilots were the equitable owners and had the right of user in perpetuity, and the provision that the cost of maintenance and repairs was to be paid out of their earnings, reaffirm their ownership in the vessel.

(2) By the agreement the pilots were required to effect the insurance, keep it in force and pay the premiums. The insurance was solely for the protection of the Minister *qua* creditor and not *qua* owner of the vessel.

(3) The insurance moneys cannot be used to purchase a new vessel because Section 318 of the Act limits the Funds of the District to pilotage dues and fees for licenses, and the power of the Pilotage Authority to pay out of the Fund is limited by the provision that payment shall be made "with such sanction and out of such Funds", i.e., pilotage dues and licenses, and that "all moneys collected" as set out in By-law 6 and "revenue" in By-law 7 (*a*) are limited to pilotage dues and fees for licenses.

(4) The loan having been repaid, the Crown has no interest in the insurance moneys and holds them in trust for all the pilots, including the suppliants, who repaid the loan.

(5) That the policies are payable to the "Minister of Transport and/or the Halifax Pilotage" and that "Halifax Pilotage" means the pilots.

(6) That the policy on disbursements covers the disbursements of the pilots because the respondent had no insurable disbursements.

The respondent submits that:—

(*a*) The Crown was the sole owner of the vessel and of the insurance policies and holds the money for the use of the Pilotage District and has obtained a new vessel with the proceeds of the policies.

(*b*) The agreement expressly provides that the vessel is to be the property of the Crown. The pilots made an agreement as a matter of policy and are bound by its terms. That the pilots have not a perpetual use of the vessel by reason of By-law 7(*b*) and that they are not the

1945

HARRIS H. HIMMELMAN ET AL. v. THE KING

O'Connor J.

equitable owners and no individual pilot had any interest in the vessel nor has any interest in the insurance moneys.

(*c*) The Crown is the owner by reason of By-law 7(*a*) which provides that all vessels shall be purchased out of the revenue of the District and be owned by the Pilotage Authority. That the insurance moneys take the place of the vessel and "revenue" in By-law 7(*a*) would include insurance money. That the essential purpose of the insurance was to protect the pilot vessel and the service so that if the vessel were damaged or lost she could be repaid or replaced.

(*d*) The Pilotage Authority under By-law 7(*b*) determines whether insurance shall be maintained or not and that he effects the same and that the premiums are a proper charge on and should be paid out of the Funds of the District and that the pilots have no right to the gross revenue.

(*e*) It is doubtful if the Crown can be a Trustee and almost impossible to establish a case of constructive trust against the Crown.

(*f*) That the insurance was to cover the Crown in respect to its loan and also in respect to its ownership of the vessel and the insured described in the policy as "and/or the Halifax Pilotage" is not the pilots.

(*g*) In the alternative the Pilotage Authority is not an agent of the Crown and does not act on behalf of the Crown.

First as to the alternative argument of the respondent that the Minister of Transport as Pilotage Authority is not the agent of the Crown. This point determines not only whether this action should have been brought against the respondent, but must be determined in order to ascertain the position of the parties on the construction of the documents.

Pilotage authorities are, in the exercise of all their powers, subject to the control of the Crown through the Governor in Council. The pilotage authority fixes the rates for pilotage dues by by-law, but the by-law must be confirmed by the Governor in Council.

The pilotage authority may with the sanction of the Governor in Council appoint a secretary and treasurer

1945

HARRIS H. HIMMELMAN ET AL. v. THE KING

O'Connor J.

and pay him such salary or remuneration out of pilotage dues or fees for licences received by it as it sees fit, and may, with such sanction and out of such funds, pay any other necessary expenses of conducting the pilotage business (Section 318, Canada Shipping Act).

Under Section 329 (2) where the Minister is the Pilotage Authority, fees on renewals of licences shall be paid into and form part of the Consolidated Revenue Fund of Canada.

In the Halifax District where the Minister is the Pilotage Authority, under By-law 6 all moneys collected are remitted to the Department of Marine (now Transport) and deposited to the credit of the Receiver-General of Canada, and designated as the "Halifax Pilotage Fund".

In the *City of Halifax* v. *The Halifax Harbour Commissioners* (1) Duff C.J., after considering the powers and rights of the Halifax Harbour Commissioners, and the rigorous control of the Crown over revenues and expenditures, reaches a conclusion that the Commission occupied the property "for the Crown".

At page 230 he states:—

> The position of the respondents cannot, I think, in any pertinent sense, be distinguished from that of the Commissioners whose status was in question in The Queen v. McCann (1868) L.R. 3 Q.B. 141. Indeed, if, instead of three Harbour Commissioners to be appointed by the Crown, holding office during pleasure, the statute had made provision for the appointment of a single Harbour Commissioner, that Commissioner to be the Minister of Marine, or the Deputy Minister of Marine, for the time being, we should have had a substantially identical case.

And on page 231 adds:—

> If the Corporation had been constituted as above suggested, as consisting of a single Commissioner, to be the Minister of Marine for the time being, it would not have been disputed that a proposal to levy a tax upon the Corporation's occupation of the harbour property was virtually a proposal to tax the Dominion Government, or the property of the Dominion Government.

The power to appoint the Minister as Pilotage Authority by the Governor in Council, is given under Section 317 (1). Provision is made in case of absence by Section 317 (2):

> Whenever the Minister is appointed as Pilotage Authority for any district, his successors in office or any Minister acting for him or, in the absence from Ottawa of the Minister, or of any Minister acting for

(1) (1935) S.C.R. 215.

1945

HARRIS H. HIMMELMAN ET AL. v. THE KING

O'Connor J.

him, his lawful deputy, shall be the Pilotage Authority, and any such Pilotage Authority may by by-law confirmed by the Governor in Council authorize the Superintendent of Pilots in the district to exercise any of his functions, and, for such time or such purpose as he may decide, authorize any person to exercise any particular function or power vested in the Pilotage Authority by this Act or any by-law made hereunder.

It is clear from this that the Minister as Pilotage Authority is not *persona designata* or "a corporation sole". I hold that the Minister of Transport as Pilotage Authority is the agent of the Crown.

The next submission of the respondent raises the question of whether the Crown can be a trustee and if so whether the Court has jurisdiction in respect of the trust.

Section 18 of the Exchequer Court Act provides:—

18. The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be subject of a suit or action against the Crown and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown.

These questions were dealt with by Burbridge J., in *Henry* v. *The King* (1), and he states at page 440,—

But the real question in any such case is not, it seems to me, whether the Crown may or may not be a trustee but whether the Court has jurisdiction in respect of the execution of the trust. Where jurisdiction to grant relief sought is expressly given by statute, no difficulty arises in respect of either question.

And again at page 441,—

If the subject's money is in the possession of the Crown the Court has undoubted jurisdiction to declare that he is entitled thereto, and the amount so awarded him is payable out of any unappropriated moneys forming part of the Consolidated Revenue Fund of Canada.

I am of the same opinion that the question is not whether the Crown may or may not be a trustee but whether the Court has jurisdiction in respect of the execution of the trust. In this case the money claimed is in the possession of the respondent and if the money is the money of the suppliants, then the Court has jurisdiction under Section 18 of the Exchequer Court Act.

Under Section 318 of the Canada Shipping Act, the revenue of any pilotage district other than the Pilotage District of Quebec is from pilotage dues and fees for licences.

(1) (1905) 9 Ex. C.R. 417.

Under Section 319 of the Act, the Pilotage Authority may by By-law confirmed by the Governor in Council, *inter alia* fix the pilotage dues and the mode of remuneration of the pilots, and the amount and description of such remuneration.

Under By-law 6 of the By-laws of the Pilotage District of Halifax, all moneys collected under and by virtue of the By-laws, shall be deposited to the credit of the Receiver-General and shall be designated as the Halifax Pilotage Fund.

Under By-law 6(*a*) the general expenses of the Pilotage District shall be paid out of this Fund.

Then under By-law 6(*b*) the balance left in the Fund at the end of each fiscal year shall be divided equally among the pilots in proportion to the time worked during the year by each.

While the pilots receive the entire net profits on the operation of the service, By-law 7(*a*) provides that if a new vessel is required, it shall be purchased out of the revenue of the District, and be owned by and registered in the name of the Pilotage Authority; and By-law 6(*a*) provides that the general expenses of the Pilotage District shall be paid out of the Halifax Pilotage Fund and without restricting the generality of the foregoing, the expenses chargeable shall include, among other things, the purchase etc., of pilot boats, etc.

From this it is clear that the Pilotage Authority having no expectation of either loss or gain, engages the pilots on the basis that they are to receive the net income of the District, provided, however, that if a new vessel is required, it must be paid for out of revenue, by making the purchase price an expense of the District and deducting it from the revenue. The vessel so purchased is to be owned by and registered in the name of the Pilotage Authority.

The difficulty in carrying out this procedure is that the revenue in any one year will not permit of the deduction of as large a sum as the purchase price of a vessel, and still leave a balance sufficient to provide the pilots with a reasonable remuneration for that year.

1945

HARRIS H. HIMMELMAN ET AL. v. THE KING

O'Connor J.

The agreement was made to overcome this difficulty. The respondent advanced the cost of constructing the vessel and this sum was to be returned in annual instalments of 7 per cent of the gross revenue of the District; the advance to be a first charge against the earnings of the pilots as provided by By-law No. 6(*a*). And By-law 6(*a*) provides for the payment of general expenses, and expenses shall include the purchase of a new vessel.

By-laws 6(*a*) and (*b*) set out the mode of the remuneration of the pilots. All moneys collected by the District are placed in the Halifax Pilotage Fund (By-law 6) and from this all general expenses including the purchase of a new vessel are made 6(*a*) and then the balance is divided among the pilots 6(*b*).

The suppliants contend that anything purchased belongs to them or they have the equitable interest in the article purchased because the purchases are made out of money which would otherwise have come to them.

Based on that contention:—

(1) They claim the equitable interest in the vessel because the advance was repaid out of the Fund as an expense, and that only the bare legal title was conveyed to the Crown by the term in the agreement that the vessel was to be the property of the Crown.

(2) They claim that the fuel and food on the ship belongs to the pilots and that the respondent had no insurable interests in these disbursements.

(3) And that the payments of the insurance premiums were payments made by the pilots.

Their contention is supported by the language of P.C. 5167, which describes the advance as a "loan" to the pilots and provides that the sum advanced and the cost of keeping the vessel insured shall be a first charge on the "earnings" of the pilots in accordance with the provisions of By-law 6(*a*).

I cannot agree with this contention.

In my opinion the vessel, fuel and food purchased out of the Fund as expenses under 6(*a*) are not the property of the pilots and they have only a right of user in them.

The arrangement was made to overcome the hardship that would fall on the pilots if the entire purchase price of the vessel were taken out of the Fund in any one year as an expense. If the vessel had been paid for out of the Fund in one year the pilots would not have owned the vessel. Their only right in the vessel would have been the right of user. The agreement does not increase or add to their interest in the vessel.

They are not the owners of the money in the Halifax Pilotage Fund and they do not own the chattels required in the operation of the service and paid for as general expenses. Under their mode of remuneration provided by By-law 6, they were entitled to only the balance left after the payment of expenses out of revenue.

As to the vessel, By-law 7(*a*) provides that it shall be purchased out of revenue and owned by the Pilotage Authority. By-law 6(*a*) sets out the method to be followed, i.e., by including in the expenses the purchase price of the vessel.

I hold that the true construction to be placed on the agreement is that:—

(1) The respondent advanced the money to pay for the construction of the vessel.

(2) This sum was to be returned in annual instalments equal to 7 per cent of the gross revenue and these annual instalments and the insurance premiums were to be included in general expenses pursuant to the provisions of By-law 6(*a*).

(3) The vessel was to be registered in the name of and owned by the Pilotage Authority for use in the Pilotage District.

(4) The vessel was to be insured during the term of repayment.

I hold that the effect of this was:—

(*a*) The advance was to be repaid out of the Halifax Pilotage Fund as part of the general expenses of the District.

(*b*) The pilots merely agreed to the increase in the general expenses of the District to the extent of the annual payments and the insurance premiums. They did not "pay" either of these items.

1945

HARRIS H. HIMMELMAN ET AL. v. THE KING

O'Connor J.

(*c*) The pilots agreed that a vessel was required for use in the District.

(*d*) The pilots had only a right of user in the vessel.

(*e*) The insurance secured the repayment of the money advanced and indemnified the pilotage service against loss of the vessel.

The insured in the policies was described as "Minister of Transport and/or the Halifax Pilotage". The suppliants contend that this means the pilots of the District and the respondent contends that this means the Pilotage Authority. I think that it was probably intended to describe the entire service in the same way that "Halifax Pilotage Fund" describes the Fund of "The Halifax Pilotage". The expression is not clear and I hold it to be meaningless. The Minister of Transport as Pilotage Authority was the insured in the policies.

While there was no evidence of insurable disbursements on the vessel, it is clear that there must have been disbursements for fuel, food, etc., to have enabled the vessel to remain on station. For the reasons which I have already set out, I hold that the Pilotage Authority had an insurable interest in these disbursements, including the payment of the insurance premiums. The proceeds of the policy on disbursements should therefore be treated in the same manner as the proceeds from the policy on the hull for $65,000, and were available to the Pilotage Authority for the purchase of a new vessel and to replace the fuel and food that was lost.

It was the duty of the Pilotage Authority, by statute, to maintain the pilotage service. The Pilotage Authority decided that a new vessel was required. The pilots subsequently agreed that a new vessel was required. I hold that the proceeds of the insurance were available for that purpose.

While the limitations in Section 318 of the Canada Shipping Act and in By-law 6, do not permit the proceeds to be deposited in the Halifax Pilotage Fund, the proceeds could be placed, in trust or for a special purpose, in the Consolidated Revenue Fund and be paid out under Section 22 (2) of the Consolidated Revenue and Audit Act, Chapter 31, Statutes of Canada 1931. The pro-

ceeds should be treated in the same way as the money in the Halifax Pilotage Fund and out of the combined totals would come the general expenses, including the purchase of a new vessel.

The suppliants contend that because the insurance was effected as security for the repayment of the loan, the balance owing to the respondent should have been paid out of the proceeds of the insurance and not out of the Halifax Pilotage Fund.

A new vessel was required and the Pilotage Authority could therefore take the purchase price out of either the Halifax Pilotage Fund or out of the proceeds of the insurance, or out of both. That being so the position of the suppliants was not affected by the procedure followed. If the Pilotage Authority had repaid the balance of the advance of $3,182.75 out of the insurance proceeds and if the full sum of $75,000 was required for the purchase of a new vessel, then the Pilotage Authority could have taken $3,182.75 from the Halifax Pilotage Fund for that purpose. The balance for division among the pilots would then have been the same balance that was actually divided among them.

There will be judgment that the suppliants are not entitled to any of the relief sought by them in their petition of right herein, and that the same be dismissed, but, under the unusual circumstances, the dismissal of the petition will be without costs.

Judgment accordingly.

1945
Sept. 14
Nov. 29

BETWEEN:

JAMES C. MAHAFFY..... APPELLANT;

AND

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

Revenue—Income—Income War Tax Act, R.S.C. 1927, c. 97, secs. 3, 5.1(f) 6.1(a), 6.1(2)—"Travelling expenses"—"Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income"—"Personal and living expenses"—"Trade or business"—Expenses incurred by a member of a legislative assembly while attending sessions of the legislature are not deductible—Appeal dismissed.

Appellant, a resident of Calgary, Alberta, was a member of the Legislative Assembly of the Province of Alberta which meets at the Capital City of Edmonton, and received the sum of $2,000, as an allowance. In his income tax return for the year 1941 he deducted certain expenses and disbursements incurred for living expenses in the provincial capital while in attendance at legislative sessions and for travelling expenses from Calgary to Edmonton and return for week-ends during the time of such session. All of these deductions were disallowed and an appeal was taken to this Court.

Held: That the deductions claimed are not travelling expenses within the meaning of s. 5.1(*f*) of the Income War Tax Act.

2. That such expenses are not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income of Appellant and are not deductible.

3. That the expenses incurred by Appellant are not personal and living expenses within the meaning of s. 6.1(*f*) of the Income War Tax Act.

APPEAL under the provisions of the Income War Tax Act.

The appeal was heard before His Honour Judge J. C. A. Cameron, Deputy Judge of the Court, at Calgary.

S. J. Helman, K.C. for appellant.

S. H. Adams, K.C. and *J. G. McEntyre* for respondent.

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

1945

MAHAFFY
v.
MINISTER OF
NATIONAL
REVENUE

Cameron
D.J.

CAMERON, Deputy Judge, now (November 29, 1945) delivered the following judgment:

This is an appeal from an income tax assessment, dated June 16, 1944, in respect of the Appellant's income for 1941. The taxpayer gave notice of appeal on July 6, 1944, and on September 22, 1944, the Minister of National Revenue gave his decision affirming the assessment, which decision is in part as follows:—

> The Honourable the Minister of National Revenue having duly considered the facts as set forth in the Notice of Appeal and matters thereto relating, hereby affirms the said Assessment on the ground that the amounts disallowed by the Minister in assessing the taxpayer are not expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income within the meaning of Section 6(*a*) of the Act and therefore on these and related grounds and by reason of other provisions of the Income War Tax Act the said Assessment is affirmed.

On October 13, 1944, the Appellant filed Notice of Dissatisfaction and on January 11, 1945, the Minister gave his reply and confirmed the assessment.

The appeal was set down for hearing at Calgary on September 14, 1945. By consent of the parties no evidence was then taken but a memorandum was filed setting out the agreed facts relevant to the appeal and subsequently both parties filed written argument.

The Appellant is a barrister practising his profession in Calgary, Alberta. He was elected to represent the constituency of Calgary in the Legislative Assembly of Alberta and in the year 1941 received the sum of $2,000 from the Province as an allowance paid to members of the said Assembly. In his tax return for 1941, he deducted certain expenses and disbursements from that allowance of $2,000 the details of which are set forth in the agreed memorandum of facts hereinafter referred to. These deductions were disallowed in full and hence this appeal.

In the memorandum of agreed facts it is stated that:

> The disputed item in this matter totals $236.35, which amount is arrived at by taking certain expenses claimed by Mr. Mahaffy which were disallowed and subtracting from them an item of $27.40 which had been reimbursed from the Provincial Government as against these expenses.

1945

MAHAFFY v. MINISTER OF NATIONAL REVENUE

Cameron D.J.

The expenses consist of the following:—

(*a*) The bill of the McDonald Hotel in Edmonton being the place at which the Provincial Legislature sits and in respect to which the Appellant paid for a room at a monthly rate of $80 per month, making a total of..... $144 35

(*b*) Expenses for berths and other conveyances to and from Calgary to Edmonton for 14 single trips which the Appellant took over each week-end so as to be in Calgary on Saturdays and Sundays in order to be available to confer with his constituents who might wish to see him about various matters, making a total of..... 43 40

As to the above it is to be noted that the actual railroad fare, apart from berths, was provided by a pass issued to the Appellant and in respect to which he has made no claim.

(*c*) Additional expenses for meals and other incidentals while away from Calgary and in Edmonton over and above the cost of the same to the Appellant while he is at home, which the Appellant has calculated at $2 per day for 38 days making a total of..... 76 00

$263 75

Less 27 40

$236 35

The Legislature of the Province of Alberta has its sessions at the City of Edmonton.

The Appellant claims that he is entitled to deduct these expenses or disbursements as travelling expenses under the provisions of Section 5. 1(*f*) and alternatively that they should be allowed under the provisions of Section 6. 1(*a*) thereof. For the Respondent it is argued that the expenses and disbursements made by the Appellant could not be allowed under either section, and that, alternatively, as personal and living expenses, they should be disallowed by the provisions of Section 6. 1(*f*).

No question arises as to assessability for the income of $2,000 which is provided for by Section 3. 1(*d*) (ii) and there is also no question that the amounts claimed were actually disbursed; the sole problem is whether they are such expenses as the Appellant is entitled to deduct under the provisions of the Income War Tax Act. It will be noted that they referred to expenses incurred in travelling on several occasions during the session from Calgary to Edmonton and return and for board and lodging at Edmonton. One might think that it would not be unreasonable that anyone accepting the honourable position of member of a legislature, often at pecuniary loss to him-

self, should be credited in his assessment with the amount expended by him in going to and from the place where his duties are to be carried out, together with his reasonable living expenses while there or, in the alternative, that the responsible authorities should fix the salary attaching to the office at a sum sufficient to cover these expenses; but however that may be no such opinion can affect this appeal. The Court has only to construe the law as it stands.

Taxable income is defined in Section 3.1 of the Act which, omitting those parts not relevant to this case, is as follows:

Sec. 3. "Income"—1. For the purposes of this Act, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be whether derived from sources within Canada or elsewhere; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source including

(*d*) the salaries, indemnities or other remuneration of

(i) members of the Senate and House of Commons of Canada and officers thereof,

(ii) members of Provincial Legislative Councils and Assemblies,

(iii) members of Municipal Councils, Commissions or Boards of Management,

(iv) any Judge of any Dominion or Provincial court whose salary was increased by chapter fifty-nine of the Statutes of one thousand nine hundred and nineteen or by chapter fifty-six of the Statutes of one thousand nine hundred and twenty and who accepted such increase, and any Judge of any such Court appointed after the seventh day of July, one thousand nine hundred and nineteen, and

(v) all persons whatsoever, whether the said salaries, indemnities or other remuneration are paid out of the revenue of His Majesty in respect of his Government of Canada, or of any province thereof, or by any person, except as herein otherwise provided.

Part of the argument centered around the question of interpreting this definition, the Appellant claiming that it was only his annual *profit or gain* from the appointment that constituted a taxable income and that he was entitled to deduct items of expense in order to arrive at the profit or gain. For the Respondent it was urged that as the word "net" was not used in the 17th line of the section

1945

MAHAFFY v. MINISTER OF NATIONAL REVENUE

Cameron D.J.

quoted, that therefore, the amount of the income was taxable without deductions being allowed, and reference was made to the case of *Lieutenant-Governors* v. *Minister of National Revenue* (1). I am of the opinion, however, that the words "annual net profit or gain" in the second line of the definition refer to income whether ascertained or unascertained; and as the word *source* is used in line 18 it could be argued that it refers to all the following subsections of clause 1 of Section 3 and that the various classifications therein detailed are given as *sources* of income rather than items of taxable income. The Lieutenant-Governors case (*supra*) was the subject of some observations by the President of this Court in the case of *Samson* v. *Minister of National Revenue* (2) and I am in agreement with his conclusions in that regard that "the word 'net' in the statutory definition of taxable income is just as referable to what is ascertained as it is to what is unascertained". It is only the net profit or gain that constitutes taxable income. From the gross income, therefore, there may be deducted such items of expenses and disbursement as are permitted under the Act in order to ascertain the net or taxable income.

I propose to deal first with the Appellant's claim that he is entitled to these deductions under the provisions of Section 5. 1(*f*) which is as follows:

"income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions

(*f*) *travelling expenses,* including the entire amount expended for meals and lodging while away from home in the pursuit of a *trade or business.*

In considering the meaning of those words (and of the words contained in Section 6. 1 (*a*)) it is to be remembered that a decision in favour of the Appellant would operate in favour not only of the Appellant but of all those mentioned in Section 3. 1(*d*) namely, members of the Senate and House of Commons and officers thereof, members of all Provincial Legislative Councils and Assemblies, members of Municipal Councils, Commissions or Boards of Management and many others therein referred to, and would or might enable the holder of any position or appointment to deduct his living expenses while away from his home.

(1) (1931) Ex. C.R. 232 (2) (1943) Ex. C.R. 17

Are the words used in subsection 5. 1(*f*) apt to include the expenses now in question? Judicial consideration has been given to the meaning of these words in the case of *Bahamas General Trust Company et al* v. *Provincial Treasurer of Alberta* (1). It is to be noted that the Income Tax Act of the Province of Alberta, 1931, Section 5 contained the identical words of Section 5. 1(*f*) of the Income War Tax Act; and the Court, in that case, held that the Section referred to expenses such as those of commercial travellers.

The words: "travelling expenses" were also considered in the case of *Ricketta* v. *Colquhoun* (2) where Rowlatt M.R. said:

> Now, that, I think, means—that where the office is of such a nature that in order to execute its duties its holder, has to travel from place to place, has, in other words, itinerant duties, there the expenses of such travelling, necessary to and involved in the work attached to the office, are and may be allowed as an expense, the obligation of which is necessarily incurred by the holder of the office.

This opinion was referred to with approval in the judgment of Lord Blanesburgh in the House of Lords in the same case (3).

The question also arises as to whether these expenses are incurred "while away from home in the pursuit of a trade or business". It is clear to me that they are not incurred in the pursuit of a trade. The word "business" however has a much wider implication and it is defined in Halsbury's Laws of England, 2nd Edition, Vol. 32 at p. 306, as follows: "Business" is a wider term not synonymous with trade and means practically anything which is an occupation distinguished from a pleasure. Further definitions of the word "business" were given in the case of *Samson* v. *Minister of National Revenue* (*supra*) at pp. 32, 33.

After consideration of these decisions I have reached the conclusion that the deductions here claimed by the Appellant do not come within the nature of "travelling expenses" under this section which, in my view, must be in the nature of itinerant expenses. I think it could not be said that the cost of board and lodging of a member of a Legislature or a member of the House of Commons, etc. while engaged over a period of many months in the performance of his

(1) (1942) 1 W.W.R. 46 at 53
(2) (1926) 1 K.B. 725 at 731
(3) (1926) A.C. 8

1945

MAHAFFY v. MINISTER OF NATIONAL REVENUE

Cameron D.J.

duties, at a Provincial Capital, or at Ottawa, could, in any sense, be considered as travelling expenses and that is the governing word in the section.

In so far as the Appellant's claim includes a small item for travelling expenses from Calgary to Edmonton and return it is to be noted that it covers 14 single trips said to have been incurred, in part, so that the Appellant could be in Calgary at week-ends to confer with his constituents. While it is doubtless of great advantage both to a member and to his constituents that such meetings should frequently take place, it is undoubtedly the fact that the duties of his office, which result in the payment of his income, do not require such visits to his constituency. Moreover, the Legislative Assembly Act of the Province of Alberta, R.S.A. 1922, chap. 3, provides for travelling expenses in going to the session at Edmonton and returning therefrom to his place of residence and this expense for the year 1941 was paid to the Appellant and is not part of his assessed income. His railway pass provided him with free transportation to and from Edmonton.

Alternatively the Appellant claims the benefit of the provisions of Section 6. 1(*a*) of the Act which is as follows:

> 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.

This section contains a double negative but it is clear by inference that expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income are allowable deductions (unless barred by other sections of the Act). At first sight it would seem that the expenses here claimed would fall within this category. The Appellant resides in the constituency of Calgary. The Provincial Capital is at Edmonton and it is apparent that in order to earn the income he must attend the Legislature there and must, of necessity, incur expenses in the way of travelling, meals and lodging. But are these expenses in reality made for the purpose of earning the income or are they, as to the travelling expenses, for the purpose of reaching the place where the duties are to be performed; and, as to meals and lodging,

merely to sustain life and health? Are they wholly, exclusively and necessarily laid out or expended for the purpose of earning the income?

Were it not for the interpretation placed on the wording of this section in decisions binding on me, I would have been inclined to the opinion that the Appellant was entitled to succeed as to expenses for board and lodging *under the terms of this section.* The clause was considered in the case of *Minister of National Revenue* v. *Dominion Natural Gas Company Ltd.* (1) and while the facts in that case are quite different from these in the instant case, the statements made by the Chief Justice are relevant. At page 22 he says:

> In order to fall within the category "disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income", expenses must be working expenses; that is to say, expenses incurred *in* the process of earning the income.

In that judgment the court followed the decision in *Lothian Chemical Co. Ltd.* v. *Rogers* (2); *Robert Addie & Sons Ltd.* v. *Inland Revenue Commissioner* (3). In the *Addie* case it was held that in order to be allowed, such expenditure must be laid out as part of the process of profit earning. Reference may be also made to the case of *Montreal Coke and Manufacturing Company* v. *Minister of National Revenue* (4) where it was held that expenditure to be deductible must be directly related to the earning of income from the trade or business conducted.

I have previously referred to the case of *Ricketts* v. *Colquhoun,* the final judgment in which was given in the House of Lords (5) and which was an appeal from an order of the Court of Appeal affirming the order of Rowlatt J. The facts are briefly given in the headnote as follows:

> The Recorder of a provincial borough, who was a barrister residing and practising in London, claimed to deduct from the amount at which the emoluments of his office had been assessed for the purpose of income tax under Sch. E of the Income Tax Act, 1918, certain travelling expenses incurred by him in travelling from London to the borough and back, and certain hotel expenses incurred while in the borough:—
>
> Held, that the travelling expenses were attributable to the exercise by the Recorder of his own volition in choosing to reside and practise in London, and were not expenses which he was "necessarily obliged" to incur and defray in the performance of his duties, nor were any of the

(1) (1941) S.C.R. 19
(2) (1926) 11 T.C. 508
(3) (1924) S.C. 231 at 235
(4) (1944) A.C. 126
(5) (1926) A.C. 1

1945

MAHAFFY v. MINISTER OF NATIONAL REVENUE

Cameron D.J.

expenses money which he was "necessarily obliged" to expend "wholly, exclusively, and necessarily in the performance" of his duties, within the meaning of r. 9 of Sch. E; and that, therefore, he was not entitled to deduct the expenses in question from the amount of his assessment.

This decision had to do with Section 9 of Schedule E of the Income Tax Act, which is as follows:

If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to expend money wholly, exclusively, and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed.

The important words there are "wholly, exclusively and necessarily—in the performance of the said duties." The judgment in the main turned on the limitation of the words "in the performance of his duties".

Viscount Cave L.C. in his judgment at p. 4 said:

The expenses in question in this case do not appear to me to satisfy either test. They are incurred not because the appellant holds the office of Recorder of Portsmouth, but because, living and practising away from Portsmouth, he must travel to that place before he can being to perform his duties as Recorder and, having concluded those duties, desires to return home. They are incurred, not in the course of performing his duties, but partly before he enters upon them, and partly after he has fulfilled them. No doubt the rule contemplates that the holder of an office may have to travel in the performance of his duties, and there are offices of which the duties have to be performed in several places in succession, so that the holder of them must necessarily travel from one place to another.....

Passing now to the claim to deduct the hotel expenses at Portsmouth, this claim must depend upon the latter part of r. 9, which allows the deduction of money, other than travelling expenses, expended "wholly, exclusively and necessarily in the performance of the said duties." In considering the meaning of those words it is to be remembered that a decision in favour of the appellant would operate in favour, not only of Recorders, but of any holder of an office or employment of profit who is liable to be assessed under Sch. E, and would or might enable every holder of such a position to deduct his living expenses while away from his home. It seems to me that the words quoted, which are confined to expenses incurred in the performance of the duties of the office, and are further limited in operation by the emphatic qualification that they must be wholly, exclusively and necessarily so incurred, do not cover such a claim. A man must eat and sleep somewhere, whether he has or has not been engaged in the administration of justice. Normally he performs these operations in his own home, and if he elects to live away from his work, so that he must find board and lodging away from home, that is by his own choice, and not by reason of any necessity arising out of his employment; nor does he, as a rule, eat or sleep in the course of performing his duties, but either before or after their performance.

At p. 7 Lord Blanesburgh said:

....But I am also struck by this, that, as it seems to me, although undoubtedly less obtrusively, the language of the rule points to the expenses with which it is concerned being only those which each and every occupant of the particular office is necessarily obliged to incur in the performance of its duties—to expenses imposed upon each holder ex necessitate of his office, and to such expenses only. It says: "If the holder of an office"—the words, be it observed, are not "If any holder of an office"—"is obliged to incur expenses in the performance of the duties of the office"—the duties again are not the duties of his office. In other words, the terms employed are strictly, and, I cannot doubt, purposely, not personal but objective: the deductible expenses do not extend to those which the holder has to incur mainly and, it may be, only because of circumstances in relation to his office which are personal to himself or are the result of his own volition...

And at p. 9:

....I cannot myself see why the appropriate expenditure by a Recorder living at Portsmouth in his own home during sessions is not as much wholly, exclusively, and necessarily expended in the performance of his duties as is the cost of the appellant's room at a hotel. The truth is that these expenses cannot in either case be properly so described; they are personal in each case to the Recorder—expenses to be defrayed out of his stipend, but in no way essential to be incurred that he may earn it.

It is to be observed that the words in the English statutes are "in the performance of his duties." In our Income War Tax Act the words are "for the purpose of earning the income". Were it not for the judgments above referred to and which have interpreted the words of our Act, I would have been of the opinion that the words "for the purpose of earning the income" had a different meaning than the words "in the performance of his duties" but they have been interpreted as meaning "in the process of earning the income", a meaning very similar to the words in the English Act.

It follows, therefore, adopting the interpretation laid down in the *Dominion Natural Gas Company* case (*supra*) that to be allowed, the expenses must have been incurred in the process of earning the income.

The Legislative Assembly Act of the Province of Alberta makes it quite clear that the allowance paid to a member is conditional on his attendance at the sessions of the legislature. It is at the sessions that he is in the process of earning his income and not when he is travelling to Edmonton from Calgary or while he is eating or sleeping.

1945

MAHAFFY v. MINISTER OF NATIONAL REVENUE

Cameron D.J

The process of earning the income—that is attendance at the Legislature, is the same for a member who resides elsewhere than at Edmonton as for one who normally resides there. If, therefore, the present claimant were entitled to deduction for board and lodging there seems no valid reason why a member residing normally in Edmonton would not be equally entitled. (See the above quotations from the judgment of Lord Blanesburgh in the *Ricketts* v. *Colquhoun* case).

Following, therefore, the decisions which I have cited, I must reach the conclusion that the appellant fails under this section also.

As to the expenses claimed for travelling, I find that they are properly disallowed under this section, for as previously indicated, the actual travelling expenses for going to and returning from the sessions were provided by the Legislature and the other trips were clearly not made exclusively for the purpose of earning the income.

The respondent also relies on the provisions of Section 6. 1(2) of the Act, which reads:

> In computing the amount of the profits or gains to be assessed a deduction shall not be allowed in respect of (*f*) personal and living expenses.

The expenses here claimed deductions by the appellant as permissible deductions for board and lodging were clearly living expenses, but I do not construe this subsection as being quite as absolute as it appears. It must be read in connection with other sections, including section 5. 1(*f*) and 6. 1(*a*), but as I have found that the appellant cannot succeed under these sections and as I have not been referred to any other section where such an allowance could be made, I must conclude that the appellant must fail under the provisions of this subsection.

In the appellant's argument I was urged to consider the fact that in England deductions are allowed to members of Parliament in respect of travelling expenses, limited possibly to such expenses in going to and from Westminister to their constituencies. Such allowances are made under a special section of the English Act, section 10 of Sch. E. being as follows:

> Where the Treasury are satisfied with respect to any class of persons in receipt of any salary, fees, or emoluments payable out of the public revenue that such persons are obliged to lay out and expend money, wholly,

exclusively, and necessarily in the performance of the duties in respect of which such salary, fees, or emoluments are payable, the Treasury may fix such sum, as in their opinion represents a fair equivalent of the average annual amount laid out and expended as aforesaid by persons of that class, and in charging the tax on the said salary, fees, or emoluments, there shall be deducted from the amount thereof the sum so fixed by the Treasury:

Provided that if any person would, but for the provisions of this rule, be entitled to deduct a larger amount than the sum so fixed, that sum may be deducted instead of the sum so fixed.

This section does not appear in our Act and it is a special provision for those whose incomes are out of public revenue and confers on the Treasury the power to determine the amount to be allowed for persons of that class. In the absence of any such provision in our Act I cannot give effect to the argument of the appellant's counsel that it should be allowed to members of Parliament and members of Legislatures in Canada, although, as he urges, it might well be considered "fair and just".

My attention was also directed by counsel for the respondent to section 75(2) of our Act, giving the Minister power to make regulations necessary for carrying the Act into effect, etc. and to authorize the Commissioner to exercise such of his powers in that regard as could in the opinion of the Minister be conveniently exercised by the Commissioner.

It was pointed out that the authorization by the Minister appointing the Commissioner to exercise such powers is dated August 8, 1940, and was published in the *Canada Gazette* on September 13, 1941, p. 832, and that pursuant thereto a regulation established by the Commissioner was published by him in the *Canada Gazette* on February 15, 1941, part of which under the heading "Taxation of Salaries" is as follows:

Please note that for 1939 and subsequent years all employees are to be taxable on any salaries or wages received without deduction by way of expenses.

My only comment in this regard would be that any such regulation must be deemed necessary for carrying the Act into effect and could not of itself affect the right of a taxpayer to deductions authorized under the Act.

For the reasons which I have stated the appeal fails and is dismissed with costs.

Judgment accordingly.

BETWEEN:

1945
June 8
Oct. 5

TEMAN T. THOMPSON, of Red Head, New Brunswick ..... } SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

AND

BETWEEN:

WILLIAM O. ANTHONY, of Red Head, New Brunswick ..... } SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Crown—Petitions of Right—Exchequer Court Act R.S.C. 1927 c. 34, s. 19(c)—Injury to property—Negligence of Officer or Servant of the Crown—Scope of duties and employment—Measure of damages.

Barn and contents of suppliants were destroyed by fire as a result of being struck by a tracer bullet fired by a member of the military forces of His Majesty in the right of Canada, who was being transported from Fort Mispec, N.B., to Partridge Island, N.B.

Suppliants seek to recover damages from the Crown, for such injuries to their property.

Held: That the wrongful act of firing the tracer bullet at the barn, was not so connected with the authorized act, of getting the soldier conveyed to the place where he was to go, as to be a mode of doing it. It was an independent act and the respondent is not responsible. *C.P.R.* v. *Lockhart* (1942) 111 L.J.P.C. 116 *Goh Choon Seng* v. *Lee Kim Soo* (1925) 133 L.T.R. 65 applied.

2. That an unloaded rifle is not an intrinsically dangerous article, but once it is loaded it becomes an intrinsically dangerous article. *Donoghue* v. *Stevenson* (1932) 101 L.J.P.C. 119 applied.

3. That the non-commissioned officers in charge of the party were negligent in failing to stop the firing. It was their duty to get the party transported and to see that all military orders were carried out during the move and this would include the order that the members must not fire their rifles except on an order of an officer.

4. That the destruction of the barn was a natural consequence of this negligence. A reasonable person would have foreseen such damage and the non-commissioned officers ought to have seen it. *Glasgow Corporation* v. *Muir* (1943) 112 L.J.P.C. 1 applied.

5. That the measure of damages is the value of the property at the time of its destruction, based upon its market value at that time, but in arriving at that value, the original cost less depreciation as well as the replacement cost at the time of its destruction less depreciation, may be taken into consideration. *Rosseau v. Lynch & Fournier* (1931) 4 D.L.R. 595 (N.B.C.A.); *Empire Marble and Tile Company* v. *Northwestern Utilities Ltd.* (1933) 3 W.W.R 225 followed and applied.

1945

WILLIAM O. ANTHONY
v.
THE KING
AND
TEMAN T. THOMPSON
v.
THE KING

O'Connor J.

PETITIONS OF RIGHT by suppliants claiming damages against the Crown for loss by fire alleged to have been caused by the negligence of members of the military forces of His Majesty in the right of Canada while acting within the scope of their duties and employment.

The action was tried before the Honourable Mr. Justice O'Connor, at. St. John, N.B.

C. F. Inches K.C. and *N. B. Tennant* for suppliants.

E. J. Henneberry, K.C. and *W. A. Ross* for respondent.

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

O'CONNOR, J. now (October 5, 1945) delivered the following judgment:

The suppliants bring these petitions of right claiming damages from the Crown (*a*) in the sum of $5,400 for the destruction of a barn owned by the suppliant Anthony and (*b*) in the sum of $705 for the destruction of chattels stored in the barn, owned by the suppliant Thompson, which they allege was caused by the negligence of members of the military forces of His Majesty in the right of Canada, and as such, servants of the Crown, while acting within the scope of their duties or employment.

A draft of gunners of the 4th Coastal Battery was being transported in trucks along the highway from Fort Mispec to the City of Saint John, New Brunswick. While some of the gunners, using blank ammunition, were discharging their rifles out of the back of the truck, one Gunner Arthur Morin joined in the firing using live ammunition. He fired a tracer bullet at the barn of the suppliant Anthony with

1945

WILLIAM O. ANTHONY v. THE KING AND TEMAN T. THOMPSON v. THE KING

O'Connor J.

the result that the barn caught fire and was destroyed together with the contents owned by the suppliant Thompson.

Both actions were tried together, and owing to the illness of Morin and the absence overseas of some of the witnesses, the evidence taken at Morin's trial held on September 8, 1944, was by agreement between counsel accepted as part of the record.

Live ammunition was issued and carried by all ranks because of the nature of their duties at Fort Mispec. Whenever a scheme or test was to take place, the live ammunition was called in and blank ammunition issued. Each man had to account strictly for the live ammunition that had been issued to him and then blank ammunition was issued to him for the scheme. When the "test" was over the blank ammunition was recalled and live ammunition issued. A careful record of the live ammunition issued and recalled was kept at all times. When blank ammunition was recalled it was impossible to check the same, because during the "test" the men fired from time to time and the officers had to accept the men's word for the amount each had fired and the balance to be turned in.

Orders prohibited firing except upon the order of an officer.

The reason for the careful check of live ammunition is obvious.

Prior to the departure of the draft for Partridge Island the live ammunition issued to the battery had been checked and found in balance.

Morin had been in charge of a gun store at Fort Mispec but had become ill and, after turning in his live ammunition to the proper authority and turning his key of the gun store over to his successor, Gunner Bradley, was taken to hospital.

On his return from hospital, and just before the departure of the draft, Morin went to Bradley and asked for the key to enable him to get some of his personal effects from the building in which the gun stores were kept. The store was kept under lock at all times and the key entrusted to one man only. Morin induced his suc-

cessor to give him the key and while there Morin stole about 26 cartridges from one of the Bren guns, consisting of incendiary, tracers and ball. He then returned the key and departed with the draft for Partridge Island.

Some of the gunners commenced firing blank ammunition out of the back of the truck, and Morin fired 26 cartridges, ball, incendiary and tracer. The firing commenced close to Fort Mispec and continued on for a distance of 15 miles. Morin stated that, "I fired the last shot in Saint John (City) by the Marsh bridge". Others continued to fire in Haymarket Square, in the City of Saint John, and when on the ship while it was proceeding out into the harbour.

When the truck in which Morin was being transported reached a point opposite the barn of the suppliant Anthony, Morin aimed at the barn and fired. An empty cartridge case of a tracer bullet was picked up, after the fire, on the highway at a point opposite the barn.

I find that Morin fired a tracer bullet at the barn of the suppliant Anthony and that this resulted in the destruction of the barn and the chattels by fire.

Morin was charged that he did unlawfully and wilfully damage by day the barn of the suppliant Anthony, by setting fire to the same through the means of a bullet from a firearm discharged by him. He made a full confession to the Royal Canadian Mounted Police, pleaded guilty, and was sentenced to "a year deferred sentence".

Under Section 50(*a*) of the Exchequer Court Act as enacted in 1943 for the purposes of determining liability in any action by or against His Majesty, a person who was at any time since the 24th day of June, 1938, a member of the naval, military or air forces of His Majesty in the right of Canada shall be deemed to have been at such time a servant of the Crown. I find that Arthur Morin, Sergeant-Major H. E. Williams and Lance Bombardier Haynes were members of the 4th Coastal Battery, were at the time in question members of the military forces of His Majesty in right of Canada and under this section are deemed to have been servants of the Crown.

1945

WILLIAM O. ANTHONY
v.
THE KING
AND
TEMAN T. THOMPSON
v.
THE KING

O'Connor J.

The suppliants submit:—

(1) That Morin, acting within the scope of his employment as a servant of the Crown, negligently discharged a tracer bullet at the barn causing the damage complained of.

The respondent submits that in discharging his rifle at the barn Morin was not acting within the scope of his employment as a servant of the Crown.

In *C.P.R.* v. *Lockhart* (1), the following statement appears at page 117:

> The general principles ruling a case of this type are well known, but, ultimately, each case will depend for decision on its own facts. As regards the principles their Lordships agree with the statement in Salmond on Torts (9th ed.), p. 95, namely: "It is clear that the master is responsible for acts actually authorized by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorized, provided they are so connected with acts that he has authorized that they may rightly be regarded as modes—although improper modes—of doing them. In other words, a master is responsible not merely for what he authorizes his servant to do, but also for the way which he does it .... On the other hand, if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible; for in such a case the servant is not acting in the course of his employment, but has gone outside of it."

The first question is, what was the scope of Morin's duties? He was at that time being transported from Fort Mispec to Partridge Island, so his duty was to submit himself for transportation or, in the language of Duff C.J. in *C.P.R.* v. *Lockhart* (*supra*) and quoted with approval in the Privy Council decision at page 116,

> ...he (Stinson) was performing a duty of the service in getting himself conveyed to the place where it was his duty to go.

Morin's wrongful act (in discharging the bullet at the barn) was not so connected with the authorized act (of getting himself conveyed to the place where it was his duty to go) as to be a mode of doing it. In *Goh Choon Seng* v. *Lee Kim Soo* (2), and set out again in *C.P.R.* v. *Lockhart* (*supra*) at page 117, the Privy Council classified the cases on this matter and set out the third classification as one where the servant is doing some work which he is appointed to do but does it in a way which

(1) (1942) 111 L.J.P.C. 116 (2) (1925) 133 L.T.R. 65

his master has not authorized and would not have authorized had he known of it. It cannot be said in this case that Morin's firing his rifle at the barn was a way or mode of doing that work which he was appointed to do, i.e., get himself transported.

I hold that it was an independent act and the respondent is not responsible.

(2) That superior officers of Morin, acting within the scope of their employment, entrusted an intrinsically dangerous article, namely, a ·303 rifle, to the said Morin and negligently failed to prevent him from procuring ball and/or incendiary ammunition for such rifle and/or from discharging such rifle at the barn.

I find that an unloaded ·303 rifle is not an intrinsically dangerous article. *Donoghue* v. *Stevenson* (1) at page 135:

> it is only when the gun is loaded or the apparatus charged with gas that the danger arises.

I find that proper precautions were taken to prevent unauthorized persons from obtaining ammunition.

(3) That Peter J. Bradley was negligent in permitting Morin to have access to the gun stores.

I hold that Bradley was negligent in this, but that the destruction of the barn as a result of this negligence was not what a reasonable person would or ought to have foreseen. *Glasgow Corporation* v. *Muir* (2), page 7.

(4) That someone was negligent in not guarding against Bradley's breach of duty.

There is no evidence of such negligence.

(5) That not sufficient effort was made to relieve the men being transferred of ammunition in their possession, blank or otherwise, as required by military regulations and by dictates of due care under the circumstances.

There is no evidence of this, and on the contrary there is evidence that a proper system was installed to prevent gunners from having either live or blank ammunition in their possession except at times when one or other form of ammunition was authorized.

(1) (1932) 101 L.J.P.C. 119 (2) (1943) 112 L.J.P.C. 1

1945

WILLIAM O. ANTHONY
v.
THE KING
AND
TEMAN T. THOMPSON
v.
THE KING

O'Connor J.

(6) That both Sergeant-Major Williams and Lance Bombardier Haynes were negligent in that neither of them attempted to stop the indiscriminate firing until the trucks reached Haymarket Square in the City of Saint John, about 6 miles beyond the barn and 15 miles from Fort Mispec. The firing started shortly after the trucks left Fort Mispec.

Sergeant-Major Williams was in charge of the party. His duty was to get the party transported to the City of Saint John. He was in command of the party so that it was his duty and it was also the duty of Lance Bombardier Haynes to see that all proper military orders were carried out during the move. There was a military order that gunners must not fire their rifles except on an order of an officer. These non-commissioned officers knew or should have known of that order. Sergeant-Major Williams eventually carried out the order but only after the firing had been going on for a distance of 15 miles.

Morin in answer to a question, "Who else on the truck fired live ammunition?", said, "I never heard any fired. I can tell the difference between a blank and a live round, when it is fired". The non-commissioned officers should have been able to tell the difference in the sound between live and blank ammunition. If they could tell the difference then they knew that live ammunition was being fired. If they could not tell the difference then they should have assumed that it was live ammunition. And therefore in either event they should have at once carried out the order that prohibited the gunners from firing, and to do so was clearly within the scope of their employment.

Sergeant-Major Williams gave evidence that when they first left Fort Mispec they were passing through an area in which a test (military manoeuvre) was being conducted and in which firing of blank ammunition might be taking place, and he could not tell from the sound where the firing was coming from.

He next states that as the trucks proceeded along and he heard the noise, he thought one of the trucks was backfiring.

1945

WILLIAM O. ANTHONY v. THE KING AND TEMAN T. THOMPSON v. THE KING

O'Connor J.

In his evidence Sergeant-Major Williams said: "I didn't stop the truck because I had a certain limited time to get to the boat and I didn't stop to investigate because knowing this alarm was on, it was nothing new to hear blank shots being fired. I wasn't sure at the time it was blank shots—I couldn't swear to that—but it sounded to me like blanks", and again, "I only had a short time to get to the boat and load all our equipment on the boat".

In my view he knew the firing was going on and that he should have stopped it, but because he was pressed for time he did not do so. As a sergeant-major he knew or should have known the difference in sound between a truck backfiring and shots from rifles.

Lance Bombardier Haynes, who was riding in the truck with Morin, must have known that the men were firing all the way along.

I find that both Sergeant-Major Williams and Lance Bombardier Haynes knew that these gunners were firing from the back of the truck from Fort Mispec to Haymarket Square, and that their failure to stop this firing was negligence.

The destruction of the barn and the chattels was a natural consequence of this negligence. A reasonable person would have foreseen such damage, and the non-commissioned officers ought to have foreseen it, see *Glasgow Corporation* v. *Muir* (*supra*).

Once the rifle is loaded it becomes in itself an intrinsically dangerous article and requires, in the language of Lord McMillan in *Donoghue* v. *Stevenson* (*supra*) at page 143, "the high degree of care amounting in effect to insurance against risk", and again on the same page, "a degree of diligence so stringent as to amount practically to a guarantee of safety".

In view of the conclusion which I have reached, it is not necessary for me to deal with a number of the other questions raised.

The measure of damages is the value of the property at the time of its destruction, based upon its market value at that time. And in arriving at that value, the original cost of the building and depreciation thereon, as well as the replacement cost as at the time of its destruction, less

1945

WILLIAM O. ANTHONY v. THE KING AND TEMAN T. THOMPSON v. THE KING

O'Connor J.

depreciation and less the value of the salvage, may be taken into consideration. *Rousseau* v. *Lynch & Fournier* (1) and *Empire Marble & Tile Coy.* v. *Northwestern Utilities Ltd.* (2).

The suppliant Anthony gave evidence that he had constructed the barn 20 years ago at a cost which he now estimates at $3,844.10. He told the Royal Canadian Mounted Police three or four days after the fire that the barn had cost him $3,500. At Morin's preliminary hearing Anthony swore that the damage "of the whole thing", which I presume means the barn and contents, was in the vicinity of $4,000.

He had used the barn only for storage during the last twelve years and for the last four or five years the neighbours had been using it for storage without rent of any kind. During the last twenty years only minor repairs had been made. The assessed value of his whole farm of over 400 acres, including buildings, was $1,200. The barn was large, 56′ x 40′—on concrete foundations 10″ at top all round—the floor was concrete except a part 16′ x 20′. The posts were 20′ and on top was a double hip roof of boards and shingle. The barn was wired for electric lighting and there were fourteen 10″ x 12″ windows and two 8″ x 10″. There were three doors all made of spruce—one 18′ to the threshing floor and one to the cow barn of 5′ x 8′.

On behalf of the suppliant Anthony, Mr. Bates estimated the replacement value at $5,434 less 20 per cent depreciation, viz. $4,347.

On behalf of the respondent Mr. Flood estimated the replacement value at $5,200 and he felt that 25 per cent to 30 per cent should be deducted for depreciation leaving $3,640 if less 30 per cent and $3,900 if less 25 per cent.

Both valuators based these estimates on Anthony's recollection of what he put into the barn and on the measurements of the remains of the barn.

Both estimates are based on the replacement value as at the date of the destruction of the barn and, of course, after deducting the value of the "salvage" such as the concrete floor.

(1) (1931) 4 D.L.R. 595. (2) (1933) 3 W.W.R. 225.

1945

WILLIAM O. ANTHONY v. THE KING AND TEMAN T. THOMPSON v. THE KING

O'Connor J.

I fix the loss in respect of the barn at $3,500.

On the damage suffered by the suppliant Thompson, the only evidence before me is Thompson's estimate of the quantity of hay, oats and straw destroyed, and he then put a value on this quantity. He paid $175 for the separator in 1939 and said he could buy one to-day for $250. He told the Royal Canadian Mounted Police a few days after the fire that the separator was worth $150.

I find that the amount of damages to which the suppliant Thompson is entitled is the sum of $600.

The suppliants will therefore be entitled to their costs to be taxed, with only one counsel fee because the two cases were tried together.

Judgment accordingly.

ENTRE:

PIERRE BOUTHILLIER, cultivateur, de la paroisse de St-Antoine de Longueuil, district de Montréal,

REQUÉRANT ÈS-QUAL.;

1945

May 7, 14
Nov. 29

ET

SA TRÈS EXCELLENTE MAJESTÉ LE ROI,

INTIMÉ.

Petition of right—Negligence—Exchequer Court Act, R.S.C. 1927, c. 34, ss. 19 (c), 50A—Onus of proof upon suppliant to establish that claim meets all the requirements of the sections—Crown not responsible for damages resulting from negligence of officer or servant of the Crown, while not acting within the scope of his duties or employment.

In the evening of August 26, 1942, Sergeant-Major Berry, an enlisted soldier in the Canadian army stationed at St. Helen's Island, was driving a motor truck, belonging to the Department of National Defence on the road from Chambly to St. Hubert airport, when he hit the suppliant's daughter, Denise Bouthillier, a minor, causing serious injury to her. Sergeant Berry was not on duty when the accident happened. After his duties for the day had been completed he had taken the truck without permission, after permission to take it had been refused, in order to visit the St. Hubert air port for his own purpose. The petition of right was filed in this Court in November 18, 1943, but had been received by the Secretary of State on or before August 23, 1943.

Held: That since the Secretary of State had received the petition of right within a year from the date of the accident the cause of action was not barred by prescription.

1945

PIERRE BOUTHILLIER
v.
LE ROI

2. That in a claim under section 19 (*c*) of the Exchequer Court Act the onus of proof is on the suppliant to establish positively that the claim meets all the requirements of the section.

3 That while the injury to the suppliant's minor daughter resulted from the negligence of Sergeant-Major Berry in driving the respondent's truck, the suppliant has failed to establish that Sergeant-Major Berry was acting within the scope of his duties or employment at the time of such negligence and the Crown is not responsible therefor.

4. That even if there was negligence on the part of a servant of the Crown in failing to prevent Sergeant-Major Berry from taking the truck this was not the cause of the injury suffered by the suppliant's minor daughter and the Crown is not responsible therefor.

PETITION OF RIGHT. Claim by the suppliant in his capacity as tutor of his minor daughter for damages suffered by her resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment.

The trial was heard before the Honourable J. E. Michaud, Deputy Judge of the Court, at Montreal.

Hon. Vincent Dupuis K.C. and *Jean Paul Gagné* for suppliant.

Adélard Lachapelle K.C. for respondent.

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

MICHAUD D.J., now (November 29, 1945) delivered the following judgment:

Par sa pétition de droit, le requérant, en sa qualité de tuteur de sa fille mineure Denise Bouthillier, réclame de l'intimé la somme de $10,644.00 pour dommages résultant d'un accident survenu à ladite Denise le 26 août 1942 sur la route de Chambly, en la paroisse de Saint-Antoine de Longueuil, district de Montréal, province de Québec.

Le requérant dans sa pétition allègue en substance:—

Que le 26 août 1942, vers les 9 heures du soir, ladite Denise Bouthillier, accompagnée de trois autres jeunes filles, marchait du côté droit du chemin de Chambly et se

dirigeait vers le village de Saint-Hubert, lorsqu'elle fut frappée par un camion, propriété de l'intimé, et conduit au moment de l'accident par un officier de la couronne, alors qu'il était dans l'exercice de ses fonctions comme membre des forces armées de Sa Majesté;

Que le chemin à l'endroit de l'accident a une largeur d'environ 35 pieds; contient trois avenues marquées de barres blanches; qu'il n'y avait aucun automobile venant en sens inverse, ni aucune autre obstruction au moment de l'accident et que de plus il y avait une lumière de rue à l'endroit exact où l'accident est arrivé;

Que l'accident a été causé par la faute, incurie et négligence dudit serviteur de la couronne, membre des forces armées de Sa Majesté, et alors conduisant un camion de la Défense nationale;

Que par suite dudit accident, ladite Denise Bouthillier se trouvait dans un état fort grave et fut d'urgence conduite à l'hôpital Notre-Dame où l'on constata chez elle une commotion cérébrale, une fracture du coude gauche, une fracture des os de la jambe, une plaie au front, une forte contusion rénale gauche avec hématurie abondante, ainsi que plusieurs autres blessures;

Que ladite Denise Bouthillier fut hospitalisée à l'hôpital Notre-Dame audelà de deux mois;

Qu'elle souffre d'incapacité partielle de 50 pour cent d'une façon permanente.

Pour défense à la pétition de droit le procureur-général du Canada, au nom de Sa Majesté le Roi, plaide en substance:

Que la voiture automobile appartenant à l'intimé au moment de l'accident, n'était pas conduite par un officier ou un employé de l'intimé dans l'exercice de ses fonctions;

Que la voiture automobile qui aurait heurté Denise Bouthillier avait été prise sans permission par le sergent-major, Alfred Berry, à l'insu de ses supérieurs pour aller faire une course pour son compte personnel, et c'est au cours de cette course que l'accident a été provoqué par la négligence et l'imprévoyance de ladite Denise Bouthillier qui vint se jeter au devant du camion de l'intimé en voulant rejoindre ses sœurs et cousines s'en allant en avant d'elle;

1945

PIERRE BOUTHILLIER v. LE ROI

Michaud D.J.

Que les dommages réclamés par le requérant sont exagérés;

Que si ladite Denise Bouthillier avait pris la précaution de regarder en arrière d'elle avant de venir se mettre à la gauche de celles qui la précédaient, elle aurait vu venir ledit camion et aurait évité de se mettre en avant dudit camion au moment où il était impossible au chauffeur de l'éviter.

L'intimé plaide en plus prescription, comme suit: "La requête en cette cause a été signifiée que le 18 novembre 1943, le recours du requérant, s'il en avait un, ce qui est nié, serait prescrit par la prescription d'une année."

En réponse le requérant nie les allégués contenus dans la défense de l'intimé, et au plaidoyer de prescription réplique en substance: "Que le Secrétaire d'Etat ayant reçu ladite requête dans l'année de l'accident, à savoir le ou avant le 23 août 1943, ce moyen de défense est mal fondé en fait et en droit". Je crois que le requérant a raison sur ce point. *Hansen* v. *The King* (1).

La preuve révèle que le 26 août 1942, entre huit et dix heures du soir, le sergent-major Alfred Berry de l'armée canadienne, âgé de 48 ans et stationné au camp d'internement de l'Ile Sainte-Hélène, accompagné du sergent Goodwin du même camp, conduisait un camion de la Défense nationale sur la route de Chambly vers l'aérodrome de Saint-Hubert.

Les deux officiers non-brevetés portaient chacun l'uniforme de l'armée canadienne. Le sergent-major Berry explique les circonstances de l'accident de la façon suivante: (page 4 de sa déposition) "Well, it came on so quickly, there was a car, had just approached in the opposite direction, and right on top of me I could see three or four persons on the highway, walking the same way as I was driving, and I immediately swerved out and very close,—we didn't hit them—very close, and so far as I can remember there were at least three of four abreast, walking on the pavement, and I swerved out and passed, and I said to the Staff-Sergeant 'God, that was close, do you think we had better stop'? I said 'Did we hit anybody?' He said 'We had better stop and look.' He said 'I don't think we did hit anybody, but we had better stop.' I proceeded on until

(1) (1933) Ex. C.R. 197.

I found a place to pull off the pavement, and then went back and found out. It wasn't the front of the truck. I don't know whether she had put up her arm, or what happened. She seemed to be moving, one of the three, one of the four. We didn't hit them with the front of the truck, no part of the front. It must have been the side or the back. Not the front. We didn't know we had hit anybody until we had gone back, and when we went back, that is when we had our big shock. *When we found out we had hit one of the girls.*"

Berry prétend qu'il conduisait à une vitesse de 20 à 25 milles à l'heure.

Simone Bouthillier témoigne à l'effet qu'elle marchait sur le bord de la route avec sa sœur Denise; qu'elle entendit venir un camion *très vite* en biaisant sur elles; qu'après avoir frappé Denise le camion continua sur la route jusqu'à ce qu'elle le perdit de vue; qu'il n'y avait pas d'autre trafic sur la route.

Cette preuve de Simone est corroborée par une autre sœur Jacqueline et une cousine Anita Bouthillier.

Après que Denise inconsciente eût été transportée chez elle, Berry et Goodwin se présentèrent.

A l'enquête trois médecins ont témoigné pour établir d'une façon péremptoire que par suite de l'accident Denise a souffert de toutes les blessures et douleurs alléguées dans la pétition; qu'elle a été hospitalisée audelà de deux mois; qu'elle souffre d'incapacité partielle permanente de 5 pour cent au rein gauche et de 15 pour cent à la jambe gauche.

Je suis d'opinion que l'accident qui occasionna des blessures graves, des souffrances et une incapacité partielle permanente à Denise Bouthillier, fille mineure (elle était âgée de 15 ans lors de l'accident) du requérant ès-qualité, est dû à la négligence du conducteur d'un camion de l'armée canadienne, le sergent-major Alfred Berry. Si j'avais à rendre jugement contre lui personnellement, je l'obligerais à payer au requérant ès-qualité, les dommages suivants:

Comptes de médecins et d'hôpital. . .	$ 904.59
Souffrances physiques	200.00
Incapacité partielle permanente. .	2,000.00
Total	$3,104.59

1945

PIERRE BOUTHILLIER v. LE ROI

Michaud D.J.

Cependant le requérant réclame des dommages de Sa Majesté le Roi et non d'Alfred Berry, il s'agit donc en l'occurrence d'assigner la part de responsabilité de l'intimé, Sa Majesté.

Le cas qui nous occupe est régi par les articles 19(c) et 50A de la Loi de la Cour de l'Echiquier ainsi rédigés:

50A. Aux fins de déterminer la responsabilité dans toute action ou autre procédure intentée par ou contre Sa Majesté, une personne qui, en tout temps depuis le vingt-quatrième jour de juin mil neuf cent trente-huit, était membre des forces navales, militaires ou aériennes de Sa Majesté pour le compte du Canada, est censée avoir été à cette époque un serviteur de la Couronne.

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 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."

Il est admis que le 26 août 1942, le sergent-major Alfred Berry, conduisant un camion de l'armée canadienne sur la route de Chambly et occasionnant des blessures graves à la personne de Denise Bouthillier par sa négligence était alors un serviteur de la Couronne aux termes de l'article 50A précité.

Au moment de l'accident agissait-il dans l'exercice de ses fonctions ou de son emploi? Entrait-il dans les fonctions du sergent-major Berry, comme officier de l'armée canadienne, de se trouver sur la route de Chambly entre huit et neuf heures du soir, le 26 août 1942, et de conduire un camion de Sa Majesté à ce moment là.

A l'appui de ce point essentiel, le requérant n'a offert aucune preuve directe établissant le fait qu'au moment de l'accident dont il se plaint, Berry agissait dans l'exercice de ses fonctions ou de son emploi comme sergent-major ou simple troupier de l'armée canadienne. Il s'en rapporte exclusivement à sa déclaration, dont les allégués sont niés par l'intimé, et plus particulièrement au paragraphe de sa pétition ainsi libellé:

(6) Qu'elle invoque la présomption de la faute établie contre l'intimé par la Loi des Véhicules-moteurs S.R.Q. 1941, chap. 142, section 53.

Il incombe au requérant d'établir positivement que sa réclamation rencontre toutes les conditions de l'article 19, paragraphe (c), ce qu'il n'a pas fait.

Voir *McArthur* v. *le Roi* (1) Thorson, J.:

Unless the suppliant can bring his claim within terms of the Statute this Court has no jurisdiction to entertain his petition.

Même s'il pouvait y avoir présomption de faute contre la Couronne, ce que je ne suis pas prêt à admettre, cette présomption est refutée par la preuve faite à l'enquête.

Le sergent-major dans son témoignage dit:

Examined by Mr. Adelard Lachapelle, K.C.:

Q. Mr. Berry, were you in the Canadian Army on the 26th of August, 1942?—A I was.

Q. Where were you stationed?—A. St. Helen's Island Internment Camp.

Q. In what capacity were you serving there?—A. I was Camp Sergeant Major.

Q. Camp Sergeant Major?—A. Yes.

Q. Now, did you take a truck on the night of the 26th of August, 1942?—A. I did.

Q. Did you ask permission to take that truck?—A. I asked the Quartermaster Sergeant for permission and he told me not to take it.

By the Court:

Q. You took an Army truck?—A. Yes.

By Mr. Lachapelle:

Q. Before taking it, you had asked permission?—A. Yes.

Q Of the Quartermaster Sergeant?—A. Yes.

Q. And he had refused it?—A. Yes.

Q. Nevertheless, you took the truck, although he had refused it?—A. I took the truck later.

Q. Who was with you?—A. Staff Sergeant Goodwin

By the Court:

Q. You say you had asked permission of whom?—A. The Camp Quartermaster Sergeant.

Q. Who was he?

Q. Q M.S. Bonin, who was in charge of transportation at the camp.

By Mr. Lachapelle:

Q. Is that the same Bonin who was heard as a witness on the part of the Petitioner?—A. Yes, that is him in court (Witness indicates the previous witness Bonin).

Q. Tell the Court what happened. You were taking that truck to go where?—A. We were going out just to see the airport at St. Hubert, no particular duty.

By the Court:

Q. You were going where?—A. Just going out to look at the airport at St. Hubert. We had never been there. Staff Sergeant Goodwin and I were both strangers in Montreal and our duties were finished for the day. We could not get out in the daytime and I suggested we go for a little drive.

(1) [1943] Ex. C.R. 77.

1945

PIERRE BOUTHILLIER v. LE ROI

Michaud D.J.

Albert Joseph Bonin, témoin assigné par le requérant, jure que le 26 août 1942, il était employé au camp militaire de Sainte-Hélène avec grade de sergent-major, agissant comme quartier-maître chargé de la garde des véhicules-moteurs du camp. Dans le cours de l'après-midi du 26 août 1942, Berry lui demanda la permission de sortir un camion dans la soirée. Que, malgré son refus, Berry s'empara d'un camion à son insu.

Il appert donc par le témoignage de Berry, corroboré par Goodwin, que Berry ayant fini son ouvrage au camp pour la journée du 26 août, décide de satisfaire sa légitime curiosité de visiter l'aérodrome de Saint-Hubert et de se servir d'un camion de l'armée canadienne pour s'y rendre. Il demande d'abord à l'officier en charge la permission de se servir d'un camion de Sa Majesté. Nonobstant le refus de l'officier Bonin et, sans autre permission ou autre autorisation, il s'empare d'un camion de l'armée avec lequel il cause un accident. En face d'une telle preuve comment pourrais-je conclure que Berry agissait dans l'exercice de ses fonctions comme employé de la Couronne?

Il existe une longue jurisprudence pour établir qu'un employé qui se sert d'un camion de son patron pour *son usage personnel* et qui cause un accident n'engage pas la responsabilité de son patron. *Volkert* v. *Diamond Truck Co.* (1).

C'est avec regrets que je dois en venir à la conclusion que le requérant n'a pas établi que le sergent-major Berry, employé de la Couronne, agissait dans l'exercice de ses fonctions ou de son emploi, le soir du 26 août 1942, lorsque par sa négligence dans la conduite d'un camion de l'armée canadienne, et dont il s'était emparé sans la permission de l'officier militaire préposé à la garde des véhicules-moteurs au camp militaire de Sainte-Hélène, causa des blessures graves et occasionna des dommages considérables à Denise Bouthillier, fille mineure du requérant. Bien plus, la preuve démontre que Berry s'est servi du camion pour son usage personnel et n'agissait pas dans l'exercice de ses fonctions comme militaire de l'armée canadienne au moment de l'accident.

(1) [1940] 2 D.L.R. 673.

1945

PIERRE BOUTHILLIER v. LE ROI

Michaud D.J

A l'enquête le procureur du requérant a suggéré un autre moyen d'action contre l'intimé en proposant d'amender sa pétition pour invoquer l'aide du paragraphe (D) de l'article 19 de la Loi de la Cour de l'Echiquier.

L'amendement suggéré est ainsi libellé:

5a. Si le chauffeur du camion de l'armée qui a causé l'accident n'était pas dans l'exercice de ses fonctions, ce que le requérant nie, la Couronne en est quand même responsable et aussi de ses employés en charge du camp militaire de Sainte-Hélène et du parc des automobiles et la porte de garde du même camp, qui ont aussi été négligents et en faute en laissant sortir le camion qui a causé l'accident.

Le paragraphe (D) de l'article 19 de la Loi précitée est ainsi conçue:

D. Toute réclamation contre la Couronne fondée sur quelque loi ou sur quelque règlement édicté par le Gouverneur en son conseil.

Motion pour amender accordée.

Peut-on tenir l'intimé responsable de l'accident parce que des militaires préposés à la garde des camions au camp de Sainte-Hélène n'auraient pas exercé une surveillance suffisante afin d'empêcher le sergent-major Berry de prendre un camion et de s'en servir pour son utilité personnelle. Même s'il causa un accident dans l'accomplissement de son délit?

Les règlements établis par l'armée sont pour la régie interne des camps et l'infraction à ces règlements ne saurait engager la responsabilité de la Couronne vis-à-vis des tiers, à moins que les infractions *soient la cause directe des dommages. Volkert* v. *Diamond Truck Co.* (supra).

Même si l'intimé eut consenti à prêter un camion à Berry pour son usage personnel, pourrait-il être tenu responsable des dommages causés par le camion si le conducteur n'agissait pas dans l'exercice de ses fonctions au moment de l'accident?

Dans la cause *Halparin* v. *Bulling* (1) à la page 474, le juge Duff s'exprime ainsi:

The principle of law by which our decision in this appeal must be governed is stated in these words by Cockburn, C.J. in *Storey* v. *Ashton* at page 479: The true rule is that the master is only responsible so long as the servant can be said to be doing the act in the doing of which he is guilty of negligence in the course of his employment as a servant."

(1) (1914) 50 R.C.S. 471.

1945

PIERRE BOUTHILLIER v. LE ROI

Michaud D.J.

Dans la cause de *Curley* v. *Latreille* (1) le juge Anglin, à la page 156 dit:

> But there is no liability in either country where the illegal or criminal act is done wantonly for some purpose of the servant himself and not in the course of his duties.

Le sergent-major Berry, le soir du 26 août 1942, a quitté le service de son maître-employeur pour satisfaire sa curiosité bien légitime mais aussi bien personnelle de voir Saint-Hubert.

Dans la cause de *Battistoni* v. *Thomas* (2) à la page 146, le juge Lamont dit:

> The sole question in this case is: Was Claude Thomas at the time of the accident, in the course of his employment as his father's truck driver, or was he as it is put in some of the cases "on a frolic of his own". If he was on a frolic of his own the father was not responsible for damages caused by his son driving his father's truck.

Dans la cause de *Limpus* v. *The London General Omnibus Co.* (3) il fut décidé:

> That if the act of the defendant's servant was an act of his own, and in order to effect a purpose of his own, the defendants are not liable.

Même s'il y avait eu négligence de la part de l'intimé en n'empêchant pas Berry de se servir de son camion, il n'est pas prouvé qu'il y ait relation de cause à effet entre l'omission des employés préposés à la garde des véhicules-moteurs de l'armée et l'accident causé par Berry. Dans la cause de *Curley* v. *Latreille* précitée, le juge Anglin, à la page 140 du rapport expose la doctrine relative aux dommages causés par une chose inanimée:

> Responsibility for damages caused by a thing which he has under his care arises only when the occurrence is due to the thing itself, not when it is ascribed to the conduct of the person by whom it is put in motion, controlled or directed.

L'acte volontaire d'un tiers intervenant entre la faute et l'accident exonère complètement le propriétaire de toute responsabilité. Voir le dictum de Lord Dunedin dans la cause de *Dominion Natural Gas Co. Ltd.* v. *Collins, and Perkins* (4) plus particulièrement à la page 646:

> On the other hand, if the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition, then he will not be liable. For against such conscious act of volition no precaution can really avail.

(1) (1919) 60 R.C.S. 131.
(2) (1932) R.C.S. 144.
(3) (1862) 1 H. & C. 526.
(4) (1909) A.C. 640.

1945

PIERRE BOUTHILLIER v. LE ROI

Michaud D.J.

Dans le cas qui nous intéresse, même s'il y avait négligence de la part de l'intimé, en ne prévenant pas l'acte de Berry de s'emparer d'un camion avec lequel il causa un accident, l'intimé ne peut être tenu responsable parce que c'est l'intervention volontaire de Berry qui est la *causa causans* de l'accident et des dommages.

Après avoir mûrement délibéré, je le répète, c'est avec regrets que je dois conclure le requérant ès-qualité n'a pas établi en faits ni en droit que l'intimé est responsable des dommages subis par sa fille mineure, Denise Bouthillier, et que la requête doit être rejetée avec dépens.

BETWEEN:

UNION PACKING COMPANY LIMITED ..... } SUPPLIANT,

AND

HIS MAJESTY THE KING..... RESPONDENT.

1943 Jun. 8

1945 Dec. 21

Petition of right—Contract—Negligence—Bacon Agreement between Canada and the United Kingdom, dated October 31, 1940—Bacon Regulations, Order in Council P.C. 4076, dated December 13, 1939, as amended by Order in Council P.C. 4353, dated December 27, 1939—Bacon Board a servant of the Crown—Exchequer Court Act, R.S.C. 1927, c. 34, ss. 18, 19 (c)—Not intended by Bacon Agreement or Bacon Regulations that Crown should purchase or acquire bacon or pork products from Canadian packers and sell them to United Kingdom Government—Bacon Board under no duty towards packers to take care of pork products on their arrival at seaboard ports—Delay in arrival of ocean steamer one of the risks to be borne by the packer.

Suppliant alleged that on February 28, 1941, it was notified by the Bacon Board that it had booked shipment for pork products on a steamship scheduled to loa dat Saint John from March 12 to 15, 1941; that it made arrangements for delivery of said products to make connections with the said steamship and notified the Bacon Board accordingly; that said products arrived at Saint John on March 11, 1941, and were delivered at seaboard but no ship was available on which to load them, that the Bacon Board did not inspect the said products until March 29, 1941, on which date it advised the suppliant that some of them were rejected; that the Bacon Board, knowing that no ship was available, failed to notify the suppliant and failed to put the products into cold storage; and that on the resale of the rejected products the suppliant suffered loss. Similar allegations were made with regard to a second shipment.

1945

UNION PACKING COMPANY LIMITED v. THE KING

Suppliant claimed that the Crown, through the Bacon Board, had purchased or requisitioned its property and, alternatively, that it had suffered damage resulting from negligence of the Bacon Board. A question of law was set down for disposition before trial of the action as to whether a petition of right lies.

Held: That the question whether a body performing functions of a public nature is a servant or agent of the Crown or is a separate individual entity depends mainly upon whether it has discretionary powers of its own, which it can exercise independently, without consulting any representative of the Crown.

2. That the Bacon Board is a servant of the Crown.

3. That it was never contemplated or intended either by the bacon agreement or by the Bacon Regulations that the Crown in the right of Canada should purchase or otherwise acquire ownership of bacon or pork products from Canadian packers or producers and then in turn sell them to the United Kingdom Government.

4. That the function of the Bacon Board was to regulate the marketing and export of bacon and other pork products by packers but not to become itself a dealer in them.

5. That the Crown never made any contract with the suppliant for the purchase of any bacon or pork products from it and never requisitioned or took over its property.

6. That there was no duty on the part of the Bacon Board towards the suppliant to take care of its pork products on their arrival at Saint John or to inspect them immediately on such arrival or to notify the suppliant that a ship was not available.

7. That the risk of delay in the arrival of an ocean steamer was one that might normally be expected in wartime and fell upon the suppliant as the owner of the products.

PETITION OF RIGHT. Argument on question of law whether, assuming the acts or omissions alleged to be established, the petition of right lies.

The argument was heard before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

R. Quain K.C. for suppliant.

R. Forsyth K.C. for respondent.

The acts or omissions alleged and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT now (December 21, 1945) delivered the following judgment:

The suppliant, a meat packer with its head office in Calgary, Alberta, claims $8,594.75 and interest thereon as the amount of its loss in connection with two shipments of pork products made by it from Calgary in 1941.

After the commencement of the war the Governments of Canada and the United Kingdom agreed on arrangements for the delivery, at Canadian seaports, to the United Kingdom Ministry of Food of Canadian bacons and hams during the period November 17, 1939, to October 31, 1940. A further arrangement was made for the period from November 1, 1940, to October 31, 1941, by an agreement, dated October 30, 1940. By Order in Council P.C. 4076, dated December 13, 1939, "Regulations respecting the marketing and export of bacon and other pork products", known as the Bacon Regulations, were made and established, by which a Board, called the Bacon Board, was created and given certain powers. This Order in Council was amended by Order in Council P.C. 4353, dated December 27, 1939, by which the powers conferred upon the Bacon Board by paragraph 4 (1) of Order in Council P.C. 4076 were made "subject to the approval of the Minister", the Minister in question being the Minister of Agriculture.

The suppliant alleges that on February 5, 1941, the Bacon Board notified it that a put down of 160,000 pounds of bacon and other pork products was authorized for the week commencing February 10, 1941; that it placed this amount into cure, including 73 boxes of rib backs, and notified the Bacon Board accordingly; that on February 28, 1941, it was notified by the Bacon Board that it had booked shipment for this pork on a steamship scheduled to load at the Port of Saint John from March 12 to 15, 1941; that it made arrangements for delivery of the said product to make connections with the said steamship and notified the Bacon Board accordingly; that the said product arrived at Saint John on March 11, 1941, and was delivered at seaboard but no ship was available on which to load it; that the Bacon Board did not inspect the said products until March 29, 1941, on which date it advised the suppliant that the 73 boxes of rib backs

1945

UNION PACKING COMPANY LIMITED v. THE KING

Thorson P.

were rejected for slime, odour and some mould; that the Bacon Board on the arrival of the said pork, knowing that no ship was available, failed to notify it to take care of the said product and failed to take any steps to have it put into cold storage; and that on the resale of the 73 boxes of rib backs after their rejection the suppliant suffered a loss of $4,508.86. Similar allegations with particulars of the relevant dates are made with regard to the second shipment, out of which 54 boxes of rib backs were rejected, with a loss to the suppliant on their resale of $4,085.89.

On the application of the suppliant an order was made in chambers to have the following question of law set down and disposed of before the trial of the action:

> In view of the agreement dated the 30th day of October, 1940, between the Governments of the United Kingdom and of Canada for the purchase of Canadian bacon and hams, and in view of Order in Council P.C. 4076, dated the 13th day of December, 1939, as amended by P.C. 4353 dated 27th day of December, 1939, and assuming the acts or omissions alleged in the Petition of Right herein to be established, does a Petition of Right lie.

and argument was heard on this question, the agreement and the Orders in Council referred to being filed as exhibits.

I should first deal with the contention for the respondent that a petition of right does not lie against the Crown in this case on the ground that the Bacon Board is not a servant or agent of the Crown but an independent body. The latest decision bearing on this question is the judgment of the Court of Appeal of Manitoba in *Oatway* v. *Canadian Wheat Board* (1), where it was held by a majority of the court that the Canadian Wheat Board, although incorporated by statute and having capacity to contract and to sue and be sued in the name of the Board, was a servant of the Crown and that the action brought against the Board was not maintainable. An appeal to the Supreme Court of Canada was quashed on grounds that need not here be considered, but it should be noted that on the allowance of the motion to quash Rinfret C.J. made it clear that the Supreme Court of Canada expressed no opinion upon the judgment of the majority of the Court of Appeal (2). The report containing the said judgment is a valuable source of reference to the many authorities that

(1) (1945) 52 M.R. 283. (2) (1945) S.C.R. 204 at 215.

might be consulted, but it will, I think, be sufficient to refer only to a few of them in which the test to be applied in determining the question is indicated.

In *Fox* v. *Government of Newfoundland* (1) it was held by the Judicial Committee of the Privy Council that certain balances in the books of a bank to the credit of the various boards of education in Newfoundland were not debts or claims due to the Crown or to the Government or revenues of Newfoundland. At page 672, Sir Richard Couch said:

> The appointment of boards for each of the three religious denominations, and the constitution of the board, indicate that it is not to be a mere agent of the Government for the distribution of the money, but is to have within the limit of general educational purposes a discretionary power in expending it—a power which is independent of the Government.

This statement was approved by the Judicial Committee in *Metropolitan Meat Industry Board* v. *Sheedy* (2). In that case the Meat Industry Act, 1915, of New South Wales provided for the maintenance and control of slaughterhouses, cattle sale yards and meat markets in Sydney and the adjoining district, and established the Board to administer the Act. The Board had wide powers which it exercised at its discretion and money received by the Board was not paid into the general funds of the State, but to its own fund. The question for determination was whether a debt due to the Board was a debt due to the Crown, and it was held that it was not. Viscount Haldane stated the reason for such holding, at page 905, in the following terms:

> They are a body with discretionary powers of their own. Even if a Minister of the Crown has power to interfere with them, there is nothing in the statute which makes the acts of administration his as distinguished from theirs. That they were incorporated does not matter. It is also true that the Governor appoints their members and can veto certain of their actions. But these provisions, even when taken together, do not outweigh the fact that the Act of 1915 confers on the appellant Board wide powers which are given to it to be exercised at its own discretion and without consulting the direct representatives of the Crown. Such are the powers of acquiring land, constructing abattoirs and works, selling cattle and meat, either on its own behalf or on behalf of other persons, and leasing its property. Nor does the Board pay its receipts into the general revenue of the State, and the charges it levies go into its own fund.

(1) (1898) A.C. 667. (2) (1927) A.C. 899.

1945

UNION PACKING COMPANY LIMITED v. THE KING

Thorson P.

It is, I think, clear from these authorities that the question whether a body performing functions of a public nature is a servant or agent of the Crown or is a separate independent entity depends mainly upon whether it has discretionary powers of its own, which it can exercise independently, without consulting any representative of the Crown.

This test was applied by the Supreme Court of Canada in *City of Halifax* v. *Halifax Harbour Commissioners* (1). There the question was whether the Halifax Harbour Commissioners who occupied the Crown property of Halifax Harbour were assessable for business tax as an "occupier" within section 357 (1) of the Halifax City Charter (1931). Duff C.J., delivering the judgment of the Court, pointed out that in the exercise of all their powers the Harbour Commissioners were subject to the control of the Crown, carefully scrutinized in detail the nature of their powers and duties, summarized the controls and supervision to which they were subject and concluded that the Commissioners were performing Government services and were occupying the property in question for the Crown. He distinguished the facts in the case from those in *Fox* v. *Government of Newfoundland* (*supra*) and *Metropolitan Meat Industry Board* v. *Sheedy* (*supra*).

This leads to an examination of the position of the Bacon Board as set out in the Orders in Council. The members of the Board are appointed by the Governor in Council, hold office during pleasure and have their salaries or remuneration fixed by the Governor in Council. If a member is unable to perform his duties the Minister may appoint temporarily a substitute. The Board cannot appoint any officers, clerks or other persons or fix their remuneration except subject to the approval of the Governor in Council. Paragraph 4 (1) of Order in Council P.C. 4076 gave the Board certain powers, but the amending Order in Council P.C. 4353 made every one of these powers subject to the approval of the Minister, so that the Board cannot exercise any of such powers independently of the Government or without consulting the Minister. Moreover, the Board has no funds of its own; it may requisition cheques to be drawn against the Bacon Export Fund, but only with the

(1) (1935) S.C.R. 215.

approval of the Minister. The expenses of the Board are met out of moneys provided by Parliament, but expenditures even for this purpose are subject to the Minister's approval. The Bacon Export Fund is a special account in the Consolidated Revenue Fund to which the Minister of Finance must credit all moneys received from the United Kingdom Ministry of Food for the purchase of bacon and other pork products and only the Minister of Finance may make payments out of this Fund. The records of the Board are subject to inspection by the Minister of Finance, and it must report to the Minister of Agriculture as and when required to do so by him. It seems perfectly clear to me from the Orders in Council that the Bacon Board is purely a Government board performing specific services for the Government and responsible to it for its actions. It falls far short of having the free discretionary powers that are necessary to independence. It is no more independent than a Government department. It is quite a different kind of body from that dealt with in *Metropolitan Meat Industry Board* v. *Sheedy* (*supra*). In my opinion, the Bacon Board is clearly a servant of the Crown, and, if the suppliant had any cause of action, it acted properly in bringing a petition of right against the Crown rather than instituting an action against the Bacon Board.

But whether a petition of right lies under the circumstances alleged is, of course, a different matter. Counsel for the suppliant contended that its claim was, primarily, a contractual one based on a contract for the purchase by the Crown of the suppliant's products made between it and the Crown through the agency of the Bacon Board; secondarily, a claim for compensation on the ground that the Crown through the Bacon Board had requisitioned and taken over its property; and, thirdly, a claim for damages resulting from the negligence of the Bacon Board, while acting as a servant of the Crown. The first two claims are made under section 18 of the Exchequer Court Act, R.S.C. 1927, chap. 34, which reads as follows:

18. The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction

1945

UNION PACKING COMPANY LIMITED v. THE KING

Thorson P.

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.

and the third under section 19 (*c*), as amended in 1938, which provides:

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.

Before the claims can be dealt with it is necessary to ascertain the purpose and scheme of the Bacon Regulations. They became necessary because of the arrangements between the Governments of Canada and the United Kingdom for the delivery to the United Kingdom Ministry of Food of bacon and other pork products. The arrangement is set out in a document called "Heads of Agreement for Purchase of Canadian Bacon". Paragraph 1 sets out, *inter alia*, that the Ministry of Food undertakes to purchase from the Canadian Government, through the Bacon Board, and the Canadian Bacon Board undertakes to supply a stated average weekly minimum of Canadian bacon and hams; that the Ministry accepts responsibility for providing ships for ocean transport and that all payments will be made by the Ministry to the Canadian Bacon Board in Canadian funds at the Bank of Canada. Paragraph 2 sets out the prices that are to apply for the various classes of products. Paragraph 3 deals with weighing and shrinkage. By paragraph 4 it is provided that Canadian Government grading certificates will be accepted as evidence of quality and that the Canadian Government will maintain a suitable staff of qualified graders in Canada. Paragraph 5 (*a*) dealing with claims reads as follows:

5 (*a*) In the event of the Ministry of Food deciding that a claim against the Packers is justified, notice of claim has to be given within five days of final discharge of the steamer carrying the product in all cases except inherent faults, such as, broken legs, burst veins, abscesses, excessive fatness, etc. It is agreed that such cases may be dealt with within a reasonable time.

This obviously refers to claims in respect of products actually received on board steamer and it is significant that claims against packers, and not against the Canadian Government, are contemplated. Paragraph 6 pro-

vides that the Canadian Bacon Board will be responsible for storing the bacon and hams in good condition in suitable stores at suitable temperatures in Canada and will be responsible for placing the bacon and hams on board as ships are made available. Paragraph 7 reads:

7. All bacon and hams shall, in respect of fire or other loss or damage, be at the risk of the Sellers until it is placed f.o.b. ocean steamer.

The word "sellers" is in the plural and must, I think, be read as meaning Canadian packers. Then paragraph (8) is headed "Private Contracts" and provides:

8. The Ministry of Food undertakes not to purchase any bacon and hams from Canada except from the Canadian Government.

This agreement is an informal memorandum of the broad arrangements made between the Governments of Canada and the United Kingdom to meet the needs of the United Kingdom in the matter of bacon and pork products and should be regarded as such rather than as a contract with specific enforcible obligations. In any event, it is no part of the law of Canada except in so far as it is incorporated in the Order in Council, and it is the Order in Council that governs.

Counsel for the suppliant, in support of his contentions that the Crown in the right of Canada had acquired the suppliant's bacon and pork products by purchase or requisition and, therefore, owed the suppliant money in respect thereof, relied strongly upon the terms in the agreement, contained in paragraphs 1 and 8, that the Ministry of Food undertakes to purchase its bacon and ham requirements from the Canadian Government and from no one else in Canada and argued that in consequence of these terms it was contemplated that the Canadian Government should itself acquire the products.

I have come to the conclusion that it was never contemplated or intended either by the bacon agreement or by the Bacon Regulations that the Crown in the right of Canada should purchase or otherwise acquire ownership of bacon or pork products from Canadian packers or producers and then in turn sell them to the United Kingdom Government. In my opinion, all that was meant by the terms in the agreement on which counsel for the suppliant relied was that the Ministry of Food would make its pur-

1945

UNION PACKING COMPANY LIMITED v. THE KING

Thorson P.

chases of Canadian bacon and hams only through the Canadian Bacon Board, and not otherwise, but this did not make the Bacon Board the seller of the products. The packers were the sellers and the owners of the products until they were delivered on board steamer, and then the title to the products passed to the United Kingdom. The Bacon Board was a marketing and export controller, but not a vendor in its own right or in that of the Crown. This is borne out by the recitals of Order in Council P.C. 4076. It recites the making of the arrangements between the two Governments and then states:

> That it will therefore be necessary, in order to insure that regular and sufficient supplies will be available for export as required and that satisfactory prices will be paid to hog producers, to control the marketing of bacon and other pork products and to store bacon or other pork products during seasons of heavy hog marketing to supplement supplies of seasons of light hog marketing;

The Bacon Regulations are called "Regulations respecting the marketing and export of bacon and other pork products". The title aptly describes their purpose. They were intended to assist in the fulfilment of the purposes of the agreement; there was to be a control of the marketing and export of the products so that there would be a regular, steady and sufficient flow of them from Canadian packers and producers to the United Kingdom to meet its needs.

The powers conferred upon the Bacon Board support the view that its function was to regulate the marketing and export of bacon and other pork products by packers and that it was not to become itself a dealer in them. The very first power conferred upon the Board makes this abundantly clear. Paragraph 4 (1) (*a*) reads:

> 4. (1) The Board shall have power subject to the approval of the Minister
>
> (*a*) to regulate the export of bacon and other pork products to Great Britain pursuant to the agreement made between the Governments of Canada and the United Kingdom and to that end to arrange with or require any packer to ship and deliver bacon or other pork products of the quantity and quality specified in such arrangement or requirement to the United Kingdom Ministry of Food at seaboard ports in Canada.

The Bacon Board regulates exports; it is not itself an exporter. It has power to arrange with or require a packer to ship and deliver bacon or other pork products but the

delivery is to be made by the packer, not to itself, but to the United Kingdom Ministry of Food at seaboard ports in Canada; the packer is the exporter. In my opinion, paragraph 4 (1) (*a*) is conclusive against the suppliant's contention. The words used in it are not those one would expect if it were intended that the Canadian Government should itself first acquire the pork products and then sell them to the United Kingdom. Nowhere in the Bacon Regulations is any power given to the Bacon Board to acquire, either by purchase or otherwise, the ownership of any pork products. If it had been intended that it should do so it is inconceivable that the power of such acquisition should not have been conferred in express terms.

The price arrangements also bear out the same view. By paragraph 4 (1) (*c*) the Bacon Board has power to determine the prices which shall be paid to packers for products delivered in accordance with requirements of the Board but it is made the duty and responsibility of the Board

> to ensure that the prices to be paid to the packers and all other expenditures or liabilities incurred or to be incurred in respect of such bacon and other pork products delivered as aforesaid (administrative expenses of the Board excepted) shall be fully covered by and met out of the amount to be paid by the Government of the United Kingdom under the agreement aforesaid:

The prices are fixed in relation to the prices arranged with the United Kingdom Government and are to be met "out of" the amount paid by it. This is part of the regulation of marketing undertaken by the Canadian Government. It does not itself become a trader in bacon or pork products.

The arrangements relating to payment are likewise inconsistent with the view that the Canadian Government is to buy pork products from Canadian packers and sell them to the United Kingdom Government. Section 5 of the Bacon Regulations provides that there shall be a special account in the Consolidated Revenue Fund called the Bacon Export Fund to which the Minister of Finance shall credit all moneys received from the United Kingdom Ministry of Food for the purchase of bacon and other pork products. This is a statutory fund. Then it is further provided that the Minister of Finance, on the requisition of the Bacon Board, shall pay out of this fund and "to the extent only"

1945

UNION PACKING COMPANY LIMITED v. THE KING

Thorson P.

of the Fund sums necessary to compensate packers for the deliveries made by them. From these provisions it is clear that the Canadian Government acts as paying agent for the United Kingdom Ministry of Food. Instead of paying the packers who have delivered pork products to it separately and individually, the Ministry of Food pays lump sums to the Canadian Government which are credited to the Bacon Export Fund and the Minister of Finance makes payments out of this fund for the Ministry of Food to the packers according to their entitlement, on the requisition of the Bacon Board. No such arrangements would be necessary if the Canadian Government had become itself the owner of the products. It would then be obliged to pay for them either their purchase price if they had been purchased or their value if they had been acquired by requisition, regardless of whether it had received anything from the United Kingdom or not. Under the regulations the prices to be paid depend upon those agreed upon between the two governments and the Canadian Government makes distribution to the packers only out of moneys received from the United Kingdom and not otherwise; it does not assume any independent obligation of its own to pay for any pork products. Under this arrangement the packer remains the owner of the pork products until they are delivered on board steamer and it is not until then that their ownership changes hands and passes to the United Kingdom Government. That this was intended is clear from paragraphs 5 and 7 of the agreement by which the United Kingdom preserves its right to make claims against the packers in respect of products delivered on board steamer and it is provided that the sellers, who cannot be other than the packers, shall take all the risks of loss until the products are placed on board such steamer.

In my opinion, the Crown never made any contract with the suppliant, through the Bacon Board or otherwise, for the purchase of any bacon or pork products from it and its contractual claim completely fails. Nor has it any claim for compensation on the ground that the Crown acquired its products by requisition. The provisions as to requirement of delivery are necessary only in the event of shortage of supply and have no application in the present case. Moreover, it was not competent for the Bacon Board to requisi-

tion or take over any pork products at the prices fixed by the Bacon Regulations. If the regulations purport to give the Board any such power, they are to that extent *ultra vires,* as indicated by the *Chemicals Regulations Reference* (1). But, as a matter of fact, the Crown never requisitioned or took over the suppliant's property. All that the Bacon Board did was to notify the suppliant first that a certain put down of bacon and other pork products was authorized and later that it had booked shipment for the products in a steamship that was scheduled to load between certain dates. These notifications were given by the Board in the course of its marketing and export regulations and were in no sense a requisition or taking over of the suppliant's property. The suppliant remained the owner of the pork products and they were at its risk until delivered on board the United Kingdom ocean steamer. The claims of the suppliant under section 18 of the Exchequer Court have, in my opinion, no foundation whatever.

Nor am I able to find any foundation for the suppliant's claim based on negligence on the part of the Bacon Board, even if it is assumed that it is an officer or servant of the Crown within the meaning of section 19 (*c*) of the Exchequer Court Act. It is alleged in the petition that the Bacon Board, as the agent and servant of the Crown, was negligent in handling the pork products and failed to use reasonable care in that when it found that no ship was available it should have taken steps to have them put into cold storage or should have notified the suppliant that shipping space was not available and so have permitted it to make arrangements itself for their care. On the argument counsel for the suppliant contended that the Crown, through the Bacon Board, was bound to take care of the products and see that they did not go bad; that it owed a duty to inspect and take care of them as soon as they arrived at Saint John; and that the damage to the suppliant was the result of the Bacon Board's failure to inspect and notify.

There was, in my opinion, no duty on the part of the Bacon Board towards the suppliant to take care of its pork products on their arrival at Saint John. It is true

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

1945

UNION PACKING COMPANY LIMITED v. THE KING

Thorson P.

that under paragraph 6 of the agreement the Bacon Board is to be responsible for storing bacon and hams in good condition in suitable stores at suitable temperatures in Canada and for placing them on board as ships are made available, but this responsibility towards the United Kingdom is assumed by the Bacon Board as part of its control of marketing, and refers, I think, to a situation where storage becomes necessary in a period of heavy marketing to make up for periods of light marketing in order that deliveries may be maintained in a continuous and regular flow. There is no such situation in the present case. Paragraph 6 of the agreement must be read in the light of the Bacon Regulations and the provisions therein relating to storage. Paragraph 4 (1) (*b*) gives the board power to require any packer to store pork for future curing and delivery to satisfy future requirements of the United Kingdom Ministry of Food and paragraph 4 (1) (*c*) provides for the price to be paid for pork so stored plus carrying and storage charges as approved by the Board. These provisions have no application to the present case. The suppliant was not required to store and its products were not taken into storage. The facts alleged do not bring the case within any of the provisions of the Bacon Regulations relating to storage. It is not alleged that the Board instructed the suppliant to deliver any pork products to it, or that, after the products arrived at Saint John, the suppliant delivered them to the Board or the Board took delivery of them. Nor is there any suggestion that either the Bacon Board or the suppliant intended that the products should be taken into store by the Bacon Board on their arrival at Saint John. In fact, quite the contrary is the case, namely, that it was intended that they should be loaded directly on board the United Kingdom steamer immediately on their arrival. This is borne out by the suppliant's own allegation that arrangements were made for delivery of the products at seaboard so as to make connections with the steamship that was scheduled to load between certain dates. The case falls outside the provisions relating to storage and there is no duty of storage apart from them. Nowhere in the Bacon Regulations can I find any provision imposing any duty on the Bacon Board to take care of pork products shipped under such circumstances as exist in the present case.

Paragraph 7 of the agreement makes it clear that all bacon and hams shall be at the risk of the sellers until placed f.o.b. ocean steamer and it seems to me that it was the duty of the suppliant to make its own arrangements for the care of its own products from the time they left Calgary up to the time they could be loaded on a United Kingdom ship. Before the suppliant can hold the Crown responsible for negligence on the part of the Bacon Board in failing to take care of its products on their arrival at Saint John, it must be able to show a duty on the part of the Board to take such care. I cannot find any such duty imposed upon the Board by the agreement or the Bacon Regulations, and there is no such duty apart from them.

Nor was there any duty on the part of the Board to inspect the suppliant's products immediately on their arrival at Saint John. The duty of inspection was owing, not to the suppliant, but to the United Kingdom Ministry of Food, for it will be remembered that under the agreement Canadian government grading certificates are to be accepted as evidence of quality. The Bacon Board is the inspecting agent for the United Kingdom Ministry of Food. It is obvious that if the duty of inspection is to be properly performed, the inspection should be made immediately before loading. The suppliant had no right to have its products inspected any earlier since it carried the risks up to the time of actual loading on board steamer. It is not a case of the suppliant having a right to inspection and suffering loss through delay therein. Power to inspect and reject was given to the Board by the Bacon Regulations and the suppliant had to submit to inspection when it was most properly done. Delay in the inspection was, no doubt, due to delay in the arrival of a steamship. There was no object in inspecting until there was a steamer available to take the products. Shipping was the responsibility of the United Kingdom, not of the Crown in the right of Canada or of the Bacon Board. I am unable to find any cause of action by the suppliant due to failure by the Bacon Board to inspect its products before it did.

Nor can I see any duty on the part of the Board to notify the suppliant that a ship was not available to load

1945

UNION PACKING COMPANY LIMITED v. THE KING

Thorson P.

its products. All that the Bacon Board did as export regulator was to notify the suppliant that it had booked shipment for the products on a steamship scheduled to load at Saint John between certain dates. There could be no guarantee that such steamship would arrive as scheduled and the possibility that it would not be there on schedule was a contingency as well known to the suppliant as to the Bacon Board. The Board had performed its function as a regulator of exports when it notified the suppliant as it did, and was not under any duty to notify the suppliant of delay in the arrival of the steamship.

In my judgment, if the suppliant suffered loss through deterioration in its products between their arrival in Saint John and their inspection by the Bacon Board, such loss was due, not to any breach of duty or negligence on the part of the Bacon Board, but to delay in the arrival of a steamship. For such delay the Bacon Board was not responsible. The risk of such delay was one that might normally be expected in war time and it was a risk, just like any other risk in the course of transit, that fell upon the suppliant as the owner of the products. If it did not guard against such risk, the resulting loss, like any other loss prior to the products being placed f.o.b. United Kingdom ocean steamer, is due to its own failure to make arrangements for the care of its own products, and must be borne by it; it has no right to impose such loss on anyone else.

In my opinion, the suppliant has not satisfied the onus cast upon it by section 19 (*c*) of the Exchequer Court Act, and fails on this ground as well as on the others.

The result is that the question of law before the Court is answered in the negative.

In view of the such answer, there is no object in proceeding with the trial of the issues of fact herein for the answer to the question of law disposes of the suppliant's claims, even if all the acts or omissions alleged in the petition are proved. The judgment of the Court is, therefore, that the suppliant is not entitled to any of the relief sought in its petition of right, and that the respondent is enitled to costs; these will include costs of motions and other proceedings herein previously reserved.

Judgment accordingly.

BETWEEN:

CANADIAN INDUSTRIES LTD. AND CANADIAN GENERAL ELECTRIC COMPANY ..... } PLAINTIFFS,

AND

THE SHERWIN-WILLIAMS CO. OF CANADA, LIMITED ..... } DEFENDANT.

1942
Sept. 22 to 25; 28 to 30
Oct. 1 to 3; 5 to 9; 26 to 30
Nov. 2 to 6; 9; 11 to 13; 16 to 20

1945
Oct. 5

Patents—Invention—Subject matter—Anticipation—Lack of invention—First inventor—Lack of obviousness is not sufficient to establish invention—Evidence of invention—Patent Act 25-26 Geo. V. c. 32, s. 61.

The action is for infringement of Canadian patent No. 292,354 for improvements in resinous condensation products granted Canadian General Electric Company, assignee of Roy H. Kienle, the inventor, on August 20, 1929. The Court found Plaintiffs' patent invalid for lack of invention and also on the ground of anticipation.

Held: That mere lack of obviousness is not sufficient to establish invention, there must be inventive ingenuity.

2. That mere conception is not invention, the conception must be followed by reduction to practice.

3. That first inventor within the meaning of the Patent Act means not the first discoverer of the thing or the first to conceive it but means the first to publish it.

ACTION by the Plaintiffs to have it declared that, as between the parties, patent for invention No. 292,354 is valid and has been infringed by the defendant.

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

W. F. Chipman, K.C., H. Gérin-Lajoie, K.C. and *H. Hansard, K.C.* for plaintiffs.

R. S. Smart, K.C., Erskine Buchanan, K.C. and *Christopher Robinson* for defendant.

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

1945

CAN. IND. LTD. & CAN. GEN. ELEC. CO. v. SHERWIN-WILLIAMS CO. OF CANADA, LTD.

Angers J.

ANGERS J. now (October 5, 1945) delivered the following judgment:

This is an action for infringement of a patent, No. 292,354, granted to Canadian General Electric Company, assignee of Roy H. Kienle, the inventor, on August 20, 1929, pursuant to an application filed on April 4, 1927.

A copy of the specification was produced as exhibit 1.

The invention relates to alleged new and useful improvements in resinous condensation products.

The statement of claim, after stating that Canadian Industries Limited, Canadian General Electric Company and The Sherwin-Williams Company of Canada, Limited are all three bodies politic and corporate, the first and third ones having their principal places of business in the city of Montreal, province of Quebec, and the second one having its principal place of business in the city of Toronto, province of Ontario, alleges in substance:

The plaintiff, Canadian General Electric Company, is the owner of the letters patent above mentioned issued to Roy H. Kienle as the inventor, whereby he was granted the exclusive right and privilege, for a term of eighteen years from the date of the letters patent, of making, constructing and using, and vending to others to be used, the said invention;

The plaintiff, Canadian Industries Limited, is a licensee, and in certain fields an exclusive licensee, under the above letters patent and the claims thereunder;

The defendant has infringed the rights of plaintiffs under said letters patent as set out in the particulars of breaches and threatens to continue said infringements.

In their particulars of breaches, plaintiffs aver:

The defendant has infringed the rights of plaintiffs under patent No. 292,354 by the manufacture and use and the sale and offering for sale, in the city of Montreal and elsewhere in Canada, of alkyd resins and paints and varnishes containing them which infringe the said patent over a period commencing some time before January 1, 1937, up to the present date (June 26, 1939);

The precise number and dates of defendant's infringements are at present unknown to plaintiffs;

The plaintiffs will rely on claims 3 and 4 of the patent.

Further particulars of breaches were given in compliance with an order of the Court as follows:

The alkyd resins and paints and varnishes containing them, referred to in the particulars of breaches filed and served with the statement of claim herein, are those which are designated and known as Fleet-X Kem Finishes, Air-Drying Kem Enamels and Exterior Kem Enamels.

In its statement of defence, the defendant admits the allegations of the statement of claim concerning the status of the plaintiff and defendant companies, admits that Canadian General Electric Company is the owner of the patent referred to in the statement of claim, but denies that Roy H. Kienle is the inventor or that any invention is described in the letters patent, says that it has no knowledge that Canadian Industries Limited is a licensee, denies having infringed the letters patent, avers that the letters patent are and always have been invalid for the reason set forth in the particulars of objection delivered on behalf of defendant and submits that the action should be dismissed with costs.

The particulars of objection amended pursuant to the orders of December 12, 1939, and December 4, 1941, allege:

There was no invention having regard to the common knowledge of the art and to the patents and publications set forth in Schedules I and II;

The alleged invention was not new; it was known and used by others before the date thereof as appears from the common knowledge in the art at the date the said invention is alleged to have been made and from the patents set forth in Schedule II and the applications therefor;

The claims of the letters patent claim more than the applicant invented, if he invented anything, inasmuch as they refer to any polyhydric alcohol and to any polybasic acid and to any mixed fatty acids derived from a drying oil, whereas only particular alcohols, acids, polybasic acids and fatty acids are disclosed in the specification as useful in the process there described;

The alleged invention described in the letters patent was abandoned by the inventor or his assignee many years before the date of application for the letters patent in Canada; under this paragraph the defendant will rely upon: (*a*) the fact that neither the alleged inventor Kienle nor his assignee, General Electric Company, took any steps towards patenting the alleged invention but allowed it to lie dormant and abandoned for a number of years; (*b*) the further fact that General Electric Company and the plaintiff Canadian General Electric Company elected to obtain Canadian patent No. 292,353, and United States patent No. 1,803,174 as an alleged invention of a chemist named Dawson, which was intended to cover any useful work done in relation to alkyd resins, and the said General Electric Company and Canadian General Electric Company, by filing and prosecuting the applications for the aforesaid patents as an invention of the said Dawson, abandoned any claim that could be made for any related invention made by Kienle;

The specification of the said letters patent describes an inoperative process; it would not be possible by following the processes of the examples set forth in the specification to obtain the products described;

The invention described in the letters patent is not useful; it would not be possible by following the directions contained therein to obtain any useful product; the directions of the specification indicate the use of

1945

CAN. IND. LTD. & CAN. GEN. ELEC. CO. v. SHERWIN-WILLIAMS CO. OF CANADA, LTD.

Angers J.

any cyclic polybasic acid in association with any unsaturated, oxidizable acid, whereas many aromatic cyclic polybasic acids and many unsaturated oxidizable acids when used in the process do not produce a useful result;

The specification forming part of the letters patent is ambiguous and insufficient inasmuch as it states that any polybasic acid may be used in the reaction, whereas many polybasic acids cannot be used in the way described and would be useless for the purposes set forth in the specification;

Claim 3 of the letters patent is wider than the invention and the composition defined thereby is old in the art set forth in Schedule I; this claim refers generally to an oxidizable, unsaturated fatty acid and would include acids not dervied from a drying oil;

Claim 4 of the letters patent is wider than the alleged invention described in the specification in so far as it refers to any polyhydric alcohol and to any polybasic acid, whereas many polyhydric alcohols and polybasic acids are not useful for the purposes of the alleged invention;

The alleged invention defined by the claims of the patent was previously patented by the plaintiff, Canadian General Electric Company, by the issue of Canadian patent No. 262,979 on July 27, 1926, filed August 1, 1925, and the Commissioner is therefore without authority to grant the letters patent referred to in the statement of claim;

The invention defined in the claims of the patent upon a proper construction is anticipated by the prior patents, applications and publications referred to in Schedules I and II.

Schedules I and II mentioned in the particulars of objection are made up as follows:

SCHEDULE I

UNITED STATES PATENTS

Number	*Patentee*	*Date*
335,485	Schaal	Feb. 2, 1886
1,098,728	Howell	June 2, 1914
1,098,776	Arsem	June 2, 1914
1,098,777	Arsem	June 2, 1914
1,119,592	Friedburg	Dec. 1, 1914
1,141,944	Dawson, Jr.	June 8, 1915
1,214,611	Terrisse	Feb. 6, 1917
1,422,861	Hocker	July 18, 1922
Re 16,240	Hocker	Jan. 5, 1926

CANADIAN PATENT

223,007	Hocker	Aug. 22, 1922

BRITISH PATENT

25,727	Lake	1898

PUBLICATIONS

"The Manufacture of Varnishes and Kindred Industries" by Libache & McIntosh, London, Scott Greenwood & Son, p. 28.

"The Manufacture of Varnishes and Kindred Industries" by John Geddes McIntosh, London, Scott Greenwood & Son, 1911, pp. 376 to 379 inclusive.

"Varnishes and Their Components" by Robert Selby Morrell, London, Henry Frowde and Hodder & Stoughton, 1923, pp. 30 and 31.

"Synthetic Resins and Their Plastics" by Carleton Ellis, 1923, published by The Chemical Catalog Company, Inc., New York, pp. 147, 148, 149 and 293.

Journal of the Society of Chemical Industries, Article by Watson Smith entitled "A New Glycerole Phthalate", pp. 1075 and 1076.

SCHEDULE II

UNITED STATES PATENTS

Number	*Patentee*	*Issue Date*	*Filing Date*
1,690,515	Weber	Nov. 6, 1928	Oct. 13, 1925
1,773,974	Ellis	Aug. 26, 1930	Sept. 23, 1926
1,803,174	Dawson	April 28, 1931	May 23, 1925
1,843,869	Ellis	Feb. 2, 1932	April 26, 1924
1,893,874	Adams	Jan. 10, 1933	June 25, 1926
1,927,086	Ellis	Sept. 19, 1933	Mar. 13, 1926
1,958,614	Ellis	May 15, 1934	Oct. 10, 1925
1,974,742	Hopkins & McDermott	Sept. 25, 1934	Aug. 14, 1926

CANADIAN PATENTS

223,007	Hocker	Aug. 22, 1922	May 23, 1921
262,979	Adams	July 27, 1926	Aug. 1, 1925
292,353	Dawson, Jr.	Aug. 20, 1929	April 4, 1927
311,488	Hopkins & McDermott	May 19, 1931	Oct. 29, 1929
311,690	Weber	May 26, 1931	Oct. 15, 1928
329,631	Ellis	Jan. 24, 1933	June 8, 1931
351,517	Hopkins & McDermott	July 9, 1935	July 25, 1931

1945

CAN. IND. LTD. & CAN. GEN. ELEC. CO. v. SHERWIN-WILLIAMS CO. OF CANADA, LTD.

Angers J.

The patentee, in his specification, says that his invention relates to artificial resins of the condensed ester type and comprises an improved resinous composition which contains in a combined state oxidizable, unsaturated fatty acid, for example, such acids as may be derived from drying oils.

The object of the invention is described as follows:

It is the object of my invention to produce resins of the polyhydric alcohol-polybasic acid class, which can be fully hardened or set at ordinary room temperatures, that is, without baking, which shall have greater hardness and elasticity and in general have more advantageous physical properties for industrial purposes than resins of this class which have been produced heretofore.

The patentee refers to the United States patent No. 1,098,776 relating to resins and says:

Arsem U.S. patent 1,098,776 of June 2, 1914, describes the preparation of resins from a polyhydric alcohol, such as glycerine, and a cyclic polybasic acid such as phthalic acid together with an aliphatic acid. Included among the aliphatic acids are fatty acids, such as stearic or oleic acids. These fatty acids are of the non-drying type, that is, they are not hardened by oxidation.

The patentee then proceeds to describe in general terms his discovery and states:

I have discovered that when an aromatic or cyclic polybasic acid, such as phthalic acid, is associated with an unsaturated, oxidizable acid, namely an acid derived from a drying oil, such, for example, as eleostearic, linolic, or linolenic acid, that then a new form of resinous material is produced which differs in many important respects from the resin containing a non-drying fatty acid. For example, such a resin is soluble at ordiary temperatures in a drying oil. The resin containing such acid is convertible by contact with the air at ordinary temperatures to a hard, tough state. When applied in solution on metal or other foundation material a tough, flexible and tenaciously adherent film is formed upon evaporation of the solvent and air drying. All these properties render this resin valuable as an ingredient in varnishes or other protective coatings.

The specification then gives two specific examples to ilustrate the manner of carrying out the invention and the character of the products derived therefrom. They are worded thus:

First example: About 92 parts by weight of glycerine and 296 parts by weight of phthalic anhydride are heated with the temperature gradually rising. At about 160° C. a clear, straw-coloured solution is produced. The temperature is gradually increased to about 200° C. to cause a reaction to proceed, water vapor and some anhydride being given off. At this point an additional quantity of phthalic anhydride may be added—say about 74 parts by weight, and also about 140 parts of one or more fatty acids derived from a drying oil, such as chinawood, linseed, or perilla oil. Heating is continued at a temperature within the range of 190° C. to 210° C. until frothing and the giving off

of vapors ceases and a clear liquid is formed. Instead of the mixed acids derived from a drying oil, which include also as minor constituents non-oxidizable fatty acids, I may use one or more oxidizable, unsaturated acids, such as eleostearic, linolic or linolenic acids unassociated with other fatty acids.

Second example: The cyclic or aromatic acid may be mixed with the aliphatic acid and reaction then may be carried out in one stage by the addition of glycerine. By weight, about 370 parts of phthalic anhydride and about 140 parts of the fatty acids derived from one of the drying oils are melted by heating to about 160° C. About 92 parts of glycerine then are added and the temperature is raised to about 200° C. until resinfication occurs. I prefer to heat the mixture until a resin is formed which strings out at about 180° C. when allowed to fall in drops.

Then follows the concluding statement which reads as follows:

A resin prepared by either method is more flexible and tougher than a resin derived from glycerine and phthalic anhydride alone, unassociated with the acid derived from a drying oil.

The specification then continues thus:

The resins made in accordance with my invention are soluble in acetone, alcohol-benzol, coal tar oil, acetone oil, butyl acetate, butyl alcohol, ethyl lactate, glycol diacetate, glycol, glycol derivatives such as the non-ethyl ether, benzyl acetate, phthalate esters such as diethyl phthalate, triacetin.

When such resin dissolved in a suitable solvent of the types mentioned above is applied as a varnish film, a tough tenaciously adherent film is produced upon evaporation of the solvent and air drying of the resin. Such a film is particularly advantageous for coating metals because of its adherence.

The patentee then declares that the resin may be utilized in massive or bulk form, for example, by casting the fused resin into suitable moulds to produce slabs, sheets or ingots, and that it may also be used in conjunction with various filler for the preparation of moulded products, or as a cement or a binder for laminated materials, or as an impregnant for porous materials.

The patentee concludes thus:

The resins made in accordance with my invention are miscible directly by simple heating with drying oils, such as linseed oil, china-wood oil, perilla oil, or blown fish oil. Such solutions are useful as a varnish for coating metals, wood or other articles.

The plaintiffs rely upon claims 3 and 4, which I deem apposite to quote here:

3. A resinous composition constituted by the condensation product of glycerine, phthalic anhydride and an oxidizable, unsaturated fatty acid.

4. A resin constituted by the reaction product of polyhydric alcohol, a polybasic acid and the mixed fatty acids derived from a drying oil.

1945

CAN. IND. LTD. & CAN. GEN. ELEC. CO. v. SHERWIN-WILLIAMS CO. OF CANADA, LTD.

Angers J.

The first question to determine is that of the validity or invalidity of the patent. The particulars of objections raise lack of invention and anticipation.

The alleged lack of invention is based on the patents and publications set forth in Schedules I and II hereinabove reproduced and the common knowledge of the art.

The preparation of paints and varnishes always depended on the selection and mixture of a variety of ingredients, such as resins, natural or synthetic, oils and acids, not to say anything of colours which are immaterial in the present case.

Various proportions are used and diverse ingredients are substituted for one another from time to time. As may be expected, as different materials vary in their availability or their price, they are replaced. An example of this is the case of the chinawood oil or tung oil, which appeared shortly after 1900 and made a notable improvement in the varnishes and coating compositions. Yet I do not think that it could be seriously contended that one could get a patent for using this oil, notwithstanding that there may have been considerable advantages in its use.

The properties of all the oils referred to have been long known in this art. Linseed oil, with which we are almost principally concerned, has been used in coating purposes from almost time immemorial, due to the fact that it will dry. By itself it does not dry very quickly; it may run up to a month before it dries. When mixed with a pigment such as zinc oxide for instance, it dries in a much shorter time.

Drying properties in themselves are not new in the paint and varnish art. Paint and varnish of course would be of no utility unless it dried.

Synthetic resins are comparatively new in the protective coating composition art. No one had anything to do with them before 1900 and no one used them before 1910. Natural resins on the other hand have been used for a very long time, in fact ever since man began to think of that problem.

I may note incidentally that natural resins are the exudations from plants or insects. The most widely known are the shellac, which is lac melted and run into thin plates,

and the viscid secretion from the pine tree. Natural resins alone lack a number of characteristics for coating compositions but, when associated with oils, constitute a very passable protective composition. The natural resins possessed such characteristics as hardness and adherence. The oil supplied the film forming feature. The result of the combination was a varnish.

The natural resins divide themselves into soft on the one hand and hard on the other. The division is sometimes expressed thus: those that are completely soluble in an organic liquid, whether spirit or oil, and those partially or completely insoluble. The latter are usually rendered soluble by what is called cracking, i.e., heating. A few words about the principal natural resins may be convenient.

The spirit varnish, without oil, is merely a natural resin dissolved in a volatile solvent. When that material is spread on a surface the solvent evaporates and, if there is no oil added in it, nothing is left but the original resin. As already stated one of the chief spirit varnishes is shellac. Shellac is not an ideal coating as it does not stand weathering but whitens easily, particularly under effect of water.

Rosin is the exudation from the oleo-resin of pines and trees of that class after the separation from the turpentine. Rosin, if there is a large quantity of it in an oil varnish, gives a brilliant finish, but it is subject to the same criticism as shellac, as it easily whitens. Moreover the film is brittle and friable and subject to destructive oxidation. Mr. Chipman intimated that while rosin may be added to other resins and increase their solubility in oils it is usual to say that the rosin content is a measure of cheapness and indicative of a lack of desirable characteristics for a good varnish.

Counsel alluded briefly to ester gum, saying that it contains a quantity of abietic acid and that to offset this high acidity the resin can be treated with glycerol and that the result of this treatment is called an ester gum, which, like the original resin, is soluble in oils and can make a varnish. The result is not known in the art as a synthetic resin because the components are already resinous.

1945

CAN. IND. LTD. & CAN. GEN. ELEC. CO. v. SHERWIN-WILLIAMS CO. OF CANADA, LTD.

Angers J.

In addition to the natural resins and the ester gum previously referred to, there are the oil varnish natural resins, including copals known as congo and kauri. The copals are unsuitable for resin use due to their insolubility in varnish oils. They can be made suitable however by heating, called in the art cracking or running. This cracking or running, in order to make the copals soluble, is not considered as making it a synthetic resin.

To sum up, I may note that the natural resins may be divided into spirit varnish resins, oil varnish resins and natural resins which have been treated in such a way as to be useful in the art and say that where they have been esterfied, as in the case of rosin, or cracked or run, as in the case of copal, they are still natural resins and not synthetic resins.

Generally speaking, varnishes are prepared by heating together, in suitable proportions, one or more soluble resins and one or more oils. The product must be thinned in order to be useful. When it is sufficiently thinned to facilitate its application to a surface, it may be used as a coating varnish. This may dry after standing in the air a certain time and drying will harden it. The hardening involves more than the mere evaporation of the volatile solvent and the consequent setting; there must be some chemical action between the oil and the air so as to change in some way the characteristics of the film. There is no perfect theory of hardening unanimously accepted, but it is admitted in hardening there is absorption of oxygen. So the action of hardening is commonly called oxidation.

Apart from hardening in the air there is hardening by the application of heat; generally speaking, the higher the temperature, the shorter the time for the hardening. The term usually employed in the art for heating in the case of a varnish is baking. Baking a varnish is submitting it to excessive temperatures of 250° F. or over. It is a form of accelerated drying.

It was known for years that one could vary the quality and property of the varnish oils, not only with regard to the ingredients that went into them, i.e., the particular fatty oil and particular resin used, but also as to the proportions between the two; hence arose the terms a long

oil or a short oil varnish. The long oil varnish, in which there was a larger proportion of oil, would not dry as quickly, but there would be more of the qualities of the oil than of the resin in the composition; it would be durable, tough, not brittle. The short oil varnish, in which the proportion of oil is low, would dry more quickly; it would not have the same wearing qualities as the long oil varnish but it would have the fast drying property. That was one of the problems with the natural varnishes.

Dealing now with the synthetic resins, I may say that the first of these resins are the class of phenolic resins, composed of phenol formaldehyde. I may perhaps point out that the ingredients of this synthetic resin are distinct from the ingredients of the resin covered by the patent in suit, which has to do with a synthesis of an acid and an alcohol.

In 1910 a synthetic resin composed of phenol formaldehyde heated with copal, the two together forming a material soluble in oils and therefore usable as a varnish resin, appeared on the market. These resins were called albertols; they had to be combined with oils before they could be useful as a varnish. They were not complete resins in themselves and only became usable as a varnish to cover a surface after being combined with oils. Dissolving the albertols in a volatile solvent, spreading the solution on the surface and letting the solvent evaporate will not give a practical film. In order to give it forming quality one has to add linseed oil or some similar ingredient.

In 1914 some phenolic resins were made completely soluble in varnish oils. They had however to be made with a suitable oil into a whole for a commercial resin. From that point of view the fact that this synthetic resin must be used with an oil creates some analogy between the phenols and the natural resins.

A word may be said about the oleo-resinous varnishes. Usually that phrase is restricted to oil varnishes in which a natural resin is and must be mingled with an oil in order to make a finish.

The next class of synthetic resins is that of the cumarone resin. This resin is formed by the union of cumarone and indene occurring in coal-car distillation products. It

1945

CAN. IND. LTD. & CAN. GEN. ELEC. CO. v. SHERWIN-WILLIAMS CO. OF CANADA, LTD.

Angers J.

is, properly speaking, a synthetic resin because neither of the constituents is resinous. I may note that it is distinguishable from the synthetic resin in suit, seeing it is not a resin of the acid alcohol type at all.

Another branch of the varnish art, to wit the nitrocellulose coatings, must also be mentioned. Nitrocellulose coatings are known as lacquers because they are comparable with shellac in this sense that after they have been spread they dry by evaporation. The nitrocellulose supplies the film-forming characteristic of the varnish. It is not adhesive and is brittle. The resins are added in order to procure adhesion; the plasticisers are added to give the film flexibility. Nitrocellulose solutions were long known as coverings for metals.

Even a small percentage of nitrocellulose in a solid gives such viscosity as to prevent application or at least reduce its possibility. In order to get the possibility of making coats of varnish including nitrocellulose, the percentage of the latter in each spreading had to be so small that one had to have a large number of coats before getting sufficient thickness. The drawback in this connection is known as high viscosity and until the problem of high viscosity of nitrocellulose was solved nitrocellulose could not come into common use as a protective coating.

In or about 1921 an employee of the Dupont Company discovered a method of producing nitrocellulose of low viscosity, yet having good film-forming properties. The product after spreading can be said to have air dried in the sense that the cells formed a hard film irrespective of the contents of the cells. Nitrocellulose began a career of its own in the varnish art in 1923-1924. The industry was captivated by this new coating; all methods of coating were reorganized so that, whereas in 1923 about 1 per cent. of all the automobiles manufactured in the United States were finished with nitrocellulose lacquers, by 1927 over 95 per cent. were so finished.

Around 1901 a chemist named Watson Smith tried reacting glycerol and phthalic anhydride. His work is recorded in an article entitled "A new glycerol phthalate" which appeared in the Journal of the Society of Chemical Industries, of November, 1901. The article in question

is mentioned in Schedule I of the amended particulars of objection. It describes Watson Smith's product as follows:

> As characterized chiefly by its extraordinary insolubility in almost all solvents. It is practically insoluble in alcohol ether and benzene, also petroleum and petroleum spirit. Its best solvent appears to be cold acetone but in this it is sparingly soluble. On pouring some of the solution on a watch glass and letting it evaporate spontaneously, the clear transparent resin deposited in minute drops, solidifying to hard transparent masses of the tasteless resinous body.

Watson Smith had evidently discovered a new synthetic resin which however was wholly insoluble and unusable. Yet it suggested all sorts of possibilities as an entirely new synthetic product and, as time went on, the industry began to consider what might be done with this new synthesis. Around 1912 the Watson Smith resin was investigated by chemists in the employ of General Electric Company in the United States, their names being, among others, Callahan, Arsem, Dawson, Howell and Friedburg. These chemists were trying to make out of this hard glassy substance of Watson Smith, a sample whereof was filed as exhibit 24, something soluble in available solvents and thus industrially useful, something they could spread on a surface as a coating.

The patents issued to Arsem, Dawson, Howell and Friedburg, along with others, are listed in Schedule I of the particulars of objection.

I thought convenient to make a short history of the paint and varnish industry before broaching the subject of the validity of the patent in suit.

Reverting to the Watson Smith resin which came out in 1900 and about which so much has been said during the trial, because it specifically used as the acid to combine with the glycerine phthalic acid, which is the acid mentioned in the patent in suit, I may state that this resin, as shown by the sample filed as exhibit 24, was hard and brittle. It could be made into a cast article but it was too hard and brittle to find any industrial use. Long before 1921, Kienle's alleged date of invention, ways of modifying that resin had been found, those ways being similar to the ways of modifying natural resins by mixing oils with them. It has been suggested not only to mix various oils with the Watson Smith resin but to use

1945

CAN. IND. LTD. & CAN. GEN. ELEC. CO. v. SHERWIN-WILLIAMS CO. OF CANADA, LTD.

Angers J.

the acid oil instead of the oil itself. Fatty oils are glycerides or the combination of glycerine with a fatty acid. If the proposed use of the oil is the combination with glycerine and phthalic acid, the operator, by putting in the fatty acid instead of the fatty oil, will save himself the trouble of carrying the glycerine into the reaction where it already exists.

Different kinds of modifications of the Watson Smith resin were made with castor oil, oleic acid, butyric acid, etc., as evidenced by the patents aforesaid of which I propose to make a brief review in a moment.

It was submitted on behalf of defendant that there was not any inventive ingenuity in selecting fatty acids of linseed oil or linseed oil itself, since both have been put on an equivalent basis. The selection of linseed oil as the ingredient to modify the synthetic resin of Watson Smith was an accepted thing that a skilled worker in the art would do. It was urged on behalf of plaintiffs that the selection of linseed oil or the acid thereof was not an obvious thing and that consequently its adoption constituted an inventive step. The mere lack of obviousness is not sufficient to establish invention. There must be inventive ingenuity: see *Crossley Radio Corporation and Canadian General Electric Company Limited* (1), where the Honourable Mr. Justice Rinfret said (p. 555):

> Notwithstanding the very ingenious and exhaustive argument of counsel for the appellant, we would hardly think, however, he would ask this Court to give a sacro-sanct meaning to the use of the word "obvious" for the purpose of discriminating between the category of improvements which ought to be regarded as being properly inventions in the legal sense and the category of those not so regarded. We would suggest that, in England, the appearance, in later years, of the word "obvious", in judgments dealing with patent matters, probably results from the fact that, under sec. 25 (subsec. *f*) of the English Patents and Designs Act, a patent may be revoked upon the ground "that the invention is *obvious* and does not involve any inventive step having regard to what was known or used prior to the date of the patent." But although, perhaps, judgments under Canadian patent law may not have denied patentability to certain improvements upon the express ground that the advance over the prior art should be taken to have been obvious to the persons skilled in the art, the jurisprudence, both in the Canadian courts and in the Judicial Committee of the Privy Council, is not wanting in pronouncements conveying the same idea. It has long been laid down in our courts that, in order validly to support a patent, it was, of course, necessary that the art, or the improvement thereon, should be new, that it must be useful and that it must not have

(1) (1936) S.C.R. 551.

been anticipated by prior knowledge or prior user by others within the meaning of sec. 7 of the Patent Act, in force at the time of the issuance of the patent in suit; but that something additional was also required. It was essential that there should be invention and that one did not hold a valid subject-matter of a patent unless he showed the exercise of the inventive faculties (See: Halsbury's Laws of England, *vbis.* Patents and Inventions, no. 288); and that is to say, in the words of Lord Watson (*Thomson* v. *American Braided Wire Company* (1889), 6 R.P.C. 518 H.L.), "a degree of ingenuity . . . which must have been the result of thought and experiment".

See also *Shaw* v. *Burnett & Company* (1), *Bowen* v. *E. J. Pearson & Sons Ltd.* (2), *John Wright & Eagle Range Ltd.* v. *General Gas Appliances Ltd.* (3), *Sharp & Dohme Inc.* v. *Boots Pure Drug Company Ltd.* (4), *In the Matter of I. G. Farbenindustrie A. G.'s Patents* (5), *Gadd and Mason v. The Mayor, etc., of Manchester* (6).

The terms in which Kienle made his notation of this first suggestion about the use of linseed oil show that he regarded the addition of linseed oil to the Watson Smith resin as an obvious thing to do. A reference to Kienle's note book (Ex. 57) is advisable as, in my view, it confirms this statement. At page 287, under date of February 10, 1921, we find, among others, the following note:

Talking with Dawson suggested making a resin using mixed fatty acids of linseed oil instead of deic acid as in G.P.O. Believe that this will give flexible, may be self drying resin.

Then at page 309, under date of March 15, 1921, there is the following note:

Dawson made resin similar to G.P.O. to-day using fatty acids linseed oil as per suggestion.

I may note that G.P.O. was described by Kienle as follows (dep. p. 789):

G.P.O. is a sort of shorthand we use for the resin made from glycerine phthalic anhydride and oleic acid.

And further on (p. 790, *in fine*):

A. It was a name that we used in the General Electric Company's laboratories for this resin.

Q. Did that get out of the laboratory into the market?—A. On the open market, I do not believe it did.

Q. Was G.P.O. covered by any patent or patents, do you happen to know?—A. Yes, it it was covered by a patent taken out by an employee of the General Electric.

Q. Who is that?—A. Mr. Arsem.

(1) (1924) 41 R.P.C. 432 at 440.
(2) (1925) 42 R.P.C. 101 at 108.
(3) (1929) 46 R.P.C. 169 at 177.
(4) (1927) 44 R.P.C. 367; (1928) 45 R.P.C. 153 at 191.
(5) (1930) 47 R.P.C. 289 at 322.
(6) (1892) 9 R.P.C. 516 at 524.

1945

CAN. IND. LTD. & CAN. GEN. ELEC. CO. v. SHERWIN-WILLIAMS CO. OF CANADA, LTD.

Angers J.

I think it will be advantageous to look into Kienle's note book a little more thoroughly.

On page 311, under date of March 16, 1921, we find this note:

Dawson finished up resin from fatty acids. Tried benzol-alcohol solution. It acts in tube as G.P.O. No. 3 with vacuum. With air forms gummy mass on *bottom* of tube. Thought that air would spread varnish out. It did but resin gets sticky.

Then there is an entry of March 18, 1921, on page 313, thus worded:

Moehle tried fatty acid resin again. It gums up the tube too much. Rejected on account of flow.

On March 21, 1921, at page 315, we read:

Made 100:75 mixture S.O. iron treated and resin from fatty acids. Blended by heating to 200° C. Cut in coal tar oil-alcohol. Trouble was result came streaky hence got breaks in wire. Except for this fine enamel. Streaks seem to be in tube.

On March 22, 1921, at page 316, Kienle noted:

Moehle tried Resin E.A.—Linseed Oil without T. Couldn't seem to get uniform covering. Also got beading.

The entry of March 25 is to the effect that Kienle tried a different solution with a dip process, that he did not get a very even flow, that the coating was tacky and came very beady.

On March 26 the beading was again found to be pronounced.

On March 28, at page 320, there is the following entry:

To-day tried enameling with the 75/100 F.A.R.-L.O. mixture. Used new glass T. Ran boronized copper, cleaned only by solution. Got fair speed with I=18.0 but got uneven covering.

The entry of March 29, at page 320, shows that Kienle made 8 dips and that the coating was still porous.

On March 30, at page 321, we have the following entry:

Tried blending G.P.O. resin with tansil (?) oil. Got negative result. Also negative result with paraffin oil. Did get blending with glycerine.

On April 5, Kienle wrote the following entry (p. 326):

Made several quick electrolysis at 125 V. Found out washing with water or alcohol works to give more even effect. Got distinct resin in each case. Coatings very firm.

On April 8, at page 329, we find the following note:

Tried high speeds. As speed goes up of course wire gets stickier. Also seems to get point where beading occurs again. All this phenomena is indefinite so will have to follow up further.

The last relevant entry in Kienle's note book, under date of April 21, 1921, contains, among others, the following statements:

Tried 3.0 mill with F.A. Resin in coal tar oil/allyl alcohol. Too thin a solution again when beading stops via dip process.

Allyl alcohol with coal tar oil cuts resins.

It seems evident from these entries that Kienle's only problem in 1921 was that of providing an insulation coating for fine wires and it is quite manifest that his endeavours did not meet with success.

Mr. Smart pointed out that nothing in these notes is said about air-drying, to which Mr. Chipman retorted that self-drying is the same. I must say that off-hand I felt inclined to agree with him. But looking over the testimony of Kienle on the subject I am satisfied that the two expressions are not synonymous. I believe it apposite to refer to Kienle's deposition in this connection and quote a few brief extracts.

At page 781 Kienle, asked what particular work he was doing in the research laboratory (of General Electric Company) in 1921, says: "At that time I was engaged in the study connected with the enamelling of fine copper wires, in fact, fine wires in general."

The witness then describes the operation thus (p. 783):

A. You pass the wire over a pulley to guide it down through a varnish bath and then by a baking tower over another pulley, and in the plant you pass it down again into the bath by a tower again—in the plant, the same tower— and do that a number of times until you build up the requisite thickness.

Q. That is a series of baths in an enamel and a series of bakings? —A. The same bath.

Q. I mean, the thing is being subjected to bathing several times?— A. We call that a series of dips.

Q. A series of dips and a series of bakes, is that right?—A. That is correct.

And further on (*ibid.*):

A. The wire, as you can well imagine, is very weak mechanically, and it is particularly weak when it gets into the baking oven, because the temperatures in there are fairly respectable temperatures: they run to the order of magnitude of 400 to 900 degrees Fahrenheit.

1945

CAN. IND. LTD. & CAN. GEN. ELEC. CO. v. SHERWIN-WILLIAMS CO. OF CANADA, LTD.

Angers J.

Dealing with the objects he had to keep in mind in the operation, Kienle declared (p. 786):

A. . . . In the application the wire had to, as I said, pass through the bath of the varnish and then up the baking oven. If the baking in that baking oven was not sufficiently dry or hard or baked as we call it, then when it hit the pulley at the top, which we call a sheave, it would be apt to stick on that and flake off and you would destroy the entire effect you were trying to produce. Furthermore when you return the wire to the bath you pass through the enamel and of course that had solvent in it and you wanted to be sure that it would not re-dissolve when it was in the solvent bath.

To the question as to whether the baking operation offers conundrums that have to be solved in the enamelling process, Kienle replied in the affirmative and added (p. 787):

A. . . . You have to, as I pointed out, be sure that when you get it out of the oven it is dry, and you have to be sure that all the reactions that occur in the oven in the baking process have been carried to the proper point rapidly enough to meet the speed with which you are passing the wire through the oven.

Asked why the baking oven was employed, Kienle answered (p. 787, *in fine*):

A. In order to give a thoroughly dry film with the proper maximum type of polmerization—I guess we can call it that.

Speaking of the use of the G.P.O. varnish in his enamelling operations, Kienle said that he was attracted by its adhesive qualities but found that it lacked the characteristic of building up insulation thickness on the wire in a reasonable number of dips and he added (p. 790):

I had found that it also did not bake too well when it went through the baking oven I reasoned that if I could possibly get in some product the adhesive characteristics of the G.P.O. and overcome the other characteristics, especially the baking, so as to get quicker baking, baking of the order of magnitude of the temperatures I referred to in this use, we might have something that would be of value in the wire enamelling on it (art?).

Kienle specifically stated that he did not discuss drying but quicker baking. Perhaps I had better quote another passage from his testimony (p. 792):

Q. Then did you discuss with Dawson anything more than that note presents? Did you discuss any question of drying with him?—A. No, other than the fact that I requested him to make the resin and I also stated to him that I would provide him with the fatty acids for making up the resin.

Q. But did you discuss with him any question of drying of the resin? —A. No.

Q. Nothing of the kind?—A. No.

Q. . . . Well, now, the note, as you read it out, had "believe that this will give flexible, may be self-drying resin." Did you discuss with Dawson the possibility that if you used these acids instead of oleic that you might get a resin with different results or speedier results in drying?—A. As I recall it, I discussed with him the possibility of getting quicker baking. That was the first thought I had with respect to this possibly new resin.

Q. Baking is a form of drying, is it not?—A. In the very broad sense only.

Q. But the note, "may be self-drying" you tell me you did discuss that with Dawson?—A. No, after I had had the conference with Dawson, that is after I had talked with him and between that time and the time I entered this note, I thought that possibly, if we had such highly unsaturated drying oil acids in the resin molecule we might be able to get something new; that is, we might be able to get the property in the resinous composition of self-drying.

Q. Will you tell me what self-drying means in reference to baking.—is it distinguished from baking?—A. Oh, yes, self-drying means the type of hardening in the physical sense. By that I mean a change of state from liquid to a solid would occur by exposure to the atmosphere or to ordinary temperatures. That is, it dries by itself.

These various extracts from the deposition of Kienle read in the whole satisfy me that the only idea which was discussed between Dawson and Kienle was not that of air-drying but that of quicker baking.

The use of linseed oil must have been considered as the obvious thing to do by the skilled persons, familiar with commercial practice, who were working with Kienle at the General Electric Company. Neither the company nor any of its employees made any attempt to obtain a patent on the new product or the process for making it. They did not produce it as an invention. They did nothing until it appeared that someone with the Dupont de Nemours Company had filed an application for a patent. In 1927 they made experiments and prepared the application for the patent in suit. This course of conduct does not indicate that these people in 1921 considered their deed as an invention.

When the time came, by the drop in the price of phthalic acid, the introduction of phenolics, the discovery of nitrocellulose and the development of the automobile industry, where an air-drying natural resin was desired, at least four chemists thought of the thing, namely Hopkins and McDermott, Weber, Carleton Ellis and Adams. They had no idea that it was an invention. The use of an oil

1945

CAN. IND. LTD. & CAN. GEN. ELEC. CO. v. SHERWIN-WILLIAMS CO. OF CANADA, LTD.

Angers J.

with the resin naturally occurred to them. The whole circumstances tend to prove that it was not the kind of mental act which constitutes invention.

Regarding the inventive act it must be considered as of the date when it is alleged to have been made, to wit in 1921. According to the evidence there does not seem to have been any unsatisfied demand for the kind of air-drying resin with which we are concerned. There were many air-drying natural varnish oils available and the synthetic resins liable to dry by baking. Although the idea of the air-drying resin was allegedly noted in 1921 nothing was done in that respect and it only came on the market in 1929. This long delay entirely disposes of the question of long felt want. It does not seem reasonable to believe that there was a long felt want in 1921 which Kienle's invention is supposed to have filled when General Electric Company, a large and wealthy corporation, having the answer to that want in its possession, did nothing to satisfy it until 1929.

It seems to me expedient to make some brief comments upon the following patents: United States patent No. 1,098,728, to Kenneth B. Howell; United States patent No. 1,119,592, to Louis Henry Friedburg; United States patents Nos. 1,098,776 and 1,098,777, to William C. Arsem; United States patent No. 1,141,944, to Edward S. Dawson, Jr.

U.S. patent No. 1,098,728 granted to Kenneth B. Howell, assignor to General Electric Company, for resinous condensation product and process of making the same, on June 2, 1914, on an application filed July 25, 1913, a copy whereof was filed as exhibit I, deals with a new resinous material suitable for electrical insulation, varnishes, moulded materials, particularly characterized by possessing flexibility and elasticity.

The patentee declares that glycerol and other polyhydric alcohols combine with polybasic organic acids, e.g., phthalic acid, at an elevated temperature to form resins. He states that these resins are esters of complex molecular structures and that most of them, while stronger and tougher than the phenol resins, are still quite brittle when cold.

He says that the object of his invention is to provide resinous materials of this general nature which are pliable and elastic at ordinary temperatures.

He points out that, in accordance with the invention, an unsaturated ester containing uncombined hydroxyl groups is first made and is then acted upon at an elevated temperature by means of castor oil until combination takes place. He illustrates his invention by describing the process in detail regarding the formation of a resin into which glycerol and phthalic anhydride enter, but says that he wishes it to be understood that the process is equally applicable to the formation of resins containing other polybasic acids such as camphoric, cinnamic and citric acids. He adds that gylcol, mannitol and other alcohols may likewise be substituted in some cases for glycerine.

He describes at length the various elements which are to form part of his resin, mentioning the percentage of each of them and explaining the manner in which the product is to be heated.

He declares that the resinous material in the fusible stage may be used for insulating or coating purposes, but that preferably it is thinned by adding a solvent, such as benzol and alcohol. He states that the solution may be used as a varnish or an impregnant for fibrous or porous materials. He adds that the solvent may be evaporated either by exposing the material to the open air by heating it in a closed or evacuated container. He says that by heating for a length of time depending upon the finishing temperature of the material in the first stage of the reaction, the resin may be made insoluble and infusible without becoming porous.

He points out that it is evident that chemical combination of the resin and the oil has taken place as the oily layer commingles with the resin and cannot be extracted after hardening by means of organic solvents. He says that the oil cannot be brought into combination with the same effect with a neutral ester containing no free hydroxyl. In his opinion, these facts point to a chemical combination of the ricinoleic and isoricinoleic acids and the uncombined hydroxyl groups. He observes that undoubtedly

1945

CAN. IND LTD. & CAN. GEN. ELEC. CO. v. SHERWIN-WILLIAMS CO. OF CANADA, LTD.

Angers J.

some dissociation of the castor oil takes place and, as fast as the ricinoleic acid combines with the resin, the dissociation continues.

He concludes in saying that the final product when hardened is a reddish brown elastic material which is transparent in relatively thin layers.

He says that the hardened resin is entirely unattacked by methyl alcohol or acetone and that the ordinary glycerine phthalate swells into a gelatinous sticky mass in contact with the solvents.

Three of his five claims concern the process; the other two deal with the product. I may quote claim 4 which is typical:

> 4. A resinous material formed from castor oil and an unsaturated ester of a polyhydric alcohol and a polybasic acid, said resin being soluble in a mixture of benzol and alcohol, fusible without decomposition, and convertible to an insoluble, infusible, pliable, elastic material.

U.S. patent No. 1,119,592 granted to Louis Henry Friedburg, assignor to General Electric Company, for plastic condensation product, on December 1, 1914, following an application filed September 12, 1912, a copy whereof was filed as exhibit R.

Friedburg, in his specification, declares that the "invention comprises a new plastic composition and the process of making the same" and that "its object is to provide a synthetic resin, suitable for electrical insulation, moulded articles and the like, which possesses flexibility and may be rendered insoluble and infusible without loss of flexibility."

It was an old practice to add oily materials in spirit varnishes made of natural resins to make them more flexible.

The patentee declares that glycerol and other polyhydric alcohols and polybasic acids or anhydrides, such as phthalic anhydride, combine at an elevated temperature to form fusible and soluble resins. He says that upon further heating these resins become infusible and insoluble and that they, both in their intermediate and final state, although strong and hard, are usually quite brittle.

Friedburg wanted flexibility in his resin and he developed a method whereby he could incorporate butyric acid in the resin. His method consists of heating two parts by weight of phthalic anhydride and one part of glycerol

in a suitable container to a temperature of about 100° C., the temperature being slowly increased to about 185° C. He says: "The mixture is maintained at this temperature until distillation of water, acrolein and other vapours ceases." He adds that the temperatures may be allowed finally to rise as high as 210° C. He declares that, when a sample taken from the mass upon cooling is hard and brittle without being sticky, the first part of the reaction is completed. According to him "the product is a colourless or yellowish resin, fusible, and soluble in acetone".

He states that about 22 parts of the resulting resinous product are dissolved, with about 10 parts of butyric acid, in glycerol and heated, using a reflux condenser, for a period varying with the quantities and other conditions from eight to twenty-four hours. He says that the product is then heated under conditions permitting the removal of vapours, in an open vessel, at a temperature of about 300° C. until distillation ceases and samples taken from the mass show proper consistency. He declares that "the product is a very soft, rubber-like brownish mass, also soluble in acetone". He states that "for impregnating fibrous or cellular matter, such as electrical coils wound with fabric, or wood, cloth, paper and the like, the acetone solution may be used and the solvent subsequently evaporated".

He adds that the fusible, soluble resin may be rendered infusible, and apparently insoluble, without destroying its flexibility by heating for about two to three hours to about 100-120° C.

He points out that the resin is saponifiable with alkali to yield the polyhydric alcohol used, for example, glycerine and a compound of the alkali with the respective acids used.

He states that either normal butyric acid or isobutyric acid may be used in carying out the process.

The patentee then mentions the proportions of phthalic anhydride, glycerol and isobutyric acid, which I do not believe necessary to relate in detail.

The patent contains seven claims, two of which deal with the process; the others refer to the product. In claims 5 and 6 the patentee mentions monobasic aliphatic acid.

1945

CAN. IND. LTD. & CAN. GEN. ELEC. CO. v. SHERWIN-WILLIAMS CO. OF CANADA, LTD.

Angers J.

This term includes all of the fatty acids in oils whether they be of the oxidizable type, the saturated or partially saturated type.

Claim 6, which is typical, reads thus:

6. As a composition of matter, a flexible resinous condensation product saponifiable with alkali to form a polyhydric alcohol and a phthalate and a compound of a monobasic, aliphatic acid.

U.S. patent No. 1,098,776, granted to William C. Arsem, assignor to General Electric Company, for resinous condensation products and process of making the same, on June 2, 1914, on an application filed September 12, 1912, a copy whereof was filed as exhibit 68. The specification states that the invention comprises a new plastic composition and the process of making the same and that its object is to provide synthetic resinous compositions which may be rendered insoluble and infusible and which are suitable for the production of moulded articles, electrical insulation, varnishes, etc.

The patentee declares that glycerol and other polyhydric alcohols combine with organic acids, particularly polybasic acids, at an elevated temperature to form resins, which are esters of molecular structure. He points out that two or more molecules of organic base or alcohol may combine with two or more molecules of acid, the molecular structure probably varying with the proportions and conditions.

He says that in accordance with his invention an ester is formed from a polyhydric alcohol and a polybasic acid in such proportions that unesterified hydroxyl groups remain. He says that such an ester is then combined with another organic acid or acid anhydride to complete the esterification, thus producing mixed esters of fairly definite composition.

The patentee then illustrates his invention with reference to the formation of a glycerol mixed ester of phthalic acid and succinic acid. I do not think that this illustration, which is rather extensive, need be reproduced.

He states that his product when cold is slightly elastic and "will recover when stretched similar to rubber". He states that "the compound when heated for a short time loses its flexibility and becomes a strong, tough, clear

solid mass, free from bubbles" and that "it is infusible and is insoluble in the usual solvents". He says that all these resins are esters having a molecular structure comprising two like radicals of acid and an unlike radical. He declares that in some cases mixtures may be prepared and gives examples, which I do not deem necessary to relate. He points out particularly that glycerol esters of organic acids, as "tartaric, glutaric, camphoric, malic acids in which not all the hydroxyl groups of the alcohol radical have been esterfied may be treated with an additional portion of acid to complete the esterification". He states that in fact the ester of an acid such as phthalic, containing unesterified hydroxyl groups, may be treated with an additional amount of phthalic anhydride to form a neutral cyclic ester and that the procedure also applies to resins of polyhydric alcohols other than glycerol, for instance, glycol and mannitol.

Dealing with the replaceability of the acids by each other he says:

> Other dibasic acids may be used to esterify the remaining hydroxyl groups, and also equivalent amounts of various monobasic acids, and substituted dibasic or monobasic acids, may be employed.

He specifies that he may use propionic, stearic, palmitic, oleic, benzoic acids or such substituted acids as lactic, salicylic, glycollic, chloracetic, chlorbenzoic and chlorpropionic.

He concludes in saying that, in fact, mixtures of these acids may be used in some cases and that various substances not strictly acids but having acid properties may be employed. He then cites examples which I do not deem useful to reproduce.

The patent contains seven claims, the first four of which concern the process. Claim 5, concerning the product, is thus worded:

> 5. A composition of matter, comprising a neutral mixed cyclic ester of a polyhydric alcohol, phthalic acid and succinic acid, said material being hard, tough, fusible and soluble in common organic solvents and convertible to an insoluble, infusible state by heating.

U.S. patent No. 1,098,777, granted to William C. Arsem, assignor to General Electric Company, for resinous condensation products and process of making the same, on June 2, 1914, pursuant to an application filed July 25, 1913, a copy whereof was filed as exhibit A. The specifica-

1945

CAN. IND LTD. & CAN. GEN. ELEC. CO. v. SHERWIN-WILLIAMS CO. OF CANADA, LTD.

Angers J.

tion declares that the invention relates to "synthetic resinous compositions which may be rendered insoluble and infusible, and which are suitable for the production of molded articles, electrical insulation, varnishes, etc."

The patentee states:

> Glycerol, and other polyhydric alcohols, combine with various polybasic acids at an elevated temperature to form resins. These resins apparently are esters of complex molecular structure. Two or more molecules of organic base or alcohol may combine with two or more molecules of acid, the molecular structure probably varying with the proportions and the conditions.

Further he says:

> In accordance with my present invention esters are formed from a polyhydric alcohol and a polybasic acid in such proportions that free or unesterified hydroxyl groups remain, and such esters are then combined with oleic acid to complete the esterification, thus producing mixed esters of fairly definite composition having properties which render them especially valuable for electrical insulations

The patentee then states that an ester of a polyhydric alcohol, as glycerol, and a polybasic acid, as phthalic acid or its anhydride, is first prepared, the two ingredients being used in such proportions that unesterified hydroxyl groups remain.

Further on Arsem states that he takes one and one-half gram-molecules of phthalic anhydride and combines that with one gram-molecule of glycerine. He says that in the preparation of the preferred form of resin one-fourth gram-molecule of phthalic anhydride is replaced by oleic acid. He points out that oleic acid being a monobasic acid one-half gram-molecule of the same is required to replace one-quarter gram-molecule of the dibasic phthalic anhydride.

He declares that "instead of combining with the glycerine all of the phthalic anhydride to be added" he prefers to "combine 1 gram-molecule of glycerine with 1 gram-molecule of phthalic anhydrid and then to add the rest of the phthalic anhydrid with the oleic acid".

After discussing the effect of the oleic acid and its proportion in the resin according to the proposed use of the latter, Arsem states that the resinous condensation product thus obtained is "a thick reddish liquid which congeals at room temperature and is soluble in various organic solvents such as benzol, naphtha, turpentine, coal tar oil, and the like". He adds that "the material may be made insoluble

and infusible by continued heating about twenty to thirty hours at a temperature of about 160° C., but remains flexible". He points out that the flexibility may be varied by varying the proportions of the phthalic and oleic acids and that decreasing the amount of oleic acid decreases the flexibility of the resin.

He declares that the liquefied resin or its solution may be used as an impregnating material for fabrics, paper, wood or the like in the electrical arts or may be used as a varnish applicable directly on metal surfaces for insulating or other industrial purposes. He says that the resinous material may also be used in the production of moulded compounds and for this purpose may be mixed in the liquid or dissolved state or as a dry powder with a filler such as asbestos, clay, ground slate, silicia and the like and moulded under pressure.

He admits that the change in physical properties due to the hardening treatment is not entirely understood but is probably due to a polymerization in molecular structure.

The patent contains four claims, one of which deals with the process. Claim 3 concerning the product is perhaps the most typical:

> 3. A flexible, fusible, soluble resinous product of a polyhydric alcohol, phthalic anhydrid, and oleic acid, said material being convertible by heating to an insoluble, infusible state, while retaining flexibility.

U.S. patent No. 1,141,944, granted to Edward S. Dawson, Jr., assignor to General Electric Company, for resinous composition and process of making the same, on June 8, 1915, pursuant to an application filed April 9, 1914, a copy whereof was filed as exhibit M.

The specification states that "the present invention relates to the class of resinous organic condensation products made by the chemical interaction of polyhydric alcohols and polybasic acids, and particularly to the class of mixed esters such as described in an application filed September 12, 1912, by W. C. Arsem, Serial No. 719,994."

The patentee declares that it is the object of the invention "to prepare a resin having a high dielectric strength, and a tenacity and flexibility which enables it to be used

1945

CAN. IND. LTD. & CAN. GEN. ELEC. CO. v. SHERWIN-WILLIAMS CO. OF CANADA, LTD.

Angers J.

for a wide variety of purposes in the electrical art, and which may be converted by a short heat treatment from a fusible to an infusible state."

He says that when two molecular proportions of a polyhydric alcohol, e.g., glycerol, are acted upon by three molecular proportions of phthalic acid or its anhydride a saturated soluble, fusible, resinous ester is produced convertible to a tough, hard, infusible, insoluble resin by heat. He adds that other acids, namely cinnamic, citric and succinic, may be similarly combined with polybasic alcohols. He points out that a mixed ester may be prepared by substituting for part of the polybasic acid a monobasic acid, such as oleic acid, thereby producing a flexible resin which adheres tenaciously to metallic surfaces.

He says that in accordance with his invention

> A neutral oily ester such as castor oil as well as a monobasic acid is associated with an unsaturated ester, preferably the glyceryl phthalate, to form a resin convertible to the insoluble, infusible state in less time than the resins described and having superior insulating and mechanical properties.

He states that the castor oil preferably replaces some of the monobasic acid and is added to the unsaturated resin together with the monobasic acid.

The patentee then gives a specific example purporting to illustrate his invention, which I do not think necessary to reproduce.

He says that the condensation products containing the castor oil may be dissolved in a suitable menstruum, such as benzol, naphtha, turpentine, coal tar oil and the like, to form a varnish having adhesive properties superior to a solution of resin containing no castor oil.

The patentee declares that the varnish may be used for impregnation of fabric, paper or the like, for the insulation of electrical apparatus or may be applied directly on the surface of electrical conductors as it adheres tenaciously to bright metallic surfaces. He states that in the latter state the resin is preferably mixed with various mineral fillers as clay, flint, chromium oxid, red oxid of iron, which act as a spacer and a ready conductor of heat. He says that the coating thus applied may be rendered infusible by heating without losing its flexibility.

There are nine claims in the patent, six of which relate to the product. Claim 3, which seems to me typical, is thus worded:

3. A resinous composition comprising a mixed glycerine ester of phthalic and oleic acids, having indistinguishably incorporated therewith castor oil, said composition being convertible by heat to an infusible, insoluble, flexible resin from which the castor oil is non-separable by solvents.

This closes the analysis of the material patents which preceded Kienle's application.

An article entitled "Alkyd resins as film-forming materials" by R. H. Kienle, the inventor, and C. S. Ferguson, of General Electric Company, was published in the issue of April, 1929, of the review "Industrial and Engineering Chemistry". The pages of said issue containing the article in question were produced as exhibit L. The article supplies pertinent and material information relative to the knowledge of the art, particularly of the use of alkyd resins, in and prior to the year 1921, the alleged date of invention of Kienle. I think it is proper to quote a few brief excerpts of this article.

In a short but substantial statement of the situation of the use of alkyd resins as film-forming materials, the authors submit *inter alia* the following facts (p. 349):

During 1911-1915 Callahan (Callahan, U.S. Patent 1,108,329 (1914), et al.) at the Pittsfield works laboratory, together with Arsem, (Arsem, U.S. Patent (1914)), Dawson (Dawson, U.S. Patent 1,141,944 (1915)) and Howell (Howell, U.S. Patent 1,098,728 (1914)) at the Schenectady research laboratory of the General Electric Company, carried out an extensive investigation into the glycerol-phthalic anhydride reaction, and as a result new and useful resins were made. They became particularly interested in the resins because of their heat irreversibility.

In the following paragraph Kienle and Ferguson set forth these facts:

Arsem and his co-workers studied the alkyd reaction as a whole and the preparation of numerous other resins based on this reaction—i.e., they replaced the phthalic anhydride in whole or in part with other polybasic acids and in part with some monobasic acids. In addition they studied flexibilization, working chiefly with castor oil as the flexibilizing agent. They ascertained many characteristics of the resins and pointed out the possibility of using them as film-forming materials. They found the resins to be extraordinarily good stickers and, working with solutions of the resins, they obtained very adherent, tough, varnish-like films on metals if these films were properly baked. They only worked with a few simple solvents, such as acetone, alcohol-benzene, and coal-tar oil-alcohol. With these solvents films of poor bodying characteristics and

1945

CAN. IND. LTD. & CAN. GEN. ELEC. CO. v. SHERWIN-WILLIAMS CO. OF CANADA, LTD.

Angers J.

with decided tendencies to pull up, owing to high surface-tension effects, were the best they obtained. In only one case did they obtain a satisfactory result. Dawson, working with alcohol-benzene solutions of a glycerol-phthalic anhydride-oleic acid resin, was able to obtain smooth, tough, adherent films on metals, but the film-building properties of this varnish were poor.

Then on page 350, under the heading "Recent Developments", are the following observations:

During the war the introduction of the Gibbs process for the manufacture of phthalic anhydride by catalytic oxidation of the vapors of naphthalene resulted in cheap phthalic anhydride. Following this, nitrocellulose lacquers were developed, which led to the commercial availability of many types of new solvents. These two developments awakened a new interest in the alkyd resins as film-forming materials.

On page 351 we find these comments:

Film Characteristics. The films prepared from baking solutions are invariably very adherent, hard, and tough. Properly baked, a very good gloss results. The films can be made exceedingly flexible for their hardness.

Finally on page 352, under the title conclusion, there are, among others, the following remarks:

In general, we can divide these solutions into (1) baking, and (2) air-drying. The former require heat to develop their maximum properties, outstanding of which are toughness, adhesiveness, flexibility, oil resistance. The latter require primarily reaction with oxygen, although heat can also be used, in which case its function is essentially to speed up the oxygen reaction. These air-drying films possess the same outstanding properties as the films from the baking solutions, together with an additional pronounced film-building characteristic.

This article shows that at the time under consideration therein it was the baked films that were sought for the purpose to which Callahan, Dawson, Arsem and Howell were directing their investigations and that, in case films were desired for other purposes where baking was not available, then linseed oil or a somewhat similar ingredient would be used.

After a careful perusal of the evidence and of the able and exhaustive argument of counsel I have reached the conclusion that there is lack of subject-matter in the patent in suit and that accordingly the said patent must be declared invalid, null and void and that it must be struck from the record.

There remains the question of anticipation which I could abstain from examining in view of the conclusion to which I have arrived concerning the lack of invention, but as very likely my opinion will not be unanimously accepted, I deem it apposite to deal briefly with the question.

1945

CAN. IND. LTD. & CAN. GEN. ELEC. CO. v. SHERWIN-WILLIAMS CO. OF CANADA, LTD

Angers J.

Anticipation may be considered as of two dates, 1921 and 1927. The two dates are important, as intervening between them are the patents and applications mentioned in Schedule II of the particulars of objection.

I do not believe that Kienle is entitled to the date of 1921. The evidence has not convinced me that his invention was then sufficiently developed to constitute an invention. All that Kienle had at that time was an idea or a vision, such as could not be considered as an invention reduced to practical shape.

The remarks of Viscount Cave L.C. in *The Permutit Company* v. *Borrowman* (1) seem to me pertinent:

> It is not enough for a man to say that an idea floated through his brain; he must at least have reduced it to a definite and practical shape before he can be said to have invented a process

Mere conception is not invention and a party who pretends to be the first inventor of an object but who has not published his invention is not entitled to priority over a later inventor who has made it public: *Gerrard Wire Tying Machines Company Limited* v. *Cary Manufacturing Company* (2). I deem it convenient to quote an extract from the judgment of the late president, Maclean J., which has some relevance (p. 179):

> Upon another ground Cary cannot, I think, even assuming he did all he claims to have done early in 1919, be held to be the first inventor. Mr. Anglin very ably and ingenuously put forward the contention that a person who conceives an invention, and who is in a position if and when he chooses to produce a physical embodiment of his mental conception, is in law an inventor in this country. Mr. Anglin of course conceded that such a person might have great difficulty in establishing his invention by satisfactory evidence, but in this case he thought that difficulty had been overcome by Cary on the facts already related . . . I cannot accept Mr. Anglin's proposition, as expressing the law, even with the evidence of the alleged inventor as to the conception being accepted as proven, nor can I agree that a "physical embodiment" of the conception, which was never disclosed would void the patent of a subsequent inventor who had first and effectively diclosed his invention It must be conceded I think, without qualification, that a mere conception of anything claimed to be an invention, that is concealed and never disclosed or published, is not an invention that would invalidate a patent granted to a subsequent inventor To say that mere conception is invention or that a first inventor in the popular sense who has not communicated or published his invention is entitled to priority over a later invention accompanied by publication, and for which a patent was granted, or applied for, would I think throw this branch of our jurisprudence into such utter confusion as to render the law of little practical value owing to uncertainty. If this is the policy and meaning of the

(1) (1926) 43 R.P.C. 356 at 359. (2) (1926) Ex. C.R. 170.

1945

CAN. IND. LTD. & CAN. GEN. ELEC. CO. v. SHERWIN-WILLIAMS CO. OF CANADA, LTD.

Angers J.

Patent Act, an inventor might safely withhold from the public his invention for years, while another independent but subsequent inventor of the same thing, who had secured or applied for a patent, and who had proceeded to manufacture and sell his invention without any knowledge of the undisclosed invention, would always be in danger if the prior inventor could secure a patent by merely proving an unpublished invention.

And further on (p. 180):

It seems to me that the first inventor must and should mean in patent law, not the first discoverer or the first to conceive, but the first publisher, and publication is always a question of fact. That person must, however, be a true inventor, that is he must not have borrowed it from anyone else. This principle was laid down in Great Britain by the courts there as early as 1776, and is there still accepted as expressing the law. In the case where a person who was first granted a patent was not in popular language the first inventor because somebody had invented it before him, but had not taken out a patent for it, it has been decided that the former was entitled to a grant provided the invention of the first inventor had been kept secret, or without being actually kept a secret had not been made known in such a way as to become part of the common knowledge or of the public stock of information. Therefore, the person who was in law held to be the first and true inventor was not so in popular language because one or more people had invented before him, but had not sufficiently disclosed it. *Plympton* v. *Malcolmson* (1876), 3 Ch. Div. 531, Jessel M.R., at pp. 555, 556; *Dollonds Patent* (1766)), I W.P.C. 43; *Cornish* v. *Keen* (1835), 1 W.P.C. 501; *Smith* v. *Davidson* (1857), 19 Court of Sessions 691, at p. 698—2nd Series; *Robertson* v. *Purdy* (1906), 24 R.P.C. 273, at p. 290; *Ex parte Henry* (1872), 8 Chan. App. 167.

Dealing now with the question of anticipation, I think it advisable to review certain patents relied upon by defendant.

The first is the United States patent No. 1,422,861, for liquid-coating composition, granted to Western Electric Company, Incorporated, assignee of Carl D. Hocker, on July 18, 1922, following an application filed on December 11, 1919. A copy of the specification was filed as exhibit D.

The specification says that the "invention relates to the production of suitable resinous compositions which may be employed as the base in the manufacture of varnishes, impregnating compounds, lacquers, enamels, japans, and the like" and that "more particularly it has to do with the use of such coating when heat is applied thereto to facilitate the drying thereof".

The patentee declares that an object of his invention is to produce a liquid-coating composition which, after applica-

tion with the aid of heat, converts it into a semi-solid through chemical action and with continued heating forms a hard, firm, continuous and durable coating.

He states that it has been found that "such compositions may be formed by combining under the proper conditions a resin, such as Congo copal, shellac, Manila copal, etc., one or more free fatty acids and a polyacid alcohol such as glycerine". Hocker says that in carrying out the preparation of this compound, the resin and free fatty acids are mixed in suitable proportions until, with the aid of heat, a uniform homogeneous mass is obtained. He adds that this condition having been achieved the polyacid alcohol is added and the temperature increased until the mass again becomes homogeneous. He then sets forth an example, which I do not think necessary to reproduce.

He declares that the compound thus produced possesses the property of gelatinizing upon further application of heat without the addition of other substances.

He states that while the above method is sufficient to produce the desired result it is expensive because of the large amount of free fatty acid and polyacid alcohol required and that by substituting a vegetable oil, e.g., castor oil, for part of the glycerine and part of the acid, the cost of the material will be decreased and the product will be identical for practical purposes.

The patentee then describes the method of producing the liquid-coating composition under this alternate process and concludes that the composition will then be in such a state that further heating will cause gelatinization.

He states that before the gelatinization is carried out the composition is applied to the surface which is to be coated and that it is desirable, in some cases, to add organic solvents, such as kerosene, in order to render the composition more liquid. He says that, when a smooth, uniform covering has been secured, heat is applied in such a manner that a gradual thickening of the fluid coating takes place and that the temperature is increased until solidification occurs.

He states that it is to be understood that, although Congo copal and shellac have been mentioned, it is intended to include any resin which has the property of forming a gela-

1945

CAN. IND. LTD. & CAN. GEN. ELEC. CO. v. SHERWIN-WILLIAMS CO. OF CANADA, LTD.

Angers J.

tinous product with a polyacid alcohol and that in referring to vegetable oils or fatty oils all oils which will, upon saponification, yield one or more fatty acids are included. He adds that some of the oils which have been used are Chinese wood oil, corn oil, castor oil, linseed oil, soya bean oil, rapeseed oil, sesame oil, cotton-seed oil and peanut oil.

The patentee then gives a list of the acids intended to be included as belonging to the fatty acid class.

Claim 3 referring to the product, which seems to me typical, reads thus:

3. A liquid-coating composition resulting from a combination comprising glycerine, Congo copal, free fatty acid and castor oil.

The Canadian patent No. 223,007, for liquid-coating compositions, granted to International Western Electric Company Inc., assignee of Carl D. Hocker, on August 22, 1922, following an application filed on May 23, 1921, is similar to the United States patent previously mentioned. A copy of the specification attached to the Canadian patent was filed as exhibit C.

The terms of the United States patent No. 1,422,861 to Hocker (exhibit D) are such that the patent constituted a disclosure to a person skilled in the art as of the date of the patent, the application for which was filed on December 11, 1919, of the modification of a resin, synthetic or natural, by fatty acids of the drying oils. These fatty acids are clearly indicated in the patent as the modifying agent. The last paragraph of the specification outlines the different series of the acids to be used, including those with a single bond, a double bond, two double bonds and three double bonds. The list includes the linoleic, linolenic and oleic series. The acids of linseed oil are mentioned in the evidence; on line 15 of page 2 of the patent, the oils from which the acids are to be derived include linseed oil.

It was submitted on behalf of plaintiffs that Hocker does not, in his specification, refer to a synthetic resin. Indeed what he says at lines 43 and following on the first page of the patent is "combining under the proper conditions a resin, such as Congo copal, shellac, Manila copal, etc."

I am satisfied that the term "a resin" addressed to a person skilled in the art on December 11, 1919, would mean a synthetic resin as well as a natural resin. As

a matter of fact, that date is long after Arsem and Friedburg had produced the Watson Smith resin modified with different agents. The Watson Smith resin had been before the public for years, so that the art was aware of synthetic as well as natural resins. In addition there is the statement of McWhorter that to him or to a chemist the term "resin" as used in the Hocker patent would mean synthetic as well as natural resins.

In the circumstances I believe that the Hocker patent (exhibit D) constitutes an anticipation because it is the use with the synthetic resin of Watson Smith, including glycerine and phthalic acid, of the acids of linseed oil.

The next patent to which I deem fit to refer is the United States patent No. 1,803,174, for a resinous condensation product and method of preparation, granted to General Electric Company, assignee of Edward S. Dawson, Jr., on April 28, 1931, pursuant to an application filed on May 23, 1925, and renewed on November 28, 1928. A copy of the specification was filed as exhibit N.

The specification states that "the present invention comprises an improved resinous composition made by chemical combination and condensation of an aliphatic polyhydric alcohol, such as glycerine, one or more polybasic acids and a small portion of sulphuric acid".

The patentee declares that he introduces "to advantage into the resin a fatty acid component, preferably an acid derived from drying oil, such as linseed oil or China-wood oil".

He says that as a consequence of his invention he has provided resins capable of being transformed from a fusible, soluble state to an infusible, insoluble state in a shorter time than similar resins heretofore produced and which have superior physical properties, in particular are capable of polymerization or setting with a hard surface while retaining elasticity or flexibility.

He states that the utilization of sulphuric acid in accordance with his invention which involves the heating together of the resin-forming constituents with a relatively small proportion of sulphuric acid, may be distinguished from the use of such acid as an ordinary catalyzer by the fact that the chemical reaction which would occur in the absence of the sulphuric acid is modified by the latter as

1945

CAN. IND. LTD. & CAN. GEN. ELEC. CO. v. SHERWIN-WILLIAMS CO. OF CANADA, LTD.

Angers J.

evidenced by the colour of intermediate products, the odour of gaseous by-products and the distinct physical properties of the ultimate resinous product.

The patentee then gives two methods of making his resinous composition and states:

When this resin, produced by either one of the above methods, is heated for a sufficient length of time, it becomes infusible and insoluble and has a hard glass-like surface, while possessing considerable flexibility. It is tough and strong and therefore well suited for use as a binder in moulding compounds, as a wire enamel, and as a protective coating for metals. The resin is resistant to moisture, oil and acid. It is also highly adhesive to metal surfaces. It may be applied either by spraying the parts to be coated or by dipping them into the fluid resin.

The patentee declares that a film consisting of this new resin on a surface of a metal can be hardened in about thirty minutes at 210° C., whereas similar resins made without sulphuric acid will require several hours for hardening. He adds that in some cases the resin can advantageously be dissolved in a high boiling point solvent and a solution applied as a varnish to parts to be coated.

He says that the flexibility of the resin may be increased by incorporating material such as China-wood oil or castor oil with the resin in the high boiling point solvent.

Claim 1 may be cited as typical:

1. A resin comprising the reaction product of an aliphatic polyhydric alcohol and a polybasic acid, a fatty acid derived from a drying oil and a small proportion of sulphuric acid.

The Canadian patent No. 292,353 granted to Canadian General Electric Company, Limited, assignee of Edward S. Dawson, Jr., on August 20, 1929, pursuant to an application filed on April 4, 1927, for resinous condensation products and methods of preparation, a copy whereof was filed as exhibit O, is substantially similar to the United States patent No. 1,803,174 previously mentioned. It has omitted the word "aliphatic" before the words "polyhydric alcohol" wherever they are found in the body or the claims of the latter. In addition some of the claims are differently drafted and the last claim (No. 8) of the United States patent has been left out. A certified copy of an oath dated March 29, 1927, signed by Edward S. Dawson, Jr., filed as exhibit P, states that the affiant verily believes that he is the inventor of certain new

and useful improvements in resinous condensation products and methods of preparation described in the specification relating thereto, and for which he solicits a patent, by his petition dated March 29, 1927, and that no application for a patent for said improvements has been filed by him or others with his consent in any country foreign to Canada, except as follows:

United States serial No. 32,447 filed May 23, 1925;

England, filed May 21, 1926;

France, filed May 21, 1926, Pat. 616,463;

Germany, filed May 22, 1926.

The Dawson patents exhibits C and D only differ from the patent in suit by the use of a small quantity of sulphuric acid to accelerate the reaction of the product.

It seems to me expedient to analyse five other decisions in cases dealing with resins, mentioned in Schedule II with defendant's particulars of objection.

United States patent No. 1,773,974, for film, granted to Carleton Ellis on August 26, 1930, following an application filed on September 23, 1926. A copy of the patent was filed as exhibit T.

The specification states that

> This invention relates to a duplex or composite film containing a cellulose ester such as cellulose acetate or nitrate or other soluble cellulose compound and relates especially to a duplex film comprising a pigmented layer and a non-pigmented or substantially transparent film comprising nitro-cellulose and a synthetic resin compatible therewith.

The patentee declares that when the film is applied to a supporting surface the protecting and exposed stratum consists of nitrocellulose and a synthetic resin compatible therewith. He says that this stratum is preferably free from pigment, whereby a fine lustrous effect is obtained. He further says:

> As a synthetic resin I prefer those made from glycerol (or glycol, pentaerythritol, and the like, or mixtures of these various polyhydric aliphatic alcohols) and a crystalline acid or anhydride such as phthalic acid or anhydride, together with the free fatty acid or a glyceride oil, particularly the various vegetable oils such as the fatty acids of linseed oil, cotton seed oil, soya bean oil, rape-seed oil, and the like. Resins of this general character greatly increase the life of the nitrocellulose films as compared with films made from the same nitrocellulose with a like proportion of rosin, damar, and other natural resins.

1945

CAN. IND. LTD. & CAN. GEN. ELEC. CO. v. SHERWIN-WILLIAMS CO. OF CANADA, LTD.

Angers J.

The patentee then points out that these oil-acid-glyceride resins give to nitrocellulose a greater durability than that obtained with modified natural resins such as rosin ester or ester gum.

The patentee declares that nitrocellulose is impaired in durability by the addition of most of the natural resins. He states that films are desired containing a large amount of resin in order to obtain a considerable degree of thickness with the application of only one or two coats of a solution containing such resin and nitrocellulose. He adds that on the other hand all synthetic resins compatible with nitrocellulose improve the life of nitrocellulose films and cooperate, for instance, with nitrocellulose of low viscosity to produce durable films. He says that among the synthetic resins appropriate for the aforesaid purpose and compatible with nitrocellulose of low viscosity are those made from an oily fatty acid, a polyhydric alcohol such as glycerol and an organic acid of what may be termed the crystalline type, including tartaric, citric, malic, benzoic, phthalic and similar acids or less definitely crystallizable acids of the type of lactic.

The patentee then gives an illustration of his invention which I do not consider useful to cite.

He concludes in saying the the composition set forth for making the lustrous finish is one which shows remarkable endurance to weather, even though low viscosity nitrocellulose be employed. He states that

> the high degree of compatibility of low viscosity nitrocellulose, . . . with the vegetable oil fatty acid phthalic glyceride resins secures a cooperative effect whereby the tendency of the low viscosity nitrocellulose films to disintegrate on exposure is overcome by the presence of the resin and a durable product results.

Claim 6, which is typical, reads thus:

> 6. A film serving as a coating on a supporting article comprising a pigmented substratum adjacent a supporting surface of said article and a superposed and exposed substantially transparent protecting stratum comprising nitrocellulose, a synthetic resin of the oily fatty acid phthalic polyhydric-aliphatic-alcohol type.

United States patent No. 1,690,515, for composition of matter containing a cellulose derivative, granted to Ellis-Foster Company, assignee of Harry M. Weber, on November 6, 1928, following an application filed on October 13, 1925. A copy of the specification was filed as exhibit S.

The specification states that the

> Invention relates to a composition of matter comprising artificial resins, and relates especially to resins of complex constitution prepared from drying and semi-drying oils and their fatty acids, an organic acid other than the fatty acids from oils, and a polyhydric alcohol, such complex resins having incorporated with them a toughening agent, such as an ester or ester of cellulose, particularly nitrocellulose . . .

The patentee says that

> In the present invention resins prepared from drying or semi-drying oils, such as castor oil, linseed oil, or their fatty acids, an organic acid, such as phthalic anhydride, and glycerol, glycol, or other appropriate alcohol, toughened by means of a cellulose ester or ether, are superior in that compositions so prepared are less susceptible to outside influences, such as moisture, light, etc., particularly where such composition is to be used for the preparation of lacquers or lacquer enamels, which would be subject to exposure to the weather.

The patentee points out that the resins prepared from the fatty acids of drying or semi-drying vegetable oils are superior to those made with the drying oils themselves in that they can be prepared with less danger of polymerization and that a homogeneous resin is produced containing no free oil liable to interfere with the production of suitable articles for all purposes when blended with a cellulose ester or ether.

The patentee then cites various examples which I do not think necessary to reproduce.

He states that in the examples given phthalic anhydride has been cited as the organic acid used but that it is to be understood that other organic acids, such as benzoic, maleic, tartaric, succinic or mixtures of these, may also be used and be within the scope of the invention.

He points out that vegetable oils and fatty acids obtained from vegetable oils other than those mentioned in the example can also be used, such as soya bean oil, linseed oil, cocoanut oil, China-wood oil or products obtained by blowing these oils or mixtures of them.

Claim 4, which is typical, reads thus:

> 4. A composition of matter comprising a cellulose ester and the reaction product of a vegetable oil, free fatty acids obtained from vegetable oil, a polybasic organic acid and a polyhydric alcohol.

United States patent No. 1,893,874, for resinous compositions and method of making, granted to General Electric Company, assignee of Lester V. Adams, on January 10, 1933, following an application filed on June 25, 1926, a copy whereof was filed as exhibit F.

1945

CAN. IND. LTD. & CAN. GEN. ELEC. CO. v. SHERWIN-WILLIAMS CO. OF CANADA, LTD.

Angers J.

The specification says that this application is a continuation in part of an application filed on June 13, 1924.

The patentee declares in his specification that the present invention comprises new resinous compositions which are useful for coating and other purposes and which are made by the combination of resinous condensation product and oil, preferably drying oil.

He states that natural resins, such as copal, can be readily combined with an oil, e.g., linseed oil, by heating the resin and the oil in contact with each other. He points out that some synthetic resins, such as the phenolic and the glyceride resins, cannot be caused to combine with oils in this manner. He adds that in some cases complex bodies have been prepared from a resinous material containing free hydroxyl groups by heating the resin and an acid derived from an oil until chemical combination took place.

He declares that, in accordance with this invention, resinous condensation products of the heat-hardening class are combined with non-resinous esters of the aliphatic series by the dispersion of one of said substances in the other to form new materials having properties differing from either of the constituents. He gives an example and goes on to say that his invention is particularly applicable to resins resulting from the chemical reaction of polyhydric alcohols and resinifying carboxylic organic acids such as polybasic acids or anhydrides thereof, these resins being termed generically polyhydric alcohol-polybasic acid resins.

He says that the term "dispersion" is used "in a general sense which includes chemical combination, solution and colloidal suspension as special cases".

He states that varnish bases constituted of a heat-hardening resin and a drying oil, that is an oil containing an unsaturated, oxidizable fatty acid, constitute an example of his invention.

He says that the combination of the resinous material and the oil is preferably carried out by heating these materials in the presence of a high boiling point liquid, which may or may not form part of the product.

Specific examples are given to illustrate the invention; I do not think expedient to deal with them.

The patentee declares that "the resin-oil complex constituting my invention may be applied as a varnish or as

a solution in any suitable solvent"; also that "material prepared by any of the above processes and freed from solvent, or largely so, may also be used as a molding composition, and for this purpose may be mixed with various fillers"; and finally that the "material may be applied upon wires and other metal surfaces as an insulating enamel and may be used as a cement for such products as laminated mica compositions".

The patentee adds that while his invention is applicable particularly to blending oils with synthetic resins it can be applied to blending oils with resins with which oils blend with difficulty by ordinary methods.

Claim 1 may be quoted as typical:

1. A composition comprising a resinous polyhydric alcohol-polybasic acid condensation product which is capable of being rendered infusible by heating, and a fatty acid glyceride, said ingredients being indistinguishably united, and said composition being soluble in one or more liquids in which said condensation product is insoluble.

On August 1, 1925, Lester V. Adams, the patentee aforesaid, applied for a patent in Canada. A patent bearing No. 262,979, for resinous compositions and method of making, was granted to Canadian General Electric Company, Limited, assignee of the applicant, on July 27, 1926. A certified copy of the specification was filed as exhibit B.

The specification, which differs somewhat from that of the United States patent, may perhaps be summarized briefly. It states that

the present invention relates to the preparation of resinous compositions of the general nature of a varnish or a japan base and comprises an indistinguishable mixture or blend or a resin and an oil, in particular a blend of a resin made by the esterification of polyhydric alcohol and polybasic acids or derivatives thereof, as for example, the resin made from glycerine and phthalic anhydride, and a glyceryl ester of a fatty acid, preferably a drying oil, such as china-wood oil or linseed oil.

The patentee says that in accordance with the preferred method of carrying out his invention the two classes of materials, that is resinous and oily esters, are incorporated with one another by causing these compounds to be dispersed in a solvent of relatively high boiling point by heating the materials to be incorporated in contact with the solvent at an elevated temperature. He points out that unless the presence of a high boiling or non-volatile solvent is required it is removed after the dispersion in the

1945

CAN. IND. LTD. & CAN. GEN. ELEC. CO. v. SHERWIN-WILLIAMS CO. OF CANADA, LTD.

Angers J.

solvent is complete and the resulting viscous mixture constituting the desired base is dissolved in an ordinary volatile solvent or otherwise utilized.

The patentee submits an example which I do not think necessary to reproduce. He then says that the term "dispersion" is used in a general sense which includes solution and colloidal suspension as special cases. He adds that, when the solvent is removed, a sticky and viscous mass remains which constitutes a complex or blend of a glyptal and the oil.

He states that the resin-oil complex may be dissolved in suitable volatile solvents, as for example the aromatic compound known as "solvent naphtha", and, when the solvent is evaporated after application of the varnish, a tough flexible film is produced. He says that the material constituting the film is infusible and insoluble, is highly resistant to oil, will withstand temperatures and is more flexible and adhesive than other similar enamels.

He declares that the "glyptal which is preferably introduced in its initial stage of combination, i.e., the state in which it is fusible and soluble, is partly cured or rendered less fusible and less soluble by the heating step in contact with the high boiling point solvent". He explains that "during the process of incorporating the glyptal resin in its loosely combined fusible state, the esterification reaction between the glycerine and the phthalic anhydride is completed with the elimination of water to produce the resin in its more stable form, from which it can be easily converted by additional heating to the final infusible, insoluble state".

Claim 2, which is typical, is thus worded:

> 2. A new composition of matter comprising glyptal and a drying oil incorporated as an indistinguishable mixture, said composition being viscous and sticky, soluble in organic solvents and convertible by heat to a hard, tough, infusible, insoluble condition.

The last patent which I believe apposite to mention is the United States patent No. 1,974,742, for synthetic resin and process of making same, granted to Horace H. Hopkins and Frank A. McDermott, assignors to E. I. du Pont de Nemours & Company, on September 25, 1934, pursuant to an application filed on August 14, 1926, a copy whereof was filed as exhibit W.

The invention relates to synthetic resinous condensation products of polyhydric alcohols with polybasic acids and drying oils or drying oil acids, with or without other acidic constituents, and the process of making the said products.

The patentees declare in their specification that certain resinous compositions are valuable in the plastic art, particularly for use in the manufacture of varnishes or lacquers. They say that to be desirable for this purpose a resin should have the following properties:

(*a*) Solubility in the solvents used in the varnish and lacquer industry.

(*b*) Formation with cellulose esters or ethers or drying oils, or a combination of cellulose esters or ethers and compatible modified drying oils, of a hard, durable, non-brittle film.

(*c*) Compatibility with cellulose esters or ethers or drying oils, or a combination of cellulose esters or ethers and modified drying oils compatible with the cellulose esters or ethers.

The patentees declare that natural resins are sometimes used with cellulose esters or ethers to make lacquers, but give very brittle films. They add that many synthetic resins are known but have been found to be unsatisfactory since they do not have all of the necessary properties.

They state that it is known that resinous bodies can be formed by heating a polybasic acid with one of the various polyhydric alcohols, such as glycerol, glycol, glucose, mannitol, cellulose or dextrin, although glycerol is the alcohol generally used.

They say that a brittle resin is obtained when glycerol is esterified with phthalic anhydride and that a tough elastic condensation product results when succinic, tartaric, pyrotartaric or citric acid is heated with glycerol, while the glyceride of maleic acid is a flexible, gummy, sticky material.

They state that it is also known that "less brittle and more soluble, resinous materials can be prepared by replacing part of the dibasic acid by certain monobasic acids, such as oleic, palmitic, stearic, butyric, and the acids of rosin". They point out that the mixed glyceride of phthalic and oleic acids is soluble in naphtha, turpentine and coal tar oil, while the glyceride of phthalic and butyric acids and the glyceride of phthalic and rosin acids are soluble, respectively, in acetone or mixtures of benzene and alcohol.

1945

CAN. IND. LTD. & CAN. GEN. ELEC. CO. v. SHERWIN-WILLIAMS CO. OF CANADA, LTD

Angers J.

The patentees declare that an "object of this invention is to produce a synthetic resin having the property of hardening by absorption of oxygen at atmospheric temperature, and suited, by reason of this property, for various uses in the arts." They add that another object is "to produce a resin which is initially soluble in various organic reagents, and which, on evaporation of the solvent and hardening, becomes chemically inert and substantially insoluble". They say that a more specific object is "to provide synthetic resin compositions which are of value as protective films either alone or in combination with other film-forming ingredients".

The specification contains the following statement:

> We have discovered that if drying oil acids or drying oils are heated with a polyhydric alcohol, such as glycerol, and a polybasic acid, for example, phthalic anhydride, with or without resin acids, highly valuable synthetic resins are obtained which attain the objects set forth.

The patentees then give five examples which I do not think useful to summarize.

They declare that their new resins are well adapted for use in oil varnishes and enamels, since they are soluble in drying oils and in solvents, such as turpentine and petroleum distillates, used in thinning such compositions. They add that the durability and elasticity conferred by these resins make varnishes and enamels containing any of them of great value.

Claim 21, which seems to me typical, may be quoted:

> 21. An alkyd resin formed by the combination and condensation of a polyhydric alcohol and an organic polybasic acid and an oxidized fatty acid.

Section 61 of the Patent Act was discussed with reference to the applications filed in the period between 1921 and 1927, that is those of Weber, Ellis and Hopkins & McDermott. Section 61 was included in the statute intituled "An Act to amend and consolidate the Acts relating to Patents of Invention" and bearing the short title "The Patent Act, 1935", which came into force on August 1, 1935, by proclamation of the Governor in Council.

The provisions of subsec. 1 of sec. 61 were first partly enacted in subsec. 1 of sec. 37a, added to the Patent Act, 1923, by sec. 4 of ch. 21 of the statute 22-23 Geo. V, which later became ch. 150 of the Revised Statutes of Canada, 1927. Section 37a came into force on September 1, 1932.

Subsection 1 of sec. 37a reads as follows:

37a. (1) No patent or claim in a patent shall be declared invalid or void on the ground that, before the invention therein defined was made by the inventor by whom the patent was applied for, it had already been known or used by some other inventor, unless it is established either that, before the date of the application for the patent such other inventor had disclosed or used the invention in such manner that it had become available to the public, or that, before the issue of the patent, such other inventor had made an application for a patent by virtue of which he is entitled to priority or upon which conflict proceedings should have been directed.

Prior to the statute 22-23 Geo. V, ch. 21, there was no such enactment in the Patent Act. This statute followed the decision of the Privy Council in the case of *Rice* v. *Christiani and Neilsen* (1), where it was held that inventor might carry the date of his invention back and upset a Canadian patent, even though he had kept his invention secret for years. Section 37a was passed, placing a restriction on prior inventors carrying the date back unless he had disclosed or used his invention in such a manner that it had become available to the public or had, before the issue of the patent, filed an application for patent in Canada.

It was urged on behalf of defendant that the statute 22-23 Geo. V, ch. 21, does not apply as regards Weber, Ellis and Hopkins & McDermott and that the law applicable to them is the law as laid in the case of *Rice* v. *Christiani and Neilsen.* After giving the matter due consideration, I am satisfied that this contention is well founded.

Weber, Ellis and Hopkins & McDermott being prior inventors to Kienle, the latter's patent so anticipated is invalid.

It was argued for the defendant that the statute 22-23 Geo. V, ch. 21, enacted in 1932, some five years after Kienle's patent was granted, had the retroactive effect of making the said patent valid. Counsel admitted that there is no decision on that point. *Craies* on *Statute Law,* 4th edition, at pages 330 and following, expounds the doctrine that retrospective effect of a statute cannot be presumed. The doctrine and most of the earlier decisions on the subject are carefully reviewed by Mr. Justice Duff, as he then was, in the case of *Upper Canada College* v. *Smith* (2).

(1) (1931) 48 R.P.C. 511. (2) (1921) 61 S.C.R. 413.

1945

CAN. IND. LTD. & CAN. GEN. ELEC. CO. v. SHERWIN-WILLIAMS CO. OF CANADA, LTD.

Angers J.

At page 419 we read the following observation:

> Examples might be multiplied in which judges of very high authority have said that the intention to affect prejudicially existing rights must appear from the express words of the enactment.

Further on the learned judge supplemented his remarks by this statement:

> And even more numerous instances might be adduced of dicta enunciating the doctrine that the intention must appear from the words of the statute itself.

In the statute with which we are concerned there is no indication whatever that it is intended to apply retrospectively to patents granted before its enactment.

The three patents aforesaid use either the acids of drying oils or the oils themselves and these are all heated with glycerol and phthalic acid. These patents disclose, in my opinion, the alleged invention of Kienle.

The problem of combining the Watson Smith resin with various oils or their derivatives, particularly linseed oil, butyric acid and oleic acid, and the production of an adherent film had been solved by, among others, Arsem and Friedburg. The teachings of these men gave a chemist versed in the art the knowledge that any monobasic fatty acid could be utilized. In Arsem's specification the phrase used is "various monobasic acids" and in Friedburg's "monobasic aliphatic acid". Their patents taught further that the characteristics of the acids would be carried into the oils. I do not believe that Kienle's alleged invention has added anything essential to the inventions of Arsem and Friedburg. In the case of *Sharp & Dohme Inc.* v. *Boots Pure Drug Company Ld.* (1), there are observations of Sargant L.J., in appeal, which are, as I think, much in point (p. 182):

> It would seem, on principle, that, in the case of a patent for a substance, just as much as in that of any other patent, there must be an element, a "scintilla", of invention in connection with the process and the material, at any rate, in combination; and this would appear to be in accordance with the implications of sec. 38a of the Act of 1907, as introduced by the later Act of 1919, and with the decision of Sir Ernest Pollock as Solicitor-General in *M.'s Application* (1922) 39 R.P.C. 261. But here, for the reasons already given, there appears to have been nothing more than the verification of a process and the production of a substance both of which had already been clearly pointed out. I may add that sec. 38a is not of great importance here, for its direct operation would seem to be confined to cases where there is sufficient

(1) (1928) 45 R.P.C. 153.

invention to justify a patent for a new substance, and, even in that case, would seem merely to limit the protection of the patent to that substance only when produced by the process claimed.

I wish also to refer to a passage of the judgment of Manton, Circuit Judge, of the Circuit Court of Appeals, second circuit, rendered on February 10, 1936, in the case of *General Electric Company* v. *Paramet Chemical Corporation* (1), containing observations which seem to me applicable in the present case (p. 498):

> While the fact, standing alone, that a number of chemists struck on the substitution independently of each other and independently of Kienle, is not sufficient to disprove invention, under these circumstances, it is sufficient to negative invention: *Ruben Condenser Co.* v. *Aerovox Corp.* 77 F. (2d) 266, 268 (C.C.A. 2); *Baker* v. *Hughes-Evans,* 270 F. 97, 99 (C.C.A. 2); *Elliott & Co.* v. *Youngstown Car Mfg. Co.,* 181 F. 345, 349 (C.C.A. 3).
>
> Changed conditions in the varnish and paint trade did awaken a new interest in the alkyd resins as film-forming materials. It is shown by these contemporaneous responses to a need that any skilled chemist, familiar with the natural-resin drying-oil blends of varnish, would have no difficulty when commercial operations called therefor, in ascertaining that synthetic resin could be combined with the ordinary drying oils to form the equivalent of the old combinations. It was not this patentee who turned the art to the use of an air drying glycerol phthalate resin.
>
> There was no inventive thought in this substitution, and the patent is invalid.

The Arsem patents (exhibits A and 68) and the Howell patent (exhibit I) were issued on June 2, 1914, and would have expired on June 2, 1931. The Friedburg patent (exhibit R) was issued on December 1, 1914, and would have expired on December 1, 1931. If Kienle had applied for his Canadian patent on the alleged date of invention, to wit in 1921, and if the patent had been granted after a delay of two years and four months, which is the delay incurred for the issue of the patent on his application filed on April 4, 1927, the patent would only have had about two years and a half to run from the date of the commencement of the proceedings herein. It was getting close to the expiry of the Arsem and Friedburg United States patents when Kienle's application was filed. It may have been a clever move on the part of Canadian General Electric Company Limited not to file Kienle's application in 1921, but to wait until April 4, 1927, to

(1) (1936) 28 U.S.P.Q. 496.

1945

CAN. IND. L94. & CAN. GEN. ELEC. CO. v. SHERWIN-WILLIAMS CO. OF CANADA, LTD.

Angers J.

do it. The company obviously was anxious to prolong its monopoly. Be that as it may, this does not affect the question of validity of the patent in suit.

I have reached the conclusion that the patent in suit is also invalid and void by reason of anticipation.

In view of the decision to which I have arrived concerning the invalidity of the patent due to want of invention and anticipation, I do not think necessary to deal with the validity of claims 3 and 4 relied upon by plaintiffs.

The action will accordingly be dismissed with costs against plaintiffs.

Judgment accordingly.

1941

May 27 to 30
June 3 to 7

1944

Aug. 28

BETWEEN:

DANIEL WANDSCHEER, GERRIT WANDSCHEER, JACOB WANDSCHEER, BEN WANDSCHEER, WALTER E. KLAUER, CHARLES L. OSTRANDER AND KLAUER MANUFACTURING COMPANY.. } PLAINTIFFS;

AND

SICARD LIMITÉE..... DEFENDANT.

Patents—Invention—Subject matter—Utility—Inoperativeness — Anticipation—Novelty—Aggregation—Mere mechanical improvement not involving the exercise of inventive ingenuity.

The action is for the infringement of two patents owned by the plaintiffs relating to snow removing apparatus. The claim alleged to be infringed in the one patent consisted of a combination of elements which the Court found lacked utility as the plow made in conformity therewith would not operate. The claims in the second patent alleged to be infringed were directed to means in a rotary snow plow for loosening the snow in front of the rotors, which claims the Court found to be invalid because they were lacking in subject matter and novelty.

Held: That the combination of elements as set forth in the claim of the first patent constituted a mere juxtaposition of elements which were old and well known and did not require the exercise of inventive ingenuity; any skilled and competent mechanic could have made it.

2. That the use of cutter bars as described in the claims in the second patent alleged to have been infringed only required ordinary mechanical skill and it does not involve the exercise of inventive ingenuity; moreover the said cutter bars were anticipated.

3. That the test of utility of an invention is that it should do what it is intended to do and that it be practically useful at the time when the patent is issued for the purposes indicated by the patentee.

4. That utility alone in the absence of invention cannot support a grant of a patent.

ACTION by the plaintiffs to have it declared that, as between the parties, two patents for invention owned by plaintiffs are valid and have been infringed by defendant.

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

W. F. Chipman, K.C., Hazen Hansard, K.C. and *E. G. Gowling* for plaintiffs.

H. Gérin-Lajoie, K.C. and *C. H. MacNaughton* for defendant.

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

ANGERS J. now (August 28, 1944) delivered the following judgment:

This is an action for the infringement of five patents hereinafter described.

In chronological order these patents are:

(*a*) Canadian letters patent No. 253,159 for improvements in snow removers granted on September 1, 1925, to Harry D. Curtis, of Oshkosh, State of Wisconsin, United States of America;

(*b*) Canadian letters patent No. 352,708 for improvements in a snow plow granted on August 27, 1935, to Daniel Wandscheer, of Sioux Center, State of Iowa, United States of America, as a reissue of United States patent No. 288,040 granted on March 19, 1929, to the same;

1944

WANDSCHEER ET AL. v. SICARD, LTÉE

Angers J.

(c) Canadian letters patent No. 309,848 for improvements in snow removing apparatus granted on March 31, 1931, to Dan Wandscheer, of Dubuque, State of Iowa, United States of America;

(d) Canadian letters patent No. 309,849 for improvements in snow remover granted on March 31, 1931, to Dan Wandscheer, of Dubuque, State of Iowa, United States of America;

(e) Canadian letters patent No. 330,827 for improvements in snow plow loading hood granted on March 14, 1933, to Walter E. Klauer and Charles L. Ostrander, of Dubuque, State of Iowa, United States of America.

A notice that plaintiffs discontinue their claim for infringement of letters patent number 330,827 dated March 13, 1941, was filed on April 22, 1941.

At the opening of the trial counsel for plaintiffs moved the Court to withdraw letters patent Nos. 309,849 and 352,708 and to discontinue their claim for the infringement thereof. He also moved the Court for an amendment of the date of invention regarding letters patent No. 309,848 from December to September 1927. The motion to withdraw letters patent Nos. 309,849 and 352,708 was granted with the costs of motion as well as those occasioned by the insertion of these letters patent in the action, including the costs of the evidence already adduced concerning them, against plaintiffs. The motion to amend was granted with costs against plaintiffs.

As a result of the notice of discontinuance regarding patent No. 330,827 and the motion to withdraw patents Nos. 309,849 and 352,708, the action, as it now stands, concerns only the alleged infringement of patents Nos. 253,159 and 309,848.

The patent No. 253,159 issued on September 1, 1925, to Harry D. Curtis and by him and Leo A. Schoebel, Simon C. Schaeffer and Charles M. Boller, on behalf of himself and Frank Morgan, deceased, assigned to the plaintiffs, Jacob Wandscheer, Ben Wandscheer, Daniel Wandscheer and Gerrit Wandscheer, relates to alleged new and useful

improvements in snow removers. A copy of this patent was filed as exhibit P10 and a copy of the assignment bearing No. 139,276, recorded on June 17, 1927, was filed as exhibit P11.

The objects of the invention are set forth in the specification as follows:

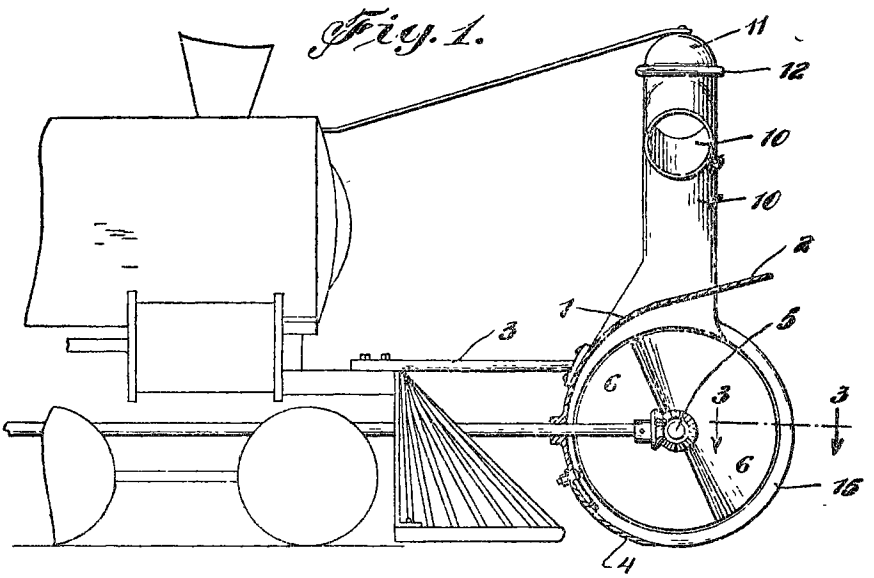
This invention relates to snow plows for steam and street railways, trucks and the like and the principal object of the invention is to provide spiral conveyor means for forcing the snow to one or both sides of the track or road.

Another object of the invention is to provide blower means for receiving the snow from the conveyor means for blowing to a distant point.

Figures 1, 2 and 8 of the drawings, reproduced below, will help in understanding the description of the invention.

The patentee describes his invention thus:

In these views 1 indicates a casing which has its lower portion of substantially semi-cylindrical form in cross section with its upper part inclining upwardly and outwardly as at 2. This casing is supported in any suitable manner in front of the engine or street car or other vehicle so that it will scoop up the snow from the track or road in front of the vehicle. As shown in Figure 1 the casing is attached to the engine by the arms 3. The lower edge of the casing is provided with an adjustable shoe 4 so that the shoe may be brought adjacent the surface to be cleared of snow. A shaft 5 is suitably journalled in the said casing and this shaft carries the right and left hand screwed conveyors 6 which extend



1944

WANDSCHEER ET AL. v. SICARD, LTÉE

Angers J.

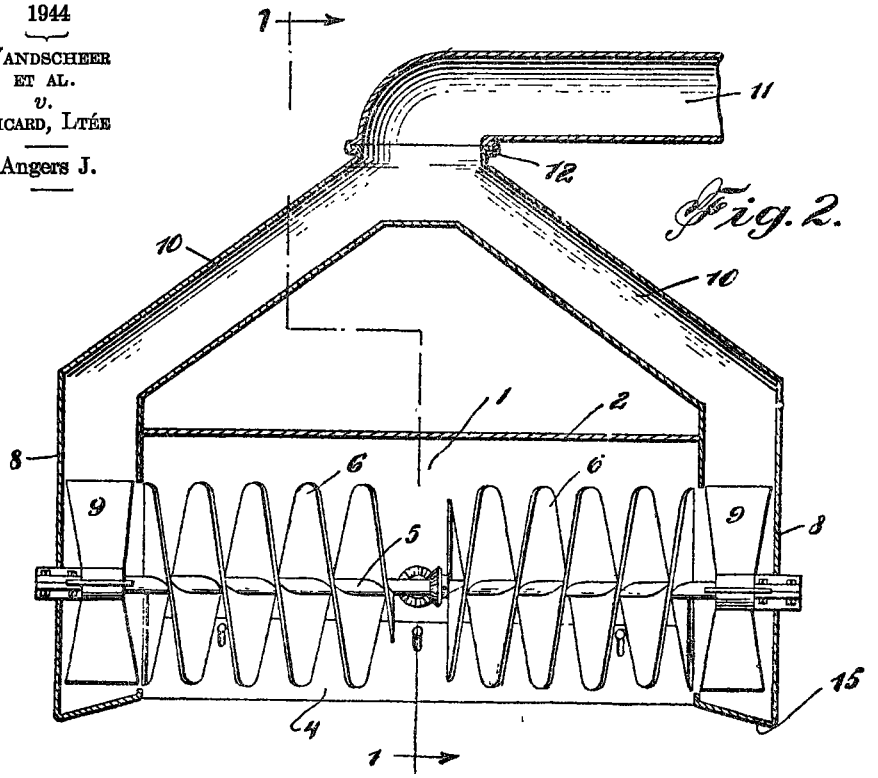


Fig. 2.

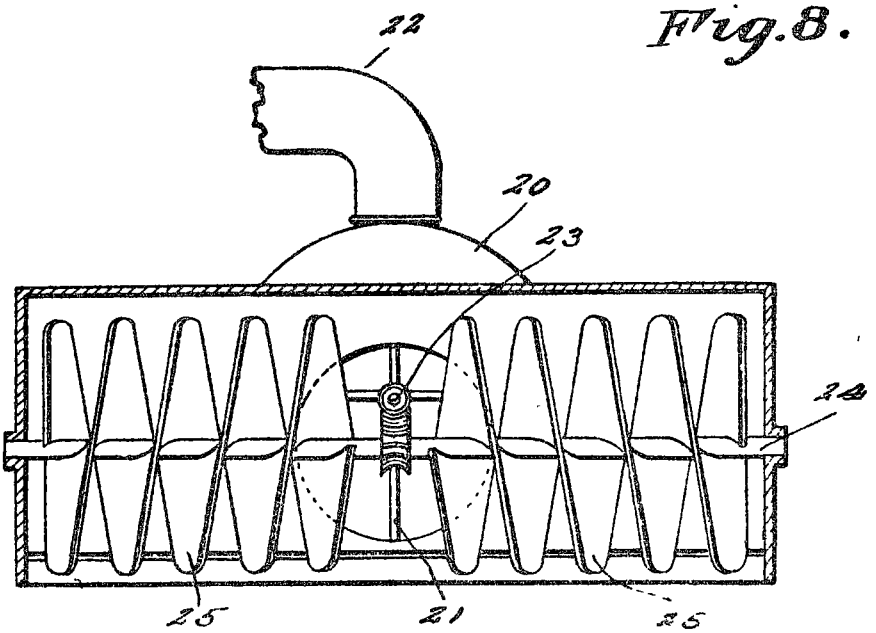


Fig. 8.

from a point adjacent the centre of the shaft to the ends of the casing. This shaft carries a gear wheel 7 which is connected in any suitable manner with the source of power so that the shaft may be rotated.

It will thus be seen that the snow scooped up by the casing will be forced towards each end of the casing by the conveyor blades and if the ends of the casing are open the snow will be deposited on each side of the track or road.

I prefer, however, to attach a casing 8 at each end of the casing 1 and to extend the ends of the shaft 5 through these casings. These extended ends of the shaft carry fan blades 9 so that a blast is created in each casing to drive the snow delivered to the casings by the conveyors through the outlet pipes 10 and the delivery pipe 11 which is connected with said pipes 10 by the rotary elbow 12. In this way the snow may be delivered at any desired point on either side of the road bed.

In the modification shown in Figures 4 and 5 the ends of the casing It may be left open so that the fan 9′ will throw the snow from each end of the casing as the snow is delivered to them by the conveyors * * * *

In the modification shown in Figures 6 anad 7 the shaft 5′ carries but one conveyor blade 6′ which delivers the snow to one end of the casing. The gear 7′ is located at one end of the shaft and a fan 9′ may be connected with the other end so as to deliver the snow received from the conveyor to the outlet pipe 10′ * * *

The specification further states:

It will thus be seen that as the plow is driven through the snow on the track or road the conveyor means will force the snow to each side of the track or road or to one side thereof and if the blower device is used this snow can be delivered to a distant point so as to remove the danger of the banked snow at the side of the track falling back upon the track.

In the modification shown in Figures 8 and 9 a double conveyor is used which is so arranged as to feed the snow to the centre of the casing. A fan casing 20 is connected with the rear of the conveyor casing at the centre thereof, and the fan 21 therein acts to draw the snow from the conveyor casing and then discharge it from the outlet 22 at the top of the fan casing. This fan has its shaft 23 geared to the shaft 24 on which the conveyors 25 are carried. The fan shaft is connected in any desired manner with a source of power.

The plaintiffs rely on claim 1 which reads thus:

1. A snow plow of the class described comprising a horizontally arranged semi-cylindrical casing, a fan casing connected therewith, a conveyor in the first mentioned casing, a fan in the fan casing, means for actuating the conveyor and fan, an adjustable conduit connected with the fan casing for rotary movement.

The patent No. 309,848 granted to Dan Wandscheer on March 31, 1931, concerns an alleged new and useful improvement in snow removing apparatus. A copy of this patent was filed as exhibit P12.

1944

WANDSCHEER ET AL. v. SICARD, LTÉE

Angers J.

The principle of the invention is laid down and its objects are stated in the following paragraphs of the specification, which are the only ones material herein:

This invention relates to snow removing apparatus and has particular reference to apparatus of this type which is especially designed for mounting upon the front end of a motor vehicle or similar propelling devices.

* * * * *

A further defect in prior apparatus was that the banks of snow left on the sides of the road after the passage of the apparatus were irregular and, when the drift was deeper than the height of the apparatus, the banks were undercut so as to later develop snow slides and other movement of the snow which covered the previously cleared areas.

* * * * *

A further feature resides in the provision of a shearing element on the sides of the snow apparatus to insure a clean-cut bank by severing all overhanging edges and to cause the high layers of snow to fall into the path of the apparatus and be properly disposed of.

The specification then describes the feature of the apparatus with which we are concerned as follows:

The front upright edges 73 of the auger casing are sharpened as in my aforesaid copending application to facilitate cutting and the provision of a clean side surface in the banks of snow as the remover cuts its swath. A cutting bar or blade 75, preferably one on each side of the auger casing, is mounted forwardly of the snow apparatus by means of bolts 77 which pass therethrough and into the side faces 13 of the casing. Each cutting bar may be sharpened as at 79 and is preferably arranged at such an angle with the casing that it slices into the upper layers of snow in advance of the time that the auger casing will cut into the corresponding lower layers. In this manner, immediately that the augers cut away the lower snow, the upper layers will tumble down and be swept back into the fan casing and thence out of spout 21. The bars 75 may be removed when the snow is not deep enough to warrant their use, and they may be adjusted to various heights by removing the bolts and replacing them in auxiliary holes 81. Should it be found desirable to change the inclination of the cutting bars, further sets of spaced holes 83 and 85, are provided, each of these sets being in alignment with the hole through which the uppermost bolt 77 passes. The sharp edges 79, like those indicated at 73, serve to leave a clean path and smooth bank behind the snow remover.

The plaintiffs rely on claims 6, 7, 8, 9 and 10; I think it will be sufficient to reproduce claims 7, 8, 9 and 10:

7. In a snow remover, a vehicle snow removing apparatus mounted upon said vehicle, and cutting bars formed at the sides of said apparatus for advancing into the snow to aid in cutting a clean swath.

8. In a snow remover, a vehicle, a casing mounted forwardly of the vehicle, rotors disposed within the casing, and means on the front lateral edges of the casing for loosening the snow ahead of the rotors.

9. In a snow remover, a vehicle, snow removing mechanism mounted forwardly thereof, and cutting bars or plates arranged at the sides of said mechanism in substantially vertical planes, said cutting bars extending upwardly for a substantial distance above the snow removing mechanism.

10. In a snow remover, a vehicle, a casing mounted forwardly of the vehicle, rotors disposed within the casing, and cutting plates arranged on opposite sides of the casing, said cutting plates projecting above and forwardly of the rotors.

The plaintiffs in their statement of claim say:

the plaintiffs Daniel, Gerrit, Jacob and Ben Wandscheer are citizens of the United States of America, reside at Sioux Center, in the State of Iowa, and are the owners of the Canadian letters patent Nos. 253159, 352,708, 309848 and 309849 hereinabove described;

the plaintiffs Walter E. Klauer and Charles L. Ostrander are citizens of the United States of America, reside at Dubuque, in the State of Iowa, and are the owners of Canadian letters patent No. 330827 hereinabove described;

the plaintiff Klauer Manufacturing Company is a corporation having a place of business at Dubuque, in the State of Iowa, and is the exclusive licensee under the aforesaid patents owned by its co-plaintiffs;

the defendant is a corporation having a place of business in the City of Montreal, Province of Quebec;

the defendant has infringed the rights of the plaintiffs under the said letters patent as set forth in the particulars of breaches and threatens to continue the said infringement;

wherefore the plaintiffs claim (*a*) a declaration that as between the parties the said letters patent are valid and have been infringed by the defendant; (*b*) an injunction restraining the defendant from further infringing the rights conferred by the said letters patent; (*c*) damages in the amount of $10,000 or such larger amount as may be awarded or alternatively an account of profits as plaintiffs may elect; (*d*) an order directing that the defendant deliver to plaintiffs all articles in its possession or power made in infringement of the said letters patent or that said articles be destroyed; (*e*) such further relief as the justice of the case requires; (*f*) costs.

In their particulars of breaches the plaintiffs say that the defendant has infringed the rights of the plaintiffs under the said letters patent since the dates of their issue

1944

WANDSCHEER ET AL. v. SICARD, LTÉE

Angers J.

and prior to the institution of the action by manufacturing and selling snow plows in Canada at times and places at present unknown to the plaintiffs, which said snow plows embodied the inventions covered by said letters patent;

the plaintiffs rely on the following claims (leaving aside the patents withdrawn): patent No. 253,159, claim 1; patent No. 309,848, claims 6, 7, 8, 9 and 10;

the precise numbers and dates of defendant's acts of infringement are unknown to plaintiffs but they claim damages in respect of all such infringements.

In its statement of defence the defendant says as follows:

it is ignorant of the allegations of the statement of claim concerning the status of plaintiffs but admits the one regarding its own status;

it denies infringement and the particulars of breaches thereto relating;

the letters patent in suit have always been invalid, irregular and null for the reasons set forth in the particulars of objections.

The particulars of objections amended according to a judgment rendered on May 16, 1941, leaving aside the matter relating to letters patent Nos. 352,708, 309,849, 330,827 withdrawn by plaintiffs, say in substance:

letters patent Nos. 253,159 and 309,848 are invalid, irregular and null for the following reasons:

the subject-matter of these patents is not proper subject-matter of letters patent for invention, because:

(*a*) it is not and was not any new art, process, machine, manufacture or composition of matter, new and useful, nor any new and useful improvement thereto relating;

(*b*) it is and was the readaptation of means and articles already known, for analogous purposes and without any novelty in the mode of adaptation nor in the result;

(*c*) it is and was the substitution of equivalents already known to elements already manufactured of the same character;

(*d*) it is and was only the reunion or juxtaposition of separate elements without modifying their functions and without producing any other result than the united results of the separate operations of the divers elements;

the alleged inventions are not the result of the exercise of the inventive faculty, but would be at most the product of mechanical skill;

there was no invention nor subject-matter for a patent for invention having regard to the common knowledge in the art and to the patents, publications and prior knowledge hereinafter referred to;

the alleged inventions were not new; they were known and had been used by others before being made by the applicants for the said patents, as appears from: (*a*) the common knowledge in the art at the time; (*b*) the prior knowledge established by the patents hereinafter mentioned and the applications for the same;

the alleged invention which is the object of letters patent No. 309,848, even if there were subject-matter for an invention, which the defendant denies, would not be the invention of the plaintiff Daniel Wandscheer alone, but the joint invention of the plaintiffs Gerrit, Jacob, Ben and Daniel Wandscheer;

the alleged invention forming the object of letters patent No. 253,159 was already known to the persons to whom the letters patent hereinafter mentioned were granted and the alleged invention was anticipated, disclosed and described in the following letters patent and the application therefor:

United States patents

Tierney	March 16, 1869	No. 87,989
Webber	April 3, 1883	No. 275,301
Truesdell	July 2, 1889	No. 406,117
Bakkethun	November 19, 1889	No. 415,317
Herran	January 17, 1899	No. 617,830
Cutting	January 12, 1904	No. 749,172
Lund	August 2, 1921	No. 1,386,066
Yeiter	September 6, 1921	No. 1,389,727

the alleged invention forming the object of letters patent No. 309,848 was already known to the persons to whom

1944

WANDSCHEER ET AL. v. SICARD, LTÉE

Angers J.

the following letters patent were granted and the alleged invention was anticipated, disclosed and described in the following letters patent and the applications therefor:

United States patents

Elliot	November 1, 1870	No. 108,894
Webber	April 3, 1883	No. 275,301
Bergenthal	March 13, 1888	No. 379,441
Bakkethun	November 19, 1889	No. 415,317
Scheffler	February 18, 1890	No. 421,768
Derby	October 1, 1901	No. 683,682
Fittenhouse	February 14, 1922	No. 1,406,897
Curtis	April 18, 1922	No. 1,413,007
Miller	November 17, 1925	No. 1,562,180
Milne & al	November 24, 1925	No. 1,562,842
Wandscheer	June 1, 1926	No. 1,587,449
Curtis	April 5, 1927	No. 1,623,910
Von Lackum	November 19, 1867	No. 71,249
Dunbar	October 18, 1870	No. 108,338
Ballock	September 30, 1879	No. 220,141
Caldwell	December 11, 1888	No. 394,244
Rye	June 9, 1891	No. 453,942
Kobb	June 14, 1892	No. 476,800
Mowbray	July 2, 1907	No. 858,616
McLain	January 18, 1910	No. 947,121
Peltier	January 1, 1918	No. 1,252.164
Barber	January 24, 1924	No. 1,498,987
Souhigian	August 26, 1924	No. 1,506,263
Fulcer	April 28, 1925	No. 1,535,913
Brown	February 23, 1926	No. 1,574,230

the alleged invention forming the object of letters patent No. 309,848 was already known to the said Arthur Sicard since the year 1924 and to Sicard Limitée since the year 1929 and had been used by them since said dates;

the alleged invention forming the object of letters patent No. 309,848 was already known to the persons, firms and corporations hereinafter mentioned and had been used by them as follows:

(*a*) The Rotary Snow Plow Co., of Minneapolis, State of Minnesota, United States of America, during the years 1926 and 1927 and since;

(*b*) Imperial Machine Company, of Minneapolis aforesaid, during the years 1926 and 1927 and since;

(*c*) Zygmund L. Phillip, of Minneapolis aforesaid, during the years 1926 and 1927 and since;

(*d*) Percy Ferguson, of Minneapolis aforesaid, during the year 1927 and since;

the claims of the letters patent Nos. 253,159 and 309,848 over more than any invention made by the applicants for said letters patent;

the specifications and claims of said letters patent do not indicate clearly the improvements and are not limited to the improvements on which the applicants for said letters patent pretend to found their invention;

the alleged inventions are not useful;

the alleged inventions, particularly as described in the specifications contained in the said letters patent and the drawings relating thereto, are inoperative;

the specifications of the said letters patent contain more than is necessary for obtaining the end for which they were made and this addition was wilfully made for the purpose of misleading;

the specifications of said letters patent contain less than is required for obtaining the end for which they were made and this omission was wilfully made for the purpose of misleading.

It seems to me apposite to first consider the question of the validity of the letters patent, commencing with No. 253,159 relative to improvements in snow removers and later dealing with No. 309,848 concerning improvements in snow removing apparatus.

A common ground of defence raised by defendant against both patents, as previously noted, is the lack of subject-matter and the want of novelty in view of the state of the prior art. It was also urged on behalf of defendant that patent No. 253,159 was invalid because useless, the machine therein described being inoperative.

Counsel for plaintiff submitted that this patent is a combination of six elements forming one unit, the six elements being a semi-cylindrical or substantially semi-cylindrical casing, a conveyor in that casing, a fan casing connected therewith, a fan in the fan casing, means for actuating the conveyor and the fan and an adjustable conduit or chimney connected with the fan for rotary movement in order to discharge the snow in the direction desired. The question arising is: has there been in this combination of old contrivances any invention?

1944

WANDSCHEER ET AL. v. SICARD, LTÉE

Angers J.

A miniature model of the machine was filed as exhibit P13. Counsel for defendant submitted that this model differs from the snow remover covered by the patent while counsel for plaintiffs claimed that it is an exact representation of the patented machine; I shall deal with this question briefly later.

It is idle to say that utility is an essential quality of an invention. The test of utility of an invention is that it should do what it is intended to do and that it be "practically useful", at the time when the patent is issued, for the purposes indicated by the patentee. Reference may be had in this respect to the following decisions: *Lane-Fox* v. *Kensington and Knightsbridge Electric Lighting Co. Ltd.* (1); *Atking & Applegarth* v. *The Castner Kellner Alkali Co. Ltd.* (2); *Re Alsop's Patent* (3); *Hatmaker* v. *Joseph Nathan & Co. Ltd.* (4); *Ward Bros.* v. *James Hill & Son* (5). It has been held many a time that utility is part of the consideration for a grant of letters patent and that, if a material portion of the invention be useless, there is a failure of consideration and the patent is void: *Simpson* v. *Holliday* (6); *Turner* v. *Winter* (7); *Morgan* v. *Seaward* (8); *United Horseshoe and Nail Co.* v. *Stewart & Co.* (9); *United Horseshoe and Nail Co.* v. *Swedish Horsenail Co.* (10). I may note that a slight amount of utility will suffice to support a patent: *Morgan* v. *Seaward* (11); *Otto* v. *Linford* (12); *Badische Anilin und Soda Fabrik* v. *Levinstein* (13).

On the other hand, utility alone, however great it may be, cannot in the absence of invention support a grant of letters patent: *Morgan & Co.* v. *Windover & Co.* (14).

Counsel observed that, in stating that the snow remover described in patent No. 253,159 was inoperative, he considered the form of the alleged invention with the use of the fan and of the conduit or chimney for the delivery of the snow to a distant point in any direction. He did not

(1) (1892) 3 Ch. 424 at 431.
(2) (1901) 18 R.P.C. 281 at 295.
(3) (1907) 24 R.P.C. 733 at 752.
(4) (1919) 36 R.P.C. 231 at 237.
(5) (1903) 20 R.P.C. 189 at 199.
(6) (1866) L.R., 1 H.L. 315 at 322.
(7) (1787) 1 W.P.C. 77 at 82.
(8) (1837) 2 M. & W. 544 at 561.
(9) (1885) 2 R.P.C. 122 at 132.
(10) (1888) 6 R.P.C. 1 at 8.
(11) (1835) 1 W.P.C. 167 at 186.
(12) (1882) 46 L.T., n.s., 35 at 41.
(13) (1887) 4 R.P.C. 449 at 462.
(14) (1890) 7 R.P.C. 131 at 136.

refer to the simpler form of machine whose object is merely to provide conveyor means for forcing the snow to one or both sides of the road.

This object, which Curtis in his patent designates as the principal, is not a novelty. It is disclosed in the following prior patents:—

(*a*) United States patent No. 87,989, issued on March 16, 1869, to Charles W. Tierney for a snow plow.

The specification says:

> The object of this invention is to introduce into use a more complete and successful machine for removing snow from the tracks of railroads than has heretofore been in use; and it consists in the use of a revolving shaft having spiral wings, in the form of a screw, thereon, in combination with a revolving fan which distributes the snow after the screw has raised it.

This patent shows that the use of a spiral for removing snow was well known. A detail which is somewhat significant is the statement contained in the last paragraph of the specification, reading as follows:

> I am aware that screws have been used for the purpose of elevating the snow from the track of a railroad. A screw alone I do not claim;

As shown by the drawing annexed to the specification the snow plow invented by Tierney consisted of a spiral placed horizontally, fitted, at one end, with a revolving fan.

(*b*) United States patent No. 617,830, issued on January 17, 1899, to Heinrich Herran, for a snow plow, pursuant to an application filed on July 16, 1898.

The specification forming part of patent No. 617,830 states (*inter alia*):

> The present invention relates to that class of vehicles designed to clear the snow from streets, roads, avenues, and the like; and the special object thereof is to provide a snow-plow of very simple but substantial construction and which, with a moderate amount of motive power, readily throws the snow to each side of the road.
>
> The wedge-shaped sledges or snow-plows heretofore employed require a great expanse of motive power for their operation, resulting from the accumulation of the snow at the fore part of the plow, where it is compressed to such an extent that the plow can only advance with the greatest difficulty. This inconvenience is removed with the snow-plow forming the object of the present invention by driving the snow to the two sides of the road by means of two screws or conveyers acting in opposite directions on a common rotating shaft, as more fully and clearly pointed out and claimed hereinafter.

1944

WANDSCHEER ET AL. v. SICARD, LTÉE

Angers J.

In Herran's patent are found the spirals used for the purpose of removing the snow to one or both sides of the road as provided for in the first and "principal" object of Curtis' patent. In his first alternative or object Curtis has not added anything to the patents of Tierney and Herran.

(*c*) United States patent No. 749,172, issued on January 12, 1904, to Otis Cutting, for a reversible rotary snow plow, according to an application filed on August 4, 1903.

The use of a spiral or rotary screw to remove the snow from railway and street car tracks and consequentially roads is shown in this patent.

Figure 2 of the drawings accompanying the specification shows distinctly the spiral in front of the machine, whilst figure 1 gives a side view thereof. With the Cutting machine the snow was thrown to one side of the road.

I may add that in the three patents above cited we find a substantially semi-cylindrical casing within which is the spiral conveyor. This feature can be seen by looking at figure 1 of the Tierney patent, figure 2 of the Herran patent and figure 1 of the Cutting patent.

(*d*) United States patent No. 1,389,727, issued on September 6, 1921, to Clarence W. Yeiter for a snow plow, following an application filed on March 29, 1920.

This patent also shows the use of a spiral conveyor; it is particularly visible in figure 1 of the drawings.

Copies of these four patents form part of exhibit D44.

I think it is fair and reasonable to conclude from these facts that the first object of the Curtis patent (exhibit P10) offers no novelty, but was anticipated by the patents abovementioned. In this respect the said patent is irregular, invalid and null.

As to the second object of the patent, which is to provide, in a snow remover, not only a spiral conveyor in a semi-cylindrical casing but also a fan in a fan casing and an adjustable conduit connected with the fan casing for blowing the snow at a distance, the defendant's contention is that the machine represented by Curtis in his patent No. 253,159 (exhibit P10), is inoperative and useless and that the patent is consequently invalid.

1944

WANDSCHEER ET AL. v. SICARD, LTÉE

Angers J.

The inventor describes the second object of his patent in the tenth paragraph of the specification, which reads thus:

I prefer, however, to attach a casing 8 at each end of the casing 1 and to extend the ends of the shaft 5 through these casings. These extended ends of the shaft carry fan blades 9 so that a blast is created in each casing to drive the snow delivered to the casings by the conveyors through the outlet pipes 10 and the delivery pipe 11 which is connected with said pipes 10 by the rotary elbow 12. In this way the snow may be delivered at any desired point on either side of the road bed.

I shall endeavour to recapitulate as briefly as possible the evidence referring to this aspect of the case.

I believe it convenient to refer in the first place to the deposition of Curtis himself, who apparently has no interest in the present case. His deposition was taken by consent of counsel at Minneapolis, State of Minnesota, U.S.A., and a transcript thereof was filed in the record.

His first experiments with snow plows date back to the winter of 1919-1920. He said that he took an auger and placed it under a tractor. His machine consisted of a shaft with augers, one right and one left, and a belt from the tractor pulley running down to one end of the auger to rotate it.

One Leo A. Schoebel helped him in his experiments.

Curtis said that he and Schoebel put on a couple of temporary fans to see "how the snow would go past from the auger" and "what the fan would do when it got in contact with the snow". These fans were connected with the auger on one side.

The witness stated that there was a semi-cylindrical casing in the rear of the auger and that there was only one row of spiral conveyors placed horizontally.

The purpose of this work with this type of auger, according to witness, was to get an idea of how it would cut the snow and deliver it. His experience was that the auger seemed to cut the snow and deliver it in nice shape. He had no picture of the type of machine used during that winter; he volunteered the information that he had no "interest in that".

Asked if he had pursued his experiments further during that same winter, Curtis replied: "that was as far as we went that winter".

1944

WANDSCHEER ET AL. v. SICARD, LTÉE

Angers J.

In answer to the question if he had come to any conclusion as to the type of rotary snow plow that was going to be practical, Curtis summed up his opinion as follows (p. 6):

A. Well, from that experiment we figured that the auger was all right for delivery, but we found out that we had side draft. We would cut on one side, and so we decided that it would be better if we would reverse the augers, and put the fan in the rear, and make the delivery through a hole in the casing.

Q. Will you explain a little more what you mean by the draft that you had?—A. Well, when we had this one auger we had, from pulling on one auger, we noticed a considerable side draft. It was pulling against the bank, and would pull on the auger. There was nothing on the other side to counter-balance it.

Q. And as a result of that it would prevent the snow plow from travelling in a straight line?—A. It would, unless it was heavy enough to hold it down. We figured that there would be considerable trouble, so I tried to remedy that.

I do not think that the experiments carried on in the winter of 1919-1920 have any bearing in the present case and that it would be useful to spend any more time on this phase of Curtis' activities. I thought however that it might be interesting to outline briefly the first steps of Curtis in the field of snow removers.

The evidence discloses that, almost immediately after the winter of 1919-1920, without having had the opportunity of testing the mechanism therein described, Curtis applied in the United States for patent No. 1,413,007 for a snow remover. A copy of the patent was filed as exhibit D13; the application appears to have been filed on May 25, 1920, and the patent issued on April 18, 1922. I may note that this patent is identical to the Canadian patent in suit, No. 253,159, filed as exhibit P10, with the exception that in the fourth line of the first claim of the former we find the expression "a spiral conveyor in the first mentioned casing", whilst in the latter we have the expression "a conveyor in the first mentioned casing" and that the said claim of the Canadian patent ends with the words "for rotary movement" whilst these words are not included in the same claim of the United States patent. These differences have no importance whatever in the present case. I may add that claim 2 of the United States patent differs from claims 2 and 3 of the Canadian patent, but with these claims we are not concerned.

It is interesting to note that Curtis applied for a patent in the United States and some time later in Canada for an invention which he had never tested, at least as far as the use of a fan and fan casing and of outlet pipes and a delivery pipe for the projection of the snow at a distance in any direction is concerned.

It seems proper to quote in this respect a few passages from Curtis' testimony, which will, I think, substantiate the foregoing remarks.

Firstly we find at page 8 of the deposition the following statements regarding the fans and the gear used for driving the auger shaft; it is expedient to note that figure 2 of the United States patent (exhibit D13) is similar to figure 2 of the Canadian patent (No. 253,159) in suit:

Q. I notice that this figure shows two fans at the outer ends of the auger. I believe you mentioned to us that you had tried it out with only one?—A. Yes, I tried it out with only one.

Q. So you had not experimented with two fans as shown in figure 2? —A. No, we did not.

Q. I notice in figure 2 that the auger shaft seems to be driven by a gear in the centre of the shaft. Is that the way the shaft was operated in the experiments you carried out?—A. No, we had a pulley out on the opposite end where this other fan shows.

Q. So you had not experimented with a gear in the centre as shown in figure 2?—A. No, we did not.

Q. The remarks you have just made as to figure 2 would apply, I presume, also to figure 4?—A. What was that question?

Q. Whether the remarks you had made with respect to the auger shown in figure 2 would also apply to figure 4?—A. Yes, it would.

Later on dealing with the auger shown in figure 8 of the United States patent as well as of the Canadian patent and with the chimney appearing in figures 2, 6 and 8 of both patents, Curtis made the following declarations (p. 9):

Q. Will you refer to figure 8 of the same drawing and look at the form of auger shown in that figure? I notice that there is a blower casing in the centre into which the snow is supposed to be driven.—A. Yes.

Q. Had you experimented with that type of an auger?—A. Not yet. This was not yet.

Q. Do I understand rightly therefore, that the disclosure, the teachings of that patent with respect to the shape of the auger was the result of deductions that you made from the work that you had carried on in the winter of 1919-1920?—A. Yes, that is correct.

Q. Will you look at the chimneys or conduits which appear in figures 2, 6 and 8 of this same patent and state if, during that winter of 1919-1920, you had experimented on any such chimneys?—A. No, we had not.

Q. Had you experimented with any sort of chimneys?—A. Not that winter.

1944

WANDSCHEER ET AL. v. SICARD, LTÉE

Angers J.

Q. So I gather that the teachings of this patent in connection with the chimney was merely from your general knowledge as to what you thought might work properly?—A. Yes, that was the idea.

Curtis stated that he experimented further with snow plows in the winter of 1920-1921, using the type of machine represented in figure 8. He said that the snow plow used in the winter of 1920-1921 had a chimney or conduit but that it was not similar to that shown in figure 8. I had better quote an extract from the witness' deposition in this regard (p. 11):

Q. Perhaps you might tell us what sort of conduit you were working with.—A. We just had a plain, square, three-sided conduit, open at the bottom.

Q. Could it be described as an inverted U?—A. Well, hardly. It was more, I would say, a square shape.

Q. But with only three sides?—A. Yes, with only three sides.

Curtis said that he had a photograph of the snow plow in question, which was marked by the reporter for identification as exhibit D3. The same photograph was filed at the trial as exhibit D14. Counsel for plaintiff admitted that exhibit D3 is a photograph of a Curtis machine without having the photographer called to identify it.

The photograph shows a machine with a single auger having right and left hand screw parts, bringing the snow into the centre towards the blower casing opening at the rear of the auger.

Curtis stated that the auger shaft was driven by a worm gear, instead of a bevel pinion as indicated by numeral 5 in figure 1. The worm gear he used in the auger with which he experimented is the one designated by numeral 24 in figure 9.

According to Curtis, the conduit or chimney on the snow plow shown in the photograph exhibit D14 was not adjustable and it could only deliver the snow on one side.

On pages 15 and 16 of the deposition reference is made to the experiments made by Curtis during the winter of 1921-1922 with chimneys such as shown in figures 2, 6 and 8. I deem it convenient to quote an excerpt from the deposition (p. 15):

Q. In the course of that year, or of that winter 1920-1921, did you operate with chimneys or conduits forming an elbow such as shown in figures 2, 6 and 8 of the drawing of said patent?—A. No, we did not.

Q. Did you subsequently have occasion to experiment with such chimneys?—A. Yes, later on, the next winter.

Q. What result did you get?—A. Well, we did not think that it was very successful, that type of—we used a 45, but we did not like the operation of it.

Q. What do you mean by using a 45?—A. Well, instead of a U, it was halfway between a square and straight.

Q. You mean a 45-degree elbow?—A. Yes, a 45-degree elbow.

Q. So it was not nearly so pronounced as the elbow in figure 6 for instance, which shows a 90-degree elbow, does it not?—A. It was just halfway between that and straight. Straight would be up, and this is, you might say, square, or a U, and the other is halfway between.

Q. Now, did you experiment with a 90-degree angle or elbow such as shown in figure 6?—A. No, we did not.

Q. You experimented with a 45-degree?—A. We experimented with a 45-degree.

Q. With what result?—A. Well, it did not prove to be satisfactory.

Q. Why did it not?—A. Well, it seemed to choke the motor down too much.

Questioned as to the result he got with the auger shown in the photograph exhibit 14, Curtis gave this information (p. 16):

A. Well, I found out that the auger was not quite large enough, and we put it on a truck, and I found out that the plow did not jibe with the power of the truck; that we went too fast ahead, and when we wanted to go ahead, if the snow was deep we did not have speed enough for the plow. I made up my mind that we had to put in a separate engine and run it independent of the truck.

Q. Did you experiment with that particular auger in deep snow?—A. Yes, I found out that one auger would not be enough unless it was a big one.

Q. What was the size of that auger?—A. 16 inches. It was the same auger that we had the winter before, only that we reversed them.

Q. Did you build a two-auger snow plow that winter?—A. Not that winter.

Reverting to his experiments in the winter of 1921-1922 at the request of counsel, Curtis made the following statements (p. 17):

A. Well, the next winter I built an altogether different type of a plow with two augers, one above the other.

Q. Both on a horizontal axis?—A. Both on a horizontal axis.

And further on (p. 17):

Q. What type of augers were those that you built in that winter, that you used in the winter of 1921-1922?—A. I used a 20-inch diameter.

Q. Each?—A. Each—a right and a left.

Q. Each of the two rows?—A. Each of the two rows was the same diameter.

Q. And then did each auger have a right and a left-hand part?—A. Yes, each auger had a right and a left-hand part.

Q. And where were they carrying the snow?—A. To the centre.

Q. And was there a blower casing with a fan in it, to the rear of the augers?—A. Yes, there was.

1944

WANDSCHEER ET AL. v. SICARD, LTÉE

Angers J.

The model of snow remover which Curtis made in the winter of 1921-1922 is the one represented in the photograph exhibit D15, as well as in the photograph exhibit D19, of which the former is an enlargement. Curtis in the winter of 1921-1922 solved the problem which confronted him. He had not solved it however when on May 25, 1920, he filed his application in the United States, which resulted in the patent No. 1,413,007 (exhibit D13). As already said, this patent is similar to the Canadian patent No. 253,159 with which we are concerned.

The snow plow shown in the photograph exhibit D15 is very similar to the model exhibit P13. Both have two horizontally superposed spiral conveyors, baffle plates, a conveyor casing having at the back a straight wall with a semi-cylindrical scraper at its base, a fan casing at the rear of the conveyor casing and a fan in the said fan casing to draw the snow from the conveyor casing and a four-sided conduit which can be fixed so as to discharge the snow to the right or left of the machine as desired. This machine differs materially from the one described in patent exhibit P10,: see deposition Choquette pp. 290 and 386.

In the winter of 1921-1922 Curtis, who had always thought of a system capable of delivering the snow to the right or to the left, imagined an opening that would revolve around the casing. The opening for the snow could be adjusted to appear on one side or the other. Curtis explained the construction and working of this outfit by means of a drawing which he prepared and which was filed as exhibit D27 (D15 with the examination on discovery).

It appears to me convenient to quote an extract from his testimony which will enlighten the subject (pp. 31 and 32):

Q. Will you state, what does this crude drawing represent that you are now exhibiting?—A. That represents the arrangement I had, to do the experimenting.

Q. What does the red colour represent?—A. That represents the outer circle of the casing, between the two outside walls.

Q. And what does the blue represent?—A. That represents the revolving part of the arrangement, that the hood is fastened to.

Q. So that that part shown in blue is the part that revolves?—A. That is the part that revolves.

Q. Enabling the hole to be presented either on the righthand side or the lefthand side?—A. That is the idea.

* * * * *

Q. With this arrangement illustrated by Exhibit D-15, I gather that you could throw the snow either on the lefthand side or the righthand side?—A. That is correct.

Q. Could you rotate this device so as to send the snow in either direction around the circle?—A. No, it could not be done.

Curtis asserted that the chimney shown in figure 2 of the Canadian patent No. 253,159 (exhibit P10) was intended to throw the snow in any direction, all around the snow plow, and he willingly admitted that that result could not be achieved with the arrangement represented in the drawing exhibit D27 (D15 with the examination on discovery). On page 32 of his deposition, Curtis makes the following observations:

Q. With the arrangement shown in Figure 2 of that patent (No. 253,159), was it intended to direct the snow in any direction, north, south, east, west, or any direction at all?—A. Yes, it was.

Q. All around the snow plow?—A. Yes, it was.

Q. Can that result be achieved with the arrangement illustrated in Exhibit D-15?—A. Well, no, it cannot.

It is obvious that we do not find in the drawing exhibit D27 and in the model exhibit P13 the rotary movement of the chimney provided for in the patent No. 253,159.

The inventor himself has to make this admission. There is nothing surprising in that fact, seeing that Curtis had not tested his machine before filing his application for the patent. He tried it later and realized that it did not work properly.

Counsel for plaintiffs insisted vigourously on the commercial success of the "Snogo" snow remover manufactured by the plaintiff Klauer Manufacturing Company. The evidence indeed shows that the plaintiff company obtained a wide market for its snow plows, but its success is not attributable to the machine described in the Canadian patent exhibit P10 or in the United States patent exhibit D13. It is mainly, if not solely, imputable to the snow plow altered and perfected during the winter of 1921-1922, to wit the one illustrated by the photograph exhibit D15 and represented by the miniature model exhibit P13.

Curtis soon grasped the situation and understod that his first model (exhibit P10) was not practical and that it did not work satisfactorily. It was not long before he changed his contrivance and applied for another patent

1944

WANDSCHEER ET AL. v. SICARD, LTÉE

Angers J.

in the United States. The patent issued on April 5, 1927, bears No. 1,623,910; a copy was filed as exhibit D26. The application appears to have been filed on May 19, 1922. As submitted by counsel for defendant, the date of the filing of the application corresponds with the termination of Curtis' experiments in the winter of 1921-1922. At the end of the winter Curtis was satisfied that he had solved the problem on which he had been working for three successive winters and he applied for his second patent in the United States; he did not however deem it advisable to obtain one in Canada.

The United States patent No. 1,623,910 (exhibit D26) discloses the use of two spiral conveyors horizontally superposed, both consisting of right and left hand screw parts so that the snow is moved inwardly from both ends of the conveyor casing in order to enter the fan casing located at the rear of the spiral conveyors. In the fan conveyor is a fan whose object is to create a blast which will drive the snow to the delivery pipe or chimney represented in figure 5. This chimney was evidently found inoperative for the same reason as the one shown in figures 2, 6 and 8 of the United States patent No. 1,413,007 (exhibit D13), and of the Canadian patent No. 253,159 (exhibit P10), as it was discarded and replaced by a totally different contraption as appears from the photograph exhibit D15 and the miniature model exhibit P13.

The evidence of Curtis that the snow remover comprising a spiral conveyor in a semi-cylindrical casing, a fan in a fan casing and an adjustable chimney or conduit connected with the fan casing for blowing the snow at a distance, forming one of the objects of the patent exhibit P10, in connection with which we are now concerned, was found inoperative and consequently useless, is corroborated by the testimonies of Arthur Sicard and Arthur Elie Choquette.

Arthur Sicard, heretofore carrying on business alone as manufacturer of snow removers under his own name and presently president of Sicard Limitée, the defendant, which took over the business of Arthur Sicard at the time of its incorporation in September, 1929, and has since carried it on, testified that he became interested in the prob-

lem of snow removers and began to devote his attention to the manufacture of miniature models in 1922. They were small wooden models of a snow removing apparatus of the type commonly known as scraper. He experimented with them to see how they would operate in the snow. Sicard made his first regular size snow remover of this kind during the winter 1923-1924.

He explained the modifications made to his machine during the spring of 1924 and stated that he produced the snow remover shown on page 4 of exhibit P7 without, however, the chimney appearing. He began to install the chimney in the spring of 1924.

Sicard relates at some length his endeavours during the winter of 1924-1925, 1925-1926 and 1926-1927 to improve his snow remover. The improvements made by Sicard to his machine of the scraper type have no relevance to the question now under examination.

In June, 1927, Sicard made a small sheet-iron model of spiral conveyors snow remover, with a chain on one side connecting the conveyors and a turbine with wooden blades driven by hand at the outset. He does not remember whether he had baffle plates on the model, but thinks that they were added after the first trials.

I may note incidentally that counsel for plaintiff, with some insistence, expressed wonder at the fact that the defendant was unable to produce the models used by Sicard in 1923 and 1927. One must not overlook the fact that the plaintiff company knew about the Sicard machine since 1930, according to Ostrander's own statement (dep. on discovery, 21), and that the action was not instituted before August 1939. Seeing the long interval which elapsed between the time these models were made and the date on which the action was instituted, the defendant had no reason to surmise that these models might some day be wanted.

Sicard began to build a regular size snow remover with spirals in 1928 and sold the first machine of this type to the city of Outremont in 1929.

Reverting to the lack of operativeness and utility of a snow remover made in conformity with patent exhibit P10, after this digression which I deemed useful, I will

1944

WANDSCHEER ET AL. v. SICARD, LTÉE

Angers J.

cite an extract from Sicard's testimony which seems pertinent. Referring to the Canadian patent No. 249,041 granted to Sicard on April 28, 1925, for a "Combination snow plough and loading machine" (exhibit P28), counsel for defendant asked Sicard if he had tried a chimney like the one shown in figure 1; the witness replied in the negative. I will quote the questions and answers relating to the subject (pp. 203 and 204):

D. Dois-je comprendre que vous n'avez pas essayé une cheminée construite, tel qu'indiqué sur la figure numéro 1 du brevet?—R. Jamais.

D. D'après votre expérience et vos connaissances actuelles, est-ce qu'une cheminée de cette nature peut fonctionner?—R. Ne peut pas marcher du tout.

D. Vous l'avez peut-être expliqué, mais mon savant ami me demande que je vous demande pourquoi cela ne fonctionne pas. Dites-le donc?—R. C'est que quand on a fait des essais, et qu'on mettait des coudes coupés carrés, c'est-à-dire 90 degrés, cela n'a jamais marché.

A comparison of the chimney represented in figures 2, 6 and 8 of patent No. 253,159 and the one shown in figure 1 of patent No. 249,041 discloses that both chimneys are identical.

Arthur Choquette, who described himself as technical engineer, testified that he studied at Laval University in Montreal from 1898 or 1899 to 1906, that he was associated with the firm of Louis & Purvey, of New York, from 1910 to 1920, acting particularly as consulting engineer and supervisor in the preparation of patents and plans relating thereto, and that he was employed by the United States Government at Washington as engineer and designer in ballistics in 1917 and 1918, during the first world war.

According to him, his experience in patents for invention and in plans as technical engineer and designer dates back to 1910.

Choquette stated that he came back to Canada in 1920 and was associated with one René Pigeon, as patent solicitor, during a few months. He then became affiliated with the Institut du Radium of the University of Montreal, with which he is presently connected. Asked what his functions at the Institut du Radium are, he replied (p. 280):

R. Comme ingénieur expert dans l'installation de machines de Rayons-X, l'analyse et la préparation de radium pour les traitements de cancer ainsi que de la préparation des dessins illustratifs en biologie, en histologie pour les conférences et les congrès de médecins.

Referring to his experience in the manufacture of snow removing machines, Choquette said he began with the firm of Pigeon & Lymburner. Perhaps I had better quote an extract from his deposition (p. 280):

J'ai commencé là-dedans quand j'étais justement avec M. Pigeon de la firme Pigeon & Lymburner, autrefois. Alors que justement M. Sicard est venu pour la première fois pour l'application d'un brevet. J'ai travaillé au premier brevet de concert avec M. Pigeon et de là M. Sicard, naturellement, n'étant pas resté longtemps chez M. Pigeon, M. Sicard m'a demandé si je lui fournirais des détails dans la construction de la machine. Et dès alors, j'ai étudié la chose avec M. Sicard et depuis ce temps-là, je me suis occupé des machines à neige.

D. Par conséquent, depuis 1922?—R. Depuis 1922, environ 1922 ou 1923.

Choquette acknowledged his signature as witness opposite that of Arthur Sicard in the patent No. 263,349 granted to the latter on August 10, 1926, for improvements in snow removing machines, filed as exhibit P29.

He declared that he made a careful study of the patents forming the basis of the present action and of the prior art in connection with snow removing machines and the patents in suit.

He explained the working of various elements shown in figure 2 of patent No. 253,159 (exhibit P10, particularly the fan blades, the outlet pipes and the delivery pipe connected with the former by a rotary elbow.

Witness' attention was then drawn by counsel to the want of operativeness and utility of the snow remover described in said patent. As this question is eminently important, I deem it expedient to cite a passage of the testimony (p. 283):

D. Maintenant, ce que je désire savoir de vous, comme expert, quelle est votre opinion relativement à l'opération d'un appareil dessiné et construit de cette manière? Je désire savoir si cette construction, d'après vous, est opérante ou non, et pourquoi?—R. Ce conduit, cette cheminée ou conduit de 10, référence des chiffres 10-12-11, ne peut fonctionner pour la neige. La neige est un corps fondant par pression ou friction, et ne peut être lancée qu'en une certaine ligne parabolique dont la trajectoire est comme une balle, elle ne peut suivre un conduit angulaire ou coudé.

D. Ce que vous entendez par un conduit angulaire ou coudé, est-ce une construction de la nature de la construction de la cheminée qui apparaît à la figure 2, spécialement à la jonction à gauche du chiffre 12?—R. Parfaitement. Figure 2, figure 6 et figure 8, dans le brevet.

1944

WANDSCHEER ET AL. v. SICARD, LTÉE

Angers J.

Asked if he makes a distinction between a light and a heavy snow in so far as the efficiency of a chimney similar to the one described in Curtis patent (exhibit P10) is concerned, Choquette replied (p. 283):

R. Oui, dans un sens, parce qu'il faut d'abord comprendre que l'éventail, ce qu'on appelle le souffleur (blower), usité dans cet art ne fonctionne réellement pas en causant un courant d'air. Son travail est simplement de lancer par force centrifuge. Et lorsqu'il se présente un mur, qu'il soit courbé ou obliquement placé, la neige s'arrête à ce mur, à cette obstruction et ne peut continuer parce qu'elle n'est pas d'un corps comme l'on peut représenter la paille ou la plume.

Later, dealing with the chimney shown in figure 6 of patent exhibit P10, Choquette made these comments (p. 286):

R. Mes remarques sur la figure 2 sont pratiquement les mêmes pour la figure 6.

D. Référez-vous spécialement aux coudes de la cheminée?—R. Exactement.

D. C'est un coude formant angle droit?—R. Angle droit à 90 degrés.

Finally Choquette, speaking of the Chimney represented in figure 8, said that the same remarks applied (p. 288).

Referring to the mechanism in a machine having two spiral conveyors as model P13, conformable to the mechanism indicated in patent exhibit P10, to set in motion the conveyors, Choquette stated that it would not be practical (p. 321):

R. J'ai déjà dit que ce mécanisme n'est réellement pas pratique, parce qu'il offre des objections à la pratique même, empêchant la neige de pénétrer vers l'intérieur de la turbine.

Regarding the modification shown in figures 8 and 9 of the drawings annexed to the specification of patent P10, Ostrander, chief engineer of Klauer Manufacturing Company, owns that it would not be entirely practical on account of the snow and ice forming on the mechanism in the centre of the casing and preventing the snow from entering into the fan casing. Perhaps I should quote a brief excerpt from the witness' deposition:

Q. From your knowledge and experience of the snow plow industry, is it not a fact that a construction of that type would not be practical on account of the snow and ice forming on this mechanism in the centre of the casing and forming an obstruction, preventing the snow from freely entering into the fan casing?—A. I think that is true. That would represent an obstruction and perhaps be a little hard to arrange in there and to cover.

Q. In other words, it would not be practical?—A. Not entirely, I would think.

Ostrander admitted that neither Klauer Manufacturing Company nor any other company or person ever constructed a snow removing machine with a mechanism similar to the one shown on figures 8 and 9 of said patent (pp. 66 and 67).

This evidence establishing the inoperativeness and want of utility of the snow remover made in conformity with patent exhibit P10 is unchallenged.

Counsel for defendant further argued that there is lack of subject-matter in this patent. The combination submitted by Curtis is, in my view, the juxtaposition of elements which were old and well known and it did not require the exercise of inventive ingenuity. I think that any skilled and competent mechanic could have done it. See *Durable Electric Appliance Co., Ltd.* v. *Renfrew Electric Products, Ltd.* (1).

Anglin, C.J.C., who delivered the judgment of the Supreme Court, said (p. 9):

> The ground on which the Court of Appeal has rested its judgment is, we think, sound. As the case appears to us, there is nothing new in the appellant's device; no novelty is disclosed, notwithstanding the ingenious argument of appellant's counsel to the contrary. Admittedly all the elements of the plantiff's heater are old. The combination of them effected by him may be new in one sense—that is, precisely such a combination may not have been made before—but it is a combination the making of which did not involve any inventive ingenuity. Any competent and well-informed mechanic could readily have effected it.

Fox, in *Canadian Patent Law and Practice,* expresses the following opinion (p. 70):

> The success of a patented combination has, of course, much to do with the question of subject-matter. Its merit will depend largely upon the result produced and although the invention be small the court will be anxious to uphold the patent if the result produced is greatly beneficial.

The author refers to a number of decisions, of which the following in particular are, to a certain extent, relevant: *Hinks & Son* v. *Safety Lighting Co.* (2); *Patent Exploitation Ltd.* v. *Siemens Brothers and Co. Ltd.* (3); *Edison & Swan United Electric Light Co.* v. *Woodhouse & Rawson* (4).

I may add that the United States patent No. 1,389,727, granted to Clarence W. Yeiter (part of exhibit D44), seems to me anticipatory.

(1) (1926) 59 O.L.R. 527 (1928) S.C.R. 8.
(2) (1876) L.R. 4 ch. D. 607 at 615.
(3) (1904) 21 R.P.C. 541 at 549.
(4) (1886) 4 R.P.C. 79 at 106.

1944

WANDSCHEER ET AL. v. SICARD, LTÉE

Angers J.

In the circumstances, after giving the matter careful consideration and attentively perusing and annotating the evidence, I have reached the conclusion that the letters patent for invention bearing No. 253,159, granted to Harry D. Curtis on the first of September, 1925, for alleged new and useful improvements in snow removers, are irregular, invalid, null and void as between the parties herein and that consequently the defendant has not infringed them.

I shall now deal with the other patent in suit, viz. the one bearing No. 309,848, issued to Dan Wandscheer on the 31st of March, 1931, for alleged new and useful improvements in snow removing apparatus, pursuant to an application filed on June 10, 1929.

The feature of this patent which plaintiffs contend has been infringed is the one mentioned in the specification as a shearing element and generally referred to in the evidence as cutter bars or sometimes snow slicers.

The clause of the specification concerning this feature has been previously recited and I need not repeat it here.

I do not think that this element constitutes valid subject matter for a patent. Moreover, it was known to the public long before the aforesaid patent was issued.

The addition of cutter bars in front of a snow removing machine to cut the snow from the banks and cause it to fall ahead of the scoop shovel or of the spiral conveyors, as the case may be, does not, in my judgment, require the exercise of the inventive faculty but is merely the use of plain mechanical skill. The simplicity of the adaptation of a cutter bar on a snow removing machine is particularly evidenced by the incident which occurred at Dubuque, Iowa, during the week of November 20, 1927, when Ralph Stewart, General Foreman for the Minnesota Highway Department at the Duluth district, went to Dubuque to take delivery for the State of Minnesota of a "Snogo" snow removing machine shipped by Klauer Manufacturing Company. I deem it apposite to quote a passage of Stewart's testimony which appears to me pertinent and especially to the point (p. 98):

A. ... I had been plowing snow for three or four years for the Highway Department, and when the boss sent me to Dubuque to take delivery of this 'Snogo', I, of course, was curious to know what kind of machine

it was, and he did not seem to know; he told me it cost between ten and twelve thousand dollars, the latest piece of equipment in snow removal at the time, the last word, in fact.

Q. So you were very interested in this?—A. Yes, I thought all our snow problems were all solved; at that time, when we arrived at Dubuque, four or five men from the factory took us around the factory. In fact, they took me around the block with the machine and showed me how to operate it, and when we got back to the factory, I asked them what we were going to do with a machine like that in Minnesota, that did not seem like it was in the position, four or five feet high in front, and we had large drifts as high as fifteen feet deep. Some party, I don't remember his name, some one of the officials there, put on slicer bars.

Q. Put on slicer bars?—A. Yes.

Q. Did they explain to you how that was to be done?—A. He went into the shipping room where he picked up a piece of 1 x 4, I imagine, crating lumber, and held it up on the casing on the side of the 'Snogo' in such a manner as he told us to mount it.

Q Perhaps if you state just where he told you to mount it?—A. Well, he told us to mount it on the left side or that happened to be the particular place that he held the 1 x 4, on the left side of the casing.

Stewart declared that Ferguson, to whose testimony I shall refer in a moment, was present when this conversation took place. According to him, the suggestion to put a cutter bar was made by one of a group of four or five men from Klauer Manufacturing Company whose name he did not recall (dep. pp. 99 and 100).

The "Snogo" machines in the Klauer Manufacturing Company's plant at the time were not equipped with cutter bars (p. 103).

In reply to questions from counsel for defendant, Stewart made certain remarks which are material and are worth quoting (p. 104):

Q. Is it your feeling that party met the suggestion, just got that idea, and when you put to him the question as to how you would do in deep snow, that that was the solution that he offered spontaneously at that time?—A. Yes.

Q. He did not suggest, I presume, that the invention had already been made at that connection?—A. No, I did not hear anything of the invention.

Q. Or that the problem had already been studied at the time?—A. I doubt it.

Q. I presume he just expressed that as being the natural thing to do?—A. That is what he told us would be the solution.

Q. I suppose you also considered that to be the obvious thing to do? —A. That is right.

Stewart said he did not suggest to the representative of Klauer Manufacturing Company that the company should equip the machine with cutter bars before its delivery. He took it without the bars (p. 105).

1944

WANDSCHEER ET AL. v. SICARD, LTÉE

Angers J.

Percy Ferguson, Labour Foreman for the Minnesota State Highway Department for nearly twenty years, testified that he operated a snow plow every winter. According to him, the type used up to 1927 was the V-type plow. In the fall of 1927 the Department bought a two-auger "Snogo" rotary snow plow, a product of Klauer Manufacturing Company. He went to the company's plant, at Dubuque, to take delivery of the snow plow in the early part of November 1927; he drove it from Dubuque to St. Paul. He said that he met with difficulties in the operation of this plow on account of the very deep snow in some places, which was above the augers. He thought that a knife of some kind would be useful to cut through the snow and make it fall down in front of the machine. Perhaps I had better quote the witness' remarks in this connection (p. 5 *in fine*):

A. We had very deep snow in some places, and it was way above the augers, three or four feet sometimes, or more, and some places, where it was so deep, we would run under, tunnel under as far as we could, and back out, but it would not break down. We had to have men with shovels to break this down.

Q. To break the snow that would remain on top?—A. Yes.

Q. Above the tunnel formed by the machine?—A. Yes. In fact we got out and broke it down ourselves before we got men to help us. When we got to Willmar we had the blacksmith put on two bars, one on each side.

Q. On each side of what?—A. On each side of the augers, on the outside.

Q. Do you mean on the sides of the main casing?—A. Yes.

Q. Who suggested to you to install such bars?—A. No one. I could see what was needed on it. We had to have it.

Q. Well, what led you to think of installing those bars?—A. Well, I thought if we had something to cut, a knife of some kind to cut through that snow, it would fall down.

Q. It would fall down where?—A. Fall down so we could get it with the augers.

Ferguson said that the bars in question were installed by the blacksmith at the State shop at Willmar.

The witness then describes these bars and explains how they were installed. This occurred a week or ten days after Ferguson had left St. Paul, which would be about December 15 or 18, 1927. Ferguson asserted that he had never seen such bars previously.

1944

WANDSCHEER ET AL. v. SICARD, LTÉE

Angers J.

Asked if he had thought of taking a patent on them, he replied in the negative; I deem it expedient to quote a passage from his deposition (p. 9):

Q. You did not think of taking out a patent on that?—A. No, I did not.

Q. Why did you not?—A. Oh, it was such a simple operation.

In addition to the testimonies of these two independent and disinterested witnesses, there is the following statement by Sicard, who was asked if he had ever had the notion of seeking a patent on cutter bars (p. 89):

Je trouvais que c'était tellement de pure simplicité, je n'aurais jamais pensé de faire ce qui existait quand j'étais petit garçon.

It seems obvious to me that the cutter bars, or snow slicers as they have also been called, only required the use of ordinary mechanical skill and that they do not present that amount of inventive ingenuity which should be rewarded by a patent. In this connection reference may be had to the following decisions, although they can only serve as illustrations of the manner in which the Courts have treated various sets of circumstances and are not binding authorities to determine whether or not in any particular case there is present the essential feature of inventive genius: *Imperial Tobacco Company of Canada Limited et al.* v. *Rock City Tobacco Company Limited* (1); *The Crosley Radio Corporation* v. *Canadian General Electric Company Limited* (2); *Porter et al.* v. *Corporation of City of Toronto* (3); *Canadian Gypsum Company Limited* v. *Gypsum, Lime and Alabastine, Canada, Limited* (4); *Gillette Safety Razor Company of Canada Limited* v. *Pal Blade Corporation Limited et al.* (5); *Wright & Corson* v. *Brake Service Limited* (6); *Thomas* v. *South Wales Colliery Tramworks and Engineering Company Limited* (7).

See also: *Lister* v. *Norton Brothers and Co.* (8); *Savage* v. *D. B. Harris and Sons* (9) (per Lopes, L.J.); *Lyon* v. *Goddard* (10) (per Bowen, L.J.).

(1) (1936) Ex. C. R. 229; (1937) S.C.R. 398.
(2) (1935) Ex. C.R. 190; (1936) S.C.R. 551.
(3) (1936) Ex. C.R. 217.
(4) (1931) Ex. C.R. 180.
(5) (1932) Ex. C.R. 132; (1933) S.C.R. 142.
(6) (1925) Ex. C.R. 127 at 131.
(7) (1924) 42 R.P.C. 22 at 28.
(8) (1886) 3 R.P.C. 199 at 205.
(9) (1896) 13 R.P.C. 364 at 370.
(10) (1893) 10 R.P.C. 334 at 346.

1944

WANDSCHEER ET AL. v. SICARD, LTÉE

Angers J.

Let us now consider the question of anticipation. The proof clearly shows that cutter bars were in use and known to the public prior to the issue of patent No. 309,848 to Dan Wandscheer and to the application therefor, filed on June 10, 1929, as appears by exhibit P12.

The evidence discloses that cutter bars were used by Sicard since 1924 on his snow removing machine of the scraper type.

Eugène Lacombe, automobile salesman for Garage Fortier, Limitée, of Montreal, testified that he commenced working for the said firm as a mechanic in the shop in December 1923. In the fall of 1924 he saw a snow removing machine of the scraper type supposedly built by Sicard, which was brought to the Fortier garage for storage. The machine was used for demonstration purposes, in opening roads. Shown the picture of a machine appearing on page 4 of the catalogue exhibit P7, Lacombe recognized it as the type of machine to which he had referred.

Asked if the machine in storage in the Fortier garage was exactly the same as represented in exhibit P7 or if it had something more—"quelque chose de plus"—Lacombe gave the following information (p. 55):

R. Il y avait certainement quelque chose de plus. Il y avait certainement le couteau de côté, et ils l'ont améliorée en avant. Les deux années qu'elle a été en 'storage', ils sortaient, ils amélioraient cela. Je sais que celle-là n'a pas de barres à côté du couteau. J'ai manqué de perdre ma 'job', par rapport à cela. C'est pour cela que je m'en rappelle.

D. Qu'est-ce que vous voulez dire par cela?—R. C'est par rapport que j'ai reculé dessus avec un truck.

D. Nous ne sommes pas intéressés dans cette histoire là. Maintenant, la première fois que vous avez vu cette machine à neige, dans l'automne 1924, comme vous avez dit, est-ce qu'il y avait un couteau dessus?—R. Oui, monsieur.

D. Couteau sur le côté?—R. Oui, il y avait un couteau sur le côté.

At the request of counsel for defendant, Lacombe described in detail the cutter bar in question and, with the aid of the picture on page 4 of exhibit P7, indicated its position in front of the machine to the right of the driver. If these particulars are not of first importance, they show that Lacombe had occasion to examine minutely the Sicard snow remover fitted with a cutter bar and that he evidently did so.

1944

WANDSCHEER ET AL. v. SICARD, LTÉE

Angers J.

Adélard Turcot, mechanic presently in the employ of the Roads Department of the province of Quebec, declared that he worked for Sicard beginning in August 1926. In the winter of 1926-1927, he drove for him a snow removing machine of the scraper type. Shown the machine represented on page 4 of exhibit P7, Turcot said that he recognized it as the one he operated for Sicard. This machine was used for demonstration purposes. Turcot asserts that it had a cutter bar on its right side (p. 33). He describes it thus (p. 34):

R. Exactement la longueur, le tour du 'scraper' qui dépassait le 'scraper', le premier devait avoir une quinzaine de pouces qui dépassaient, parce que je l'ai défait moi-même, je l'ai crochi, je l'ai envoyé pour le faire dresser, mais on se servait du 'scraper' pas de couteau, quand il était enlevé pour réparation.

D. Vous dites que le premier couteau qu'il y avait dépassait environ 15 pouces le côté de l'appareil?—R. Au-dessus du côté du 'scraper'.

D. Au-dessus du côté du 'scraper', c'est-à-dire du côté de l'appareil?—R. Oui, du côté de l'appareil.

D. En avant du souffleur?—R. En avant du souffleur.

Asked what was the purpose of this cutter bar, Turcot replied (p. 34):

R. C'était fait en partie pour couper la glace et la neige dure quand on donnait des démonstrations, ils nous envoyaient toujours dans les chemins les plus durs, dans les chemins abandonnés, et cela prenait absolument un couteau pour couper le côté de la neige.

D. C'est-à-dire dans les bancs de neige?—R. Dans les bancs de neige, qui servaient à retomber la neige dans le souffleur, quand il y en avait trop haut.

Turcot declared that he drove snow removing machines for Sicard nearly every winter since 1927. During the winters when Sicard did not sell machines, witness worked in the shop as mechanic. When Sicard had a demonstration to do with one of his machines, Turcot said that he usually drove it.

Turcot believes that it was in the fall of 1927 that the first machine of the scraper type was sold to the city of Outremont. He delivered it himself and he was there for a period of about two months. This machine was equipped with a cutter bar.

Counsel for defendant exhibited to the witness the drawing filed as exhibit D4 and asked him if he recognized thereon the cutter bar he had mentioned. Turcot said that he did and he indicated the figure on the left hand side of the drawing above the words "front elevation".

1944

WANDSCHEER ET AL. v. SICARD, LTÉE

Angers J.

Charles-Auguste Larose, foreman for Sicard Limitée since 1936, testified that he had previously worked for the same firm in 1929, 1930 and 1931.

Between 1927 and 1929 he was employed by Louis Lirette, blacksmith. He said that he saw a Sicard snow removing machine of the scraper type in 1927. He made various parts of this machine for Sicard. Shown the machine reproduced on page 4 of exhibit P7, he recognized it as the type of machine to which he referred (p. 213). He remembered that the machine which he repaired in 1927 had a cutter bar on the right side.

Asked what he had done on it, Larose replied (p. 214):

R. Dans le côté, il y avait des bras qui avaient été crochis, les bras pour tenir le 'scraper', et le couteau était crochi. On l'a redressé, on a travaillé une autre partie dans ce côté de la machine, une espèce de garde qu'on a posée en même temps.

* * * * *

D. Mais quant au bras tranchant, savez-vous quelles sont les réparations que vous avez faites sur ce bras tranchant?—R. On l'a redressé.

Counsel for defendant exhibited to the witness an account of Louis Lirette for work done on February 7, 1927, and asked him if it included the repairs made to the cutter bar; Larose answered that it did (p. 214). The account was filed as exhibit D10.

Larose described the cutter bar in detail and explained how it was fixed to the machine; I do not think that this information has any materiality herein. Looking at exhibit D4, Larose said that the cutter bar was installed on the machine in the manner shown in this drawing.

He stated that in 1929, whilst in the employ of Sicard limitée, he was instructed by Sicard to demolish the machine, which he did with the aid of Prime Durocher during the summer of 1929. The machine at the time had the same cutter bar.

Prime Durocher, mechanic in the employ of Sicard limitée since the beginning of May 1927, said that in June of the same year he built a miniature model of snow removing machine with spiral conveyors pursuant to instructions received from Sicard. He describes the model fully; I do not believe that this description has any relevance to the question at issue.

He said he built a regular size model of this machine with spiral conveyors in 1928 (p. 234). He believes that he put cutter bars on both sides of the machine (p. 236).

Shown the prospectus filed as exhibit P6, Durocher stated that the cutter bars were put on the machine in the manner indicated thereon.

He declared that the machine built in 1928 was sold the following year to the city of Outremont.

He knew that snow removing machines of the type he built in 1928 were sold by Sicard limitée in 1929, 1930 and 1931 after the sale to the city of Outremont.

Durocher declared that he was instructed by Sicard in the summer of 1929 to dismantle a snow removing machine of scraper type. He remembered that this machine was equipped with a cutter bar on its right side (pp. 240, 241 and 243). He said that the machine reproduced on page 4 of exhibit P7 is similar to the one which he dismantled.

There follows a detailed description of the cutter bar in question, which, as I think, offers no particular interest in connection with the point now under discussion.

Asked if the cutter bar was installed as shown on the drawing exhibit D4, Durocher replied in the affirmative.

Sicard testified that in the winter of 1924-1925 he put a cutter bar on his machine used for demonstration purposes. Asked why he had installed a cutter bar and how he had picked up the idea of doing it, Sicard replied (p. 81):

R. Cette idée m'est venue en 1898. J'ouvrais les chemins l'hiver pour les mettre carrossables pour le printemps et on se servait d'une charrue avec couteaux pour trancher la neige, ouvrir nos chemins, c'est là-dessus que l'idée m'est venue. Seulement, le couteau, au lieu d'être en ligne, la pointe était en bas. Et pour labourer notre neige, rien que la peine de la mettre en l'air. Curieuse de coincidence, c'est à peu près la même forme de couteau, la même chose, seulement un peu plus long.

D. Ce couteau, l'avez-vous installé sur cette machine après vous être servi de la machine pendant quelque temps ou si vous l'avez mis immédiatement au début?—R. Au début, à peu près, parce que j'avais déjà l'expérience de mon premier 'scraper' dans le côté qui coupait mais qui n'était pas aussi haut. Au début, au premier essai, comme on était toujours à travailler dans le côté du chemin, dans des remparts de neige, j'ai posé de suite le couteau après le premier essai qui m'était bien familier.

1944

WANDSCHEER ET AL. v. SICARD, LTÉE

Angers J.

Explaining why he had put the cutter bar on the right hand side of the machine, Sicard stated (p. 82):

R. C'est parce que j'avais plus besoin du côté droit, on travaillait toujours à la droite pour rencontrer. Sur le chemin, on marche à la droite, je prenais toujours ma neige à la droite, la bande de neige de la droite, près des clôtures si vous voulez, c'est toujours plus élevé. Cela nous demandait plus haut pour aller chercher la neige. C'est pour cela que je l'ai installé rien que d'un côté. Je trouvais que ce n'était pas nécessaire dans le temps de le mettre à gauche.

Sicard said that the cutter bar was affixed to the machine in the manner indicated on the drawing exhibit D4, prepared by Choquette in accordance with the instructions which he gave him. It may be expedient to quote a passage from his deposition in this respect (p. 86):

D. Je demande si dans la réalité le bras tranchant était installé tel qu'indiqué sur le dessin D-4?—R. Oui, monsieur.

D. Par conséquent, un peu incliné vers l'avant?—R. Incliné vers l'avant, peut-être un peu de côté, mais très peu.

D. Quand vous dites un petit peu de côté, mais très peu, vous voulez dire un petit peu vers la droite sur le côté de la machine?—R. penché sur le côté de la droite de la machine, penché en dehors de la droite.

D. Regardant à la vue d'en haut qui est contenue sur ce dessus D-4, du côté gauche, dans le bas, et qui est intitulé 'Top view', où l'on voit un côté de la machine, et où on voit aussi le couteau qui incline légèrement vers la droite. Est-ce que c'était penché comme cela.—R. C'est bien cela.

D. Et vous avez donné instructions à M. Choquette de préparer le dessin de cette façon-là?—R. Oui, monsieur.

Sicard stated that he used this snow removing machine of the scraper type, fitted as we have seen with a cutter bar, during the winters of 1924-1925, 1925-1926 and 1926-1927 (p. 87).

Zygmund L. Phillip, purchasing agent and assistant secretary at the Imperial Machine Company, of Minneapolis, State of Minnesota, testified that the main product of his company is snow plows. He has been connected with the company since August 1926.

According to him Imperial Machine Company built snow plows for the Rotary Snow Plow Company up to 1928 or 1929 when the latter became amalgamated with the former; since that date the Rotary Snow Plow Company has been owned and operated by the Imperial Machine Company.

Phillip said that the records show that the Imperial Machine Company and the Rotary Snow Plow Company had been manufacturing or selling snow plows since 1922.

Asked to give a general description of the type of snow plows manufactured by the Imperial Machine Company for the Rotary Snow Plow Company in or around the year 1927, the witness gave the following information (p. 4):

A. At that time we built a rotary type plow. It was a V-type rotary with two rotors, one on each side, discharging snow both ways, right and left, housed in by a chute, with a slicer blade alongside of the rotor and slightly ahead of the rotor.

Q. Was there a slicer bar on each side, or only on one side of the plow?—A. It could be attached on each side. In some cases we attached them only on the righthand side for widening purposes.

Q. In other cases, on both sides?—A. In other cases on both sides—in very few cases on both sides at that time.

Shown a circular of the Rotary Snow Plow Company illustrating a snow plow and asked if it represents a machine built by the said company and, if so, in what year, Phillip replied that this snow plow was designed and sold in about the year 1929. This circular, marked on the examination of witness out of Court as exhibit D18, was produced at the trial as exhibit D32.

Phillip said that his company had a circular showing the type of snow plow sold in 1927 but that he had no copy of it. He explained the difference between the model of 1927 and the one illustrated in the circular exhibit D32 by stating that the model of 1927 had a stationary chute and straight slicer blades, whilst the other model has a reversible chute. In addition to this change in the chute there was a slight modification in the mould-board. Dealing with the slicer blade, Phillip stated that on the previous models it "was bolted on with an angle, on top of the chute, extending up over the rotor and slightly ahead of the rotor" (p. 5).

He declared that slicer bars were adapted to snow plows of the Rotary Snow Plow Company in January 1927. According to him, the slicer bars were not put on all of the snow plows produced by the Imperial Machine Company at that time, but they were put on quite a number of them. In addition, slicer bars were sold to dealers or to customers who wished to put them on the plows themselves (p. 7).

1944

WANDSCHEER ET AL. v. SICARD, LTÉE

Angers J.

Phillip produced a drawing which he said he traced in the files of the Rotary Snow Plow Company, dated November 16, 1926, marked by the reporter as exhibit D19 (exhibit D33 at trial), representing the original slicer blade used by the company starting in the month of January 1927. He said that the bottom part of this drawing, which is in two sections, shows the snow plow before the slicer blade was attached to it. Some time later the upper portion was pasted at the top so as to have a drawing showing the slicer blade affixed to the snow plow.

Describing this slicer blade and explaining how it is fastened to the snow plow, Phillip made the following observations (p. 9):

A. The slicer blade is held by an angle iron either bolted or molded over the top of the mold board, protruding above and ahead of the rotor. To the angle iron there is bolted a slicer blade which slices the snow banks.

Q. I take it then that the slicer blade itself does not extend downward? —A. Well, that all depends on the length of this bar, this blade itself. If you check the length of this bar you will find that this bottom point probably comes down below the top of these rotors.

Q. It does not extend farther down?—A. No, it does not.

Q. So the slicer bar is intended to take the upper portion of the snowbank?—A. That is right.

Asked if he had traced in the company's books and files sales of these cutter bars or snow slicers made in January or February 1927, Phillip said that he did and he filed various documents: orders, invoices, drawings and letters, showing sales thereof made in January and February 1927: see exhibits D34, D36, D37, D39, D40, D41 and D42.

Anticipation also arises from the following prior patents:

(*a*) United States patent No. 379,441, issued on March 13, 1888, to Lewis John Bergendahl, for improvements in railway-track clearers or snow-plows, pursuant to an application filed on November 3, 1887.

The specification contains the following description of the member of the machine whose object is to cut the snow and feed it into the revolving drum:

Side cutters or doors, F, are set at any required angle by means of levers f1 and connecting-rods f2, and are retained and locked in position by means of racks f3, of which one only is shown in Fig. 1.

Further on the specification, outlining the operation of the machine, adds:

. The operation of my plow is as follows: Doors F are set as required, then locked in position by means of levers f1 and rack f2, and then drum S is caused to revolve rapidly. Meanwhile cutters f at the front of the drum will adjust themselves according to the direction of rotation of said drum S. Now, if the plow be propelled forward through a snow-bank, the flaring hopper in front of drum S will scoop in the snow, which will be cut up and thrown into the several chambers formed by the radial plates R, as before described. From thence the snow will be hurled by centrifugal force through the top opening of casing B.

A reference to figure 1 of the drawings indicate clearly the purpose of these "side cutters".

(*b*) United States patent No. 71,249, issued on November 19, 1867, to Peter Von Lackum, for an improved snow-plow (date of application not mentioned).

Describing what the patentee calls "bars", which in this invention play the part of the cutter bars or snow slicers involved therein, the specification says:

At the front of the frame A1 I secure, on each side, a strong vertical iron bar, a; and these are connected at the top by a similar cross-bar, b; and these bars are held securely in place by means of the side-braces c and horizontal brace e, arranged as represented in the drawing, there being also a curved bar, d, having its lower end secured to the incline, nearly in line with the side-bars a, and its upper end secured to the horizontal brace e, the front edge of all these bars being brought to an edge on their front, for the purpose of enabling them to cut the hard snow-drifts which frequently form on the railway tracks in high latitudes.

It seems obvious to me that these vertical bars serve the same purpose as the cutter bars which are the object of the patent exhibit P12.

(*c*) United States patent No. 858,616, issued on July 2, 1907, to James William Mowbray, for improvements in snow-plows, following an application filed on March 20, 1907.

The specification forming part of this patent provides for "cutting knives" and describes them as follows:

E are cutting knives, which are designed to sever the snow to be raised from the bank of snow or drift. The front edge of the cutting knife is on a vertical plane at right angles to the track surface, but the knives flare outwardly laterally from the bottom to top and are wider apart at the bottom than at the top. The outward flare of the knives is so arranged that the plane of the knives is co-incident with the plane of the flaring sides of the scoop as will be understood on reference to Fig. 2, so that the snow is cut or severed with outwardly inclined walls at each side.

1944

WANDSCHEER ET AL. v. SICARD, LTÉE

Angers J.

Figures 1 and 2 of the drawings show these cutting knives distinctly.

Copies of these three patents are included in exhibit D45.

Counsel for plaintiffs argued that the cutter bar used by Sicard on his machine, assuming that there was one, is different from the one adopted by Dan Wandscheer and does not comply with the requirements of patent exhibit P12 because the Sicard cutter bar is slightly inclined outwardly and cannot perform the same function as a vertical one and cut the snow in a level bank.

Counsel for defendant in reply pointed out that claims 6 and 9 of patent exhibit P12, which are the only ones referring to a vertical plane, use the expression "in substantially vertical planes". He submitted that the cutter bar in the Sicard machine was in fact arranged in a substantially vertical plane. He also argued, of course, that the Sicard contrivance fulfills the same purpose as that of the patentee Dan Wandscheer.

In my opinion, the cutter bar put on the Sicard snow removing machine filled the same function as the one mentioned in patent exhibit P12. It cut into the upper layers of snow so as to cause this snow to fall in front of the conveyors and be swept back into the fan casing.

After mature deliberation, I do not think that the contention of counsel for plaintiffs is tenable. Anticipation seems to me obvious.

Before ending these notes, I wish to say that I do not believe that the intimation by plaintiffs' counsel that Sicard abandoned the scraper type of snow plow and adopted the spiral conveyor snow remover after he had seen a "Snogo" apparatus, shipped to Montreal towards the end of December 1927 or the beginning of January 1928, is founded. In fact the "Snogo" machine in question reached Montreal shortly before Gerrit Wandscheer and William H. Klauer arrived there, probably a day or two before the latter sent a telegram to W. E. Klauer, at Dubuque, Iowa, stating that a lower auger had been broken and asking to send one by express to Batchelder, Chicago, immediately. A copy of this telegram, dated January 6,

1928, exhibited to Gerrit Wandscheer was marked by the reporter as exhibit C and produced at trial as exhibit P9c —see deposition Gerrit Wandscheer, pp. 2, 3 and 4.

A few brief extracts therefrom may be convenient (p. 2):

Q ... Are you aware that there was a Snogo machine at one time shipped to Montreal, Canada?—A. Yes. It was up there when I got there, I know that.

Q. Well, when did you first go to Canada?—A. That was either the latter part of December 1927 or the very first part of January 1928.

Q. And what was the purpose of your going to Canada at that time? —A. To start this plow out for the Klauer Manufacturing Company.

* * * * *

Q. And did the plow have cutter bars on it, when you arrived?— A. No, it did not.

Q. Were cutter bars installed on it later?—A. There were. I carried those cutter bars with me all the way down there, that is, from one depot to the next, a set of bars, and I put them on, myself, the minute I got there.

Q. And that would be, you say, whether in the latter part of December, 1927, or just after the New Year in 1928—A. Well, when I put them on, I should judge that was the first part of January.

Q. In 1928?—A. Yes.

Q. Was anybody with you on that visit to Canada?—A. Mr. William H. Klauer was with me.

Then on page 3:

Q. In order to fix the date in your mind as to when this visit took place do you recall if you or Mr. Klauer sent any telegram that might be traced?—A. Yes, I do.

Q. Who sent any telegram?—A. Mr. Klauer did.

Q. And where did he send it?

* * * * *

A. To the Klauer Manufacturing Company at Dubuque.

Q. Were you with Mr. Klauer when the telegram was sent?—A. Yes, I was.

The telegram was then shown to the witness who identified it.

Now the evidence shows that Sicard commenced to busy himself with a spiral conveyor snow remover in June 1927, when he and his employees constructed a miniature model: dep. Sicard, p. 97; dep. Durocher, p. 226.

At page 97 Sicard makes the following statement:

D. Quand avez-vous commencé à vous occuper du problème de machines à neige avec spirale?—R. En 1927, dans le mois de juin.

D. En juin 1927, qu'est-ce que vous avez fait en juin 1927, à ce sujet-là?—R. On a fait un petit modèle, comme on pourrait dire miniature

D. Quand vous dites 'on a fait', de qui parlez-vous?—R. Moi-même, avec mes employés.

1944

WANDSCHEER ET AL. v. SICARD, LTÉE

Angers J.

Sicard then explains in detail how this model was made. I do not think that it is opportune to reproduce here these explanations which are rather lengthy.

Durocher, who said that he commenced to work for Sicard in May 1927, corroborated the latter's testimony in this connection. I may perhaps quote a short passage from his deposition (p. 226):

D. Avez-vous eu quelque chose à faire dans la construction d'un modèle miniature de machine à neige?—R. Oui, monsieur.

D. Est-ce vous qui avez construit ce modèle miniature?—R. Oui, sur demande de M. Sicard.

D. D'après les renseignements et les instructions de qui avez-vous construit ce modèle?—R. De M. Sicard.

* * * * *

D. Quand ce modèle miniature a-t-il été fait par vous?—A. A peu près en juin, je crois.

D. De quelle année?—R. 1927.

Durocher also describes at length the different features of this model; I do not deem it useful to quote this description.

After carefully perusing and annotating the evidence I have come to the conclusion that claims 6, 7, 8, 9 and 10 of the letters patent for invention No. 309,848 granted to Dan Wandscheer on the 31st day of March, 1931, for alleged new and useful improvements in snow removing apparatus, the said claims relating to the shearing element called a cutter bar or blade in the last paragraph but one of the specification and cutter bars or plates in claims 7, 9 and 10 is concerned, are irregular, invalid, null and void as between the parties herein and that consequently the defendant has not infringed them.

For the aforesaid reasons there will be judgment dismissing the action, with costs against plaintiffs.

Judgment accordingly.

BETWEEN:

SECURITIES & MONEY TRANSPORT INC. ..... } SUPPLIANT,

AND

HIS MAJESTY THE KING..... RESPONDENT.

1943
Dec. 14
1945
Jan. 5

Crown—Collision—Street intersection—Traffic lights—Driver crossing with green light in his favour has right of way—Negligence—Driver crossing against red light—Army convoy not given right of way independently of traffic light—Liability of Crown.

Suppliant's truck, in charge of one of its employees, while being driven in a northerly direction on St. Hubert Street in the city of Montreal, P.Q., approached Sherbrooke St., and as the traffic light there situated facing the driver of the truck was green, he proceeded to cross the intersection. When the crossing had been nearly completed the truck was struck by another truck owned by the respondent and operated in the service of His Majesty's armed forces and in charge of one of His Majesty's servants, a private in the Toronto Scottish Regiment, which truck was proceeding on Sherbrooke St. in a westerly direction.

Suppliant seeks to recover from the respondent for damage done to the truck and also for loss of its use while being repaired.

Respondent contended that the army truck was one of a convoy three cars of which preceded the one with which suppliant's truck collided, and that suppliant's truck attempted to cut through the convoy and that respondent's truck had the right of way.

The Court found that the traffic light on Sherbrooke St. facing the driver of suppliant's truck was green when it entered the intersection and also that the army convoy was proceeding without an escort.

Held: That cars in an army convoy do not have the right of way in crossing an intersection independently of the traffic light facing them; the fact that the first car of the convoy has crossed the intersection on the green light does not entitle the following cars to cross if the light has changed.

2. That a driver entering an intersection or crossroads when the traffic light is in his favour has the right of way over vehicles entering the same intersection or cross-roads from his right or left.

PETITION OF RIGHT by suppliant herein to recover from the Crown damages for loss resulting from a collision between suppliant's vehicle and one owned by the Crown due to the alleged negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

1945

SECURITIES & MONEY TRANSPORT INC. v. THE KING

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

Hugh O'Donnell, K.C. for Suppliant.

Leon Garneau, K.C. for Respondent.

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

ANGERS J. now (January 5, 1945) delivered the following judgment:

By its petition of right the suppliant claims from His Majesty the King the sum of $318.31, representing damages suffered as the result of a collision between a truck owned by it and a truck belonging to the respondent, on February 14, 1942, at about one o'clock p.m., in the circumstances hereinafter related.

The suppliant in its petition alleges in substance:

on February 14, 1942, at about one p.m., when the streets were clear and the weather fine, a truck owned by the suppliant and then in charge of one of its employees, a competent chauffeur, was being driven in a northerly direction on St. Hubert street, in the city of Montreal, at a moderate speed and in a prudent manner, in compliance with the provisions of the Motor Vehicles Act of the Province of Quebec and all regulations concerning traffic;

as the suppliant's truck approached the intersection of St. Hubert and Sherbrooke streets at low speed, the traffic light situated thereat facing the driver of the suppliant's truck was green and accordingly the said driver drove his truck into the said intersection and proceeded to cross it, the said truck being then in second gear;

the suppliant's truck had almost completed the crossing of the intersection, being near the northeast corner thereof, when it was struck on the right front side by another truck, the property of the respondent, bearing Ontario license No. 694F (1941), then operated in the service of His Majesty's armed forces and in charge of one of His Majesty's servants, viz. B-76885, Private Boorman, A.E., Toronto Scottish Regiment (MG) C.A. Att'd. C.M.G.T.C.,

A-17 Staff, acting within the scope of his duties as a servant of His Majesty under the supervision of the Department of National Defence;

at the time of the collision His Majesty's truck was proceeding from east to west on Sherbrooke street at a reckless rate of speed, having entered the intersection suddenly, without warning and against the direction of the traffic light which was showing red, and struck the suppliant's truck throwing it towards the west;

the said collision and all damages resulting therefrom are wholly attributable to the negligence, imprudence, lack of care or want of skill of His Majesty's servant, an incompetent and reckless driver inasmuch as:

(*a*) he was operating His Majesty's truck at a reckless and illegal rate of speed when approaching and entering the said intersection;

(*b*) he entered the said intersection when the traffic light was showing red against him;

(*c*) he did not have his truck under control and was not keeping a proper lookout;

(*d*) notwithstanding the fact that the suppliant's truck had the right of way, he endeavoured to proceed across the intersection;

(*e*) he did not immediately stop his truck when the danger was apparent;

(*f*) the brakes of His Majesty's truck were defective and the said truck was not in a good state of repair and mechanical condition;

immediately after the collision, the driver of the respondent's truck acknowledged that the traffic light was showing red against him as he approached the intersection and claimed that he was entitled to cross it notwithstanding this fact;

as a result of said accident, the suppliant has suffered damages in the amount of $318.31, as the frame of its truck was badly twisted and the radiator, radiator grill, headlights and bumper were broken and bent and the motor block cracked, repairs thereto having been effected in the said amount.

1945

SECURITIES & MONEY TRANSPORT INC. v. THE KING

Angers J.

In his statement of defence the respondent denies all the allegations of the petition of right and pleads in substance as follows:

on the date in question the motor car belonging to the respondent was being driven as part of a convoy proceeding westward on Sherbrooke street;

the suppliant's car was being driven on St. Hubert street from south to north;

there were three cars in such convoy preceding the one with which the suppliant's car collided;

the person in charge of suppliant's car, had he kept a proper lookout, could not help seeing the several cars forming the convoy proceeding westward on Sherbrooke street;

such cars, and in particular that which collided with the suppliant's car, were travelling at a distance of about 15 to 20 feet apart on the right side, i.e. the north side of Sherbrooke street, at a moderate speed, in accordance with traffic regulations;

instead of waiting until all the cars composing the convoy had passed St. Hubert street, the person in charge of suppliant's car attempted to cut through such convoy in violation of the rules of traffic and of elementary prudence and his car ran into and struck the respondent's car;

moreover it is untrue that, at the time suppliant's car attempted to cross Sherbrooke street, there were green lights allowing him to make such crossing;

the respondent's car had the right of way and the suppliant's car should have stopped before attempting to cross Sherbrooke street;

the suppliant's car was proceeding at an illegal and reckless speed and gave no warning of its approach;

if suppliant's car was damaged as a result of the collision, the suppliant has only itself to blame;

the accident was caused by the sole fault, imprudence and lack of skill of the person driving suppliant's car;

the respondent is not liable towards the suppliant for any damages that may have been caused to its car and, in any event, the amount claimed is exaggerated;

the respondent reserves his right to recover from the suppliant the damages suffered by his car.

In its reply the suppliant admits the allegation of the defence that its car was being driven on St. Hubert street from south to north, denies or joins issue with the other allegations thereof and says that the reserve by the respondent of his right to recover from suppliant the damages suffered by his motor car is irrelevant, the suppliant averring that the respondent has suffered no damages.

I deem it apposite to summarize briefly the evidence.

Frederick Russell, manager of the Three Rivers branch of the suppliant company, testified that on February 14, 1942, he was in charge of a truck on a run for the Provincial Bank of Canada and that, at about a quarter to one o'clock, he was going north on St. Hubert street. He said that he came up St. Hubert hill, between Ontario and Sherbrooke streets, on second gear, that he was travelling at a speed of about ten miles an hour and that, as he arrived at the intersection of Sherbrooke street, the light was green.

He said that, when he was at the southeast corner of Sherbrooke and St. Hubert streets, he saw, at a distance of approximately 50 feet, a truck proceeding west on Sherbrooke street.

He stated that, whilst he was crossing Sherbrooke street, his truck was hit at the back of the right front wheel. He asserted that after the collision he noticed that the traffic light was still green.

Russell declared that he got out of his car and asked the driver of the army truck why he had not stopped and that the latter replied that he was not obliged to stop because he was in a convoy. The witness observed that with a convoy there is generally an escort and said that on the day of the accident there was none.

Russell stated that the impact was very heavy and that, after the accident, his truck was facing west. He added that he tried to avoid the collision by turning to the left.

He said that he had seen three army trucks crossing St. Hubert street on the green light but that, when he reached Sherbrooke street, the light had turned green in his favour.

According to him the collision took place near the northeast corner of Sherbrooke and St. Hubert streets.

1945

SECURITIES & MONEY TRANSPORT INC. v. THE KING

Angers J.

Russell stated that after the collision his truck was taken to the International Harvester Company of Canada Limited for repairs. He produced as exhibit 1 two bills of the latter, dated April 6, 1942, one being for $292.31 and the other for $3.04. He also produced as exhibit 2 a bill of Peel-Windsor Garage Inc., dated February 1942, for $26. Russell said that while his truck was being repaired the suppliant had to rent a car and that the bill exhibit 2 is for the rental.

He declared that the army truck did not moderate its rate of speed when arriving at the intersection of St. Hubert street and that it did not give any signal.

In cross-examination Russell said he did not think that the respondent's truck formed part of a convoy. He admitted that he saw three cars passing, but stated that there was no car behind the one involved in the collision. He asserted that the traffic light was green for him. He denied having tried to cut through a convoy, as he did not think it was a convoy. According to him a convoy is generally escorted and there was no escort on that occasion. He submitted that he had the right to cross Sherbrooke street as the light was in his favour.

Russell said that, when he was coming up the hill of St. Hubert street, he was going at a rate of from 8 to 12 miles an hour. He admitted that he gave evidence before a military tribunal in the winter of 1942 and that he may have stated that his truck was going at a rate of from 12 to 15 miles.

Re-examined Russell declared that the army truck which struck his car was behind the other trucks of the so-called convoy; that it had lost the convoy by about 200 feet and that it was trying to catch up with it.

Michael J. Cassin, serviceman of International Harvester Company of Canada Limited, declared that the suppliant is a customer of his company.

Shown the invoices exhibit 1, he said that he saw the suppliant's truck when it was brought to the garage for repairs. He stated that the truck, before the collision, was in good working condition and that, after the collision, the frame was bent. In his opinion, the impact must have been heavy. He asserted that the truck was hit at the rear

of the right front wheel and that the only repairs made by his company were those rendered necessary by the collision. He stated that the truck was in his company's garage for four or five days.

In cross-examination, Cassin said that his company towed the truck to the garage as it could not be driven on its own power.

Albert Boorman, truck driver of the city of Toronto, province of Ontario, testified that on February 14, 1942, he was in the army, being a member of the "Toronto Scottish", a machine gun unit, and that on that day he was truck driver in a convoy, which was his ordinary post at that time.

He admitted that, on the day in question, he had a collision at the corner of Sherbrooke and St. Hubert streets, in Montreal, whilst driving an army truck. According to him, the truck was a Ford, but he could not remember whether it was a 30 cwt. or a 15 cwt. He was driving west on Sherbrooke street. He said that the collision took place at the intersection of St. Hubert and Sherbrooke streets, shortly after midday; he could not tell the exact time. He asserted that he did not see the suppliant's truck as he approached the intersection and added that he did not see it until his own truck had been struck. He emphasized the fact that his truck did not hit the suppliant's truck, but that it was the latter which hit his own. I think preferable to quote a passage from the witness' deposition:

Q. You saw the truck that you struck, as you approached the intersection?—A. No, sir; I never saw the truck until after I had been struck.

Q. You did not see the truck until after you had hit it?—A. Until after he had hit me.

Q. Well,—after the collision?—A. That is right.

Q. You did not see the truck before the collision?—A. No.

Q. Where were you looking?—A. Where I was going.

By the Court:

Q. You were going into the truck. You should have seen it?—A. Going into the truck? No, sir, I didn't go into the truck.

Q. Well, you hit it?—A. The truck hit me.

Asked if the front part of his car came into contact with the right front side of the suppliant's truck Boorman replied:

The left front fender of my truck was hit on the outside of the fender.

1945

SECURITIES & MONEY TRANSPORT INC. v. THE KING

Angers J.

And later:

Well, it was the left outside part of the front fender of my truck.

After the witness had restated that he had not seen the suppliant's car "until after he had hit", counsel asked him where he was looking; Boorman answered: "Where I was going, ahead."

He admitted that Sherbrooke street is about eighty feet wide at the intersection. He agreed with counsel that the suppliant's truck came from nowhere in front of him and he added:

The light was green when I was going across. Therefore, I didn't have to look right or left. The red light should be on for him. I had the green.

Counsel asked the witness if it is not a fact that the light was red when he started to cross the intersection; the latter consistently replied: "No, sir".

Boorman denied that he had an argument with the driver of suppliant's truck immediately after the collision. He stated that he offered him to tow the truck "off the intersection out of the road of the traffic" and that the latter refused.

Counsel reverted to the conversation between witness and the driver of suppliant's car and asked Boorman to relate it; I think it advisable to quote an excerpt from the witness' testimony:

Q. What was the discussion about the light being red against you? —A. It wasn't red against me.

Q. What was the discussion you had with the driver of the other truck, right after the collision? Do you remember that? You don't answer. You don't remember?—A. No, I can't say that I remember arguing about the light.

Q. You remember talking to him right after the accident, don't you? —A. Yes.

Q. But you don't remember what the discussion was about the light?—A. No.

Q. You don't swear that you did not talk about the light, do you? —A. No, sir.

Boorman declared that he was travelling at a speed of between 8 and 15 miles. I may say, as I observed it at the trial, that his estimate is very accurate.

He stated that his truck was at a distance of from 12 to 15 feet feet behind the car immediately ahead of him.

Asked if he was serious in that statement, Boorman replied affirmatively and supplemented his answer with these comments:

Because the Army sets a rule for convoys. You have got to stay a certain distance behind the truck ahead of you, and you are "brought up" if you don't.

He denied that he was considerably further than the distance mentioned behind the last of the military cars in front of him and that he was trying to catch up with them.

He also declared untrue the statement that he went into the intersection "at a good, fast clip". Asked how far his car had pushed the other one, i.e. the suppliant's truck, toward the west he replied: "It didn't push it very far".

Counsel pressed the point; I believe it expedient to quote a passage from the witness' deposition:

Q. Well, how far did it push it? Would you say fifteen feet?—A. No.

Q. Ten feet?—A. No, nor ten either.

Q. How many feet, then, according to you?—A. Well, I never stopped to measure it.

Q. Was it a light blow or a heavy blow?—A. It was only light.

This version does not agree with the previous statement of the witness that it was the suppliant's truck that hit his car.

In the circumstances I saw fit to ask Boorman which car had struck the other one. He corrected himself and modified his story, stating: "I would say, sir, the other car struck me".

Asked if his car came into contact with the other one, viz. the suppliant's truck, back of the right front fender of the latter, Boorman replied in the negative. He asserted that the damage to the suppliant's truck was on the front of the right front fender and not on the back of it. He said that he looked at the truck after the collision and that the only damage which he could see was "on the right front fender and around the radiator". According to him, the suppliant's truck was not seriously damaged and the blow was very light.

In cross-examination Boorman said that there were four or five cars ahead of his in the convoy and thought that

1945

SECURITIES & MONEY TRANSPORT INC. v. THE KING

Angers J.

there was one behind. He added that they were all military cars proceeding west on Sherbrooke street in a procession, with a distance of 12 to 15 feet between each.

He declared positively that when he reached St. Hubert street the light on Sherbrooke street was green and he contended that all the cars ahead of him crossed St. Hubert street on that green light.

Counsel for respondent asked him what traffic light was showing when the three or four cars—I may note that witness had previously mentioned four or five cars—ahead of him crossed St. Hubert street and he replied, eluding the question or perhaps missing the point: "When I crossed the intersection the light was green". Replying however to counsel for respondent, Boorman said that the other cars had preceded him and that all the cars were going at about the same rate of speed.

Boorman stated that the car which struck his car came on St. Hubert street from the south side of Sherbrooke street and that it struck the left front fender of his car.

He said that, judging from the impact, the truck which hit his car was going at 20 or 25 miles an hour.

Asked about his experience as a driver, Boorman declared that he had driven trucks for the last eight years.

Re-examined Boorman said that there were four or five cars ahead of him which crossed the intersection before he arrived there and that in order to do so the light must have been green. He repeated that the cars were going at a speed of between 8 to 15 miles an hour and admitted that the traffic light changes once in a while. He denied however that the light was red when his turn came to cross St. Hubert street.

He insisted that the speed of the car which came into contact with his was, at the time of the collision, judging from the impact, 20 to 25 miles an hour and that he had not seen it at all before the collision. Notwithstanding this speed, he reasserted that the impact was very light.

Raoul Giroux, heard on behalf of the respondent, testified that he had knowledge of the accident. He said that his car formed part of the convoy which included 9 or 10 trucks, and that he was the fifth or sixth one. According to him Boorman drove the truck which preceded his.

He stated that, when the first truck of a convoy reaches an intersection on a green light, it crosses and that the trucks which follow also cross.

He declared that his truck was at a distance of about fifteen feet behind the one driven by Boorman.

According to him the light was yellow when Boorman's truck crossed St. Hubert street, but it was green when the car reached the intersection.

He contended that the distance between Boorman's truck and the one which preceded it was fifteen feet. I do not think that the witness was in a position to so precisely estimate the distance.

He asserted that he saw the truck coming up St. Hubert at a speed of twenty-five miles an hour and does not believe that it reduced its speed when it reached Sherbrooke street. He added that it did not decrease its rate judging from the manner in which it struck Boorman's truck. He said that the suppliant's truck hit Boorman's truck on the front left fender and that the latter had reached the middle of St. Hubert street when the collision occurred.

In cross-examination the witness repeated that, when Boorman started to cross St. Hubert street, the light was green.

He asserted categorically that no one is supposed to cut across a convoy, adding that, even though the traffic light may change to red, all the cars of a convoy cross an intersection. He was evidently in a mood to pass judgment.

He restated that the light on Sherbrooke street turned yellow as Boorman's truck reached the middle of St. Hubert street.

He admitted that the convoy had no escort.

Albert Boorman, already examined on behalf of the suppliant, was recalled by the respondent.

He stated that the approximate distance between the truck he drove and the one which preceded him in the convoy was from 12 to 15 feet and that the distance between his truck and the one behind driven by Giroux was about 15 or 20 feet. He said that the statement made by one of the witnesses that there was a distance of 200 feet between his car and the one which was ahead of his is wrong.

1945

SECURITIES & MONEY TRANSPORT INC. v. THE KING

Angers J.

Asked if just before the accident all the trucks were following each other by short distances, witness replied in the affirmative and added that "all the convoy all the way through kept their same distance".

He asserted that the green light was on when he "hit the intersection". He stated that the light turned amber after the driver of suppliant's car had hit his truck. He contended that, at the time of the impact, he looked at the light and noticed that it was amber. He insisted that the light turned amber as soon as the suppliant's truck had hit his car.

He declared that the front of his car was just over the centre of the intersection when the impact took place.

He denied positively having told Russell, after the accident, that he did not have to stop for red lights.

Boorman said that he offered Russell to tow his car off the road and that the latter refused his assistance and told him that he would move it himself. He affirmed that the suppliant's car moved on its own power.

Shown the bill exhibit 1 and asked if all the work mentioned therein had to be done the car could have run on its own power. the witness replied in the negative, adding that it would have to be towed.

In cross-examination Boorman declared that he had operated a garage and heard of running a car on its battery for a few feet. He admitted that the suppliant's truck could have been moved off the intersection on its battery.

He noticed that the radiator of the suppliant's car was broken but he could not say if the engine block was also broken. He said that he did not look at it.

Counsel for the suppliant repeatedly asked the witness how far or how long before the accident he had made his last stop and was unable to obtain a satisfactory reply. The witness started to say that he could not name the street at which he had stopped because he did not know the city. Asked if it was two or three blocks to the east, that is before reaching St. Hubert street, he replied that he could not say how far it was.

Questioned as to the time or the distance his truck had been running when the collision occurred, whether it was ten minutes or two minutes or a mile or a quarter of a

mile, Boorman replied that he could not tell, adding "we kept going along". He finally stated that his last stop had been made more than five minutes before the collision; it seems convenient to quote a passage from his testimony (p. 20):

Q. Well, before the collision can you tell us, in time, how long you had been going,—two minutes or five minutes?—A. No, I would say the last stop I had made was more than that.

Q. It was more than five minutes?—A. Yes.

Q. Would it have been ten minutes away, to the east?—A. You are getting on the other side.

Q. No,—you were coming from the east, travelling west, weren't you? —A. Yes.

Q. And you hadn't stopped for five minutes or more before the collision?—A. I could not tell you just how long it was that I had not stopped; it is quite a while back now, and I just couldn't tell you.

Q. Could you tell his lordship whether it was five minutes or longer? You know what five minutes is?—A. Yes, I know five minutes.

Q. Well, had you been running more than five minutes before you had the collision?—A. Yes.

Boorman said that he was coming from the Three Rivers barracks on the day of the accident and that he had stopped at different places. He could not tell the distance between the site of the accident and the place of his previous stop.

He stated that, according to the standing rules of the army, the cars were supposed to stop for the red light and obey the traffic policeman's signals. Asked why, in this case, he had insisted he was entitled to go through the red light, he replied that he had not said that and that he had never insisted.

He admitted that drivers of military cars are taught to obey all the traffic laws in a city and are supposed to stop when the lights are against them or follow the policeman's signals.

He stated that, with the condition indicated by the bill exhibit 1, he would agree that the suppliant's truck would have to be towed to a garage. He added that with the damage shown in the said bill he could not see how the truck could have been "moved on its own power from the centre of the road to the side of the road". He admitted that, according to exhibit 1, the damage was very serious.

In rebuttal Frederick Russell declared that his truck did not move from the place of the collision to the side of the

1945

SECURITIES & MONEY TRANSPORT INC. v. THE KING

Angers J.

road on its own power, but that it was moved by means of a battery; from there the truck had to be towed to the garage.

The evidence is conflicting, particularly with regard to the traffic lights at the intersection of Sherbrooke and St. Hubert streets.

Russell, manager of the Three Rivers branch of the suppliant company, who, on the day of the accident, was driving the suppliant's truck involved in the collision, says that he was going up the hill of St. Hubert street, between Ontario and Sherbrooke streets, at a rate of about ten miles an hour, and that when arriving at the intersection the light facing him was green and that he consequently proceeded to cross Sherbrooke street.

On the other hand Boorman who was driving the army truck, forming part of a convoy proceeding from east to west on Sherbrooke street, which was involved in the said collision, asserts that when he reached the intersection the light facing him was green, that he accordingly started to cross St. Hubert and that on having come to the middle of the intersection the light turned amber.

Which of these two versions is to be accepted?

I must say that if Russell appeared to be an honest and trustworthy witness, Boorman left me with a rather unfavourable impression: he was often evasive or forgetful; at times he was very precise and accurate in matters which could help his case. He was occasionally inclined to argue rather than testify. On two or three occasions he was aggressive, nay, provocative. I may say that I do not attach much importance to this last attitude of the witness, which may likely originate in his temperament or his breeding. The other aspects of the witness' testimony, of which I have on trial taken copious notes and which, after getting a transcription thereof, I have read carefully, so as to test the merits of my impression at the hearing, have cast in my mind very grave doubts as to its veracity.

The evidence of Boorman is, to a certain extent, corroborated by Giroux who drove the truck immediately following that of Boorman. He is the witness who said that the suppliant's truck was coming up the hill of St. Hubert

street, which is fairly long and steep, at a rate of twenty-five miles an hour and that it did not moderate its speed when it reached Sherbrooke street, judging by the way it hit the respondent's truck. I am sorry to say that I cannot believe this story; it does not seem to me plausible. I cannot conceive that a sensible man would attempt to cross Sherbrooke street, a wide thoroughfare with a dense traffic, at a speed of twenty-five miles an hour, particularly at the time at which the accident happened.

The statement by Russell that the respondent's truck hit his car is supported by the damages caused to the latter. The suppliant's truck was hit at the rear of the right front wheel, as stated by an independent and disinterested witness, Cassin, serviceman of the International Harvester Company of Canada, Limited, to whose garage the car was taken immediately after the accident for repairs, and as shown by the company's invoices filed as exhibit 1.

Counsel for the respondent, in his argument, relied on paragraph 7 of section 36 of the Motor Vehicles Act (R.S.Q. 1941, chap. 142), which reads as follows:

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. However, the drivers must conform to the regulations in force in a city respecting the right of way of one vehicle over another, or the right of way of a pedestrian over the vehicle, or respecting the direction that vehicles must follow on certain streets, provided, however, that such derogation from this act be, by the city, indicated thereon by a proper signboard or by a traffic officer.

Counsel further relied on article 83 of by-law 1319 of the city of Montreal, which is thus worded:

83. The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection. When two vehicles enter an intersection at the same time, the driver of the vehicle on the left shall yield to the driver on the right.

The evidence discloses that the drivers of the two trucks arrived at the intersection almost simultaneously. I am satisfied however that the traffic light was favourable to the driver of the suppliant's truck and that, in the circumstances, he had the right of way. Paragraph 7 of section 36 of the Motor Vehicles Act and article 83 of by-law 1319 were in the present case inapplicable.

Counsel for the suppliant, in support of his contention that his client had in the circumstances the right to cross

1945

SECURITIES & MONEY TRANSPORT INC. v. THE KING

Angers J.

the intersection inasmuch as the light facing him was green, cited the following decisions: *City of Montreal* v. *Montreal Tramways Company* (1); *Stanley Brock Limited* v. *Montreal Tramways Company* (2); *Shell Oil Company of Canada Limited* v. *Anley et al* (3).

The headnote in the case of the *City of Montreal* v. *Montreal Tramways Company* (*ubi supra*), which contains a fair summary of the judgment, reads thus:

> Where a police radio car belonging to the City of Montreal crashes into a tramcar at the intersection of two streets, an action in damages instituted by the City against the Montreal Tramways Co. should be dismissed if it appears that the police vehicle was being driven at high speed, that no signal of its approach to the corner was given and that the driver of the car failed to recognize the right of way of the tramcar inasmuch as the traffic light was favourable to the tramway.

Mr. Justice E. M. W. McDougall in his judgment referred to certain observations made by Scott L.J. in the case of *Joseph Eva, Limited* v. *Reeves* (4) which are quite pertinent. I deem it expedient to quote an extract from these observations (p. 404):

> ....possibly it may be helpful if I still express in my own way some part of what I had intended to say. I do so, because of the extreme importance in the cause of safety on the roads of bringing home to drivers as definitely and even as graphically as possible what the law now is as to traffic at cross-roads controlled by lights without police. Nothing but implicit obedience to the absolute prohibition of the red—and indeed of the amber, subject only to the momentary discretion which it grants—can ensure safety to those who are crossing on the invitation of the green. Nothing but absolute confidence in the mind of the driver invited by the green to proceed, that he can safely go right ahead, accelerating up to the full speed proper to a clear road in the particular locality, without having to think of the risk of traffic from left or right crossing his path, will promote the free circulation of traffic, which next to safety is the main purpose of all traffic regulation. Nothing again will help more to encourage obedience to the prohibition of the lights, than the knowledge that, if there is a collision on the cross-roads, the trespasser will have no chance of escaping liability on a plea alleging contributory negligence against the car which has the right of way. Finally, nothing will help more to encourage compliance with the summons of the green to go straight on than the knowledge of the driver that the law will not blame him if unfortunately he does have a collision with an unexpected trespasser from the left or right.

It seems to me apposite to cite a passage from the judgment of McDougall J. (p. 259):

> Upon the evidence thus appearing, the Court can scarcely resist the conclusion—even the conviction that this accident was due to the heedless lack of attention of the police officer in charge of the plaintiff's motor

(1) (1941) R.J.Q. 79 S.C. 258.
(2) (1942) R.J.Q. 80 S.C. 234.
(3) (1934) R.J.Q. 72 S.C. 364.
(4) (1938) 2 K.B. 393.

vehicle. Whether he regarded his mission in responding to the direction to report at the corner of St. Lawrence Blvd. and Beaubien Street as so paramount as to excuse him from compliance with ordinary traffic regulations is not important. The speed at which he approached the crossing of these streets admittedly without giving warning of his approach, and apparently ventured into the intersection (certainly reprehensible in any other driver) cannot be excused simply because he was a police officer in the discharge of a duty. The subject of the privilege accorded to public vehicles, such as fire apparatus proceeding in response to an alarm has been discussed by the undersigned in *Lapointe* v. *Bonnier* (1935, 73 S.C. 373, 376). At page 376, a citation from the remarks of the learned Chief Justice of the Court of King's Bench in *Cité de Granby* v. *Dufort* (No. 228—S.C. 595—Nov. 29, 1929) is given as follows:

> Ai-je besoin d'ajouter que les pompiers d'une corporation municipale sont assujettis à la loi des véhicules automobiles, tout comme les autres citoyens de la province? La loi ne fait aucune exception pour eux, et elle n'autorise pas la Cour à en faire, ce qui, du reste, ne me paraîtrait pas désirable.

See also *Wray* v. *Déchaux Frères* (1925, 63 S.C. 300); *Létourneau* v. *London & Lancashire Guarantee* (1930, 49 K.B. 110).

To dash headlong into a tramcar, relying upon a supposed right of way, is indefensible.

The headnote in the case of *Stanley Brock Limited* v. *Montreal Tramways Company* (*ubi supra*) is thus worded:

> Lorsqu'un garde-moteur poursuit sa course dans le croisement de deux routes sur un signe de l'agent de la circulation, malgré le feu rouge, cette manœuvre ne saurait constituer un motif d'excuse si le tramway heurte une automobile.

The judgments in the cases of the *City of Montreal* v. *Montreal Tramways Company* and *Stanley Brock Limited* v. *Montreal Tramways Company,* particularly the first one, are favourable to the contention of counsel for the suppliant, assuming of course, as I do, that the traffic light was, at the time of the collision, favourable to the driver of the suppliant's truck.

As to the decision in the case of *Shell Oil Company of Canada Limited* v. *Anley et al.* (*ubi supra*), I do not think that it has any bearing on the present case.

In my opinion, Giroux' contention that all cars in a military convoy are entitled to cross an intersection independently of the traffic light facing them, provided the first car has crossed it on a green light, is untenable. Moreover I may note that this convoy, contrary to custom, was not escorted, so that there was nothing to indicate to Russell that it was a convoy, the more so since the truck driven

1945

SECURITIES & MONEY TRANSPORT INC. v. THE KING

Angers J.

by Boorman was at a distance of some fifty feet east of St. Hubert street when the suppliant's car reached Sherbrooke street.

After a careful perusal of the evidence and of the arguments of counsel, including naturally the authorities cited and a review of the few precedents relevant herein, I have come to the conclusion that Boorman, the driver of the respondent's truck, was solely responsible for the accident, which is attributable to his negligence in attempting to cross St. Hubert street against a traffic light showing red.

The amount of the claim is not contested.

Sassin declared that all the repairs mentioned in the bills exhibit 1 were necessitated by the collision. These bills total $295.35 ($292.31 plus $3.04). The suppliant however in his petition omitted the amount of the second bill ($3.04) and claims only $292.31. In the circumstances I can only grant to the suppliant for repairs the sum of $292.31. I may note that according to Cassin the truck before the accident was in good operational condition.

The sum of $26 included in the bill filed as exhibit 2, representing the rental of a car paid by the suppliant during the time its truck was in the International Harvester Company's garage for repairs, seems to me fair and reasonable. I am disposed to allow the suppliant this sum of $26.

There will be judgment against respondent for $318.31, with costs.

Judgment accordingly.

BETWEEN:

THE CORPORATION OF THE TOWN OF DARTMOUTH, a body corporate..... SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

1939
Jun. 12
1940
Jun, 17
1943
Jun. 14 & 29
1945
Dec. 15

Expropriation—Crown—Petition of Right—Fee of streets vested in town—City or town not entitled to compensation for streets expropriated—Town holds streets as trustee for public.

In 1919 the Crown expropriated certain streets and water lots in the town of Dartmouth, Nova Scotia, to provide for the extension of the Canadian National Railways and its facilities. The action is to determine the value of the property expropriated. At the trial a claim was also made by the suppliant for possible future damage to sewers laid by the town under the portions of streets expropriated.

Respondent denied the suppliant's ownership of certain of the streets expropriated since these streets had once formed part of a Common which had been vested in trustees prior to the incorporation of the town of Dartmouth. By various grants and statutes of the Province of Nova Scotia these streets had become vested in the suppliant.

The sewers were the subject of a lease entered into between the Crown and suppliant in 1914 and also of an undertaking given by counsel for the respondent at trial that it would bear any additional cost of maintaining them, in the event of a failure to agree on the cost such to be referred to arbitration or to this Court.

Held: That the fee of the streets is vested in the suppliant; the streets belonged to the suppliant in full ownership together with the adjoining land and were opened through the suppliant's own property for the purpose of passage and the benefit and advantage of the public.

2. That at the time of the expropriation the suppliant owned the soil as well as the surface of the streets; the owner of the land on either side of the streets did not own half the soil over which the street existed.

3. That the suppliant holds the fee of the streets as a trustee for the public having no private right or interest therein and is not entitled to compensation for the streets or parcels thereof expropriated.

4. That the suppliant is entitled to compensation for the water lots expropriated by the respondent.

5. That the suppliant has reserved to it the right to repair or reconstruct the sewers as need be and to charge to respondent the increased cost of such work due to the respondent's works or tracks.

1945

CORPN. OF TOWN OF DARTMOUTH v. THE KING

PETITION OF RIGHT by suppliant claiming compensation for lands expropriated by respondent and for damages arising from such expropriation.

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

J. L. McKinnon, K.C. and *W. E. Moseley* for suppliant.

I. C. Rand, K.C. and *H. C. Friel* for respondent.

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

ANGERS J. now (December 15, 1945) delivered the following judgment:

The suppliant, by its petition of right, claims from the respondent the sum of $25,000, with interest from June 21, 1919, as compensation for the lands hereinafter described and for all damage or loss sustained or to be sustained by reason of the expropriation.

[The learned Judge here refers to the pleadings which describe the expropriated property in detail and continues.]

I think it is convenient to note that, at the time of the expropriation or thereafter, no information was exhibited on behalf of His Majesty as is usual in such cases and apparently no thought was given by either party to the matter of compensation allowable to the town of Dartmouth for the lands taken.

The matter first came before the Court by means of a petition of right instituted by the town, dated March 2, 1932, and filed on September 27, 1932, approximately thirteen years after completion of the expropriation proceeding. Indeed a plan of the lands expropriated and a description of portion thereof were registered in the office of the Registrar of Deeds for the county of Halifax, within the circumscription whereof the said lands are located, on June 21, 1919. No explanation was offered by either party for this delay.

This case, I may say, has been rather unfortunate. It opened before me at Halifax on June 12, 1939. I heard the evidence which the parties thought fit to adduce. After

the hearing of the witnesses, Mr. Rand (now Mr. Justice Rand), who was then acting as counsel for the respondent, stating that the petition merely sets out the value of the lands in the strict sense and makes no claim for stated damages or injurious affection and that, as a result, he is placed at a disadvantage in considering a question of sewers or interference therewith raised by the suppliant, asked for an adjournment so that the engineers of Canadian National Railway Company might consult with the town engineers with a view to finding out what the facts were and endeavour to come to some agreement. There being no objection to this request on the part of suppliant, the case was adjourned *sine die.*

The case came up for argument at the session of the Court in Halifax on June 17, 1940, before the late President. He suggested that the argument should be adjourned to the next term of the Court in June 1941, as I had heard the evidence and he would be in an unfavourable condition to hear the argument in a case in which the evidence had not been taken before him. Counsel however insisted on proceeding and the late President agreed to hear the argument. Following this, judgment was reserved.

The late President became ill in the spring of 1942. In spite of this he worked strenuously and assiduously until the second or third day before his decease. He had, in the meantime, delivered a number of judgments and had commenced writing notes in connection with the present case when he departed from life.

The case again came up before me in July 1943. Mr. Friel, who had replaced Mr. Rand as counsel for respondent, begged leave to adduce further evidence and file a lease entered into between His Majesty the King and the town of Dartmouth. He declared that very likely his predecessor was unaware of the existence of this lease and that that was the reason why it had not been produced before. Notwithstanding the objection on the part of counsel for the suppliant to the production of this lease, I thought advisable that it should be put in evidence, considering that it might have some bearing on the question of damages allegedly arising from the interference by the

1945

CORPN. OF TOWN OF DARTMOUTH v. THE KING

Angers J.

respondent with the sewers constructed under two of the streets of the town of Dartmouth, the right of the town to the sewers not having been reserved in the expropriation proceeding.

The parcels of land involved in this expropriation proceeding lie to the southwesterly side of the line of railway along the harbour front in Dartmouth, which was originally built in 1883-1884. The railway line was enlarged and certain facilities were constructed in 1895-1896 and the operations continued with the increase of certain facilities, which affected some of the streets with which we are concerned, until 1918 when elaborate extensions were made. It is in respect of the expropriation of 1919 that the present proceeding is brought.

Counsel for respondent intimated that he could probably facilitate the presentation of the facts by putting in certain plans and deeds before witnesses were called. I thought the suggestion appropriate and consequently allowed Mr. Rand to file his exhibits.

The first plan produced and marked as exhibit A is a copy of the expropriation plan of 1918; it shows certain of the parcels of land involved in the present action, together with others with which we are not concerned. This plan indicates that the railway line runs in a northwesterly to southeasterly direction and that the most northwesterly of the parcels of land expropriated is Mott street, that thence southeasterly one reaches a street indicated by the words "Unnamed street", which is approximately of the same size as Mott street, that a short distance below one comes to Water street and from there to Stairs street and Church street. In virtue of this plan, a copy whereof was filed in the office of the Registry of Deeds of the county of Halifax on January 5, 1918, the lands of the unnamed street, Water street and Stairs street were expropriated.

This plan, which appears to have been prepared by an engineer of the Department of Railways and Canals, does not set forth all of the railway facilities in Dartmouth, but it indicates not only the land expropriated from the town but also that taken from a concern designated as Electric Boat Company.

The next plan deposited by counsel for respondent is the expropriation plan of 1919, which took in (*inter alia*) Church and Mott streets. This plan, a copy whereof was marked as exhibit B, appears to have been filed in the office of the Registry of Deeds of the county of Halifax on June 21, 1919.

Counsel for respondent pointed out that the plan exhibit B is based upon the existing yard rail at Dartmouth and shows all the tracks then in existence as well as the projected improvements. He stated that the section of Dartmouth in which the crossings north of the southern boundary of Stairs street are embraced is what was originally known as Dartmouth common and that the southern boundary of the common was the southern boundary of Stairs street. He declared that this land was originally granted to trustees for public purposes, as hereinafter more fully set forth, and that the reason why this was done is that the town of Dartmouth, at the time of the grant, had not yet been incorporated. In fact it was incorporated in 1873 and by conveyances, to which reference will be made later, the properties held by the trustees were conveyed to the town.

Counsel for respondent intimated that he made these statements with the concurrence of counsel for suppliant, it being agreed that the admission of facts would facilitate the hearing.

He said that, seeing that the streets with which we are concerned were originally within the area of the common and that some question may arise as to the underlying fee therein, his position is going to be that, when these streets were laid out and lots fronting thereon sold on both sides, the common law rule followed, so that the underlying fee of the streets resided in the abutting owners, but that the position taken by counsel for suppliant will be that the underlying fee remained in the town.

Counsel for respondent observed that with regard to the land located south of the southerly limit of Stairs street, which takes in the parcel of Church street, one is faced with the ordinary case of a grant of land to private individuals. He concluded in stating that we have Church street, i.e. the land adjoining it and the soil thereof, origin-

1945

CORPN. OF TOWN OF DARTMOUTH v. THE KING

Angers J.

ally granted to private individuals and everything to the north, including Stairs street, originally granted to the Trustees of the Common.

Certain admissions agreed upon by counsel were read into the record, which I deem advisable to reproduce herein *in extenso:*

1. That the Town of Dartmouth, through its Council, thereto authorized, entered into an agreement dated the 12th day of June, 1883, with the Department of Railways of the Government of Canada referring to the construction of a branch railway to and through the Town of Dartmouth.

2. That the railway was in part built on a portion of the southwesterly side of Water street by consent of the Town and that the street was widened by the railway on its northeast side and a stone wall was built from near Best street to Geary street and grading done with the consent of the Town and that this wall partially shut off access to and use of a portion of the southwesterly end of Mott street referred to as Parcel "D" in the Petition of Right.

3. That most of the 300 ft in length of the westerly end of the area described in Parcel "C" in the Petition of Right, and 50 ft. in width, was land covered by the waters of Halifax Harbour and designated in the Crown Grant to the Town of Dartmouth of June 27, 1850, in Grant Book 17, Page 60, as Public Dock 5

4. That on occupying that portion of Water street, a part of and adjoining its Railway station the Railway constructed on the Easterly side of its freight shed a roadway approximately 30 ft. in width suitable for public traffic giving passage between Geary street and Stairs street. The railway has not made any grant or transfer of said roadway to the Town and the suppliant claims that the roadway is still a private roadway belonging to the railway. The said roadway is not as wide as Lower Water street and was built, the suppliant claims, for the purpose of giving access to the doors of the freight shed.

5. That a portion of the southwesterly end of Stairs street together with the land covered with water designated in Crown Grant to the Town of Dartmouth, dated June 27, 1850, registered in Grant Book 17, Page 60, was conveyed by the Town of Dartmouth under statutory authority to the sole beneficial use of W S. Symonds by deed in Book 248, Page 539 of the records of the Registry of Deeds of the County of Halifax, prior to Railway construction, subject, however, to the reservations contained in said Deed to the Town in reference to its sewers and sewerage.

6. Referring to the southwesterly end of Mott street, Geory street (Unnamed street) Stairs street and Church street (between the Railway as originally constructed and the harbour front), the suppliant says that the use of the ends of said streets as streets may have been restricted by the original construction of the said Railway but the suppliant claims that said streets were used at the time of the expropriation as streets by the general public and also by the Town in respect to its sewers.

7. That all the land adjoining each side of those portions of Church street, Stairs street, Water street, Geary street (Unnamed street) and Mott street expropriated was land conveyed in fee by reference to the streets as boundaries and to the sole beneficial use of respective private land owners prior to June 12, 1883.

8. That no part of Ochterloney street was expropriated.

[The learned Judge here considers the evidence and continues.]

The claim of the suppliant is based on three heads:

(1) portions of streets;

(2) water lots;

(3) sewers.

Dealing with the ownership of the streets, counsel for suppliant submitted that with respect to Church street he was not in a position to show very much about the title thereto except the statutory title in virtue whereof the street is vested in the town.

He claimed that the other streets, namely Mott street, the foot of Geary street, Water street and Stairs street, are a part of the common and that the title to the common derives from the grant hereinabove referred to, a copy whereof was filed as exhibit 5.

A brief history of the title of the town of Dartmouth seems appropriate. The first document available is a grant from His Majesty "George the Third, by the Grace of God, of Great Britain, *France* and Ireland King, Defender of the Faith, and so forth", unto Thomas Cochran, Timothy Folgier and Samuel Starbuck in trust for the use and purpose hereinafter mentioned of "all that certain tract and parcel of land commonly called the Dartmouth Common as the same hath been lately surveyed and laid out by the Surveyor General of Lands for the Province of Nova Scotia situate, lying and being in Dartmouth aforesaid within the County of Halifax and Province aforesaid." There follows a detailed description by measurements and bounds, which I do not deem it necessary to reproduce here.

The grant, dated September 4, 1788, registered the same day, a copy whereof was filed as exhibit 5, stipulates (*inter alia*) as follows:

TO HAVE AND TO HOLD the said parcel or tract of one hundred and fifty acres of land, and all and singular other premises hereby granted unto the said Thomas Cochran, Timothy Folgier and Samuel Starbuck, their Heirs, Executors and Administrators in special trust to and for the use and benefit of the Inhabitants settled and resident and which may hereafter settle and actually reside within the Town Plat of Dartmouth aforesaid during such residence only as a Common for the General and equal Benefit of such resident settlers in said town and not otherwise they the said inhabitants or the said Trustees, their Heirs or Assigns, yielding and paying therefor unto us, our heirs and successors, or to our Receiver-General for the time being, or to his

1945

CORPN. OF TOWN OF DARTMOUTH v. THE KING

Angers J.

Deputy or Deputies for the time being, yearly—that is to say, at the Feast of St. Michael in every year, at the rate of two shillings for every hundred acres, and so in proportion according to the quantities of acres hereby granted; the same to commence and be payable from the said Feast of St. Michael, which shall first happen after the expiration of years from the date hereof.

The deed then provides for the clearing, and draining if required, within three years after the date thereof, of three acres for every fifty acres of plantable land. It further provides for the voidance of the grant and the reversion to the grantor of the lands granted, in the event of the rent being in arrear for the space of one year from the time it shall become due. It finally provides that if the land granted to the trustees shall at any time or times come into the possession and tenure of any person or persons whatever, inhabitants of the Province of Nova Scotia, such person or persons, being inhabitants as aforesaid, shall within twelve months after his, her or their entry and possession of the same, take the oaths prescribed by law and make and subscribe a declaration to the effect that the declarant promises that he will maintain and defend the authority of the King in his Parliament as the supreme Legislature of the Province; and it stipulates that in case of default on the part of such person or persons in taking the oaths and making and subscribing the declaration within twelve months the present grant and every part thereof shall be null and void to all intents and purposes and the lands granted and every part thereof shall revert to and become vested in the grantor, his heirs and successors.

These provisoes have no materiality herein and spending more time on them would be idle.

The next document, in order of date, put in evidence is a grant from Her Majesty Queen Victoria, in consideration of the sum of ten pounds, eighteen shillings and nine pence paid to her, unto John Tempest, Walter Robb and Charles W. Fairbanks, trustees of the Dartmouth water lots, in trust for the inhabitants of the Township of Dartmouth, of "the public docks situate, lying and being at Dartmouth aforesaid and known and described as follows viz., the dock marked No. 1 on the plan annexed hereto and adjoining the Southern side of water lots belonging to Thomas Boggs, Esq. near the Point, being of the same

width as the street opposite to it and measuring three hundred feet into the harbour—The dock marked No. 2 on the said plan and situate on the Northern side of Mr. Bogg's water lots aforesaid, being bounded on the Northern side by a water lot belonging to E. H. Lowe, Esq., and measuring three hundred feet into the harbour—The dock marked No. 3 on the said plan and lying opposite to the Western end of Boggs street, being of the same width as the street and measuring three hundred feet into the Harbour—The dock marked No. 4 at the end of North street, being thirty feet in width and three hundred feet in length—The dock marked No. 5 at the end of Church street, being of the same width as the street and thre hundred feet in length—The dock marked No. 6 at the end of Stairs street, being of the same width as the street and three hundred feet in length—The dock marked No. 7 on the said plan and bounded Northerly by a water lot of Thomas and Michael Tobin and Southerly by a water lot of William Foster, and measuring three hundred feet in length—The dock marked No. 8 at the end of Mott street, being of the same width as the street and three hundred feet in length—The docks marked Nos. 9, 10 and 12 being of the same width as the streets to which they are severally opposite and each three hundred feet in length—which said Lots are particularly marked and described in the annexed Plan, as also in a Plan of Survey of the said Lots made by Charles W. Fairbanks, Deputy Surveyor; together with all Hereditaments and Appurtenances whatever thereunto belonging, or in any wise appertaining; to have and to hold the said Lots of Land, and all and singular the premises hereby granted, with their appurtenances, unto the said John Tempest, Walter Robb and Charles W. Fairbanks In Trust as aforesaid, and to their Successors in Office."

Dealing further with the consideration, the grant stipulates as follows:

forever, yielding and paying for the same to Us, our Heirs, and Successors, one Peppercorn of yearly rent on the 25th day of March in each year, or so soon thereafter as the same shall be lawfully demanded;

There follows a clause reserving to the grantor, her heirs and successors a large number of mines, which it would not be useful to enumerate here, with the right to enter

1945

CORPN. OF TOWN OF DARTMOUTH v. THE KING

Angers J.

upon the land to search and dig for the same and carry them away and to open any road or roads that may be found necessary.

The grant is dated June 27, 1850, and appears to have been registered. A copy was filed as exhibit C.

The title to the Common vested in the trustees by the grant exhibit 5 was later vested in the town of Dartmouth, in virtue of section 35 of chapter 17 of the Statutes of Nova Scotia (36 Victoria), entitled "An Act to incorporate the Town of Dartmouth", passed on April 30, 1873, to which further reference will be made later.

An Act of the Legislature of Nova Scotia passed on April 10, 1841, 4 Vic., chapter 52, for regulating the Dartmouth Common, after referring to the grant of September 4, 1788 (exhibit 5), to an Act passed in 1789, 29 Geo. III, chap. VII, entitled "An Act to enable the Inhabitants of the Town Plot of Dartmouth to use and occupy the Common Field, granted them by his Excellency the Lieutenant-Governor, in such way as they may think most beneficial to them" and to an Act passed in 1797, 37 Geo. III, chap. II, entitled "An Act to enable the Governor, Lieutenant-Governor, or Commander in Chief for the time being, to appoint Trustees for the Common of the Town of Dartmouth, on the death or removal of the Trustees holding the same, and to vacate that part of the grant of the Common aforesaid, which vests the trust in the heirs, executors or administrators, of the Trustees named in the said grant, on the death of such Trustees", and relating that on April 13, 1798, under the last mentioned Act, Michael Wallace, Lawrence Hartshorne and Jonathan Tremain were appointed trustees of the said Common in place of the trustees named in said grant, that the trustees so last named and appointed are all deceased and that there has for several years last past been no proper authority to take charge of the said Common, to prevent trespasses or to effect improvement thereon, recites (*inter alia*):

And whereas, the said Common fronts on the Harbour of Halifax, and some of the Water Lots in front thereof have been granted to certain individuals, and it would be advantageous if a certain portion of said Common, fronting on the Harbour, were demised in Lots to persons who would be willing to pay rents for the same;

And whereas, it is requisite, for the purposes aforesaid, to appoint new Trustees for said Common:

. . . . . .

And whereas, it is requisite, for the purposes aforesaid, to appoint new Trustees for said Common:

I. *Be it therefore enacted,* by the Lieutenant-Governor, Council and Assembly, That it shall and may be lawful for the Governor, Lieutenant-Governor, or Commander in Chief for the time being, to nominate and appoint three fit and proper persons to be Trustees of the said Common, at Dartmouth; and in case of any vacancy among such Trustees, by death, resignation, removal from office, or permanent absence, from time to time, to supply such vacancy.

II. *And be it enacted,* That in the said Trustees, for the time being, the legal estate and title of and in the said Common shall be and be deemd at all times hereafter absolutely vested for the benefit of the said Inhabitants of Dartmouth

III. *And be it enacted,* That the said Trustees shall, when appointed as aforesaid, make and execute to any persons who may be named and selected for that purpose, by the officiating Roman Catholic Clergyman, at Dartmouth, a Deed or Conveyance, in fee simple, of so much and such portion of the said Common as is now enclosed and used as a Burial Ground for the Roman Catholic Congregation, at Dartmouth, to be held by such persons, and their heirs, for the purpose of being so used and employed as a Burial Ground, as aforesaid.

IV. *And be it enacted,* That the said Trustees shall, immediately after they shall be so appointed as aforesaid, proceed to lay off and divide into proper, convenient, and suitable lots and parcels, all that portion of the said Common, which is bounded in front, westerly, on the Harbour of Halifax, and in rear, eastwardly, by the road leading from Water street, in Dartmouth, to the Windmill: *Provided,* that there shall be reserved and laid off, through the said Lots so directed to be laid out as aforesaid, a Public Road, sixty feet wide, along the line of high water mark, or as near thereto as may conveniently be.

V. *And be it enacted,* That after the said several lots or parcels of Land shall have been laid off as aforesaid, the said Trustees shall fix and apportion for each lot or parcel of Land some small annual rent; and, after due notice of such sale, publicly given by advertisement, shall proceed to offer such respective lot or parcel of Land for sale, at Public Auction, for the highest price to be obtained for the same, subject to the annual rent as aforesaid, for the term of nine hundred and ninety-nine years.

On September 21, 1868, an Act was passed by the Legislature of Nova Scotia entitled "An Act to amend the several Acts relating to the Dartmouth Common", being 31 Victoria, chapter 31. Section 1 thereof reads as follows:

1. The Trustees of the Dartmouth Common shall be a Body politic and corporate, and shall have power to give releases under seal in fee simple, of such parts of the Common as are held under lease, upon receiving from the lessees at the rate of sixteen dollars and sixty-seven cents for every dollar of rent payable by such lessees, respectively, and shall keep the moneys so arising continually invested in securities on real estate or in the public funds.

1945

CORPN. OF TOWN OF DARTMOUTH v. THE KING

Angers J.

Section 3 reads thus:

3. The streets already made in and around the Common shall be under the control and management of the Commissioners of Streets for the Town of Dartmouth.

Counsel for suppliant referred to section 68 of chapter 86 of the Statute of 1886 (49 Vic.) entitled "An Act to amend the Acts relating to the Town of Dartmouth"; section 68 is thus worded:

68. All the public streets, roads, highways, lanes, sidewalks, bridges, squares and thoroughfares, all public sewers, drains and ditches, and all public wells in the town are hereby vested absolutely in the town, and the council shall have full control over the same.

Counsel also referred to section 149 of chapter 56 of the Statute of 1902 (2 Ed. VII), entitled "An Act to consolidate the Acts relating to the Town of Dartmouth", which enacts:

149. The common of Dartmouth, excepting such parts thereof as have been alienated and such parts as are vested in the commissioners of Dartmouth park, is the property of the town.

Dealing first with the title to the streets, counsel for suppliant declared that with regard to Church street he was unable to show very much about the title except the statutory title in virtue of which the street vested in the town. In regard to Mott, Water, Geary and Stairs streets, counsel stated that they are all a part of the Dartmouth Common, the title to which derives from the aforesaid grant by His Majesty the King to trustees in trust and for the use of the inhabitants resident and who might in the future reside within the town plat of Dartmouth, a copy whereof was filed as exhibit 5. He submitted that the title to the Common includes the streets. He said that later the streets were laid out on plans by the Commissioners and eventually opened for the convenience of the residents of Dartmouth.

As previously noted, the Common became vested in the Town of Dartmouth, when the town was incorporated by 36 Vic., chap. 17, passed on April 30, 1873. Section 35 of this Act provides as follows:

35. The Common of Dartmouth, the School House and all property, real and personal, which at the passing of this Act of Incorporation shall be public property or shall have been held in trust for the Town of Dartmouth, shall on the passing of this Act vest in and become the property of the Town.

As we have seen, section 3 of the statute 31 Vic., chap. 31, puts the streets already made in and around the Common under the control and management of the Commissioners of streets for the town.

Then section 68 of chapter 86 of the statute 49 Victoria declares that all the public streets, roads, highways, lanes, sidewalks, bridges, squares and thoroughfares and all public sewers, drains and ditches are vested absolutely in the Town and that the Council shall have full control over the same.

It seems to me unquestionable that, in virtue of the grants and statutes hereinabove referred to, all the real property which at the time of the passing of the statute 36 Vic., chapter 17, was vested in the trustees, including the Common and the neighbouring land held as public property in trust for the town, became vested in the Town of Dartmouth.

It was argued on behalf of respondent that the town of Dartmouth had only a title to the surface of the streets and that the subsoil thereof was the property of the abutting owners, each *usque ad medium filum viae.*

Counsel for suppliant on the other hand urged that the doctrine that a municipality is only vested with the surface of its streets and that the ownership of half of the soil over which the way exists rests in the owners of the land on either side of the way is not applicable herein, particularly in view of the categorical wording of section 68 of chapter 86 of the Statute of 1886 hereinabove reproduced, which says, *inter alia,* that "all the public streets ...are hereby vested *absolutely* in the town..."

Precedents were cited in support of each of these contentions.

A brief review of the authorities is not only expedient but needful.

Cripps on *Compensation,* 8th edition, dealing with the subsoil under a public street, says (p. 76):

> In the event of the promoters requiring to take land under a public street or highway, it is necessary in the absence of any special provision in the private Act to serve a notice to treat on the owners of the subsoil. It is now settled that the interest of a public authority in the surface of a street extends only to so much thereof whether above or below the surface as is necessary for the control, protection and maintenance

1945

CORPN. OF TOWN OF DARTMOUTH v. THE KING

Angers J.

of the street as a highway for public use, and does not extend to the sub-soil or *usque ad coelum*. It has not been usual in practice for owners to insist on a notice to treat in respect to their interest in the sub-soil under streets or highways, since in the majority of cases no substantial claim could be maintained, but the fact that a claim may only be nominal in amount does not affect the legal rights of the parties, and the owner of the sub-soil is entitled to the same protection as a surface owner. The presumption that half the soil of the road is intended to pass to a purchaser under a conveyance of land described as bounded by a public thoroughfare, is equally applicable to streets in a town as to highways in the country; but this presumption may be rebutted by evidence of surrounding circumstances which lead to the inference that no part of the soil of the highway was intended to pass or did pass.

Cripps refers to the case of *Finchley Electric Light Company* v. *Finchley Urban District Council* (1).

The plaintiffs, a limited company, had for one of their objects the supply of electricity. They had not obtained any statutory authority for such supply. The defendants, the urban district council for the district of Finchley, had obtained a provisional order from the Board of Trade empowering them to undertake the supply of electricity within their district, but they had done nothing under the order except acquiring a site for a generating station.

The plaintiffs carried two wires across a road in defendants' district called Regent's Park Road, at a height of 34 feet in order to supply electricity to a customer. The defendants cut the wires and threatened to cut any other which plaintiffs could carry over any street within their district. Plaintiffs sued for an injunction and damages. Defendants in their defence alleged that the site of Regent's Park Road was vested in fee simple and by a rejoinder they disclaimed any intention to prevent the plaintiffs carrying wires over any roads the fee simple whereof was not vested in defendants.

Regent's Park Road was originally built by turnpike trustees appointed under a local Act of Parliament (7 Geo. 4, chap. XC.). The site or part of the site of the road where plaintiffs' wires crossed it was originally glebe land and was later conveyed to the trustees in fee simple by the rector of the parish under the Turnpike Roads Act (3 Geo. 4, chap. 126). The turnpike-gates were subsequently removed and the road became a highway repairable by the inhabitants at large.

(1) (1903) 1 Ch. 437.

The defendant's title rested upon section 149 of the Public Health Act, 1875, 38 & 39 Vict., chap. 55, which enacts *inter alia:*

All streets, being or which at any time become highways repairable by the inhabitants at large within any urban district, and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof, shall vest in and be under the control of the urban authority.

Farwell J. was of opinion that under that section what was vested in the urban authority under the word "street" was so much of the soil of the street as was required for the purposes of the street under the particular circumstances of the case, and, having regard to the fact that the site of the road was conveyed to turnpike trustees in fee simple under the Turnpike Roads Act, 1822, for the purposes of the road, he held that the whole estate of the trustees vested in the urban authority, which was entitled to prevent the electric wires being carried over the road at any height whatever and dismissed the action.

Plaintiffs appealed and the judgment of Farwell J. was reversed.

Collins M.R. expressed the following opinion (p. 440):

Then the local authority come in under s 149 of the Public Health Act, 1875. There is no doubt that this street had become a highway repairable by the inhabitants at large, and therefore the right conferred by s. 149 upon the local authority existed. That right is that the street and the pavement, stones, and other materials thereof, etc., shall vest in and be under the control of the urban authority. It has been decided by a long series of cases that the word "vest" means that the local authority do actually become the owners of the street to this extent: they become the owners of so much of the air above and of the soil below as is necessary to the ordinary user of the street as a street, and of no more. For example, they do not take that part of the subsoil which has to be used for the purpose of laying sewers. That point was clearly decided by the House of Lords in the case of the *Tunbridge Wells Corporation* v. *Baird* (1896, A.C. 434), where the question was whether, by virtue of the vesting of the street, the local authority were entitled to make underground lavatories and conveniences. It was contended that this was a sort of use which a public authority might properly make of a street, but it was held that that was going beyond the ordinary use of a street qua street.

Romer L.J. concurred and made the following observations (p. 443):

The defendants can only claim that the road in question here became vested in them in the full sense in which they seek to maintain that it has been vested in them by relying on s. 149 of the Public Health Act, 1875. Now that section has received by this time an authoritative interpretation by a long series of cases. It was not by that section in-

1945

CORPN. OF TOWN OF DARTMOUTH v. THE KING

Angers J.

tended to vest in the urban authority what I may call the full rights in fee over the street, as if that street was owned by an ordinary owner in fee having the fullest rights both as to the soil below and as to the air above. It is settled that the section in question was only intended to vest in the urban authority so much of the actual soil of the street as might be necessary for the control, protection, and maintenance of the street as a highway for public use. For that proposition it is sufficient to refer to what was said by Lord Halsbury L.C. and by Lord Herschell in *Tunbridge Wells Corporation* v. *Baird* (1896, A.C. 434).

In re *White's Charities. Charity Commissioners* v. *The Mayor of London* (1), it was held by Romer J. as follows (headnote):

The presumption that half the soil of the road is intended to pass to a purchaser under a conveyance of land described as bounded by a public thoroughfare is equally applicable to streets in a town as to highways in the country; and this presumption is not rebutted by the fact that the vendor is the owner of the soil beyond the medium filum viae; in such a case the presumption is that the conveyance passes the soil of the highway so far as it is vested in the vendor.

In the case of *The Mayor, etc., of Tunbridge Wells* v. *Baird* (2), it was held by the House of Lords that The Public Health Act, 1875, which by section 149 vests certain streets in the urban authority, does not vest the subsoil and that, in the present case, the urban authority had no power to excavate the soil and erect lavatories below the surface of the street for the use of the public.

Lord Halsbury, L.C. expressed the following opinion (p. 437):

My Lords, I really am hardly able to follow the reasoning which suggests that a right of property in the subsoil, to the extent and degree to which it has here been taken possession of, has passed under any Act of Parliament whatever. Whatever may be the true construction of the word "street"—and many observations might be made about the mode in which the word "street" is defined—it appears to me that in no sense have these structures been placed in the "street". The word certainly would be very inappropriate in ordinary parlance to describe a subterranean excavation made with the conveniences described. My Lords, for my own part, I am disposed to adopt every word of what James L.J. said in the passage that has been quoted as to the true effect and meaning of the vesting of a "street" in a local body. That the street should be vested in them as well as under their control may be, I suppose, explained by the idea that, as James L.J. points out, it was necessary to give, in a certain sense, a right of property in order to give efficient control over the street. It was thought convenient, I presume, that there should be something more than a mere easement conferred upon the local authority, so that the complete vindication of the rights of the public should be preserved by the local authority; and, therefore, there was given to them an actual property in the street and in the materials thereof. . . . . It is intelligible enough that Parliament should have vested the street

(1) (1898) 1 Ch. 659. (2) (1896) A.C. 434.

quâ street, and, indeed, so much of the actual soil of the street as might be necessary for the purpose of preserving and maintaining and using it as a street.

But the provisions with respect to the subsoil are totally different. In the first place, it lies plainly before one that if the complete vesting of the whole of the property in the land over which the public had rights or duties of repair were intended to be given, there would be no reason in the world why the Legislature should not have said so, whereas it has carefully guarded apparently, in the various Acts of Parliament to which reference has been made, against any suggestion that it ever was intended to convey the land over which the public right existed in the sense in which it would be conveyed to an ordinary private proprietor if you were conveying a piece of land.

See also the reasons of Lord Herschell on pages 440 and 441.

In the case of *Municipal Council of Sydney and Young* (1), it was held by the Judicial Committee of the Privy Council that the Sydney Corporation Act of 1879, which vests public streets in the municipal council, does not so vest them in proprietary right but only for purposes incidental to the exercise of municipal authority.

Lord Morris, who delivered the judgment of the Court, expressed the following opinion (p. 459):

Now it has been settled by repeated authorities, which were referred to by the learned Chief Justice, that the vesting of a street or public way vests no property in the municipal authority beyond the surface of the street, and such portion as may be absolutely necessarily incidental to the repairing and proper management of the street, but that it does not vest the soil or the land in them as the owners. If that be so, the only claim that they could make would be for the surface of the street as being merely property vested in them quâ street, and not as general property. Their Lordships are of opinion that that is not the subject-matter of compensation, but the street being diverted into a tramway is in no way a taking of property within the meaning of the compensation to be assessed under the Public Works Act of Sydney. In point of fact, it is rather the opposite, because the municipal authority, by getting rid of the street, pro tanto have less expense, and it is in that respect a relief to the ratepayers.

The law in England regarding the ownership of the soil of the streets is substantially summed up in *Halsbury's Laws of England*, second edition, pp. 240 and 241, Nos. 290 and 291. I believe it expedient to quote the two paragraphs:

290. The public right in a highway being a right of passage only, an owner who expressly dedicates, or is presumed to have dedicated, land as a public highway retains at common law his property in the soil, and can transfer it by conveyance or lease to others.

(1) (1898) A.C. 457.

1945

CORPN. OF TOWN OF DARTMOUTH v. THE KING

Angers J.

291. There is a general presumption that the owner of land of whatever tenure adjoining a highway is owner also of the soil of one-half of the highway, i.e., *usque ad medium filum viae;* and a similar presumption arises in the case of a private or occupation road. Such a presumption is, however, *praesumptio juris* and not *juris et de jure:* it may be rebutted by evidence, e.g., by proof of title deduced to another from some person shown to have been the original owner of the highway, or by proof of acts of ownership on the part of another; and, indeed, acts of ownership, such as the letting of the roadside herbage, if continued for a sufficiently long period, may confer a statutory title, or justify the presumption of a lost grant.

Further on, dealing with the statutory vesting of country roads and of streets, Lord Halsbury (loc. cit. pp. 248 and 249, Nos. 299 and 300) says:

299. Every "county road" and the materials thereof, and all drains belonging thereto, vest in the county council (or county borough council, as the case may be), except where an urban authority has retained the power and duty of maintaining and repairing such road, in which case it vests in the urban authority as an ordinary road.

Subject as above mentioned in all urban districts, all "streets" which are for the time being highways repairable by the inhabitants at large, and the pavement, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof, vest in and are under the control of the local authority.

300. The effect of these provisions is not to transfer the freehold to the authority, even where it had originally been vested in turnpike trustees, but merely to vest in the authority the property in the surface of the street or road, and in so much of the actual soil below, and air above, as may reasonably be required for its control, protection, and maintenance as a highway for the use of the public, and to this extent the former owner is divested of his property.

In re *Land Titles Act—Ex parte Jackson et al* (1), Beck J.A., after quoting the part of section 300 (numbered 81 in the first edition of Halsbury's Laws of England), makes these observations (p. 345):

This statement is well supported by such cases as *Finchley Elec. Light Co.* v. *Finchley Urban Council* (1903, 1 Ch. 437; 72 L.J. Ch. 297; 88 L.T. 215; 19 T.L.R. 238) following the principle laid down by the House of Lords in *Tunbridge Wells Corpn.* v. *Baird* (1896, A.C. 434; 65 L.J.Q.B. 451; 74 L.T. 385) and see *Land Tax Commissioners* v. *Central London Ry.* (1913, A.C. 364; 82 L.J. Ch. 274; 108 L.T. 690; 29 T.L.R. 395). The general proposition is quite well settled, but the particular applications of it may well vary, not only by reason of the different statutory powers of the local authorities and the different systems and methods of municipal government generally, but also by reason of the constantly developing views on more or less divergent lines here in this new country of the needs and requirements of the public. But in the application of the principle we are not in this case interested. It is quite clear therefore that the vesting of a highway

(1) (1925) 1 W.W.R. 337.

in a municipality does not vest in it the title to the mines and minerals below so much of the soil as may be reasonably necessary for the ownership of the highway as such.

Reference may also be had with benefit to the remarks of Cotton, L.J. in the case of *Micklethwait* v. *Newlay Bridge Company* (1), where at page 145 he said:

But the question is whether this conveyance of a piece of land described by quantity of yards, and described as being bounded on the north by the river, carries with it as part of that which was conveyed the right to the soil *ad medium filum aquae*. In my opinion the rule of construction is now well settled, that where there is a conveyance of land, even although it is described by reference to a plan, and by colour, and by quantity, if it is said to be bounded on one side either by a river or by a public thoroughfare, then on the true construction of the instrument half the bed of the river or half of the road passes, unless there is enough in the circumstances or enough in the expressions of the instrument to show that that is not the intention of the parties. It is a presumption that not only the land described by metes and bounds, but also half the soil of the road or of the bed of the river by which it is bounded, is intended to pass, but that presumption may be rebutted. In my opinion, you may look at the surrounding circumstances, but only to see whether there were facts existing at the time of the conveyance and known to both parties, which showed that it was the intention of the vendor to do something which made it necessary for him to retain the soil in the half of the road or the half of the bed of the river, which would otherwise pass to the purchaser of the piece of land abutting on the road or river.

Further on, in order to support his view, Cotton, L.J. commented on certain cases as follows (p. 146):

In *Lord* v. *Commissioners of Sydney* (12 Moo P.C. 473), where there was a grant by the Crown of a piece of land described as bounded on one side by a creek, it was held that even as against the Crown the grant must be taken to pass the soil of the creek up to the middle. The case of *Berridge* v. *Ward* (10 C.B. (N.S.) 400) is very important, because there, although the map annexed to the conveyance coloured the land only to the edge of the highway, one half of the highway was held to pass by the conveyance. The rule as to the presumption is there laid down, and the case is a very strong instance of its application. The case of *Leigh* v. *Jack* (5 Ex. D. 264) was referred to, where the Court of Appeal held that the rule did not apply. That case is a good illustration of the circumstances which may show that the presumption is not intended to apply to the particular conveyance. The property there was laid out for building, and there was an intended road which adjoined and bounded the plot which was conveyed to one of the parties. It was obviously necessary that the vendor should retain the soil of that intended road in order that he might construct and make it into a road and then dedicate it to the public. This object was shown by the conveyance, for the road was described in it as an intended road, and the purchaser must have known that the half of it was not to pass to him.

(1) (1886) 33 Ch. D. 133.

1945

CORPN. OF TOWN OF DARTMOUTH v. THE KING

Angers J.

Counsel for respondent stressed the point that, if the fee in the streets vested in the town, there is no value for which the town should be compensated. He submitted that these stub ends of streets, if used as such, would be a burden to the town, as they were held in trust and would have to be kept up for the benefit and use of the public. He stated that the same remark applies to the water lots. In connection with these lots he added that before the town could make any construction thereon it would have to have the plans approved by the Governor in Council. He relied on section 7 of chapter 115 of the Revised Statutes of Canada, 1906, which reads:

7. The local authority, company or person proposing to construct any work in navigable waters, for which no sufficient sanction otherwise exists, may deposit the plans thereof and a description of the proposed site with the Minister of Public Works, and a duplicate of each in the office of the registrar of deeds for the district, county or province in which such work is proposed to be constructed, and may apply to the Governor in Council for approval thereof.

This section must be read in conjunction with sections 4 and 5, which are thus worded:

4. No bridge, boom, dam or aboiteau shall be constructed so as to interfere with navigation, unless the site thereof has been approved by the Governor in Council, nor unless such bridge, boom, dam or aboiteau is built and maintained in accordance with plans approved by the Governor in Council.

5. Any bridge to which this Part applies, which is built upon a site not approved by the Governor in Council, or which is not built in accordance with plans so approved, or which, having been so built, is not maintained in accordance with such plans, may, in so far as the same interferes with navigation, be lawfully removed and destroyed under the authority of the Governor in Council.

Sections 4 and 5 were repealed by 9-10 Edward VII, chapter 44, section 1, and others submitted therefor, which have no materiality herein. The sections 4 and 5 enacted by the aforesaid statute were repealed by 8-9 George V, chapter 33, section 2 and replaced by the following:

4. (1) No work shall be built or placed in, upon, over, under, through or across any navigable water unless the site thereof has been approved by the Governor in Council, nor unless such work is built, placed and maintained in accordance with plans and regulations approved or made by the Governor in Council.

(2) The provisions of this section shall not apply to small wharves or groynes or other bank or beach protection works, or boat-houses, provided that, in the opinion of the Minister of Public Works (*a*) they do not interfere with navigation, and (*b*) do not cost more than one thousand dollars.

5. (1) Any work to which this part applies which is built or placed upon a site not approved by the Governor in Council, or which is not built or placed in accordance with plans so approved, or which, having been so built or placed, is not maintained in accordance with such plans and regulations, may be removed and destroyed under the authority of the Governor in Council by the Minister of Public Works, and the materials contained in the said work may be sold, given away or otherwise disposed of, and the costs of and incidental to the removal, destruction or disposition of such work, deducting therefrom any sum which may be realized by sale or otherwise, shall be recoverable with costs in the name of His Majesty from the owner; Provided, however, that the Governor in Council may approve of works constructed, or in process of construction, on the first day of June, one thousand nine hundred and eighteen, subject to the provisions of section seven hereof, and such approval shall have the same effect as approval of works to be constructed.

Paragraph (2) of section 5 contains a definition of the word "owner" and need not be reproduced.

Sections 4 and 5 hereinabove immediately preceding were those in force at the time of the expropriation.

The same provisions are reproduced almost literally in chapter 140 of the Revised Statutes of Canada, 1927.

I see no reason for assuming that the Governor in Council would refuse to the town the permission to construct a wharf or some other work on its water lots, provided it did not interfere with navigation. I would rather think that the government would welcome improvements in a harbour. One must not overlook however the fact that in order to get to the wharf erected on the water lot one would have to go over the tracks and that the right to cross over the tracks depends on the approval of the government. This approval would likely be obtained but the crossing of several sets of tracks would be difficult. Useless to say, those impediments are not liable to enhance the value of the lot.

Counsel for respondent cited a case dealing with this feature, to wit *The King* v. *Wilson* (1). It will suffice to quote the headnote:

In assessing compensation for lands compulsorily taken under expropriation proceedings any "special adaptability" which the property may have for some use or purpose is to be treated as an element of market value. *The King* v. *McPherson*, 15 Ex. C.R., 215 followed. *Sidney* v. *North Eastern Railway Co.* (1914) 3 K.B.D. 629.

2. In such cases the Court should apply itself to a consideration of the value as if the scheme in respect of which the compulsory powers are exercised had no existence. *Cunard* v. *The King*, 45 S.C.R. 99; *Lucas* v. *Chesterfield Gas & Water Board* (1909) 1 K.B.D. 16; *Cedar Rapids Mfg. Co.* v. *Lacoste* (1914) A.C. 569, referred to.

(1) (1914) 15 Ex. C.R. 283.

1945

CORPN. OF TOWN OF DARTMOUTH v. THE KING

Angers J.

3. The owner of a water-lot in a public harbour under a patent from the Crown granted before Confederation cannot place erections thereon without the approval of the Governor in Council as required by Cap. 115, part 1 of R.S. 1906.

Held, that the market value of the water-lot is the proper basis for assessment of compensation, but while that value may be enhanced by the hope or expectation of obtaining authority to erect structures on the lot where there is no evidence of market value to guide it the Court will not assess compensation on a hope or expectation which cannot be regarded as a right of property in the defendant. *Lynch* v. *City of Glasgow* (1903) 5 C. of Sess. Cas. 1174; *May* v. *Boston,* 156 Mass. 21; *Corrie* v. *McDermott* (1914) A.C. 1056 referred to.

See the comments of Cassels, J. at pages 287 and 288.

Counsel suggested that this case is useful for the consideration which it gives to hopes and expectations. He said that, assuming that the town owned the fee in the street, its only hope of using it would be in the event that, due to some unexpected circumstance, the street would be closed up and the fee would revert to the town.

Counsel pointed out that Minshull, who was one of the valuators acting for the Intercolonial Railway Company in connection with the properties expropriated, declared that, supposing there was a possibility of reversion to the town of the fee in the street, the latter, so long as it remained a street, would not have any commercial value. Minshull added that the possibility of the street being removed was so remote that he would not offer anything for that possibility. In counsel's opinion Minshull had a precedent for making this statement in the case of *Municipal Council of Sydney and Young.* I do not think that the decision in that case upholds the last point submitted by counsel.

In addition to the case of *Municipal Council of Sydney and Young* counsel for respondent relied on the decision of the Supreme Court of the State of New York in *The People of the State of New York et al* v. *Kerr et al* (1). I deem it apposite to quote an excerpt from the headnote:

The act of the legislature, passed April 17, 1860, to authorize the construction of a railroad in the seventh avenue, and in certain other streets and avenues in the city of New York, is not to be construed as granting the use of the streets, etc. only after compensation made to, or agreed upon with, all owners of any interest in the lands forming the streets, and as not establishing such right absolutely and unconditionally.

(1) (1862) 37 Barbour's S.C. Rep. 357.

It is apparent from the whole scope and tenor of the act that the legislature, in passing it, assumed the right to grant the franchise absolutely and unconditionally, so far as the occupation of the streets and avenues mentioned, for the purposes of the railroad was involved.

The act is not void as being repugnant to the constitutional prohibition against the taking of private property for public use, without compensation, for the reason that it omits making any provision for compensation to the corporation of the city of New York, or to property owners, for the franchise granted.

The fee of the streets and avenues resides in the corporation of the city of New York, in trust, to keep them open forever as streets for the use of the public. Leonard, J. dissented.

Reference may be had to Lewis on Eminent Domain, 3rd ed., p. 321, no. 175 (119), where the author says:

As we have already had occasion to observe a municipal corporation, though holding the fee of its streets, holds them simply as a trustee for the public. It has no such private right or interest therein, as entitles it to compensation when a railroad is laid thereon by legislative authority, though without its consent.

Mr. Friel submitted that, if a statute gives a right and does not provide compensation,, the people from whom land is taken cannot get compensation, as long as the work is done without negligence. He urged particularly that the Intercolonial Railway had the right to cross the streets of the town without paying any compensation. He cited in support of his contention the case of *The City of Ottawa* v. *Canada Atlantic Railway Co.* (1). I may note that this question is not in dispute in the present case. The petition claims compensation for parcels of streets expropriated; it does not ask for damages arising out of the crossing of the streets by the railway. The case cited has no relevance.

The following cases may also be consulted: *Marquis of Salisbury* v. *Great Northern Railway Co.* (2); *Berridge et al.* v. *Ward* (3); *Holmes* v. *Bellingham* (4); *O'Connor* v. *Nova Scotia Telephone Company* (5).

Let us now examine the doctrine that the presumption that a conveyance of land abutting on a street convoys the soil of the street *usque ad medium filum viae* may be rebutted by the surrounding circumstances (proof of title, acts of ownership, etc.). It will be convenient to review a few decisions bearing on this point.

(1) (1903) 33 S.C.R. 376.
(2) (1858) 5 C.B.N.S., 174.
(3) (1861) 10 C.B.N.S., 400.
(4) (1859) 7 C.B.N.S, 329.
(5) (1893) 22 S.C.R. 276.

1945

CORPN. OF TOWN OF DARTMOUTH v. THE KING

Angers J.

In the case of *Roche* v. *Ryan* (1), a Divisional Court of the Common Pleas Division composed of Galt, C.J. and MacMahon, J. reversing the judgment of the trial judge, held that under the Municipal and Surveyors' Acts by the filing of a plan and the sale of lots according to it abutting on a street, the property of the street becomes vested in the municipality, although they may have done no corporate act by which they became liable to repair.

At page 115 we find the following comments of Galt, C.J.:

> By section 62, of 50 Vic. ch. 25 (O.), to which I have already referred, "All allowances for streets surveyed in villages, or any part thereof, which have been, or may be, surveyed or laid down on the plan thereof, and upon which lots of land fronting on or adjoining such allowances for streets have been or may be sold to purchasers shall be public highways, streets and commons".
>
> I refer to this in reference to the argument of Mr. McCarthy that the law in England as respects public highways does not extend to streets laid down in towns, as shown by the case of *Leigh* v. *Jack*, 5 Ex. D. 264, in which Cockburn, C.J., says, at p. 270: "I think that the legal presumption as to the ownership of the soil of a highway does not apply to intended streets." This opinion was also expressed by the other learned Judges.
>
> It is, however, manifest that whatever may have been the right of adjoining owners, or of the original proprietor, under the common law, they are settled by the positive provision already referred to in the Municipal Act, sec. 527, viz.: "Every public road, street, bridge or other highway, in a city, township, town, or incorporated village, shall be vested in the municipality, subject to any rights in the soil which may have been reserved." In the present case no rights had been reserved, consequently the streets vested absolutely in the municipality.

In the case of *Cotton et al.* v. *The Corporation of the City of Vancouver* (2), the headnote reads thus:

> Section 218 of the Vancouver Incorporation Act, 1900, provides, in part, that every public street . . . in the City shall be vested in the City (subject to any right in the soil which the individuals who laid out such road, street, bridge or highway may have reserved).
>
> In an action for an injunction to restrain the Corporation from digging and blasting for the construction of a drain on a street within the corporate limits, plaintiffs submitted that a proper construction of the word "vest" as used in section 218, did not authorize the Corporation to dig to an excessive depth:—
>
> *Held,* adopting the ruling in *Roche* v. *Ryan* (1891), 22 Ont. 107, that the word "vest" was not a vesting of the surface merely, but is wide enough to include the freehold as well.

(1) (1892) 22 O.R. 107.

(2) (1906) 12 B.C.R. 497.

The judgment of the Supreme Court of British Columbia rendered by Irving, J. contains the following comments (p. 499):

Then turning to the other ground upon which the injunction is sought, *viz.*: that danger is reasonably to be apprehended: the plaintiffs rely chiefly on section 218 of the Vancouver Incorporation Act, 1900, Cap. 54. By that section it is enacted as follows:

"218. Every public street, road, square, lane, bridge or other highway in the City shall be vested in the City (subject to any right in the soil which the individuals who laid out such road, street, bridge or highway may have reserved), and such public street, road, square, lane or highway shall not be interfered with in any way or manner whatsoever, by excavation or otherwise, by any street railway, gas or waterworks company, or any companies or by any company or companies that may hereafter be incorporated, or any other person or persons whomsoever, except having first made application and received the permission of the City Engineer in writing."

There was much discussion as to what this section meant The plaintiffs' contention is that it only gives or vests in the Corporation the surface of the street as street, with a depth sufficient to enable the Corporation to do that which is done in every street, that is to say, to raise the street, lay down sewers and water pipes; and that the sinking to an excessive depth is not authorized by this construction of the word "vest".

A number of English cases were cited in support of that contention, but I have arrived at the conclusion that this limitation is not at all applicable to the section in question. There is a marked difference between our Act and the English Acts referred to by Mr Wilson By our Act, everything is vested in the Corporation, unless expressly reserved; nothing, therefore, will be reserved by implication. In *Roche* v. *Ryan* (1891), 22 Ont. 107, Street, J., came to the conclusion that the word "vest" was not a vesting of the surface merely; that the word was wide enough to include the freehold as well as the surface; that where the individual who had laid out the lane had reserved no right in the soil, the soil and freehold were vested in the municipality. I think that the argument is applicable to section 218. The defendants, then, own the street.

In *Mappin Brothers* v. *Liberty and Co. and Attorney-General* (1), it was held by Joyce, J. that the presumption that a conveyance of land abutting on a highway passes the soil of the road *usque ad medium filum* is rebutted by the surrounding circumstances where a new street is made by Commissioners under an Act of Parliament which imposes on them obligations inconsistent with the presumption and where the parcels and plan show no intention to pass any part of the street.

In the case of *Leigh* v. *Jack* (2), it was held by the Court of Appeal, affirming the decision of the Exchequer Division, that the presumption that the soil to the middle of a highway belongs to the owner of the adjoining land

(1) (1903) 72 L.J. Ch. D. 63. (2) (1880) L.J. 49 Q.B.D. 220.

1945

CORPN. OF TOWN OF DARTMOUTH v. THE KING

Angers J.

does not apply where such land abuts on an intended highway which, at the time of the conveyance, has not been dedicated to the public.

I deem it convenient to quote a passage from the reasons of Cotton, L.J., which seems to me relevant (p. 223):

> Neither of the two conveyances purports in terms to convey the land in question to the defendant, so that he is obliged to rely on the old presumption of law which obtains in the case of roads the dedication of which is of ancient date. It is a presumption which is well known, clearly defined, and founded on reason; it is a presumption which applies, moreover, to existing roads; and no case has been cited in which a conveyance of land adjoining something which it is intended to make into a road at some future time has been held to pass the right to half the soil of that road when it shall be made. In such a case the grantor still retains the ownership of that land, and still retains over it his rights, which have not been diminished by any public rights such as result from the dedication of land to the public. The presumption of law on which reliance has been placed is easily rebutted; and in such a case as the present I think that many circumstances would require to co-exist to establish the presumption. I am of opinion that it does not arise where there was only an intention to dedicate a street hereafter.

Another case offering some interest although not so directly in point is *Ernst* v. *Waterman* (1). This was an action of ejectment. Plaintiff had laid off a tract of land into lots and streets, according to a plan, and sold to defendant lots on both sides of one of the streets. The action was brought to eject the defendant from the part of the street lying between the lots purchased by him, he having fenced it in and ploughed and occupied it for several years. It was held by the Supreme Court of Nova Scotia, in appeal, setting aside the verdict, that the presumption that the defendant held the street *usque ad medium filum viae* was rebuttable by proof of the title being in the plaintiff and that under the description in defendant's deed designating the land, as indicated on the plan, and specifying the dimensions, which were such as not to include the street, the title to the street did not pass to the defendant.

Thompson, J., who delivered the judgment of the Court, expressed the following opinion (p. 275):

> It was urged that the law presumes the ownership of half the soil over which the way exists, to be in the owners of the land on either side of the way, and that consequently the defendant was entitled to one-half the locus, being the half adjoining his lot of land; also, that although the defendant's conveyance should bound his lot on the way or street, the ownership *ad medium filum viae* would also pass. 7 C.B., N.S., 329, and 10 C.B., N.S., 400, were cited to sustain this double proposition. As

(1) (1883-84) 4 Russell & Geldert, 272.

regards the first branch of this contention, we have to observe that the presumption is by no means conclusive, and may be rebutted, as was done here, by proof of title being in another than the owner of the contiguous land. As regards the second branch, it will be found that the application of the doctrine depends in every case on the language of the conveyance, and it cannot be contended that all deeds, no matter what the description may be, will pass the title to half the adjoining ways. The description in this deed, we think, excluded the soil of the way, because it not only designated the land conveyed as a certain lot indicated on an annexed plan, but specified the dimensions which the conveyed parcel was to contain, and these dimensions do not admit of any part of the way being included. The cases above mentioned sustain these views and also the case of *Pugh* v. *Peters*, 2 R & C., 143.

The theory that the owner of land adjoining a street is also owner of the soil of one half of the street on which his land abuts is very likely based on the presumption that the adjoining owners each contributed half the land required for the street: *Doe dem. Pring et al.* v. *Pearsey* (1); *Holmes* v. *Bellingham* (2).

Cockburn, C.J., in the last case, said (p. 336):

The direction complained of is, that the learned judge told the jury that there was a presumption, in the case of a private way or occupation road between two properties, that the soil of the road belongs *usque ad medium filum viae* to the owners of the adjoining property on either side. That proposition, subject to the qualification which I shall presently mention, and which I take it was necessarily involved in what afterwards fell from the learned judge, is in my opinion a correct one. The same principle which applies in the case of a public road, and which is the foundation of the doctrine, seems to me to apply with equal force to the case of a private road. That presumption is allowed to prevail upon grounds of public convenience, and to prevent disputes as to the precise boundaries of property; and it is based upon this supposition,—which may be more or less founded in fact, but which at all events has been adopted,—that, when the road was originally formed, the proprietors on either side each contributed a portion of his land for the purpose.

See *Nichols* on *Eminent Domain*, 2nd ed., vol. 1, p. 394, para. 132; *Gebhardt* v. *Reeves* (3).

The streets with which we are concerned were not dedicated to the town by the adjoining owners; they belonged to the town in full ownership together with the adjoining land and were opened through its own property for the purposes of passage and the benefit and advantage of the public.

After a careful perusal of the grants and statutes abovementioned and a minute study of the doctrine and precedents, I have reached the conclusion that the Town of

(1) (1827) 7 B. & C, 304; 26 English and Empire Digest, 323, No. 566.
(2) (1859) 7 C.B. n.s. 329.
(3) (1874) 75 Ill. 301.

1945

CORPN. OF TOWN OF DARTMOUTH v. THE KING

Angers J.

Dartmouth, at the time of the expropriation, owned the soil as well as the surface of its streets and that the rule that the ownership of half the soil over which a street exists is vested in the owners of the land on either side thereof does not obtain in the present case. There was no dedication of the streets by owners of land adjoining them. The land on which the streets were opened and the land on each side abutting thereon was wholly vested in a single owner, namely the Town of Dartmouth, and, prior to the latter's incorporation, in the trustees. In my opinion the suppliant held the fee of its streets.

The question arises as to whether the suppliant is entitled to compensation for the parcels of streets expropriated. The doctrine and jurisprudence are unanimous in disallowing compensation for streets expropriated on the ground that the municipality holds them in trust for the public: Nichols on Eminent Domain, 2nd ed., vol. 1, p. 394, para. 132; Lewis, Eminent Domain, 3rd ed., vol. 1, p. 321, para. 175 (119); *City of Vancouver* v. *Burchill* (1); *Zanesville* v. *Telegraph and Telephone Co.* (2); *City of International Falls v. Minnesota, Dakota & Western Railway* (3); *Worcester* v. *Worcester etc. Street Railway Co.* (4); *People* v. *Walsh* (5); *State* v. *Shawnee County Commissioners* (6); *Prince* v. *Crocker* (7); *Browne* v. *Turner* (8); *Springfield* v. *Springfield Street Railway* (9); *Arbenz* v. *Wheeling & H.R. Co.* (10); *Tyler County Court* v. *Grafton* (11); *State* v. *Hilbert* (12); *Gebhardt* v. *Reeves* (13); *Chicago* v. *Carpenter* (14); *Paul* v. *Detroit* (15).

Lewis says (*loc. cit.*):

> As we have already had occasion to observe a municipal corporation, though holding the fee of its streets, holds them simply as a trustee for the public. It has no such private right or interest therein, as entitles it to compensation when a railroad is laid thereon by legislative authority, though without its consent.

(1) (1932) S.C.R. 620 at 625.
(2) 64 Ohio State Rep. 67.
(3) (1912) 117 Minn. Rep. 14.
(4) 196 U.S. 539.
(5) 96 Ill. 232.
(6) (1910) 83 Kan. 199, 110 Pac. 92.
(7) (1896) 166 Mass. 347, 44 N.E. 446.
(8) (1900) 176 Mass. 9, 56 N.E. 969.
(9) (1902) 182 Mass. 41, 64 N.E. 577.
(10) (1889) 33 W. Va. 1, 10 S.E. 14.
(11) 86 S.E. 924.
(12) 72 Wis. 184, 39 N.W. 326.
(13) 75 Ill. 301.
(14) 201 Ill. 402, 66 N.E. 362.
(15) 32 Mich. 108.

Nichols, though less explicit, expresses a similar opinion (*loc. cit.*):

Whatever doubts may arise regarding other property, it is well settled that streets and highways are held in trust for the public, and whatever estate or interest in them belongs to the city or town in which they lie is owned by the municipality in its governmental capacity and as an agency of the state.

Further on the matter adds:

A city or town is not however wholly without rights even in a public way. The public easement in a bridge, forming part of a highway, is completely under legislative control, but the timbers or other materials in the bridge may be said to be the property of the town in a stricter sense, so that there is some authority for holding that the town must be compensated for them when they are destroyed by the construction of some other public work. If the highway over the bridge is discontinued, the materials in the bridge would become the absolute property of the town, and the same is probably true of the curbstones, lamp posts and other materials put into a roadway by a city or town.

This statement is unquestionably restrictive.

At page 499 Nichols makes the following observations:

It has been suggested that while it is conceivable that a municipality might have an absolute fee in a street, and so would have the same rights as a private owner to use its land in any reasonable way that it found desirable, yet it ordinarily holds the fee of a highway in trust to be used for highway purposes. This may be true, but it is in trust for the public that it is held, and not for the abutting owners.

Nichols then comments on the remedy at the disposal of the *cestui que trust* in case the trust is abused. These remarks have no relevance to the question at issue.

I may say with deference that I hesitated before adopting the doctrine expounded by the authors and the judgments aforesaid because depriving a municipality of its right to compensation for streets or parcels of streets expropriated is liable to cause great prejudice. Municipalities have duties towards their residents; they are bound to open streets and keep them in good condition. I believe that a municipality might be compelled to open new streets to replace those which have been expropriated and accordingly prohibited to traffic. I think it would only be fair and equitable in these circumstances to compensate the municipality for its loss.

If I had reached the conclusion that the suppliant ought to receive compensation, I must say that the task of placing a value on these parcels of streets is extremely difficult.

1945

CORPN. OF TOWN OF DARTMOUTH v. THE KING

Angers J.

There is no evidence of recent sales in the vicinity. The only sale put in evidence is one by the Town of Dartmouth to William S. Symonds, on January 29, 1873, for the price of $280, of "a certain lot of land, land covered with water and water lot situate in the Town of Dartmouth," at the foot of Stairs street, described in the deed, a copy whereof was filed as exhibit 3, as being bounded on the north and south by property of said Symonds, on the east by Stairs street, extending westerly into the harbour of Halifax four hundred feet more or less, with the reserve to the town of the right at any time to enter upon the said land and land covered with water and open and dig the same and build and lay sewers or drains through it for the purpose of public drainage and at any time to re-enter thereupon for the purpose of repairing or rebuilding the said sewers or drains or building or laying down new ones. The price represented approximately 10 cents per square foot.

Another sale was mentioned, to wit that made by the Town of Dartmouth to Electric Boat Company, of a lot of land and land covered with water, bounded by Stairs street, Commercial street, Church street and the harbour as shown on plan exhibit 2, about which we have no information, as well as the expropriation thereof by the Crown in 1919. Minshull, valuator for the Intercolonial Railway at the time of the expropriation in 1918-1919, who said he had the original estimates before him, declared that the property consisted of lots 3, 8 and 9 having an area of 83,910 square feet and of lots 4, 5, 6 and 7, all waterlots, having an area of 138,675 square feet; he appraised this property at $40,000. The matter was settled and taken out of his hands. He said he had nothing to do with the actual settlement; he thought that it was made on a basis of .30c. per square foot for land and land covered with water.

I must say that the sale by the Town of Dartmouth to Electric Boat Company and the expropriation of the same property by the Crown, with the scanty and most indefinite information about them, are of very little assistance in determining the value of the land and land covered with water taken by the respondent.

As far as the sale from the Town of Dartmouth to Symonds is concerned, it is far too remote to be of any help in determining the value of land at the time of the expropriation. We have the declaration by Evans that he did not understand that there had been an improvement in value from 1873 to 1918 and that, if there was any change, it was a depreciation in value. Evans said he valued this land at 2 1/3 cents per square foot, being the price paid by Symonds to the town. He stated that this price was for the land above high water and that the price for the whole worked out to about 1.16 cents per square foot.

The ends of streets expropriated, in view of the construction of the railway in 1883 and the retaining wall from near Best street to Geary street and the various additions to the railway facilities since 1883, have a considerably restricted use and their value as land is accordingly rather small. The sum of .35c. per square foot claimed by the suppliant is, in my opinion, grossly exaggerated.

At Mott street the parcel expropriated contains, according to Minshull, 1,529 square feet and, according to Evans, about 1,973 square feet. Geary street, according to Minshull, has an area of 2,239 square feet and according to Evans, of about 2,375 square feet. Lot No. 4, made up of portions of Water street and Stairs street, contains, according to Minshull's figures, 7,600 square feet; Evans did not mention the area. The parcel consisting of the foot of Stairs street, below the tracks, has, according to Minshull's calculation, an area of 13,720 square feet; Evans gave no information with reference to this piece of land. As to Church street, mentioned in the description as parcel C, it has according to Minshull an area of 9,727 square feet and according to Evans of 27,590 square feet. I have never seen such a wide discrepancy between estimates of the superficies of parcels of land comparatively small. The Court is usually asked to determine the value of land, not its area. Had I concluded that suppliant is entitled to compensation for its parcels of streets I would have allowed $1,150.

After carefully perusing the evidence in relation to the water lots and considering the growth of the Halifax har-

1945

CORPN. OF TOWN OF DARTMOUTH v. THE KING

Angers J.

bour, which, in all likelihood, is destined to become one of the principal Canadian ports on the Atlantic coast, but not overlooking the difficulties of access to these lots due to the railway tracks which existed on June 21, 1919, I am convinced that a compensation of $3,250 will be fair and reasonable.

I shall now examine the question of the sewers. The sewer on Stairs street, 18 inches in diameter and 500 feet in length, was constructed in 1914. It has been used ever since and the evidence shows that it is in good condition. No trouble has ever been experienced in its functioning; no repairs have ever been required. It is made of vitrified sewer pipe and, in the opinion of the town engineer Allan, it may last indefinitely. The station and its platform are built across Stairs street. There are six railway lines crossing the street. In view of these obstacles any repairs to the sewer would cost much more than if the street were vacant. The Geary street sewer is 9 inches in diameter. Nobody could say where it empties. The plan exhibit 2 shows that it ends between Water street and the harbour. The same plan shows a proposed extension of the sewer from the point where it presently ends to the harbour, a distance of 100 feet.

Of the Stairs street sewer approximately 200 feet in length were affected by the expropriation. No estimate of the cost of replacing or repairing this sewer was supplied. Allan however placed a value of $2,800 on it on the basis of 500 feet of an 18-inch sewer as shown on the plan exhibit 2, as it exists to-day. In his estimate that is what it would cost to reproduce that sewer to-day. Allan suggested that a new 18-inch sewer from point A, at the intersection of Turner and Stairs streets, to point B, which is the harbour, shown on the plan exhibit 2, being 325 feet in length, would cost $2,700. He declared that a 30-inch sewer from point A to point B would cost $2,900.

Allan computed the cost of the 9-inch sewer on Geary street, extending out as far as it goes, to $430; he estimated the cost of the extension of this sewer from the old outlet to the water at $1,400, this portion being more expensive than the one presently existing due to the fact that there is a fill containing large boulders through which it would be difficult to dig a trench.

In view of the conclusion which I have reached with regard to the sewers and which I propose to submit forthwith, I do not think that these figures have any materiality.

As already stated a lease was entered into by His Majesty the King and the Town of Dartmouth on December 9, 1914, a copy whereof was filed as exhibit L.

This lease stipulates (*inter alia*) as follows:

This indenture . . . between His Majesty the King, represented herein by the Minister of Railways and Canals, acting under the provisions of Chapter 35 of the Revised Statutes of Canada, 1906, and of the 34th section of "The Expropriation Act," and under the authority of an Order in Council dated the Fifth day of December, A.D., 1914, hereinafter called the Lessor, of the First Part; and The Town of Dartmouth in the County of Halifax and Province of Nova Scotia, hereinafter called the Lessee, of the Second Part.

Witnesseth, that the Lessor, in consideration of the rents, covenants, provisoes and conditions hereinafter reserved and contained, hath demised and leased, and, by these presents, doth demise and lease unto the Lessee

The right and privilege to lay and maintain across the right of way and under the tracks of the Intercolonial Railway at Dartmouth aforesaid, one Standard Heavy one and one-half inch (1½") galvanized iron water pipe at the south end of Prince street, near the so called Marine Railway, and one eighteen-inch (18") sewer pipe on Stairs street, both as indicated in red ink on the plans dated October 5, 1914, hereto annexed.

TO HAVE and TO HOLD the said right and privilege unto the Lessee, from and after the First day of December, one thousand nine hundred and fourteen, during the pleasure of the Lessor.

YIELDING and PAYING therefor, invariably in advance, on the First day of December in each year, during the existence of this Lease, unto the Lessor, through the Honourable the Receiver General of Canada for the time being, the yearly rent or sum of One Dollar ($1), of lawful money of Canada, the first payment of which rent, being for the year commencing on the First day of December, 1914, having been made at or immediately before the delivery of these Presents, the receipt whereof is hereby acknowledged.

It is . . . further agreed by and between the said parties hereto that these Presents are made and executed upon and subject to the covenants, provisoes, conditions and reservations hereinafter set forth and contained, and that the same and every of them, representing and expressing the exact intention of the parties are to be strictly observed, performed and complied with, namely:

. . . . . .

8. Should it become necessary or expedient for the purposes of repairs or improvements on the said Intercolonial Railway that the said pipes be temporarily removed, the said "The General Manager of Government Railways" may notify the Lessee, either verbally or in writing, to remove the same, and on failure forthwith thereafter to comply with such notice, the said "The General Manager of Government Railways" may remove or destroy the said pipes without the

1945

CORPN. OF TOWN OF DARTMOUTH v. THE KING

Angers J.

Lessor becoming thereby liable for damages of any nature and may collect from the Lessee, as rent due hereunder, all expenses occasioned by reason thereof. The Lessee upon complying with such notice may, if the said "The General Manager of Government Railways" deems it expedient, and the progress of the work is not thereby interfered with, temporarily maintain the said pipes in such manner or at such point as the said "The General Manager of Government Railways" may direct; the Lessee bearing all expenses and assuming all risk or damage. At the conclusion of the work the said pipes may, if deemed expedient by the said "The General Manager of Government Railways" be replaced by the Lessee at own cost and expense and in exact accordance with instructions and directions of the said "The General Manager of Government Railways" with respect thereto.

. . . . . .

10. That the Lessor may at any time terminate this Lease by giving to the Lessee notice in writing signed by the Minister or the Secretary for the time being of the Department of Railways and Canals, and either delivered to the Lessee or any officer of the Lessee, or mailed addressed to the last known residence or office of the Lessee, at any of His Majesty's Post Offices, and thereupon after the delivery or mailing of such written notification these Presents shall be void, and the Lessee shall thereupon, and also in the event of the determination of this Lease in any other manner, forthwith remove the said pipes and all materials, effects and things at any time brought or placed thereon by the Lessee, and shall also to the satisfaction of the said "General Manager" repair all and every damage and injury occasioned to the lands and premises of the Lessor by reason of such removal or in the performance thereof, but the Lessee shall not, by reason of any action taken or things performed or required under this clause, be entitled to any compensation whatever.

It was argued on behalf of respondent that the suppliant had no right to ask for damages in connection with the sewers because the petition of right only claims compensation for the lands taken. The petition is perhaps not very cleverly drafted; it certainly might be more explicit. I believe however that the conclusions of the petition are broad enough to include the claim regarding the sewers. The allegation relating thereto, would naturally have been more in place in the body of the proceeding than in its conclusion, but this is only a matter of form of little, if any, importance. The late president, before whom the case was argued in June 1940, told counsel for suppliant that, if he wanted to amend the petition and if he made a motion to that effect he would feel inclined to grant it, although he did not consider that an amendment was necessary. I may say that I share this opinion and believe that the petition, although not in a particularly happy form, is sufficient to embrace the claim respecting

the sewers. If I were to accept the interpretation of Mr. Rand, I would have to take for granted that the respondent expropriated the sewers as well as the land in which they lie, which legally he did seeing that there was, in the notice of expropriation, no reserve about the sewers as there was in the sale by the Town of Dartmouth to William S. Symonds, and consequently allow to the suppliant the full value thereof at the time of the expropriation. This means that I would add to the value of the water lots, to wit $3,250, the value of the sewers fixed at $3,230. I feel loath to adopt this conclusion, as apparently there was an oversight on the part of respondent's representative with regard to the sewers at the time of the expropriation. On the other hand the fact that the respondent saw fit to give a lease to the suppliant covering the sewer on Stairs street seems to indicate that the respondent took for granted that it owned the sewer in question. It may be that respondent did not fully apprehend the logical consequence of his act.

Mr. Rand in his written argument dated July 11, 1940, filed on the 13th of the same month, made the following statement:

> As respects the sewers, the Respondent is willing to give an undertaking in the following terms:
>
> The expropriation will be abandoned in relation to the existing sewers on Stairs and Geary (unnamed) streets. These sewers will be reserved to the Town in a deed to the Crown from the Town of the interest of the Town in the lands taken. The Crown will at all times in the future bear the additional expense of maintaining the sewers caused by the expropriation and the improvements which have in the past and may in the future be placed on the lands taken. The amount of that shall be ascertained by the Engineers of the Railways and of the Town and if they cannot agree it may be referred either to arbitration or to this Court.

In his oral argument before me on July 2, 1943, Mr. Friel, speaking on behalf of respondent, said that an undertaking had been given by his predecessor, Mr. Rand, in reference to the sewers, that it still stands and that it reads as follows:

> The expropriation will be abandoned in relation to the existing sewers on Stairs street and Geary street, when the sewers will be reserved to the Town in a deed to the Crown from the Town of the interest of the Town in the lands taken. The Crown will at all times in the future bear the additional cost of maintaining the sewers covered by this expropriation and the improvements which have since the expropriation and may in the future be placed on the lands taken. The amount of that

1945

CORPN. OF TOWN OF DARTMOUTH v. THE KING

Angers J.

shall be ascertained by the engineers of the Railways and of the Town and if they cannot agree it may be referred either to arbitration or to this Court.

I do not know if this proposed understanding was ever signed, but no copy of it was produced. In the circumstances I must consider it as inexistent. The declaration by counsel in his brief dated July 11, 1940, or in his argument on July 2, 1943, cannot bind the respondent. It has been decided several times that a minister has no authority to bind the Crown, unless authorized by statute or order in council: *The Jacques-Cartier Bank* v. *The Queen* (1); *Quebec Skating Club* v. *The Queen* (2); *The King* v. *Vancouver Lumber Co.* (3); *The King* v. *McCarthy* (4); *Livingston* v. *The King* (5). The same doctrine applies in the case of any representative of the Crown: *De Galindez* v. *The King* (6); *Burroughs et al.* v. *The Queen* (7); *The Queen* v. *St. John Water Commissioners* (8); *Attorney-General of the Province of Quebec* v. *Fraser et al.* (9); *The Queen* v. *Lavery* (10); *Wood* v. *The Queen* (11).

The texts of the aforesaid undertakings are substantially identical; the few slight differences in the wording are absolutely immaterial.

The compensation for the water lots or land covered with water expropriated, as previously stated, is fixed at $3,250. The suppliant will be entitled to recover the said sum from the respondent, with interest thereon at 5 per cent per annum from the 21st day of June, 1919, date of the expropriation, to the date hereof, upon giving to the respondent a good and valid title to the said property, free from all mortgages and incumbrances whatsoever.

After giving the matter my best consideration I have decided that, whether the undertaking aforesaid in relation to the sewers be duly executed or not, the proper course to follow is to reserve the right of the suppliant to make use of the two sewers abovementioned and in the event of

(1) (1895) 25 S.C.R. 84.
(2) (1893) 3 Ex. C.R. 387.
(3) (1914) 17 Ex. C.R. 329.
(4) (1919) 18 Ex. C.R. 410.
(5) (1919) 19 Ex. C.R. 321.
(6) Q.R. 15 K.B. 320; (1907) 39 S.C.R. 682.
(7) (1891) 2 Ex. C.R. 293; (1892) 20 S.C.R. 420.
(8) (1889) 2 Ex. C.R. 78; (1889) 19 S.C.R. 125.
(9) Q.R. 25 S.C.R. 104; Q.R. 14 K.B. 115; (1906) 37 S.C.R. 577.
(10) Q.R. 5 Q.B. 310.
(11) (1877) 7 S.C.R. 634.

their collapsing or becoming obstructed or of the lease coming to an end the suppliant shall have the right, with the assent of the respondent, to proceed to their repair or reconstruction as need be and to charge to respondent the increased cost of such work due to the existence of the constructions or tracks lying over the sewers so repaired or reconstructed.

In the event of the respondent failing to allow the suppliant to do the necessary work, the claim of the suppliant for compensation for the value of the sewers is reserved and the suppliant shall be at liberty to come before the Court for directions, if necessary, after notice duly served upon respondent.

In examining the record I found that counsel for respondent at the trial had only filed a plan of the property expropriated (exhibit B) and had overlooked the filing of a description. I instructed the registrar to communicate with him and to draw his attention to this omission, which he did on June 1, 1945. Counsel sent copies of descriptions of, among others, parcels C and D, with a certificate of the registrar of deeds for the county of Halifax stating that they had been deposited of record in his office on June 21, 1919. He failed however to forward copies of descriptions of lots 3 and 4. On my request the registrar again wrote to counsel asking him for these copies. The reply was that descriptions of lots 3 and 4 had not been registered. In compliance with my direction the registrar wrote to counsel pointing out that if, in 1919, the solicitor, who had charge of the expropriation, had not complied with the exigencies of the law, the situation could be remedied. I advised the registrar to call counsel's attention to sections 9 and 10 of the Expropriation Act and quote the material portions thereof.

The first paragraph of section 9 reads as follows:

> Land taken for the use of His Majesty shall be laid off by metes and bounds; and when no proper deed or conveyance thereof to His Majesty is made and executed by the person having the power to make such deed or conveyance, or when a person interested in such land is incapable of making such deed or conveyance, or when, for any other reason, the minister deems it advisable so to do, a plan and description of such land signed by the minister, the deputy of the minister or the secretary of the department, or by the superintendent of the public work, or by an engineer of the department, or by a land surveyor duly licensed

1945

CORPN. OF TOWN OF DARTMOUTH v. THE KING

Angers J.

and sworn in and for the province in which the land is situate, shall be deposited of record in the office of the registrar of deeds for the county or registration division in which the land is situate, and such land, by such deposit, shall thereupon become and remain vested in His Majesty.

Section 10, which is particularly pertinent to the point involved, is thus worded:

In case of any omission, misstatement or erroneous description in such plan or description, a corrected plan and description may be deposited with like effect.

As a result counsel for respondent caused to be deposited of record with the registrar of deeds aforesaid on November 9, 1945, descriptions of lots 3 and 4 and on November 15, 1945, he forwarded to the registrar of the Court certified copies thereof together with a copy of a plan of these lots and a certificate of the registrar of deeds.

Needless to say, I had to keep the matter in abeyance until all the formalities of the expropriation had been completed. Failing this I could not have held that lots 3 and 4 had become vested in His Majesty the King. My conclusion in this respect would have been limited to parcels C and D. This unfortunate incident delayed the judgment; had the proceedings in expropriation been duly fulfilled, I would have been in a position to deliver judgment early in June.

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

Judgment accordingly.

BETWEEN:

D. R. FRASER & COMPANY LIMITED ..... } APPELLANT:

AND

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

1945
Sep. 19, 20 & 21
Dec. 20

Revenue—Income—Income War Tax Act, R.S.C. 1927, c. 97, s. 5 (1) (a)—License to cut timber is a contract for sale of goods containing lease of land on which timber is growing—Claim for allowance for exhaustion of timber limits—Discretion of Minister exercised on proper legal principles—Extent of discretion given Minister by s. 5 (1) (a) of Income War Tax Act—Appeal dismissed.

Appellant has, for many years, operated a logging, sawing, planing and general lumber milling business in the Province of Alberta, and during its fiscal year ending October 31, 1941, produced 8,031,305 board feet of lumber from three timber limits, licenses for which were granted to it by the Minister of Lands and Forests of Alberta. In making its income tax return for the year 1941 appellant claimed an allowance for exhaustion of these timber limits which claim was disallowed. On appeal the court found that the contract entered into between the appellant and the Minister of Lands and Forests of Alberta, called a license, is one for the sale of goods which also gave appellant a right to enter upon the land for the purpose of cutting and removing the goods agreed to be sold, and, therefore, contained a lease of the land. The appellant is not the owner of the timber being exhausted and has no depletable interest therein. It has already benefited by deductions from its income over a period of years of all costs which could possibly be called capital costs (as well as all costs of operation) and, therefore, by such deductions, has been allowed to keep its capital investment intact. The Province of Alberta is not subject to income tax and indicated its consent to 99 per cent of any allowance for exhaustion being made to appellant.

Held: That the allowance provided for by s. 5 (1) (*a*) of the Income War Tax Act is permissive as contrasted with obligatory and the section must be so read unless such an interpretation would be so inconsistent with the context as to render it irrational or unmeaning.

2. That the discretion given to the Minister extends not only to the determination of what is a fair and just allowance but also as to whether or not, under all the circumstances, any allowance should be made.

3. That the Minister having concluded that an allowance for exhaustion should not be made to appellant exercised his discretion upon proper legal principles and the appeal must be dismissed.

1945

D. R. FRASER CO. LTD. v. MINISTER OF NATIONAL REVENUE

APPEAL under the provisions of the Income War Tax Act.

The appeal was heard before His Honour Judge J. C. A. Cameron, Deputy Judge of the Court, at Edmonton.

S. B. Smith K.C. and *C. W. Clement, K.C.* for appellant.

G. Auxier and *J. G. McEntyre* for respondent.

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

CAMERON D.J. now (December 20, 1945) delivered the following judgment:

This is an appeal from an assessment dated February 5, 1944, made in respect of the Appellant's income for the year 1941. Notice of Appeal is dated March 4, 1944, and on September 26, 1944, the Minister, by his decision, affirmed the assessment, stating in part:

> The Honourable the Minister of National Revenue having duly considered the facts as set forth in the Notice of Appeal, and matters thereto relating, hereby affirms the said Assessment on the ground that the taxpayer is not entitled to an allowance under the provisions of Subsection (*a*) of Section 5 of the Income War Tax Act for the exhaustion of timber limits owned by the Crown in right of the Province of Alberta on which the taxpayer has been licensed to cut timber. Therefore on these and related grounds and by reason of other provisions of the Income War Tax Act and Excess Profits Tax Act the said Assessment is affirmed.

On October 23, 1944, the Appellant gave Notice of Dissatisfaction and the reply of the Minister dated December 2, 1944, affirmed the Assessment. Pleadings were delivered. At the trial, on motion of Appellant's counsel, I approved of two amendments to the Statement of Claim (1) by substituting an amended schedule of timber limits in Paragraph 14; (2) by adding to the prayer of the Statement of Claim the following clause:

> (*aa*) That the Appellant's assessment be amended by making it an allowance for exhaustion of $1.40 per thousand feet board measure, or a just, fair and reasonable allowance for exhaustion.

I also approved of an amendment to the Statement of Defence by adding thereto Paragraph 17 as follows:

> 17. That in the years prior to the taxation year 1941 the Minister has allowed to the Appellant amounts for exhaustion which have enabled the Appellant to recover, free of income tax, its entire cost of any timber

licenses or permits held by it, and in making the said allowances the Minister has exercised the discretionary power vested in him by the provisions of Section 5 1 (*a*) of The Income War Tax Act.

1945

D. R. FRASER CO. LTD. v. MINISTER OF NATIONAL REVENUE

Cameron D.J.

The Appellant has, for many years, operated a logging, sawing, planing and general lumber milling business in Alberta and during its fiscal year ending October 31, 1941, produced 8,031,305 board feet of lumber from 3 timber limits, licenses for which were granted to it by the Minister of Lands and Forests of Alberta. It claims to be entitled to an allowance for exhaustion of these timber limits under the provisions of Section 5 (1) (*a*) of the Income War Tax Act which is as follows:

Depletion 5. 1 "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—

(*a*) The Minister in determining the income derived from mining and from oil and gas wells and timber limits may make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair, and in the case of leases of mines, oil and gas wells and timber limits the lessor and the lessee shall each be entitled to deduct a part of the allowance for exhaustion as they agree and in case the lessor and the lessee do not agree the Minister shall have full power to apportion the deduction between them and his determination shall be conclusive.

For the Respondent it is urged that the Appellant has no proprietary or other depletable interests in the timber limits; that it is not such a lessee as is referred to in Section 5 (1) (*a*) but merely a purchaser of timber the cost of which has been allowed as a deduction in determining the profits subject to tax; and, alternatively, that in the years prior to 1941 the Minister has allowed the Appellant amounts for exhaustion which enabled it to recover free of income tax its entire cost of such timber limits or permits and in so doing that the Minister has exercised the discretionary powers vested in him under the said section.

It is clearly established that the Appellant did recover the above mentioned amounts of timber from the said limits in 1941. Exhibit 21 is a statement, dated June 8. 1944, signed by the Minister of Lands and Forests of Alberta, indicating that the Appellant is entitled to 99 per cent of the allowance for exhaustion and the Province of Alberta is entitled to 1 per cent thereof for the year 1941.

1945

D. R. FRASER CO. LTD. v. MINISTER OF NATIONAL REVENUE

Cameron D.J.

In approaching the problems involved, it is necessary to first consider the agreements under which the Appellant operated these timber limits.

Berth 1161 was originally acquired in 1904 from the Dominion Government by the Appellant and an associate; the latter's interest was subsequently acquired by the Appellant. The license was renewed from year to year by the issue of a new license and Exhibit 8 is a photostatic copy of the last one issued by the Minister of the Interior; Exhibit 9 is the first license issued to the Appellant by the Province of Alberta and is for the year ending March 31, 1932. It has been renewed from year to year by the issue of a new license, and apparently without tender. Exhibits 10 and 11 are respectively the licenses for the years ending March 31, 1941, and March 31, 1942.

Berth 1727 was acquired from the Dominion Government in 1912 by the Appellant and Walters but later the licenses were granted in the name of the Appellant only. Exhibit 13 is a copy of the last license issued by the Dominion Government, expiring April 30, 1931. Subsequently annual licenses were granted by the Province of Alberta and Exhibits 14 and 15 are copies of such licenses for the year ending March 31, 1941, and March 31, 1942, respectively.

Berth 6722 was acquired in 1940 from the Province of Alberta. Exhibits 19 and 20 are respectively the licenses for the years ending March 31, 1941, and March 31, 1942. This berth was secured by the Appellant following a sale by public tender and Exhibit 17 is the advertisement of such "sale of timber by public tender".

In 1941, therefore, the Appellants were operating all these berths under Provincial licenses, identical in character, except as to the consideration and description of the property.

As mentioned above, berths 1161 and 1727 were originally acquired from the Dominion Government. Tenders were called for and the license was granted to the highest bidder, who, in addition to the amount of his bid, was required to pay an annual ground rent, certain costs for fire protection and dues according to the amount of lumber and timber manufactured and sold. The

amount of this bid or "bonus", as it was called, was not returned to the licensee. The amount of dues varied from time to time.

In the Provincial licenses for the year 1941, in addition to the dues fixed by the regulations, there was paid at the time of granting the annual license, an amount expressed to be for ground rent, license fee, fire guarding charges and Timber Areas tax. When new areas are put up for public tender the bidder makes an offer of a certain amount per 1,000 feet board measure; and in addition makes a deposit which, if his bid has been successful, is retained as a guarantee of compliance with the conditions of sale. Eventually it is credited or returned to the licensee. For the year 1941 all amounts paid by the Appellant to the Province of Alberta in respect of the licenses (other than the deposit) and whether for ground rent, or for dues, were allowed as deductions in arriving at the taxable income.

As regards the cost of acquiring berths 1161 and 1727, for cruising, "bonus" and purchase of the interests of the former associates etc. the Appellant entered these in its own books as capital assets and annually wrote off an amount as an operating expense to earn the income. In its income tax returns it showed these amounts so written off, merely as an expense of operation, and the amounts so shown were allowed by the Income Tax Department and by 1939 the entire cost had been fully written off. The basis on which they were passed by the Department is not shown; it may have been as an expense of operation as claimed in the appellant's tax return; or it may have been as an allowance for exhaustion under the then Sec. 5 (1) (*a*). In any event it is clear that the appellant, by its return, indicated that it viewed it as a matter of ordinary operating expense. If in fact, it were a capital asset, then by the provisions of Sec. 6 1 (*b*) no allowance for depletion or exhaustion could be allowed except as otherwise provided in the Act, namely Sec. 5 1(*a*) as it then stood. While the appellant in 1928 had on its own books appreciated the value of the berths, it continued to claim as deductions from income on the basis of cost only. After 1939 no additional claim

1945

D. R. FRASER CO. LTD. v. MINISTER OF NATIONAL REVENUE

Cameron D.J.

was made for further deductions in respect of these items, the entire cost having been written off. The cost of road, mill and camp construction was written off from year to year during the life of the particular area served, as depreciation. Wages and normal operating costs were allowed as deductions under the heading of operating expenses.

I am satisfied that the income here is derived from timber limits and I think it is clear also that the words "derived from" apply equally to oil, gas wells and timber limits as well as to mining notwithstanding the suggestion of Respondent's counsel to the contrary.

It is to be noted that the allowance provided for is "for the exhaustion of the timber limits". The marginal note to the section is "depletion" but the word is not used in the section nor is it defined in the interpretation section. There is no provision for depletion as such in the English Act and while in the United States of America such an allowance is made, it is on an entirely different basis. So far as I am aware there are no reported Canadian cases where the principles applicable to an extractive industry have been fully considered. I think I can assume that this section is made part of the Income War Tax Act in order to ensure that the tax is levied on income and not on capital and that, therefore, special consideration is given to the industries where the capital asset is extracted and disposed of and where in the ordinary course of things the proceeds of such disposal would be income. The apparent intention is to provide for a deduction from gross income of an amount which in part at least will take the place of the capital assets so extracted and disposed of. The first part of the section, in my opinion, is intended to give such relief to the owner of the capital asset being exhausted. But with the knowledge that some extractive industries are frequently worked under a lease special provision is made later in the section for the division of such allowance as the Minister *may* make, between the lessor and the lessee as they agree; and failing agreement, to be apportioned between them as the Minister may determine.

1945

D. R. FRASER CO. LTD. v. MINISTER OF NATIONAL REVENUE

Cameron D.J.

It would seem that except for the special provision relating to the case of lessor and lessee, the allowance should be made to the owner of the industry, for it is his capital asset that is being exhausted.

But the section does include a provision for the case where timber limits are operated under a *lease* and that in such cases each is entitled to that portion of the allowanace agreed upon. I think that what is here contemplated is that when the Minister has determined, after consideration of all the facts, that an allowance for exhaustion should be made, that the lessor and the lessee may then deduct such allowance in the proportions they have agreed upon.

The appellant here is clearly not the owner of the capital asset being exhausted i.e. the standing timber; the owner is the Province of Alberta and the terms of the annual licences clearly provide for the vesting of the right of property in the appellant only when the trees have been cut. The ownership of all uncut trees is clearly still in the Province and remains so until such trees have been cut in any subsequent year under the terms of a new license.

Reference may be made to *Smylie* v. *The Queen* (1). While the question there had to do with the right of the Province of Ontario to attach new conditions upon the granting of a renewal of the license to cut timber, the Court had to consider timber licenses very similar to the one here in question. At p. 178, Osler J.A. said:

> The case was argued as if by the purchase, as it is called, of the berth or limit, the licensee acquired some title to or ownership of the timber beyond that which by virtue of the Act the license conferred upon him for the time it was in force. That contention cannot, in my opinion, be supported. The right acquired was to cut, during the term of the license, timber belonging to the Crown. That timber, when it was cut, and not until then, became the property of the licensee, as provided by the Act. When a new license was granted the Crown was dealing with its own property and not the property of the licensee * * *

And on p. 2 of the license here in question certain rights are given the appellant regarding proceedings against trespassers "and any such proceedings which have commenced and are pending at the expiration of the license may be continued *as if this license had not expired*". The rights of the licensee were confined to the

(1) (1900) 27 O.A.R. 172.

1945

D. R. FRASER CO. LTD. v. MINISTER OF NATIONAL REVENUE

Cameron D.J.

timber cut during the term of the license; see judgment of Maclennan J.A. in *Smylie* v. *The Queen* (*supra*) at p. 183.

Unless, therefore, the appellant is a lessee of the Province of Alberta, it cannot, in my view, come within the provisions of Section 5 (1) (*a*). Are the documents, under which the appellant operated the timber limits in 1941 and which are called "licenses to cut timber on the provincial lands", licenses or leases? In deciding whether a grant amounts to a lease or is only a license, regard must be had to the substance of the agreement; Halsbury 2 ed. Vol. 20, p. 9. Exhibit 19 is a copy of the provincial license for berth 6722 for the year ending March 31, 1942, and for all practical purposes is the same as all the other "licenses" under which the appellant operated in 1941.

The Respondent argued that in fact this "licence" is actually nothing more than a sale of goods and in support of that contention he referred to *Marshall* v. *Green* (1) and to *Kauri Timber Co. Ltd.* v. *Commissioner* (2). In the former case it was held that a sale of growing timber to be taken away as soon as possible by the purchaser is not a contract or sale of land or any interest therein within the fourth section of the Statute of Frauds. Brett, J. at p. 42 outlined the judicial test in regard to the question and said:

> Then there comes the class of cases where the purchaser is to take the thing away himself. In such a case where the things are fructus industriales, then, although they are still to derive benefit from the land after the sale in order to become fit for delivery, nevertheless it is merely a sale of goods, and not within the section. If they are not fructus industriales, then the question seems to be whether it can be gathered from the contract that they are intended to remain in the land for the advantage of the purchaser, and are to derive benefit from so remaining; then part of the subject-matter of the contract is the interest in the land, and the case is within the section.

In the case at bar it is clear that the timber is not *fructus industriales* and that, as the licenses were renewable for a period of some years, the timber would derive benefit by way of increase from so remaining in the soil. The timber here appears to be *fructus naturales*.

(1) (1875) 1 C.P.D. 35 at 38. (2) (1913) A.C. 771 at 778.

1945

D. R. FRASER CO. LTD. v. MINISTER OF NATIONAL REVENUE

Cameron D.J.

The principles enumerated in that case were followed in the *Kauri Timber* case (*supra*) and Lord Shaw of Dunfermline stated at p. 778:

> The law—so clearly settled with regard to the working of coal and of nitrates, and settled upon a broad general principle—is in no way different when it comes to be applied to timber-bearing lands. The principle set out above in the present judgment as to the true reason for holding that such timber rights are of the nature of possession of, and interest in, the land itself has long been settled. A note by the learned editor in the first volume of Saunders' Reports, p. 277c, puts the matter thus: "The principle of these decisions appears to be this: that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold, from further vegetation and from the nutriment afforded by the land, the contract is to be considered as for the interest in the land; but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold and the contract is for goods.
>
> There may have been certain necessary modifications of the generality of this principle with respect to emblements or the products of industry like ordinary agricultural crops; but it is unnecessary to analyse these instances or to make any pronouncement upon some of the dicta of judges in later times. For the present is a broad case of the natural products of the soil in timber—a crop requiring long-continued possession of land until maturity is reached, and the contract with regard to it in the present case raises none of the difficulties springing out of a covenant for immediate severance and realization. The judgment of Brett J. in *Marshall* v. *Green* (1) distinguishes this broad case and properly accepts the note in Saunders' Reports which has just been cited.

I was also referred to *St. Catherines Milling & Lumber Co.* v. *The Queen* (2) in which it was held that a permit under which the purchaser had the right within a year to cut from Crown property 1,000,000 feet of lumber is a contract for sale of chattels. But by reason of a particular term of that contract it was not within the contemplation of the parties that the purchasers were to derive any benefit from its future growth in the soil. The same judge (Burbidge J.) in the case of *Bulmer* v. *The Queen* (3) stated at p. 217:

> Here, however, the facts are very different. The licensee is given, subject to certain exceptions that are not material, the exclusive possession of the lands and the right to bring an action against any person unlawfully in possession thereof and to prosecute all trespassers thereon, and a ground-rent is reserved. Then, if the licenses were renewable from year to year, possibly for twenty years or more, at the request of the licensee, subject only to a revision of the ground-rent and royalty, and that is a necessary part of the claimant's case, how can it be said that the agreements entered into were for the sale of goods and not of an interest in land?

(1) (1875-76) 1 C.P.D. 35.
(2) (1877-91) 2 Ex. C.R. 202.
(3) (1893) 3 Ex. C.R. 124.

1945

D. R. FRASER CO. LTD. v. MINISTER OF NATIONAL REVENUE

Cameron D.J.

These decisions however were made before the passing of the Sale of Goods Act. This Act in Alberta is Chap. 146, R.S.A. 1922. It defines "goods" as follows:

> "Goods" shall include all chattels personal other than things in action or money. The term shall include emblements, industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

In Lord Hailsham's 2 Ed. Halsbury, Vol. 29, p. 11, dealing with the Sale of Goods Act, it is stated.

> The concluding words of the definition appear to give a general rule for dealing with all things attached to the land, other than emblements and industrial growing crops, and to get rid of subtleties as to whether they were to be severed by buyer or seller, or whether they were to get any benefit from remaining attached to the land before severance. Under the Act the sole test appears to be whether the thing attached to the land has become by agreement goods, by reason of the contemplation of its severance from the soil.

Applying this test to the instant case it would seem that as the "license" itself provides for vesting all rights of property in the trees, timber, etc., *which have been cut,* that the thing attached to the land, namely the trees, has become by agreement "goods" by reason of contemplation of its severance from the soil.

The case of *Carlson* v. *Duncan* (1) dealt with the contention that "timber" was within the defintion of "goods" in the Sale of Goods Act and, while the Court of Appeal there held that in that case they were not goods the decision was arrived at because of the special conditions of the contract. There the sale was an out and out sale of all the trees mentioned, the purchaser to have as much time as he desired to remove them from the land. The agreement did not provide that the timber should be severed before sale; and the Court held (presumably because the timber had been sold for cash) that before severance the purchaser had title to an interest in the timber which was part of the land. Macdonald J.A. said at p. 349:

> Whether a contract relating to timber constitutes a sale of chattels or relates to an interest in land depends upon the terms of the contract. Because of the special terms of the contract we are considering it is not one for the sale of goods.

(1) (1931) 2 W.W.R. 343.

1945

D. R. FRASER CO. LTD. v. MINISTER OF NATIONAL REVENUE

Cameron D.J.

In the case of *James Jones & Sons Limited* v. *Tankerville* (1) after discussing *Marshall* v. *Green* (*supra*) it was said:

Lastly, in determining the effect of such a contract at law the effect of the Sale of Goods Act, 1893, has now to be considered. Goods are there defined in such a manner as to include growing timber which is to be severed under the contract of sale, whether by the vendor or the purchaser.

In *Fredkin* v. *Glines* (2) *Perdue* J.A. said:

By this definition we are to consider as goods things attached to, or forming part of, the land which are agreed to be severed under the contract of sale. It appears to me that by this definition the intention of the parties as evidenced by the contract is the determining factor in arriving at the conclusion whether the article in question is, or is not, a chattel. If, therefore, growing trees, or natural grass, be sold for the purpose of being cut and taken away, pursuant to the contract, they are goods under this definition. There does not appear to be any limit of time imposed by the statute within which the intended severance is to take place. The question is well discussed in Benjamain on Sales, 5th ed. 190.

In Benjamin on Sales 7th ed. 199, in discussing the question "What are goods" it is stated:

The definition therefore includes such things, when sold as chattels as fixtures, buildings and other erections and *fructus naturales*.

And at page 200:

It should be remarked that the Act in referring to severance lays down no limit of time, thus going beyond *Marshall* v. *Green* (*supra*); for even if the "things" sold are to derive further benefit from the soil, and are not to be removed within a short period, provided that they are agreed to be severed "under the contract of sale", they are declared to be "goods" within the Act.

I have reached the conclusion that in this particular case the contract, in so far as it relates to the acquisition of timber by the appellant, was a contract for the sale of goods. The timber had to be cut before it became the property of the appellant and it was then completely severed from the soil. The severance was clearly in the contemplation of the parties and payment was provided for on the basis of board measure after milling.

But in the view that I have taken of the whole contract that does not dispose of the matter. In my opinion the contract is something more than a mere sale of goods. It is also a right to enter upon the land for the purpose of cutting and removing the goods agreed to be sold. Do these rights in the land constitute a license or a lease?

(1) (1909) 2 Ch. 440 at 445. (2) (1908) 18 M.L.R. 249 at 252.

1945

D. R. FRASER CO. LTD. v. MINISTER OF NATIONAL REVENUE

Cameron D.J.

Counsel for the appellant relied strongly on the case of *Glenwood Lumber Co. Ltd.* v. *Phillips* (1), in support of his contention that the licenses were in fact leases. The court there was dealing with the effect of certain timber cutting rights in Newfoundland. Lord Davey said at p. 408:

> The appellants contended that this instrument conferred only a license to cut timber and carry it away, and did not give the respondent any right of occupation or interest in the land itself. Having regard to the provisions of the Act under the powers of which it was executed and to the language of the document itself, their Lordships cannot adopt this view of the construction or effect of it. In the so-called license itself it is called indifferently a license and a demise, but in the Act it is spoken of as a lease, and the holder of it is described as the lessee. It is not, however, a question of words but of substance. If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself.

The Provincial Lands Act of Alberta 1939 is an Act to amend and consolidate the Provincial Lands Act. It provides for the disposal of agricultural land, grazing land, hay and marsh land and mineral lands by lease. Then follows certain sections under the heading "Disposal of Timber".

Section 49 gives to the Lieutenant Governor in Council power to make regulations for the disposal by public competition of the right to cut timber on berths to be defined in the public notice of such competition.

Section 50 reads:

> The person to whom a timber berth is awarded under the last preceding section shall be granted a license therefor. . . .

Throughout the section the person to whom the berth is awarded is referred to as a licensee and the authority granted to him is called a license and not a lease.

Under the regulations of July 25, 1940, a timber license means "any permit granted under these or any former regulations for the cutting and removal of Crown timber for any purposes." It was under that Act and those regulations that the licenses in question were granted. By the terms of exhibit 17—in regard to berth 6722—the successful bidder was required to apply for a license and the appellant apparently did so. All the documents under which the appellant operated in 1941 were called licenses throughout.

(1) (1904) A.C. 405.

The distinction between licenses and leases is discussed in the 24th Edition of Woodfall on Landlord and Tenant p. 6, and in English and Empire Digest Vol. 30, p. 501, and all the relevant cases are referred to therein. In Woodfall it is stated "it has been seen above that there is a demise where a right is granted to the exclusive possession of the lands or tenements for a determinate term. The grant of such exclusive possession is a lease although there may be certain reservations or restrictions of the purpose for which the possession may be used and although it may be described as a license".

In proceedings between the parties to the contract it might well be impossible to successfully assert that what each has called a license was in fact a lease. But this is not such an action and I have to determine whether under the Income War Tax Act the contract is a lease of timber limits. There being no definition of lease in the Act I think I am not entitled to construe the word as it may have been defined in any Provincial Act but rather to ascertain how it has been judicially construed.

In the case of *Grand Trunk Railway* v. *Washington* (1) it was said: "As these are enactments emanating from a different legislative body from that which passed the statute to be interpreted and cannot be said to be in *pari materia* with it, their Lordships are unable to see that they ought to have any influence upon the question to be decided arising exclusively upon the Dominion Act."

Exhibit 19, as to the rights conferred on the appellant in the land, seems to answer all the tests laid down in the cases referred to in the text books I have mentioned and in the cases therein noted as well as the ones I have specifically referred to. A fixed rental is provided for; exclusive possession, subject to specific reservations, is given and there is a definite term—1 year. Rights of action against trespassers are given the appellant and the latter is required to pay all rates and assessments and taxes imposed by any municipal improvement scheme or drainage district to be charged on the timber berth. Looking, therefore, at the substance of the agreement

(1) (1899) A.C. 275 at 280.

1945

D. R. FRASER CO. LTD. v. MINISTER OF NATIONAL REVENUE

Cameron D.J.

I must on the authorities reach the conclusion that, notwithstanding the words used in the document itself, it contains a lease of the land, and I so find.

The so-called license is, I think, both a contract for the sale of goods and a lease. Reference to the regulations (Ex. 28 sec. 8) and to the conditions of sale (Ex. 17) shows that a bidder in addition to tendering for the sawn lumber, is required also to enter into a contract to pay rent. The "license" embodies both in one document. See *Bulmer* v. *The Queen* (1).

Counsel for the Appellant urged upon me that his client had a statutory right to an allowance for depletion and referred me to the *Pioneer Laundry* Case (2). The decision in that case was made under section 5 (*a*) which then read:

5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—

(*a*) Such reasonable amount as the Minister, in his discretion, may allow for depreciation, and the Minister in determining the income derived from mining and from oil and gas wells and timber limits shall make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair;

And in the case of leases of mines, oil and gas wells and timber limits, the lessor and the lessee shall each be entitled to deduct a part of the allowance for exhaustion as they agree and in case the lessor and the lessee do not agree, the Minister shall have full power to apportion the deduction between them and his determination shall be conclusive.

In Lord Thankerton's judgment he stated:

Their Lordships are unable to agree with these views, and they agree with the opinion of Davis J., in which the Chief Justice concurred, and in which he states: The appellant was entitled to an exemption or deduction in "such reasonable amount as the Minister, in his discretion, may allow for depreciation". That involved, in my opinion, an administrative duty of a quasi-judicial character—a discretion to be exercised on proper legal principles.

In their Lordships' opinion, the taxpayer has a statutory right to an allowance in respect of depreciation during the accounting year on which the assessment in dispute is based.

But following that decision the section was changed and insofar as depletion or exhaustion is concerned from 1940 on the section has been as shown on page 2 herein. The changes in my view are important and it is necessary to consider whether, under the new wording the taxpayer, has

(1) (1894) 23 S.C.R. 488 at 496. (2) (1940) A.C. 127 at 136.

now a statutory right to the deduction or whether the granting of such an allowance by the Minister is purely permissive.

Before the amendment it is to be noted that the words were: "Income as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions: (*a*) Such reasonable amount as the Minister in his discretion may allow for depreciation" * * *

As stated in the *Pioneer Laundry* case the taxpayer had a statutory right to an allowance, the amount of which was in the discretion of the Minister, and as laid down by the Privy Council the Minister had a duty to fix a reasonable amount with which decision the Court would not interfere unless it was manifestly against sound and fundamental principles. As the section then read it was only the amount of the allowance which was left to the discretion of the Minister.

As it now stands the first part of the section reads:

"Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—

(*a*) The Minister in determining income derived from mining and and from oil and gas wells and timber limits *may* make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair . . .

The discretion here conferred on the Minister is in my view quite different from that which he had prior to the amendment. In my opinion the word "may" is used in its permissive sense and not as imperative. The Interpretation Act, section 37 (24) says "shall" is to be construed as imperative and "may" as permissive.

Reference may be made to the judicial interpretation of the words "may" and "shall" in the case of *Canada Cement* v. *The King* (1) and cases therein referred to. In that case Audette J. quoted the judgment of Lord Moulton in *McHugh* v. *Union Bank* (2), as follows:

It is true that (as is customary in interpretation clauses) these subsections are prefaced by the words "unless the context otherwise requires", but that does not take away from the authority of the express direction as to the construction of the words "shall" and "may". The Court is bound to assume that the legislature when it used in the present instance the word "may" intended that the imposition of the penalties should be permissive as contrasted with obligatory unless such an interpretation would be inconsistent with the context, that is,

(1) (1923) Ex. C.R. 145 at 150. (2) (1913) A.C. 299 at 314.

1945

D. R. FRASER CO. LTD. v. MINISTER OF NATIONAL REVENUE

Cameron D.J.

would render the clause irrational or unmeaning. But there is nothing in the context which creates any difficulty in accepting this statutory interpretation of the word "may". The clause is just as intelligible with the one interpretation as with the other. So far from creating any difficulty the interpretation which leaves it permissive appears more reasonable seeing that there is no exception in the clause for cases where the excess has been taken either under mistake or by inadvertence, and it is not likely that the Legislature would insist on penalties being enforced where no blame attached. Be this as it may, there is nothing in the clause which will permit their lordships to depart from the express provision of the Interpretation Ordinance stating that "may" shall be construed as permissive.

This being the case, it is not necessary to examine the English decisions which establish that in certain cases "may" must be taken as equivalent to "must". In the light of these decisions it is often difficult to decide the point, and in their Lordships' opinion the object and the effect of the insertion of the express provision as to the meaning of "may" and "shall" in the Interpretation Ordinance was to prevent such questions arising in the case of future statutes.

In this case I think the court is bound to assume that when Parliament changed the wording of the section it intended that the allowance should be permissive as contrasted with obligatory and it must be so read unless such an interpretation would be inconsistent with the context, that is, render the clause irrational or unmeaning. No such inconsistency appears in the section. Here a much wider direction is given to the Minister than if the wording were "shall be entitled to such an allowance as the Minister may deem fair and just." In my view the discretion extends not only to the determination of what is a fair and just allowance but also as to whether or not, under all the circumstances, any allowance should be made. It may seem to be a somewhat arbitrary power but it is not for the Court to question the wisdom of Parliament in so enacting.

But, in fact, in this particular case the discretion of the Minister does not seem to have been used in any arbitrary way as will appear from a consideration of all the facts. As I have found, the appellant is not the owner of the timber being exhausted, and has no depletable interest therein. In addition, it has already benefited by deduction from its income over a period of years of all costs which could possibly be called capital costs (as well as all costs of operation) and, therefore, by such deductions, has been allowed to keep its capital investment intact. And while, appar-

ently, the appellant had never previously claimed these deductions as depletion under section 5 (1) (*a*), but rather by way of depreciation or as disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income, they were in fact allowed. The result was that the appellant was eventually able to write off its full capital investment.

Moreover, there is a special situation here which deserves comment. It sems to me that Parliament in providing for the division of any allowance made by the Minister between the lessor and lessee "as they agree" may have had in mind that a lessor and lessee, both of whom were interested in a share of such allowance, would endeavour to reach an agreement which would reasonably reflect their actual respective interests in the thing which was being exhausted. Failing such an agreement the Minister would have had to give similar consideration to the facts disclosed to him. But here it is to be observed that the Province of Alberta is not subject to payment of income tax and having no interest in claiming a part of such allowance has indicated its consent to 99 per cent of such allowance being made to the appellant. The result is quite clear, namely that the appellant, having little or no proprietary interest in the asset being exhausted and having had all its costs already taken care of by annual deductions would escape a considerable degree of taxation. It is true of course that a taxpayer may take such legal steps in managing his affairs as may avoid attracting tax to his income. But it seems to me that situations such as I have outlined are matters which the Minister is quite entitled to consider in reaching any conclusion as to whether any allowance should be made. It is apparent that he has had them or some of them in mind and has concluded that no allowance in this case should be made. It is not a case where allowances had formerly been made to operators of timber limits, holding under such an agreement as this over a long period of time; the evidence indicates that they had never been made up to 1941. Inasmuch therefore as the Minister appears to have reached a conclusion which, in my interpretation of his powers,

1945

D. R. FRASER CO. LTD. v. MINISTER OF NATIONAL REVENUE

Cameron D.J.

he was quite entitled to reach and the decision on which is left to him, it is not a matter where the Court should interfere.

Nor can I find that in exercising his discretion the Minister has proceeded on any wrong principles. All the facts necessary to determine the matter were in his possession and it has not been shown that in reaching his conclusion he did not follow the principles laid down for the exercise of discretion in the *Pioneer Laundry* and other cases.

At the trial I allowed certain evidence to be given subject to later ruling as to its relevancy and admissibility. Certain "rulings" given by the Department and published in Gordon's Digest of Income Tax Cases (1939) were tendered. This digest was published by the direction of the then Minister of National Revenue and printed by the King's Printer. These "rulings appear to have been issued from time to time by the Department and sent to the various branch offices of the Income Tax Department as an indication of the view taken by the Department in certain problems; they sometimes included information as to changes in rates of depletion and gave lists of cases in which shareholders were entitled to depletion allowances and other matters of a like nature. They have received fairly wide publicity and are well known to lawyers and accountants.

The statement of claim brings in issue the practice of the department in regard to the administration of depletion allowances; generally speaking, I think it may be said that evidence of departmental practice is inadmissible in construing a statute; but there are cases in which it would be of assistance in interpreting an ambiguous statute, particularly when such practice has long continued and is clearly not contrary to the Act itself. And as the "rulings" referred to have to do with other extraction industries mentioned in the subsection, I have reached the conclusion that they are relevant to the issue and should be admitted.

Evidence was also tendered as to certain special allowance for sawlogs scaled in 1943 west of the Cascade Range (in which area the appellant was not included) and as to several allowances for depletion granted in 1945 to the

1945

D. R. FRASER CO. LTD. v. MINISTER OF NATIONAL REVENUE

Cameron D.J.

pulp and paper industry only, to commence in the 1941 period. This evidence is, I think, quite irrelevant to the issue before me. These special allowances were made as a war measure to stimulate production of certain commodities in certain areas and they do not affect the appellant. I recall no evidence that they were made under Sec. 5 (1) (*a*), and if, as a war measure, the Minister exercised his discretion in a special way for certain limited groups of the industry, I can see no reason why it must be made applicable to all.

My conclusions, therefore, are that while the contracts in question are leases as to the land mentioned therein, and are contracts for the sale of goods as to the timber purchased, that the Minister having a discretionary power, after considering all the facts in the case to grant or withhold any allowances, and having exercised that discretion according to proper legal principles, his discretion should not be interfered with.

The appeal is therefore dismissed with costs.

Judgment accordingly.

1945

Oct. 5

1946

Jan. 9

BETWEEN:

THE EXECUTORS OF THE WILL OF THE HONOURABLE PATRICK BURNS, DECEASED ..... } APPELLANTS;

AND

THE ROYAL TRUST COMPANY ET AL.

ADDED APPELLANTS;

AND

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

Revenue—Income Tax—Income—Charitable trust—Income War Tax Act R.S.C. c. 97, sects. 2(h), 3(1), 4(e), 11(2), 11(4) (a)—Income in hands of trustees—Income accumulating in trust for the benefit of unascertained persons—Appeal dismissed.

The will of the late Honourable Patrick Burns provided for distribution of sixty per cent of the net annual income from his Trust Estate. The balance of forty per cent of the net annual income is to be accu-

1946

EXECUTORS OF WILL OF HON. PATRICK BURNS DECEASED, ET AL. v. MINISTER OF NATIONAL REVENUE

mulated until the death of the last annuitant named in his will or the death of the widow of the son of the testator, whichever should last occur. Sixty-seven per cent of this corpus is to be distributed to certain persons named in the will. The balance of thirty-three per cent of the corpus is to be used for the creation and establishment of a trust to be known as the "Burns Memorial Trust". The net annual income from this fund is to be distributed amongst five named institutions.

The appeal is from the assessment for income tax in each of the years 1938, 1939, 1940 and 1941 during which years the executors transferred by book entry forty per cent of the net income of the estate from estate income accrued to estate capital account.

Held: That the Burns Memorial Trust and the five organizations which will eventually benefit by the income from the Burns Memorial Trust Fund, when established, are persons within the meaning of s. 2(1) (*h*) of the Income War Tax Act.

2. That an estate is a person within the definition contained in s. 2(1) (*h*) of the Income War Tax Act, and the money received by the executors is income within the meaning of the Income War Tax Act.

3. That the income assessed in the hands of the executors is not income of any religious, charitable, agricultural or educational institution as set out in s. 4(*e*) of the Income War Tax Act.

4. That the Burns Memorial Trust is not a charitable institution; it is merely a name descriptive of the character of a certain fund and the fact that the trust is to be administered in perpetuity does not make it an institution.

5. That no part of the income for the taxation years in question is income of the five beneficiaries of the Burns Memorial Trust since it is received by and remains in the hands of the executors of the will of deceased, during the taxation years.

APPEALS under the provisions of the Income War Tax Act.

The appeals were heard before His Honour Judge J.C.A. Cameron, Deputy Judge of the Court, at Calgary.

G. H. Steer, K.C. for Royal Trust Company.

E. J. Chambers, K.C. for Executors of the Honourable Patrick Burns, deceased.

H. W. Riles, Jr., J. G. McEntyre and *N. D. McDermid* for respondent.

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

CAMERON, D.J., now (January 9, 1946) delivered the following judgment:

This case has to do with four appeals from assessment made in respect of the appellant's income for the years 1938, 1939 and 1940, dated March 17, 1942, and in respect of the income for 1941, dated November 19, 1943.

Notices of Appeal were duly given and the decision of the Minister in respect of all said assessments was delivered on June 5, 1944, and is in part as follows:

> The Honourable the Minister of National Revenue having duly considered the facts as set forth in the Notices of Appeal, and matters thereto relating, hereby affirms the said Assessments on the ground that all the income accumulating in the hands of the executors is taxable in their hands under the provisions of Subsection 2 and paragraph (*a*) of Subsection 4 of Section 11 of the Act; that no part of the said income is the income of any religious, charitable, agricultural or educational institution within the meaning of paragraph (*e*) of Section 4 of the Act. Therefore on these and related grounds and by reason of other provisions of the Income War Tax Act the said Assessments are affirmed.

The appellant served Notice of Dissatisfaction on June 30, 1944, and by the reply of the Minister, dated July 28, 1944, the said assessments were affirmed and these appeals now follow.

The appellants are the present executors of the will of the Honourable Patrick Burns, late of the City of Calgary, who died on the 24th day of February, 1937. On May 4, 1937, probate of his will, dated January 15, 1932, and of a codicil dated March 4, 1933, was granted. The will is a lengthy one and Exhibit 2 is a certified copy thereof. A chief beneficiary named in the will was his son who, however, predeceased the testator, leaving a widow but no issue. By reason of these facts it is not necessary to consider many of the clauses in the will, but careful attention must be given to a number of its provisions.

At the trial, by consent, I added The Royal Trust Company as party appellant; and pursuant to application made at the trial and upon filing consents later I added as additional appellants the five organizations and funds hereinbefore named, in order that all parties interested in the appeal should be before the Court. Such consents have now been filed.

1946

EXECUTORS OF WILL OF HON. PATRICK BURNS DECEASED, ET AL. v. MINISTER OF NATIONAL REVENUE

Cameron D.J.

Substantial testamentary provision was made for the widow of the testator's son, but, prior to the testator's death, an order was made by Mr. Justice Ewing, of the Supreme Court of Alberta, on December 21, 1936, on the application of the then guardians of the testator, which provided for a monthly payment of $350 to the son's widow during her lifetime upon her releasing all her interest in her husband's life insurance policies and waiving any benefits to which she might be entitled under the will of the testator. Such a release was executed on January 18, 1937. In order to take care of this liability the executors have appropriated the sum of $145,000, which has been administered separately from the general estate. Following the death of the testator a further and final settlement was made with the son's widow which provided for an additional monthly payment to her of the sum of $150 during her lifetime in consideration of certain releases, and this was approved by the Court on June 21, 1938. This last mentioned amount is provided for by the executors out of the general revenue of the estate in the same manner as the other annuities later to be referred to.

All the specific legacies in the will were paid or transferred by the executors on or before February 24, 1939, and it is understood that all succession duties and debts were duly paid.

By paragraph 20 of his will, the testator bequeathed to the Children's Shelter at Calgary certain preference shares of a par value of $5,000, and provided that if there were no such institution, the bequest should be used as a nucleus of a fund for establishing such an institution, or alternatively, for the establishing of a fund to be administered by the City for the benefit of the poor, indigent and neglected children.

By Section 21 a similar bequest was made for a fund for the benefit of widows and orphans of members of the Police Force of the City of Calgary, and by paragraph 22 a similar bequest was made for the benefit of widows and orphans of members of the Fire Brigade of the City of Calgary.

It appears that at the time of the testator's death no such institutions as those refererred to were in existence but by order of Mr. Justice Ewing, of the Supreme Court of Alberta, dated December 11, 1939, and filed as Exhibit 8 herein, schemes for the establishment and administration of each of the said funds were established and approved and trustees thereof appointed. It is understood that the bequests above referred to have been paid to such trustees.

By paragraph 30 of his will the testator directed "that my trustees shall stand possessed of "my trust estate" and the income therefrom and all parts thereof, Upon Further Trust" and then followed gifts of certain annuities. Some of the annuitants predeceased the testator and one has since died and the funds necessary to meet the remaining annuities are provided out of the general income from the trust estate. These annuities directed by the will and the second annuity payable to the son's widow, total a relatively small portion of the total income from the trust estate.

Paragraph 35 of the will contains a further direction that in the event of the testator's son having predeceased the testator, or should he survive the testator, but die without leaving lawful issue, but leaving a wife surviving, (as was actually the case) and subject to the provisions thereinbefore mentioned as to the payment of annuities, the trustees should stand possessed of the trust estate, including the accumulations thereof and additions thereto upon further trusts:

(*a*) To allow the use of a residence and the upkeep thereof to his son's widow, and

(*b*) to pay her an annuity of $15,000.

Both of these provisions are now of no effect due to the settlements made with the said widow as heretofore mentioned. Following these provisions for his son's widow the testator in said paragraph 35 further provided:

And I Further Direct my trustees to hold "my trust estate" and to appropriate sufficient of the same or of the investments thereof to insure an annual income therefrom sufficient to pay and discharge the annuities then outstanding and hereinbefore given and bequeathed by this my will, and to hold "my trust estate", including the accumulations thereof and the additions thereto by reason of the deaths of annuitants

1946

EXECUTORS OF WILL OF HON. PATRICK BURNS DECEASED, ET AL. v. MINISTER OF NATIONAL REVENUE

Cameron D.J.

or otherwise until the death of the last of the annuitants to whom I have bequeathed annuities by this my will or the death of the widow of my said son, Patrick Thomas Michael Burns, whichever shall last happen and subject to prior payment of the said annual income of fifteen thousand dollars ($15,000) per annum to the widow of my said son during all the days of her life which she shall survive my said son and during the period aforesaid, Upon Further Trust To Pay:—

and then followed provision for payments to certain nephews and nieces aggregating 60 per cent of the net annual income derived from his trust estate. Distribution of these percentages has been made in each of the years referred to. The final sentence in paragraph 35 is important and is as follows:

And, until the death of the last annuitant to whom I have bequeathed an annuity by the terms of this my will, or the death of the widow of my said son, whichever shall last happen, *to invest the surplus, if any, of such annual income in the names of my trustees as part of the capital of "my trust estate" at compound interest.*

From the above it will be seen that 40 per cent of the net surplus income of the trust estate is to be accumulated until the death of the last annuitant or of the son's widow whichever shall last occur.

Paragraph 36 of the will is as follows:

And I Further Direct that upon the death of the last of the annuitants to whom I have bequeathed annuities in this my will or the death of the widow of my said son, whichever shall last happen and if my said son, Patrick Thomas Michael Burns, shall have predeceased me, or having survived me, shall have died without leaving lawful issue, that my trustees shall stand possessed of "my trust estate" with all accumulations thereof and additions thereto and the whole thereof to hold Upon Further Trust to distribute the same as follows:—

Subsection (*a*)—This section provides for distribution to the persons therein named of 67 per cent of the corpus of the estate then remaining and need not be dealt with in further detail. Then follow in paragraph 36 the clauses which are particularly relevant to this matter:

And Upon the Further Trust to pay and convey the rest, residue and remainder of "my trust estate" unto The Royal Trust Company for the creation and establishment of a trust to be known as the "Burns Memorial Trust" to be administered by it as trustee at its office in the City of Calgary, in the Province of Alberta, and the net annual income therefrom to pay and distribute anually in equal shares thereof amongst the following:—

(1) The Father Lacombe Home at Midnapore in the Province of Alberta.

(2) The branch of the Salvation Army, having its Headquarters at the City of Calgary, in the Province of Alberta.

(3) The Children's Shelter carried on under the auspices of the said City of Calgary, towards which I have bequeathed fifty (50) 4 per cent non-voting, non-cumulative, redeemable preference shares in the capital stock of Burns Foundation (Limited) by this my will.

(4) To the fund established for the benefit of Widows and Orphans of Members of the Police Force of the City of Calgary, towards which I have bequeathed fifty (50) 4 per cent non-voting, non-cumulative, redeemable preference shares in the capital stock of Burns Foundation (Limited) by this my will.

(5) To the fund established for the benefit of Widows and Orphans of Members of the Fire Brigade of the City of Calgary, towards which I have bequeathed fifty (50) 4 per cent non-voting, non-cumulative, redeemable preference shares in the capital stock of Burns Foundation (Limited) by this my will.

This last clause of paragraph 36 therefore provides for the final distribution of 33 per cent of the corpus of the trust estate remaining in the hands of the executors at the date of death of the last of the annuitants or of the sons's widow, whichever shall last occur. Certain of the annuitants and the son's widow are still alive.

For the appellants it is contended that 33 per cent of 40 per cent of the income accumulating in said estate in each of the said years accumulates for the benefit of the Burns Memorial Trust and that the Burns Memorial Trust is a charitable institution; that the institutions beneficially entitled to the Burns Memorial Trust were named in the will and definitely ascertained as beneficiaries at the date of the testator's death; that the shares of income and capital so bequeathed to the said beneficiaries vested immediately upon the death of the said testator, that they are charitable institutions and therefore the said 33 per cent of 40 per cent of the income being accumulated as aforesaid was exempt from taxation by virtue of Section 4 (*e*) of the Income War Tax Act, which is as follows:

Section 4. The following income shall not be liable to taxation hereunder:

(*e*) The income of any religious, charitable, agricultural and educational institution, board of trade and chamber of commerce, no part of the income of which inures to the personal profit of, or is paid or payable to any proprietor thereof or shareholder therein.

It is also to be noted that by the order of Mr. Justice Ewing, dated 11th of December, 1939 (Exhibit 8) it was ordered that according to the true construction of the last

1946

EXECUTORS OF WILL OF HON. PATRICK BURNS DECEASED, ET AL. v. MINISTER OF NATIONAL REVENUE

Cameron D.J.

will and testament of the deceased the legacies contained in paragraphs 20, 21 and 22 of the said will constituted good and valid charitable bequests; and further, that under that portion of paragraph 36 of the said will by which the remaining 33 per cent of the residue of the trust estate was payable to the Royal Trust Company for the creation and establishment of a trust to be known as the Burns Memorial Trust and for the distribution of the income to The Father Lacombe Home, the Salvation Army, the Children's Shelter, the funds established for the benefit of widows and orphans of members of the Police Force and the Fire Brigade of the City of Calgary, were good and valid charitable bequests.

The organizations known as The Father Lacombe Home at Midnapore and the branch of the Salvation Army at Calgary, were in existence at the time of the testator's death. It was admitted by all parties that the executors' accounts for each of the said years were duly filed in the proper Court and approved of; copies of these accounts and orders are filed as Exhibit 9.

In the statement of agreed facts filed at the hearing paragraph 10 is as follows:

> In each of the years 1938 to 1941 inclusive of the total net income of the estate 60 per cent thereof was paid out by cheque to the nephews and nieces named in sub-paragraphs (*a*) to (*e*), inclusive of paragraph 35 of the will, as found on pages 31 and 32 thereof, and the remaining 40 per cent was transferred by book entry by the executors from the estate income account into the estate capital account as shown on the accounts filed as exhibits. The books of account of the executors show that they have made no segregation or allocation of the said 40 per cent of the net income as between the individuals entitled to 67 per cent thereof under paragraph 36, sub-paragraph (*a*) of the will, and the party or parties entitled to the remaining 33 per cent thereof under the last paragraph of the said paragraph 36.

In order to succeed the appellants must come within the provisions of Section 4 (*e*) (supra). They must show not only that the amounts in question in each year are income but also income of charitable institutions as described in the subsection.

"Income" is defined in Section 3.1. as "annual net profit or gain or gratuity.....directly or indirectly received by a person....." "Person" is defined in Section 2.1. (*h*) as—

"person" includes any body, corporate and politic, and any association or other body, and the heirs, executors, administrators and curators, or other legal representatives of such person, according to the law of that part of Canada to which the context extends.

I am satisfied that the Burns Memorial Trust and the five organizations which will eventually benefit by the income from the Burns Memorial Trust Fund, when established, are "persons" within the meaning of the above definition.

In this Court it was held in the case of *Capital Trust Corporation et al* v. *Minister of National Revenue* (1) that the Income War Tax Act assesses income for the year in which it is received, irrespective of the period during which it is earned or accrues due. This judgment was affirmed in the Supreme Court of Canada (2). But as pointed out by Davis J. at p. 196, section 11 had no application to the facts of that case inasmuch as it related only to income of a beneficiary or trust. This section relates to income from estates or trusts and provides that income *for any taxation period* includes income accruing to the credit of a taxpayer whether received by him or not during such period. The words "accruing to the credit of" would seem to imply that the amount is actually made available for disposal by the taxpayer. Section 2.1. (*k*) defines taxpayer as including any person whether or not liable to pay the tax.

Does the "income" here sought to be declared exempt from taxation partake of the nature or characteristics of income as defined in the Act? The Act provides for a scheme of taxation based on the *annual* net profit or gain. Section 9 is the charging section and provides for the levy upon the income during the preceding year (i.e. calendar year). Section 11(1) refers to the taxation period—the calendar year.

An estate is a "person" within the definition contained in section 2(*h*). It is therefore taxable upon its income but may charge as proper deductions amounts paid to or which accrue to or are credited to any beneficiary and such amounts are then taxable in the hands of the beneficiaries; but in the event of such beneficiary being such an institution as is described in section 4(*e*) no tax would be payable by such recipient.

(1) (1936) Ex. C.R. 163. (2) (1936) S.C.R. 192.

1946

EXECUTORS OF WILL OF HON. PATRICK BURNS DECEASED, ET AL. v. MINISTER OF NATIONAL REVENUE

Cameron D.J.

In the instant case it is manifest that none of the income in question in any of the relevant years was paid to or received by the beneficiaries but was accumulated. Was it then received indirectly or did it accrue to the beneficiaries? Reference is made to the case of *St. Lucia Usines and Estates Company* v. *St. Lucia Colonial Treasurer* (1) where Lord Wrenbury said at p. 512 "The words 'income arising or accruing' are not equivalent to the words 'debts arising or accruing'. To give them that meaning is to ignore the word 'income'. The words mean 'money arising or accruing *by way of income*'. There must be a coming in to satisfy the word 'income' ".

In the present case so far as the beneficiaries are concerned there was "no coming in" in any of the relevant years and there was no "arising or accruing *by way of income*". The Burns Memorial Trust will never receive it as income but as corpus; and the five named beneficiaries will never receive the income for any of the relevant years in any form. They will merely receive shares in the income earned on such corpus at some time in the future. The income in question for the years mentioned will never, as income, be available for any charitable institutions. It has been capitalized in accordance with the terms of the will.

I am, therefore, of the opinion that the income here assessed in the hands of the executors is not *"income"* of such an institution as is referred to in Section 4 (*e*) of the Act. (Reference may be made to the case of *Inland Revenue Commissioners* v. *Blackwell,* later referred to).

In my view of my finding as above it might not be necessary to deal with other matters raised by the appellants and respondent but they are of importance and should, I think, be considered.

Are the ultimate beneficiaries of this portion of the income charitable institutions such as are referred to in Section 4 (*e*)? The Royal Trust Company to which the accumulated corpus will eventually be turned over is obviously not a charitable institution. It is merely the trustee of a fund and will invest it and turn over the income therefrom in equal proportions to the five named

(1) (1924) A.C. 508.

organizations. The trust which it administers is admittedly a charitable trust but that is not the same as a charitable institution. Reference may be made to the case of *Minister of National Revenue* v. *Trusts and Guarantee Company* (1) where Lord Romer stated at p. 149 "had the Dominion Legislature intended to exempt from taxation the income of every charitable trust nothing would have been easier than to say so".

In the same case consideration was given to the words "charitable institution". At p. 149 it is stated:

> It is by no means easy to give a definition of the words "institution" that will cover every use of it. Its meaning must always depend upon the context in which it is found. It seems plain, for instance, from the context in which it is found in the subsection in question that the word is intended to connote something more than a mere trust.

Counsel for the appellants urged on me strongly that applying this text to the instant case something more than a mere trust here existed—that it was also a "Memorial Trust" to do honour to a well known Westerner and having charitable objectives and that therefore it was a charitable institution.

Lord Romer in continuing his judgment said further:

> In view of the language that has in fact been used, it seems to their Lordships that the charitable institutions exempted are those which are institutions in the sense in which boards of trade and chambers of commerce are institutions, such, for example, as a charity organization society, or a society for the prevention of cruelty to children. The trust with which the present appeal is concerned is an ordinary trust for charity. It can only be regarded as a charitable institution within the meaning of the subsection if every such trust is to be so regarded, and this, in their Lordships' opinion, is impossible. An ordinary trust for charity is, indeed, only a charitable institution in the sense that a farm is an agricultural institution. It is not in that sense that the word institution is used in the subsection.

In my view the fact that the charitable trust is also designated as a memorial trust does not make the Burns Memorial Trust a charitable institution. The word "Memorial" is merely descriptive of the fund. The Burns Memorial Trust is nothing more than a name attached to a fund; it is not a charitable institution. The fund in due course will be the source of income for five organizations but neither the fund nor its trustees has any charitable functions. It is in no sense an organization

(1) (1940) A.C. 138.

1946

EXECUTORS OF WILL OF HON. PATRICK BURNS DECEASED, ET AL. v. MINISTER OF NATIONAL REVENUE

Cameron D.J.

devoted to charitable purposes. It is merely a name descriptive of the character of a certain fund, naming its founder, honouring his memory, and indicating that it is a trust. It falls far short of being a charitable institution. It holds no assets and distributes no funds, all these functions being performed by The Royal Trust Company. Everything that is to be done in connection with the administration of the 33 per cent of the residue is to be done by The Royal Trust Company and nothing is to be done by the Burns Memorial Trust. It is clearly a name and nothing more. The fact that the trust is to be administered in perpetuity, does not, I think, make it an institution, such as is contemplated in the section, any more than it would be if established for a specific number of years.

See also the case of *Cosman's Trustees* v. *Minister of National Revenue* (later referred to) in which it was held that the Nova Scotia Trustees of a fund established by a will did not constitute a charitable institution within the meaning of section 4 (*e*) so as to render the income exempt from taxation.

The appellants alternatively argue that the five organizations which will eventually receive the income from the Burns Memorial Trust are charitable institutions. It is true that they are the organizations which will be paid the income of the trust. But holding as I have done that no part of the income for any of the relevant years will at any time reach the beneficiaries as income, it is quite unnecessary for me to determine this point and I make no finding in regard thereto.

A further argument of the appellants was that this income vested in the persons entitled to it a *morte testatoris* and I was referred to the well known case in the Privy Council of *Brown* v. *Moody* (1). I doubt very much whether the principles there laid down are applicable in the instant case inasmuch as the intervening annuities constitute a charge on all the estate, principal as well as income, and it is conceivable that the executors might have to use all the interest and even resort to the principal at some later date to meet them. The beneficiaries, therefore, had no absolute right in the

(1) (1936) 2 A.E.R. 1695.

trust estate until the death of all of the annuitants and the son's widow. See *Bowen* v. *Inland Revenue Commissioners* (1). And, while it could be said that they have an interest in the income of the years in question inasmuch as it may eventually form part of the corpus of the trust, no part of that income will ever be received by them in any form.

The question of vesting or non-vesting of the income in the five named organizations is in my view of no importance in this case because of my finding that the income in the years 1938 to 1941 was not income of a charitable institution in any of those years. Upon that question it is therefore quite unnecessary to pass any opinion.

Reference may be made to the case of *Inland Revenue Commissioners* v. *Blackwell* (2) where Rowlatt J. said at p. 362:

> The first point which Mr. Latter makes is that it does not matter whether the interest which the eldest son takes under the will is vested or contingent, because, even assuming that this specific bequest is vested in the eldest son, just as the shares in the residue are vested in all the children under the other part of the will, still, inasmuch as there is a trust to accumulate a fund during the infancy of the eldest son, subject to a power to the trustees to apply such sum as they think proper for his maintenance, the part of the income which is accumulated is not the income of the minor. It is a very important point, but I have come to the conclusion that he is right. It is perfectly true to say, as Mr. Harman did, that in a case of that kind the income must come to the infant in the end if the interest which he takes is a vested interest: but in my judgment it will not come to him as income; it will come to him in the future in the form of capital. The trustees are directed to accumulate the surplus income, and they are bound to comply with that direction and to accumulate it. It is income which is held in trust for him in the sense that he will ultimately receive it, but it is not in trust for him in the sense that the trustees have to pay the income to him year by year while he is an infant. All the minor can get while he is an infant is such amount as the trustees allow for his maintenance. I think that view of the case is supported by what was said in *Inland Revenue Commissioners* v. *Wemyss* (1924) S.C. 284; 61 S.L.R. 262. In my judgment it is fallacious to look into the future and say: This fund that is being accumulated is for his benefit and he will get it all. What you have to do is to ask, whether the surplus income that is accumulated is the annual profits and gains of the year of this infant now? I do not think it is.

For the same reason I shall not deal with another argument of the appellants, namely, that while the executors did not in fact appropriate any portion of the trust estate

(1) (1937) 1 A.E.R. 607 at 612. (2) (1924) 2 K.B. 351.

1946

EXECUTORS OF WILL OF HON. PATRICK BURNS DECEASED, ET AL. v. MINISTER OF NATIONAL REVENUE

Cameron D.J.

for the purpose of meeting the annuities as may seem to have been required by the will, that actually they did so in substance. This submission was based on the judgment of the Appellate Division of the Supreme Court of British Columbia in *Hamilton* v. *Hart* (1). That judgment indicated that where there was a duty to appropriate, the estate should be administered as though it had been appropriated although in fact the executor had not done so. It is to be observed, however, that paragraph 30 of the will is the one which provides, *inter alia*, for payment of the annuities and the direction there to the trustees is "And I further direct that my trustees shall stand possessed of my trust estate and the income therefrom and all parts thereof Upon Further Trust". That is in fact what the trustees have done. They have appropriated the entire estate for the purpose of meeting the annuities. I must assume that they were quite entitled to do so in view of the above instructions, notwithstanding the later direction to appropriate as stated on page 31 of the will (Exhibit 2).

The annuities created by the will are charged on all the income and corpus of the trust estate; and the annuity of the son's widow established by the Court is a charge against the net income of the estate. In the case of *Blake-Berry* v. *Geen* (2) Farwell J. said: "Prima facie when residue is given subject to annuities, the annuities are charged on the whole of the residue." This judgment was affirmed in the House of Lords (3).

The respondent also relies on section 11 (4) (*a*) as follows:

> Income received by an estate or trust and capitalized shall be taxable in the hands of the executors or trustees or other like persons acting in a fiduciary capacity.

The last paragraph in clause 35 of the will is as follows:

> And until the death of the last annuitant to whom I have bequeathed an annuity by the terms of this my will or the death of the widow of my said son, whichever shall last happen, to invest the surplus, if any, of such annual income in the names of my trustees as part of the capital of "my trust estate" at compound interest.

The terms of section 11 (4) (*a*) are clear and unambiguous, and, so far as I am aware, permit of no exception. The general scheme of the Act is to tax all incomes

(1) (1919) 2 W.W.R. 164.
(2) (1937) 1 A.E.R. 742.
(3) (1938) 2 A.E.R. 362.

(save as excepted in the Act) in the hands of the recipients. This subsection provides for the taxation in the hands of the trustees of capitalized income. This section itself in my view is a complete answer to the appellants' claim in respect of the years 1940 and 1941, the section having been added to the Act in 1940.

Counsel for the respondent admitted that for the years 1938 and 1939 he could not succeed on this point as the section then read.

The respondent further relies on Section 11 (2) of the Act which in part is as follows:

> Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustee or other like person acting in a fiduciary capacity, as if such income were the income of a person other than a corporation * * *

As pointed out by the late President of this Court in *McLeod* v. *Minister of National Revenue* (1) (affirmed in the Supreme Court of Canada) (2), the general scheme of the Act is to tax all incomes save such as are specially exempted. Section 11 (1) makes it clear that the beneficiary of a trust is liable to tax on income accruing to his credit whether received or not during the taxation period. Subsection 2 was meant apparently to make clear where income should be taxed when it was accumulating for unascertained persons or for persons with contingent interests or in other words where it was not accruing annually to the credit of known beneficiaries. And he used these words, p. 110:

> I think the words "contingent interests" were intended to cover the case where no person had a present and ascertained interest, in the income for any taxation period * * *
>
> Further the words of a statute, when there is a doubt about their meaning, are to be understood in the sense in which they best harmonize with the subject of the enactment, and the object which the legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion in which they are used, and the object to be attained. If there are circumstances in the Act showing that the phraseology is used in a larger sense than its ordinary meaning, that sense may even be given to it. Maxwell on Statutes at page 95. In dealing with matters relating to the general public, statutes are presumed to use words in their popular sense. If the object of an enactment had reference to the subject of wills, or the distribution of property, the word "contingent" might possibly be con-

(1) (1925) Ex. C.R. 105 at 110. (2) (1926) S.C.R. 457.

1945

EXECUTORS OF WILL OF HON. PATRICK BURNS DECEASED, ET AL. v. MINISTER OF NATIONAL REVENUE

Cameron D.J.

strued to have a different meaning than the same word would have in a general statute, such as is under consideration, where it should, I think, be construed in a popular and not technical sense.

I have no doubt that the income accumulated by the trustees in the year in question, and which, unless it is used in later years for the purpose of meeting annuities, will form part of the fund, the income on which will be distributed by the trustees of the Burns Memorial Trust for the benefit of poor, indigent and neglected children, and for the benefit of widows and orphans of members of the Fire Brigade and of the Police Force of the City of Calgary, is income accumulating in trust for the benefit of unascertained persons. Reference may be made to the case of *Cosman's Trustees* v. *Minister of National Revenue* (1) affirmed in the Supreme Court of Canada (2); and the case of *Minister of National Revenue* v. *Trust and Guarantee Co.* (3). Further I do not think that liability for the tax under Section 11 (2) of the Act can be avoided by intervening a body of trustees between the executors of a testator's will and the ultimate beneficiaries of a charitable trust created under that will.

There remains for consideration therefore only the question as to whether for the years 1938 and 1939 the income which was said to have accumulated for the benefit of the Father Lacombe Home and the branch of the Salvation Army at Calgary is liable to tax. It must be kept in mind that the prior annuities are charged on the whole of the net estate—both principal and interest—and that there is always the possibility that the executors in order to meet the annuities might have to resort to part or all of the accumulated income. In the *McLeod* case (*supra*) Newcombe J. said in the Supreme Court of Canada, p. 470:

> It is uncertain at present who is to have or enjoy the income, and it is for that very state of uncertainty that I think the clause, in its application to this case, is intended and apt to provide * * * In a sense of course all beneficiaries of a trust are ascertained when the trust is created, because it is essential that they shall be capable of ascertainment from the provisions of the trust; but, where the income is to accumulate and become payable in the future, and the ascertainment of the beneficiaries is subject to events which may happen in the interval, the beneficiaries are, nevertheless, for the purpose of the statute, unascertained.

(1) (1941) Ex. C.R. 33. (1941) 2 D.L.R. 218.
(2) (1941) 3 D.L.R. 224.
(3) (1940) A.C. 138.

1946

EXECUTORS OF WILL OF HON. PATRICK BURNS DECEASED, ET AL. v. MINISTER OF NATIONAL REVENUE

Cameron D.J.

It would therefore seem that even these two organizations are "unascertained persons" within the meaning of section 11 (2).

I have reached the conclusion therefore that the income of the appellant in the years 1938-1939, now in question, was subject to tax under the provisions of section 11 (2).

It follows from what I have stated above that all of the income received by the appellant in each of the years 1938, 1939, 1940 and 1941, and which is the subject of these appeals, is subject to tax.

The appeal is therefore dismissed. The costs of all parties appearing on the appeal will be payable by the estate of the Honourable Patrick Burns, deceased, forthwith after taxation; the costs of the executors to be taxed on a solicitor and client basis.

Judgment accordingly.

1943

Sept. 28

1946

Jan. 10

BETWEEN:

THOMAS D. TRAPP..... APPELLANT.

AND

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

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 3, 5(b), 6(a), 6(b), 6(d), 9, 11, 47—Basis of taxability is income received —Taxpayer has no right to file returns and be assessed on accrual basis—Minister has no authority to permit taxpayer to file returns on accrual basis or to assess on such basis—"Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income"—Unpaid interest on mortgage not deductible under s. 6(a)—Payment on account of capital—S. 5(b) an exception to s. 6(b)—Onus on taxpayer to show that this case comes within an exempting provision—Interest on borrowed capital used in the business to earn the income deductible only if paid.

The appellant owned property subject to a mortgage on which there was a garage building. He leased the building, and included the rental from it in his income tax return, but sought to deduct interest on the mortgage which was payable but had not been paid. The Minister disallowed the deduction of the unpaid interest.

Held: That the basis of taxability under the Income War Tax Act is that of income received. *Capital Trust Corporation Limited* v. *Minister of National Revenue* (1936) Ex. C.R. 163; (1937) S.C.R. 192 followed.

1946

TRAPP
v.
MINISTER OF
NATIONAL
REVENUE

2 That a taxpayer is not entitled, as a matter of right, under the Income War Tax Act as it stands to elect whether he shall file his income tax returns on an accrual rather than on a cash basis and be assessed for income tax accordingly. He is liable to tax only on the net profit or gain or gratuity that he has received, either directly or indirectly, ascertained by deducting only disbursements or expenses made or paid out from gross income received and has no legal right to be taxed on any other basis.

3. That there is no authority, under the Act as it stands, for the practice of the taxing authority to permit taxpayers in certain classes of cases to file their income tax returns on an accrual rather than a cash basis if they so elect and indicate such election and to assess them for income tax on such basis and that the Minister has no power under section 47 to permit such practice.

4. That section 5(*b*) allows the deduction of interest on borrowed capital used in the business to earn the income only when the interest has been paid; and that no deduction is allowed in respect of unpaid interest, even although it has become payable or is accruing from day to day.

APPEAL under the provisions of the Income War Tax Act.

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

Hon. J. W. de B. Farris K.C. and *J. L. Lawrence* for appellant.

Dugald Donaghy K.C. and *H. H. Stikeman* for respondent.

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

THE PRESIDENT, now (January 10, 1946) delivered the following judgment:

This appeal raises two important related questions; one, whether a taxpayer is entitled, as a matter of right, under the Income War Tax Act, R.S.C. 1927, chap. 97, to file his income tax returns on an accrual rather than a cash basis of accounting, if he so elects, and to be assessed for income tax thereon; and the other, whether the Minister has power to permit a taxpayer to file his returns on such basis and assess him accordingly.

The appellant resides in New Westminster, British Columbia. On February 13, 1931, he purchased certain lands and premises in that city from The T. J. Trapp Company, Limited, which had gone into voluntary liquidation, and on the same day executed a mortgage of $106,000 in favour of the liquidator to secure the amount of the purchase price and interest thereon at the rate of 5 per cent per annum. On February 28, 1931, the liquidator assigned this mortgage to the shareholders of The T. J. Trapp Company, Limited, in proportion to their holdings of shares in it, the amount to which the appellant was entitled being $30,000. This was applied on the principal of the mortgage, leaving the appellant the registered owner of the property subject to a mortgage of $76,000. On the premises there was a garage building which was rented to Trapp Motors Limited. The appellant was entitled to the rentals from this building and liable for payment of the mortgage and the interest thereon. In his income tax return for the year ending December 31, 1940, he included the rental income from the garage building but claimed as an item of expense the sum of $3,800 as one year's interest on the mortgage, although as a matter of fact he had not paid it. At the trial he stated that the last payment of interest made by him was on January 10, 1938, and explained that his reason for not paying the interest was that he did not have it and that he was working out a plan of settlement for cash and kind with the shareholders of The T. J. Trapp Company, Limited, who were entitled to the mortgage. On the assessment this sum of $3,800 was disallowed and added to his stated income.

An appeal from this assessment, confined to the question of disallowance of the unpaid interest, was taken to the Minister. In his notice of appeal the appellant claimed that the sum of $3,800 was the mortgage interest which accrued during the taxation year in respect of property, the income of which was taxed under the Act, and was an expense, wholly, exclusively and necessarily provided for the purpose of earning the income; that his return of income for the taxation year 1940 was on an accrual basis; that he had always made his return of income on an

1946

TRAPP
v.
MINISTER OF
NATIONAL
REVENUE

Thorson P.

accrual basis and elected to continue on that basis; that the disallowance of the sum of $3,800 was unreasonable and not in accordance with the Income War Tax Act, and not in the discretion of the Minister, or, alternatively, an improper exercise of discretion by him. In his decision on the appeal the Minister affirmed the assessment on the grounds that the mortgage interest was not actually laid out or expended for the purpose of earning the income within the meaning of section 6 (*a*) of the Act; that there is no provision in the Act permitting the taxpayer to elect to be taxed on an accrual basis; and that under section 47 of the Act the Minister shall not be bound by any return or information supplied by or on behalf of a taxpayer and, notwithstanding such return or information, the Minister may determine the amount of tax to be paid by any person.

In his notice of dissatisfaction, the appellant set forth further grounds of appeal, namely, that having adopted a return of income on an accrual basis he was justified in continuing that system and was not prohibited from so doing; that the sum of $3,800 was properly deductible on an accrual basis; that it was deductible under section 5 (*b*) as interest on borrowed capital used in his business to earn the income; and that section 47 did not authorize the Minister to determine the amount of the tax payable by the appellant on any basis other than as set forth in the Income War Tax Act.

In his statement of claim the appellant put forward still another claim, namely, that his return of income for the taxation years previous to 1940 was on an accrual basis and such method was accepted and ratified by the Minister. This was denied by counsel for the respondent. At the trial, evidence was given that the income tax returns of the appellant for 1938, 1939 and 1940 had in fact been made on an accrual basis, and I accept this evidence. But there is nothing to justify the allegation that this method was accepted and ratified by the Minister. In the return for 1940, which was the only one before the Court, there is nothing to indicate that it was made on an accrual basis. Indeed, quite the reverse is the case. Item No. 23 on page 2 is headed "Gross Income from Rentals (give amount received from and

address of each property" and under this there is entered "net—as per statement attached" $2,179.42). This is a clear statement that the net income had been "received" and there is nothing on the statement attached to show that it is made on an accrual basis and that the interest was not paid. In my opinion, any one looking at the return by itself would certainly conclude that it had been made on a cash basis, and there was nothing in it to lead the Minister to think otherwise.

It was argued for the appellant that section 3 of the Income War Tax Act defines income for the purposes of the Act as meaning "annual net profit or gain or gratuity"; that what is "net" profit or gain must be ascertained by the application of the recognized principles of good business and accountancy practice; and that the deduction of the interest on the mortgage, although it had not been paid, was justified by such principles. It may well be that the deduction of the interest, although unpaid, was in accord with good business and accountancy practice on the ground that the interest accrues from day to day and that accounting on an accrual basis in such a case as this more clearly reflects the true net profit or gain position of the appellant than accounting on a cash basis would do. But it is well established that for income tax purposes accountancy practice, however sound it may be, must give way before the provisions of the Income War Tax Act, and that if there is any conflict between them the provisions of the Act must prevail. The Act makes no reference either to the cash or to the accrual method of accounting and gives the taxpayer no right of election between them. Nor can it be said that the Act is a scientific document or that what is truly net profit or gain from an accountant's point of view is necessarily the same as taxable income under the Act. The Court is concerned only with the latter and the question for it to determine in the present case is, not whether the deduction of the unpaid interest was in accord with the principles of good business and accountancy practice, but rather whether the appellant was entitled to it under the Act. If he was not, that is the end of the matter and the appeal must be dismissed.

1946

TRAPP
v.
MINISTER OF
NATIONAL
REVENUE

Thorson P.

Section 9 is the primary charging section of the Act, and subsection 1 provides for the assessment, levy and payment of the tax upon "the income during the preceding year" of every person, other than a corporation or joint stock company. The income is defined by section 3 as meaning "the annual net profit or gain or gratuity * * * * * directly or indirectly received by a person * * * * *". The income thus defined is made subject to the exemptions and deductions specified in section 5 and section 6 lays down the deductions that shall not be allowed in computing the amount of the profits or gains to be assessed. The taxpayer is, therefore, taxable not on his "net profit or gain" as it might appear to an accountant on an accrual basis of accounting, but on the net profit or gain that he has "received" during the preceding year.

In *Robertson Limited v. Minister of National Revenue* (1) this Court held that the test of taxability of the income of a taxpayer in any year is not whether he earned or became entitled to such income in that year but whether he received it in such year, and the taxpayer has no right to have income received by him during a taxation year distributed for taxation purposes over the years in respect of which he may have earned or become entitled to such income. This means that he has no right to have his income taxed on an income receivable basis, but only on an income received basis, and it must, I think, follow that he is liable to tax only on such a basis and not on an income receivable basis. This was clearly settled in *Capital Trust Corporation Limited et al* v. *Minister of National Revenue* (2). In that case, a testator by a codicil to his will had directed that his son, who was one of his executors, should be paid "the sum of $500 per month in addition to any sum which the Courts or other proper authorities may allow him in common with the other executors". The testator died on December 5, 1923, but the son did not receive any of the monthly payments of $500 until March 10, 1927; on that date, he received the sum of $19,500, representing 39 payments of $500 each from December 5, 1923, to March 5, 1927, and, subsequently, he received the monthly payment regularly until his

(1) (1944) Ex. C.R. 170 at 180.

(2) (1936) Ex. C.R. 163; (1937) S.C.R. 192.

death on July 16, 1932. His income tax returns for the years 1927 to 1932, filed by him or his executor, made no mention of these monthly payments of $500. Subsequently, his estate was assessed in respect of them in addition to the amounts mentioned in the returns made and for the year 1927 the assessments included the $19,500 received on March 10, 1927, as well as the monthly payments received during the balance of that year. An appeal was taken to this Court on the ground that the amounts of $500 per month were a bequest under a will under subsection (*a*) of section 3 of the Income War Tax Act, and that, in any event, the assessment in respect of the year 1927 should not be for more than the amount payable for that year. Angers J. held that the amounts in question were not a gift or bequest under section 3 (*a*) of the Act but constituted additional remuneration to the son for his services as executor and, as such, were taxable income. He also held that it was the intention of the legislature to assess income for the year in which it was received, irrespective of the period during which it was earned or accrued due, and pointed out that there was no stipulation in the Income War Tax Act providing for the apportionment of accumulated income, paid in one sum, over the period in respect of which it became receivable. The appeal to this Court was, therefore, dismissed. On appeal to the Supreme Court of Canada, the judgment of Angers J. was affirmed. It was argued before the Supreme Court that if the payments were to be treated as additional remuneration, then the assessments should be revised so as to allocate $6,000 to each of the years in respect of which the amounts were payable, and the tax levied accordingly. The Supreme Court held that the appellant had no right to have this done. Davis J., delivering the judgment of the Court, said, at page 195:

> The statute here by section 3 defines income as "income received" and by section 9 imposes the tax upon "the income during the preceding year". Unfortunately in this case the taxpayer is bound to pay a larger amount than could have been levied and collected upon the same income had it been paid in instalments month by month as it became due and payable, but that cannot affect the liability plainly imposed by the statute.

1946

TRAPP
v.
MINISTER OF
NATIONAL
REVENUE

Thorson P.

If the taxpayer is not entitled to have his income assessed as it is receivable, then it follows, I think, that there is no authority to tax him on income that has accrued or is accruing but has not been received by him, either directly or indirectly. What is taxable is the income "received", not the income receivable, whether accrued or accruing.

The decision in the *Capital Trust Corporation* case (*supra*) is, I think, conclusive against reading the word "received" in section 3 of the Act as meaning or including "receivable". Since the taxpayer is not entitled to be taxed on the basis of the income receivable by him, whether accrued or accruing, and is liable to tax in respect of the income received by him during the year, regardless of when it accrued to or was receivable by him, it seems to me that the conclusion is inescapable, as long as the authority of the *Capital Trust Corporation case* (*supra*) remains unchallenged, that, under the Act as it stands, so far as receipts are concerned, a taxpayer is not entitled, as a matter of right, to be taxed on an income computed according to an accounting on an accrual basis.

Now we come to the question of deductible expenditures. Section 6 (*a*) provides:

> 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.

This is put in double negative form. While there is no positive statement anywhere in the Act as to what disbursements or expenses may be deducted, it follows by necessary implication that if disbursements or expenses have been wholly, exclusively and necessarily laid out or expended for the purpose of earning the income, and are not otherwise excluded from deduction, they are deductible, for in such case they fall outside the excluding provisions of the section.

Counsel for the appellant contended that the words "laid out or expended" were referable to each of the words "disbursements" and "expenses". In my view, the words "laid out" are referrable to the word "disbursements" and the word "expended" to the word "expenses". A person "lays out" disbursements; they

are not ordinarily spoken of as "expended"; and the term "expended" is, I think, referable only to the word "expenses". The contention of counsel was necessary to his further argument that the distinction between disbursements and expenses is that one is paid while the other is only incurred, and that the term "laid out" in the context necessarily includes "incurred". "Laid out or expended" would then mean "incurred or expended". I am quite unable to give effect to this argument and agree with the contention of counsel for the respondent that the words "laid out" and "expended" mean "actually paid out" and that if it had been intended to allow expenses that had merely been incurred but not paid, the terms used would have been "laid out, expended or incurred", or terms to the like effect. The term "incurred" is frequently used with regard to expenses and, in ordinary use, is sometimes equivocal in meaning; it may mean either that the expenses have been paid or that an obligation to pay them has been assumed. The fact that the word "incurred" is not used in the section strongly indicates that the expenses referred to are those that have been paid out. Nor can I think that the words "laid out" can include "incurred". Disbursements that have been laid out are those that have been made, not those that are to be made. Nor can the word "expended" be read as meaning or including "expendible". The words must be given their plain ordinary meaning and should not receive the meaning urged on behalf of the appellant. As I read section 6 (*a*) disbursements that have not been made and expenses that have not been paid out do not fall outside the excluding provisions of the section or within the class of deductions allowed by the necessary implication from it. So that, as far as disbursements or expenses are concerned, it seems to me that a taxpayer has no right to deduct them in computing his taxable income unless they have been made or paid out.

It is obviously essential to the keeping of accounts on an accrual basis that in preparing the statement of receipts and expenditures from which the net profit or gain during the year is to be ascertained account should be taken of amounts receivable on the one hand and

1946

TRAPP v. MINISTER OF NATIONAL REVENUE

Thorson P.

amounts payable on the other. But since only income "received" is taxable and only disbursements or expenses that have been made or paid out can be deducted in computing the amount of profits or gains to be assessed, it follows that a taxpayer is not entitled, as a matter of right, under the Income War Tax Act as it stands, to elect whether he shall file his income tax returns on an accrual rather than on a cash basis and be assessed for income tax accordingly. He is liable to tax only on the net profit or gain or gratuity that he has received, either directly or indirectly, ascertained by deducting only disbursements or expenses made or paid out from gross income received and has no legal right to be taxed on any other basis.

This conclusion finds further support in section 6 (*d*) which provides as follows:

> 6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of
>
> (*d*) amounts transferred or credited to a reserve, contingent account or sinking fund, except such an amount for bad debts as the Minister may allow and except as otherwise provided in this Act;

This was introduced in 1923. The reason for its introduction is not clear. Obviously if income tax returns are to be made on a cash basis and the taxpayer is taxable only on such basis there is no need for any allowance for bad debts. It is, I think, equally clear that if the taxpayer is entitled, as a matter of right, to make his returns on an accrual basis and to be taxed thereon he is entitled to an allowance for bad debts, for such an allowance is essential to a proper accounting on an accrual basis. But the taxpayer is not given any legal entitlement to an allowance for bad debts. The provision for the allowance appears in the section which specifies the deductions that "shall not" be allowed and is an exception to it. The taxpayer gets the benefit of an amount for bad debts only if the Minister allows it and not otherwise. As I see it, section 6 (*d*) confirms the view that the taxpayer is not entitled, as a matter of right, to make his returns and to be assessed thereon except

on a cash basis, and that if he files his returns on an accrual basis and is assessed accordingly, this can happen only as the result of permission by the taxing authority.

This leads to the question whether there is any authority in the Act for such permission. It was argued by counsel for the respondent that a taxpayer has no right to file his income tax returns or to be assessed for income tax on an accrual basis unless the Minister so permits, and that in the present case no such permission had been given. While I have found that in fact the appellant's return was made on an accrual basis, I have also found that there is nothing in the return itself to indicate that it was made on such basis and I find further that there is no evidence to establish that any permission to make his return on such basis was ever given to the appellant by the taxing authority. Moreover, even if such permission had been given, it would not, in my opinion, help him.

It has been the practice of the taxing authority for a great many years to permit taxpayers in certain classes of cases to file their income tax return on an accrual rather than a cash basis if they so elect and indicate such election and to assess them for income tax on such basis. I have come to the conclusion that there is no authority, under the Act as it stands, for this practice. Counsel for the respondent contended that the Minister's powers under section 47 of the Act were wide enough to authorize the practice; it reads as follows:

> 47. The Minister shall not be bound by any return or information supplied by or on behalf of a taxpayer, and notwithstanding such return or information, or if no return has been made the Minister may determine the amount of the tax to be paid by any person.

While the Minister has the power to determine the amount of the tax to be paid by any person, his power to do so is subject to the Act and is governed by it. The Act lays down a specific basis for taxation and the Minister has no right to use a different basis in determining the amount of the tax that a person is to pay. Parliament has decreed by section 3 that the basis of taxability of income is that of income received, as was held in the *Capital Trust Corporation case* (*supra*), and the Minister has no right to tax on the basis of income that has not been received; Par-

1946

TRAPP
v.
MINISTER OF
NATIONAL
REVENUE

Thorson P.

liament has also laid down that disbursements or expenses shall not be deductible if they have not been made or paid out, and the Minister has no right to allow their deduction. It cannot have been intended by Parliament that, although it had fixed the basis of taxation, the Minister should have the right to change it, if in any case he should decide to do so. The basis of taxability is fixed by the Act, and section 47 does not, in my judgment, give the Minister any power to depart from it. Such a power would have to be conferred in clear and explicit terms before effect could be given to it and no such terms can be found in section 47. The view that the Minister may, under such section, permit a taxpayer to file his income tax returns on an accrual basis and assess him for income tax accordingly, notwithstanding the specific provisions of section 3 and section 6 (*a*), is, in my opinion, quite untenable.

This leaves the case for permitting the filing of income tax returns on an accrual basis and assessing taxpayers accordingly dependent solely upon the implication involved in the exceptional provision in section 6 (*d*) that an amount for bad debts may be allowed by the Minister. It might be argued from the inclusion of this provision in the Act for an allowance, which would be necessary only when a taxpayer had included items of receivable income in his receipts, that the filing of returns on an accrual basis and assessment accordingly might be permitted, but if that were so, there would surely be some clear authority in the Act for such permission. I have been unable to find any such authority; it is, in my opinion, not contained in section 47; and no other source of authority was suggested by counsel. In view of the express provisions in the Act fixing the basis of taxability, it is, I think, inconceivable that Parliament should have intended a different basis, dependent upon the Minister's permission, to be discovered in the indirect implication involved in the exceptional provision in section 6 (*d*) to which I have referred. The only explanation I can think of for the inclusion in the Act of the

provision in section 6 (*d*) for a permissive allowance of an amount for bed debts is that the draughtsman assumed that such a provision was desirable in view of the permissive practice that had been followed by the taxing authority and that Parliament adopted it on such assumption without making any amendment of the basis of taxability as fixed by the Act.

The basis of taxability under the Income War Tax Act is different from that which exists under the Income Tax Act, 1918, of the United Kingdom. For example, Schedule D of that Act includes the following provision:

> 1. Tax under this Schedule shall be charged in respect of—
> (*a*) The annual profits or gains arising or accruing—
> (i) to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere; and
> (ii) to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere; and
> (iii) to any person, whether a British subject or not, although not resident in the United Kingdom, from any property whatever in the United Kingdom, or from any trade, profession, employment, or vocation exercised within the United Kingdom;

In the cases that come under this part of Schedule D the basis of taxability is not "net annual profit or gain or gratuity received", as is the case in Canada, but "annual profits or gains arising or accruing". The difference is fundamental. Because of this difference it is quite unsound to apply English decisions on the subject of taxable income in the United Kingdom in the determination of taxable income in Canada under the Income War Tax Act. It might be quite proper to say in the United Kingdom, as Rowlatt J. did in *The Naval Colliery Co., Ltd.* v. *The Commissioners of Inland Revenue* (1), to which counsel for the appellant referred, that "receipts include debts due" and "expenditure includes debts payable", but such a statement is not applicable in Canada under the Income War Tax Act and in view of the decision in the *Capital Trust Corporation* case (*supra*).

(1) (1926) 12 T.C. 1016 at 1027.

1946

TRAPP
v.
MINISTER OF
NATIONAL
REVENUE

Thorson P.

The law in the United States on this matter is also very different from that in Canada. Section 41 of the United States Revenue Act of 1938 provides as follows:

> 41. The net income shall be computed * * * * in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income * * * *

In the United States, while the taxpayer may keep his accounts and file his returns on a cash or on an accrual basis of accounting, as he elects, the essential requirement is that the method of accounting used by him shall clearly reflect his true net income. If it does, the Commissioner cannot change it, but if it does not, he may do so. The essential thing in the United States law is to ascertain what is truly the net income. There is a constitutional reason for this, for the Sixteenth Amendment prevents Congress from taxing as income what is not in fact income. The result is that, while net income from an accounting point of view may differ from taxable income under the Revenue Acts, sound accounting practice plays a much more dominant role in United States income tax law than it does in the Canadian law. If in any case the method of accounting on an accrual basis clearly reflects the net income of the taxpayer, and the method of accounting on a cash basis does not do so, the accrual basis method governs.

It is generally conceded that in many cases, if not in most, the true net profit or gain position of a taxpayer, particularly if he is in business, cannot be ascertained otherwise than by an accounting method on the accrual basis. A person who has accounts receivable at the end of the year that are attributable to the earnings of such year and owes accounts payable for debts relating to the earnings of such year but keeps his accounts only on a basis of cash received and cash expended will frequently arrive at an amount of income "received" during the year that is not a reflection of his true net profit or gain for such year. But under the Income War Tax Act, as it stands, there is no place, as a matter of right, for the accounting method on an accrual basis, even if it does reflect the

true net profit or gain of the taxpayer, and it must give way to the express provisions of the Act. Income tax law in Canada in this respect lags far behind that of the United Kingdom and the United States and runs counter to well recognized principles of sound business and accountancy practice.

The administrative practice of permitting certain classes of taxpayers to file their income tax returns on an accrual basis and assessing them for income tax accordingly, for that is all I think it is, has, no doubt, in many cases resulted in taxation on a more equitable and sounder basis than would otherwise be the case. It was, in effect, a needed income tax law reform by administrative action in the cases where such action was taken. But income tax law reform is not a matter for administrative action; it is a function that belongs exclusively to the appropriate legislative authority. It is, perhaps, not beyond the scope of the judicial function to suggest, under the circumstances, that the Act be amended with a view to coming nearer the objective of taxing what is truly net profit or gain than the Act as it stands now does; that the present basis of taxability be broadened to include income accrued or accruing as well as that received; that the taxpayer be entitled, as a matter of right, to elect under what method of accounting he shall keep his accounts and file his income tax returns and that he be assessed for income tax accordingly, with the necessary provision that the accounting method used must in each taxpayer's case be such as will clearly reflect his true net profit or gain, as is the case in the United States. In this connection it might be again pointed out as I did in *Robertson Limited* v. *Minister of National Revenue* (*supra*) that in the *Capital Trust Corporation* case (*supra*) *both* Angers J. in this Court and Davis J. in the Supreme Court of Canada commented upon the harshness and injustice of the result of the decision from which there was no escape in view of "the liability plainly imposed by the statute". If the appellant in that case had had the right of being assessed on the basis of the income as it accrued or became payable to him in each

1946

TRAPP v. MINISTER OF NATIONAL REVENUE

Thorson P.

of the years in which he earned it, he would not have suffered the inequity that the state of the law imposed upon him.

Under the law as it stands, so far as this appeal rests on the ground that the income tax return of the appellant was properly made on an accrual basis of accounting and that he was entitled to be assessed for income tax accordingly, it cannot succeed.

I have not overlooked the fact that the Act contains some specific provisions in respect of amounts that have not been received or paid by the taxpayer; for example, section 11 puts certain amounts into the category of taxable income although they have not been received, and section 5 allows the deduction of certain amounts although they have not been paid. In all of such cases the matter is covered by specific statutory authority. Such specific provisions do not disturb the conclusions I have reached; indeed, they tend to confirm them.

There are also other grounds on which the appeal must fail. The appellant cannot show that the unpaid interest on the mortgage falls outside the excluding provisions of section 6 (*a*), which I have already cited. There are two reasons why the deduction cannot be allowed. I have already mentioned one, namely, that the interest on the mortgage was not a disbursement or expense that was either "laid out" or "expended". That would be enough to prevent it from falling outside the exclusions of the section but there is also a further reason. Even on the assumption that the appellant was in the business of renting the garage and earning the rentals as the income from such business, and even if he had actually paid the interest, payment of it would not be part of the appellant's working expenses in the business of renting the garage nor would it be an expenditure "laid out as part of the process of profit earning" in the garage renting business, within the meaning of the test laid down by the Lord President (Clyde) in *Robert Addie & Sons' Collieries, Limited* v. *Commissioner of Inland Revenue* (1), as adopted by the Supreme Court of Canada in *Min-*

(1) (1924) S.C. 231 at 235.

ister of National Revenue v. *Dominion Natural Gas Co. Ltd.* (1). The interest would be payable even if the appellant did not rent the garage at all. The payment of the interest has nothing to do with the business of renting the garage. It becomes payable because of the covenant in the mortgage and this is not an obligation assumed in the course of or as part of the business of renting the garage. Nor would the payment of the interest, if it had been made, have been "directly related to the earning of the income" from the garage renting business within the meaning of the judgment delivered by Lord MacMillan in *Montreal Coke and Manufacturing Co.* v. *Minister of National Revenue* (2); *vide* also, *Siscoe Gold Mines Limited* v. *Minister of National Revenue* (3).

Moreover, if the payment had been made it would, in my opinion, clearly have been a payment on account of capital within the meaning of section 6 (*b*) which reads:

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

The payment of the interest would be the result of an obligation not of a current or business or revenue nature, but of a capital one, and it would have to be made to save the appellant's property from foreclosure. Such foreclosure would have extinguished the appellant's capital asset. The payment would be for the purpose of maintaining or preserving such capital asset. In the *Dominion Natural Gas Co. Ltd. case* (*supra*) the Supreme Court of Canada held that certain legal expenses of the company incurred and paid in defending its right to supply gas in the City of Hamilton were not deductible and one of the grounds for so holding was that they were a capital expenditure: *vide* also *Siscoe Gold Mines Limited* v. *Minister of National Revenue* (*supra*). Indeed, the argument of counsel for the appellant that it was interest on borrowed capital used in the business, within the meaning of section 5 (*b*) of the Act, admits that, if it had

(1) (1941) S.C.R. 19.
(2) (1944) A.C. 130.
(3) (1945) Ex. C.R. 257.

1946

TRAPP
v.
MINISTER OF
NATIONAL
REVENUE

Thorson P.

been paid, it would have been a payment on account of capital. As such it would be excluded from deduction by section 6 (*b*) unless it were excepted from such exclusion by the concluding words of the section "except as otherwise provided in this Act".

There remains only the question whether the appellant is entitled to have the unpaid interest deducted under section 5 (*b*) 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;

The draftsmanship of the section is careless. What is said to be exempted or deducted is "such reasonable rate of interest on borrowed capital used in the business to earn the income as the Minister in his discretion may allow * * * ", whereas it is obvious that what is meant is "interest on borrowed capital used in the business to earn the income at such reasonable rate as the Minister in his discretion may allow * * * * ". It is interest, not a rate of interest, that is to be exempted or deducted.

Section 5 (*b*) must be interpreted in the light of its complete and true context. It is not sound construction, in my opinion, to consider it solely from the point of view of its inclusion in section 5, as a statement of one of the exemptions and deductions to which "income" as defined in section 3 shall be subject. It must also be considered in the light of its context as an exception to the excluding provisions of section 6 (*b*), which I have already cited. It is obvious that section 5 (*b*) is one of the provisions of the Act that comes within the concluding words of section 6 (*b*), "except as otherwise provided in this Act", and its place as such in the scheme of the Act must not be overlooked. It is by reason of such exception that interest on borrowed capital used in the business to earn the income

falls outside the exclusions of section 6 (*b*). It would have been just as easy to specify "interest on borrowed capital used in the business to earn the income" as an exception to the exclusions of section 6 (*b*) in section 6 (*b*) itself as to provide for it otherwise in the Act, either in a substantive section or in one of the paragraphs of section 5; and the effect of the provision must be the same, wherever it is placed. The essence of the matter is that section 5 (*b*) is an exception to section 6 (*b*) and that without it, section 6 (*b*) would be the governing section.

The onus is on the appellant to show that his case comes within the terms of section 5 (*b*); he seeks the benefits of an exceptional provision in the Act and must comply with its conditions. The principles of construction to be applied are well established. In *Wylie* v. *City of Montreal* (1) 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;

And this Court, in construing another paragraph of section 5, namely, paragraph (*k*), in *Lumbers* v. *Minister of National Revenue* (2), stated the rule to be applied 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.

The judgment of the Supreme Court of Canada in the same case (3) while not referring to this statement of the rule fully supports it.

If the appellant is to succeed he must be able to show that section 5 (*b*) allows the deduction of the interest when it is payable but has not been paid. As I read the section by itself, there is nothing in it that will help the appellant. It is not specified in the section whether the interest must have been paid in order to be deductible or whether it is deductible when it has become payable but has not been paid. If the case were to rest there

(1) (1885) 12 Can. S.C.R. 384 at 386.
(2) (1943) Ex. C.R. 202 at 211.
(3) (1944) S.C.R. 167.

1946

TRAPP
v.
MINISTER OF
NATIONAL
REVENUE

Thorson P.

and no other clue were available the appellant's claim would fail, for the general scheme of the Act, taxing income on the basis of income "received", would govern. The amount of the interest having been received by the appellant and not yet laid out or expended would have to be regarded as income "received" by him during the year and, therefore, taxable in his hands. Under the circumstances, it would not be proper to construe section 5 (*b*) as allowing the deduction of unpaid interest, for such a construction would be an enlargement of an exemption provision beyond the scheme of the Act. No such enlargement is permissible in the absence of clear terms authorizing it, and there are no such terms.

Moreover, no light is shed on the question by the other paragraphs of section 5. The statutory requirements for the deductibility of the amounts specified in its paragraphs are not uniform; in most cases it is a condition that the amount to be deducted must have been paid, but in some it is deductible if payable or accruing. The statutory conditions for deductibility are specified in each of the paragraphs of section 5, except in paragraph (*b*).

Since section 5 (*b*), considered by itself, does not answer the question whether interest on borrowed capital used in the business to earn the income can be deducted if it is payable but has not been paid, the answer must be sought elsewhere. It will be found, I think, if section 5 (*b*), is read in its true light as an exception to the excluding provisions of section 6 (*b*). If section 5 (*b*) were not in the Act, it is clear, I think, that even if the appellant had paid the interest on the mortgage he would not have been entitled to deduct it. It would not have fallen outside the exclusions of section 6 (*a*) for the two reasons already mentioned and it would have fallen squarely within the exclusions of section 6 (*b*) as being a "payment on account of capital". It is also clear that section 6 (*b*) in excluding "any payment on account of capital" must *a fortiori* also exclude any amount payable on account of capital. If the appellant could not have deducted the interest even if it had been paid, there was no possible right by which he could have deducted un-

paid interest. It is only by virtue of the exception that he can have any right of deduction at all. How far does the exception extend? Does it include interest payable or is it confined to interest that has been paid? The answer, in my opinion, is to be found in the words "any payment on account of capital", contained in section 6 (*b*). If the exception with which we are concerned had been set out in section 6 (*b*) itself immediately after the words mentioned the exclusion and the exception to it would have been stated as follows, namely, "any payment on account of capital except interest on borrowed capital used in the business to earn the income at such reasonable rate as the Minister in his discretion may allow * * *". Read in that light, as I think it should be, the meaning of section 5 (*b*) becomes quite clear. Section 6 (*b*) excludes from deduction "any payment on account of capital" but provides for an exception to such exclusion by the words "except as otherwise provided in this Act". These words contemplate only exceptions of the same kind as the specific exclusions set out in the section. The exception carved out by section 5 (*b*) is, therefore, of the same kind as the exclusion to which it is an exception, that is to say, it must be some kind of a "payment on account of capital". These words govern the kind of exception that is otherwise provided for in the Act. The exception extends only to interest that amounts to a payment on account of capital; it is, therefore, confined to interest that has been paid; and does not include interest that is payable but has not been paid, for such interest cannot be a "payment" on account of capital. Such a construction of section 5 (*b*) is necessary in order to bring its subject matter outside the exclusion of section 6 (*b*) and within the exception contemplated by it, and there is nothing in section 5 (*b*) itself that is inconsistent with it. It was, therefore, not necessary to specify in section 5 (*b*) that the interest mentioned in it must have been paid in order to be deductible; that was a condition precedent to its deductibility inherent, in the absence of clear terms to the contrary, in section 5 (*b*) as one of the exceptions referred to in the concluding words of section 6 (*b*). It is, in my opinion,

1946

TRAPP v. MINISTER OF NATIONAL REVENUE

Thorson P.

clear that section 5 (*b*) allows the deduction of interest on borrowed capital used in the business to earn the income only when the interest has been paid; and that no deduction is allowed in respect of unpaid interest, even although it has become payable or is accruing from day to day.

That being so, since the appellant did not pay the interest on the mortgage, he cannot show compliance with the conditions required by section 5 (*b*) and is not entitled to the benefit of its provisions. On this ground as well as on the others mentioned the appellant fails. The Minister was right in disallowing the deduction of the unpaid interest on the mortgage and the appeal must be dismissed with costs.

Judgment accordingly.

1944

Jan. 20

1946

March 5

BETWEEN:

FOOD MACHINERY CORPORATION APPELLANT.

AND

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

Word mark "Food Machinery Corporation"—The Unfair Competition Act, 1932, Statutes of Canada, 1932, c. 38, ss. 26 (1) (b), 26 (2)—Meaning of "constitute or form part of the name"—Meaning of "word mark otherwise registrable"—Section 26 (2) not an exception to section (26) (1) (b)—Use of name of firm or corporation as a word mark prohibited but use of part of name permitted—Possible difference between trade mark and name of owner—French version of statute at variance with English version creating ambiguity—Presumption in favour of reasonable interpretation—True meaning of statute prevails over apparent meaning of words—Presumption in favour of consistency and against repugnancy—Repeal by implication not favoured.

Appellant applied for registration of "Food Machinery Corporation" as a word mark under section 26 (2) of The Unfair Competition Act, 1932, notwithstanding the prohibition of section 26 (1) (*b*), and appealed from the refusal of the Registrar of Trade Marks to grant such application. Appeal dismissed.

Held: That subsection (2) of section 26 is not an exception to subsection (1) (*b*) but relates to subject matter that falls completely outside its prohibition. Subsection (2) is simply declaratory that the prohibition against the registration as a word mark of "the name" of a firm or corporation does not extend to the use of a series of letters or numerals constituting or forming "part" of such name. Part of the name may be used although the use of the whole name is prohibited.

2. That where two constructions are advanced for either the French or English text of a statute, one subject to objection and the other free from it, that construction which is free from objection, according to the recognized canons of construction should be adopted, even although the language of the other text is at variance with it and in accord with the objectionable construction; the objectionable construction is not rendered free from objection by reason of such accord and is not entitled to any support from it.

3. That the proposed word mark "Food Machinery Corporation", being the name of the appellant corporation, is excluded from registration by section 26 (1) (*b*) and does not come wihin the ambit of section 26 (2).

APPEAL from the refusal of the Registrar of Trade Marks to register "Food Machinery Corporation" as a word mark.

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

R. S. Smart K.C. for appellant.

W. P. J. O'Meara K.C. for respondent.

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

THE PRESIDENT now (March 5, 1946) delivered the following judgment:

The appellant was incorporated under the laws of the State of Delaware. On March 5, 1943, it applied to the Registrar of Trade Marks for the registration of "Food Machinery Corporation" as a word mark in association with the wares specified in its application. On November 10, 1943, the Registrar refused the application and from such refusal this appeal is taken.

The appeal depends on section 26 of The Unfair Competition Act, 1932, Statutes of Canada, 1932, chap. 38. The Registrar took the view that the proposed word mark,

1946

FOOD MACHINERY CORPORATION v. REGISTRAR OF TRADE MARKS

Thorson P.

being the name of a corporation, was excluded from registration by subsection (1), paragraph (*b*), which provides:

> 26. (1) Subject as otherwise provided in this Act, a word mark shall be registrable if it
>
> (*b*) is not the name of a person, firm or corporation;

but the appellant contends that, notwithstanding such provision, it is registrable under subsection (2), which reads:

> 26. (2) An application for the registration of a word mark otherwise registrable shall not be refused on the ground that the mark consists of or includes a series of letters or numerals which also constitute or form part of the name of the firm or corporation by which the application for registration is made.

The controversy centres around the relative clause in section 26 (2), "which also constitute or form part of the name of the firm or corporation by which the application for registration is made". Counsel for the appellant read the words "constitute or form part of the name" as meaning "constitute the name or form part of the name". In his view the two verbs "constitute" and "form" do not each have the same direct object and do not equally govern what follows in the clause, the verb "constitute" having "the name" as its direct object and the verb "form" governing, "part of the name". From this he argued that section 26 (2) is an exception to section 26 (1) (*b*) and allows the registration of the proposed word mark, even although it is the name of a corporation and notwithstanding the prohibition of section 26 (1) (*b*). He contended that section 26 (2) permits the registration of the name of a corporation, if it meets the requirements of being a "word mark otherwise registrable", that is to say, if it has "become adapted to distinguish" within the meaning of the definition of a trade mark in section 2 (*m*) and if it is not subject to any of the prohibitions of section 26 (1), and argued that the proposed word mark met both of these requirements, namely, that it was "adapted to distinguish" and that it was not subject to any of the prohibitions of section 26 (1), having been excepted from section 26 (1) (*b*) by section 26 (2).

A different grammatical construction was put forward by counsel for the respondent. He read the words "consti-

tute or form part of the name" as meaning "constitute part of the name or form part of the name". In his view both of the verbs "constitute" and "form" have the same direct object and each governs all that follows in the clause.

There are several reasons why the respondent's construction should be adopted. In the first place it is the natural grammatical one. The conjunction "or" is commonly used to introduce an alternative and it is so used in the preceding part of the subsection, for example, "includes" is an alternative to "consists of " and "numerals" an alternative to "letters". As I read the relative clause, "form" is an alternative to "constitute". Both verbs are in the same clause; each has the same subject, which relates back to each of the alternatives "letters" and "numerals"; and I see no grammatical reason why each should not govern all that follows in the clause. That seems to me to be its simple grammatical construction. Counsel for the appellant, however, put the conjunction "or" between the verb "constitute" on the one hand and the group of words "form part of" on the other. It was only by such a construction that he could prevent the verb "constitute" from governing "part of the name", just as the verb "form" does, and make it govern only "the name", and thus lay the foundation for his argument that, while section 26 (1) (*b*) expressly forbids the registration of the name of a corporation as a word mark, section 26 (2) permits it; for that is what the argument really amounts to. Such an antithesis between two subsections of the same section ought not to be attributed to Parliament unless it is necessary to do so and, if two grammatical constructions of the relative clause are possible, that which reasonably avoids such an antithesis should be preferred.

A proposed word mark is subject to a number of tests of registrability. In the first place, it must be a "word mark" within the meaning of the definition in section 2 (*o*) of the Act, and must also meet the requirement of the definition of a trade mark in section 2 (*m*), namely, that it is a "symbol which has become adapted to distinguish". That means that it must have acquired the quality of distinctiveness before it can be registered. Dis-

1946

FOOD MACHINERY CORPORATION v. REGISTRAR OF TRADE MARKS

Thorson P.

tinctiveness is an essential requirement: *Fisher* v. *British Columbia Packers Ltd.* (1). But distinctiveness by itself is not the only requirement. It is also necessary that there should be no prohibition against its registration. Subsection (1) of section 26 provides that a word mark shall be registrable if it does not come within any of the prohibitions specified in its six paragraphs; if the proposed word mark does come within any of such prohibitions, then it is not registrable, notwithstanding its distinctiveness. Paragraph (*b*) prohibits the registration as a word mark of the name of a person, firm or corporation. The proposed word mark "Food Machinery Corporation" is the name of the appellant corporation. Even if it be assumed that it has distinctiveness, it is not registrable because it falls within the prohibition of section 26 (1) (*b*), expressed in clear and unmistakable terms.

Now we come to subsection (2). It deals with an application for the registration of a "word mark otherwise registrable". The mark applied for must have distinctiveness and also be "otherwise registrable". If its registration is prohibited by any of the paragraphs of subsection (1), then it is not "otherwise registrable", and falls outside the scope of the subsection. The kind of word mark contemplated by subsection (2) is, in my opinion, indicated by its concluding words "part of the name of the firm or corporation by which the application for registration is made". If the proposed word mark is "the name" of a person, firm or corporation its registration is prohibited by section 26 (1) (*b*), but if it consists of or includes a series of letters or numerals which also constitute or form "part of the name" of the applicant firm or corporation, then its registration is not to be refused on that ground. Section 26 (1) (*b*) forbids the registration of "the name" of the corporation, but section 26 (2) allows the use of "part of the name". This is, I think, the expressed intention and declared purpose of subsection (1) (*b*) and subsection (2) when read together. On this construction, subsection (2) is not an exception to subsection (1) (*b*) at all, but relates to subject matter that falls completely outside its prohibition. Subsection (2) is

(1) (1945) Ex. C.R. 128 at 132.

simply declaratory that the prohibition against the registration as a word mark of "the name" of a firm or corporation does not extend to the use of a series of letters or numerals constituting or forming "part" of such name. Part of the name may be used although the use of the whole name is prohibited.

This difference of treatment between the whole name of a firm or corporation and part of such name rests on reasonable grounds. I am not aware of any case, since statutory provision was made for the registration of trade marks, where the name of a corporation has been recognized as a trade mark, except where it has been represented "in a special or particular manner", as allowed by the English Act, but there are many cases where "part of the name" has been used in or as a trade mark. Under the definition of a trade mark as a "symbol which has become adapted to distinguish" there may be ground for argument that there is a possible difference between a trade mark and the name of its owner. Certainly, not all names have the distinctiveness required of a trade mark. This is clearly recognized in the case of the names of persons and it has been held in a number of cases that, while a surname can be distinctive, particularly when it is not a common one, applications for the admission of surnames to registration as trade marks should be regarded with care. Similar considerations of principle are to some extent applicable in the case of firm or corporation names. There are words in the name of a corporation, for example, such as "company", or "corporation" or "limited" that are not "adapted to distinguish" and are not suitable for trade mark use. But there are other parts of a corporation's name, that may be eminently suited for use in or as the kind of symbol that a trade mark must be, and against which there can be no objection. There are many such illustrations; for example, "Coca Cola" is a well known trade mark of The Coca Cola Company of Canada Limited. The name of the corporation is prohibited from registration as a word mark, but the fact that "Coca Cola" consists of or includes a series of letters which also constitute or form "part of the name" of the corporation does not exclude it from

1946

FOOD MACHINERY CORPORATION v. REGISTRAR OF TRADE MARKS

Thorson P.

registration. It may well be that such a mark would be registrable, even if section 26 (2) had not been enacted, but its enactment puts the matter beyond dispute. It is that kind of a mark, that may be part of the name of a firm or corporation, that is contemplated by section 26 (2).

The respondent's construction of the relative clause is in accord with this construction of the two subsections of section 26, which is, I think, a reasonable one, giving full effect as it does to both subsections without any inconsistency or repugnancy between them, and I can see no objection to it. The same cannot be said of the appellant's construction. It is open to several serious objections which I shall deal with, but before I do so, reference should be made to a novel question that has arisen.

Counsel for the appellant relies upon the French version of section 26 (2) in support of his construction of the words in dispute. The words "which also constitute or form part of the name of the firm or corporation" are rendered in the French text as follows, namely, "qui constituent aussi le nom de la firme ou corporation, ou en font partie". The grammatical meaning of the French text appears to be clear and accords with the appellant's construction. My own opinion of the English text is that its meaning is also clear, but two constructions of it have been advanced, one of which is objectionable and the other free from objection. Quite frequently the French and English texts of a statute are compared with one another with a view to clarifying its meaning, for Parliament speaks in two languages each entitled to equal respect. I have not been able to find any authority on the specific question that has arisen in this appeal; if there is any ambiguity it is because of the divergence between the two texts, and it seems to me that the Court should deal with the matter as it would deal with any other question of ambiguity, namely, seek to ascertain the true intent of Parliament, following the guidance of the canons of construction recognized as applicable in such cases. Under the circumstances, it would, I think, be sound to hold that where two con-

structions are advanced for either the French or English text of a statute, one subject to objection and the other free from it, that construction which is free from objection, according to the recognized canons of construction, should be adopted, even although the language of the other text is at variance with it and in accord with the objectionable construction; the objectionable construction is not rendered free from objection by reason of such accord and is not entitled to any support from it.

Where the meaning of words is clear, effect must be given to them regardless of their consequences and in such cases no problem of interpretation or construction arises. Here Parliament has spoken in two languages with a variance of meaning between its French and English statements. Such a situation calls for the guidance of settled canons of interpretation and construction. One of these is the presumption in favour of a reasonable interpretation, which Maxwell on the Interpretation of Statutes, 8th Edition, page 169, puts as follows:

> In determining either the general object of the Legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice, and legal principles, should, in all cases of doubtful significance, be presumed to be the true one.

It is elementary that, in the first instance, the grammatical and ordinary sense of words is to be adhered to but this is not possible in the present case where such sense is not the same in the French and English texts of section 26 (2). The circumstances under which the grammatical and ordinary sense may be modified and the extent to which such modification may go are well established. Maxwell, at page 3, describes as a fundamental principle the statement of Lord Wensleydale in *Grey* v. *Pearson* (1):

> in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further.

(1) (1857) 6 H.L. 60 at 106.

1946

FOOD MACHINERY CORPORATION v. REGISTRAR OF TRADE MARKS

Thorson P.

This was approved by Lord Blackburn in *Caledonian Railway Co.* v. *North British Railway Co.* (1). The rule was put more positively by Burton J. in *Warburton* v. *Loveland* (2):

> I apprehend it is a rule in the construction of statutes, that, in the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with, any expressed intention, or any declared purpose of the statute; or if it would involve any absurdity, repugnance, or inconsistency in its different provisions, the grammatical sense must then be modified, extended, or abridged, so far as to avoid such an inconvenience, but no further.

And this was approved by Lord Fitzgerald in *Bradlaugh* v. *Clark* (3). The second statement focuses attention upon the necessity of ascertaining and giving effect to the "expressed intention or any declared purpose of the statute" and makes the departure from the grammatical and ordinary sense of the words obligatory in the face of such necessity. If the apparent meaning of words offends against the true meaning of the statute as a whole, the true meaning must prevail. This rule was strikingly put by Pollock C.B. in *Waugh* v. *Middleton* (4):

> It must, however, be conceded that where the grammatical construction is quite clear and manifest and without doubt, that construction ought to prevail, unless there be some strong and obvious reason to the contrary. But the rule adverted to is subject to this condition, that, however plain the apparent grammatical construction of a sentence may be, if it be perfectly clear from the contents of the same document that the apparent grammatical construction cannot be the true one, then that which upon the whole is the true meaning, shall prevail in spite of the grammatical construction of a particular part of it.

No departure from the grammatical and ordinary sense of the English text of section 26 (2) is involved in the respondent's view of its meaning for it is in accord with the reasonable construction of the two subsections of section 26 which has been outlined. The same cannot be said of the appellant's construction. It is, I think, a distortion of the grammatical meaning of the English text, and its adoption would run counter to the reasonable construction referred to, for it would enable every firm or corporation to register its full name as a word mark, notwithstanding the express prohibition against such a registration contained in section 26 (1) (*b*). Such a result would, in my

(1) (1881) 6 A.C. 114 at 131.
(2) (1828) 1 Hud. & Bro. 623 at 648.
(3) (1883) 8 A.C. 354 at 384.
(4) (1883) 8 Ex. 352 at 356.

opinion, be an unreasonable one under the circumstances and could not have been intended by Parliament. It follows from the rejection of the appellant's construction of the English text on this ground that the French text must fall with it, for although its grammatical meaning appears to be plain, it is clear from the contents of section 26 that it cannot be the true meaning, for it also runs counter to the "expressed intention and declared purpose" of the two subsections of section 26 when read together.

It was said long ago in *The King* v. *Berchet* (1) to be a known rule in the interpretation of statutes

> that such a sense is to be made upon the whole, as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction, they may all be made useful and pertinent.

And this was described in *The Queen* v. *Bishop of Oxford* (2) as a "settled canon of construction".

Effect should be given as far as possible to every part of an Act. Counsel for the appellant contended that section 26 (2) is an exception to section 26 (1) (*b*) but his argument makes it more than that, for it nullifies section 26 (1) (*b*) altogether so far as the name of a firm or corporation is concerned.

Moreover, the adoption of his construction and the French text would result in a complete antithesis between two subsections of the same section which it would be unreasonable to attribute to Parliament. It could not have intended to prohibit the registration of the name of a firm or corporation as a word mark in one subsection of section 26, and then permit it in the next subsection. Such a view violates "the settled canon of construction" just referred to.

The appellant's construction runs directly against the recognized presumption in favour of consistency and against repugnancy, which Maxwell, at page 139, puts as follows:

> An author must be supposed to be consistent with himself, and, therefore, if in one place he has expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it. In this respect, the work of the Legislature is treated in the same manner as that of any other author, and the language of every enactment must be construed as far as possible in accordance with the terms of every other statute which it does not in express terms modify or repeal. The law therefore, will not allow the revocation or alteration of a statute by construction when the words may be capable of a proper operation without it.

(1) (1688) 1 Shower 106 at 108. (2) (1879) 4 Q.B.D. 245 at 261.

1946

FOOD MACHINERY CORPORATION v. REGISTRAR OF TRADE MARKS

Thorson P.

Nor should it be held that section 26 (2) repeals section 26 (1) (*b*) by implication. There is nothing in section 26 (2) referring to section 26 (1) (*b*) or indicating in any way that it shall not be in force, and there is no need for implying its repeal. Maxwell states the applicable rule, at page 147, as follows:

> repeal by implication is not favoured. A sufficient Act ought not to be held to be repealed by implication without some strong reason. It is a reasonable presumption that the Legislature did not intend to keep really contradictory enactments on the Statute book, or, on the other hand, to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted, unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention.

The appellant's construction and the French text make for unnecessary inconsistency and repugnance between the two subsections of section 26, whereas such consequences are reasonably avoided by the respondent's construction.

In my view, it is quite clear that, while section 26 (1) (*b*) prohibits the registration of the name of a firm or corporation as a word mark, section 26 (2) declares that the fact that part of the name of a firm or corporation is used in or as a proposed word mark is not a bar to its registration.

That being so, and the proposed word mark "Food Machinery Corporation" being the name of the appellant corporation, it is excluded from registration by section 26 (1) (*b*) and does not come within the ambit of section 26 (2). The Registrar was, therefore, right in refusing the application and the appeal must be dismissed. In accordance with the usual practice in appeals from the Registrar there will be no order as to costs.

Judgment accordingly.

BETWEEN:

BATTLE PHARMACEUTICALS.... PETITIONER,

AND

LEVER BROTHERS LIMITED..... RESPONDENT.

1944
Sept. 26
1946
Mar. 8

Practice and Procedure—The Unfair Competition Act, 1932, Statutes of Canada, 1932, c. 38, ss. 49, 52, 53, 54, 55—Not necessary to apply to Registrar under s. 49 before filing originating notice of motion under s. 52—Proceedings by firms or persons carrying on business in names other than their own—General Rules and Orders, rules 42, 168—The Rules of the Supreme Court, 1883, of England, Order XVIIIA rr. 1, 2, 11—Partners may sue or be sued in firm name—Single person may be sued in name or style other than his own but cannot sue in such name or style—Motion under s. 52 of The Unfair Competition Act, 1932, not interlocutory—Statements in supporting affidavit based on information and belief not admissible.

On the return of the petitioner's motion for an order expunging the registration of the respondent's word mark "Vimms" on the ground of its non-user in Canada by the respondent since the date of its registration, counsel for the respondent took preliminary objections that the petitioner should first have applied to the Registrar under s. 49 of the Act, that the notice of motion did not disclose who the petitioner was, and that statements in the affidavits filed in support of the motion were inadmissible under rule 168 of the General Rules and Orders.

Held: That it is not a condition precedent to the filing of an originating notice of motion under section 52 of The Unfair Competition Act, 1932, that the petitioner should first make an application to the Registrar under section 49.

2. That partners may sue in their firm name but a single person, while he can be sued in a name or style other than his own, cannot sue in such name or style. *Mason* v. *Mogridge* ((1892) 8 Times L.R. 805) followed.

3. That a motion made pursuant to an originating notice of motion filed under section 52 of the Act is not an interlocutory motion and statements in an affidavit filed in support of it based on information and belief are not admissible as proof of the grounds on which the motion is made.

Preliminary objections to a motion under section 52 of The Unfair Competition Act, 1932, for an order expunging the registration of the respondent's word mark "Vimms".

The objections were heard by the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

C. F. H. Carson, K.C. for respondent.

R. C. Greig for petitioner.

1946

BATTLE PHARMACEUTICALS v. LEVER BROTHERS LIMITED

Thorson P.

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

THE PRESIDENT now (March 8, 1946) delivered the following judgment:

The petitioner, the registered owner of the word mark "Multivims", filed an originating notice of motion under section 52 of The Unfair Competition Act, 1932, Statutes of Canada, 1932, chap. 38, for an order expunging the registration of the respondent's word mark "Vimms" on the ground that it "has not been and is not now used in Canada on the wares for which the said mark was registered."

On the return of the motion, counsel for the respondent took a number of preliminary objections. He contended that, if the ground for expunging is non-user of the trade mark since the date of its registration, the initial jurisdiction is with the Registrar and an application should first have been made to him under section 49. In my view, this objection cannot be sustained. Section 49 reads as follows:

49. (1) The Registrar may at any time, and shall at the request of any person who pays the prescribed fee, notify the person appearing from the register to be the owner of any trade mark that he considers, or that it has been represented to him that such trade mark has ceased to be used as a trade mark in Canada, or for any other specific reason to be set out in the notice, the registration of such mark should be cancelled or that an entry relating thereto should be struck out, corrected or amplified, and request him to advise whether he has any, and if any, what objection to the amendment of the register accordingly.

(2) If the person to whom such notice has been addressed agrees to the proposed amendment of the register in whole or in part, such amendment shall forthwith be made by the Registrar in accordance with such agreement.

(3) If, within three months from the despatch of such a notice as aforesaid, no reply to it has been received from the person to whom it was addressed, the Registrar shall send such person a second notice enclosing a copy of the first and stating that if, within a reasonable time to be fixed by the notice, no objection to the proposed amendment of the register is received, such amendment will be made, and, unless an objection is received within the time limited, the Registrar shall amend the register accordingly.

(4) Except as in the next following section provided, the Registrar shall not cause any amendment to be made in the register to which the person appearing therefrom to be the owner of the mark makes any objection.

Section 49 provides a procedure whereby the Registrar may amend the register in respect of a registered trade mark in cases where the person appearing on the register to be the owner of such mark agrees to the proposed amendment, as provided in subsection (2), or does not object to it within the time referred to in subsection (3). If he makes any objection the Registrar may not make any amendment, except as provided in section 50, with which we are not here concerned. The procedure is not restricted to cases where the amendment is proposed on the ground that the trade mark has ceased to be used as a trade mark in Canada, but extends to those where it is proposed "for any other specific reason".

Section 49 gives the Registrar no jurisdiction to determine any dispute relating to a registered trade mark between the registered owner and any other person. The jurisdiction to deal with such a dispute is vested in the Exchequer Court of Canada under section 52, which provides as follows:

> 52. (1) The Exchequer Court of Canada shall have jurisdiction, on the application of the Registrar or of any person interested, to order that any entry in the register be struck out or amended on the ground that at the date of such application the entry as it appears on the register does not accurately express or define the existing rights of the person appearing to be the registered owner of the mark.
>
> (2) No person shall be entitled to institute under this section any proceeding calling into question any decision given by the Registrar of which such person had express notice and from which he had a right to appeal.

There is nothing in section 52 to indicate that resort cannot be had to the Court without first applying to the Registrar under section 49. If effect were to be given to the respondent's contention it would mean that, before a petitioner could take any action under section 52, he would first have to wait until all the steps referred to in section 49 had been taken and all the time required for such steps had elapsed, that is to say, he would have to request the Registrar to notify the registered owner of the trademark of his proposed attack on it and his reason therefor; the Registrar would have to send out the requested notice; the three months could elapse without any reply from the registered owner; then the Registrar would have to send out a second notice with a time fixed therein for receiving

1946

BATTLE PHARMACEUTICALS v. LEVER BROTHERS LIMITED

Thorson P.

an objection; and then, if an objection was received, the Registrar would be quite powerless to make any amendment. Moreover, section 54 makes it clear that applications under section 52 are to heard and determined summarily. It seems to me that it would be quite unreasonable to construe the Act as requiring a petitioner desirous of attacking a registration to go through all the preliminary procedure of section 49 with the waste of time involved and its abortive results. Moreover, such a requirement would be quite inconsistent with the summary nature of the proceedings under section 52. In my view, it is not a condition precedent to the filing of an originating notice of motion under section 52 that the petitioner should first make an application to the Registrar under section 49.

Counsel also objected that the notice of motion did not disclose who the petitioner was. The matter of proceedings, such as this, by firms or persons carrying on business in names other than their own is not provided for by any Act of Parliament or by the Rules of this Court, and in such cases Rule 42 of the General Rules and Orders of this Court applies, which provides:

> In any proceeding in the Exchequer Court respecting any patent of invention, copyright, trade mark or industrial design, the practice and procedure shall, in any matter not provided for by any Act of the Parliament of Canada or by the Rules of this Court (but subject always thereto) conform to, and be regulated by, as near as may be, the practice and procedure for the time being in force in similar proceedings in His Majesty's Supreme Court of Judicature in England.

Resort must, therefore, be had to Order XLVIIIA of "The Rules of the Supreme Court, 1883" of England as it stood at the date of the filing of the notice of motion. Under r. 1 of that Order it is provided:

> 1. Any two or more persons claiming or being liable as co-partners and carrying on business within the jurisdiction may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action; and any party to an action may in such case apply by summons to a judge for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise as the judge may direct.

And r. 2 provides:

> 2. When a writ is sued out by partners in the name of their firm, the plaintiffs or their solicitors shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of

residence of all the persons constituting the firm on whose behalf the action is brought. And if the plaintiffs or their solicitors shall fail to comply with such demand, all proceedings in the action may, upon an application for that purpose, be stayed upon such terms as the Court or a judge may direct. And when the names of the partners are so declared, the action shall proceed in the same manner and the same consequences in all respects shall follow as if they had been named as the plaintiffs in the writ. But all the proceedings shall, nevertheless, continue in the name of the firm.

Then follow rr. 3 to 10, which do not here concern us. Then r. 11 provides:

11. Any person carrying on business within the jurisdiction in a name or style other than his own name may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply.

It was held in *Mason* v. *Mogridge* (1) that while a single person trading under a name other than his own could be sued, he could not sue, under such name.

If, therefore, the petitioner is a partnership, there is no objection to the style of cause and the respondent could obtain the necessary information as to the members of it by taking the steps indicated by the rules. If such steps were taken it would, no doubt, be ascertained whether the petitioner is a partnership or a single person. If the petitioner is a single person carrying on business in a name or style other than his own, the notice of motion could be set aside on a motion for such purpose. There was nothing before the Court to indicate whether the petitioner was a partnership or a single person and, consequently, no action can be taken on this objection.

A further objection was that the affidavit filed in support of the motion by the solicitor for the petitioner did not comply with Rule 168 of the General Rules and Orders. The deposition objected to reads:

3. That I have been informed by the petitioner herein that the said word mark "Vimms" has not been and is not now being used in Canada by the Respondent herein on the wares for which it was registered.

Rule 168 provides in part:

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

(1) (1892) 8 T.L.R. 805.

1946

BATTLE PHARMACEUTICALS v. LEVER BROTHERS LIMITED

Thorson P.

Section 53 provides for the making of applications under section 52 either by filing an originating notice of motion with the Registrar of the Court or by a counterclaim in an action for the infringement of the mark. Under section 54 every such application is to be heard and determined summarily on evidence adduced by affidavit, "unless either party requires some issue of fact to be determined on oral evidence". Section 55 provides for the transmission by the Registrar of Trade Marks to the Registrar of the Court of all papers on file in his office relating to the matters in question in the proceedings, on the request of any of the parties to such proceedings and the payment of the prescribed fee.

Where a petitioner does not take advantage of the provisions of the Act for the proper disposition of the matters in controversy involved in his originating notice of motion or does not comply with the requirements of the Rules he runs the risk of having his motion dismissed. Here the petitioner has taken no step to indicate that he requires any issue of fact to be determined on oral evidence and the file of the Registrar of Trade Marks was not produced. The only material before the Court having any bearing on the issue of non-user of the trade mark by the respondent since its registration was, therefore, the deposition referred to. Even if the motion before the Court were an interlocutory one the deposition would not be admissible since there is no statement as to the deponent's belief in the information received, but a motion made pursuant to an originating notice of motion filed under section 52 is not an interlocutory motion and statements in an affidavit filed in support of it based on information and belief are not admissible as proof of the grounds on which the motion is made. The result is that there is no proof at all before the Court of non-user by the respondent of its word mark "Vimms" since its registration, and effect must be given to the respondent's objection. While the Court might, in a proper case, grant an adjournment of the hearing of the motion under circumstances such as these, on an application therefor and on appropriate terms, in order to enable the petitioner to perfect his material, such an application for adjournment would have to be

1946

BATTLE PHARMACEUTICALS v. LEVER BROTHERS LIMITED

Thorson P.

dealt with on its merits. In the present case, there is no object in granting any such concession to the petitioner, in view of the decision of this Court in *The British Drug Houses, Limited* v. *Battle Pharmaceuticals* (1) and its affirmation by the Supreme Court of Canada (2), whereby the registration of the petitioner's own word mark "Multivims" was ordered to be expunged. Consequently, the petitioner's motion must be dismissed with costs.

Judgment accordingly.

BETWEEN:

JOHN R. BRODIE ..... SUPPLIANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

1945

Sept. 4 to 7
Oct. 10

1946

Jan. 30

Crown—Petition of Right—Damages to property by flooding of river through operation of control dams by Lake of the Woods Control Board—Statutory Powers—Negligence of Officer or Servant of the Crown—Section 19 (c) Exchequer Court Act—Independent Body created by two Legislative Bodies.

By the terms of a Convention entered into in 1925 between the Dominion of Canada and the United States of America for the purpose of regulating the level of the waters in the Lake of the Woods, the Dominion of Canada agreed to establish and maintain a Lake of the Woods Control Board, composed of engineers, to regulate and control the out-flow of the waters of the Lake of the Woods. By the said Convention the level of the Lake of the Woods was ordinarily to be maintained between 1056 and 1061·25 sea level datum, with certain permissible variations in times of low and high water, and the capacity of the outlets of the Lake was to be enlarged to permit discharge of not less than 47,000 cubic feet second when the Lake level was 1061, sea level datum. The outlets were so enlarged by the Dominion of Canada.

The Canadian Lake of the Woods Control Board was established by two similar acts of the Dominion of Canada and the Province of Ontario, each appointing two members; and the duties and powers were defined and included (1) the duty to secure severally and at all times the most dependable flow and the most advantageous and beneficial use of the waters of the Winnipeg River, and (2) to regulate and control the out-flow of waters from the Lake so as to maintain the level required by the Convention. In performance of their duties, the Board, when faced with unusual flood conditions in the Lake, increased

(1) (1944) Ex. C.R. 239. (2) (1946) S.C.R. 50.

1946

JOHN R. BRODIE v. THE KING

Cameron D.J.

the out-flow at times to the maximum capacity of 47,000 c.f.s. and the suppliant's property in Sand Lake in the Winnipeg River was damaged.

Held: That the Lake of the Woods Control Board, acting in the execution of a public trust and for the public benefit, had statutory authority to do as they did (or at least implied authority as a necessary incident to the carrying out of the duties and powers entrusted to them) and not having exceeded this authority and having acted in a proper manner without negligence, that the suppliant (although he had sustained a special injury) could not succeed unless a remedy was provided by the Statute. There being no such remedy in the Statute, the suppliant's action fails. Halsbury 2nd ed., Vol. 26, paras. 571, 572, 574, and Vol. 23, para. 992; *Mayor and Councillors of East Freemantle* v. *Annois* (1902) A.C. 213, and *Geddes* v. *Proprietors of Bann Reservoir* (1877-78) 3 A.C. 430, at p. 448 and 455, followed.

2. That the Lake of the Woods Control Board was not the servant or officer of the Crown. *City of Halifax* v. *Halifax Harbour Commissioners* (1935) S.C.R. 215, applied. *Metropolitan Meat Industry Board* v. *Sheedy* (1927) A.C. 899 followed.

3. That the relief claimed must be limited to that disclosed in the Petition of Right.

PETITION OF RIGHT by the Suppliant seeking damages against the Crown for property injuriously affected by flooding of the Winnipeg River.

The action was tried before His Honour Judge J. C. A. Cameron, Deputy Judge of the Court at Winnipeg, Manitoba.

A. E. Hoskin, K.C. and *O. S. Alsaker* for suppliant.

R. D. Guy, K.C. and *R. D. Guy, Jr.* for respondent.

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

CAMERON D.J., now (January 30, 1946) delivered the following judgment:

The Suppliant herein is the owner of Island S.655 in Sand Lake, in the Winnipeg River about two miles Northwest of the National Transcontinental Bridge crossing that river. The Island has an area of about two acres, and in the grant to the Suppliant in 1918 the reservation of the chain road allowance along the shore of the Island was dispensed with. The Suppliant has for many years used

the Island for a summer home, and has erected thereon a cottage and other buildings, and has expended additional amounts for improving the Island. Particulars of these will be referred to later. His claim arises out of flooding of portions of the said Island, said to have been caused by the actions or want of action by the Lake of the Woods Control Board (alleged to be the agent, servant or officer of the respondent) under the circumstances later to be mentioned.

Before dealing with the matters complained of by the Suppliant, it is necessary to consider briefly the origin of the Lake of the Woods Control Board (hereinafter to be called the Board).

The Lake of the Woods has an area of 1,485 square miles and drains an area of 27,170 square miles. It is partly in the United States of America and partly in Canada. Its main outlet to the North is the Winnipeg River. At or near the entrance to the Winnipeg River is the Norman Dam. The Dam was built by private interests and previously in 1887 there had been a rollerway dam. The Norman Dam as constructed in 1893 had a loose rockfill section in the centre and ten sluices on either side. About 1898 the Province of Ontario required the owner of the Dam to put in stop logs, and the operation of the Dam was vested in the Province of Ontario. That continued until 1912, but the operation was not very satisfactory to either the Americans on the Lake of the Woods, who were bothered with high and low water, or to the Canadian interests. In 1912 letters of reference by the two Governments were sent to the International Joint Commission, asking for investigation and report. That body since 1909 has had to do with all boundary matters. Extensive investigations followed and a report was made. Later a Convention and Protocol were signed in 1925 by representatives of the United States of America and Canada (Exhibit 11). The Convention was for the purpose of regulating the level of the Lake of the Woods.

It should be noted here that until 1919 the Dominion Government had not interfered in the regulation of the waters of the Lake; but in that year, following a serious flood in 1916, it acted by Order in Council to establish

1946

JOHN R. BRODIE v. THE KING

Cameron D.J.

an interim Board, consisting of two engineers appointed by the Province of Ontario and two by the Dominion of Canada.

In 1921 the Dominion enacted the Lake of the Woods Control Board Act (Chapter 10), but it was not proclaimed until June 27th, 1928. In the meantime the Legislature of the Province of Ontario had passed an identical Act. The Board, therefore, actually came into being in 1928 and has had charge of the control and operations since that time.

The relevant sections of the Convention are as follows:—

Article 2

The level of Lake of the Woods shall be regulated to the extent and in the manner provided for in the present Convention, with the object of securing to the inhabitants of Canada and the United States the most advantageous use of the waters thereof and of the waters flowing into and from the lake on each side of the boundary between the two countries for domestic and sanitary purposes, for navigation purposes, for fishing purposes, and for power, irrigation and reclamation purposes.

Article 3

The Government of Canada shall establish and maintain a Canadian Lake of the Woods Control Board, composed of engineers, which shall regulate and control the outflow of the waters of Lake of the Woods. There shall be established and maintained an International Lake of the Woods Control Board composed of two engineers, one appointed by the Government of Canada and one by the Government of the United States from their respective public services, and whenever the level of the lake rises above elevation 1061 sea-level datum or falls below elevation 1056 sea-level datum the rate of total discharge of water from the lake shall be subject to the approval of this Board.

Article 4

The level of Lake of the Woods shall ordinarily be maintained between elevation 1056 and 1061·25 sea-level datum, and between these two elevations the regulations shall be such as to ensure the highest continuous uniform discharge of water from the lake. During periods of excessive precipitation the total discharge of water from the lake shall, upon the level reaching elevation 1061 sea-level datum, be so regulated as to ensure that the extreme high level of the lake shall at no time exceed elevation 1062·5 sea-level datum.

The level of the lake shall at no time be reduced below elevation 1056 sea-level datum except during periods of low precipitation and then only upon the approval of the International Lake of the Woods Control Board and subject to such conditions and limitations as may be necessary to protect the use of the waters of the lake for domestic, sanitary, navigation and fishing purposes.

Article 6

Any disagreement between the members of the International Lake of the Woods Control Board as to the exercise of the functions of the Board under Articles 3, 4 and 5 shall be immediately referred by the Board to the International Joint Commission, whose decision shall be final.

Article 7

The outflow capacity of the outlets of Lake of the Woods shall be so enlarged as to permit the discharge of not less than forty-seven thousand cubic feet of water per second (47,000 c.f.s.) when the level of the lake is at elevation 1061 sea-level datum.

The necessary works for this purpose, as well as the necessary works and dams for controlling and regulating the outflow of the water, shall be provided for at the instance of the Government of Canada, either by the improvement of existing works and dams or by the construction of additional works.

Article 9

The Dominion of Canada and the United States shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from the fluctuations of the level of Lake of the Woods or of the outflow therefrom.

Each shall likewise assume responsibility for any damage or injury which may hereafter result to it or its inhabitants from the regulation of the level of Lake of the Woods in the manner provided for in the present Convention.

Article 4 of the accompanying Protocol states:—

In order to ensure the fullest measure of co-operation between the International Lake of the Woods Control Board and the Canadian Lake of the Woods Control Board provided for in Article 3 of the Convention, the Government of Canada will appoint one member of the Canadian Board as its representative on the International Board.

Pursuant to Article 7 of the Convention, the Government of Canada in 1925-26 caused the Norman Dam to be reconstructed so that it could discharge a maximum of 47,000 c.f.s. (cubic feet per second) when the level of the lake was 1061 s.l.d. (sea-level datum)—that being an increase of 11,000 c.f.s. beyond its previous maximum discharge capacity. At that time certain deepening of the channel near Norman Dam was also carried out. All this work was completed in 1926 before the Board took over its duties in 1928. The Norman Dam is owned by private interests.

As stated above the Board acts under the authority of identical Acts of the Dominion of Canada and of the Province of Ontario. The preamble recites that by agreement between the two Governments, the powers later

1946

JOHN R. BRODIE v. THE KING

Cameron DJ.

mentioned are vested in the Board of four members, two to be appointed by each Government. By Section 2 the Board is to consist of four members who shall be duly qualified engineers appointed as previously mentioned, and to hold office during the pleasure of the Government appointing them, vacancies to be filled by the Government which had previously made the appointment then vacant.

The duties of the Board are defined in Section 3 as follows:—

> 3. It shall be the duty of the Board to secure severally and at all times the most dependable flow and the most advantageous and beneficial use of:—
>
> (*a*) the waters of the Winnipeg River; and
>
> (*b*) the waters of the English River, and
>
> for these purposes the Board shall have power:—
>
> (*a*) to regulate and control the outflow of the waters of the Lake of the Woods, so as to maintain the level of the Lake between the elevations that have been recommended by the International Joint Commission in their final report of 12th June, 1917, or between such elevations as may be agreed upon by the United States and Canada;
>
> (*c*) to regulate and control the flow of the waters of the Winnipeg River between its junction with the English River and the Lake of the Woods, and also the flow of the water in the English river between its junction with the Winnipeg river and Lac Seul.

Certain other powers were conferred but are not relevant to this matter.

Section 4 provides penalties for enforcing the Board's orders.

Section 5 gives general powers as follows:—

> The said Board shall have all the powers necessary for effectively carrying out the authority and control vested in it by this Act and by any Act passed by the Legislature of the Province of Ontario, and any order made by the said Board may be made a rule, order or decree of the Exchequer Court of Canada or of the Supreme Court of Ontario, and shall be enforced in the same manner as any rule, order or decree may be enforced in the Court in which such proceeding is taken.

Section 6 gives the Board power to enforce its orders by taking possession and control of property.

Section 7 authorizes the Board to appoint officers, inspectors and employees as necessary, and provides for entry on property to make surveys and investigations.

1946

JOHN R. BRODIE v. THE KING

Cameron DJ.

Section 8 is as follows:—

The Board and the members thereof, and its officers and employees, shall not be liable to any action for acts done by them or any of them under the authority of this Act.

The Board was duly established in accordance with the two Acts, each Government appointing two members. All were fully qualified engineers of great ability and wide experience, and the same comment may be made as to the present members, (who were also the members in 1944) who are Dr. K. M. Cameron, Chief Engineer, Department of Public Works of the Dominion; I. R. Strome, District Hydraulic Engineer for Ontario, in the Dominion Water and Power Bureau, Service and Engineering Branch of the Department of Mines and Resources, and the Dominion member of the International Lake of the Woods Control Board—both appointed by the Dominion Government; and Dr. T. H. Hogg, Chairman and Chief Engineer of the Hydro Electric Power Commission of Ontario, and C. H. Fullerton, Surveyor-General of Ontario—both appointed by the Ontario Government.

While the evidence led at the hearing indicated that serious flooding took place in 1938, 1941, 1943, 1944 and 1945, the claim of the Suppliant is based on what occurred in 1944, and consideration of the procedure followed in that year will, I think, be sufficient to indicate what took place in each of the years mentioned.

The Board has regular meetings in Ottawa where the Dominion representatives reside, and in Toronto where the Ontario members reside. Its office is in Ottawa and records are kept there. It has gauges and gauging stations throughout the area affected from some of which it receives daily or weekly reports. Meteorological reports of unusual precipitation are received. Paid observers send in daily reports by telegram in cases of emergency. All the necessary and available data are collected so that the Board can get the best information as to the run-off in the area and the inflow into the Lake. An annual snow-survey has been conducted for the last sixteen years. Priority is given to the work daily by Mr. Strome, who is the Board's engineer, and from the information received as to the Lake level

1946

JOHN R. BRODIE v. THE KING

Cameron DJ.

and the discharge and the run-off, the Board computes what water should be let out at the Norman Dam into the Winnipeg River.

Its problems are both numerous and complex. It must maintain the reservoir between 1056 and 1061 s.l.d., or control passes to the International Board; and between these levels it must ensure the highest continuous uniform discharge from the Lake. During periods of excessive precipitation when the level in the Lake reaches 1061, it must regulate the discharge so that the level will never exceed 1062·5 s.l.d. It must never let the level go below 1056, except during periods of low precipitation, and then only upon the approval of the International Board. It must provide the most advantageous use of the waters of the Lake and of the outflow therefrom for domestic, sanitary, navigation and fishing purposes, and for power, irrigation and reclamation purposes; and in addition, secure severally and at all times the most dependable flow and the most advantageous and beneficial use of the waters of the Winnipeg River as provided for in the Act.

Exhibit "A" is a list of persons and interests that the Board has to consider. It includes, among others, properties in Minnesota, Ontario and Manitoba; Indian reserves, Navigation, Milling and Power Companies, riparian owners, mining interests; water for the City of Winnipeg and power for the greater part of the City of Winnipeg and Province of Manitoba.

The Board cannot, of course, control the inflow into the reservoir, but merely the outflow. The uncertain factors—the inflow into and the level of the reservoir—are caused by such occurrences as the extent and duration of rain precipitation, the inflow from melting snow and adjacent streams, evaporation of snow and from the waters in the Lake, and to a certain extent by wind. It is clear from the evidence that the Board considers these as quite unpredictable factors, and I think they were quite entitled to do so. It is not possible at any time to predict with certainty the approach of either a rainy or dry season. Nor do they follow in cycles; a year of unusually heavy precipitation may be followed by one or more years of very low precipitation.

But the Board has available its long-term records from which it computes the average conditions to be anticipated in each month, and with this information as a guide and its knowledge of what water has to be discharged to meet this average condition, it prepares in advance its proposal for the operations for the ensuing months. Exhibit "G" is such a table prepared on April 1st, 1944, for the following months. Substantially the same procedure has been followed by the Board since 1928, and with the exception of the years 1938, 1941, 1943, 1944, flooding in the river had been avoided.

Having in mind the many interests that it has to protect against the possibility of continued dry weather (which it can accomplish to some extent by limiting the outflow) and that by the terms of the Convention, it has to provide for the *highest* continuous uniform discharge of water from the Lake, the Board considered it to be its duty to keep the Lake replete to a level of 1061 whenever possible to do so. And again I think they were right in so doing. Given average conditions of rainfall and weather including normal Spring floods as indicated by their records, no harm would befall any of the interests affected, and the largest possible reservoir would be maintained as an assurance against a prolonged dry period during which the various interests could be served, and the highest continuous uniform discharge maintained. Unless very unusual conditions occurred, the outflow could be regulated so that no flooding would take place.

The occurrences in 1944 may be stated briefly as follows:—On April 1st the Lake level was 1059·58. Exhibit "G" is a table giving the long term average inflow in the Lake for the next five months, the proposed outflow for each month in that period and the effect on the Lake level of such proposed operations under average conditions. Such a plan would have resulted in no flooding, because it is only after the outflow is above 21,000 c.f.s., that the Suppliant's property is affected. Exhibit "H" is the table indicating what actually occurred. It shows the actual precipitation in relation to the anticipated long term average precipitation to be as follows:—In April, 20 per cent; in May, 155 per cent (but well spread over the whole

1946

JOHN R. BRODIE v. THE KING

Cameron D.J.

month as given in the evidence); in June, 157 per cent; in July, 128 per cent; in August, 205 per cent (most in the latter month falling in two days). For the five months' period, the precipitation was 20·40 being 144 per cent of the long term average. Table "I" shows the actual regulation of the controls for the same period, and the actual inflow into the reservoir. In June the actual inflow was 276 per cent of the long term average for that month. These figures indicate extraordinary flood conditions in the Lake.

As the figures indicate, the proposed outflow was greatly increased. In June it reached 47,400 c.f.s., which was about the maximum possible outflow. In July the inflow was 226 per cent of the average, and in August 601 per cent. In September it was 338 per cent. In each of the months of June to September, the level of the Lake was above 1061 and, due to the fact that the Board was required to keep the level below that figure if possible, the outflow was greatly increased—at times reaching a maximum of something over 48,000 c.f.s.

The Board gave flood warnings as soon as it became apparent that unusual conditions existed, and that the outflow would have to be increased greatly. It knew that riparian owners would be affected, and gave consideration to their difficulties. In view of the level of the Lake at the commencement of a period of unusual and heavy precipitation, about June 1st, there was nothing else the Board could do except to step up the outflow; otherwise the level of the Lake would have risen rapidly and great loss would have been occasioned to the property owners adjacent to the Lake of the Woods. The American member of the International Board—that Board having power as the level exceeded 1061—requested the maximum outflow.

In the result the water in the Winnipeg River, of which Sand Lake is a part, rose and part of the Suppliant's Island was flooded. He says that in the light of the floods which had occurred in 1938, 1941 and 1943 and for the same reasons, the Board should have foreseen the conditions and emptied the reservoir in the early Spring in anticipation of another heavy rainfall. Looking back upon the event, it is clear that if that had been done the flooding

in the Winnipeg River would have been minimized. Reference will be made later to what the result would have been to residents on the Lake of the Woods. But after the event it is a simple matter to point out what could have been done when all doubtful factors have been ascertained. Had they done so and a long period of dry weather followed, the results would have been disastrous to the many interests I have referred to. In 1930 and 1931 and on some other occasions when the outflow was reduced to a minimum to preserve the level of 1056, power users and others were seriously affected.

In this connection several answers of Mr. MacLean, an engineer called by the Suppliant, are interesting. At page 130:—

Q. You don't know of anything that the Board did that was outside its powers, or that they failed to do anything which they were required to do?—A. That would be correct; they have almost unlimited power.

Q. You are familiar with the powers of the Board?—A. As I just interpret them as an engineer I think they have almost unlimited power.

Q. You did make a statement that the two floods in 1944 could have been eliminated, could have been avoided, I think you said. I presume you mean—well, you had better tell us?—A. If from wet season to wet season they had produced a uniform flow that would have used up just about the five feet or five and one-quarter feet of storage on the Lake of the Woods. They could have done that, but I will agree that it would have been almost a miracle if they had.

Q. If what?—A. If they had been able to do that one hundred per cent.

Q. Your opinion is that it might have been done?—A. It is very easy after a thing is past, very easy to criticize and say if this thing had been done theoretically it could have been done. I think it would be very hard to do.

At page 132:—

Q. But you don't expect them to foresee what the future is going to be?—A. No.

I have not endeavoured to set out in detail all that took place in 1944, but merely to indicate the nature of the problems before the Board, the basis on which they planned, how they carried out the operations and the result thereof.

The claim here is based on the acts or omissions of the Board, but by reason of Section 8 of the Act of 1921, no claim may be brought against the Board or its mem-

1946

JOHN R. BRODIE v. THE KING

Cameron DJ.

bers for anything done under the authority of the Act, and I assume that is one of the reasons why the claim is made against the Crown. Before dealing with the question as to whether the Crown is liable for the acts of the Board, I propose to consider the law applicable if the claim had been made against the Board, and as if the protection afforded to the Board by Section 8 did not exist; for I consider that if under those circumstances the Suppliant could not succeed, then the Crown would not be liable.

In essence, the claim of the Suppliant is that the Board should have so regulated the flow of the waters from the Lake, that at no time would the water in Sand Lake rise above a level of 1036·14 s.l.d., a level which he considered the normal high water mark, and at which level he had constructed certain of his facilities. To bring about that condition of affairs—no doubt desirable from the point of view of one or more individuals—would have meant that at no time and under no circumstances could the Board let out more than 21,000 c.f.s. When the Board took over its duties, facilities were supplied to it, pursuant to the Convention, to drain off a maximum of 47,000 c.f.s., when the Lake reached 1061 s.l.d., and, in my view, not to have used those facilities under the named conditions, would have been a breach of the duty imposed on the Board.

The principles applicable hereto have been discussed in many cases, to some of which I will later refer. In the 2nd. Ed., Halsbury, Vol. 26, p. 257, under the heading of "Statutory Powers and Duties" of public authorities and officers, it is stated:—

571. The doing of an act authorized by statute cannot, of itself, be wrongful, whether the act be authorized for a public purpose or for private profit; and no action will lie at common law for damage inevitably caused by the proper exercise of statutory powers or duties, including acts reasonably necessary for such exercise.

572. Whether the statute authorizes the exercise of powers to the injury of other persons is a question of interpretation, wherein the burden lies on those who seek to establish that the legislature intended to take away the private rights of individuals, to show that, by express words or by necessary implication, such an intention appears. If no compensation is given, it affords a reason, though not a conclusive one, for thinking that the intention of the legislature is that the thing shall only be done if it can be done without injury to others. But where the legislature directs that a thing shall at all events be done or authorizes certain works at a particular place for a specific purpose or grants powers with the

intention that they shall be exercised, although leaving some discretion as to the mode of exercise, no action will lie for nuisance or damage which is the inevitable result of carrying out the statutory powers so conferred. The onus of proving that the result is inevitable lies upon those who seek to escape liability. The criterion of inevitability is what is possible according to the state of scientific knowledge at the time, having regard to practical feasibility in view of situation and expense.

574. In all cases, those exercising statutory powers or duties must use all reasonable diligence to prevent their operations from causing damage to others. Their liability in this respect must be determined upon a true interpretation of the statute in question, but, in the absence of something to show a contrary intention, they have the same duties and their funds are rendered subject to the same liabilities as the general law would impose upon a private person doing the same things, including liability for the acts of their servants. The diligence to be exercised must be reasonable according to all the circumstances, regard being had not only to the interest of those exercising the powers, but also to that of those suffering, or threatened with, injury; and reasonableness applies not only to construction of works, but also to improvement.

And in Vol. 23, p. 703, under the heading of "Negligence":—

992. The particular act may be held to be authorized by statute where it is one which is a natural incident or effect of the operation legalized under the statute, or is ordinarily necessary for carrying out the powers conferred by the statute in question.

Many of the cases cited to me have established the principles above mentioned and it is not necessary to refer to most of them.

The judgment of the Privy Council in the case of *Mayor and Councillors of East Freemantle* v. *Annois* (1) is of interest. In that case the municipality in the exercise of statutory authority reduced the gradient opposite the respondent's house so that it was left on the edge of a cutting with a drop of about six or eight feet to the road. It was held that the respondent was without remedy, since none had been given by statute, and the appellants had not exceeded the powers conferred. At page 217, Lord MacNaghten stated:—

The law has been settled for the last hundred years. If persons in the position of the appellants, acting in the execution of a public trust and for the public benefit, do an act which they are authorized by law to do, and do it in a proper manner, though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by the statute. That was distinctly laid down by Lord Kenyon and Buller J., and their view was approved by Abbott C.J., and the Court of King's Bench.

(1) (1902) A.C. 213.

1946

JOHN R. BRODIE v. THE KING

Cameron DJ.

At the same time, Abbott C.J., observed that if in doing the act authorized the trustees acted arbitrarily, carelessly, or oppressively, the law in his opinion had provided a remedy. Those words, "arbitrarily, carelessly, or oppressively," were taken from the judgment of Gibbs C.J., in *Sutton* v. *Clarke,* (1815) 6 Taunt. 34; 16 R.R. 563, decided in 1815. As applied to the circumstances of a particular case, they probably create no difficulty. When they are used generally and at large, it is not perhaps very easy to form a conception of their precise scope and exact meaning. In simpler language Turner L.J., (*Galloway* v. *Corporation of London* (1864) 2 D.J. & S. 213, 229) observed in a somewhat similar case that "such powers are at all times to be exercised bona fide and with judgment and discretion." And in a recent case, where persons acting in the execution of a public trust were sued in respect of an injury likely to result from their act, the present Master of the Rolls, then Collins L.J. (1898) 2 Ch. 613 observed that "the only obligation on the defendants was to use reasonable care to do no unnecessary damage to the plaintiffs."

In a word, the only question is, Has the power been exceeded? Abuse is only one form of excess.

The problem was considered by Rose C.J.H.C., in *Aikman* v. *George Mills & Co., Ltd.,* (1) and at page 605, he states:—

Sometimes in the cases the rule as to the immunity is said to be that the statutory authorization of the work relieves from liability unless negligence be shown; for example, it is so stated in *Roberts* v. *Bell Telephone Co.,* (1913), 10 D.L.R., 459; but I do not think that those who use this form of expression intend to be understood as meaning that when there is created what but for the statutory authority would be a nuisance, or where but for the Statute there would be liability under the doctrine of *Rylands* v. *Fletcher* (1868), L.R., 3 H.L., 330, a person whose property is damaged and who brings action must assume the burden of proving "negligence" as part of his case. Indeed, the contrary seems to be established by *Manchester Corporation* v. *Farnworth,* (1930) A.C. 171. In that case Viscount Dunedin said, at p. 183, "When Parliament has authorized a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorized. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance . . ." And Lord Blanesburgh said, at p. 203, "It (the fact that there was no 'nuisance-clause' in the Statute under which the defendants were acting) means also that so soon as the Corporation are in a position to establish that in the working of their power station . . . they are acting without negligence in the sense in which in such a connection these words are used, they are relieved of all further liability to the plaintiff for nuisance."

In the case of *Greenock Corporation* v. *Caledonian Railway Company* (2) Lord Finlay L.C., said at page 572:—

It is true that the flood was of extraordinary violence, but floods of extraordinary violence must be anticipated as likely to take place from time to time. It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel

(1) (1934) O.R. 597. (2) (1917) A.C. 556.

provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable. Such damage is not in the nature of damnum fatale, but is the direct result of the obstruction of a natural water-course by the defenders' works followed by heavy rain.

In that case, however, the question of statutory duty or power did not arise.

In the case of *Manchester Corporation* v. *Farnworth* (*supra*), Viscount Dunedin further said (p. 183):—

> The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense.

Lord Blackburn considered the question in the House of Lords in the case of *Geddis* v. *Proprietors of Bann Reservoir,* (1) and at page 455 he said:—

> For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorized, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, "negligence" not to make such reasonable exercise of their powers. I do not think that it will be found that any of the cases (I do not cite them) are in conflict with that view of the law . . . The whole question, therefore, comes around to this, was such a power given or was it not?

In that case the plaintiff succeeded on the ground that, having constructed a reservoir, it was the defendant's duty to exercise the powers conferred in the Act to cleanse the bed or channel of the stream and keep it in proper state for the flow and reflow of the waters that had to pass through it, and that such action would have prevented the damage complained of.

The latest decision I have been able to find is that of *Provender Millers (Winchester), Ltd.,* v. *Southampton County Council* (2) where at page 162 Sir Wilfrid Greene, M.R., said:—

> The other branch of the argument dealt with the point of statutory duty. It was suggested that Farwell, J., had misdirected himself and that he had taken a view of the evidence which could not be supported.

(1) (1877-78) 3 A.C. 430.

(2) (1939) 4 A.E.R. 157.

1946

JOHN R. BRODIE v. THE KING

Cameron DJ.

On this branch of the case, without attempting to put my language with exact precision, the position may be stated thus. The appellants, being under a statutory duty to repair bridges carried by county highways and to keep the county highway in repair, and in particular to protect it against flooding, set themselves to perform that task, which was admittedly necessary. That being the task, what they have actually done is something beyond what their duty imposed upon them, because they have not only rebuilt the bridge—that is right—they have not only protected the highway against flood water—that is right—but they have also gone further and effected a permanent alteration in the natural flow of the stream. Having, therefore, done something which goes beyond their duty, it is for them, and admittedly it is for them, to justify that excess. If the statutory duty could only have been performed (and when I say that I mean from a reasonable point of view, and without calling in the aid of extravagant devices, or anything of that kind) by going to that excess, the appellants would have been under no liability, because then they could truly have said that what they had done was the only reasonable thing that they could have done in the performance of their duty, and that, if, in order to perform that duty, they had at the same time to go beyond its exact limits, that would be a matter of which the respondents could not complain. Farwell, J., in my opinion, correctly stated the law, and appreciated the facts correctly. He found that the appellants had really made no attempt to discharge the burden upon them of showing that the statutory object of repairing the bridge and protecting the highway against flooding could not reasonably have been achieved without going to the further point of permanently altering the normal flow of the river to the prejudice of persons interested in the water flowing down the River Itchen.

In applying these principles to the facts of the case, several questions arise. Did the Board have statutory powers to do what it did or as a necessary incident to such powers as were granted to it? Did the Board act negligently in carrying out its powers either in what it did or in what it failed to do? In the true interpretation of the statute, does it authorize the exercise of powers to the injury of the Suppliant and has the Respondent shown that the Act intended to take away the private rights of the individuals either by express words or necessary implication?

On the first question I am quite satisfied that the Board had the necessary powers conferred on it by the Act to do as it did, or at least as a necessary incident to such powers. I will not repeat what I have previously said as to all the provisions of the Convention and the Act. Its duty was to secure severally and at all times the most dependable flow and the most advantageous and beneficial use of the waters in the Winnipeg River: it had the duty of

regulating and controlling the outflow from the Lake, so as to maintain its level between the limits laid down. To secure the most dependable flow in the River and the highest continuous uniform discharge from the Lake, it had to keep its reservoir at as high a level as was consistent with safety, keeping in mind its long-term records, and to secure the most advantageous and beneficial use it had to take into consideration the advantages of all parties who would be affected by its operations—not merely one or more individuals who might be adversely affected. It was supplied with facilities which permitted it to discharge 47,000 c.f.s., and in my opinion it was its duty to use these facilities to the limit in times of crises, even though it well knew that flooding of individual properties was inevitable.

And I believe also that in the exercise of its statutory powers, the Board did not act negligently in what it did. It was composed of engineers of very wide experience and all holding important positions in the public service of Canada and the Province of Ontario. It made use of all available information, planned to take care of all such conditions as it could reasonably anticipate, including normal Spring freshets; gave consideration to all the interests that would be affected (not overlooking those of the Suppliant) and applied its best judgment to the whole situation. The Board appreciated the fact that if the flood flow in the river was above 21,000 c.f.s., the riparian owners would suffer some damage and make every effort to avoid it, consistent with its overall duty.

Mr. S. S. Scovil, called as a witness for the Respondent, said that what the Board did was in his opinion what should have been done and what he in similar circumstances would have done himself; and that to have done as the Suppliant suggested should have been done (namely to empty the Lake in the early Spring) would have been contrary to everything that his long experience has shown him to be the correct procedure. Since 1925 he has been a consulting hydraulic engineer, and prior to that was employed by the Dominion Government. He collected data for submission to the International Joint Commission in connection with the control of the Lake of the Woods;

1946

JOHN R. BRODIE v. THE KING

Cameron DJ.

was engineer from 1914 to 1919 for the Lake of the Woods Technical Board. In 1919 he was appointed engineer of the interim Lake of the Woods Control Board and remained as such until 1925. All his professional life has been devoted to the control and conservation of water and water power, and he has been retained as consultant in many of the largest developments in Canada. He is undoubtedly an expert in his field and I do not think that his former connection with Government Boards, and his extensive experience in the Lake of the Woods area, minimizes in any degree the importance of his evidence. As stated by this witness, and the other Crown witnesses, a proper regard for their duties impelled the Board to act as it did, and to have acted otherwise, in the light of the then known conditions, would have nullified the whole functions of the Board. As stated by Mr. Scovil, in order to provide a uniform flow "you must always have a reservoir on which to draw".

As further evidence that a policy of limiting the outflow to an amount that would never flood the property of the Suppliant (21,000 c.f.s.,) would have been unwise and unsuccessful,—reference may be made to Exhibit "K". This is a table prepared by Mr. Scovil and indicates the depth in feet of storage capacity required in the Lake for actual maximum flood inflows if the outflow were limited to 27,000, 30,000, 35,000 and 40,000 c.f.s., in the periods of high inflows from 1892 to 1944. For example in the year 1927, a depth of 6·48 for storage would have been required with an outflow of 27,000 c.f.s., and obviously more than that if the outflow were limited to 21,000 c.f.s. So that even if the reservoir had been lowered on April 1st to 1056 s.l.d., the result would have been that the Lake would have risen to 1062·48, well beyond the authorized limit. It follows that it was necessary for the Board to increase the outflow to a point where flooding of the Suppliant's property would be the inevitable result of the Board performing its duty.

The two expert witnesses called for the Suppliant—Mr. McLean and Mr. McGillivray, stated that the flooding in Sand Lake at times of excess outflow was caused by a bottle neck further North at White Dog Falls (which, as

I understood the evidence, are still in their natural state). These witnesses said that had these Falls been widened or deepened, the waters would have been able to flow more rapidly without back-up to Sand Lake. With that statement the Crown witnesses agreed, but they point out that if it were done without further controls, then in dry periods, most, if not all, of the water in the Winnipeg River in the South would be drained off to the great detriment of all the residents and water users. It would, therefore, be necessary to install controls and the cost of the whole suggested and necessary development was estimated at $1,000,000. In some of the cases which I have cited, it is pointed out that such unreasonable expenses are not warranted to accomplish a very limited objective. It should be observed in any event that the Board had no funds to carry out such a project; was never required to do so by the Crown, and, in my view, it had no duty and no power under the Act to do so.

While section 3(c) of the Act confers powers on the Board to regulate and control the flow of waters of the Winnipeg River between its junction with the English River and the Lake of the Woods, and section 5 confers on it all powers necessary for effectively carrying out the authority and control vested in it by the two Acts of the Dominion and the Province of Ontario, the Board has not exercised any such power except by controlling the outflow from the Lake of the Woods into the Winnipeg River through the Norman Dam. The Board has no specific power of expropriation, or to purchase land, or construct controls, and has no assets or revenue to defray such costs. In fact the whole tenor of the Act seems to be that the Board shall act only by issuing orders. Only the expenses of the Board are to be provided for and the Crown has at no time provided any funds beyond the expenses of the Board and its servants. The Board has to deal only with the facilities supplied to it and to operate them to the best of its ability. Unless, therefore, the Dominion of Canada or the Province of Ontario were to supply additional facilities for the purpose of more completely controlling the waters of the Winnipeg River or supply funds

1946

JOHN R. BRODIE v. THE KING

Cameron DJ.

for that purpose to the Board, the latter cannot effectively control the water in the Winnipeg River. It is limited to the operation of the Norman Dam.

In the *Geddis* v. *Bann Reservoir* case (1) referred to by counsel for both parties, Lord Hatherley summarized the law as follows, at p. 448:—

> In that case, which has been followed by several others, it seems to have been laid down that persons having powers to execute certain works, and executing those works in such a manner as to perform that duty in compliance with an Act of Parliament, and being utterly guiltless of any negligence, cannot be liable to an action. If the person injuriously affected cannot find any clause in the Act of Parliament, giving him compensation for the damage which he has received, he cannot obtain compensation for such damage by way of action against the parties who have done no wrong. That is the simple proposition which is laid down in that case, and when it is expressed in those terms it is impossible for anybody to find fault with it.

I am of the opinion that the Acts by which it was appointed and the Convention under which it was to control the level of the Lake gave the Board express powers to raise the outflow up to 47,000 c.f.s., when in their judgment it was necessary to do so; and in any event such powers should be implied in order that the duties and powers given by the Acts and the Convention should be reasonably and efficiently carried out and that without such powers the duties could not have been so exercised.

I also find that it did not act negligently, but that its members, all professional engineers of wide experience, brought to the problems involved all knowledge available to them and exercised the skill of their profession. There was no such lack of care, under all the circumstances, as is necessary to create negligence, and there is nothing in the act which gives the Suppliant a remedy against the Crown. The standards to be applied are not standards of perfection. See *McMillan* v. *Murray* (2); *McLean* v. *Y.M.C.A.*, (3) and *Hughston* v. *Jost* (4).

I think it should be noted also that the Board was not established as a Flood Control Board but was brought into existence pursuant to the Convention with the primary purpose of controlling the waters in the Lake of the Woods. It is interesting also to note from the evidence of Mr.

(1) (1877-8) 3 A.C. 430.
(2) (1935) S.C.R. 572 at 574.
(3) (1918) 3 W.W.R. 522.
(4) (1943) O.W.N. 3.

McLean, a witness of the Suppliant, that the International Joint Commission (which made the investigation leading up to the Convention and whose recommendations as to the water level in the Lake of the Woods and as to the necessity of increasing the outflow up to 47,000 c.f.s., were adopted) clearly anticipated that damage could result to those having property in the Winnipeg River. Part of the recommendation of the International Joint Commission was that compensation be provided for those who would suffer damage by reason of such increase in the level of the waters in the Winnipeg River. As stated by Mr. McLean—"They were going to flood". That recommendation was not carried out.

It is also to be noted that prior to the establishment of the new peak level in the Lake of the Woods by the terms of the Convention at 1061 s.l.d., there was a range in the Lake of the Woods of nine feet and by the terms of the Convention this range was reduced to an overall range of 5·25 feet. The evidence of Mr. Strome is very clear that it was computed by the engineers in charge that it would be necessary to increase the discharge capacity of the Lake of the Woods up to 47,000 c.f.s., at an elevation of 1061 s.l.d., and that within a range of 5·25 feet the Board had to handle the same amount of water under the new control with about two-thirds of its former capacity for that purpose. Unless the level of the Lake is at 1061 s.l.d., it is not possible to secure a maximum outflow of 47,000 c.f.s., as provided by the Convention.

The evidence of Mr. Strome establishes that the Board cannot get the most advantageous and beneficial use of the waters in the reservoir unless it has the storage as full as possible over the period that the inflow is sufficient to fill up the Lake, as against the outflow being used for power purposes. And his statement also proves that the Board has found that for the purpose of controlling the flood in the Lake with the discharge facilities supplied to it, it is not necessary to draw the Lake down below 1060·59 s.l.d., to provide for any later Lake flood at or below 1062·50 s.l.d. The Suppliant complained also that there was some delay in June, 1944, in stepping up the

1946

JOHN R. BRODIE v. THE KING

Cameron D.J.

outflow, alleging that had the Board acted more promptly, the flood in the river would not have been so serious. I accept the evidence of Mr. Strome in this regard, when he says that the lag was not important and that the difference in the water level in the river could hardly have been measured. He says the step up in outflow should be gradual, and not immediate; and that the delay of a few days does not eliminate, but merely postpones the flooding. I also accept his statement that as the inflow into the Lake between May 1st and September 30th, 1944, was 488 billion cu. ft., and the total capacity of the reservoir between 1056 s.l.d.,—1061·25 was 217 billion cu. ft.,—it was quite impossible, even had the reservoir been lowered to 1056 on May 1st, to keep the outflow below 21,000 c.f.s., at all times and at the same time prevent the level of the Lake going above 106·25 or even above 1062·50.

The witnesses, McLean and McGillivray, called by the Suppliant, are men of considerable experience in their own field, but neither has had actual experience in the regulation and control of lakes and reservoirs. On the other hand Strome and Cameron (both members of the Board) and Scovil, all of whom gave evidence for the Respondent, are men of very wide experience in their field—not only at the Lake of the Woods, but in many other very important similar projects throughout Canada. Their evidence is based on information obtained from practical experience, and not on any theory arrived at after the event, and I prefer their evidence to that of the Suppliant's witnesses.

Finally, I think that in the true interpretation of the Act, it must be found that the Parliament of Canada took into consideration the fact that the Board in carrying out its duties, might at times interfere with private rights by causing flood damage. The records were all in Government departments; provisions had been made for an outflow up to 47,000 c.f.s., and such an outflow was bound to cause flooding in the Winnipeg River. Inasmuch as Section 8 of the Act bars any remedy against the Board or its officers, Parliament must have anticipated the possibility of such damage arising.

Moreover, Article 9 of the Convention clearly indicates that the contracting parties had in mind the possibility, if not the probability, that private rights would be interfered with. But that Article, in my opinion, did not create any liability for damages, but merely indicated that the inhabitants of one country could not make any claim for damages against the other country.

My findings, therefore, on this point are that the Board had statutory powers to do as it has done—that it did not exceed these powers, or act negligently in carrying them out.

The Suppliant's claim is based on the alleged negligence of the Board and must, I think, be considered under Section 19(c) of the Exchequer Court Act. To succeed, therefore, the Suppliant must prove that the damage complained of resulted from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment. I have already found that there was no negligence on the part of the Board, and there is no question that what it did was within the scope of its duties. Was the Board the officer or servant of the Crown?

Whether or not in any given case the relation of master and servant exists is a question of fact, but in all cases the relation imports the existence of power in the employer not only to direct what work the servant is to do, but also the manner in which it is to be done. (See Halsbury (1) and Umpherstone on Master and Servant p. 216 and cases therein referred to).

The Board, as previously mentioned, was created by the Acts of two governments, the Dominion of Canada and the Province of Ontario. Each appointed two members. The expenses are borne jointly by the two Governments and no report is made to either as to the Board's activities. It is given certain powers, the carrying out of which is not subject to the control of either Government, full discretion being given to the Board itself. The Acts do not reserve to the Crown the right of control over the activities of the Board in the performance of its duties. Apparently the only authority of the Crown is to appoint its representa-

(1) 2nd. Ed. Vol. 22 p. 112.

1946

JOHN R. BRODIE v. THE KING

Cameron DJ.

tives to the Board, and as the appointments are during pleasure, to revoke such appointments. The evidence indicates that the Respondent has never interfered in any way with the activities of the Board since its establishment in 1928. The Board acts as a unit and not through its individual members. Its decisions are those of the Board and not of its members appointed by the Respondent. The latter has nothing to do with the appointment of the other two members, who are appointed by the Province of Ontario and can exercise no control whatever over their actions.

By the terms of the Convention the Dominion of Canada was to establish and appoint a Lake of the Woods Control Board consisting of engineers, which Board would regulate and control the outflow from the Lake of the Woods. And having provided for the establishment of such Board of competent engineers, the full discretion as to the method of regulating and controlling the outflow was left to the Board. The latest decision bearing on this question is the judgment of the Court of Appeal of Manitoba in *Oatway* v. *Canadian Wheat Board* (1). Many authorities are discussed therein but it will, I think, be sufficient to refer only to a few of them to ascertain the tests to be applied.

In *Fox* v. *Government of Newfoundland* (2), it was held by the Judicial Committee of the Privy Council that certain balances in the books of a bank to the credit of various Boards of Education were not debts or claims due to the Crown. Sir Richard Couch said at page 672:—

> The appointment of boards for each of the three religious denominations, and the constitution of the Board, indicate that it is not to be a mere agent of the Government for the distribution of the money, but is to have within the limit of general educational purposes a discretionary power in expending it—a power which is independent of the Government.

This statement was approved by the Judicial Committee of the Privy Council in *Metropolitan Meat Industry Board* v. *Sheedy* (3). The question for determination was whether a debt due to the Board was a debt due to the Crown and in holding that it was not, Viscount Haldane stated his reasons at page 905, as follows:—

(1) (1945) 52 M.R. 283. (2) (1898) A.C. 667.
(3) (1927) A.C. 899.

They are a body with discretionary powers of their own. Even if a Minister of the Crown has power to interfere with them, there is nothing in the statute which makes the acts of administration his as distinguished from theirs. That they were incorporated does not matter. It is also true that the Governor appoints their members and can veto certain of their actions. But these provisions, even when taken together, do not outweigh the fact that the Act of 1915 confers on the appellant Board wide powers which are given to it to be exercised at its own discretion and without consulting the direct representatives of the Crown. Such are the powers of acquiring land, constructing abattoirs and works, selling cattle and meat, either on its own behalf or on behalf of other persons, and leasing its property. Nor does the Board pay its receipts into the general revenue of the State, and the charges it levies go into its own fund.

From these cases it would appear that the test as to whether a body performing functions of a public nature is a servant of the Crown, or is a separate entity, is, in the main, whether it has discretionary powers of its own which it can exercise independently without consulting any representative of the Crown. This test was applied by the Supreme Court of Canada in the *City of Halifax* v. *Halifax Harbour Commissioners* (1). In that case Duff C.J., delivering the judgment of the Court found that the Commissioners were subject to the control of the Crown, and after summarizing the controls and supervision to which they were subject concluded that they were performing Government services and were occupying the property in question for the Crown. He distinguished the facts in that case from *Fox* v. *Government of Newfoundland* (*supra*) and *Metropolitan Meat Industry Board* v. *Sheedy* (*supra*).

I have been unable to find any reported case which has to do with the status of a board established by two authorities, but inasmuch as the deciding factor in negligence cases seems to be the control by the master over the manner in which the work is to be done by the servant—an element which is entirely lacking here—I have reached the conclusion that the Board in this case is an independent body and not the officer or servant of the Respondent. For that reason also the action must fail.

The question of damages presents some difficulty. Damages are claimed in two ways:—

(1) A specific claim for "damage and expense" of $7,900.

(2) Unascertained damages or alternatively $10,000.

(1) (1935) S.C.R. 215.

1946

JOHN R. BRODIE v. THE KING

Cameron DJ.

While a good deal of the evidence at the trial had to do with the actions of the Board prior to 1944, and certain floodings that took place prior to that date, the Petition of Right (sections 16 and 17) claimed damages as a result of flooding in 1944 only. The fiat, permitting the claim to proceed, was based on the Petition of Right as so framed and, in my opinion, I must confine the matter to the damages sustained in that year.

Exhibit 4 is a sketch of the Suppliant's Island and indicates the elevations of the various buildings he constructed. He erected buildings thereon at what he thought were convenient places on the assumption that the ordinary high water mark was 1036·14 s.l.d., as indicated by the level of the Government dock at Minaki. He made no inquiries as to previous floods or extraordinary high water marks and completely disregarded the knowledge he had of an extraordinary high flood in 1916 when, as the evidence clearly shows, the level of the river reached almost 1040 s.l.d. Exhibit 14 shows the levels from 1893 to 1944, and had he made inquiries, he could have secured the data then existing. In eight of the years, 1893 to 1905, the level exceeded 1036·14 as it did also in 1916, 1919, 1920, 1922 and 1923. In 1927 with an outflow from the Lake of 55,400 c.f.s., the level in the river reached 1042·04 s.l.d. He anticipated that the proposed controls would entirely eliminate all flooding in the river. His witness, McLean, stated that the official records showed that in the last century there had been a high water mark of 1041·3 and that such an unusual occurrence would happen once in a great many years.

It was suggested that the Suppliant was entitled to have the flow of water continued as in a state of nature. But even if there were any clear evidence as to what conditions were in a state of nature—and there is not—I think he is wrong in that contention. Controls of various sorts have been in effect for 75 years. He bought his property long after the state of nature no longer existed and, in my view, the most that he could expect so far as the Board is concerned, would be the continuance of conditions such as existed in 1928 when the Board took over the control, for the Board was not responsible for what had happened

prior to that date. And it is to be remembered that the whole claim is based on the action, or want of action, of the Board. The Suppliant was unwise in his assumption, when erecting his buildings, that the proposed new Control Board could always and under all circumstances keep the level below 1036·14 s.l.d., and to that extent is the author of his own difficulties.

The claim for $7,900 is made up as follows:—

Building 7 foot rock and concrete wall in two sections to protect Island from being totally destroyed—$2.00 per sq. ft.	$6,400
Repairing cavities created by flood waters washing out rock and earth	400
Moving power plant and building to higher ground (completed)	600
Moving refrigerator ice house to higher ground (estimate)	500
	$7,900

The first item is in relation to a protective wall built to prevent further erosion. It is about 65 per cent completed and the amount claimed covers the total cost including the part not yet completed. Work on it was started in 1938 as a result of the flood in that year and was discontinued in 1942. It was not built as a result of the 1944 flood and, in my opinion, it is not a proper item of damages, in any event. If entitled to anything, the Suppliant is entitled to the damages sustained by lessening in value of his property due to the 1944 flood and not to the cost of the protective works. If the damages recur, and there is entitlement, he could claim for the damage so sustained in subsequent years.

The item of $400 for repairing cavities created by a flood water was done in the Fall of 1944, and was attributable to the flood in that year. The amount of this item was not questioned and I accept it as having been made.

The power plant and its buildings were moved to higher ground in 1942 and that expense was not therefore incurred as the result of the 1944 flood. The amount of disbursements was not questioned.

1946

JOHN R. BRODIE v. THE KING

Cameron DJ.

The ice house has not as yet been removed but the amount claimed as a reasonable cost ($500) is not questioned. There is no evidence as to the extent to which it was damaged by the 1944 flood.

As to the claim for general damages, the evidence is very unsatisfactory, and in my opinion quite insufficient to reach any conclusion. It is based on the destruction of trees and erosion of the Island, but there is nothing to indicate what part of the damage was caused in 1944. The evidence of Mr. McGillivray would seem to indicate that most of the damage was done prior to 1944. There can be no doubt that the floodings over a period of years did cause erosion and the loss of some trees. (The Suppliant estimates the number at over 750). But in the absence of information as to what losses were caused in 1944, and the lessening in value of the Island by reason of such losses, I cannot find any evidence on which to determine the amount of general damages caused by that year's flood. It is the duty of the Suppliant to establish his claim in this regard, and having failed to do so, I decline to guess as to what the damage actually was.

For the reasons which I have set forth, the action fails, and I find that the Suppliant is not entitled to any of the relief claimed in the Petition of Right. The Suppliant will pay the Respondent's costs forthwith after taxation.

Judgment accordingly.

1946

Jan. 14, 16-18, 21-23, 25
Feb. 20-22, 26.
Mar. 26.

BETWEEN

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

AND

GORDON C. EDWARDS ..... DEFENDANT.

Expropriation—Expropriation Act, R.S.C. 1927, c. 64, s. 9—Exchequer Court Act, R.S.C. 1927, c. 34, ss. 19 (a), 47—Compensation money to be measured by value of the land—Fair market value to be estimated on value for most advantageous use—Evidence of sales of other property useful if property comparable and proper account taken of change in value—Court must value property as a whole—Value to owner is realizable money value—Limited market does not justify departure from valuation on basis of market value—Where property has higher value as a site for other than residential use purposes than for such purposes buildings have no economic value—Award of compensation on basis of generosity erroneous—Owner has no separate claim for damages for disturbance—No claim for additional compensation where value of property for other than residential use purposes exceeds value for such purposes by more than owner's loss by disturbance—Owner left in possession not entitled to interest.

Plaintiff expropriated certain property, in the City of Ottawa, on which there was a large private residence. The action is taken to have the amount of the owner's compensation determined by the Court.

Held: That the standard for measuring the amount of compensation money to be paid to the owner of expropriated property has been set by section 47 of the Exchequer Court Act as the value of the land at the time when it was taken.

2. That such value is its fair market value estimated on its value for its most advantageous use.

3. That evidence of sales of property near the expropriated property affords an excellent basis for arriving at its market value provided the sales are of property comparable with it and were made at a time near the date of expropriation, and there has been no change in value in the interval. Evidence of sales made at one time under certain conditions cannot be proof of value at a different time when the conditions are not similar. *The King* v. *Halin* (1944) S.C.R. 119 followed. Evidence of sales reasonably near the date of expropriation is not without probative value provided proper account is taken of changes in conditions and any intervening changes in value.

4. That the Court should not estimate the value of the land and buildings separately but must estimate the market value of the property as a whole. *The King* v. *Manuel* (1915) 15 Ex. C.R. 381 followed.

1946

THE KING
v.
EDWARDS

5. That the value of expropriated property to the owner is not an imaginary value in the mind of the owner or its intrinsic value but its realizable money value and cannot be disassociated from or exceed the price which a possible purchaser would be willing to pay for it. *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (1914) A.C. 569 and *Pastoral Finance Association, Limited* v. *The Minister* (1914) A.C. 1083 followed.

6. That there is no justification in departing from these principles in the case of a property with a large residence on it, such as that of the defendant, because of the limited market for such a property. *The King* v. *Spencer* (1939) Ex. C.R. 340 disapproved.

7. That where a property on which there is a residence has a higher value as a site for other than residential use purposes than it has for such purposes, the buildings on it, since they are no longer an adequate development of the property or well adapted to the land and its location, having regard to its higher value for other purposes, do not enhance the value of the land or the property as a whole for such other purposes and have no economic value.

8. That the Court has no right to be generous to the former owner of expropriated property. *The King* v. *Larivée* (1918) 56 Can. S.C.R. 376 followed. It is the duty of the Court to be fair and measure the owner's compensation by the standard set by Parliament—the value of the land taken, no less but no more.

9. That the owner of expropriated property has no separate claim for damages for disturbance and where the value of the property for other than residential use purposes exceeds its value for such purposes by more than the amount of the owner's loss by disturbance of his residential use the owner is not entitled to any additional compensation for such loss. *Horn* v. *Sunderland Corporation* (1941) 2 K.B. 26 followed.

11. That where the owner of expropriated property has been left in undisturbed possession of it since the date of its expropriation he is not entitled to any allowance of interest. *The King* v. *Manuel* (1915) 15 Ex. C.R. 381 followed.

INFORMATION by the Crown to have the amount of compensation money to be paid for certain expropriated property in the City of Ottawa determined by the Court.

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

Lee A. Kelley K.C. and H. C. Kingstone for plaintiff.

J. A. Robertson K.C. and *Alastair Macdonald* for defendant.

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

The President now (March 26, 1946) delivered the following judgment:—

The Information shows that the land described in paragraph 2 was taken under the Expropriation Act, R.S.C. 1927, chap. 64, for the purpose of the public works of Canada. The expropriation was completed pursuant to section 9 by the deposit of the necessary plan and description in the office of the registrar of deeds for the registration division of the City of Ottawa, in which the land is situate, on June 12, 1943. On such deposit the land became vested in His Majesty and the defendant ceased to have any right, title or interest therein.

The expropriated property is at the extreme north east end of Sussex Street and lies between it on the south, the French Embassy property on the west, and the Ottawa River. It has a depth on the west of 409 feet to the high water mark of the river, a frontage of 563·8 feet on Sussex Street, and a river frontage of approximately 720 feet. It is triangular in shape, coming almost to a point at its extreme north east end. It is about 40 feet above the river, with a sharp slope down to it, and has a total area of 3·98 acres, of which approximately one acre is taken up by the slope. There are four buildings on the land, a very large stone residence, No. 24 Sussex Street, set back approximately 195 feet from the street, a stone garage and tool house, west of the residence, and two stone buildings facing on Sussex Street, one at the east end, No. 10 Sussex Street, formerly a coach and stable building but now converted into a dwelling, and the other at the west end, No. 26 Sussex Street, formerly a gate house but now also occupied as living quarters. There is a low stone wall along the frontage on Sussex Street. Driveways from two entrances lead to the residence. There are many fine large trees on the property, and the well kept grounds have been landscaped with hedges and shrubs.

The parties have been unable to agree as to the amount of compensation money to which the defendant is entitled and these proceedings are taken to have such amount fixed by the Court. By the Information the plaintiff offers the sum of $125,000 in full satisfaction of the defendant's

1946

THE KING v. EDWARDS

Thorson P.

rights. By his amended statement of defence the defendant claimed the sum of $261,190, of which $233,500 was said to represent the value of the land and buildings taken, and $27,690 the damage caused by the said taking to the household goods contained in the premises. During the trial, pursuant to leave, the statement of defence was further amended, whereby the defendant claimed $261,190 in one amount as loss and damage caused by the taking, leaving his claim as first stated as an alternative one. The divergence between the parties is very great, but that is not unusual in proceedings of this kind.

The Expropriation Act does not itself provide any basis upon which the compensation money for expropriated property should be fixed. This Court derives its jurisdiction to deal with the matter from section 19(*a*) of the Exchequer Court Act, R.S.C. 1927, chap. 34, which provides:—

> 19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—
>
> (*a*) Every claim against the Crown for property taken for any public purpose;

and section 47 of the same Act lays down the rule which the Court must follow in determining the amount to be paid:—

> 47. The Court, in determining the amount to be paid to any claimant for any land or property taken for the purpose of any public work, or for injury done to any land or property, shall estimate or assess the value or amount thereof at the time when the land or property was taken, or the injury complained of was occasioned.

The standard for measuring the amount of compensation money has thus been set by Parliament as the value of the land at the time when it was taken. The Court must, therefore, estimate the value of the expropriated property as at June 12, 1943, the date of its expropriation.

The general principles for determining the value of expropriated property are well established. This Court dealt with them in *The King* v. *W. D. Morris Realty Limited* (1), and, at page 147, I summarized the effect of the authorities as follows:—

> The owner of expropriated property is to be compensated for the loss of the value of such property resulting from its expropriation by receiving its equivalent value in money, such equivalent value to be

(1) (1943) Ex. C.R. 140 at 145-149.

estimated on the value of the property to him and not on its value to the expropriating party, subject to the rule that the value of the property to the owner must be measured by its fair market value as it stood at the date of its expropriation.

The value to be estimated is a money value; the Court must not allow itself to be influenced by any consideration of personal or sentimental attachment of the owner towards his former property.

Market value has been defined by Nichols on Eminent Domain, 2nd edition, p. 658, as follows:—

> By fair market value is meant the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the land was adapted and might in reason be applied.

This definition serves as the basis for another general principle, also dealt with in the *W. D. Morris Realty Limited* case (*supra*), at pp. 152-154, namely, that the owner of expropriated property is entitled to have its market value estimated on its value for its most advantageous use. The best statement of this principle, frequently enunciated in this Court, is contained in Nichols on Eminent Domain, 2nd edition, p. 665, where the author says:—

> Market value is based on the most advantageous use of the property.
>
> In determining the market value of a piece of real estate for the purposes of a taking by eminent domain, it is not merely the value of the property for the use to which it has been applied by the owner that should be taken into consideration, but the possibility of its use for all purposes, present and prospective, for which it is adapted and to which it might in reason be applied, must be considered, and its value for the use to which men of prudence and wisdom and having adequate means would devote the property if owned by them must be taken as the ultimate test.

This broad statement assumes a price that a purchaser, having carefully considered the advantages and possible uses of the property, would be willing to pay in order to obtain it. It must not be forgotten, however, that, while consideration may be given not only to the present use of the property but also to its prospective advantages, it is only the present value, as at the date of expropriation, of such prospective advantages, that falls to be determined: *vide The King v. Elgin Realty Company Limited* (1).

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

1946

THE KING v. EDWARDS

Thorson P.

The value of the expropriated property must be considered in the light of the conditions existing as at June 12, 1943. The general trend of real estate values in the Ottawa district may be outlined briefly. The stock market crash in 1929 did not cause a break in real estate values until about 1931. They were then substantially depressed until about 1935. Vacant land lay dormant. There was little, if any, demand for large houses. They were a "drug on the market". This continued to be the case even after a general increase in values, commencing in 1937, which by about 1939 or 1940 had almost reached the high levels of 1930. There has been an increase in real estate values since 1940 and by 1942 they were somewhat higher than in 1930. There was a great demand for low and medium priced houses, with some market for large ones. Evidence was given of some sales of such houses on Sandy Hill, once a fine residential district, in 1941 and 1942, all at prices less than the assessed value of the properties. Since 1942 improved properties have brought substantially increased prices, but in nearly every case there has been a proviso for immediate possession and the increase in price has really been a premium for such immediate possession. Also, the number of vacant lots has become smaller. Two factors, in 1942 and afterwards, contributed to the increased market for large houses. The Department of National Defence was looking for barrack accommodation for members of the forces serving in the Ottawa area and was willing to pay prices not in excess of the cost of constructing barrack buildings; it was able to buy large houses at such prices from willing vendors without resort to expropriation proceedings. This was a temporary demand for a number of large houses but such demand was at low prices. The other contributing factor was the coming to Ottawa of representatives of other governments in increasing numbers. In 1940, nine countries were represented by High Commissioners or Ministers; this number had grown to 11 in 1941, and 18 in 1942; 1943 saw the first ambassador in Ottawa, and by the end of 1944 there were 23 Ambassadors, High Commissioners or Ministers representing their respective countries. These required adequate space for their official residential requirements.

This likewise created a market for large houses in the Ottawa district which did not previously exist. The witnesses for the defendant laid great stress on this new market value factor.

In the light of these conditions the Court must now consider "the uses to which the land was adapted and might in reason be applied". The outstanding feature of the expropriated property is its location and the view which it affords. It is on a cliff rising sharply 40 feet above the Ottawa River. It is right at the easterly limit of the City, but is convenient to the centre. On the west there is the French State property with its fine expensive embassy building on well landscaped grounds; to the south it faces the South African legation and overlooks the well treed grounds of Rideau Hall; the remaining boundary is the Ottawa River. This gives the site a commanding and magnificent view; from the north-east across Governor's Bay towards Rockcliffe Public Park; from the north across a wide stretch of the river towards the picturesque village of Gatineau Point at the mouth of the Gatineau River and the Laurentian Hills in the distance; and from the north-west across and up the river with a wide sweep of the hills in the background. There is no industrial development to mar the view in any direction. Mr. Hazelgrove described the site as the finest site for a residence in the City of Ottawa. The only comparable sites in the City, not owned by the Crown, are those of Earnscliffe and the French Embassy. To find other comparable fine views from residential properties it is necessary to go to the residence of the United States Ambassador and the other fine residences along the cliff overlooking the river in the adjoining Village of Rockcliffe Park. The view from the expropriated property is one of great charm and beauty and makes the site a most desirable one.

For the defendant it was urged that the most advantageous use to which the property could be put would be for private, or embassy, legation or other official residential purposes. Mr. A. H. Fitzsimmons, the main expert for the defendant, an experienced real estate broker in Ottawa, gave an elaborate description of the buildings and expressed the opinion that the main residence was splendidly

1946

THE KING v. EDWARDS

Thorson P.

adapted for home purposes and entertainment on a large scale, that the ground floor plan was ideal for such entertainment, that the rooms were large and so arranged as to permit the free circulation of a large number of guests, that the house was fully equipped with adequate kitchen and other arrangements, that the ground floor arrangements were capable of extension and rearrangement, for example, that the drawing room could be enlarged, that the large picture gallery could be used as a reception or ball room or converted into a large dining room or library and study and that, if it were turned into a dining room, the present dining room could be converted into a library and study, that the rooms upstairs were large and commodious with ample bath room arrangements, that there was plenty of room for household staff and employees in the main residence and that the two buildings, No. 10 and No. 26 Sussex Street, were also useful for housing such staff. The witnesses for the defendant drew a very attractive picture of the premises for the uses suggested by them.

As might be expected, the witnesses for the plaintiff emphasized what they considered defects in the residence that would strike a prospective purchaser adversely. Their opinion was that the main residence had not been placed on the site so as to make the best use of the fine view, that this was likewise true of the arrangement of the rooms on the ground floor, for example, that the drawing room windows did not give the view that might be expected, that there were no views from the picture gallery except from the north end of it, and that the kitchen and servant quarters took up the north-east part of the building and prevented full use of the view from that direction, that there was no ground floor library or study, that there was no verandah, sun-room or outside terrace, that the house was not modern in its arrangements, for example, that the ceilings were too high, that there was no access from the kitchen and servants' quarters to the front door without going through other rooms, and that there was no ground floor cloakroom and washroom, that the garage was not attached to the house, that the presence of street car tracks on Sussex Street was not desirable, that the

buildings on it to the south-east were old and low class and that the approach to the property was not a good one. There was very little, if anything, in the way of possible defects in the premises that escaped their attention.

Other possible uses of the property were suggested. Mr. Fitzsimmons thought it could be sold for a high class office building such as an insurance company's headquarters. Mr. Bosley, a real estate broker from Toronto, was strongly of the opinion that it could be put to more advantageous use than for either private or official residential purposes. He agreed that it would be suitable for a high-class insurance office building, and thought that it was also adaptable for an institutional or public building, such as the National Research Council building, or for a high class apartment block.

The possible uses of the property having been thus outlined, it is necessary to consider the evidence as to sales of other properties.

In *The King* v. *Eastern Trust Company* (1) I held that evidence of sales of property near the expropriated property affords an excellent basis for arriving at its market value provided the sales are of property comparable with it and were made at a time near the date of expropriation. This statement requires qualification in view of the decision of the Supreme Court of Canada in *The King* v. *Halin* (2). In that case Taschereau J., speaking also for Rinfret J., as he then was, and Rand J., at page 126, rejected the evidence of sales of property made in certain years as proof of the value of the expropriated property at the date of its expropriation on the ground that the conditions which existed during such years had disappeared at the time of expropriation. He also, at page 125, expressed serious doubts as to the legality of proof of sales made after the date of expropriation, although, later on the same page, he spoke of sales made about such date. His doubts are at variance with the opinion expressed by Anglin J. of the same Court in *Toronto Suburban Railway Company* v. *Everson* (3), in whose judgment the Chief Justice, Sir Charles Fitzpatrick, concurred, that evidence

(1) (1945) Ex. C.R. 115 at 121. (2) (1944) S.C.R. 119.
(3) (1917) 54 Can. S.C.R. 395 at 411.

1946

THE KING v. EDWARDS

Thorson P.

of bona fide sales within a short time after an expropriation accompanied by proof that there had been no change in value in the interval was relevant and admissible. Duff J. appears to have had a similar opinion. While these two cases leave the question of the admissibility of evidence of sales made subsequently to the date of an expropriation not entirely free from doubt, they are in agreement that the Court must keep in mind any change in value in the interval between the time of the sales and the expropriation date. This is, I think, of greater importance than the mere element of nearness in point of time. Trends and changes in market values must always be considered. Evidence of sales made at one time under certain conditions cannot be proof of market value at a different time when the conditions are not similar. Obviously, the nearer the sales are to the date of expropriation, the less likelihood there is of an intervening change of value. It is not always, however, possible to give evidence of sales very near the date of expropriation and, while the nearer sales are to such date the greater is the weight to be attached to evidence of them, evidence of other sales reasonably near such date having regard to the activity in the district is not without probative value, provided that proper account is taken of the conditions under which they were made as compared with those existing at the date of the expropriation and any intervening changes in value.

Evidence was given of sales of properties in the vicinity of the expropriated property, in Sandy Hill, in the Village of Rockcliffe Park and in other residential districts in the Ottawa area. Many of these were of non-comparable properties and evidence of them has no bearing on the value of the expropriated property. The most relevant sales are those of the Earnscliffe property to the United Kingdom, the Blackburn and Lemay properties to the French State, the Soper Estate property in Rockcliffe to the United States, and the other fine properties on the cliff in Rockcliffe.

The property known as Earnscliffe is on the Ottawa River just west of the National Research Council building. It was formerly the property of Sir John A. Macdonald

and then passed into the hands of Charles Harriss. On June 21, 1930, it was sold by the Harriss Estate to the United Kingdom for $90,000 and was bought as a residence for the British High Commissioner. The area of the property is 2·38 acres.

The Blackburn property was at the corner of John Street and Sussex Street, with a frontage of 260 feet on Sussex, and a total area of 2·33 acres. It was sold to the French State on December 31, 1931, for $80,000. On it there was a house assessed at $15,000. The Lemay property lay between the Blackburn property and the defendant's. It had a frontage of 86·4 feet on Sussex Street and extended back to the river with an area of ·81 acres. The defendant bought it in 1928 for $20,700 to protect the west side of his property from improper development, but when this danger disappeared with the proposal to build the French Embassy, he sold it to the French State on December 20, 1937, for $25,000. On it there was a building assessed at $6,900. It is quite clear that these properties were bought as a site, for the existing buildings were immediately demolished and the present French Embassy building erected, for which a building permit of $475,000 was taken out. On this basis, which is the only one to be considered, the price paid for the Blackburn property works out at $34,334 per acre, for the Lemay property at $30,864 and for the two combined at $33,439.

The Soper Estate property is in the Village of Rockcliffe Park. It was divided and the division plans registered in September, 1935. On this division the United States bought the northern portion, known as Lornado, in November, 1935. The registered transfer does not show the purchase price, but counsel for the defendant stated it as $225,000, and counsel for the plaintiff accepted this figure. The property was purchased as a residence for the United States Minister, now its ambassador. Its area is 9·2 acres.

Mr. E. N. Rhodes, an Ottawa real estate broker, gave details of sales of properties along the cliff in Rockcliffe extending back to a sale in 1920 of 3½ acres of vacant land for $35,000, of which a specially choice acre was sold in 1922 for $22,000, a sale in 1928 of 5 acres with an old

1946

THE KING v. EDWARDS

Thorson P.

house on it, of which only the walls were used in the new building, at $78,000, two sales in 1929 at over $11,000 per acre, one of which was of property back from the cliff, and several sales of land, now included in the Swedish property, at from over $6,000 to over $11,000 per acre. These represent the choicest purely residential lands in the Ottawa district. Mr. Rhodes stated that these sales showed an average of $12,800 per acre for land alone.

Certain other tests as to value that might exist in other cases are not available in this one. It is not possible to value the expropriated property from the point of view of the rent that might be obtained from it, for it is not the kind of property for which an adequate rent could be obtained.

Nor is the assessment proof of its market value. In 1943 the land was assessed at $51,100 and the buildings at $41,400, making a total assessment of $92,500. In the *W. D. Morris Realty Limited* case (*supra*) I held that there may be cases where a municipal assessment might afford some check against an exorbitant claim, but that generally speaking evidence of a municipal assessment is not of itself to be relied upon as evidence of market value. An assessment is not made for the purpose of establishing such value, but for raising municipal taxes. Assessments may vary from ward to ward in the same city and may not be uniform even in the same ward, and they may be higher in the city than in its surrounding suburbs. In the present case the assessment of the expropriated property cannot be accepted as proof of its value.

The valuations put forward may now be considered. It may be said of all the expert witnesses that they are men of experience and good standing, but it seems characteristic of real estate experts, according to my experience, that they tend to become advocates for the parties who call them, and their opinion evidence is subject to discount accordingly. This places an additional responsibility upon the Court.

The defendant's original claim of $233,500 as the value of the expropriated property was based on the valuation made by Mr. A. H. Fitzsimmons. It is broken up into

separate items, the land at $130,026, and the buildings and improvements at $103,586, which was further broken up into the roads at $2,700, the main residence at $91,386, No. 10 Sussex Street at $5,000, No. 26 Sussex Street at $3,500 and the garage and tool house at $1,000, making a total valuation of $233,612. Mr. Fitzsimmons expressed the opinion that the property could have been sold in 1943 for $233,500 within a reasonable time from the date of expropriation.

Mr. Fitzsimmons valued the land on the basis of 173,369 square feet at 75 cents per square foot, or 3·98 acres at $32,670 per acre. He was influenced, *inter alia*, by the sales I have referred to, particularly the sales of the Blackburn and Lemay properties to the French State. He applied his unit figure to the whole area of 3·98 acres, including the acre taken up by the slope down to the river. Mr. N. B. MacRostie, a well known engineer, surveyor and land valuator, worked on the land valuation with Mr. Fitzsimmons and agreed with it.

The defendant's witnesses then valued the buildings separately. Part of the main residence is approximately 70 years old. In 1907 to 1909 it was rebuilt and extended, the old part being made to conform to the new. Since 1923 the defendant has spent $30,000 on improvements. The house is of grey limestone. It is not of any known style of architecture but is related to the chateau type. It rests with heavy stone walls on the rock and shows no signs of sinking or settlement. Its physical condition is excellent. Admittedly some repairs are necessary, for example, new shingling for the roof is required, with necessary repairs to flashings, eavestroughs and pipes; all the outside woodwork needs painting; the greenhouse is not in good condition; the outside wall of the picture gallery shows cracks and should be restuccoed. Inside the house, the heating units need renewing and repairs to piping are required. It was also agreed that the house was subject to some structural depreciation in that a modern house would not be built with such heavy walls and beams; there would be lighter construction and more use made of steel. It was also admitted that there was some obsolescence in the house

1946

THE KING v. EDWARDS

Thorson P.

due to its age and the fact that it is not laid out as a modern house would be. The witnesses for the defendant denied any great degree of obsolescence, but, in my judgment, this is its greatest defect—and it is a very serious one. The view which the Court took of the premises, in the presence of counsel, strongly confirms me in this opinion.

Mr. Fitzsimmons took the cubical contents of the main residence from the architect and applied the rate of $1.00 per cubic foot to obtain its reconstruction cost as at the date of expropriation. He used this rate, he said, because of his knowledge of construction costs at the time with their great increase over 1939. This gave him $182,772, to which he applied a depreciation of 50 per cent for the factors mentioned, arriving at a valuation of $91,386. Mr. MacRostie took off the quantities and applied to them the prices he considered fair for materials and labour and arrived at a replacement cost of $192,000. He also applied a depreciation of 50 per cent, and arrived at a valuation of $96,000. In his opinion the value of the land was enhanced by this amount. Mr. A. J. Hazelgrove, an Ottawa architect of great experience and ability, also took off the quantities in detail, estimated the cost of the necessary materials and labour, and arrived at a reconstruction cost in 1943 of $198,360. He also depreciated this by 50 per cent and arrived at his valuation of $99,000. While there is no reason to doubt Mr. Hazelgrove's estimate of reconstruction cost, his opinion that the building added $99,000 to the value of the land cannot be accepted, particularly in view of the fact that he admitted that he was not qualified to give any opinion as to the value of the land or the total value of the property and would express no opinion as to what it could have been sold for at the date of its expropriation.

The other buildings were not valued by Mr. Fitzsimmons and Mr. MacRostie on the basis of their replacement cost less depreciation, but at an estimate of their value for use for accommodation for employees and staff. No. 10 Sussex Street has been converted into residential quarters and rented at $100 per month. No. 26 Sussex has been rented

for some time at $42.50 per month. Mr. MacRostie agreed with Mr. Fitzsimmons' valuation of them as well as of the garage and roads. Mr. Hazelgrove valued these buildings on the basis of their replacement cost less a higher rate of depreciation than in the case of the main residence and arrived at a valuation of No. 10 Sussex Street of $7,500, of No. 26 Sussex Street of $5,000 and of the garage at $1,800.

The expert witnesses for the plaintiff put their valuations on quite a different basis. They did not make separate valuations of the land and the buildings, but valued the property as a whole. Mr. Rhodes, although his general real estate experience is not as wide as that of Mr. Fitzsimmons, has had a good deal of practical experience in dealing with large houses. His opinion was that the nature of the land value of the expropriated property had changed, after the French Embassy had been built, from value for private residential purposes to value for higher uses. On this premise he valued the property as a site. He took the per acreage price of the Blackburn property, applied this to the acreage of the expropriated property, then expressed his opinion that it was not as good a site as that bought by the French State, and arrived at his conclusion that the highest valuation that could be placed on it was $125,000. In his opinion, if this valuation was placed on the property for its value as a site, then there was no economic value in the buildings.

Mr. Bosley, whose long experience extends across Canada, agreed with Mr. Rhodes' valuation. It was his view that the expropriated property had a much higher value than could be attributed to it on a residential basis. I have already referred to his opinion as to the uses to which the property was adaptable. The realization of such higher value would necessarily involve demolition of the buildings and, consequently, nothing should be added for them. In Mr. Bosley's opinion $35,000 per acre was the top price that could be paid for the purposes mentioned, and if such value was given, there was no commercial value in the buildings; but he reduced this top valuation because of the triangular shape of the property and, in his opinion, its

1946

THE KING v. EDWARDS

Thorson P.

lesser capacity for utilization as compared to the French Embassy site, and arrived at the same conclusion as Mr. Rhodes that $125,000 was a fair and reasonable valuation of the property as a whole at the date of its expropriation.

The method of valuation, such as that followed by the defendant's witnesses, of estimating the value of the land separately and adding thereto a valuation of the buildings and improvements based on their reconstruction cost less an allowance for depreciation frequently leads to a valuation of the property as a whole greatly in excess of its fair market or real value. It has unquestionably done so in the present case. The danger of erroneous valuation involved in this method has frequently been pointed out in this Court, for example, by Audette J. in *The King* v. *Loggie* (1), where he was dealing with an old shipyard, and in *The King* v. *Manuel* (2), where he was considering a large private residence. In the latter case he said, at p. 386:—

> the assessment of the compensation should not be made on the basis of separating and segregating the various factors or component parts of the buildings and the lands—although all these elements must be taken into consideration—but the property must be regarded as a whole and its market value as such assessed as of the date of the expropriation.

Numerous other decisions to the same effect might be cited. The matter was also discussed in the *W. D. Morris Realty Limited* case (*supra*). At page 151, I held:—

> Evidence as to the structural value of buildings or improvements upon land based upon their reconstruction cost, less depreciation at a fixed or general rate, is not admissible as an independent test of value in expropriation proceedings and the value of expropriated property cannot be ascertained by adding such structural value of the buildings or improvements to the fair market value of the land by itself, except only to the extent that the construction of the buildings or improvements has enhanced the fair market value of the property as a whole.

Nor is the defect in the method cured by fixing the depreciation at a percentage instead of a fixed or general rate. This does not mean that evidence of the kind given has never any value, for it is frequently convenient and helpful, provided it is considered within the limits indicated in the same case at page 154:—

> where the character of the buildings or improvements is well adapted to the land and its location, their structural value may afford a test of the extent to which the construction of the buildings or improvements has enhanced the market value of the property as a whole.

(1) (1912) 15 Ex. C.R. 80. (2) (1915) 15 Ex. C.R. 381.

The Court is not directed to estimate the value of the component parts of the property separately, "although all these elements must be taken into consideration"—and it should not do so; it must estimate the value of the property as a whole, for it is the whole property, and not its component parts separately, that has been expropriated, and its value as such is indivisible. While, therefore, evidence of the structural value of buildings and improvements may be received, it is not admissible as an independent test of value and calculations based upon its reception must be checked in the light of the value of the property as a whole. And, while the estimate of value must be on the basis of value to the owner, such value means, not an imaginary value in the mind of the owner, but real money value. Nor is it an intrinsic value apart from what the property could possibly be sold for. The value of the property to the owner means its realizable money value, "tested by the imaginary market which would have ruled had the land been exposed for sale", as Lord Dunedin put it in *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (1), and cannot be disassociated from the price which a possible purchaser would be willing to pay for it, or exceed the amount which a prudent man, in a position similar to that of the owner, "would have been willing to give for the land sooner than fail to obtain it", as Lord Moulton expressed it in *Pastoral Finance Association, Limited* v. *The Minister* (2).

While it might be necessary to deal somewhat differently with the case of a property of an exceptional character, the nature of which need not now be determined, I can see no justification for departing from these principles and the basis of assessment approved by Audette J. in *The King* v. *Manuel* (*supra*), whose judgment was affirmed by the Supreme Court of Canada, in the case of a property with a large residence on it, such as that of the defendant, because of the limited market for such a property, for as Audette J. pointed out, at page 385, "it has nevertheless a commercial value". Indeed, such a departure would be particularly productive of excessive valuations in the case of such properties. We need look no further than the

(1) (1914) A.C. 569 at 576. (2) (1914) A.C. 1083 at 1088.

1946

THE KING v. EDWARDS

Thorson P.

present case for proof of this fact, for evidence was given of many sales of large residences at prices far below their structural value. To have valued such properties on the basis of the value of the land plus the reconstruction cost of the buildings less the depreciation they have suffered would have been clearly erroneous. Mr. Bosley gave the Court the benefit of his experience that owners of large residences do not, when they wish to sell their properties, get back the reconstruction cost of their buildings less depreciation—but much less. That experience is a common one. I can see no ground of principle why the owner of expropriated property should reasonably expect to get more for it from the Crown than he could possibly get for it from any one else, merely because it was taken from him against his will. The value of the land which Parliament has directed the Court to estimate as the amount of compensation to be paid to him does not depend on whether he was willing to part with it or not. In *The King* v. *Spencer* (1) Angers J. took a different view. The property before him was a large one in Vancouver, consisting of 5·86 acres of land, on which there was a large private residence together with other improvements. He valued the land separately and, because the demands for that type and standard of residential property were very limited, he set the value of the residence at its replacement cost less the depreciation suffered since its erection. He also made separate valuations for the other improvements and to the total of the amounts so computed he added 10 per cent to cover incidental costs and charges (depreciation of contents of house, removal, acquisition of new premises, etc.). In my opinion, the basis and methods of valuation applied in that case run counter to the decision of Audette J. in *The King* v. *Manuel* (*supra*) and other opinions to a like effect frequently expressed in this Court, and are against the weight of authority. Under the circumstances, I have respectfully come to the conclusion that it should not be followed.

Without attempting to pass in detail upon the advantages and disadvantages of the expropriated property for residential purposes, it is enough to say that, while

(1) (1939) Ex. C.R. 340.

the residence is well built, it is not a modern one and has defects which would weigh heavily with a prospective purchaser.

The market for it for private residential use would be very limited. Only a very wealthy person could afford to acquire and maintain it. The annual cost of upkeep for taxes and water rates, insurance premiums, heating, repairs and maintenance alone is very high, amounting in 1942, the last full year prior to the expropriation, to $4,258.66 (Exhibit 2). The staff required to look after the premises and grounds, according to the defendant, consisted of a cook, two housemaids, one gardener and caretaker and one part time male employee, and the cost of paying and keeping such a staff was estimated by one of the plaintiff's witnesses at approximately $330 per month. Moreover, such a staff would have been very difficult to get at the date of expropriation. Mr. Bosley's evidence knocks the defendant's valuations out of Court. In his opinion, it would not have been possible to sell the property in 1943 for private residential use for $233,000. He stated that he had never heard of any sale of a house for private residential use for such an amount anywhere in Canada; a person with that much to invest would want "a tailor made job", a house built to suit himself; such a person would not be attracted by the property, but would look for a more modern house or build one to suit his own tastes. Mr. Bosley gave several instances of sales of large residences, some very much larger and finer than the defendant's and situated on more spacious grounds, at prices very much lower than even the amount offered by the plaintiff. He did not think it possible to find a private purchaser in Ottawa for the property at the amount claimed, and with this opinion I entirely agree. Even at the amount offered by the plaintiff there would be few, if any, possible purchasers of the property for private residential use.

The possible market for the property for embassy, legation or other official residential purposes was also limited; it was not nearly as great as suggested by the defendant's witnesses. All the larger countries represented at Ottawa, such as the United Kingdom, the United States, France

1946

THE KING v. EDWARDS

Thorson P.

and the Soviet Union had already satisfied the residential requirements of their representatives prior to the date of the expropriation and were not likely to make any changes. They were, therefore, not likely purchasers of the property. This left only those who had not then satisfied such requirements. Mr. Rhodes gave evidence of sales of residential properties in the Ottawa district for embassy and legation purposes. Many of these have no direct relevancy to the value of the expropriated property, for the properties involved were not comparable, but his list of sales has considerable significance. It shows that the average price paid by 13 countries for their embassy or legation residences since 1940 has been $33,840. This clearly indicates that they have been able to satisfy their official space requirements in satisfactory large houses without paying high prices for them. There is also an indication that the purchasing countries required adequate floor space rather than spacious grounds. The list includes sales subsequent to the date of expropriation and those countries who had not then bought residences might have been possible purchasers of the defendant's property if it had not been expropriated, such as Belgium, Mexico, the Netherlands, Peru, South Africa, Sweden and some others. None of these countries, however, has purchased a house the size of that on the expropriated property. Even the highest of such subsequent sales, namely, that of the Fauquier Estate property to Sweden at $62,000, was at less than a quarter of the amount claimed by the defendant and less than half that offered by the plaintiff. The residence on this property is not as large as the defendant's, but the land is as great in area, the view from it is very fine, and its location for purely residential purposes is, I think, superior. It may be that the price paid for it was low considering the fine property acquired, but it is a check against the exaggerated importance attached by the defendant's witnesses to the coming to Ottawa of diplomatic representatives as a stimulating real estate value factor. The other countries who have not bought properties but are occupying residences on a rental basis would also have been possible, but not likely, purchasers.

There are two sales of large properties bought for official residential purposes to which further reference should be made, namely, those of Earnscliffe to the United Kingdom in 1930 for $90,000 and of Lornado to the United States in 1935 for $225,000. A detailed comparison between the expropriated property and Earnscliffe need not be made, although much evidence was devoted to such comparison. The United Kingdom bought Earnscliffe on the strength of two valuations, one by Mr. H. G. Legg, senior assistant engineer of the Department of Public Works, who valued the land at $28,000 and the buildings, including the residence, at $64,000, and the other by Mr. A. H. Fitzsimmons who valued the property as a whole at $90,000. Notwithstanding the argument of counsel for the defendant, I am convinced that Mr. Fitzsimmons, in formulating his total valuation, did not ascribe any substantially higher value for the land, than Mr. Legg did. Mr. Legg's land valuation for the residence part of the property was to some extent based on the same Rockcliffe sales as those referred to by Mr. Rhodes, and Mr. Fitzsimmons could have had no other basis at that time for a higher one. While the defendant's total claim, almost three times the purchase price of Earnscliffe, is clearly excessive, there are several reasons why he is entitled to a higher valuation for his property than that upon which Earnscliffe was bought. The land area is greater, 3·98 acres as compared with 2·38; his residence is larger, of better construction, and in better physical condition than the Earnscliffe residence was at the time of its purchase, the United Kingdom having since then spent substantial sums on alterations and improvements.

But the contention involved in the defendant's valuations that his property was worth more for official residential purposes than the amount paid by the United States for Lornado in Rockcliffe is absurd. It was worth very much less. The residences on the two properties are comparable in size, that on the Soper Estate property being somewhat larger; it was built about the same time as the one on the expropriated property was reconstructed; while it may be of less expensive construction, it is more modern and much better adapted to official residential purposes. The views from the two properties are comparable in

1946

THE KING v. EDWARDS

Thorson P.

beauty, that from the United States residence being wider in extent because of its greater height. But the greatest difference is location: that of the United States residence is much more desirable for residential purposes. It is approached by the Federal District Commission driveway through Rockcliffe Public Park and is situated in private park-like surroundings on 92·2 acres of beautiful grounds in the Village of Rockcliffe Park with its restrictive by-laws and other exclusively residential advantages. The valuation of the expropriated property for official residential purposes falls thus above the price paid for Earnscliffe and below that paid for Lornado.

Moreover, the expropriated property is not really well adapted for such purposes. Before it could be so used, very substantial and expensive alterations in the residence would have to be made. The weight of evidence is against the possibility of substantial alterations, but even if they could be made the result would not be satisfactory. The house would still be an old made-over one and the owner would never have that feeling of satisfaction and pride in his property that he should be entitled to have after such a large expenditure of money.

On the basis of its value for residential use, whether private or official, I can see no justification for ascribing to the land any higher value than the high average of $12,800 per acre, which Mr. Rhodes found for the sales of the choice residential land on the cliff in Rockcliffe. Indeed, for residential purposes it is not as desirable. As for the buildings, if they are to be valued with due regard to the extent to which they enhance the value of the property as a whole for residential use, the defendant's witnesses did not take sufficiently into account the serious factor of obsolescence in the residence with the need for substantial alterations in and the effect this would have on a prospective purchaser. Under all the circumstances, if I had to make an estimate of the value of the expropriated property on the basis of its value for residential use, I could not make it higher than the amount offered by the plaintiff.

But I do not put my estimate of the value of the property on this basis. In my opinion, the defendant is entitled to a valuation on a higher basis. I agree with Mr. Rhodes

that the sales of the Blackburn and Lemay properties to the French State and the erection of the French Embassy building changed the character of its land value. It would be well adapted for a high class office building such as the headquarters of an insurance company, or as a site for a high class apartment block. It would be particularly well suited for a modern public or official building; indeed, it would be difficult to find as fine a site for such a building anywhere in Ottawa. The use of the land for such purposes would be a more appropriate development of the property than the present buildings could be and give it a higher value than could reasonably be ascribed to it for residential use. It is as a site for such purposes that it has its highest value, and I agree with Mr. Rhodes and Mr. Bosley that its valuation should be made on such a basis. I thought they showed a more realistic approach to their valuations than the defendant's witnesses did to theirs. That being so, it is obvious that the present buildings would have to be demolished to enable the site to be put to adequate use. And, since they are no longer an adequate development of the property or well adapted to the land and its location, having regard to its higher value for other purposes, they do not enhance the value of the land or the property as a whole for such purposes, and have, consequently, no economic value. The fallacy in the defendant's valuations lies in the assumption that he was entitled to the value of the land for higher than residential use purposes, and at the same time to the value of the buildings for such purposes. He cannot have it both ways. He is entitled to a valuation based on either the value of his property for residential use or its value for other purposes, but not both. It cannot be put to higher than residential use and at the same time retained for such use. The defendant cannot have his land valued on one basis and his buildings on a different and inconsistent one. If he is to get the higher value of his property for other than residential use, its lesser value for such use must be relinquished. What the defendant's witnesses have done is to add part of such lesser value for residential use to its total higher value for other purposes. This accounts in large measure for their excessive valuations.

1946

THE KING v. EDWARDS

Thorson P.

The witnesses were agreed that the sales of the Blackburn and Lemay properties to the French State could fairly be used as a basis of valuation and I concur. Obviously, there cannot be many sales of such properties and I see no reason for assuming that the prices paid by the French State were in excess of the value of the properties acquired. Mr. Rhodes assumed a valuation based on the price paid for the Blackburn property of $34,334 per acre as applied to the 3·98 acres of the expropriated property, and then expressed his opinion that it could not be sold for more than $125,000. Mr. Bosley, using a similar calculation, came to the same conclusion, because of the triangular shape of the property and its lesser capacity for utilization. Both witnesses thus assumed a lesser relative value for it than for the French site. With this assumption I am unable to agree. In my opinion, there are several reasons for giving it a higher value. The site is a most desirable one. Its location is superior to that of the French site, with the dilapidated buildings on John Street to the west, the disused fire-station diagonally opposite, and a number of old buildings on the south side of Sussex Street. The view from the expropriated property is much superior to that from the French site. And I agree with Mr. Fitzsimmons' view that the construction of the French Embassy building increased the value of the expropriated property. Also it was the last site available with frontage on the Ottawa River. Nor do I agree with Mr. Bosley's opinion as to its lesser capacity for utilization; he doubted whether the French Embassy could have been erected on it, but in this he was in error as examination of the map (Exhibit C) will clearly show. And I see no reason for reducing its value because of its triangular shape, for this and its long river frontage might well add distinctiveness to a proper development of it. All these factors give the expropriated property a considerably higher value than the amount paid for the French site, even after making due deduction in respect of the area taken up by the slope.

The Court has no right to be generous to the former owner of expropriated property; the Supreme Court of Canada has held that an award of compensation on such a basis is erroneous: *The King* v. *Larivée* (1). It is the

(1) (1918) 56 Can. S.C.R. 376.

duty of the Court to be fair and measure the owner's compensation by the standard set by Parliament—the value of the land taken, no less but no more. While the form of his property may be changed through the taking of his land, its value should remain unchanged, the money value of the land taken replacing the land itself.

After hearing the evidence and arguments of counsel, who presented their cases with their usual care and ability, taking a view of the premises, and considering the matter as carefully as I can, I estimate the value of the expropriated property as at the date of its expropriation at $140,000 and fix this as the amount of compensation money to which the defendant is entitled.

There remains the defendant's claim for $27,690 as damages to his household goods caused by the taking of his property, necessitating their removal and sale with resulting loss. This is a claim for damages for disturbance. I have before me in another case a difficult question whether or to what extent the former owner of expropriated property is entitled to compensation for such items as cost of moving, depreciation in the value of chattels and loss from business disturbance, but the defendant's claim in the present case presents no difficulty. Evidence was given on his behalf that the cost of moving his goods would amount to $3,262, which included $2,000 for packing and crating his pictures and certain storage charges. Then Mr. R. N. Irvine, an interior decorator, furniture manufacturer and antique dealer of Toronto, gave evidence as to the loss he would suffer on the sale of his furniture and household furnishings. He has a good knowledge of the articles in the defendant's residence, having sold most of them to him about 1928 or 1929. His evidence was that many of the articles of furniture, although not certificated antiques, were fine collectors' pieces bought specially for the house, and would lose value if they had to be sold separately and apart from their surroundings; this was also true of much of the other furniture, which was large and adaptable only to the defendant's house or one like it; then there were such furnishings as rugs and carpets specially woven to fit certain rooms or stairs, and drapes and portieres made to fit specific windows and doorways, on which there would be a great loss on their sale. Mr.

1946

THE KING v. EDWARDS

Thorson P.

Irvine estimated the defendant's loss at $26,347. (Exhibit Z 1). For the plaintiff, evidence was given by Mr. W. B. Ward-Price, an experienced valuator of used household furniture and furnishings and a large dealer in them by auction and private sale in Toronto. He put the defendant's loss, including a moving cost of $2,000, at the maximum figure of $9,220.50 (Exhibit 51). There was a wide divergence between these two witnesses, each outstanding in his special field. Mr. Irvine had, very naturally, a high opinion of the value of the articles he had acquired for the defendant and the furniture and furnishings he had provided, but I felt that his valuations were too high. Mr. Ward-Price was, I thought, more realistic. Apart from the fine pieces referred to, in which he found defects, he thought the style of furniture in the house was "passé"; the upholstery was worn; some of the rugs were stained and others badly worn; and the drapes and portieres were faded and some stained. This might be expected in view of their long use since 1928. Mr. Ward-Price also thought that a number of the articles in the house were quite adaptable to another house without loss and that the loss in respect of the articles not so adaptable came to only $5,249. Without passing on the merits of this opinion, I am of the view that the defendant's loss on the sale of his household goods would not exceed $9,220.50, the maximum amount estimated by Mr. Ward-Price.

The defendant has, however, no separate claim for such amount. It was for that reason that he further amended his statement of defence, leaving his original claim as an alternative one. Moreover, in view of the value of the expropriated property for higher purposes than its residential use that I have found, nothing should be added for the defendant's disturbance of his residential use of it with its resulting loss on the sale of his household goods. The decision of the English Court of Appeal in *Horn* v. *Sunderland Corporation* (1) supports this disposition of the matter. Sir Wilfrid Greene M.R. pointed out that damages for disturbance suffered by the owner of expropriated property was not a separate head of compensation, but merely one of the elements going to build up the

(1) (1941) 2 K.B. 26.

purchase price to which he was fairly entitled and Scott L.J. was of the same view. The Master of the Rolls also made it clear that where the value of the land as building land exceeded its value for agricultural purposes plus the damages for disturbance, nothing could be added to the building land value for disturbance, for the owner would have to give up his agricultural pursuits and incur the resulting disturbance in order to realize the greater value of the land for building purposes. And Scott L.J., at page 50, put the same view in these terms:—

> Where, by reason of the notice to treat, an owner is enable to effect an immediate realization of prospective building value and thereby obtains a money compensation which exceeds both the value of the land as measured by its existing user and the whole of the owner's loss by disturbance, to give him any part of the loss by disturbance on the top of the realizable building value is, in my opinion, contrary to the statutes.

In this case, the value which I have placed on the expropriated property as a site for other than residential use purposes exceeds its value for such purposes by more than the amount I have fixed as the possible maximum of the defendant's loss by disturbance. In order to realize such higher value the defendant would have to cease residence on the property and suffer the resulting disturbance and loss in value of his household goods. Under the circumstances, he is not entitled to any additional compensation for such loss.

The defendant has been in undisturbed possession of the expropriated property since the date of its expropriation and has collected the rents from the two small buildings on Sussex Street. He is, therefore, not entitled to any allowance of interest: *The King* v. *Manuel* (*supra*).

There will, therefore, be judgment declaring that the property described in paragraph 2 of the Information is vested in His Majesty the King as from June 12, 1943; 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 $140,000, without interest; and that the defendant is entitled to costs to be taxed in the usual way.

Judgment accordingly.

1945
Nov. 7 & 8
Dec. 29

BETWEEN:

DOMINION TELEGRAPH SECURITIES LIMITED, ... } APPELLANT;

AND

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

Revenue—Income—Income War Tax Act R.S.C. 1927, c. 97, secs. 6 5(1) (b), 6(1) (a), 6(1) (d)—Rentals held to be income and not compensation for transfer of physical assets—Interest on funds held in sinking fund is income of appellant—Appeal dismissed.

Appellant was incorporated for the purpose of distributing the assets of Dominion Telegraph Company among the shareholders of that company. These assets consisted of a cash payment of $116,640 00 and an assignment of annual payments as rentals of the sum of $62,500.00 each under an agreement entered into between the Great North West Telegraph Company and the Dominion Telegraph Company, such rentals representing the payment by the former company for the physical assets of the Dominion Telegraph Company. Pursuant to an agreement between the appellant and Dominion Telegraph Company the appellant issued bonds of the par value of $1,000,000.00 under a mortgage and deed of trust entered into with the Royal Trust Company as trustee, and also issued 2000 certificates of interest under an agreement with the same trustee. Also pursuant to the agreement appellant purchased bonds of this issue to the amount of $52,500 00 and delivered these to the trustee to be held by it to retire the certificates of interest; appellant also purchased bonds of the par value of $56,500.00 and deposited these with the trustee as a sinking fund for the redemption of the entire bond issue. Appellant also assigned to the trustee the annual rentals of $62,500.00 to pay the interest on the bonds. Except for these two lots of bonds all the certificates of interest and bonds were distributed among the shareholders of Dominion Telegraph Company as partial distribution of the assets of that company, appellant receiving in return all the share certificates of that company from its shareholders.

Appellant filed income tax returns for the years 1926 to 1929, both inclusive, showing the rentals as income and the interest paid on the bonds as expense.

Respondent allowed the interest paid on the bonds outstanding, other than those in the sinking fund as an expense but disallowed the interest on the bonds held in the sinking fund as an expense and assessed appellant for income tax purposes on such interest as income received by it. Appellant appealed to this Court.

Held: That the annual payments of $62,500.00 are income of the appellant.

2. That the interest on the bonds in the sinking fund is not an expense which the appellant is entitled to charge against income in determining appellant's taxable income.

1945

DOMINION TELEGRAPH SECURITIES LTD. v. MINISTER OF NATIONAL REVENUE

O'CONNOR J.

APPEAL under the provisions of the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice O'Connor, at Ottawa.

L. A. Landriau, K.C. for appellant.

R. Forsyth, K.C. and *A. A. McGrory* for respondent.

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

O'CONNOR J., now (January 14, 1946) delivered the following judgment:

The appellant appeals from assessments for income tax made by the respondent for the years, 1926 to 1929, both inclusive.

The appellant was incorporated for the purpose of distributing the assets of Dominion Telegraph Company among its shareholders, consisting of the cash payment of $116,640.00, and an assignment of annual payments of $62,500.00, under an agreement between the Great North West Telegraph Company and the Dominion Telegraph Company. The appellant then issued bonds of the par value of $1,000,000.00 under a mortgage and deed of trust with the Royal Trust Company, and issued 2,000 certificates of interest under an agreement with the same trustee and distributed both the bonds and the certificates of interest among the shareholders of Dominion Telegraph Company, and received in return the share certificates of Dominion Telegraph Company from its shareholders.

Pursuant to the mortgage and the agreement, the appellant used $109,000.00 of the cash payment of $116,640.00 to acquire part of the bonds which it had issued, and placed these bonds with the trustee to create a sinking fund to retire all the bonds and the certificates of interest, and the appellant assigned sufficient of the annual payments to the trustee to secure the payment of the interest on the said issue of bonds.

The appellant in its income tax return, under The Income War Tax Act, being chapter 97 of the Revised Statutes of Canada, 1927, and amendments, filed in each of the years in question, charged the interest on the bonds in the sinking fund as an expense against income.

1945

DOMINION TELEGRAPH SECURITIES LTD. v. MINISTER OF NATIONAL REVENUE

O'CONNOR J.

The respondent disallowed the interest on the bonds in the sinking fund and charged them back to income and assessed the appellant in respect of these items in each of the years in question.

The appellant contends that the interest on these bonds in the sinking fund is not taxable owing to the fact that the same does not constitute sinking funds created in the ordinary way, but represents the distribution of a fund received as a repayment of capital exclusively.

The respondent contends that the interest on these bonds in the sinking fund gives rise to income by way of interest, and, although received by the trustee, is income of the appellant and taxable, and in the alternative the interest received in respect of the bonds held in the sinking fund is not an expense which the appellant is entitled to charge against income in determining taxable income under the act.

Dominion Telegraph Company was incorporated in 1871, and established and maintained throughout Canada a public telegraph system.

On the 12th June, 1879, by an indenture of lease, Dominion Telegraph Company, as lessor, leased to American Union Telegraph Company, as lessee, the entire telegraph system for a period of ninety-nine years from the 1st July, 1879, at a rental of $52,500.00 per annum, payable quarterly, and the lessee covenanted to keep the telegraph system in good working order and on the termination of the lease, to surrender and yield up the property in good working order and repair, and to pay an increased rental of $10,000.00 per year if the lessee made arrangements with any telegraph company in Canada for pooling receipts.

On the 11th July, 1881, American Union Telegraph assigned the lease to Western Union Telegraph Company and the rental was increased to $62,500.00 by reason of the provision set out in the preceding paragraph.

On the 26th August, 1881, Western Union Telegraph Company assigned the lease to the Great North Western Telegraph Company in so far as the lease related to that portion of the system lying West of the Province of New Brunswick.

Counsel agreed that Canadian National Railways took over the Great North Western Telegraph Company.

The appellant alleges that the officers of Dominion Telegraph Company discovered that the telegraph system had been so interwoven with the telegraph lines of the Great North Western Telegraph Company as to be indistinguishable, and tendered certain evidence, which will be referred to later, as to the negotiations which took place over a period of years between the officers of the Dominion Telegraph Company and the officers of Canadian National Railway.

As a result of these negotiations a settlement was effected. The appellant was incorporated for the purpose of distributing the payments received from the settlement among the shareholders of Dominion Telegraph Company.

The agreement containing the settlement was entered into between the Great North Western Telegraph Company and the Dominion Telegraph Company, and the appellant, and the intervening lessees are parties thereto.

The agreement is dated 15th January, 1925, and the Schedules "A", "B" and "C", which are attached to the agreement, are the original lease and the two assignments already referred to.

The agreement then provides:—

1. In consideration of the sum of One hundred and sixteen thousand six hundred and forty dollars ($116,640.00) heretofore paid to the Dominion Company and for the sum of One dollar—($1.00) each in hand paid to the Dominion Company and the Securities Company upon the execution of this agreement, the receipt whereof is hereby acknowledged, the Dominion Company and the Securities Company hereby release the other parties hereto from all claims and demands, present and future, in respect of the following covenants in the Indenture hereunto annexed as Schedule "A" hereto which are to the following effect:—

FIRSTLY, that the lessee in the said Indenture of the 12th of June, 1879, should, during the demised term, keep the said telegraph lines, system and plant in good working order and should pay all costs of renewals thereof and all expenses of carrying on the same, and

SECONDLY, that on the last day of the said term, or on the sooner determination of the estate thereby granted, the lessee should peaceably and quietly leave, surrender and yield up unto the Dominion Company all and singular the said demised premises and property in good working order and repair with an adequate supply of instruments and plant of the most improved character then in use on telegraph lines in America.

2. Upon the expiration of the said lease on the 20th day of June 1978 or upon its earlier termination as therein provided for, the Dominion Company and the Securities Co., for the aforesaid sum of

1945

DOMINION TELEGRAPH SECURITIES LTD. v. MINISTER OF NATIONAL REVENUE

O'CONNOR J.

One hundred and sixteen thousand six hundred and forty dollars ($116,640.00) hereby agree to sell, transfer, quit claim and assign unto the Great North Western all of the Dominion Company's and the Securities Company's right, title and interest in and to all of the lines, telegraph system and properties conveyed by the said lease existing and being West of the Province of New Brunswick in the Dominion of Canada and elsewhere West of the Province of New Brunswick and the Dominion Company and the Securities Company hereby agree to sell, transfer, quit claim and assign unto the Western Union all the Dominion Company's and the Securities Company's right, title and interest in and to all of the other lines, telegraph system and properties conveyed by the said lease; PROVIDED, HOWEVER, that the provision of the said lease with respect to the payment of rentals shall have been in all respects fully complied with.

3. The Indenture of Lease hereunto annexed as Schedule "A" hereto and all the covenants, provisos, conditions, powers, matters and things whatsoever contained therein shall enure to the benefit of and be binding upon the successors and assigns of each of the corporate parties hereto and shall continue in full force and effect save and except as hereby expressly amended.

4. All future rents payable during the whole of the currency of the said Indenture of Lease and amounting to the sum of Sixty-two thousand five hundred dollars ($62,500.00) per annum payable quarter-yearly on the 1st days of January, April, July and October in each and every year during the currency of the said lease, shall be paid to the Securities Company which has acquired by purchase all the assets and goodwill of the Dominion Company subject to the terms and conditions of this Agreement.

Then by an agreement dated 12th January, 1925, after reciting the original lease and assignment, Dominion Telegraph Company assigned the lease and the rent payable thereunder to the appellant. The agreement recites all the provisions of the agreement between the two telegraph companies and appellant and Dominion Telegraph Company covenants and agrees with the appellant that the rent of $62,500.00 per annum will continue to be paid quarter-yearly until the expiration of the lease.

Then by another agreement between Dominion Telegraph Company, as vendor, and the appellant, as purchaser, also dated 12th January, 1925, it was provided:—

1. The Vendor hereby agrees to sell and the Purchaser hereby agrees to purchase the entire assets of the Vendor subject to all liabilities, if any, of the Vendor which shall be assumed and paid by the Purchaser.

2. The Purchaser covenants, promises and agrees to execute a Mortgage and Deed of Trust in favour of The Royal Trust Company (hereinafter called "the Trust Company") to secure an issue of 5½ per cent Fifty-three Year Mortgage Bonds bearing date the Second day of

February 1925, of a total par value of One million dollars ($1,000,000.) and consisting of bonds of the denominations of One hundred dollars ($100 00), Five hundred dollars ($500 00), One thousand dollars ($1,000.00) and Fifty thousand dollars ($50,000.00) respectively and to deposit with the Trust Company bonds of the said issue to an amount sufficient to create a sinking fund which will retire all of the said bonds at or before maturity by reason of provisions being inserted in the said Mortgage and Deed of Trust to provide that bonds of said issue shall at all times be available for purchase for the sinking fund on interest dates by drawings by lot. The interest on the said issue of bonds shall be fully secured by an assignment by the Purchaser to the Trust Company of a sufficient part of the rentals payable under a certain Indenture of Lease bearing date the Twelfth day of June, 1879, made between the Vendor, as Lessor, and The American Union Telegraph Company, as Lessee.

3. The Purchaser further covenants, promises and agrees to and with the Vendor to enter into an agreement with the Trust Company to deliver to it additional bonds of the said issue of the par value of Fifty-two thousand five hundred dollars ($52,500.00) to be invested and kept invested by the Trust Company in bonds of the Purchaser until such time as the said bonds may be required for the sinking fund in connection with the bond issue hereinbefore referred to and thereafter any monies not so invested shall by the terms of the said agreement with the Trust Company be expended in the redemption of Certificates of Interest (hereinafter referred to) at the then ascertained value thereof by drawings by lot or by purchases from the Company or in the open market. By the terms of this agreement the Trust Company shall be bound to issue Two thousand (2,000) "Certificates of Interest" in the said fund which will entitle the holders thereof to a pro rata division of the said fund on the date of the final maturity of the said issue of bonds.

4. As the consideration for the assets (subject to liabilities) hereby agreed to be sold by the Vendor to the Purchaser, the Purchaser shall deliver the entire issue of such bonds and the entire number of certificates of interest hereinbefore referred to pro rata to the individual shareholders of the Vendor, as its nominees, upon surrender to the Purchaser of stock certificates with power of attorney thereon duly endorsed representing the shares held by the shareholders in the Vendor. Such certificates, however, shall be only used by the Purchaser for surrender and cancellation to the Vendor in connection with the voluntary liquidation of the Vendor which shall be undertaken by the Purchaser. As the lowest denomination of the bonds to be issued by the Purchaser will be One hundred dollars ($100 00) and the Vendor's shares are of the par value of Fifty dollars ($50.00), the holders of only one share and the holders of shares which would call for a fractional interest in a bond shall be paid the sum of Fifty dollars ($50.00) in money for such one share.

Clause 5 is a covenant for further assurance and Clause 6 provides that the agreement shall enure to the benefit of and be binding upon the successors and assigns of each of the parties thereto.

Pursuant to the last agreement dated 12th January, 1925, the appellant entered into a deed of trust and mortgage with the Royal Trust Company and an agreement

1945

DOMINION TELEGRAPH SECURITIES LTD. v. MINISTER OF NATIONAL REVENUE

O'CONNOR J.

with the Trust Company under which it carried out the provisions of paragraphs 2, 3 and 4 of this last mentioned agreement and out of the sum of $116,640.00 which the appellant had received, the appellant purchased bonds of the par value of $52,500.00 of the issue and delivered these to the Royal Trust Company to be held by it to retire the certificates of interest of the par value of $100.00 each. The appellant in addition purchased bonds, having a par value of $56,500.00, and deposited these with the Royal Trust Company as a sinking fund for the redemption of the entire bond issue. The certificates of interest and all the bonds, with the exception of these two blocks, were distributed among the shareholders of Dominion Telegraph by way of partial distribution of assets of Dominion Telegraph.

Dominion Telegraph Securities, Limited, reserved the sum of $7,000.00 annually out of the annual payment of $62,500.00 in order to maintain an office, keep the books and for other expenses.

The Dominion Telegraph Company was then liquidated, and its assets distributed among its shareholders.

The appellant filed returns for the years 1926 to 1929, both inclusive, and on July 28, 1931, the respondent made and delivered to the appellant, assessments for those years.

In each return for the years in question in this appeal, the appellant, in the profit and loss account, set out the rentals as income, and set out as an expense, the interest paid on the bonds. One of the witnesses for the appellant explained that this was done merely to show the complete transaction.

The respondent accepted the rentals as income and allowed the interest on the bonds outstanding, other than those held in the sinking fund, as an expense, but disallowed the interest on the bonds held in the sinking fund as an expense against income, and charged them back to income and assessed the appellant accordingly.

On the appeal the appellant contended that:

1. At the time of the settlement the telegraph system had been completely destroyed and that it did not exist and could not therefore be leased.

1945

DOMINION TELEGRAPH SECURITIES LTD. v. MINISTER OF NATIONAL REVENUE

O'CONNOR J.

2. The payment of $116,640.00 and the annual payment of $62,500.00 were compensation for the loss of a capital asset viz; the telegraph system and were therefore capital in character and not income.

3. The $1,000,000.00 is capital because the settlement was not $116,640.00 but that sum was only a basis which represented $1,000,000.00 that is a sum calculated on a 4 per cent interest compounded annually basis to produce $1,000,000.00 in 1978.

4. The sinking fund was not set up out of profits, nor was it to meet some certain contingency and differed materially from the ordinary sinking fund in which when the bonds are redeemed or paid off, the appellant would not get back its properties and the interest on the bonds in the sinking fund was a distribution of capital. Therefore section 6 (1) (d) does not apply.

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

(*d*) amounts transferred or credited to a reserve, contingent account or sinking fund, except such an amount for bad debts as the Minister may allow and except as otherwise provided in this Act.

5. Without varying the written agreement, the true character of the original transaction can be ascertained and that this discloses that all the payments are capital in character.

The respondent contends that:

1. The interest on the bonds in the sinking fund gives rise to income by way of interest and, although received by the Trustee, is income of the appellant, held and reinvested by the Trustee to create sinking funds of the appellant to meet its capital obligations to its bondholders and holders of certificates of interest, and that such interest income is taxable in the appellant's hands, and, in the alternative, the interest received in respect of the bonds held in the sinking fund, is not an expense which the appellant is entitled to charge against income in determining taxable income under the Act.

2. The whole sum of $55,000.00 could have been disallowed because it was not interest on borrowed capital used in the business which would be deductible under 5 (1) (b) nor was it a disbursement laid out to earn the income which would be deductible under 6 (1) (a).

1945

DOMINION TELEGRAPH SECURITIES LTD. v. MINISTER OF NATIONAL REVENUE

O'CONNOR J.

3. Under the agreement between the appellant and the Royal Trust Company the money was transferred to the Royal Trust Company for the purpose of creating a sinking fund and that this money was income and that 6 (1) (d) (ante) prohibited any deduction in respect thereto.

The appellant tendered the evidence of Mr. A. W. Hodgetts, who has been the Secretary-Treasurer of the appellant company since May, 1928, and the evidence of Mr. A. W. Holmested, the solicitor for Dominion Telegraph Company, at the time of the negotiations with the Canadian National Railway. The evidence, in part, of both these witnesses consisted of statements made by the late Mr. Macrae as to conversations he had had with Mr. Ruel, General Counsel for the Canadian National Railways, during the negotiations.

I understood that counsel for the respondent consented to the evidence being admitted. After going over the transcript of the evidence I was unable to find any passage in which this was set out; and at the end of the evidence it appeared that Mr. Ruel was available as a witness. I was informed that counsel for the respondent had not agreed to the admission of the evidence and had objected to it. In view of the misunderstanding I requested counsel for both parties to appear and argue the admissibility of this evidence, and I gave to counsel for the appellant, the right to call evidence to establish the admissibility of this evidence or any further evidence so that the appellant would not be prejudiced by the misunderstanding.

Counsel for the appellant submitted that the evidence as to these conversations with the late Mr. Macrae was admissible as declarations made by a deceased person in the ordinary course of duty, or was admissible to show the circumstances which the parties had in mind at the time the settlement was made. In support of his contention, Mr. Hodgetts and Mr. Holmested gave further evidence and I reserved the question of the admissibility of the evidence which they had given at the trial.

After considering the matter I reach the conclusion that the evidence of these witnesses as to their conversations with the late Mr. Macrae is not admissible. The evidence

did not establish that Mr. Macrae's statements were made in the ordinary course of duty. I reject those portions of the evidence of both of these witnesses, based on conversations with Mr. Macrae.

Counsel for the appellant tendered in evidence the Minute Book of Dominion Telegraph Company in respect of the minutes of a special general meeting of the shareholders held April 2, 1924. Counsel for the respondent stated that he had no objection to this and the minute in question was accepted in evidence.

Under the agreement between the telegraph companies and appellant the sum of $116,640.00 is the consideration for a release of the covenants and a transfer of the telegraph system in 1978.

It also provides that the lease is to remain in full force and effect until 1978 and that the rental of $62,500.00 is to be paid annually to the appellant.

In view of this express provision, it would require evidence of the clearest and most cogent character that these annual payments were not rentals but part of the compensation for the destruction of the system.

There is no evidence of that character before me.

The minutes of the meeting of April 2, 1924, do not support the contention of the appellant. Mr. Macrae reported the position of the directors to the meeting as:

> The directors were not satisfied with our position under the lease of June 12, 1879. We had nothing behind our stock to maintain its value except the covenants in the lease and we did not know if the leasehold property was in good repair or could be kept in good repair, or what could be done with it when we got it back, or if we could want it back, or what damages we could get if it was not restored to us.

The President and Secretary then went to New York to ascertain the position of the system. They saw the officials of the Western Union; and the Secretary reported the information received to the meeting of the shareholders.

> They told us our lines were being absorbed into their own system * * * They said 99 years is a long time and they could not be expected to keep this Company's whole system just as they got it for such a long period. It would not be practicable for them to do so, nor would the law require it, the poles and wires were on the highways: all modern companies have private rights of way, therefore, the big Companies have gradually rebuilt the whole lines into their own

1945

DOMINION TELEGRAPH SECURITIES LTD. v. MINISTER OF NATIONAL REVENUE

O'CONNOR J.

systems on their own rights of way and they have become merged into those systems. *As they were gradually taking in the whole system in this way,* it would not be possible for them to restore it as an operating unit to the Dominion Telegraph Company at the end of the lease * * *

While the system could not be restored at the end of the lease it could not be said that there was nothing left to lease.

The explanation of the sum of $1,000,000.00 is given in Mr. Macrae's description of the negotiation:

> Negotiations followed—they lasted about 18 months. We were first offered $65,000.00 to be paid in cash now, as a sum which at 5 per cent would net us $1,000,000.00 in 55 years. The sum of $1,000,000.00 *was the goal* because it was the value of the property when the lease was made and was also the amount of our stock. We declined this offer of $65,000.00 as we could not be sure of earning 5 per cent over the long period.

The offer from the Canadian National Railway was described to the meeting by the President as follows:

> . . . and that the negotiations had been successful and an offer had recently been made by the Great North Western Company to pay the sum of $115,660 00 for a release by this company of the covenants in the lease above mentioned. The amount was arrived at as a sum which would, invested at 4 per cent and interest compounded for the remainder of the term, produce the sum of not less than $1,000,000.00 which would pay the shareholders the par value of their stock $50.00 per share, and in the *meantime the rentals would continue to pay the dividends as heretofore.*

It is quite clear from all this that the minute of the meeting of April 2, 1924, sets forth the true agreement between the parties.

I find the annual payments of $62,500.00 were rentals and not compensation and were income of the appellant.

I hold that the sum of $1,000,000.00 was not capital in character merely because the sum of $116,640.00 paid in 1925 *if* invested at 4 per cent, compounded annually, would produce this amount.

In any event the appellant did not invest the sum of $116,640.00 in the method indicated at the meeting nor use the rentals as dividends. It issued bonds of a par value of $1,000,000.00 and certificates of interest and distributed these among the shareholders and assigned the rentals to the trustee to pay the interest on the bonds.

The trustee used part of the rental income each year to pay the interest on the bonds in the hands of the

bondholders and used the remainder of the rental income (termed interest on bonds in the sinking fund) to acquire more bonds for the sinking fund.

The interest on the bonds in the sinking fund is not an expense which the appellant was entitled to charge against income in determining taxable income under the Act.

I find that these items were properly disallowed as expense chargeable against income.

The appeal is dismissed with costs.

Judgment accordingly.

BETWEEN:

DAME JEAN PRINGLE, wife separate as to property of Joseph Christie, engineer, of the City of Westmount, and the said JOSEPH CHRISTIE, to authorize his wife ..... SUPPLIANTS;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Crown—Petition of Right—Liability of Crown for damage caused by negligent operation of a motor vehicle driven by an unauthorized driver—Unauthorized driver taking over operation of vehicle from authorized driver, both drivers servants of the Crown acting within the scope of their duties or employment.

An army vehicle driven by an authorized driver was taking part in demonstrations of army material in Westmount, P.Q. A soldier of higher rank but not an authorized driver obtained the driving of the vehicle and drove it recklessly and negligently in the presence of the authorized driver, causing grievous injury to the female suppliant. The vehicle was the property of the Crown and both drivers at the material time were servants of His Majesty.

Held: That the authorized driver of the army vehicle was negligent in entrusting it to an unauthorized driver and that since both were acting within the scope of their duties or employment respondent is liable to suppliant for the damages incurred by her.

PETITION OF RIGHT by suppliants to recover damages from the Crown for loss suffered by the female suppliant due to the negligence of servants or employees of the Crown acting within the scope of their duties or employment.

1946

DAME JEAN PRINGLE et al v. THE KING

Angers J.

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

G. B. Foster, K.C. and *A. M. Watt* for suppliants.

Hon. F. Philippe Brais, K.C. for respondent.

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

ANGERS J. now (March 1, 1946) delivered the following judgment:

The suppliant, Dame Jean Pringle, by her amended petition of right, claims from the respondent the sum of $16,229.78 for damages allegedly suffered as the result of being run down and injured by a motor vehicle owned by the respondent and driven, at the time of the accident, by an officer or servant of the Crown, to wit an enlisted officer or man of the Second Battalion, Black Watch of Canada.

The petition alleges in substance:

on June 29, 1942, at about 5.45 p.m., the suppliant was run down and severely injured by a motor vehicle, owned by the respondent and driven at the time of the accident by an officer or servant of the Crown, acting within the scope of his duties or employment, viz. by an enlisted officer or man of the Second Battalion, Black Watch of Canada;

she was run down by the said motor vehicle while she was standing on the east sidewalk of Melville avenue, in the city of Westmount, talking to the occupants of an automobile, parked along the curb on that side of the street, opposite 223 Melville avenue, between St. Catherine street and Western avenue;

the motor vehicle in question came east on St. Catherine street, made a wide turn to the left on Melville avenue, mounted the east sidewalk and on to a lawn beyond it, swung back towards its left, after travelling a distance of over thirty feet, struck the suppliant and crashed into the left side of the parked automobile;

the suppliant invokes the presumption of fault established by the Quebec Motor Vehicles Act, R.S.Q. 1941, chap. 142, s. 53;

without waiver of this presumption, the damages which the suppliant has suffered and will continue to suffer were caused by the fault, negligence and want of care and skill of the driver of the motor vehicle for whom the respondent is responsible, in that

(*a*) he was driving at a dangerous and illegal speed;

(*b*) he failed to keep control of the vehicle;

(*c*) he failed to bring it to a stop before hitting the suppliant;

(*d*) he undertook to drive a type of motor vehicle with the operation of which he was not familiar;

the said damages were also caused by the negligence of another enlisted man of the Second Battalion, Black Watch of Canada, Private Somerset, who, while acting within the scope of his duties or employment as a servant of the Crown, surrendered the jeep which caused the accident to Sergeant A. G. Martin, in disobedience to orders when he knew or should have known, as he admitted before the Court of Enquiry, that Martin was unqualified to drive the jeep and had no experience with this type of vehicle;

as a result of the accident suppliant sustained fractures of the 1st to 8th ribs inclusive on the right side, fractures of the 3rd, 4th, 5th, 8th, 9th, 10th and 11th ribs on the left side, fracture of the left humerus, fracture of the left fibula, laceration of the scalp, laceration of the left upper arm and cerebral concussion;

these injuries caused her to be confined to the Homoeopathic Hospital from June 29 to October 3, 1942, and from January 24 to February 1, 1943;

during and after these periods of confinement to the hospital she endured and still endures pain, discomfort and inconvenience from her injuries and their treatment;

she will never fully recover from the injuries sustained by her and will always be partially disabled, due to a paralysis of the left hand and arm and limitation of movement and weakness in the left knee and leg;

1946

DAME JEAN PRINGLE et al v. THE KING

Angers J.

she has suffered or will suffer the following damages as a result of the accident:

hospital bills	$1,083 94
nursing fees	262 00
doctors' fees to date	625 00
massage treatments to date	168 00
estimated cost of future massage	220 00
estimated future medical and X-ray expenses	300 00
cost of X-ray examinations to date	37 00
taxi fares	6 00
loss of wages to date	1,448 84
estimated future loss of wages	300 00
clothing destroyed in the accident	75 00
extra household help to date	220 00
estimated future cost of extra household help	1,000 00
pain, suffering, inconvenience and loss of enjoyment of life and movement during period of total incapacity	2,000 00
future pain, suffering and discomfort	500 00
permanent partial disability	8,000 00
Total	$16,229 78

following the accident the Officer Commanding, Second Battalion, Black Watch of Canada, C.A., held a Regimental Court of Enquiry into the occurrence and since that time suppliant's attorneys furnished the Department of National Defence with full details of suppliant's damages and she, herself, has submitted on two occasions to medical examinations by a physician, representing the Department;

respondent has nevertheless neglected to pay or offer to pay anything to the suppliant although requested so to do;

the driver of the jeep in question, Sergeant A. G. Martin, admitted verbally, after the accident, to Sergeant Charles Baker of the Westmount Police Force that he lost control of the jeep by stepping on the gas instead of the foot brake when turning north on Melville avenue from St. Catherine street;

respondent has admitted that Sergeant A. G. Martin, the driver of the jeep, was at fault and that respondent is liable for the accident by paying to John B. Pringle, on or about November 18, 1942, the full amount of the damages caused to his automobile in the aforesaid accident.

The respondent in his amended defence says in substance as follows:

he denies all and every the paragraphs of the petition of right;

the accident was not caused by the fault of any person for whom the Crown is in law responsible;

there is no fault or negligence attributable to the driver of the respondent's vehicle;

in any event the damages claimed are indirect, illegal and grossly exaggerated;

there is no lien de droit between the suppliants and the respondent;

the petition of right is unfounded in fact and in law;

Sergeant Martin was not in the exercise of his functions but on the contrary had obtained the use of the jeep for his own purpose;

Private Somerset had no authority to allow Sergeant Martin to obtain possession of the car and when so doing acted outside of the scope of his duties;

Private Somerset did not know that Sergeant Martin was not a qualified and competent driver;

at the time of the accident the vehicle complained of was not under the care or control of respondent;

any admission which may have been made by Sergeant Martin cannot bind the respondent;

any payment which may have been made to any other person than suppliants can have no bearing upon the present claim and, without limiting the foregoing, any such payment was made as a result of the condemnation of Sergeant Martin to pay the said damages upon his plea of guilty to a charge of having taken the jeep without authority;

suppliant is not entitled to plead by way of amendment to matters averred in paragraphs 5-a, 14 and 15 of the petition as the said averments, if valid in fact or in

1946

DAME JEAN PRINGLE et al v. THE KING

Angers J.

law, which is denied, would constitute a new cause of action, which could no longer be averred when suppliants moved to have them added to the petition of right nor can the petition of right be amended before the Court;

moreover, as it is alleged in the foregoing paragraph, the said amendments constitute a new cause of action which is prescribed.

In their amended answer to the amended defence the suppliants deny all and every the allegations of the latter.

The evidence discloses that on June 29, 1942, a jeep, the property of the respondent, was driven easterly on St. Catherine street west, in the city of Westmount, by a sergeant named Martin, of the Second Battalion, Black Watch of Canada. When arriving at Melville street on the east side of Westmount Park, it turned north thereon at an excessive speed, mounted the sidewalk on the east side of the street and on to the lawn between the sidewalk and the house, swung back towards its left and hit the suppliant, Jean Pringle, who was talking to the occupants of an automobile, parked against the curb on the said side of the street, and crashed into the side of the parked automobile.

Following the accident, the suppliant had to be taken to the Homoeopathic Hospital of Montreal for treatment, where she was confined until October 3, 1942. As a result of the accident, the suppliant suffered fractures of several ribs, of the left humerus and of the left fibula and also a laceration of the scalp and of the left upper arm. In addition she sustained a cerebral concussion.

On January 14, 1943, the suppliant underwent an X-ray examination of her left humerus, which showed that there was no union of the ends of the bone. On January 24 she was admitted to the hospital and an operation was performed on her left arm; she was released from the hospital on February 1, 1943. On April 8, 1943, an examination of her arm disclosed that there was no union of the bone. On October 19, 1943, she was again admitted to the hospital where she underwent another operation. She was discharged from the hospital on October 30, 1943. Another X-ray examination was performed on December

16, 1943, which showed that the bone was in good condition. A final examination was made on January 15, 1944, which showed that the union of the bone was complete.

According to the evidence of Dr. James Griffith, chief surgeon of the Homoeopathic Hospital, who first attended the suppliant, Jean Pringle, on June 29, 1942, her left arm is between 80 per cent and 90 per cent disabled and is rather useless in its present condition. Dr. Griffith believed that tendons could be taken to replace those which have been injured and that this would probably improve the condition of the suppliant's arm to a certain extent. He admitted, however, that he would not be prepared to guarantee the result of the operation, although he thinks that it may be worth trying. He observed that the suppliant still carries her arm in a sling and that he did not think that she could operate a typewriter. He stated that his charges to date amount to $625.

Dr. Ivan Patrick, attached to the staff of the Royal Victoria Hospital, examined the suppliant on March 7, 1944, and noticed a deformity of the humerus. He stated that the suppliant had a pain in her knee and that she cannot walk as well as she did before the accident. According to him she has a permanent loss of the use of the left arm to the extent of 90 per cent. He considered that an operation to improve her arm by putting new tendons would be difficult and perhaps not very successful. He did not believe that the suppliant could operate a typewriter.

Walter Hatch, Manager of the Homoeopathic Hospital of Montreal, filed as exhibit 1, five accounts of the hospital, one for room, board and attendance from June 29, 1942, to October 3, 1942, amounted to $1,147,59, one for similar services from January 24 to February 1, 1943, amounting to $89.06, one for similar services from October 19 to October 30, 1943, amounting to $110.05, one for physiotherapy services from April 22 to August 25, 1943, amounting to $108, and one for X-ray services in January, February, March and December, 1943, and January, 1944, amounting to $37.

1946

DAME JEAN PRINGLE et al v. THE KING

Angers J.

William Lyall Grey, Vice-President of Stone Franklin of Canada, Limited, testified that the female suppliant was employed with his company at the time of the accident and had been for about fifteen years. He said that she looked after the books. He asserted that as a result of the accident the suppliant lost $1,448.84 in wages. He stated that she is now back at work for part time, from eight oclock in the morning to three o'clock in the afternoon.

According to him she cannot do typing to the same extent as she did before the accident.

Mary Ellen Davidson, wife of W. J. Boyce, said that she worked as housekeeper for the suppliants from December 1, 1942, to March 31, 1943, and received in payment of her services $160. She filed as exhibit 2, a receipt for this amount.

Nellie Richards, wife of Lester A. Thomson, testified that she worked as attendant for the suppliants from October 4 to November 14, 1942, and received $60 in payment of her services. She filed as exhibit 3, a receipt for that sum.

Jean Pringle, suppliant, testified that before the accident she was in good health, that when it occurred she was fifty years old and that previous thereto she did all the housework alone. She said that since the accident she had to hire help and pay therefor between $2.50 and $3 and supply two meals a day. She declared that she paid $72 to Mrs. H. A. McKean, a physiotherapist, for massage treatments, and filed in support of her claim three accounts as exhibit 4. She said she disbursed at least $6 for taxi fares. She valued her clothing destroyed in the accident at $75. She asserted that she has not now the strength that she used to have, that her left knee hurts, that she does not sleep as well, that she has headaches, that she feels nervous, that she cannot walk as much as she formerly did, that she has to get help to dress and undress and to cut her meat.

The evidence shows that, at the time of the accident, she was working for Stone Franklin of Canada, Limited, as a typist and bookkeeper and had been in the employ of

the company for about fifteen years. She stated that she cannot do as much typewriting as she was accustomed to do because she can only use her right hand.

She declared that she was married in Montreal and has a marriage contract stipulating separation as to property. I may note that the best evidence would have been an authentic copy of the contract; however, as no objection was made against this verbal evidence, I assume that I am entitled, in the circumstances, to consider the suppliant as being separate as to property.

In cross-examination, she owned that she has been able to get along with the help of assistants but said that her mother is living with her and helping her.

Joseph Christie, husband of the suppliant, declared that he had to hire outside help to do the housework from the date his wife was injured. He said that before the accident she used to do all the housework alone.

John Pringle, owner of the automobile, a Pontiac coach, which, on the day of the accident, was parked on the east side of Melville street and was damaged by the jeep, testified that the suppliant, Mrs. Christie, was standing on the sidewalk, talking to him and to his wife. He declared that he heard a noise and noticed the jeep coming up on the sidewalk. He said that the suppliant was hit by the jeep.

He asserted that his car was damaged, that he made a claim against the Crown and that it was settled, the cheque being sent to the party who had repaired the car.

In cross-examination, Pringle admitted that he did not know who had signed the cheque, nor that Sergeant Martin had been condemned to reimburse to the Crown the amount of the damages. He filed as exhibit 5, a copy of a release given by him to the Crown in consideration of the sum of $131.59 for the damages caused to his car by the accident in question.

Andrew Lawson, constable of the city of Westmount, investigated the accident. He testified that he saw the jeep shortly prior thereto, carrying children around the block between Academy road, Park Place, St. Catherine street and Melville street. He said he was then stationed on Western avenue, a short distance west of Melville street,

1946

DAME JEAN PRINGLE et al v. THE KING

Angers J.

for traffic control. He declared that, on the day of the accident, there was a display of armaments given by the members of the Black Watch regiment, in Westmount Park.

According to him the accident happened on June 29, 1942, at 5.23 p.m. and the demonstration at that time was practically finished, because there were no children around then.

There were, however, quite a number of soldiers and several pieces of equipment parked north of Western avenue.

He stated that, when the accident occurred, he was talking to Major Knox of the Black Watch regiment on Western avenue, that he heard a noise and saw a cloud of dust, that he took his motorcycle and drove to the place of the accident. He added that Major Knox ran across the park.

He noticed Sergeant Martin and Privates Somerset and Jobin on the street beside the jeep. He said he saw Somerset on it several times prior to the accident but did not see Martin driving the jeep on that day.

Charles Baker, Sergeant in the Westmount Police Force at the time of the accident, said he heard the evidence of Constable Lawson.

He declared that, on the day of the accident, about five minutes after it had occurred, he spoke to Sergeant Martin who told him that he had been driving the jeep in an easterly direction on St. Catherine street, that he made a left hand turn to proceed north on Melville street, that he stepped on the accelerator by mistake instead of the brake and that he momentarily lost control if his car, which mounted upon the sidewalk and proceeded thereon for a distance of about 35 to 40 feet, striking a lady. He said that he and Constable Lawson measured the distance from the tire marks on the sidewalk.

He asserted that when he arrived on the scene of the accident the jeep was on the sidewalk, to the right of a parked automobile, opposite the apartment bearing No. 223 Melville street. He stated that a lady, whom he later found to be the suppliant, was lying on the sidewalk about ten or twelve feet ahead of two stationary vehicles, one of

which, the jeep, was on the sidewalk and the other, a private car, was in the street, parked alongside the sidewalk. He said that the lady was being attended to by a doctor and Constable Lawson.

Walter Alfred Somerset, who described himself as a Private in the army, testified that on June 29, 1942, the day of the accident, he formed part of the Black Watch regiment.

He stated that he remembered the accident with which we are concerned and that he was then riding in a jeep on his way to dinner in the messing area in Westmount Park. According to him there were three others in the jeep with him at the time and Sergeant Martin was driving. Somerset said that he was in the back seat and that Martin had been driving ten minutes at the most before the accident. He admitted that he did not know whether Martin had driven a jeep before.

Somerset declared that he got a three-week course to learn how to drive a jeep. In his opinion driving a jeep is very easy for one who is trained. Asked if he could say anything about Martin's experience with a jeep by the way he drove it, Somerset replied that he could not say very much. I deem it apposite to quote an extract from the testimony (p. 4):

Q Could you state anything about Mr. Martin's experience with a jeep, by the way he drove it, after he got it from you?

A. Not very much.

Q. What could you state? Much or little?

A. He drove a bit faster. Other than that I have no comments to make.

To the question as to how Martin had got up on the sidewalk with his jeep, Somerset stated (p. 4):

A. All I see. I believe he chose the sidewalk because he did not have room on the left to pass the parked car on the left.

Further on Somerset, asked how it happened that Martin got into that position, answered (p. 5):

A. I believe he saw a street car coming on Saint Catherine travelling west.

. . . . . .

A. And rather than be hit by the street car he drove a little bit faster than he should have perhaps around the corner.

1946

DAME JEAN PRINGLE et al v. THE KING

Angers J.

Somerset said he understood that Martin was going to relieve him whilst he (Somerset) had his supper. He stated that when the accident occurred Martin was driving him to the messing area.

He asserted that he had not been instructed not to give the jeep to Martin or to any other sergeant.

He said that he had a "work ticket" to drive the jeep on the day of the accident but that he had not "a driver's standing order", which he received later. He admitted that when he surrendered the jeep to Martin he did not know whether the latter had a "driver's standing order" and a "work ticket" and that he did not inquire. To the question as to why he had given the jeep over to Martin, Somerset replied (p. 7):

A. His rank was higher than mine, and I took that to be sufficient.

In cross-examination Somerset was asked to supply information about the "work order"; I believe it expedient to quote a passage from the deposition (p. 8):

Q. Now, you will have to say a little of this "work order". What is it?

A. This was signed by the motor transport officer, to move the vehicle in question.

Q. To move that vehicle described in the "work order"?

A. Right.

Q. And there is a "work order" applicable to any vehicle that must be in shape to go, and the one identified driver is permitted to drive an identified car, and nothing else in it?

A. Unless there is a change in the "work order".

Asked if the "work order" in his case gave him "the sole authority to drive that car from where to where, and back where", Somerset answered (p. 9):

A. From the motor transport garage on Saint Catherine Street to the administration area around the park. And I was to continue there, going round and round the park with these children and so on

Q. Until?

A. Until when, I do not know.

Q. Until another order was given to you?

A. That is right.

Somerset stated that he had learned since the accident that Martin had no "work order". He said he thought that his superior rank entitled him to take the wheel over from him.

He declared that Martin had driven the jeep "just the length of the park, down one block to St. Catherine, and along St. Catherine to Melville". He believed that,

contrary to what he had said previously, the time during which he had driven the car was considerably less than ten minutes.

Somerset declared that, since the accident, he understood that he had no right to allow the sergeant to drive his vehicle and that he was bound to say no to his request to let him drive.

Somerset stated that there was nothing to prevent him from continuing on with his companions and driving himself to the messing area. I may perhaps quote an extract from the deposition (p. 11):

Q. There was no reason for an emergency which caused Sergeant Martin to take it over, he took it as a whim of his own. There was no reason which would justify him to take the vehicle?

A. Nothing, except I had no dinner at the time.

Q. But you could have driven yourself, your dinners (diners?) to the messing area, with the vehicle?

A. I believe so.

Q. You need not have done it?

A. Physically no; but I was down by the order at a certain are (?), which could have been done, so I imagined.

Asked if his orders were to drive until he was relieved, Somerset admitted that he did not remember the orders and added that he was "sent out to do this job, and whether they were going to leave me to take the vehicle off the road I am not sure".

He understood that Martin was allowing him to go and have supper and that he would take over while the witness was having supper. He believed at the time that it would be feasible for Martin to continue driving the jeep while he (Somerset) was having his supper. He owned that he knows the contrary now.

He estimated that the accident occurred on Melville avenue at a distance of about fifty feet from St. Catherine street. Martin was not called as witness. I doubt whether he could have explained plausibly his unfortunate venture.

Lieutenant-Colonel Homer Morton Jacquays was examined on discovery, on behalf of suppliants and his deposition was taken as read by consent of counsel and put in evidence entirely.

He testified that in June, 1942, he was Commanding Officer of the Second Battalion of the Black Watch of Canada, then stationed at the Westmount Barracks.

1946

DAME JEAN PRINGLE et al v. THE KING

Angers J.

He declared that on June 29, 1942, his unit was engaged in a demonstration of various army equipment at Westmount Park for civilians. He stated that the unit was demonstrating every piece of equipment it had, including at least one jeep. He said the demonstration comprised taking members of the public for rides in the jeep.

He recalled that one of the jeeps attached to his unit was involved in an accident on June 29, 1942, on Melville avenue. He stated that as a result of this accident a Court of Enquiry was held by the regiment when he was still in command.

He did not see the accident occur, but he made it his business to find out, in view of his position of Officer Commanding, who was driving the jeep. He said he found out that the jeep was driven by Sergeant Martin, a member of the unit under his command.

He declared that Martin was on duty in the park on the day of the accident but that "his duties did not call for him to drive the jeep".

He stated that Martin was Provost Sergeant and that a Provost Sergeant has generally three or four men forming a Regimental Police. According to him the job of a Provost Sergeant is to see that the Regimental Police carry out their duties according to battalion or standing orders. He specified that the duties of a Provost Sergeant and his men are to keep an eye on the regimental canteen, to see that the men of the regiment are properly dressed on the streets and to check the equipment being taken from the unit and make sure that the proper men are driving it. He added that they may be used sometime for traffic control.

He declared that, as far as he knew, these were the duties which Martin was supposed to do at the demonstration in Westmount Park on that day.

He stated that Private Somerset was driving the jeep before Martin took it over from him.

Jacquays said that a private soldier has to take orders from a sergeant if the orders given are in his line of duty, which is for the private to determine. An extract from the deposition seems apposite (p. 7):

Q. Is it not a fact that a private soldier has to take orders from a Sergeant?

A. If the orders are in his line of duty.

Q. Does the private determine that?

A. Yes. I can give you an example. If, for example, any officer ordered the duly authorized driver of a vehicle to turn that vehicle over to the officer in question, the driver would be wrong if he did so.

Q. Suppose you ordered an authorized driver of a jeep that day to let you drive, would you not expect the private or sergeant to do so?

A. If he did he would be technically wrong.

Q. Would he not be disobeying an order of his commanding officer if he refused?

A. It would be up to the man in charge, and if I insisted that he give up the vehicle he should report the matter to someone.

Asked if the same procedure would apply to a Major if he ordered the driver to give him the machine in his charge, the witness replied that ordinarily speaking a field officer would know better. He added that if the Major did give the order, the same procedure would apply.

Counsel for suppliants asked Jacquays if the same answer would apply in case a Sergeant ordered the driver of a vehicle to give it to him; witness replied (p. 8):

A. I think if a Sergeant ordered him to do so, an experienced driver would definitely refuse.

Q. So the driver who had the jeep before Sergeant Martin was not an experienced driver?

A. No. He was not an experienced Military driver.

Jacquays stated that in a case of emergency anyone would naturally assume the driving of a vehicle. He added that, if a Provost Sergeant felt his duties required it, he could go to the Transport Officer and get a work ticket authorizing him to drive.

In cross-examination, Jacquays declared that the Provost Corps had no traffic control outside the park on the day of the accident as the regiment was not moving as a unit. According to him their job "would be mostly to move around and help a bit with the children, of which there is always a large group, and see that none of the men did anything out of the way, and preserve order and help any officers and run messages".

He stated that it was Private Somerset's duty to drive the jeep during the demonstration at Westmount Park and that no one else could drive it legally. He said that, if Private Somerset's hours were long, the Transport Officer would probably send another driver, who would have

1946

DAME JEAN PRINGLE et al v. THE KING

Angers J.

another work ticket to take over. He asserted that Martin had no authority to drive the jeep on the day of the accident.

Jacquays said he ascertained through the Court of Enquiry that Martin drove the jeep on the day of the accident. Asked how this came about, Jacquays replied that Martin decided to take the jeep to Westmount Barracks for his supper. He modified his answer forthwith and stated that the supper was served in the park. He intimated that Martin wanted to try driving a jeep for his own satisfaction.

To the question as to how it had come that Somerset had given the jeep to Martin, Jacquays answered (p. 13):

> Somerset being new to the Army was nervous about saying "no" to a Sergeant.

He affirmed that a Sergeant would have no disciplinary powers over Somerset if the latter refused to give up the jeep.

In answer to a question from counsel for respondent, Jacquays dealt with the findings of the Court of Enquiry regarding the accident; these findings, in my opinion, are wholly immaterial. I may note incidentally that Jacquays added to his comments the following statement (p. 15):

> Furthermore we (obviously the Court of Inquiry) also felt that Mr. J. P. Pringle was also at fault for the incorrect manner in which his car was parked.

I must say that I fail to see how the parking of a car alongside the curb on the east side of Melville avenue may have in the least contributed to the accident. Witness' claim is preposterous.

Jacquays declared that Martin must have known the rules and orders of the army concerning the authority to use a car as he had received careful instructions about his duty as Provost Sergeant and had instructed his men not to allow unauthorized vehicles out of the parking area. He added that a Provost Sergeant must instruct his men that any vehicle leaving the parking area should be stopped and the driver requested to produce a properly signed work ticket.

He stated that besides the work ticket which a driver must have to drive an army vehicle, he must further be

in possession of the drivers' standing orders. He described these standing orders as a small booklet which gives a great deal of instructions regarding the actual driving, maintenance, convoy work and so forth. He was sure that Martin did not have the standing orders at the time of the accident.

He said that Martin had passed the test which the unit give the men to make sure that they are fit to attend the trade test, but that as far as he knew Martin had no standing orders or trade test.

Jacquays admitted that, apart from this incident, Martin had always been a reliable man and one in whom he had confidence, giving as reason that the army usually picks the most reliable men as Provost Sergeants.

Jacquays believed that Somerset was in the jeep when the accident occurred and that he was sitting beside Martin. He admitted that Martin was entitled to get his supper in the mess in the park, although he could have taken it in the mess in the barracks if he so wished, since he was a Sergeant. He did not remember if the other men in the jeep, including Somerset, were going to have their supper in the mess in the park. He stated, however, that Private Jobin was going to have it there.

Jacquays said he thought that Somerset had passed his examinations to drive the jeep; after having looked at the Enquiry, he added that he passed his board I. C. class 3. He stated that he had not received the standing orders booklet but that it was being prepared for him.

He agreed that technically, according to army rules, Somerset should not have been driving. He stated, however, that, as there was a shortage of drivers, the army was forced to let a few drivers take over vehicles as soon as they had passed the tests, although they had not actually received the physical licence.

He declared that a certain number of the members of the unit were in different kinds of demonstrations in Westmount Park, among which was exhibiting the vehicles and weapons.

He stated that a Sergeant has a certain authority over a man of lower rank and that, in the present case, the

1946

DAME JEAN PRINGLE et al v. THE KING

Angers J.

Sergeant abused his authority. Asked if when he said "abused" he meant that he was going outside of his authority, Jacquays replied (p. 23):

> It is both. The abuse was when he told Somerset he would drive, and he went outside of his authority when he drove it.

Hector Marcotte, employed in the section of the Canadian Government Annuities of the Department of Labour, filed as exhibit A, annuity tables showing the cost of deferred and immediate annuities on the ordinary life and ten-year guarantee plans. He declared that the amount payable for an annuity of $100, payable quarterly, for a female at the age of 50 is $1,604, and at the age of 52, $1,555. I may note that this appears from the tables. He said that these figures are based on the expectation of life.

Counsel agreed that the expectation of life for a woman 52 years old is twenty years.

Gérard Nantel, legal adviser in the Army Department, District No. 4, filed as exhibit B, a copy of the Standing Orders for Drivers of M. T. Vehicles and Motorcycles, with amendments to November, 1940.

The question of negligence on the part of the driver of the jeep does not arise. The facts are such that negligence is obvious and unquestionable. The jeep was running from west to east on St. Catherine street at an excessive speed when, without moderating, it turned to its left to proceed north on Melville avenue. It was intimated by Somerset that the driver of the jeep crossed St. Catherine street from south to north speedily in order to avoid being hit by a tramway running from east to west. It is idle to say that the sensible course for the driver of the car to adopt so as not to endanger public safety would have been to slow down, let the tramway pass, turn to his left and go into Melville avenue at a reasonable speed. Martin proceeded into Melville avenue so rapidly that he evidently lost control of his car, mounted on the sidewalk and could not bring the car to a stop before violently hitting suppliant and crashing into the automobile stationed near the sidewalk.

The evidence disclosed that Martin was an incompetent and, in the present case, a very negligent and imprudent driver. I am satisfied that the accident is attributable to his negligence and incompetence. When the suppliant

was struck she was standing on the sidewalk, talking to someone in an automobile parked alongside the curb. She stood at a place where she was entitled to be and no negligence whatsoever can be imputed to her.

The respondent denied all the allegations of the petition of right and pleaded specifically that Sergeant Martin was not in the exercise of his functions at the time of the accident but, on the contrary, had obtained the use of the jeep for his own purpose and that Private Somerset, who was the only one authorized to drive the jeep, had no authority to allow Sergeant Martin to drive it and that in so doing he acted outside the scope of his duties.

The principal if not the sole question which arises is that concerning the right of Sergeant Martin to drive the jeep on the day of the accident.

It was urged on behalf of the suppliant that Sergeant Martin had the right to give orders to Private Somerset to let him drive the jeep and that a Private is not entitled to discuss the order of a Sergeant, his superior.

Jacquays, as already noted, declared emphatically that, if Sergeant Martin ordered Private Somerset, an authorized driver, to let him drive the jeep, the latter should refuse. He added that an experienced driver would definitely refuse. He admitted however that Somerset was not an experienced driver and that being new to the army he was nervous about saying no to a Sergeant.

Counsel for respondent relied on the Standing Orders and referred particularly to subsection (*f*) of section 1 and sections 15 and 16. Subsection (*f*) of section 1 provides that the drivers, when detailed for duty with a government vehicle, will have with them (*inter alia*) drivers' standing orders. The balance of this subsection is immaterial.

Sections 15 and 16 read as follows:—

15. *Authorized Drivers.*—No persons will at any time be permitted to drive a Department of National Defence vehicle except as stated hereunder:—

(*a*) Officers and Other Ranks who are qualified as drivers and belong to the unit concerned.

(*b*) Workshop personnel, of other than the unit on whose charge the transport is held employed in the repair or inspection of a vehicle necessitating road tests.

(*c*) Personnel undergoing authorized M. T. Instruction under proper supervision.

1946

DAME JEAN PRINGLE et al v. THE KING

Angers J.

16. *Unauthorized Driving.*—No Department of National Defence vehicle is at any time to be taken out from its garage, parking ground or vehicle standing for any purpose except by a direct or written order from the O. C. unit, or from his authorized representative.

The proof shows that, on the day of the accident, Somerset was the authorized driver of the jeep and that Martin had no authorization to drive it.

Sergeant Martin took advantage of his rank to obtain from Somerset the driving of the jeep. He drove it recklessly under the apparently apathetic eyes of Somerset and grievously injured the female suppliant.

The case is governed by subsection (*c*) of section 19 and section 50A of the Exchequer Court Act.

The material part of section 19 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.

Section 50A, in virtue whereof members of the naval, military or air forces are deemed to be servants of the Crown, assented to on July 24, 1943, is thus worded:

50A. For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and thirty-eight, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

The text of subsection (*c*) is plain and unambiguous: the injury must result from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment.

This doctrine has been invariably expounded since the coming into force of the Exchequer Court Act. There are numerous decisions reported dealing therewith; it will suffice to refer to a few: *City of Quebec* v. *The Queen* (1); *Martin es qual.* v. *The Queen* (2); *Martial* v. *The Queen* (3); *Filion* v. *The Queen* (4); *Colpitts* v. *The Queen* (5); *The Alliance Assurance Company* v. *The Queen* (6);

(1) (1892) 3 Ex. C.R. 164; (1894) 24 S.C.R. 420.
(2) (1891) 2 Ex. C.R. 328; (1891) 20 S.C.R. 240.
(3) (1892) 3 Ex. C.R. 118.
(4) (1894) 4 Ex. C.R. 134.
(5) (1899) 6 Ex. C R. 254.
(6) (1898) 6 Ex. C.R. 76.

Joubert v. *The King* (1); *Marcoux* v. *The King* (2); *Jokela* v. *The King* (3); *Yukon Southern Air Transport Limited et al* v. *The King* (4).

It is expedient to note that by the enactment of the statute 2 George VI, chapter 28, assented to on June 24, 1938, the words "upon any public work" were deleted from subsection (*c*) of section 19.

It was argued on behalf of suppliants that the fact that Somerset entrusted the driving of the jeep to Martin constitutes a negligence on the part of the former for which the respondent must be held responsible.

Several decisions were cited in support of this contention, among which are particularly the following: *Hall* v. *Johnson* (5); *Ricketts* v. *Thos. Tilling, Limited* (6); *Gillespie Grain Company Limited and Kuproski* (7); *Lockhart* v. *Stinson and Canadian Pacific Railway* (8).

The case of *Gillespie Grain Company Limited and Kuproski* is much in point and I believe apposite to quote a few extracts from the notes of the Chief Justice, Sir Lyman Duff, and of Mr. Justice Hughes. At page 15 we find the following observations by the Chief Justice:

> Colby was present in the front seat of the cab of the motor truck while Wilkie was driving. He was there in his capacity of employee of the appellant. It was within the scope of his employment and it was his plain duty to see that the truck was driven with reasonable care; to that end to keep a proper look-out and to exercise such control as might be necessary for the purpose of preventing mistakes or faults on the part of Wilkie. His failure to do so constituted negligence in his capacity of servant of the appellant; negligence for which it is, therefore, responsible. That he failed to keep a look-out, that he failed to exercise anything like proper control over the driving is plain from his own evidence, and it was, moreover, so found by Mr. Justice Ewing, the trial judge; who also found in effect that this negligence was a direct cause of the collision.

The Chief Justice then quotes an excerpt from the judgment of Lord Justice Pickford in the case of *Ricketts* v. *Thos. Tilling, Limited,* which reads as follows:

> It was admitted that the driver of this motor omnibus was alongside the man who was driving, and it is admitted that he was negligent. I entirely accept, of course, the proposition that, in order to make the owner liable, there must be negligence on the part of the person for whose

(1) (1931) Ex. C.R. 113.
(2) (1937) Ex. C. R. 23.
(3) (1937) Ex. C.R. 132.
(4) (1942) Ex. C.R. 181.
(5) (1939) R.J.Q. 66 K.B. 81.
(6) (1915) 1 K.B. 644.
(7) (1935) S.C.R. 13.
(8) (1941) S.C.R. 278.

1946

DAME JEAN PRINGLE et al v. THE KING

Angers J.

acts the owner is responsible—his servant, either regularly or for that occasion only . . . . In this case I say it is admitted that the driving was negligent. It is admitted that the driver was sitting by the man who was driving and he could see all that was going on—he could control what was going on. It seems to me that the fact that he allowed somebody else to drive does not divest him of the responsibility and duty he has towards his masters to see that the omnibus is carefully, and not negligently, driven.

Mr. Justice Hughes, who delivered the judgment of Cannon J., of himself and of Maclean J. *ad hoc*, at page 16 of the report expresses the following opinion:

The appellant Gillespie Grain Company Limited had in its employ as a driver the defendant George Colby. Sometime before the day of the collision, Colby had, contrary to the instructions of his employer, arranged with the defendant George Wilkie to come on the truck with him and to help by occasional driving and other work. Colby paid Wilkie from time to time small sums for these services. The reason underlying the arrangement was that Colby drank considerably and was out frequently late at night and as a result was, with his advancing years, at times too tired to do the work alone. On several occasions, Mrs. Wilkie also went along.

and further on (p. 21):

We now come to the fourth contention of the appellant that, assuming there was negligence on the part of Wilkie, it should have been held that Colby's act in permitting Wilkie to drive was outside the scope of Colby's employment, an unauthorized act, to effect a purpose of Colby for which the appellant employer was not liable. It should here be mentioned that in the province of Alberta there was not any statutory liability for damages imposed on the owner of the truck *qua* owner. Rupert Settle, an officer of the appellant, testified at the trial that one condition of Colby's employment was that he should see that nobody else should have "anything to do with that truck," that Colby was to be the sole driver and that Colby understood that clearly. Colby testified at the trial that he was in charge of the truck and Wilkie testified that every time they came back to the elevator, Colby resumed the actual driving. It must be clear, therefore, that Colby was in charge and in legal control of the truck, although the actual manipulations of the steering wheel and the gears had been temporarily turned over to Wilkie. It cannot be said that Colby had thereby freed himself, as employee of the appellant, of his ordinary duties of keeping a proper look-out, or seeing that the truck was on the proper side of the road, considering the rights of other traffic, although it may very well be that when Wilkie assumed the driving, he also assumed duties of keeping a proper look-out and keeping the truck on the proper side of the road, considering the rights of other traffic. In other words, it may be said that as the truck approached the place of the collision, Wilkie had a duty to keep a proper look-out also and a duty to drive the truck on the proper side of the road, considering the rights of other traffic; and that Colby continued to have, within the scope of his employment, a duty to keep a proper look-out and a duty to see that the truck was on the proper side of the road, considering the rights of other traffic.

We are not of opinion that Colby when he gave over the actual driving to Wilkie divested himself of the above duties or that the above duties were outside of Colby's authority merely because it was outside the scope of his authority to permit Wilkie to drive at all.

Mr. Justice Hughes then reviews certain decisions, among which is the one in the case of *Ricketts* v. *Thos. Tilling, Limited,* above mentioned.

After a careful perusal of the evidence and of the able and exhaustive argument of counsel and an extensive study of the precedents, I have reached the conclusion that Somerset was negligent in entrusting Sergeant Martin, who he knew was not a qualified and licensed driver, with the conduct of the jeep.

The contention that the driver of the jeep, whether it be Somerset or Martin, was not acting within the scope of his duties or employment in proceeding to the mess area for supper does not seem to me tenable.

The damages incurred by suppliant amount to $9,207.34 as follows:

hospital bills, including doctors' fees, nurses and X-rays	$1,491 50
household help	220 00
physiotherapy treatments apart from hospital treatments	72 00
clothing destroyed as a result of the accident	75 00
loss of wages to date of petition	1,448 84
pain and suffering, inconvenience and loss of movement during period of total incapacity	600 00
future pain and partial permanent disability estimated at 90 per cent	5,300 00
	$9,207 34

There will be judgment for the suppliants against respondent for the sum of $9,207.34, with costs.

Judgment accordingly.

1945
Oct. 15
Nov. 5
1946
Jan. 14

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY ..... } SUPPLIANT;

AND

HIS MAJESTY THE KING, ... RESPONDENT.

Crown—Petition of Right—Workmen's Compensation Act, R.S., B.C. 1936, c. 312—Contract—Suppliant entitled to recover from respondent amount of award made by Workmen's Compensation Board to widow of suppliant's employee whose death was caused by negligence of servants of the Crown—Damages not too remote.

An agreement entered into between suppliant and respondent provided, *inter alia,* that the respondent would indemnify and save harmless suppliant from any and all loss, costs and damages caused by or contributed to on account of non-compliance by respondent with the laws and orders of the Board of Transport Commissioners for Canada. Murray, an employee of suppliant, was killed because of the negligence of respondent's servants in failing to comply with General Order No. 236 of the Board of Transport Commissioners. Pursuant to the Workmen's Compensation Act of British Columbia, R.S. B.C. 1936, c. 312, suppliant became charged with the award made by the Workmen's Compensation Board to the widow of Murray. The award included certain sums paid by the Board for funeral and other expenses and also the capital amount of a pension of $40.00 per month. The total award amounted to $7,626.32.

Suppliant now seeks to recover the said sum of $7,626.32 from respondent.

Held: That the position of suppliant under the Workmen's Compensation Act is such that it bears the burden of its own accidents and in the result becomes charged with the actual cost to the Workmen's Compensation Board of all accidents suffered by its employees.

2. That the fact that suppliant is assessed from year to year in accordance with an estimate of accidents that may happen in the course of the year and that these assessments become part of the Consolidated Revenue Fund of the Province out of which payments are made by the Board does not alter the legal position that suppliant has to re-pay to the Board whatever money the Board pays out in consequence of an accident to any one of suppliant's employees.

3. That the suppliant has lost the total amount paid by the Board on account of the accident resulting in the death of Murray and it does not matter that such loss is suffered by way of increased future assessments.

4. That the loss sustained by suppliant is not too remote to be recoverable under the express provision in the contract entered into between suppliant and respondent.

PETITION OF RIGHT by suppliant to recover from the Crown the amount of an award made by the Workmen's Compensation Board of British Columbia consequent upon the death of an employee of suppliant due to the negligence of employees of the respondent.

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

J. E. McMullen, K.C. and *J. A. Wright* for suppliant.

F. A. Sheppard and *K. L. Yule* for respondent.

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

SIDNEY SMITH D. J., now (January 14, 1946) delivered the following judgment:

A railway siding agreement of the 1st October, 1943, entered into between the suppliant Railway Company and the respondent, contained a provision to the effect that the respondent would "indemnify and save harmless the Railway Company from any and all loss, costs and damages caused by or contributed to on account of non-compliance by the party of the second part with such laws and orders" (namely, the laws and orders of the Board of Transport Commissioners for Canada).

The respondent's servants negligently failed to comply with General Order No. 236 of the said Commissioners and thereby caused the death of one, Murray, an employee of the Railway Company. I so held at the conclusion of the trial, leaving the question of damages for further argument and consideration.

The position taken by the Railway Company is: It submits that pursuant to the terms of the Workmen's Compensation Act of British Columbia, R.S.B.C. 1936, Ch. 312, it became charged with the award made by the Workmen's Compensation Board to the widow of the deceased Murray; that this award included certain sums for funeral and other expenses immediately paid by the Board, and also the capital amount of a pension of $40.00 per month, the total award amounting to $7,626.32; that this was a loss suffered by the Railway Company within the terms of the above contractual provision, and so recoverable from the respondent. But the respondent submits in answer thereto that the said award was too remote to be recoverable as loss or damage, and that in any event the Railway Company had suffered neither loss nor damage in that the amounts were paid out of the Consolidated Revenue Fund of the Province and were not paid out of the funds of the Railway Company.

1946

CANADIAN PACIFIC RAILWAY COMPANY v. THE KING

Sidney Smith D.J.

Mr. Archibald, the Secretary of the Workmen's Compensation Board, was called and gave useful evidence. From his evidence, and from a consideration of the Act, and of the case of *Workmen's Compensation Board v. Canadian Pacific Railway Company* (1), I think it is clear that the Railway Company is in a special position under the Statute. It is in a sub-class by itself, namely, the sub-class of Railway Companies under class 10 of section 28 of the Act; and in this sub-class of Railway Companies it is the sole member by reason of the fact that the Canadian Pacific Railway Company and the Esquimalt and Nanaimo Railway Company are the only Railway Companies included in class 10; and that the latter Company is wholly owned by and leased to the Canadian Pacific Railway Company. In these circumstances therefore, it is not here the case of the Railway Company being one of many industries, all of whom pay assessments into a common fund to answer for accidents to the employees of any one of their number. Its position under the Act is such that it bears the burden of its own accidents and in the result becomes charged with the actual cost to the Board of all accidents suffered by its employees. It is, of course, true that assessments are made upon it each year, in accordance with an estimate of accidents that may happen in the course of the year, and that these assessments become part of the Consolidated Revenue Fund of the Province; and that out of this fund payments are made by the Board. But that does not seem to me to alter the legal position, namely, that the Railway Company has to re-pay to the Board whatever monies the Board pays out in consequence of an accident to any one of its employees. A distinct and separate record is kept of the monies paid by the Board under the Railway sub-class of class 10. Mr. Archibald made this perfectly clear. There is no doubt that as this fund diminishes it has to be replenished; and that it has to be replenished by the Railway Company. It would therefore appear that the Railway Company has in fact lost the total amount paid by the Board on account of this accident, that is to say, $7,626.32; and that this is not the less true because the loss is suffered by way of increased future assessments.

(1) (1920) A.C. 184.

1946

CANADIAN PACIFIC RAILWAY COMPANY v. THE KING

Sidney Smith D.J.

I cannot see that this loss is in any legal sense too remote to be recoverable. It is a matter of contract. The respondent was negligent, the death ensued, the award was made and will be paid by the Board by way of pension as the years go on. The Railway Company thereby became obligated to recoup the Workmen's Compensation Board for the amount of the award by payment of increased assessments. This must have been within the contemplation of the parties when the contract was made. Why then should such loss to the Railway Company not be recoverable under the express provision in the contract? The fact that it may be charged by the Board to the Railway Company under the name of assessments can make no difference. We must look beneath the words to the legal realities of the situation and they seem to me to be such as I have indicated.

The suppliant will therefore have judgment for the amount of its claim and costs.

Judgment accordingly.

BETWEEN:

1945

Oct. 16

1946

Jan. 18

HIS MAJESTY THE KING .....PLAINTIFF;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY, ... } DEFENDANT.

Crown-Government Employees Compensation Act, R.S.C. 1927, c. 30—Action to recover from defendant money paid to a servant of plaintiff injured by negligence of servants of defendant dismissed—No recovery at common law—No recovery on ground of loss to the Crown of a servant's services—Damages too remote.

The Crown seeks recovery from the defendant of certain sums of money paid out by the Crown to and on account of one, Christian, an employee of the Crown within the meaning of the Government Employees Compensation Act R.S.C. 1927 c. 30, injured by the negligence of servants of defendant.

Held: That the compensation sought by plaintiff cannot be regarded as legal damages since it is not the proximate and direct result of the negligence of defendant's servants.

1946

THE KING v. CANADIAN PACIFIC RY. CO.

Sidney Smith D.J.

2. That the compensation in question is compensation to an injured servant, payable by the Crown, and not compensation in the form of damages to the Crown for the loss to His Majesty of the services of a servant.

3. That the liability of the Crown to pay the compensation arises from an independent intervening cause, namely an act of the Parliament of Canada, which lies wholly outside the common law of the Province.

INFORMATION exhibited by the Attorney General of Canada to recover from defendant certain monies paid by the Crown to one of its servants injured by the negligence of servants of the defendant.

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

F. A. Sheppard and *K. L. Yule* for plaintiff.

J. E. McMullen, K.C. and *J.A. Wright* for respondent.

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

SIDNEY SMITH, D.J. now (January 18, 1946) delivered the following judgment:

I find negligence on the part of the Defendant's servants in leaving a certain gate ajar and projecting across the National Harbour Board Terminal Railway, owned and operated by the Plaintiff, at Vancouver, British Columbia. As a consequence of this negligence one, Herbert William Christian, a switchman, was severely injured and lost his right leg above the knee. The said Christian was an employee of the Crown within the meaning of the Government Employees' Compensation Act R.S.C. 1927, chap. 30, as amended by the 1931 Statutes, Chap. 9. Under the provisions of Sec. 3 (1) of this Act the plaintiff, through the Workmen's Compensation Board of British Columbia (which acted "not under the Provincial Act, but as the administrator of the Dominion law" per Rand J. in *Ching v. C.P.R.)* (1), made certain payments to Christian, and also set aside a capital sum to provide for a

(1) (1943) S.C.R. 451 at 459.

monthly payment to him of $49.98, the whole of said outlays amounting to the sum of $13,851.37. The Crown now claims recovery of this sum.

There can be no doubt that if Christian had sued the defendant for damages in his own name, and on similar evidence as in the present trial, Christian would have recovered judgment against the defendant, upon the ground that his injury was the direct result of the negligence of an employee of the defendant. His damages would then have been such as are allowed by the common law of the province, viz., future loss of earnings due to his injuries, allowance for pain and suffering, special damages such as medical and hospital expenses. But the defendant submits that the plaintiff cannot recover in the present case because the compensation sought to be recovered is not damages in the legal sense, but is a statutory obligation resting on His Majesty, created by an act of the Parliament of Canada. I think this view is sound.

The Plaintiff does not contend that this action is maintainable under any provision of the Government Employees' Compensation Act. Such a contention would indeed be without force in view of the language of Rand J., delivering the judgment of the Court in *Ching v. C.P.R. supra.* But the plaintiff says that this action lies at common law. It is true that His Majesty in his capacity of an employer would have a right of action at common law against the defendant if the defendant's negligence had so injured His Majesty's servant as to incapacitate the servant from performing his service to His Majesty. The gist of this action however is not the injury to the servant, but the loss of the service to the master—*The Amerika* (1). That is not this case. It is also true that at common law a parent may sue the defendant for medical expenses incurred by the parent in treating injuries inflicted upon his child by the negligent act of the defendant; and that a husband may sue a negligent defendant for medical expenses incurred in respect of injuries suffered by his wife. These are cases in which under the common law the parent is under a legal obligation to care for the child; and the husband is obligated to care for his wife. But these, too, have nothing to do with the present case.

(1) (1917) A.C. 38 at 54.

1946

THE KING v. CANADIAN PACIFIC RY. CO.

Sidney Smith D.J.

What is here sought is the recovery of monies which by an Act of the Dominion Parliament, the Crown is made liable to pay to its injured servant. This obligation does not arise under the common law of the province, but is created by a Parliament that is excluded by the British North America Act from legislating upon civil rights in the province. It seems plain that such an action will not lie. The compensation cannot be regarded as legal damages for it is not the proximate and direct result of the act complained of; Halsbury, vol. 10, p.103, para. 130; *The Amerika supra.* The liability of the Crown (Dominion) to pay the compensation arises from an independent intervening cause, namely an act of the Dominion Parliament, which lies wholly outside the common law of the province; *The Circe* (1). The compensation in question is compensation to an injured servant, payable by the Crown, and is in no sense compensation in the form of damages to the Crown for the loss to His Majesty of a servant's services. Nor is it claimed as such.

For these reasons I am of opinion that the action must be dismissed with costs.

Judgment accordingly.

1945

Oct. 11

Oct 11

BETWEEN:

THE CANADIAN PACIFIC RAILWAY COMPANY, ... } SUPPLIANT;

AND

HIS MAJESTY THE KING, ... RESPONDENT

Shipping—Petition of Right—Collision in Vancouver Harbour between suppliant's tug boat and respondent's vessel—Liability of respondent —Negligent operation of respondent's vessel—Suppliant entitled to repair its boat.

Held: That where suppliant's boat was damaged by the negligent operation of respondent's vessel suppliant was justified in having its tug boat repaired in order to get it back at work as soon as possible, and respondent is liable to suppliant for the cost of such repairs.

(1) (1906) P.1.

1945

CANADIAN PACIFIC RY. CO. v. THE KING

Sidney Smith D.J.

PETITION OF RIGHT by suppliant to recover from the Crown damages suffered by suppliant because of a collision in Vancouver Harbour between suppliant's tug boat and respondent's vessel due to negligence of officers and servants of the Crown.

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

J. E. McMullen, K.C. for suppliant.

D. McK. Brown for respondent.

The facts are stated in the reasons for judgment.

SIDNEY SMITH D.J. now (October 11, 1945) delivered the following judgment:

I am obliged to counsel for their assistance in this matter. I have in my own mind arrived at a conclusion, and therefore it will not be necessary in this case to reserve my judgment.

It is quite clear that the issues before me are very largely issues of fact; that I have to make up my mind as to which of the two conflicting versions I must accept. I feel bound to say at once that I find myself quite unable to accept the view which has been placed before me by the witnesses for the respondent. I do not find the evidence which they have given, to my mind at least, tenable; and I think that Sergeant Moodie is simply mistaken in his conception of the events that happened.

There can be no doubt that this small tug, the *Green Jade,* with a small tow, was circling the car ferry pier, and that if a proper lookout had been kept by those on board the other vessel, they would have appreciated this; and that they would have seen that the *Green Jade* never at any moment was on a steady settled course. It seems to me significant that Sergeant Moodie did not at any time discern that this vessel had a tow of logs; and I think it significant too that the collision happened at what I might call the change of watch; that is when Corporal Olson handed over charge of the vessel to Sergeant Moodie I think Sergeant Moodie in some way which I need not determine became confused, and I think his confusion was such as to render the collision inevitable.

1945

CANADIAN PACIFIC RY. CO. v. THE KING

Sidney Smith D.J.

I wish to say quite clearly that I was impressed by the evidence of the Master of the *Green Jade*. I think he told me exactly what happened, and that he told me the sequence of events accurately as he observed them.

It follows that I am bound to give judgment for the suppliant and I do so for the damages that have been proved. On the question of damages there can be no doubt that the owner was entitled to repair his vessel. The motor car case referred to is not helpful in a case of this kind. The owner had every right to repair his vessel in order to get her back at work, particularly in these recent times when ships of every kind were in great demand. There will be judgment for the suppliant as I have said with costs.

Judgment accordingly

1945

Nov. 1, 2 & 10

Nov. 17

BRITISH COLUMBIA ADMIRALTY DISTRICT.

BETWEEN:

THE SHIP *PRINCESS NORAH*.....PLAINTIFF;

AND

THE SHIP *CO-OPERATOR 1*.....DEFENDANT

Shipping—Collision in Inner Harbour of Victoria, B.C.—Failure to keep proper lookout—Failure to become aware of vessel being under way—No practice in Victoria Harbour that three blasts be blown as warning signal—Ship not required by Article 28 to blow three blasts since not on any authorized course.

Plaintiff and defendant ships collided in the Inner Harbour of Victoria, British Columbia. The Court found the *Princess Norah* was one-quarter to blame and the *Co-Operator 1* three-quarters to blame for the collision.

Held: That the failure on the part of the *Co-Operator 1* to keep a proper lookout was without any extenuating circumstance and was the primary cause of the collision, and that the *Princess Norah* was at fault since her Master should have become aware of the presence of the *Co-Operator 1* sooner than he did and that she was under way and given her a wider berth.

2. That since the *Princess Norah* was never at any material time going full speed astern nor taking any course "authorized by these rules" she was not called upon to blow three blasts as required by Article 28.

3. That there is no practice in Victoria Harbour calling for three blasts as a precautionary measure or warning signal.

1945

"PRINCESS NORAH"
v.
"CO-OPERATOR 1"
Sidney Smith D.J.A.

ACTION by plaintiff to recover damages resulting from a collision with defendant ship due to alleged negligent operation of defendant ship.

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

J. E. McMullen, K.C. for plaintiff.

J. V. Clyne for defendant.

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

SIDNEY SMITH D. J. A. now (November 17, 1945) delivered the following judgment:

The Inner Harbour of Victoria, B.C., is roughly in the shape of a half moon, with the diameter running approximately North and South and with the rim to the westward. The diameter is approximately 2000 ft. long and therefore the radius is about 1000 ft. long. The exit from the harbour is to the West, about the middle of the rim, and is about 400 ft. in width. The central part of the harbour is therefore little more than a turning basin and only one vessel of any size can safely manoeuvre therein at the one time.

On the 30th September, 1944, at 11 p.m., or very shortly thereafter, the *Princess Norah,* a Canadian Pacific Railway coasting passenger steamer 262 ft. in length, 48 ft. beam and 2731 tons gross tonnage, left her berth at the South end of the harbour on her usual voyage to the West Coast of Vancouver Island. About the same time the *Co-Operator 1,* a small fish packer, 82 ft. long, 18 ft. beam, 97 tons gross tonnage, with a crew of 4, left another berth at the north end of the harbour, on a voyage to Vancouver, B.C. Both vessels went astern and when in a position to shape up for the outward channel, stopped their engines and then went ahead; the *Princess Norah* under starboard helm and the *Co-Operator 1* under port helm. While so turning, and with very little headway on the *Princess Norah* but with some 3 to 4 knots headway on the *Co-Operator 1,* the two vessels collided with considerable

1945

"PRINCESS NORAH" v. "CO-OPERATOR 1"

Sidney Smith D.J.A.

damage to each; the port side of the *Co-Operator 1* striking the starboard counter of the *Princess Norah*. At the time of the collision the *Princess Norah* was heading S.S.W. and the *Co-Operator 1* about S.W. x W. The task before the Court is to determine where the liability rests for this rather unusual and peculiar collision. Fortunately the area of controversy is very limited, and there can be little doubt as to the sequence of events.

I heard evidence from Captain Robert Thomson, the Master of the *Princess Norah,* and also from his second and third officers and from the third engineer. They produced the deck log, the engine-room log and the engine-room bell-book of their vessel. These contained entries depicting the events that happened, made as they happened, or very shortly thereafter. It will be convenient to say here that I reject at once the suggestion that the engine-room bell-book may have been falsified; and also the suggestion, made at one time during the evidence, that the vessel may have been exhibiting a green stern-light. Captain Thomson seemed to me to be a ship-master of experience and ability. He had been in permanent command of Canadian Pacific Railway coasting vessels for twenty years. His evidence was impressive and I accept it. He was navigating his vessel from the top bridge and therefore was in a commanding position to see the events as they occurred. I prefer his evidence to that of his officers, particularly to that of his junior officer, whose primary duty was to stand-by aft and, with the aid of a spot light, to sight and report on logs likely to endanger the propeller. There was a light South-West wind; the night was clear, cloudy and moon-lit. There was some controversy about this last feature, but I think I can take official notice of the phase of the moon. I find it was full moon on the night after the collision.

The *Princess Norah* left her wharf at 11.02 p.m. and the following are the entries in her engine-room bell-book, viz., 11.02 slow astern; 11.03 stop; 11.03½ slow astern; 11.05 half astern; 11.07 full ahead; 11.08 stop. The collision was at 11.08. The 3rd officer said that when his vessel was proceeding astern he saw the white and red lights of a vessel; but in this I think he was mistaken. I think they were not seen till later, and that they were

1945

"PRINCESS NORAH" v. "CO-OPERATOR 1"

Sidney Smith D.J.A.

first seen by the Master, and that that was just before the 3rd officer directed his spot-light upon the vessel exhibiting them, which proved to be the *Co-Operator 1*. The Master testified that he was proceeding with his engines at half speed astern and, having reached the proper position to turn to starboard for the outward channel, had put his engines full ahead with helm hard-a-starboard; and at that time he saw the *Co-Operator 1* about 4 points on his port quarter, 350 to 400 feet distant, and close to and a little to the North of Enterprise Wharf. I am satisfied that at the time and place indicated by the 3rd officer the red light of the *Co-Operator 1* had not opened out and could not then be seen by those on board the *Princess Norah*. Captain Thomson judged the other vessel was going at 2 to 3 knots with increasing speed. He heard her blow one short blast. Under the influence of her engines and helm the *Princess Norah* gradually lost her stern-way and her stern swung to port. The *Co-Operator 1* came on with headway and with her head swinging to port. These movements resulted in the *Co-Operator 1* colliding with the *Princess Norah* in the manner already mentioned, and in a position rather less than midway between Enterprise Wharf and Tuzo Rock. Both vessels then stopped their engines and in due course made their way back to dock.

The case for the *Co-Operator 1* was that she sailed at approximately 11 p.m. from Spouse's Fish Slip at the North-East corner of the harbour, just below Johnson Street bridge, and went astern for about 500 ft parallel to, and close to, the North side of the harbour. During this movement she gave three short blasts of her whistle. She then ported her helm, went slow ahead for about 2 minutes, steadied on her course out of the harbour with helm amidships, and proceeded with engines at half ahead. She then saw on her port bow the stern of the *Princess Norah* bearing down upon her, under very fast sternway, at a distance which was variously estimated in the evidence as being from 30 feet to 83 feet. Collision was seen by her Master to be inevitable, and in order to minimize the impact he ported his helm so as to bring about a glancing blow. He testified that had it not been for this helm action the damage would have been much more serious.

1945

"PRINCESS NORAH" v. "CO-OPERATOR 1"

Sidney Smith D.J.A.

I am of opinion that the *Co-Operator 1* never steadied on her course out of the harbour. I think that after she concluded her stern movement she went ahead under hard-a-port helm and that she continued so doing until the collision. I think her Master was confused and shaken by the sudden appearance of the *Princess Norah*. Captain Williams, then Superintendent of the Canadian Pacific Railway Coast Service, found him so when he went on board later that night to survey the damage.

I formed the opinion that the Master of the *Co-Operator 1* did his best to assist me with his evidence. I think that in familiar ships and in familiar waters he would be a competent officer; but I think, too, that on this occasion he was neither in the one nor in the other. He holds a certificate as passenger mate, obtained in 1944. No point was raised before me as to whether this was a proper certificate for Master of this vessel. He had been at sea since 1919; for all but two years of that time in the ships of the Union Steamship Company out of Vancouver, reaching the position of Chief Officer. He said he had had some service during the war as officer, master, and pilot with the United States Army Transport Service, but the type and the term of this was left very vague. He stated that at the date of the trial he was fairly familiar with Victoria harbour, but that at the date of the collision he had been there only five or six times. No deck or engine-room log was produced from his vessel; and therefore he spoke, as did the other three witnesses from the ship, from memory of events long after they had taken place. I find their evidence unreliable. They had no accurate idea of the time intervals and in their evidence seem to have accepted those of the *Princess Norah*. In their Preliminary Act they gave the time of collision at 11 p.m.—a time when neither vessel had left her berth. The Master said he first became aware of the *Princess Norah* when her spot light flashed into his pilot house, and that she was then almost on top of them; and that it was only a matter of seconds before the collision. Yet in this brief period he stated that he blew a series of short blasts, put his helm hard a port, rang full astern on his engines and sounded

1945

"PRINCESS NORAH" v. "CO-OPERATOR 1"

Sidney Smith D.J.A.

three short blasts on the whistle. He made no mention of the one short blast heard by the witnesses from the *Princess Norah.*

The reason for the failure of those on board the *Co-Operator 1* to become aware of the presence of the *Princess Norah* at an earlier period was because (as they testified) she showed no lights. The argument advanced seemed to be that the grey colour of her hull merged into the dark background of the piers; or, alternatively, if she were showing lights, that her lights merged into the lights of the piers in the background. This seemed to me to be rather inconsistent but, in any event, I accept neither limb of the submission. There can be no doubt in relation to this matter that the *Princess Norah* was properly exhibiting all her regulation lights, and that in addition she was showing a series of deck lights round her stern. When it is remembered that the *Princess Norah* is a relatively large vessel and that all this happened in restricted waters, on a moon-lit night, the failure of the *Co-Operator 1* to see her becomes, to me at least, quite inexplicable.

It was contended that the *Princess Norah* should have blown three blasts, as required by Article 28. I cannot accept this view. For one thing, her engines were never at any material time going full speed astern; for another, she was not taking any course "authorized or required by these rules." She was pursuing her usual and proper course out of the harbour. *The Anselm* (1); *The Bellanoch* (2). Then it was argued, failing this submission, that she should have blown three blasts as a precautionary measure or warning signal, and that this was a customary thing to do. However it may be in other harbours, there is no such practice in Victoria Harbour. A three-blast signal might well have been misleading. Moreover, no one in the *Princess Norah* could have been expected to realize in the circumstances that the *Co-Operator 1* could possibly fail to see her, or could possibly fail to appreciate the manoeuvre she was carrying out. *The Lady Belle* (3).

If the *Princess Norah* had been seen earlier, the *Co-Operator 1,* being much the smaller and more easily handled vessel, as a matter of good seamanship in the

(1) (1907) P. 151.
(2) (1907) P. 170.
(3) (1933) 49 T.L.R. 595.

1945

"PRINCESS NORAH" v. "CO-OPERATOR 1"

Sidney Smith D.J.A.

circumstances, might have been expected to take the prudent course of stopping and allowing the *Princess Norah* to pass out ahead of her. *S.S. Cameronia v. S.S. Hauk* (1). Indeed her Master expressly stated that this is what he would have done. I therefore regard the failure to keep a lookout on the part of the *Co-Operator 1* as being without any extenuating circumstance, and as being the primary cause of the collision. She must therefore be held in fault.

There remains to consider whether there was also fault on the part of the *Princess Norah.* I think there was. It seems to me that her Master should have become sooner aware of the presence of the *Co-Operator 1* and that she was under way. Had he done so he might have the sooner noticed the turning movement in which she became engaged, and given her a wider berth. But this fault falls far short of that of the *Co-Operator 1.* Giving the best attention I can to the proportion of liability in the light of all the circumstances, I find that the *Princess Norah* was one-quarter to blame and the *Co-Operator 1* three-quarters to blame for this collision.

Mention should perhaps be made of two witnesses who gave evidence on behalf of the *Co-Operator 1.* The first was Captain Cecil Claxton, Superintendent of Pilots at Vancouver, B.C. From Captain Claxton's testimony it is evident that, apart from some experience in command of mine-sweeping vessels in the Mediterranean in the first Great War, he spent his sea career as an officer in ocean-going liners; that he has had no experience in vessels like the *Princess Norah;* that he has never been in command (except as aforesaid), and that he has never navigated any type of vessel in Victoria Harbour. In these circumstances I was unable to derive much guidance from his evidence. The other witness was the skipper of a fishing vessel in a nearby berth to the *Co-Operator 1.* His evidence was not particularly helpful to me; and neither side seemed to regard it as being of much weight. That is also my view.

For these reasons judgment will go as indicated, with costs in the like proportions. There will be a reference to the Registrar to assess the damages of each vessel.

Judgment accordingly.

(1) (1927) S.C. 518

1945

Oct. 11, 12 15 & 16

1946

Mar. 27

BETWEEN:

WESTERN DOMINION COAL MINES LIMITED, ... } SUPPLIANT,

AND

HIS MAJESTY THE KING, ... RESPONDENT.

Crown—Petition of Right—Emergency Coal Production Board—Estoppel —Promise made without consideration not enforceable—Exercise of discretionary power.

Suppliant alleges that the Emergency Coal Production Board induced it to believe that it had been found entitled to the maximum subsidy permissible under Order in Council P.C. 10674, November 23, 1942, and that it was entitled to have and keep it as of right. Suppliant's claim is for $44,209 30. Respondent denies all liability to Suppliant. The Court found that the actual representation made to Suppliant was that it had been placed on Form 4A subsidy and that this was subject to certain qualifications. The Court also found that Suppliant had not altered its position as a result of anything done or said by the Emergency Coal Production Board.

Held: That since Suppliant did not change its position by reason of any statement or representation by the Respondent or its agent there is no basis for estoppel against the Respondent.

2. That any services rendered by Suppliant were not rendered at the request of the Board, and accordingly any promise made by the Board would not be enforceable for services rendered prior to the making of such promise.

3. That the Board cannot be compelled to exercise its discretion in favour of the Suppliant.

PETITION OF RIGHT by Suppliant to recover from the Crown the sum of $44,209.30 alleged due it by reason of certain arrangements entered into between Suppliant and the Emergency Coal Production Board.

The action was tried before His Honour Judge J. C. A. Cameron, Deputy Judge of the Court, at Winnipeg.

A. E. Hoskin, K.C. and *O. S. Alsaker* for suppliant.

J. B. Coyne, K.C. for respondent.

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

1946

WESTERN DOMINION COAL MINES LTD. v. THE KING

Cameron D.J.

CAMERON D.J., now (March 27, 1946) delivered the following judgment:

The Suppliant's Petition of Right as amended is for $44,209.30, said to be due it by reason of certain arrangements alleged to have been made between it and the Emergency Coal Production Board, (hereinafter referred to as the Board). The Respondent denies all liability.

By Order in Council P.C. 10674, dated November 23, 1942, the Board was established under powers conferred by the War Measures Act and otherwise. It consisted of the Coal Administrator and two other members to be appointed by the Governor in Council. Its powers and duties are set out in Section 3 of P.C. 10674 (Exhibit 3). In general terms it was responsible, under the direction of the Minister of Finance, for taking all necessary measures for maintaining and stimulating the production of Canadian coal and for ensuring an adequate and continuous supply thereof for all essential purposes. Certain of its specific powers and duties will be referred to later.

The Suppliant Company was reorganized in April, 1939, and about that time commenced the business of strip mining. This is a relatively simple operation and has proven successful and profitable. In 1941 the Suppliant being in need of water for its operations, decided to open up a deep seam mine with the dual purpose of securing a water supply which lay underneath and operating the seam itself. This new operation was entered into voluntarily by the Suppliant without any order or direction from any Governmental authority. It was producing coal by September, 1941. By the end of that year about $100,000.00 additional expenses had been incurred in the new operation, and a further $84,000.00 outlay was necessary to secure new equipment. In 1942, with the co-operation of the Coal Administrator's office, the War Contracts Depreciation Board permitted the Suppliant to write off $144,000.00 of this expense over a period of three years.

Towards the end of 1942 the Suppliant found itself in difficulties in regard to the new operations. New machinery had been installed and production increased somewhat, but not to the level anticipated. On December 29, 1942,

the Suppliant wrote to the Board, outlining its position, which it attributed to a shortage of competent workmen, and suggested the Government take over the whole operation. This was the first contact with the Board which had just been established.

On January 4, 1943, the Suppliant advised that the National War Labour Board had granted increases in wages, effective from October 1, 1942, and requested information as to how it would be compensated for the additional outlay. Later this additional expense was provided for.

On January 4, 1943, the Suppliant wrote the Board in regard to its stripping operations, requesting its assistance in securing further tax allowances in respect of expense of $50,000.00 to be incurred in moving the stripping operations to a new site, so as to greatly increase its production. The Chairman of the Board requested the President of the Suppliant Company to come to Ottawa to discuss the matter.

No record was kept by anyone as to what took place at the interview, and the evidence is conflicting and quite unsatisfactory. It was the only interview that the Suppliant had with anyone connected with the Board on matters in question; for while the evidence indicates another interview early in 1942, the Board had not then been constituted. Mr. Brodie, on his examination for discovery, said that his interview was with Mr. Stewart, the Board's Chairman, and that its whole purpose was how the Suppliant would be compensated for increase in wages. At the trial Mr. Brodie said it was with Mr. Stewart or Mr. Neate (the Deputy Coal Administrator and Technical Adviser to the Board)—or both; that he stated that as the deep seam operations were running at a loss, the Company would have to have some relief either by an increase in the price of coal or by a subsidy. He stated that they agreed that the matter would be taken care of, but that the formula had not yet been worked out and would come later. Mr. Neate in that part of his examination for discovery read into the record by Counsel for the

1946

WESTERN DOMINION COAL MINES LTD. v. THE KING

Cameron D.J.

Suppliant, says that undoubtedly there was discussion in regard to remuneration for operations that were not paying.

Even if I accept the evidence of Mr. Brodie at the trial as to what transpired at this interview, I am quite satisfied that there was then no contract entered into which would be binding upon the Respondent. It was not a meeting with the Board, and the Board's Minutes do not indicate that anything was done as a result of this interview. There is no evidence whatever that the Suppliant Company itself, undertook to do anything; Mr. Brodie merely asked for help in a losing operation. There was no consideration passing to the Board; no details of any proposed assistance were agreed upon and there was, therefore, no binding contract.

It seems to me that this interview, in the main, had to do with Mr. Brodie's request, contained in a letter, dated January 4, 1943, for the Board's assistance in securing further tax allowances regarding the expenses in moving the stripping operations to a new site. The Board Chairman wired an acknowledgment of that letter and requested the interview above mentioned.

The Board's Minutes of its meetings on December 7, 8 and 9, 1942, indicate the manner in which it proposed to function, and the basis on which it would grant financial assistance, and while these Minutes were not known to the Suppliant until they were produced by Mr. Neate on his examination for discovery in September, 1945, they are important as indicating the procedure of the Board and the meaning of certain expressions used at the trial.

The following are extracts of relevant portions of such minutes:—

With a view to maintaining production at certain mines the Chairman was of the opinion that financial aid would be necessary in several instances. After reviewing the financial position of certain mines, the members approved the Chairman's suggestion that a memorandum should be immediately submitted to the Honourable the Minister of Finance to the following effect:—

The Board recommends that in the first instance assistance be made available in the form of accountable advances based on estimated needs; and that payments be made by Commodity Prices Stabilization Corporation Limited on the recommendation of the Board. In most cases

it would be inadvisable if not dangerous to withhold assistance until the audited annual statements of the companies can be made available and studied or until the report of a Mines Inspector or other authority can be made.

The Board further recommends that the following principles be followed in making settlements with companies to which accountable advances may be made:—

(*a*) That the amounts and terms of payment of accountable advances be reviewed at least once every three months and be based wherever possible on audit and inspection reports satisfactory to the Board.

(*b*) That save in exceptional cases settlements be made with companies on the basis of standard profits as ascertained under the provisions of the Excess Profits Tax Act or such amount of net taxable profits as shall be equal to 15 cents per net ton of coal produced or sold, whichever amount may be the less.

(*c*) That in cases in which unprofitable operations have been carried on in 1942 at the request of the Coal Administrator, the Board, if satisfied that the Coal Administrator's request was reasonable and that the request for reimbursement of losses is bona fide, will join with the Coal Administrator in recommending such reimbursement.

On January 29, 1943, the Executive Assistant of the Board wrote to Mr. Brodie as follows:—

Referring to your letter of the 4th instant and our reply of the 6th instant in connection with accountable advances, I am instructed to advise you that the Board has approved a plan whereby *operators who are operating at a loss may be reimbursed on the basis of standard profits as ascertained under the Excess Profits Act* or alternatively to a maximum net profit of 15 cents per net ton before taxation.

For the purpose of establishing a basis on which these advances may be calculated, a new form F-4 has been prepared and I enclose a supply for your use. I note that the increased wage scale was, in the case of Western Dominion, approved as of October 1, 1942, and in order to study the effect of such increased wages, I will require a form F-4 for each of the months of October, November and December 1942 and monthly thereafter as soon after the close of business each month as possible.

I would request that the form be read carefully with particular attention paid to the instructions shown on the back. Inaccurate or incorrectly prepared forms will only cause unnecessary delay in making subsidy payments.

If you will forward the forms for the three months, October, November and December immediately, prompt consideration will be given thereto.

Exhibit 5 is Form F-4 therein enclosed. It is a comprehensive form and was intended to secure all necessary information as to the operations of the coal mining com-

1946

WESTERN DOMINION COAL MINES LTD. v. THE KING

Cameron D.J.

panies for individual operating months. Certain instructions were printed on the back of this form, and the following Sections thereof are relevant:—

1. This production subsidy statement must be completed monthly, in duplicate, certified by the proprietor, partner or in the case of a corporation by a person authorized by by-law to sign, and the original promptly forwarded to the office of The Emergency Coal Production Board, 238 Sparks Street, Ottawa. The duplicate must be retained for your files.

2. With every sixth consecutive statement the mine operator must attach the certificate of a recognized firm of Auditors or a recognized public auditor reconciling the accuracy of the six statements concerned.

3. *Subsidy may be paid as an accountable advance* to the mine operator monthly or quarterly. If a change in wage scales should be authorized by The National War Labour Board the operator should submit at once a statement showing the effect of such change on his payroll so that the amount of the accountable advance may be adjusted.

4. The *maximum amount of subsidy paid is regulated* by the lesser of the amounts indicated hereunder:—

(*a*) Profits not to exceed "Standard Profits" as ascertained under the provisions of the Excess Profits Tax Act or

(*b*) Such amount of net taxable profits as shall be equal to 15c. per net ton of coal produced or sold.

5. "Standard Profits". If the operator has not had his "Standard Profits" assessed under the Excess Profits Tax Act he should at once make application to the Inspector of Income Tax, Ottawa, for the establishment of a standard.

Under date of February 5, 1943, the Company returned individual F-4 forms for each operation—strip and deep seam—for the months of October, November and December, 1942. The letter accompanying these forms pointed out that separate statements were included for each operation—intimated that the standard profits had not yet been determined, and pointed out that the operations were to a certain extent seasonal, the low point being in the Summer. Information was also given as to the extra cost occasioned by wage increases for that year.

These items of correspondence are, in my view, of great importance. The Board's letter of January 29 was clear notice to the Suppliant that only operators operating at a loss would be reimbursed. (No exception is taken to that policy in the Company's reply.) Attention was called to the instructions on the back of Form F-4, and there it is clearly stated that subsidy may be paid as an accountable

advance to the mine operator, monthly or quarterly; and to the manner in which the maximum amounts of subsidy would be regulated.

It is suggested that the Board's letter of January 29, 1943, enclosing the blank forms, constituted an offer to the Suppliant, and that its reply, with the completed forms, was an acceptance of that offer, and that there was then a binding contract between the Board and the Suppliant. With that contention, I cannot agree. There was no offer and, therefore, there could be no acceptance; and there was also no consideration. In substance it amounted to nothing more than intimation to the Suppliant that if it desired to furnish proper information to the Board, then, subject to the express qualification that subsidy would be given only to operators operating at a loss, the Board would consider what should be done with the application under its powers and discretion contained in P.C. 10674. This Order in Council gives wide discretion to the Board as to how it would render assistance—Section 3(1) (e) being as follows:—

> The Board shall be responsible, under the direction of the Minister, for taking all such measures as are necessary or expedient for maintaining and stimulating the production of Canadian coal and for ensuring an adequate and continuous supply thereof for all essential purposes and, without restricting the generality of the foregoing, the Board shall have the power and duty, under the direction of the Minister, of
>
> (*e*) rendering or procuring such financial assistance in such manner to such coal mine *as the Board deems proper,* for the purpose of ensuring the maximum or more efficient operation of such mine; provided, however, that in no case shall the net profits of operation exceed standard profits within the meaning of the Excess Profits Tax Act.

There is ample evidence to indicate that for the period in question, at least, the Board established a policy of giving assistance by way of subsidy only to operators, operating at a loss. Its letter of January 29, 1943, so states, as does also the letter of the Board's Chairman to the Suppliant, dated April 18, 1944, in which he says:—

> On January 29, 1943 you were advised of a subsidy plan whereby operators who were operating at a loss might be reimbursed. It has been the fixed policy of this Board that, until an operator can clearly establish that his operation is suffering losses, no subsidy will be advanced. (Exhibit 4 (51).)

1946

WESTERN DOMINION COAL MINES LTD. v. THE KING

Cameron D.J.

This is confirmed by the evidence of Mr. Neate taken on his examination for discovery—questions 166 and 327—and read into the record at the trial by Counsel for the Suppliant.

Clearly there was nothing to prevent the Board deciding on such a policy, nor did it at any time misrepresent the matter to the Suppliant. In a letter from Mr. Neate to Mr. Brodie, dated April 17, 1943, he states:—"If and when subsidy should become payable on the basis of your rates in Form F-4 in accordance with our recent ruling . . . . ."

Moreover, it is evident that the Board's policy was that of granting financial assistance by way of accountable advances. This is indicated by the Minutes of December, 1942, and by the evidence at the hearing. It was considered inadvisable to withhold assistance until the annual audited statements were received, and, therefore, when subsidies were given they were actually advances made, subject to review when the annual statements were received; and I take it that if these indicated that the advances were not warranted under the Board's policy, the Company which had received the assistance would be required to return all or part of the amounts.

On June 7, 1943, the Company forwarded consolidated Forms F-4 for the period October 1, 1942, to March 31, 1943, for both strip and deep seam operations, together with letter from its auditors, verifying the forms. These consolidated returns were to replace ones previously forwarded for individual months, and certain necessary corrections were made to replace estimated amounts in the previous statements.

The annual statement of the Company was also forwarded to the Wartime Prices and Trade Board at the same time. On June 14, the Board requested certain additional information in regard to the forms just received, and this information was later forwarded to the Board. On July 17, 1943, the Board was advised that the standard profits of the Company had been fixed at $75,000.00; this, of course, was referable to the entire operations of the Company, and for a full twelve months' period.

The Suppliant continued its dual operations and I think I can assume that the deep seam operations were unprofitable and the strip operations profitable. The Board from time to time expressed its desire that the Suppliant should exert a maximum effort to obtain the production planned by the Suppliant, but gave no orders (such as it had power to do) and the Suppliant continued on a purely voluntary basis with relatively good results, considering the difficulties it encountered regarding manpower. Progress reports were sent in from time to time, and the Board expressed its appreciation of the Suppliant's efforts.

On September 8, 1943, the Suppliant wrote to remind the Board that all necessary information had been supplied, and requesting an early disposition of its claim. On December 3, 1943, the Suppliant again asked for information as to the status of its claim for the period October 1, 1942, to March 31, 1943, and received a reply from one Blouin, Assistant Accountant, as follows:—

> In reply to your letter of December 3rd, we may assure you that the Emergency Coal Production Board has authorized subsidy on your operations from the 1st of October, 1942. In order to facilitate the computation of the correct amount of subsidy to which you are entitled, we will require a consolidated F-4A Return for the six months' period October 1st to March 31st, (the end of your fiscal year) certified by your auditor. We would suggest that you also have prepared, at the same time, a consolidated F-4A statement to date from April 1st, certified by your auditor. It will then be in order for you to submit monthly F-4A statements for subsidy for subsequent months. *Your annual audited statements will then be the basis of final adjustment.*
>
> You will understand, of course, that separate statements are required for the different operations and that these must be prepared in accordance with the instructions to operators regarding costs.
>
> A. O. BLOUIN
> for A. E. Bradfield
> Accountant.

This was the first intimation that the Suppliant had as to the result of its application. At the trial I authorized an amendment to Paragraph 5 of the statement of defence (which had originally admitted that this letter was written by or on behalf of the Board). Exhibit "A" is the said amendment and, in essence, it states that the letter was written on behalf of the Accountant of the Board, and that the Board did not authorize subsidy for the Suppliant's operations, except as to certain items of assistance which are not relevant to this claim.

1946

WESTERN DOMINION COAL MINES LTD. v. THE KING

Cameron D.J.

At the trial there was some evidence that Mr. Blouin's duties were to assist the Accountant and that he was not authorized to speak for the Board. But in view of a letter by the Chairman to the Suppliant on February 29, 1944, (Exhibit 4 (45)), stating that the Board at its 20th meeting held on July 29, 1943, approved the placing of the Suppliant on F-4A subsidy, I am satisfied that the question raised as to Mr. Blouin's authority to write the letter, is unimportant, except possibly as to the date when the subsidy was to begin, which is not mentioned in the Chairman's letter or the Board Minutes of that meeting. Section 4(5) of P.C. 10674 seems to establish conclusively that the statements in the Chairman's letter were in fact the act of the Board, itself.

In reply to the Board's letter of December 9, 1943, the Suppliant on December 20, 1943, forwarded separate consolidated forms for the two operations for the period in question, together with auditor's certificates. No reply being received it wrote again on February 15, 1944, asking for early attention. On February 29, 1944, the Board Chairman wrote the Suppliant as follows:

> Under date of January 29, 1943, you were advised by Mr. J. R. Cox that the Board had approved a plan whereby operators who were operating at a loss would be reimbursed. This Board at the 20th meeting held on July 29, 1943, approved the placing of your company on F-4A subsidy.
>
> At a recent meeting of the Emergency Coal Production Board there was considerable discussion with respect to the production subsidy now being paid to domestic mines throughout Western Canada.
>
> In view of the surplus supply of domestic coal now available throughout the West, the emergency which existed during 1943 must now be considered over.
>
> As the Emergency Coal Production Board was set up solely to deal with coal supply during the emergency, it cannot justify further payments of production subsidy to mines producing domestic coal which are operating at a loss.
>
> The question of financial assistance to the coal mining industry generally is now under review and whether or not subsidies in some other form will be authorized is a matter for the Government to decide.

This was followed by a further letter of March 3, 1944, from the Chairman as follows:—(Exhibit 4 (46)).

> After making a careful review of the circumstances surrounding your claim for subsidy assistance, we have arrived at the conclusion that it would not be possible to justify a recommendation to the Board for subsidy assistance to your project. It will be unnecessary for you to submit F-4A Production Subsidy Statements.

Your profits for the fiscal years 1942 and 1943 have been substantially higher than for previous fiscal periods. These have been due in some measure to the generous assistance which has already been accorded to you by the Board.

May we take this opportunity of thanking you for your co-operation during the period of emergency in the production of coal. We are pleased to advise that this emergency is now past.

On March 6, 1944, the Assistant Accountant wrote the Suppliant requesting certain information. The evidence indicates that this was a circular letter to mine operators and this seems to be the case, as it refers to the fiscal year ending March 31, 1944, and to payment of subsidies already advanced. While assistance had been given, the Suppliant had not actually received any F-4 or F-4A subsidy.

On March 22, 1944, the Suppliant replied to the Chairman's letter of March 3, 1944, outlining its position and requesting payment of its claim of $30,487.44 for the six months' period in question. On April 18, 1944, the Chairman again wrote the Suppliant in these words—(Exhibit 4 (51)):—

On January 29, 1943, you were advised of a subsidy plan whereby operators who were operating at a loss might be reimbursed. It has been the fixed policy of this Board that until an operator can clearly establish that his operation is suffering losses no subsidy will be advanced.

We must point out that for your fiscal years ended March 31, 1942 and 1943, you showed profits of $24,643.11 and $25,639.15 respectively after providing for depreciation in the amounts of $100,150.82 in 1942 and $127,360.40 in 1943 and the depletion of $64,002.50 in 1942 and $64,727.50 in 1943.

In view of the foregoing we have no alternative but to confirm our letter of March 3.

Inasmuch, therefore, as the Suppliant had been placed on F-4A subsidy on July 29, 1943, the question arises as to the meaning and effect of such action by the Board. Exhibit 8 is an extract of the Board's Minutes of that date. All members and certain officials were present, but no representative of the Suppliant. Paragraph 2 of the Minutes reads:—

There was tabled a list of operators for whom production subsidy had been provided up to and including July 27, 1943, authorization for which had not been recorded in previous meetings. The meeting approved the names of the operators listed as being eligible for subsidy in accordance with Form F-4A. In future, certified lists of production subsidies will be submitted monthly for the Board's approval.

1946

WESTERN DOMINION COAL MINES LTD. v. THE KING

Cameron D.J.

Appended to the Minutes is a list of operators, headed "20th meeting on Thursday, July 29, 1943—Companies receiving or authorized to receive F-4 assistance". There are thirty-eight names on the list, and in respect of six of these (of which the Suppliant is one) no amount appears in the column headed "Amount of Assistance", but varying amounts are placed after the names of the other thirty-two.

The only evidence as to the procedure of the Board in matters of this sort is that of Mr. Neate, much of whose examination for discovery was introduced by Suppliant's counsel at the trial. He stated that the Board wanted to find out what was the best way to get the information "to find out whether an operator was operating at a loss", and Form 4 was established, drawn up and approved, and that was the plan or form sent to the Suppliant. Later the form was changed to F-4A. The subsidies were definitely to be accountable advances, as I have previously stated, and while granted to certain operators, they would later have to account for these sums, and only those later found to be operating at a loss would be permitted to retain such advances. Mr. Neate stated that the amounts inserted in the column headed "Amount of Assistance" were merely the amounts claimed by each operator and not the amounts approved by the Board. He also says that the reason for no amount being placed opposite the Suppliant's name was that its forms had not then been processed. The evidence is clear that at no time did the Board fix any amount as being payable by way of accountable advance to the Suppliant. Why this was the case, when they had been placed on the list and when all necessary material had been filed, does not appear from the evidence. It may have been because one of the operations was showing a profit and the other a loss, or because the Suppliant was receiving financial assistance in other forms.

It was suggested that the letters signed by the Board Chairman, denying liability to the Suppliant, were written in a personal capacity, and not on behalf of the Board, and Mr. Neate seemed to be of that opinion. But it must be remembered that Mr. Neate was not a Board member and was not present at all the meetings, and in view of

Section 4(5) of P.C. 10674, to which I have previously referred, it is conclusive that the statements therein contained were the acts of the Board itself.

In the Suppliant's reply filed by reason of the amendment of Clause 5 of the statement of defence, Counsel raises the question of estoppel. But Respondent's Counsel argues that there is no estoppel as against the Crown; and alternatively that there is here no basis for an estoppel.

The decisions as to estoppel against the Crown are somewhat conflicting. In the Supreme Court of Canada in *Bank of Montreal* v. *The King,* (1), three of the Judges held that estoppel could not be invoked against the Crown. Reference also may be made to *The King* v. *Capital Brewing Co., Ltd.,* (2); Everest & Strode Law of Estoppel, 3rd Ed. 8; Robertson on Civil Proceedings by and against the Crown p. 576. On the other hand there are many leading cases which would seem to indicate that while the doctrine of estoppel by deed does not apply as against the Crown, yet estoppel in pais does so operate. In *Attorney-General to the Prince of Wales* v. *Collom* (3), Atkin J., said, after referring to *Attorney-General for Trinidad and Tobago* v. *Bourne* (4), and *Plimmer* v. *The Mayor of Wellington* (5):—

> A further point was raised that no estoppel binds the Crown, and that this equity is based upon estoppel. There is authority for the general proposition so far as estoppel by deed is concerned. I know of no authority for the proposition as applied to estoppel in pais.

Reference also may be made to *Queen Victoria Niagara Falls Park Commissioners* v. *International Railway Company* (6),

But is there, in fact, any basis for raising the question of estoppel? The principle is stated in *Square* v. *Square* (7), where Langton J., at p. 49, quotes the statement of Lord Denman, C.J., in Pickard *v.* Sears:—

> But the rule of law is clear that where 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.

(1) 27 C.L.T., 227.
(2) (1932) Ex. C.R. 182.
(3) (1916) 2 K.B., at 204.
(4) (1895) A.C. 83.
(5) (1884) 9 A.C. 699.
(6) (1927) 63 O.L.R. 49 at 68
(7) (1935) L.J., N.S., 104 at 46.

1946

WESTERN DOMINION COAL MINES LTD. v. THE KING

Cameron D.J.

Further Langton J., said:—

It is a rule of evidence which comes into operation if (*a*) a statement of the existence of a fact has been made by the defendant or an authorized agent of his to the plaintiff or someone on his behalf; (*b*) with the intention that the plaintiff should act upon the faith of the statement; and (*c*) the plaintiff does act upon the statement.

See also *Greenwood* v. *Martins Bank Limited,* (1).

In essence, what the Suppliant now alleges is that the Board induced it to believe that it had been found entitled to the maximum subsidy permissible under the Order in Council, and that it was entitled to have and keep it as of right. But clearly the Board did not do so. The actual representation made to the Suppliant in December, 1943, was that it had been placed on Form 4A subsidy. But this was qualified by the prior statement by the Board that such subsidy was to be by way of accountable advances, and the whole matter was subject to the further qualification that subsidies could be paid by the Board and kept by the recipient only if the operator were operating at a loss. The Suppliant was fully aware of these qualifications, but assumed that because one of its operations was conducted at a loss, that therefore it was entitled to subsidy in respect of that operation. There never was, for the period in question, any decision by the Board that the deep seam operation would be treated entirely as a separate matter, although it did request that separate forms be supplied for each operation. Financial assistance in ways other than by way of subsidies had been granted in respect of the two operations, and as Mr. Neate said,—"The Board had to find out how each was progressing". The total operations could not be disregarded by the Board, for, by the terms of the Order in Council, it had to consider the standard profits, which are the profits of a taxpayer, and not those of each operation of a taxpayer. And I can find no evidence that the Suppliant altered its position as a result of anything done or said by the Board. As stated by Counsel, it "went on" when it could perhaps have shut down. The deep seam operation had been planned and put into execution in 1941 long before the Board came into existence. The correspondence filed at the hearing indicates that the Suppliant planned

(1) (1932) L.J., 101 K.B.D. 623 at 626.

to continue this operation for several years, if not for the full duration of the war. In February, 1942, the Suppliant wrote the War Contracts Depreciation Board, outlining the plan and stated:—

> This proposed additional production of 250,000 tons will not be required the minute our war effort ceases, and all the capital expended will become idle. We, therefore, apply to your Board to grant a depreciation allowance sufficient to write this off in two years. With such a provision to write this off in two years, our bankers will provide us the finances required.

On March 7, 1942, the Department of Munitions and Supply wrote the Suppliant (as requested by the latter) referring to the Company's proposition to acquire equipment and expand its facilities to increase production to 250,000 tons per annum, and requesting the Company at its own expense to make these expenditures, and stating that no liability of any sort was thereby incurred. This letter was requested by the Suppliant to further its application to the War Contracts Depreciation Board.

I find, therefore, that the Suppliant did not change his position by reason of any statement or representation by the Respondent or its agent, and that there is, therefore, no basis for raising the question of estoppel.

It is to be kept in mind that the claim here is for payment of subsidy for the period October 1, 1942, to March 31, 1943, and that nothing was done by the Board to place the Suppliant on subsidy until July 29, 1943, and no statement to that effect was given to the Suppliant until December 9, 1943.

Assuming that the Board did on July 29, 1943 place the Suppliant on subsidy for the period in question, can the Respondent be now compelled to pay any subsidy for services said to have been rendered in a previous period and without any contract, expressed or implied? The "services so rendered" (the production of coal) were not rendered at the request of the Board, and therefore in my view, even if the action of the Board on July 29, 1943 was taken to be a promise, it would not be enforceable. See *Pollock on Contracts,* 10th Ed., 177, and cases therein referred to. And even if there were an existing moral obligation not enforceable at law, such would not furnish good consideration for a subsequent express promise. See

1946

WESTERN DOMINION COAL MINES LTD. v. THE KING

Cameron D.J.

Privy Council decision in *Jayawickreme* v. *Amarasuriya* (1), and cases therein referred to; also *Roscorla* v. *Thomas* (2).

A so-called past consideration—that is something done by the promisee before the promise was made—may constitute a motive for the promise but is not a real consideration (save perhaps in exceptional cases of which this is not one). It would be otherwise if the services had been rendered at the request of the promisor. There being no legal consideration, there was no enforceable contract.

And it seems apparent that there is no statutory right to receive the financial assistance. This is not a case where moneys are appropriated for division among named parties, or those in a special class. The financial assistance is to be "in such manner to such coal mine *as the Board deems proper*". The discretion is entirely that of the Board, under the direction of the Minister. No direct grant was made by the Order in Council to the Suppliant.

While the Board had the power and duty of rendering financial assistance, it was to be in such manner and to such coal mine *"as the Board deems proper"*. Here the Board has not seen fit to exercise its discretion in favour of the Suppliant in this particular matter. And where there is a discretionary power, there appears to be no legal remedy to compel the Board to exercise that discretion in favour of the Suppliant.

In *Quebec, Montreal and Southern Railway Company* v. *The King* (3), Audette J., said:—

> Therefore, using the words of the Chief Justice in re Hereford Railway Company *v.* The Queen neither on the ground of contract nor on that of statutory obligation are the suppliants entitled to succeed. It was further held in that case that when money is granted by the Legislature and its application is prescribed in such a way as to confer a discretion upon the Crown, no trust is imposed enforceable against the Crown by petition of right. The statute granting the subsidy did not create a liability on the part of the Crown to pay the same. Where there is a discretionary power, there is no legal remedy.
>
> The authority to grant a subsidy under the statute, is not mandatory but purely discretionary, and essentially a matter of bounty and grace on behalf of the Crown, creating no liability to pay the same enforceable by petition of right. Moreover, under the facts of the case the suppliants are not entitled to the relief sought herein.

(1) (1918) A.C. 869 at 875.
(2) (1842) 3 Q.B. 234. 114 E.R. 496.
(3) (1914) 15 Ex. C.R. 237.

Reference may also be made to *The King* v. *Noxzema Chemical Company of Canada, Ltd.*, (1), where Kerwin J., stated at page 186:—

> The Legislature has left the determination of that matter and also of the fair prices on which the taxes should be imposed to the Minister and not to the Court. In my view, section 98 confers upon the Minister an administrative duty which he exercised and as to which there is no appeal. In such a case the language of the Earl of Selborne in Spackman *v.* Plumstead District Board of Works appears to be particularly appropriate:—And if the Legislature says that a certain authority is to decide, and makes no provision for a repetition of the inquiry 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.

See also *Literary Recreations Ltd.*, v. *Sauve* (2); *Lake Champlain & St. Lawrence Ship Canal Company* v. *The King* (3).

In the case of *Hereford Railway Company* v. *The Queen* (4), Sir Henry Strong, C.J., said at page 15:—

> Therefore, neither on the ground of contract nor on that of statutory obligation are the suppliants entitled to succeed There remains the ground of trust. Can it be said that the Crown is by the statute made a trustee or *quasi* trustee of this money to hold it until the railway should be completed and then pay it over to the Company? Several cases have been before the English courts where moneys have come into the hands of the Crown for the purpose of being distributed amongst a certain class of persons. Such were the cases of Kinloch *v.* The Queen, and Rustomjee *v.* The Queen, in both of which it was determined that money so held by the Crown could not be considered as subject to a trust enforceable by means of a petition of right. I see no reason why the principle of these cases should not apply here. If no enforceable trust is to be considered as imposed when money to be applied to a particular designated purpose is placed in the hands of the Crown under treaty or otherwise than by act of parliament, why should the conclusion be different where the money is granted by the legislature and its application is prescribed in such a way as to confer a discretion upon the Crown? No reason can be suggested for such a difference.

I find, therefore, for the reasons stated that the Suppliant has no contractual, statutory or other right to the sum claimed or any part thereof.

Some reference, however, should be made to the amount claimed, should the matter go further.

The claim as filed was for $30,847.44 and was according to the computation made in paragraph 25 of the Petition

(1) (1942) S.C.R. 178.
(2) (1932) 3 W.W.R. 123 at 125.
(3) (1916) 54 S.C.R. 461 at 475.
(4) (1894) 24 S.C.R. 1.

1946

WESTERN DOMINION COAL MINES LTD. v. THE KING

Cameron D.J.

of Right. At the trial, by consent, a new paragraph 25A was added and paragraph 26 was amended (Exhibit 1). The claim now is for $44,209.30. The figures given in the computation in paragraph 25A are not in dispute. The computations are based on (1) the limitation that financial assistance cannot exceed an amount which would result in the net profits of operation exceeding standard profits within the meaning of the Excess Profits Tax Act, and (2) Section 4 of the Instructions on the reverse side of Form F-4, which states that the maximum amount of subsidy paid is regulated by the lesser of,—

(*a*) Profits not to exceed standard profits;

(*b*) Such amount of net taxable profits as shall be equal to 15 cents per net ton of coal produced or sold.

The first computation in Section 25A shows that the maximum subsidy for the six months' operations of the deep seam mine and based on 15 cents per ton of coal produced would be $90,020.22, a sum much greater than that indicated by the alternative method limiting the profits to standard profits.

But the second computation is in my view quite wrong. The figures used are for the Company as a whole for the full year, and are based on standard profits for the full year ending March 31, 1943.

In view of the fact that the maximum subsidy is the lesser of two amounts, one of which is based on standard profits, and inasmuch as standard profits under the Excess Profits Tax Act are for a taxpayer and not for single operations of a taxpayer (and have been so fixed for the Suppliant) I cannot see how a subsidy could be computed, except for the whole operation.

Section 2(1) of the Excess Profits Tax Act defines standard profits, and contains a proviso that such profits shall be deemed to have accrued on an equal daily basis throughout any fiscal period or portion thereof which is in question. At no time was there any suggestion that the financial assistance should be for the full year ending March 31, 1943, although that is the claim now made in paragraph 26. And as the standard profits are deemed

to have accrued on an equal daily basis, the proportion of the standard profits for the six months in question would be $37,500.00.

The following, therefore, would be the only basis on which maximum subsidy could have been awarded by the Board:—

Net gain for six months on strip mine operations	$ 110,497 07
Net loss for six months on deep seam mine operations	77,131 32
Net gain for six months	$ 33,365 75
Maximum amount of subsidy	4,134 25
	$ 37,500 00

The amount shown for profit on the strip mine is taken from the Company's return of December 14, 1943. The amount shown for loss on the deep seam operation is from paragraph 25A of the Petition of Right. It is apparently arrived at by deducting certain additional labour costs, later recovered from the Board, from its loss in this operation as shown on the other return of December 14, 1943.

Two things only remain to be said. The Suppliant on a purely voluntary basis exerted considerable effort to increase the production of coal, and, under the conditions, achieved some success. The Board on the other hand has not, I think, failed in any duty it may have had to the Suppliant as will be seen from various forms of assistance itemized in paragraph 7 of the defence.

For the reasons mentioned above, I find that the Suppliant is not entitled to any of the relief claimed in the Petition of Right, and it will be dismissed with costs.

Judgment accordingly.

1946

Jan. 17, 18, 21

Mar. 27.

BETWEEN:

LORNE PUCKRIN ..... SUPPLIANT,

AND

HIS MAJESTY THE KING ..... RESPONDENT.

Crown—Petition of Right—Expropriation—Damages—Abandonment of part of lands expropriated—Value of leasehold interest in land—"Public Work"—"Officer or Servant of the Crown"—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19 (a) (b) (c)—Expropriation Act, R.S.C. 1927, c. 64, s. 24 (4).

Suppliant claims compensation from the Crown for the expropriation of a part of land held by him under lease and also for the injurious affection to the balance of that leasehold land and to adjoining freehold land owned by him, suffered because of the expropriation. Suppliant also claims compensation for damages to his crops and lands through the construction of a railroad spur across the leased land, and damages for loss through flooding of his lands, caused by the operation of a factory erected on the expropriated land, prior to April 1, 1943, and on and after that date. The Crown had expropriated 30·6 acres of the leasehold land and had abandoned 22·77 acres of it.

Held: That since the contractors who had constructed the railroad spur were not servants of the Respondent there was no liability on the Crown for any damage suffered by Suppliant.

2. That the claim for compensation should be on a basis of the acreage originally expropriated and the abandonment of part thereof is an element to be considered in arriving at the amount of compensation.

3. That the value of the tenancy is considered to be the present value of the difference between the rental paid by the tenant and the rental that the property is worth for the unexpired portion of the lease.

4. That the farming of the leasehold land had been rendered more difficult because of the severance due to the expropriation of part of such land and Suppliant is entitled to compensation for such injurious affection.

5. That since the manufacturing plant known as Defence Industries Limited which caused the flooding of the lands in question did not belong to Canada, and was not acquired or constructed at the expense of Canada, and no money for the acquisition or construction of it had been voted by the Parliament of Canada prior to April 1, 1943, it was not a public work within the meaning of s. 19 (*b*) of the Exchequer Court Act and Suppliant is not entitled to any relief for damages suffered during that period.

6. That since Defence Industries Limited had been transferred to the Respondent on April 1, 1943, it had become a public work within s. 19 (*b*) of the Exchequer Court Act but as there was no construction of a public work on or after April 1, 1943, there could be no claim for relief under s. 19 (*b*) and since no land was taken from Suppliant he had no claim for injurious affection by reason of user.

7. That Defence Industries Limited was not an officer or servant of the Crown within the meaning of s. 19 (*c*) of the Exchequer Court Act.

PETITION OF RIGHT claiming damages from the Crown for the expropriation of certain leasehold lands and damages suffered by Suppliant allegedly due to 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 O'Connor, at Toronto.

J. W. Carrick, K.C. for suppliant.

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

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

O'CONNOR J. now (March 27, 1946) delivered the following judgment:

By a Petition of Right dated 3rd March, 1944, the Suppliant claims compensation for the expropriation by the Respondent of part of the lands held by the Suppliant under a lease, and damages for injuriously affecting the remainder of the leasehold lands, and adjoining freehold land owned by the Suppliant.

The Suppliant also claims for injury to his property, resulting from the negligence of the servants of the Respondent sustained;

(*a*) During the construction of a spur railroad on the expropriated land.

(*b*) From the flooding of his land.

The Suppliant owns a farm known as "50 acres", and he leased the "Lavine Farm" which lies to the south of "50 acres" from Isaac Lavine for a term of five years from the 1st of April, 1941, at an annual rental of $3.25 per acre (99 acres), plus payment of the annual taxes of $1.10

1946

PUCKRIN v. THE KING

O'CONNOR J.

per acre per year. Both farms were worked together. The buildings were on the south part of the Lavine farm. A dirt road known as the "base line" separated the farms. The Pickering Beach highway runs north and south on the west side of both farms.

The Respondent first expropriated certain lands *west* of the Pickering Beach highway and has been, at all times material, the owner thereof.

His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland entered into an agreement with Defence Industries Limited (Exhibit 13), dated March 22, 1941, to take effect as of the 1st of November, 1940, whereby Defence Industries Limited, on behalf of and as the agent of such Government, undertook to construct a plant for the filling of shells on the land, west of the Pickering Beach highway, expropriated by the Respondent. All shares of the capital stock of Defence Industries Limited were owned by Canadian Industries Limited.

His Majesty the King, in right of Canada, intervened as the owner or prospective owner of the land on which the plant was to be constructed, and consented to the construction and equipment of the plant on the said lands in accordance with the terms of the agreement, and agreed to lease the said land west of the Pickering Beach highway, or otherwise make it available to His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland until such time as the plant ceased to be operated or maintained by the Government of the United Kingdom.

Pursuant to the said agreement Defence Industries Limited erected the plant and constructed a drainage system, shown in red on Exhibit 9, which drained the ditches on the roadways and railroad, and provided drainage for the buildings as shown on the plan. Water was used in the processing of the shells and then emptied into the drains.

An open ditch extended from the plant easterly to the Pickering Beach highway, and this ditch is marked "X" on Exhibit 9. An existing culvert under the Pickering Beach highway was moved 119 feet south and an additional culvert installed at the same point, which was opposite the end of the ditch "X".

The evidence shows that the ditches and culverts were constructed by Carter-Hall Company, but there was no evidence as to who employed them. The evidence of the Suppliant was "whoever built the plant did the things I complain of".

These culverts carried the water under the highway to the ditch on the east side of the Pickering Beach road at a point on the Lavine farm where an old watercourse led eastward through the Lavine farm. This is marked "creek" on plan Exhibit "J". The trees along this watercourse are shown on the plan.

In addition to moving and installing the culverts, the Suppliant swore that the contractors had dug a ditch about 6 feet in length on the Lavine farm. This was on the old watercourse at the western boundary of the farm and at a point in line with the eastern end of the culverts.

The result was that surface water from a wide area, plus the water used in the plant, was drained onto the Lavine farm, and flowed along the old water course and spread out forming the marsh area thereon shown on Exhibit "J". The extent of the marsh area is shown by the fact that muskrats built houses in the area. The water flowed east until it reached a creek on the lands east of the Lavine farm.

The Suppliant stated that when he took the farm over in 1941 there was water in this creek, except during the spring run off, and he was able to farm all the land. This was also the evidence of the former tenants.

By an agreement, Exhibit 14, dated 26th March, 1942, to take effect as of the 15th June, 1941, between His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland, and Defence Industries Limited, Defence Industries Limited undertook on behalf of and as the agent of His Majesty's Government in the United Kingdom, the operation, management and maintenance of the plant in consideration of a monthly fee fixed in the agreement.

On the 12th November, 1942, the Respondent filed a description and plan Exhibit 1 which expropriated *inter alia* 30·6 acres, part of the Lavine farm. Contractors entered upon the land and constructed a railroad spur from the plant west of the Pickering Beach road easterly across the north end of the Lavine farm to a storage depot,

1946

PUCKRIN v. THE KING

O'Connor J.

constructed on the lands east of the Lavine farm. The spur line was enclosed on both sides with a steel mesh fence. There is no evidence that these contractors were engaged by the Respondent. In constructing the spur line, these contractors caused damage. They entered on land, which had then been expropriated, with tractors and bulldozers and damaged the soil of an area. They also excavated the soil from another area, and used this soil in the construction of the railroad spur. They damaged a crop of 19 acres of the Suppliant, and by making breaches in his fence, allowed his cattle and horses to escape. They damaged certain timber which had been piled on the land. Because of the expropriation, the Suppliant did not fall plough any part of the 30·6 acres.

A natural watercourse, which ran across the Lavine farm about 300 feet from the northern boundary, was blocked by the spur line and the water was diverted south into the ditch "X" and onto the Lavine farm.

On January 11th, 1943, the Respondent filed a new description and plan, Exhibit 2, but this plan did not change the lands of the Respondent, expropriated by the filing of plan, Exhibit 1.

On the 5th April, 1943, the Respondent filed a Notice of Abandonment, Exhibit 3, of plans Exhibits 1 and 2, and on the same date filed a new plan Exhibit 4 and description, which expropriated an area from the Lavine farm of only 7·83 acres, but which was part of the area of 30·6 acres expropriated under plans Exhibits 1 and 2.

The land expropriated, 7·83 acres shown on Exhibit 4, is edged in green. The portion edged in yellow is a restricted area, into which only the Suppliant or his family or his employees were permitted to enter for the duration of the war and six months thereafter.

The portion expropriated extends right across the Lavine farm and contains the railroad spur. This completely cut off access between the Lavine farm, south of the expropriated land, from a strip at the north of the Lavine farm, containing approximately 6 acres, and from direct access to the "50 acres" farm over the base line.

By an assignment, Exhibit 15, dated the 27th day of May, 1942, the Government of the United Kingdom sold,

assigned and transferred as of March 31, 1943, all its right, title and interest in the said plant *inter alia* and in the said agreement, Exhibit 14, *inter alia*.

On and after the 1st of April, 1943, Defence Industries Limited, on behalf of and as the agent of the Respondent, continued the operation, management and maintenance of the plant.

The surface water from a large area, the water diverted by the spur line, and the water used in the plant, continued to drain through the ditch "X" onto the land of the Suppliant.

The claim of the Suppliant, as presented, can be divided into four parts:—

1. Compensation for his leasehold interest in 7·83 acres taken.
2. Compensation for injuriously affecting the remaining leasehold "Lavine Farm" and the freehold "Fifty Acres".
3. Damage to crop and lands done during the construction of the railroad spur across the "Lavine Farm".
4. Damages caused by flooding—
   (*a*) Before April 1, 1943.
   (*b*) On and after April 1st, 1943.

The Crown admits the Suppliant's right to compensation for claims 1 and 2 and denies liability for claims 3 and 4.

The Suppliant must bring his claims within subsections (*a*), (*b*) and (*c*) of section 19 of the Exchequer Court Act, R.S.C. 1927 chapter 34, as amended in 1938:—

19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

(*a*) Every claim against the Crown for property taken for any public purpose.

(*b*) Every claim against the Crown for damage to property injuriously affected by the construction of any public work.

(*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.

Counsel for the Suppliant contended that the damage done during the construction of the spur line (claim No. 3) resulted from the negligence of servants of the Crown and came within section 19 (*c*).

1946

PUCKRIN v. THE KING

O'Connor J.

The contractors who constructed the spur were not servants of the Respondent, but on the contrary were employed by Defence Industries Limited, the agents of the Government of the United Kingdom. Nor could the damage done on the expropriated lands, 30·6 acres, be said to result from negligence. The Suppliant's claim is clearly not within section 19 (*c*).

The Suppliant is, however, entitled to claim compensation which arose on the original expropriation of 30·6 acres. The claim still remains for adjustment and the revesting of 22·77 acres by the abandonment of the first plan; and the filing of plan No. 3 is an element to be considered in the settlement of the claim.

Section 24 (4) of the Expropriation Act, R.S.C., 1927 chapter 64, provides:—

> 24 (4). The fact of such abandonment or revesting shall be taken into account, in connection with all the other circumstances of the case, in estimating or assessing the amount to be paid to any person claiming compensation for the land taken.

Lord Buckmaster in *Gibb* v. *The King* (1) in considering the effect of this section said:—

> The claim for compensation arises on the original expropriation of the land. Nor is this claim defeated by the subsequent proceeding. Even after revesting, the claim for compensation still remains open for adjustment, for it has nowhere been taken away or satisfied and in its settlement the effect of the vesting is an element to be considered.

The Suppliant's claim for compensation should, therefore, be on a basis of 30·6 acres; and the revesting of 22·77 acres is an element to be considered in arriving at the amount.

Now, while the evidence on behalf of the Suppliant was, in part, as to the 7·83 acres finally taken and in part as to damages under section 19 (*c*), it is clear from the evidence that the 22·77 acres eventually revested had been damaged, and its value affected before it was revested.

The evidence of the Suppliant showed that in November, 1942, when the 30·6 acres were taken, he had a crop of soya beans growing on part of the 7·83 acres and on the land immediately adjoining on the south, and he valued this at $627.00. This crop was destroyed in the construction of the spur line. The Respondent admitted that the Suppliant is entitled to compensation for that portion of the crop on the 7·83 acres valued at $114.00.

(1) (1918) A.C. 915, at 922.

The Suppliant claimed that the topsoil of 3 acres had been removed and used in building the spur and that the tractors and construction machinery had so cut into $3\frac{1}{2}$ acres that the topsoil had been driven down and the subsoil brought to the top. He also claimed that gates and fences had been broken and that he had not been able to fall plough the area.

In order to show the value of his leasehold interest in the 7·83, he gave evidence of the gross amounts he would have received from crops and cattle which he would have been able to grow on this land if it had not been expropriated. Particulars are set out in Exhibit 8. While this evidence is admissible as tending to show the use for which the land is available, care must be taken to distinguish the income from the property and income from the farming business conducted upon the property—see Nichols on Eminent Domain, page 714.

Charles McNeil, Assistant Commissioner for Agricultural Loans for the Province of Ontario, gave evidence for the Respondent. Mr. McNeil had farmed for twenty-one years in Ontario, and has had long experience in evaluating farm land and in estimating damage.

Based on part being good working land, and part being pasture, he valued the 7·83 acres leasehold to the Suppliant as a farmer, at $50.00 per year. He was of the opinion that this would fully compensate the Suppliant for the taking of the 7·83 acres.

Sydney G. Smith, Ontario Land Surveyor, made a survey of the Lavine farm on December 15th, 1943, and prepared the plan Exhibit "J". He stated that the area damaged by the tractors was 0·74 acres and the area from which the topsoil had been removed was 1·23. This is a total of under 2 acres compared with the Suppliant's claim of $5\frac{1}{2}$ acres.

The plan Exhibit 2 shows the 30·6 acres originally taken. The same area can be ascertained on Exhibit "J" by using the measurements from Exhibit 2. Exhibit "J" will then show that part of the area originally taken which was work land (marked ploughed lands), and that part which was pasture, and it also shows the area damaged by tractors and the excavated area.

1946

PUCKRIN v. THE KING

O'Connor J.

The evidence showed that of the total area of the farm, approximately 40 acres were pasture and 60 acres work land.

It is clear from the evidence that the land 22·77 acres revested in the Suppliant was of less value when it was revested than it had been when it was originally expropriated. The crop had been destroyed and approximately 2 acres had been damaged. In addition, the work land had not been fall ploughed. The gates and fences had been broken.

Sir Charles Fitzpatrick, C.J., in *Gibb* v. *The King* (1) said:—

> The values of the land at the date of the expropriation and at the date of the abandonment have to be ascertained in the ordinary way but otherwise, in my view, it is immaterial to inquire what were the causes of the value of the land at these dates. The value of the land at the time of the expropriation is ordinarily the compensation which the owner is entitled to claim. I refer to sec. 47 of the "Exchequer Court Act" and also to the decision of the Judicial Committee of the Privy Council in the *Cedar Rapids Manufacturing and Power Co.*, v. *Lacoste*, (1914), A.C. 569, to the effect that the compensation to be paid for land expropriated is the value to the owner as it existed at the date of the taking. If, by the inverse process to expropriation, the Minister forcibly vests the property in him again, the value of the land to the owner at the time of such revesting is an element to be considered in estimating the amount to be paid to him.

In the Privy Council (2), Lord Buckmaster said:—

> Their Lordships think, therefore, that the judgment of Fitzpatrick, C.J., was accurate in all respects. . . .

It is difficult to apply the test of market value to leasehold interest in Canada. This is particularly true when only a portion of the leasehold interest is taken. Audette, J., stated this very clearly in *Rex* v. *Goldstein* (3):—

> However, as Nichols on Eminent Domain, page 714, says it is no simple matter to fix the market value of an unexpired term of a lease; it is almost impossible to apply the customary test of market value to a leasehold interest. It is really no test at all, because a lease rarely has any market value. It would seem that a lease in this country—contrary to custom of trade in France in that respect—might well be held to fall within the class of property not commonly bought and sold, and that consequently the intrinsic value or the value to the owner might be taken as the best and only available test of market value.

While the difficulty is there, I am of the opinion that value to the owner cannot exceed the highest price that a purchaser would be willing to pay:—

(1) (1915) 52 S.C.R., at 407.
(2) (1918) A.C. 915, at 922.
(3) (1924) Ex. C.R. at 59.

1946

PUCKRIN v. THE KING

O'Connor J.

The value of the land which should be awarded by the arbitrator is in no sense more than the price that the legitimate competition of purchasers would reasonably force it up to. *Sidney* v. *North Eastern Railway Company* (1).

Compensation payable to a tenant when land subject to a lease is expropriated, is determined in the manner described in the 8th edition of *Cripps on Compensation* at page 189:—

> The purchase-money payable to a lessee or tenant, as the value of his term or tenancy, depends on the difference between the actual rental paid by him and the improved annual rental that the property is worth. This difference must be multiplied by the number of years' purchase at which the tenant's interest should be valued. This will be determined by the character of the property and by the length of the term or tenancy. If the actual rental of property is 90l., and its improved annual rental is 100l., and the property is such that it should be purchased to pay six per cent., and the length of the term is ten years, then the recognized tables would give 7·360 as the number of years' purchase to be taken, and the capitalized value of the tenant's interest would be ascertained by multiplying 10l., by 7·360.

This method was approved by the Court of Appeal in Ontario in *City of Toronto* v. *McPhedran,* (2), and Middleton, J., said:—

> The true solution of the problem is that indicated in cases where land subject to a lease is expropriated. There the value of the tenancy is always considered to be the present value of the difference between the rental paid by the tenant, and the rental that the property is worth, for the unexpired portion of the lease.

In the same case Riddell J., at pp., 90-91 said:—

> But the simpler method is obvious—for any one year the value for that year to the tenant is the difference between what he should pay on a rack-rent basis and what he does pay—here $120. Capitalize this $120 for the length of time he has the right to occupy at that rental—and there will be found (for practical purposes) the value of his interest.
>
> It is quite impossible to determine with mathematical precision the actual value—that will depend upon the rate of interest on money, the probability of its rise or fall, the probability of rise or fall of the value of land, the probability of the tenant requiring renewal of lease, etc., etc. —all being elements of uncertainty. Mathematically speaking, the value of the interest is a function of three known quantities—the actual known rental value, the actual rent, the present rate of interest—and of several unknown and highly speculative quantities.

The value is determined in this manner (with other considerations) because it is that value which one could reasonably expect a purchaser would pay. Certainly it could not be reasonably expected that a purchaser would pay more than that value.

(1) (1914) 3 K.B., at 641.

(2) (1923) 54, O.L.R., at 92.

1946

PUCKRIN v. THE KING

O'Connor J.

The difficulty of ascertaining the compensation in the manner indicated and, in doing so, to take into account the abandonment in the manner laid down by Lord Buckmaster, *ante,* arises from the fact that all the evidence was directed to the question of damages for negligence and of compensation for 7·83 acres.

However, the whole of the evidence tendered, including that of the Suppliant, his neighbours and former tenants, and the witnesses for the Respondent, gives a fairly complete picture of the farm in all its phases, and from this I am able to estimate the rental value that the farm was worth. The rent paid by the Suppliant during the period in question was the same rent as that paid by the former tenant prior to the war. Because the length of the remaining term is so short, 2½ years, the rate on which the difference is capitalized is not material, amounting to only a few dollars either way.

And from the evidence before me I have reached the conclusion that for all practical purposes, the sum of $125.00, which would be Mr. McNeil's estimate on a 2½ year basis, is correct. This, of course, covered only 7·83 acres and did not take into account the expropriation of the 30·6 acres and the subsequent abandonment of the 22·77 acres.

I find, therefore, that the value of the expropriated property at November 12th, 1942, was $750.00.. In assessing this amount I have taken into account the revesting of the 22·77 acres in connection with all the other circumstances of the case.

Claim No. 2 is for injurious affection due to severance. The Suppliant in his evidence made no claim for damage by reason of the severance of the 6 acres at the north end of the Lavine farm, but Mr. McNeil very fairly stated that the leasehold had been injuriously affected by severance, which he estimated at $25.00 per year. I fix the sum of $75.00 for this item for the years 1943 to 1945, both inclusive.

The Suppliant also claims for injurious affection by severance to the freehold "50 acres". This is made up in two items. First, the sum of $330.00 estimated loss in

cattle which he could not raise on "50 acres" without being able to water the cattle on the Lavine farm during the summer when the water supply on "50 acres" fails. Second, the additional cost of $396.80 of working "50 acres" from the Lavine farm due to the severance, which necessitated driving from the buildings up the Pickering Beach highway, and back into "50 acres", instead of proceeding north through the Lavine farm and over the base line.

Mr. McNeil stated that there was an injurious affection by reason of the severance, which he estimated at $50.00 per year, but only because the Suppliant would be unable to raise cattle there. He stated that there would be no additional cost of working "50 acres" because of the severance.

The evidence showed that during the summer there was very heavy traffic on the Pickering Beach highway, between Toronto and the large summer resort, known as Pickering Beach, and I am of the opinion that this would render the farming of "50 acres" via this road much more difficult. I find that there would be an additional cost of working "50 acres" due to the severance.

I fix the compensation for injuriously affecting the freehold by reason of severance at $100.00 per year for each of the years, 1943, 1944, and 1945.

The Suppliant claims (No. 4), damage caused by the flooding of his land.

Water came from three sources through the ditch marked "X" on the plan Exhibit 9 to the Lavine farm:—

(*a*) From the drainage system installed during the construction of the plant which drained surface water from a large area.

(*b*) Water brought on the land, used in the process of filling shells and emptied into the drainage system.

(*c*) Water diverted south when the natural watercourse was blocked by the construction of the spur line (after November 12th, 1942).

First, as to the period prior to April 1st, 1943.

1946

PUCKRIN v. THE KING

O'Connor J

It is clear from the agreements (Exhibits 13 and 14) that Defence Industries Limited constructed and operated the plant on behalf of and as agent for His Majesty's Government in the United Kingdom and that the Respondent had only intervened in agreement (Exhibit 13) to consent to the construction of the plant and to agree to lease the land or otherwise to make it available. Under these circumstances it is clear that the Suppliant has no claim under 19 (c) against the Respondent during this period.

The Suppliant is only entitled to claim under section 19 (b) if the plant and spur railroad were "public works" within the meaning of the term in that section.

Section 23 of the Expropriation Act authorizes the payment for property injuriously affected by the construction of any public works, and 19 (b) of the Exchequer Court Act gives this Court jurisdiction to determine those claims:—

19 (b). Every claim against the Crown for damage to property injuriously affected by the construction of any public work.

"Public work" in subsection 19 (b) of the Exchequer Court Act is a public work coming within the definition of "public work" and "public works" in section 2 (g) of the Expropriation Act.

Mignault, J., in *The Wolfe Company* v. *The King* (1), said:—

It appears obvious that the "public work" mentioned in subsection (b)—the construction of which might injuriously affect property and thereby cause damage—is a public work coming within the definition of "public work" and "public works" in section 2 of the Expropriation Act (R.S.C. ch. 143), to which Act subsections (a) and (b) of section 20 of the Exchequer Court Act are properly referable. It is noticeable that no definition of a public work is contained in the latter statute, and I cannot doubt that the public work referred to in subsection (b) is the public work contemplated in the Expropriation Act, for we find, in sections 22, 25, 26 and 30 of the Expropriation Act, the very words, *property injuriously affected by the construction of any public work*, which are in subsection (b), which property, so affected, is a subject for compensation.

In *The King* v. *Dubois* (2), Duff C.J., in quoting the judgment of Mignault, J., in *Wolfe* v. *The King* (*supra*), said:—

Indeed, he (Mr. Justice Mignault) expressly holds that its (public work) scope is limited by the definition in the Expropriation Act.

(1) (1921) 63 S.C.R., at 155. (2) (1935) S.C.R., at 396.

"Public works" are defined in the Expropriation Act as follows:—

2. (g). "Public work" or "public works" means and includes the dams, hydraulic works, hydraulic privileges, harbours, wharfs, piers, docks and works for improving the navigation of any water, the light-houses and beacons, the slides, dams, piers, booms and other works for facilitating the transmission of timber, the roads and bridges, the public buildings, the telegraph lines. Government railways, canals, locks, dry-docks, fortifications and other works of defence, and all other property, which now belong to Canada, and also the works and properties acquired, constructed, extended, enlarged, repaired or improved at the expense of Canada, or for the acquisition, construction repairing, extending, enlarging or improving of which any public moneys are voted and appropriated by Parliament, and every work required for any such purpose, but not any work for which the money is appropriated as a subsidy only.

The plant and spur did not "belong to Canada" and were not acquired or constructed at the expense of Canada, nor for the acquisition or construction of them was any public money voted and appropriated by Parliament until April 1st, 1943.

I hold that neither the plant nor the spur railroad were, prior to April 1st, 1943, "public works" within the meaning of that term in subsection 19 (b) and that the Suppliant is not entitled to the relief claimed (4) for damages during that period.

Nor can the Suppliant succeed in a claim for injurious affection by reason of user in that the water was brought on artificially, and, after being used in processing of shells, was allowed to drain onto the Lavine farm.

When the plant was constructed no part of the Suppliant's leasehold was taken. And it is clear that when no land is taken a claim for injurious affection by reason of user cannot be made. See 8th edition Cripps on Compensation, p. 221.

While part of the Suppliant's leasehold was taken for the spur line, no claim is made for injurious affection by reason of user, i.e., the operation of the railroad which took place on the leasehold taken.

Second, as to the period on or after the 1st April, 1943.

The plant had been transferred to the Respondent and was a "public work" within subsection 19 (b) because it had been acquired at the "expense of Canada".

1946

PUCKRIN v. THE KING

O'Connor J.

It was being operated by Defence Industries limited on behalf of and as the agent of the Respondent.

Water from all three sources flowed through the ditch "X" onto the land of the Suppliant. The flooding undoubtedly caused damage, not to the extent claimed by the Suppliant, but in the sum of $100.00 per year according to the evidence of Mr. McNeil, which I accept.

There was no construction of public works on or after that date so there can be no claim under subsection 19 (b).

And as no land was then taken from the Suppliant, he cannot claim for injurious affection by reason of user.

This leaves only one further question as to whether the damage to his property resulted from the negligence of an officer or servant of the Crown while acting within the scope of his employment under subsection 19 (c).

This, in turn, depends on whether Defence Industries Limited was a servant of the Crown within the meaning of that term in subsection 19 (c).

In the preamble to the agreement (Exhibit 14) there is set out:—

> Whereas the Government desires the Company to undertake on behalf of and as the agent of the Government, the operation, management and maintenance of the plant and the Company is willing so to do.

And the agreement then provides:—

> 4. *OPERATION OF PLANT.* It is hereby agreed that the Company shall operate, manage and maintain the plant for and on behalf of the Government, and that the Company shall commence operation of the plant as soon as possible.
>
> 5. *SUPERVISION, MANAGEMENT, ETC.* The Company shall, subject to such supervision, direction and control as the Minister may from time to time in writing advise the Company that he desires to exercise, be at liberty to adopt all methods and to do all acts and things that it shall consider necessary or advisable in connection with the proper operation, management and maintenance of the plant, including the hiring and discharging of all employees and the purchase of all necessary materials except such materials as may be supplied by the Government; provided always that the Company shall not, without the prior approval of the Minister, make advance purchases of materials in excess of the quantities fairly estimated to be necessary for the full operation of the plant during any three months' period. The Company shall furnish to the Minister such reports as the Minister may request from time to time in connection with the operation, management and maintenance of the plant.

It is quite clear from the agreement that Defence Industries Limited was the agent of the Respondent.

It was at liberty to adopt all methods and to do all acts and things that it considered necessary and advisable in connection with the proper operation, management and maintenance of the plant, and it was paid under the agreement a fixed fee for its services. It was subject, however, to such supervision, direction and control as the Minister (as agent of the Government) desired to exercise. Therefore, at any moment the Government could exercise complete supervision, direction and control.

The test to be generally applied in deciding whether a man is a servant or an independent contractor is laid down in *Performing Right Society* v. *Mitchell & Booker (Palais de Danse), Ltd.* (1):—

> It seems, however, reasonably clear that the final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of detailed control over the person alleged to be a servant. This circumstance is of course one only of several to be considered, but it is usually of vital importance. The point is put well in Sir Frederick Pollock's *Law of Torts,* 12th ed., pp., 79 and 80: "The relation of master and servant exists only between persons of whom the one has the order and control of the work done by the other. A master is one who not only prescribes to the workman the end of his work, but directs, or any moment may direct, the means also, or, as it has been put, 'retains the power of controlling the work'"—see *per* Crompton, J., in *Sadler* v. *Henlock* ((1855) 24 L.J.Q.B. 138).

Under this agreement the Government retained the power of controlling the work and could at any moment direct the "means also".

The same test is also the proper one as to when a man is that particular class of agent defined as servant:—

> But while the appellant had the right to take the work out of Sinclair's hands, it had not the right to say that he was to continue the work and direct him during the continuance of it. In thus paraphrasing another extract from the judgment in the *Performing Rights* case ((1924) 1 K.B., 762), I have not overlooked the fact that McCardie, J., was there considering the test to be applied in deciding whether a man is a servant or an independent contractor, but I think the test is also the proper one as to when a man is that particular class of agent defined as servant. Kerwin, J., in *T. G. Bright & Company Limited* v. *Kerr* (2).

After applying this test I reach the conclusion that Defence Industries Limited was that particular class of agent defined as a servant.

(1) (1924) 93 L.J.K.B., at 306. (2) (1939) S.C.R., at 73.

1946

PUCKRIN v. THE KING

O'Connor J.

But is that particular class of agent defined as a servant, a servant within the meaning of that term in section 19 (c)?

The term "officer or servant of the Crown" in section 19 (c) was considered in *McArthur* v. *The King* (1). Thorson, P., held that the term must not be construed apart from its context or without regard to the origin of the statutory enactment in which it appears and the judicial history of such enactment. After reviewing the judicial history of the enactment, he reached this conclusion, page 113:—

> While the doctrine of employer's liability became thus fully applicable to the Crown in respect of the tort of negligence, by virtue of the 1938 amendment of the statute, and a great extension of the field of the liability of the Crown for the negligence of its officers or servants resulted in consequence thereof, the amendment had no further effect. The officers or servants for whose negligence the Crown was made responsible were still the kind or class of officers or servants to whom the doctrine of employer's liability would apply if the employer were some person other than the Crown, that is to say, employees of the Government in the real sense of the term, coming within the general concept of the relationship of master and servant as it is ordinarily understood, with full freedom of action to each party to the relationship, persons of the same kind or class as public companies or individuals could have as their officers or servants, in other words, civilian servants or employees of the government appointed or hired by it to carry out the regular purposes of government.

Page 114:—

> Before the Crown should be held responsible for the negligence of such persons to whom the doctrine of employer's liability, as understood between subject and subject, would not apply, and where the relationship of the parties is so different from that of master and servant or employer and employee, would require language in the statute of the clearest and most explicit kind. Any such far reaching extension of the liability of the Crown would have to be stated in the statute in express terms. In the absence of such express statutory terms, the Court is not justified in including within the term "officer or servant of the Crown", which by judicial definition has become synonymous with the term "servant or employee of the government", persons whose status is fundamentally different from that of government servants or employees.

In this case the relationship between the Respondent and Defence Industries Limited is so different from that of master and servant or employer and employee that it would require language in the statute of the clearest and most explicit kind before the Respondent should be held responsible.

(1) (1943) Ex. C.R. 77.

To include that particular class of agent defined as a servant within the term "officer or servant" in section 19 (c) would be to enlarge the statutory term without justification. If Parliament had intended this, the wording of the section would have been similar to that of section (26) (1) of the Minister of Transport Act (1919) 9 and 10, George V, (United Kingdom) chapter 50:—

> 26(1). The Minister may sue and be sued in respect of matters, whether relating to contract, tort or otherwise . . . . . and shall be responsible for the acts and defaults of the officers and servants *and agents* of the Ministry in like manner and to the like extent *as if they were his servants,* and costs may be awarded to or against the Minister.

The rules of construction do not permit any expansion of the term "officer or servant of the Crown" and as Thorson, P., pointed out in *McArthur* v. *The King supra,* an examination of the judicial decisions of section 19 (c) show how essential it is to determine and keep within the precise limits of the jurisdiction conferred upon the Court by this section.

I hold that Defence Industries Limited was not a servant of Respondent, within the meaning of that term in section 19 (c), and that the Suppliant is not entitled to the relief claimed from the Respondent for damage caused by flooding on or after the 1st of April, 1943.

I find the total compensation to which the Suppliant is entitled is the sum of $1,125.00 as follows:

Value of the expropriated property as at Nov. 12, 1942.	$ 750.00
Injurious affection due to severance—	
(*a*) leasehold	75.00
(*b*) freehold	300.00
	$1,125.00

And I adjudge that this is the amount of compensation money to which the Suppliant is entitled.

Since the amount of the award exceeds that of the tender by the Respondent, the Suppliant is entitled to interest on this sum at 5% per annum from the 12th November, 1942, to the date of judgment.

1946

PUCKRIN v. THE KING

O'Connor J.

There will be the usual judgment declaring the interest of the Suppliant in the expropriated property, as set out and shown in the description and plan (Exhibit 4), is vested in His Majesty the King.

There will be a declaration 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 $1,125.00, together with interest at 5% per annum, from the 12th of November, 1942.

As to the remainder of the claims of the Suppliant, there will be judgment that he is not entitled to the relief sought by him.

The Suppliant will be entitled to his costs to be taxed.

Judgment accordingly.

1946

Jan. 22 to 25, 28 to 31. Feb. 1, & 4 to 6.

May 20.

BETWEEN:

THE KING ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA, ... } PLAINTIFF;

AND

THE CORPORATION OF THE CITY OF TORONTO, AND THE TORONTO TERMINALS RAILWAY COMPANY, } DEFENDANTS

Expropriation—Expropriation Act R.S.C. 1927, c. 64, ss. 3, 9, 11, 12, 23—Exchequer Court Act R.S.C. 1927, c. 34, s. 47—Expropriation of land already in use and occupation of the Crown—Leasehold interest—"Power to expropriate"—Good faith of Minister not open to review by the Court—Filing of plan by Minister indicates that in his judgment the land is necessary for a public work.

The building housing Postal Station "A" forming the east wing of the Union Station in the City of Toronto is owned by the Plaintiff, the site on which it is erected is owned by defendant City and is held under lease from it by defendant Company which in turn leased it to the Plaintiff in perpetuity. The Crown expropriated the land on which is erected Postal Station "A" together with the "right-of-way in common with all others entitled thereto . . . . . along and over"

certain "drives, roadways, courts, entrances and exits in and about the Union Station reasonably necessary . . . . . ". The action is to have determined the amount of compensation money to be paid each defendant. Defendant Company contends that the Crown has no right of expropriation of the land in question.

Held: That s. 11 of the Expropriation Act confers a power to expropriate land already in the occupation and possession of the Crown and used for the purposes of any public work quite independent of the power contained in s. 3(b) of the Act.

2. That under s. 12 of the Act the filing of the plan is deemed to indicate that in the Minister's judgment the land is necessary for the purpose of a public work. The Minister having so acted cannot be said not to have acted in good faith and his judgment is not open to review by the Court.

3. That the owner of expropriated property is to be compensated for the loss of the value of such property resulting from its expropriation by receiving its equivalent value in money. *The King* v. *W. D. Morris Realty Limited* (1943) Ex. C.R. 140, followed.

4. That where property is rented for the use to which it is best adapted, the actual rent received, capitalized at the rate which local custom adopts for the purpose, may be considered as a basis to calculate the value of the land to the owner.

5. That when land subject to a lease is expropriated the value of the tenancy is considered to be the present value of the difference between the rental paid by the tenant, and the rental that the property is worth, for the unexpired portion of the lease, and the value of the right of renewal is not to be considered.

INFORMATION exhibited by the Attorney-General of Canada to have the amount of compensation money to be paid for certain expropriated property in the City of Toronto determined by the Court.

The action was tried before the Honourable Mr. Justice O'Connor, at Toronto.

J. W. Pickup, K.C. and *W. R. Jackett* for plaintiff.

C. F. H. Carson, K.C., J. P. Pratt, K.C. and *W. G. Gray* for defendant Toronto Terminals Railway Company.

G. W. Mason, K.C. and *F. A. A. Campbell, K.C.* for defendant City of Toronto.

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

1946

THE KING v. THE CITY OF TORONTO.

O'Connor J.

O'Connor J. now (May 20, 1946) delivered the following judgment:

The Information filed on the 15th day of February, 1945, exhibited by the Attorney-General herein shows that the property described in the Information was taken under the provisions and authority of the Expropriation Act, 1927, R.S.C., chapter 64, for the purposes of the public works of Canada, and that a plan and description thereof were deposited of record in the office of the Registrar for Deeds for the Registry Division of the City of Toronto, in the County of York, in the Province of Ontario, on the 27th day of September, 1939.

An amended description and plan were filed on the 12th day of January, 1946, wherein the words "the lessor and" were deleted from the description of the right-of-way expropriated.

Under section 23 of the same Act the compensation money, adjudged for the expropriated property, stands in the stead of such property and any claim to such land is converted into a claim to such compensation money.

By the Information the plaintiff offered to pay to the defendant, The Corporation of the City of Toronto, herein referred to as the City, the sum of $275,000.00, and to the defendant, The Toronto Terminals Railway Company, herein referred to as the Company, $39,912.00 in full satisfaction and discharge of all claims by the defendants. In the Statement of Defence the defendant City claimed as damages the sum of $450,196.00, and during the trial, pursuant to leave, this was amended to $550,196.00, together with a sum for compulsory taking and a sum for interest. The defendant Company claims the sum of $121,172.00 for its interest in the land acquired by reason of certain capital expenditures, and the value of its leasehold interest in the said land, estimated by its witness at $74,096.00, together with a sum for compulsory taking and interest.

The defendant Company denied that the plaintiff was entitled to take the lands under the provisions of the Expropriation Act.

The property expropriated in question is the site of Postal Station "A," which forms the east wing of the Union

Station in the City of Toronto, and a right-of-way described in the corrected plan and description and as amended at trial as follows:—

Together with the free and uninterrupted right-of-way in common with all others entitled thereto for persons, animals and vehicles through, along and over such of the courts and driveways between the lands hereinbefore described and Bay and Front streets, respectively, and of the carriage drives, roadways, courts, entrances and exits in and about the new Union Station as may be reasonably necessary for the full enjoyment of the lands hereinbefore described.

The lands on which the Union Station is situated lie between Bay and York streets and south of Front street. The driveways were created by locating the building approximately forty-eight feet back from each of these three streets so that they are between the building and Bay street on the east, Front street on the north and York street on the west. The entrance to the carriage drive is on Bay street and the exit on York street. Both these streets and the land slope from the north to the south. The driveways at the north of the building are fifteen feet below the Front street level and access from Front street to the Postal Station is by a bridge approximately forty feet in width over the driveway. A strip, twenty-five feet in width, extends between Bay and York streets, between the southern boundary of Front street and the northern boundary of the driveway, and forms part of Front street. This was not included in the valuations by any of the witnesses. The plan, Exhibit "M", shows the site of Postal Station "A" coloured red; the driveways coloured green and blue, and the twenty-five foot strip, coloured brown. Photographs, Exhibits 18 and 19, show the entrance to the driveways from Bay street.

By an Order of the Board of Railway Commissioners for Canada No. 358, dated February 23, 1905, Exhibit "A" the Grand Trunk Railway was authorized to expropriate the lands shown in pink on plan, Exhibit "B", to be used only as a Union Station and yard. The Order provided that the Grand Trunk Railway should expend $1,000,000.00 on the building of the Station and pay all compensation to the owners or parties interested in the land expropriated.

Before the Grand Trunk Railway expropriated the land, an agreement dated April 22, 1905, Exhibit "C", was entered into between the Grand Trunk Railway and the

1946

THE KING v. THE CITY OF TORONTO.

O'Connor J.

defendant City, wherein the defendant City agreed that upon the Grand Trunk Railway acquiring the interest of the tenants in the land to be leased, the defendant City would enter into a lease with the Grand Trunk Railway for twenty-one years, renewable in perpetuity. The lease was to bear the date February 23, 1905, and the annual rental for the first term of twenty-one years was fixed at $14,000.00 and at $20,000.00 for the second term of twenty-one years, and thereafter for terms of twenty-one years from time to time forever at such annual rental as "may be agreed upon" or determined by arbitration. The defendant City agreed to make a fixed assessment at $500,000.00 for a period of ten years on the lands and improvements and to close the streets coloured brown on plan, Exhibit "B". The Grand Trunk Railway agreed to indemnify the defendant City from any claims arising from the closing of the streets and from all claims of the lessees, and to take charge of and adjust such claims at its own expense.

The defendant City closed the streets and the Grand Trunk Railway acquired the interest of the tenants.

The defendant City, pursuant to the said agreement, then entered into a lease dated May 31, 1915, with the Grand Trunk Railway, Exhibit "I", for a term of twenty-one years from February 23, 1905, on the terms and conditions contained in the agreement.

The defendant Company was incorporated by an Act of Parliament in 1906; the Grand Trunk Railway and the Canadian Pacific Railway, each, subscribing for one-half the shares in the Company.

By an agreement dated March 5, 1914, Exhibit Z5, between the defendant Company, the Canadian Pacific Railway and the Grand Trunk Railway, the Grand Trunk Railway agreed that upon the request of the defendant Company, it would sell, assign, transfer and convey to the defendant Company all right, title and interest of the Grand Trunk Railway in the lands, property and facilities in and to the Union Station for the sum of $1,375,658.10.

The defendant Company paid the Grand Trunk Railway $984,714.32, particulars of which are contained in Exhibits Z11, Z12 and Z17, and are summarized on plan, Exhibit Z16.

By an assignment dated May 31, 1915, Exhibit "J", the Grand Trunk Railway assigned the lease from the defendant City, Exhibit "I", to the defendant Company.

By an indenture dated September 15, 1915, Exhibit "L", the defendant Company leased the land and right-of-way, the subject matter of these proceedings, to the plaintiff for a term of twenty-one years, from the 1st September, 1915, at an annual rental of $17,000.00; and the plaintiff covenanted to pay all taxes assessed against the property during the term of the lease. The lease was renewable for further periods of twenty-one years in perpetuity, and the plaintiff covenanted to take a new term of the premises for a further term of twenty-one years, and the lessor covenanted to grant such renewals at such rental per annum as the premises shall then be worth, exclusive of any buildings placed thereon by the lessee. It was further provided that such rental, if not agreed upon, was to be determined in accordance with the provisions of the Arbitration Act of the Province of Ontario, by the award of three arbitrators.

It was further provided that the defendant Company at the cost and charges of the plaintiff would erect a building to be used by the plaintiff for postal and other governmental purposes, and that such building should form the eastern wing of the Union Station. The building would be the property of the plaintiff.

Pursuant to the terms of this lease, the plaintiff and the defendant Company entered into a building contract, dated September 15, 1915, Exhibit Z26, and the defendant Company constructed the eastern wing of the Union Station for the plaintiff and the plaintiff took possession and has remained in occupation thereof. The position of the buildings on the land is outlined in red as shown on plan, Exhibit "Q". A canopy extends eight feet two inches over the driveway on the east side of the building, and a cornice projects beyond the face of the wall over the driveways on both the north and east sides of the building.

On March 31, 1930, the defendant City entered into the first renewal of the lease with the defendant Company, Exhibit "O", pursuant to the provisions of the original lease, Exhibit "I", and of the original agreement. This

1946

THE KING v. THE CITY OF TORONTO.

O'Connor J.

lease was for a term of twenty-one years from February 23, 1926, and terminating on February 22, 1947. The annual rental was fixed at $20,000.00 and the lease provided for renewal in accordance with the terms of the original agreement.

The lease from the defendant Company to the plaintiff, Exhibit "L", ended on August 31, 1935, and negotiations took place as to the rental in the renewal lease and these negotiations continued for a number of years.

After August 31, 1935, the defendant Company sent accounts to the plaintiff for the rental on an increased basis. The plaintiff continued to pay and the defendant Company to accept such payments on the basis of $17,000.00 per annum, plus taxes. and this continued up until the date of the expropriation on September 27, 1939, which was authorized by Order in Council P.C. 1908, dated July 15, 1939, Exhibit "R".

It was admitted by counsel that the defendant Company had paid the full rent due under its lease from the defendant City up to February 22, 1940.

The defendant Company by its Statement of Defence denies that the plaintiff was entitled to take or that the lands in question were taken under the provisions of the Expropriation Act, 1927, R.S.C., chapter 64. This is based on the contention that the power to expropriate is contained in the sections, which are headed "Power to take land etc.," commencing at section 3. And that there is no power to expropriate in section 11, which is in the group commencing at section 9 headed "Expropriation", because these contain the machinery for expropriation and not the power to expropriate:—

> 11. A plan and description of any land at any time in the occupation or possession of His Majesty, and used for the purposes of any public work, may be deposited at any time in like manner and with like effect as herein provided, saving always the lawful claims to compensation of any person interested therein.

Counsel cited the judgment delivered by Viscount Dunedin in *Boland* v. *C.N.R.* (1), in support of his contention that those sections, commencing with section 3, under the heading "Power to take land etc.," contained

(1) (1927) A.C. 198 at 201.

the power to expropriate and that the second group, commencing with section 9, under the heading "Expropriation", contained the machinery.

Based on this, counsel contended that the Minister would have to go to section 3 and specifically 3(b) to get the power to expropriate:—

> 3. The minister may by himself, his engineers, superintendents, agents, workmen and servants,
>
> (*a*) . . . . . .
>
> (*b*) enter upon and take possession of any land, real property, streams, waters and watercourses, the appropriation of which is, in his judgment, necessary for the use, construction, maintenance or repair of the public work, or for obtaining better access thereto.

And that under 3(b) the Minister would have to exercise his judgment and find that the appropriation of the land in question was necessary for the use, construction, etc., of the public work.

And that as the planitiff had the fullest use and possession of the land in question under the lease from the defendant Company, Exhibit "L", which was renewable in perpetuity, there were no facts upon which the Minister could find the appropriation necessary.

And that the judgment of the Minister was open to review because it was not made in good faith, i.e., that there was an ulterior purpose in making the judgment, in that the Crown was endeavouring to end a bargain which it found was not profitable.

Counsel cited the judgment of Viscount Maugham in *Liversidge* v. *Sir John Anderson* (1), in support of his contention that in the absence of "good faith" the judgment of the Minister was open to review.

Section 12 provides that the deposit of the plan and description shall be deemed and taken to have been deposited by the direction and authority of the Minister, and indicating that in his judgment the land therein described is necessary for the purposes of the public work, and that the said plan and description shall not be called in question except by the Minister.

I have considered Mr. Carson's very able argument, but I reach the conclusion that section 11 confers a power to

(1) (1942) A.C. 206 at 210.

1946

THE KING v. THE CITY OF TORONTO.

O'Connor J.

expropriate land in the occupation and possession of the Crown and used for the purposes of any public work quite independent of the powers contained in section 3(b).

The decision in the *Boland* case is not, in my opinion, authority for the submission that those sections, commencing at section 9, contain only the machinery and not the power to expropriate.

There is, of course, underlying section 11, a limitation on the power of the Minister that the land must be required for the purposes of a public work.

3(b) gives the Minister power to enter upon and occupy land, (not then occupied by the Crown and used for the purposes of a public work) the appropriation of which is, in his opinion, necessary for the use etc., of any public work. Section 11, in the group of sections headed "Expropriation", (the action of the state in taking the property rights of individuals on the exercise of its sovereignty), provides both the power and the machinery for expropriating land *already* occupied by the Crown and used for the purposes of a public work.

Land, which was not owned by the Crown, would only be occupied and used for a public work if it were held under a lease or tenancy of some kind. So that Parliament must have intended to give the Minister power to do just what he has done in this case, i.e., expropriate land held by the Crown under a lease.

Then under Section 12, the filing of the plan shall be deemed to indicate that in the Minister's judgment the land is necessary for the purpose of a public work.

Having done what he was expressly authorized to do by Parliament, it cannot be said that he did not act in good faith. That being so his judgment is not open to review by the Court by reason of Section 12.

For these reasons I hold that the plaintiff was entitled to take, and the lands and property have been taken under the provisions of the Expropriation Act.

Section 19(a) of the Exchequer Court Act, 1927, R.S.C., chapter 34, gives this Court jurisdiction to determine every

claim against the Crown for property taken for any public purpose, and under the heading "Rules for Adjudicating upon Claims", Section 47 provides:—

47. The Court, in determining the amount to be paid to any claimant for any land or property taken for the purpose of any public work, or for injury done to any land or property, shall estimate or assess the value or amount thereof at the time when the land or property was taken, or the injury complained of was occasioned.

The general principles for determining the value of expropriated property are well established.

The owner of expropriated property is to be compensated for the loss of the value of such property resulting from its expropriation by receiving its equivalent value in money. *The King* v. *W. D. Morris Realty Limited* (1).

(1) The value to be paid for is the value to the owner as it existed as 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 fall to be determined. *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (2).

But it is not the intrinsic value of the property to the owner, but its market value that must be ascertained. The value of the property to the owner has been aptly described as its "realizable money value" by Thorson, P., in *The King* v. *Edwards* (3):—

And, while the estimate of value must be on the basis of value to the owner, such value means, not an imaginary value in the mind of the owner, but real money value. Nor is it an intrinsic value apart from what the property could possibly be sold for. The value of the property to the owner means its realizable money value, "tested by the imaginary market which would have ruled had the land been exposed for sale," as Lord Dunedin put it in *Cedars Rapids Manufacturing and Power Company* v. *Lacoste*, (1914) A.C. 569 at 576, and cannot be disassociated from the price which a possible purchaser would be willing to pay for it, or exceed the amount which a prudent man, in a position similar to that of the owner, "would have been willing to give for the land sooner than fail to obtain it", as Lord Moulton expressed it in *Pastoral Finance Association, Limited* v. *The Minister*, (1914) A.C. 1083 at 1088.

From these authorities it is clear that the owner is entitled to receive the equivalent value in money of the value to the owner and not to the taker of the property

(1) (1943) Ex. C.R., 140 at 147.
(2) (1914) A.C. 569 at 576.
(3) (1946) Ex. C.R., 311 at 327.

1946

THE KING
v.
THE CITY OF TORONTO.

O'Connor J.

expropriated, with all the advantages present and future which the land possesses. It is the present value, however, of the future advantages that is to be determined.

But the value of the property to the owner means its "realizable money value". It cannot in this case exceed the sum a prudent man in the owner's position would be willing to give for the land sooner than fail to obtain it.

The Order of the Board of Railway Commissioners, Exhibit "A", which authorized the Grand Trunk Railway to expropriate, directed:—

> 2. That the lands taken are to be used only as a passenger station and passenger station yards therefor, and for such purposes as are necessarily or usually connected therewith.

The agreement between the Grand Trunk Railway and the defendant City, Exhibit "C", provided that the terms and provisions of the agreement were to be read and considered as additional to the terms and provisions contained in the Order, Exhibit "A", and a copy of the Order was attached to the agreement.

The agreement was an alternative method of carrying out the Order of the Board of Railway Commissioners.

The lands were, therefore, at the time of the expropriation definitely committted to this user.

The use, however, is undoubtedly a high use.

The opinions expressed as to the market conditions prevailing over a period of years vary greatly. After considering them all, I reach the conclusion that the depression which started in 1929 definitely affected this market by 1931. The real estate market from 1931 to 1936 was inactive. In the area in question the properties were apparently firmly held and the offerings were limited. There was no demand for this type of property during this period, and the only purchases were made by tenants or adjoining owners. No real market existed until 1936, but commencing at that time the market developed. The improvement, however, was a very gradual one up until 1942, when the war caused a sharp demand for certain types of property. There never was a sharp demand for property in the area in question, but the area reflected to some extent the improvement in other areas. While the market very

gradually and very slowly improved, there was not much difference between the conditions that existed in 1936 and those existing in 1939.

The conditions existing in 1939, however, were not similar to those existing in 1927 and 1928.

The assessment of the property expropriated is of no value. First because assessment is not proof of value to the owner, although it may afford some check against high valuations and claims, and secondly there was no assessment of the site and of the rights-of-way expropriated as such until after the property had been expropriated. The assessment up to the time of the expropriation had, of course, been of the various parcels of land, one forming the site and another of the lands which are now subject to the right-of-way.

The assessment of the whole area of the Station lands contained in the lease from the defendant City to the defendant Company was under the original agreement fixed at $500,000.00 from 1905 to 1916. In 1916 for 1917 this was increased to $1,207,485.00 and remained at that amount until 1931 when it was increased to $1,707,085.00. In 1937 it was reduced on appeal to $1,651,345.00 and remained at that amount until the expropriation.

The claim of the defendant City, as presented, is:—

(1) for damages based on the fact that it will not now be able to lease to the defendant Company that which it leased before the expropriation, and the defendant Company will, therefore, be entitled to a reduction in rent, and

(2) that the defendant City is entitled to the value not only of the site with the right-of-way expropriated, but also to the value of the lands adjoining the site which are subject to the right-of-way as an equivalent for the damages which the defendant City suffered by the expropriation.

The plaintiff's offer is to pay the value of the expropriated lands and property on the basis that the value of the right-of-way is reflected in the value of the site.

In my opinion the defendant City, as the owner in reversion receiving a present income from its land, is

1946

THE KING v. THE CITY OF TORONTO.

O'Connor J.

entitled to the value to it of the lands and property expropriated, calculated by either of the methods set out in *Cripps on Compensation*, 8th ed., page 188.

The plaintiff has expropriated a right-of-way in common with all others entitled thereto, over such of the driveways etc., in and about the new Union Station as may be reasonably necessary for the full enjoyment of the lands described.

The lease, under which the plaintiff has been in possession of the property for many years, contained the same description of the right-of-way, that is, a right-of-way reasonably necessary.

The user of the right-of-way, which has taken place over a long period of years, is the best guide in determining what has been expropriated, i.e., a right-of-way reasonably necessary. The construction to be placed on the words "reasonably necessary" can be determined by the past user in the same way that the construction of "used and enjoyed" is determined by the facts existing at the time of the conveyance which contains these words.

The facts as shown by the evidence were these: The past user, over many years, of the courts and driveways had been almost exclusively that of the general public in going to and from the Station, and the plaintiff's user had been almost entirely limited to an exclusive use of the 6,548 square feet marked "Post Office teamway" on Exhibit 3, and of the bridge over the northern driveway by which access to the building is obtained on the Front street level.

The right-of-way reasonably necessary is clearly indicated by this past user.

Consideration must also be given to all the circumstances in connection with the right-of-way in attempting to ascertain the value of the property expropriated.

The lands were committed by the Order of the Board of Railway Commissioners No. 358 to the use *only* of a Union Station. The defendant Company prepared the plans and the location by which the driveways were created. The plans and location were approved by the Board of Railway Commissioners on the application of the Grand Trunk Railway upon notice and in the presence of all interested parties, including those of the defendant

Company. It is true that the defendant City did not give formal approval to the location, but it must have been then, and certainly should be now, a matter, in the language of Mr. Carson, counsel for the defendant Company, "of great satisfaction to the defendant City".

The plan of the lower level of the building, Exhibit Z53, shows that this lower level has been expressly designed for these driveways. The design of the lower level and the driveways, in conjunction, greatly facilitate the operation of the Station.

The driveways were created during a horse and buggy age, and in a motor car age it would be extremely difficult, if not impossible, to properly operate a Union Station serving a very large city without these driveways.

The evidence of the experts showed that their valuations were based on the contentions of the parties. The experts, on behalf of the defendant City, who gave evidence, included in their valuations not only the site but the lands adjoining thereto which are subject to the right-of-way. Mr. Bosley, who gave evidence on behalf of the plaintiff, and Mr. Poucher, who gave evidence on behalf of the defendant Company, gave the value of the site with the value of the right-of-ways reflected therein. Mr. McLaughlin, who gave evidence on behalf of the plaintiff, valued the site and then added 10% for the right-of-way. The wide divergence is shown by the following tabulation:—

For the defendant City	
Mr. Edwards	$522,896 00
Mr. Walker	522,896 00
For the defendant Company	
Mr. Poucher	350,000 00
For the plaintiff	
Mr. McLaughlin	320,000 00
Mr. Bosley	310,000 00

These valuations were based primarily on the experience and knowledge of the witnesses and there is no question that each of them is fully qualified, and has had long years of experience in real estate in the City of Toronto. Their valuations were well prepared and their opinions are

1946

THE KING v. THE CITY OF TORONTO.

O'Connor J.

entitled to careful consideration. Their opinions were also based in part on the sales of nearby properties. While their methods of valuing and what they valued differed, and while some of them considered all the sales and others only a few, four of them arrived at a value of $8.00 per square foot for the area, but after reaching that figure they separated.

Messrs. Edwards and Walker then applied that value to the site and the lands adjacent to the site subject to the right-of-way. This is in support of the contention of the defendant City.

Mr. Poucher applied it only to the site with the value of the right-of-way reflected therein, and at $8.00 per square foot valued the property in round figures at $350,-000.00.

Mr. Bosley arrived at $8.00 per square foot on the same basis, i.e., the value of the right-of-way reflected in the value of the site, and came within $3,000.00 of the amount fixed by Mr. Poucher. Mr. Bosley then reduced this amount by 10% on the ground that the site would only have access on the Front street level by a bridge over the driveway, and, also, because the land and Bay street slope from the north to the south.

I see no object to be gained in discussing the individual sales which were taken into account by the valuators, because based on these sales four of the experts arrive at a value of $8.00 per square foot for the area in question, subject, of course, to what I have already pointed out as to the differences between them from there on.

I am of the opinion that the sales in 1927 were made under conditions that were not similar to those made in 1939, nor do I think the sales in 1914, or opinion of values that existed at that time are of any help. Even the sales made in 1934, 1938 and 1942, while they were made, by and large, under similar conditions to those existing in 1939, are not individually of much help. The difficulty of comparing sales, of land abutting on a street with the site and right-of-way expropriated, is obvious. Then the area expropriated is a large one and the question arises as to whether an additional amount should be added to the sale prices of those parcels of land to cover the cost of assembly

or plottage. Mr. Bosley added 10%; Messrs. Poucher and McLaughlin made no actual allowance, but I think that both took the question of plottage into consideration.

Then to make some of the parcels sold comparable with the land expropriated because of the difference in depth, an artificial rule known as the Davis Depth Rule was used by some of the valuators, and I think that all of them at least to some extent took it into account. The accuracy of the Rule was not shown, although it appeared to be helpful.

Two of the three sales, Gage and Gordon McKay, were complicated by buildings and the experts agreed that this made the value of the land alone a debatable question. The Gage sale was clearly low and this was probably due to the fact that the property, in the language of one of the witnesses, was "cluttered up with leases", and possibly to the fact that the sale was made by the executors of a will at the request of beneficiaries that the executor liquidate the assets. The Gordon McKay property was also sold by executors of a will at the request of the beneficiaries. The third sale, Crawley McCracken, was of a vacant lot with a comparable depth, but appeared to have a special value by reason of its particular location. As against that it was shown that a creditor of the owner had pressed to have the sale made at a price lower than that desired by the owner.

After hearing the evidence on these sales I agree with Mr. Bosley's statement that estimating value of property from sales of comparable property is not a matter of arithmetic, but is still one of expert opinion.

While the individual sales are not of much assistance, the cumulative effect is helpful and tends to show that the value of the land expropriated, measured by a consideration of the prices that have been obtained for lands in the immediate area, is $8.00 per square foot.

The question then is whether this rate should be applied to both the site and the land subject to the right-of-way adjoining the site, or to the site alone, on the basis that the value of the right-of-way is reflected in the value of the site.

1946

THE KING v. THE CITY OF TORONTO.

O'Connor J.

Having regard to the fact that the property was at the time of the expropriation committed to the use of a Union Station and that use only, and to the fact that the driveways are essential to the operation of the Station and the use made of them by the general public having business in the Union Station, I come to the conclusion that this rate should not be applied to the whole area. The right-of-way furnishes access to the site and the value of the right-of-way can be properly said to be reflected in the value of the site. On this basis Mr. Poucher's figure of $350,000.00 is close to the mark.

This does not, however, take into account the exclusive use by the plaintiff of the area of 6,548 square feet, and consideration must be given as to the additional value that should be added.

Part of the value of the right-of-way over this area, i.e., in providing access, is already included as "reflected" in the value of the site so that an additional sum of $8.00 per square foot would clearly duplicate values.

Mr. Poucher has placed a value of $5.00 per square foot for the whole Station area, consisting of approximately six acres, including both the valuable land in front and that of less value in the rear.

An additional allowance at $5.00 per square foot would not appear to be unreasonable under the circumstances, making a sum of $32,740.00 or a total value on this basis of $382,740.00.

The rental value can be considered as a basis to calculate the value of the land to the owner. *Earl of Eldon* v. *The North-Eastern Railway Company* (1).

Nichols on Eminent Domain, 2nd., ed., page 1172, states that:—

> But as a safe working rule, if property is rented for the use to which it is best adapted, the actual rent reserved, capitalized at the rate which local custom adopts for the purpose, forms one of the best tests of value . . . . . .

I accept Mr. Poucher's evidence that ground rents in Toronto in 1939 were determined on a basis of 4½%.

In the lease between the plaintiff and the defendant Company entered into in 1915, the rent was fixed at $17,000.00 per year. At the end of twenty-one years in 1936,

(1) (1899) 80 L.T.R., 723.

the use of the right-of-way reasonably necessary for the purpose of the plaintiff, would be well known to both the plaintiff and the defendant Company. When the lease terminated in 1936, negotiations were commenced as to the rental in the renewal lease and extended over a period of years. The defendant Company first requested $22,-155.00 and subsequently reduced the request to $17,600.00. The plaintiff advised the defendant Company that the Government had given very earnest consideration to the proposal but would not pay any increase. On two occasions the plaintiff, in correspondence with the defendant Company, advised the defendant Company of their willingness to renew the lease at $17,000.00, and I think it is a fair assumption that, from this correspondence and from the Order in Council, during the whole period the plaintiff was quite willing to renew at $17,000.00. During the three years from 1936 to 1939, the plaintiff paid at the rate of $17,000.00 a year and the defendant Company accepted the payments although they sent the plaintiff accounts at an increased rental.

The value tested on the basis of the rent paid for twenty-one years under the lease and paid by the plaintiff for three subsequent years up to the expropriation of $17,000.00 on a 4½% basis is approximately $378,000.00.

From the evidence given by the witnesses for the three parties as to value, the rental value on the same basis can be ascertained.

Of the witnesses for the plaintiff, Mr. Bosley has valued the property expropriated at $310,000.00, and Mr. McLaughlin at $320,000.00. Calculated on the same basis this would give a rental value at $13,950.00 and $14,400.00, respectively, but this must be discounted by the fact that after leasing the lands for twenty-one years at $17,000.00, the plaintiff offered twice, and was apparently ready during that three-year period, to renew the lease for another twenty-one years at $17,000.00, and actually paid the rent during the three-year period at the rate of $17,000.00 per year after the expiration of the lease.

The evidence of Mr. Poucher on behalf of the defendant Company estimated the value at $350,000.00 and estimated the rental on a 4½% basis at $15,750.00, but this must be

1946

THE KING v. THE CITY OF TORONTO.

O'Connor J.

discounted by the fact that the defendant Company in 1936 demanded $22,155.00 and, although it finally offered to accept $17,600.00, refused during the three-year period to accept $17,000.00 per year because it was not high enough.

The value estimated by the experts on behalf of the defendant City on a 4½% basis would fix the rental value at $23,530.32. In the first place I cannot accept the basis on which the value of the lands, namely $522,896.00, has been arrived at, and secondly the rental value of $23,530.32 is, in my opinion, much too high.

While I hold that the letter from Mr. Farley, Assessment Commissioner of Toronto, Exhibit No. 7, requesting payment of $342,000.00 from the plaintiff as the value of the expropriated property, is admissible, it is not binding on the defendant City and it does not assist me to ascertain the value. Neither does the statement in P.C. 1908, Exhibit "R", in which the Minister of Public Works reports to the Committee of the Privy Council that the figure of $376,-200.00 might be used as a basis for the compensation to be offered, assist me to ascertain the value; neither is proof of value to the owner.

I have already summarized the general principles as laid down by the authorities. Their application to this particular property, under all the circumstances, is not an easy matter.

I have, however, carefully considered the evidence before me and particularly the evidence of the experts, and I find that the value of the expropriated property as at September 27, 1939, was $380,000.00, and that the rental value at the date of the expropriation, September 27, 1939, was $17,100.00.

Counsel for all parties have agreed that the defendant Company is entitled, in any event, to the present value of the difference between the rental value of the property expropriated and the proportionate share of the rent of that property to the rent reserved in the lease for the whole of the property from the defendant City to the defendant Company between the date of the expropriation, September 27, 1939, and the date upon which the existing lease between the defendant City and the defendant

Company falls in, namely February 23, 1947. Counsel for all parties have agreed that the value of the defendant Company's right of renewal is not to be taken into consideration for the reason set out by the Court of Appeal in the Province of Ontario, *City of Toronto* v. *McPhedran*, (1), Riddell, J.,—

> Theoretically, as well as practically, the method of the city is erroneous —theoretically the method of the tenant is wrong in that it fails to take into consideration the value of the tenant's right of renewal. But practically this right may well be neglected: as upon a renewal we must consider that the full rental value will be exacted by the University. The possibility of increase or decrease of rental value after renewal is too remote to be considered in practice.

The method of determining the value, as outlined, is described in *Cripps on Compensation,* 8th ed., page 189, and described by Middleton, J., in the *McPhedran* case at page 92:—

> The true solution of the problem is that indicated in cases where land subject to a lease is expropriated. There the value of the tenancy is always considered to be the present value of the difference between the rental paid by the tenant, and the rental that the property is worth, for the unexpired portion of the lease.

I have already held that the rental value of the property expropriated is $17,100.00 and the rate to be applied is 4½%. The rental between the defendant City and defendant Company for the whole of the property is $20,000.00. This leaves the question of what proportion the rent of the expropriated property bears to this rent. Mr. Poucher estimated the proportion at 20% and Mr. Edwards at 27%. After considering the values and the area and all the factors to be taken into account, I fix the proportion at 22%, and the proportion of the rent is, therefore, $4,400.00. The annual value of the leasehold interest of the defendant Company is $12,700.00, and the present value of $12,700.00 per annum as of September 27, 1939, to February 23, 1947, on a 4½% basis, is $78,606.00.

The defendant Company paid the full rental under its lease to the defendant City up to February 22, 1940. After the expropriation the rent should have been apportioned between the defendants. My finding assumes that this will be done and I have not taken into account any arrangements made between the defendants.

(1) (1923) 54 O.L.R. 87 at 91.

1946

THE KING
v.
THE CITY OF TORONTO.

O'Connor J.

The present value of its land to the defendant City, as the owner of the reversionary interest which is receiving a present benefit, may be calculated in the following method, described in *Cripps on Compensation,* 8th ed., page 188. The present value of an annuity of $4,400.00 a year for the period from the expropriation 27th September 1939 to 23rd February, 1947, on a 4½% basis equals $27,234.00 and to this is added the value of an annuity of $17,100.00 in perpetuity, deferred for the same period 27th September, 1939 to 23rd February, 1947 equals $274,160.00 making a total of $301,394.00.

Counsel for the defendant Company claims a further interest in the land by reason of certain capital expenditures made by the Company. This contention is based on the fact that the Grand Trunk Railway by reason of the expropriation of the various leaseholds that existed in 1905, and its expenditures in connection therewith, acquired an interest in the property which was never lost, and that this interest was transferred to the defendant Company for value, and that the defendant Company is entitled to compensation for such interest in the property expropriated. This claim is in addition to the defendant Company's claim for its interest in the land as lessee under the lease from the defendant City.

Counsel for the defendant Company submitted that the agreement with the defendant City, Exhibit "C", contemplated and recognized the outstanding interest of the tenants and expressly provided for the Grand Trunk Railway to acquire that interest. So that as a result of the expropriation and agreement, the Grand Trunk Railway acquired an interest in the land itself to the extent of its capital payments to the tenants and this created an estate in the land which was never lost. The Grand Trunk Railway in turn transferred this interest to the defendant Company. The cost of acquiring this estate plus rent, interest and taxes to the date of transfer to the defendant Company was approximately $968,000.00, and this was paid by the defendant Company to the Grand Trunk Railway. Mr. Poucher estimated that of this sum, $121,-172.00 was attributable to the site and the lands adjoining the site which are subject to the right-of-way, and it is

this sum that the defendant Company claims as compensation for the interest obtained in this manner in the land.

Pursuant to the agreement, the Grand Trunk Railway acquired the interests of the tenants. It then stood in the place of these tenants in respect to the property.

And after it had acquired the interests of the tenants, the Grand Trunk Railway obtained from the defendant City a new lease for twenty-one years, so that on the argument advanced, the Grand Trunk Railway held and has continued to hold two distinct concurrent leasehold interests in the property at the same time.

I reach the conclusion that the acceptance of the lease from the defendant City to the defendant Company implied a surrender of the existing leasehold interest and operated as a surrender thereof by the act and operation of law.

This is set out and the reasons why it is so in *Woodfall's Law of Landlord and Tenant,* 24th ed., page 897:—

> Surrenders by "act and operation of law", or implied surrenders, are excepted from the requirement of a deed (Law of Property Act, 1925, s. 52). Of this sort are surrenders created by the acceptance of a new lease from the reversioner either to begin presently, or at any time during the continuance of the first lease; for the acceptance of a valid new lease implies a surrender of the existing lease, and operates as a surrender thereof by act and operation of law, but not if the second lease be void or voidable, or if there be a mere agreement for a future lease, and not an actual demise. The reason why such acceptance of a new lease operates as a surrender of the first is, because the lessee, by accepting the new lease, has been party to an act, the validity of which he is afterwards estopped from disputing, and which would not be valid if the first lease continued to exist, for he would be estopped from saying that the lessor had not power to make the new lease; and as the lessor could not grant the new lease until the first lease was surrendered, the acceptance of the new lease is of itself a surrender of the first.

Therefore, the Grand Trunk Railway held no interest or estate in the land by reason of these expenditures after it obtained the new lease from the defendant City, and there was nothing that it could transfer to the defendant Company.

I hold that the defendant Company is not entitled to compensation for such interest.

This is not, in my opinion, a case where an allowance should be made for compulsory taking.

1946

THE KING v. THE CITY OF TORONTO.

O'Connor J.

There will, therefore, be judgment declaring that the lands and property described in paragraph 2 of the Information as amended, are vested in His Majesty the King, and that subject to the usual conditions as to necessary releases and discharges of claims, the amount of compensation money to which the defendant Company is entitled, is the sum of $78,606.00, and the amount to which the defendant City is entitled is the sum of $301,394.00. As the award in each case is greater than the sum tendered by the plaintiff, I hold the defendants are entitled to interest at the rate of 5% per annum on the respective amounts awarded, from September 27, 1939, to the date of judgment.

Each of the defendants is entitled to its costs.

Judgment accordingly.

1944

Sep. 7.

1946

Jun. 25.

BETWEEN:

THE ECONOMIC TRUST COMPANY .. APPELLANT,

AND

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

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, s-6 (b)—Distinction between capital loss and loss in an operation of business or in carrying out a scheme of profit making—Distinction between fixed and circulating capital—Loss on sale of shares in course of business deductible.

Appellant was incorporated by a private act and had power to purchase and resell mortgages, debentures, bonds and capital stocks. It did not operate as a trust company in that it did not administer estates or act as executor, but it managed investments for its clients. It also bought and sold securities on its own account with a view to making a profit thereon. In 1941 it sold certain shares and sustained a loss thereon which it sought to deduct as a loss incurred in the course of its business. The claim for deduction was disallowed on the ground that it was a capital loss within the meaning of section 6 (*b*) of the Act.

Held: That the loss made by the appellant in 1941 was incurred in the ordinary course of its business as dealer in securities, that it must be considered as a loss of profit and not as capital loss, and that the appellant was justified in deducting this loss from its profits for the year 1941.

APPEAL under the provisions of the Income War Tax Act.

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

H. G. Harvey Smith for appellant.

Ward Hollands, K.C. and *A. A. McGrory* for respondent.

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

Angers J. now (June 25, 1946) delivered the following judgment:

This is an appeal under sections 58 and following of the Income War Tax Act, 1917, and amendments thereto, from the assessment of the appellant, dated September 19, 1942, whereby a tax in the sum of $312.11 was levied in respect of income tax for the year 1941.

The appellant was incorporated by a private act of the legislature of the Province of Manitoba intituled An act to incorporate "The Economic Trust Company" assented to on February 26, 1908, being chapter 76 of 7-8 Edward VII.

In its return of income and excess profits tax for the fiscal year ended December 31, 1941, bearing date April 30, 1942, the appellant showed that there was no income taxable.

A notice of assessment was mailed by the Commissioner of Income Tax to the appellant on September 19, 1942, showing a taxable income of $1,733.93 an income tax at 18% thereon amounting to $312.11 and interest of $6.90 to October 19, 1942, date of payment.

A notice of appeal dated October 16, 1942, was sent to The Minister of National Revenue by appellant's solicitors. This notice, after stating that by its act of incorporation very wide powers were given to the appellant company, refers particularly to section 13 of which the following may be quoted:

> It shall be lawful for the company to acquire, by purchase or otherwise, mortgages upon real estate and debentures of municipal or other corporations, or school districts, and bonds, debentures or capital stock of any incorporated company, and to resell the same, and to invest any moneys forming part of their capital or reserve, or accumulated profits,

1946

THE ECONOMIC TRUST COMPANY v. MINISTER OF NATIONAL REVENUE

Angers J.

in such securities, real and personal, and to mortgage sell or otherwise dispose of the same, or any part thereof. and to re-invest the proceeds, as the directors may from time to time deem expedient.

The notice of appeal then relates that prior to the taxation year 1941 the Company had acquired 100 shares without par value of Canadian Northern Power Corporation Limited, 37 shares without par value of Carnegie Finance and Investment Company Limited and 75 shares without par value of Imperial Oil Limited, all of which were sold during the year 1941, resulting in a loss of $2,607.92. The notice goes on to say that the Company regards and has treated this amount of $2,607.92 as a loss incurred in its operations and accordingly has carried it into its balance sheets as a loss, reducing its net profit for the year 1941 to $557.39. The notice then states that the sum of $1,431.38 comprises dividends on stocks of Canadian companies and is not subject to payment of income tax in the hands of the appellant and that the latter therefore had no income subject to taxation in the year 1941.

The notice of appeal concludes thus:

The Assessment appealed from proceeds on the assumption that the item of $2,607.92 is not deductible from income.

The Economic Trust Company appeals from the foregoing assessment on the ground that the loss, in the sum of $2,607.92 was incurred by the Company as an operating loss of the business of the Company under the powers and authorities contained in and conferred by its Act of Incorporation.

That such loss is not a capital loss, but a loss in operations resulting from the normal business of the Company in exercise of the powers given to it under section 13 quoted above.

That for the Taxatoin year 1936 the Company's income tax return showed a profit made on the sale of bonds, which profit was included in its taxable income, and for which profit the Company was assessed and paid income tax.

That for the Taxation year 1936 the Company's income tax return showed a profit on the sale of bonds and a loss on the sale of real estate, both of which were accepted as proper by the taxing authority and were allowed, and the Company was not assessed for income tax for that year.

The decision of the Minister of National Revenue, dated February 3rd, 1944, affirming the assessment, contains (inter alia) the following statements:

The Honourable the Minister of National Revenue having duly considered the facts as set forth in the Notice of Appeal and matters thereto relating hereby affirms the said Assessment on the ground that the loss claimed by the taxpayer as a deduction from its income was properly disallowed for Income Tax purposes under and by reason of the

provisions of Section 6 (b) of the Act and on these and related grounds and other provisions of the Income War Tax Act in that respect made and provided the Assessment is affirmed.

Notice of such decision is hereby given pursuant to Section 59 of the Act and is based on the facts presently before the Minister.

The appellant dissatisfied with the decision of the Minister, in accordance with section 60 of the Act mailed to the latter a notice of dissatisfaction in which it recapitulated the facts, statutory provisions and reasons which it intends to submit to the Court in support of its appeal.

After referring to the act of incorporation of the appellant company and quoting a part of section 13 thereof dealing with the investment of the Company's funds, the appellant repeated the main statements of its notice of appeal adding thereto the following, which seems to me material:

The purchase and resale of securities constitute part of the business of the Appellant and are authorized by its Act of Incorporation and such transactions are engaged in by the Appellant for the purpose of making profits and are acts done in the carrying on or carrying out of its business.

(b) The Economic Trust Company appeals from the foregoing assessment on the ground that the loss, in the sum of $2,607.92 was incurred by the Company as an operating loss of the business of the Company under the powers and authorities contained in and conferred by its Act of Incorporation.

The capital employed by the Appellant in connection with the purchase and resale of the securities in question was not fixed but circulating capital of the Appellant used by it in the normal and ordinary carrying on or carrying out of its business as authorized by Section 13 of its Act of Incorporation.

The Appellant will submit that Section 6 (b) of The Income War Tax Act has no application to the losses in question as the said section applies only to losses of fixed capital and that losses sustained in the ordinary carrying on of the Appellant's business are not affected by the said section.

The Minister in his reply denies the allegations of the notice of appeal and the notice of dissatisfaction in so far as incompatible with the allegations of his decision and affirms the assessment as levied.

Counsel for appellant in opening said that the loss of $2,607.92 for the taxation year 1941, shown in the profit and loss account attached to the appellant's return, arose through the sale of securities referred to in the notice of dissatisfaction and that this loss was deducted from the profits of the Company, which, naturally, were reduced accordingly.

1946

THE ECONOMIC TRUST COMPANY v. MINISTER OF NATIONAL REVENUE

Angers J.

Counsel pointed out that the profit and loss account shows a difference of $3,165.31 between revenue and expenditure and that, when the amount of the loss aforesaid is deducted from this difference, the net profit for this year is reduced to $557.39. He drew the attention of the Court to the fact that against that there are dividends payable to appellant by Canadian companies totalling $1,431.38, altogether exempt from taxation. So, in his view, we have the situation that, after having accepted as a deduction from the profit the loss of $2,607.92 the net profit left to appellant for the year 1941 is $557.39.

Evidence was adduced, a brief resume whereof seems apposite.

Elmer Woods, general manager of Oldfield, Kirby and Gardner Limited, of the City of Winnipeg, and director of the appellant company, testified that Oldfield, Kirby and Gardner Limited manage the appellant company.

Asked to describe the nature of the appellant company Woods made the following statement (p. 6):

> Well, it manages mortgage investments of private clients; it buys mortgages on its own account, stocks or bonds, or other types of securities as permitted to do by the charter. It does not administer estates or act as executor or administrator of estates.

He added that in that respect it is unlike an ordinary trust company.

He declared that the clients' funds are dealt with separately as trustee for the clients and that the company's own funds are kept separate.

He said that the company makes its profits by way of fees in the management of clients' mortgages, interest and dividends from stocks and bonds and gains made on the purchase or sale of the latter.

Dealing with the policy followed by the company in the use of its own funds, Woods set forth the following remarks (p. 8):

> When the Company has funds available we are governed in the use of those funds and the use we will put them to by the condition of the market at that particular time. At certain periods mortgages either were not available, in which case we would seek to purchase stocks or bonds, from which we could get capital appreciation or income as well, or there were periods when we did not think the security market was such that it was attractive to make investments in, and then we would seek out a mortgage market. At times we would have funds available we would not use for mortgages or stocks and bonds, but depending on

the condition existing at the particular time the funds were available, it would depend on how we would use them, and that has gone on—well, prior to my connection with the Company, perhaps twenty years or more.

Later he observed that in the past few years the company has had by far the largest part of its capital invested in stocks and bonds and a small part in mortgages owing to the adverse effect of debt legislation on mortgages in Manitoba.

Asked in what way the debt adjustment legislation would affect his judgment in dealing with mortgages Woods replied (p. 8[a]):

Well, with farm mortgages, under the Farmers Creditors Arrangement Act the Court had the right to reduce the amount owing on the mortgage, in which case you might buy a mortgage and you would think you had security for a certain amount of money, only to find within reasonable time or some time after that the mortgage principal was cut in half; and in the city, on residential property, by debt adjustment legislation, the Debt Adjustment Board had a right to postpone payments over a long period of time, and while they did not have the right to reduce the principal, they had the right to change the terms of a mortgage, which would seriously upset your investment program. In other words, the right of foreclosure was taken away on city property.

He added that mortgages lost their "marketability" feature and that no one wanted them. According to him the mortgagee companies and trust companies have largely switched the use of their capital from mortgages to stocks and bonds.

He declared that the appellant proposed to make money in dealing with various types of securities, through the increase in the market value of the securities it bought and the disposal thereof at a profit.

Woods was asked to tell the reason why the appellant in 1941 sold shares of Canadian Northern Power Corporation, shares of Carnegie Finance and Investment Company Limited and shares of Imperial Oil Limited, all acquired before the taxation year 1941; he gave the following information (p. 11):

I don't think I can answer that question specifically because I don't remember those three particular transactions, but the reason in all cases why securities are sold is because at that particular time we usually have some other security we want to reinvest in that we think has a better opportunity for market appreciation. We may have felt these securities had either reached a price that was as much as they were worth, and something else we had reinvested in had not, or we might have felt at

1946

THE ECONOMIC TRUST COMPANY v. MINISTER OF NATIONAL REVENUE

Angers J.

that time that the prospects for these particular Companies were not bright enough to warrant our continuing to hold the security. But I can't tell you what prompted us in making these sales in that way.

He added that those were the general principles which govern his company in the sale of securities.

In cross-examination Woods said that the appellant does not carry on the business of a trust company but that it has the powers to do so.

He stated that the company acts for clients who entrust their money to it, that it charges them a fee for looking after their affairs and that it derives a profit in carrying on that business.

John D. Reid, chartered accountant, of the firm of John D. Reid & Company, of Winnipeg, auditors for the appellant company since 1936, testified that he is familiar with its books and has examined them. Shown the notice of assessment for the year 1941 mailed to The Economic Trust Company on September 19, 1942 above-mentioned, he said that he studied it and that he prepared the appellant's income tax return for 1941.

It appears from this return, as it did from the company's records according to the witness, that the net income for the fiscal year 1941 was $557.39 and that the dividends received from Canadian companies amounted to $1,431.38.

He stated that he prepared the auditors' report and the profit and loss account filed with the company's income tax return and that he is familiar with these documents.

The profit and loss account shows the revenue of the company for the year 1941 as being $5,650.49 and the expenditure $2,485.18, thus leaving a balance of $3,165.31. The said account further shows a net loss on stocks and bonds sold amounting to $2,607.92, which deducted from the balance of $3,165.31 leaves a net profit of $557.39.

On counsel's request Reid enumerated the items of the revenue, as they appear in the profit and loss account. This enumeration, in my view, was superfluous.

Coming to the item of $2,607.92 for the loss on stocks and bonds sold, Reid shared it as follows: on Dominion of Canada bonds acquired in 1940 a loss of $12.50; on Imperial Oil shares bought in 1937 a loss of $946.50; on shares of Canadian Northern Power Corporation Limited purchased in 1936 a loss of $1,800.25. These losses totalled $2,759.25,

as the witness rightly pointed out. Reid declared that the shares in Carnegie Finance & Investment Company Limited were sold with a profit of $151.33. Subtracting this sum of $151.33 from that of $2,759.25 there remains a net loss of $2,607.92, mentioned as the item deducted in the profit and loss account.

Reid declared that to arrive at the figure of $1,733.93 for the taxable income the Department of National Revenue added to the sum of $557.39 mentioned in the company's return as being the net profit for the year 1941 the amount of the loss on stocks and bonds sold in the sum of $2,607.92 as indicated in the profit and loss account, which makes a total of $3,165.31. Reid said that this is the figure which the Department considered as being the company's net profit up to that point. He stated however that the Department allows a deduction for the dividends from Canadian corporations which totalled $1,431.38, thus reducing the net profit to $1,793.33 shown as being the taxable income in the notice of assessment.

He declared that he studied the books of the company and that he is familiar with the various business transactions therein disclosed. The witness was requested to tell the Court the nature of purchases and sales of securities. On the suggestion of counsel for plaintiff, Reid produced a statement prepared by himself showing the purchases and sales of stocks and bonds in the years 1927 to 1943, with the exception of the years 1930 to 1934. This statement, filed as exhibit 1, is self-explanatory and I do not think that an analysis of it herein would serve any useful purpose, apart from the fact that it would enlarge these already copious notes.

Counsel for appellant produced as exhibit 2 a summary statement of assets of the company for the years 1926 to 1943 inclusive.

This second statement shows a change in the nature of the assets of the company from 1926. For instance the amount of the mortgages in 1926 was $98,809. It decreased gradually until in 1941 it reached a minimum of $11,287. On the other hand in 1926 the common stocks amounted to $50,560 while in 1927 they had fallen down to $1,310 and in 1928 to $765. The statement exhibit 2 shows that in the

1946

THE ECONOMIC TRUST COMPANY v. MINISTER OF NATIONAL REVENUE

Angers J.

years 1929 to 1935 inclusive the company held no common stocks. In 1936 it had $5,160 worth of them and in the following years the amount increased gradually from $16,499 in 1937 to $54,843 in 1941. It discloses that the bonds totalled $25,825 in 1927, $35,450 in 1928, decreased to $9,625 in 1929 and stayed at that figure until 1934, amounted to $16,635 in 1935, $13,327 in 1936, $10,557 in 1937, 1938 and 1939, disappeared totally in 1940 and amounted to $35,407 in 1941. In brief there were in 1941 as assets: $11,287 in mortgages, $10,300 in preferred stocks, $54,843 in common stocks and $35,407 in bonds.

Reid stated that the uses to which the company was putting these funds changed according to its policy and conditions and that it is the same money changing from mortgages to stocks and bonds. He asserted that the money shown in these figures had nothing to do with clients' funds.

He declared that the clients' funds are handled entirely in a trust account, deposited in a separate bank account and entered in separate ledgers.

Asked if the securities sold in 1941 had anything to do with clients' trust funds, Reid replied that they had not, adding that they were the company's own funds.

In cross-examination Reid declared that, as appears in the balance sheet annexed to the return, the clients' funds in 1941 amounted to $310,437.79.

Counsel for respondent said he had no evidence to adduce.

The point at issue is whether the sum of $2,607.92 charged against the revenue as being a loss on stocks and bonds was a capital loss or whether it was a loss incurred in the ordinary course of business. The reason which makes it necessary to elucidate this question is the reliance placed by the respondent on subsection (*b*) of section 6 of the Income War Tax Act, which says:

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

It was submitted by counsel for appellant that practically all the cases reported deal with the taxability of profits and that these cases have mostly been decided on the basis of

the Department of National Revenue seeking to tax profits originating by way of capital appreciation of securities or other assets. Counsel pointed out that this is the general trend of the numerous cases but that the present case is the converse, since it deals with the right of the tax-payer to deduct from his income losses incurred in the sale of securities. It was argued by counsel for appellant that the same principles will apply in determining whether these losses are capital losses or losses incurred in the course of business. Counsel particularly drew the attention of the Court to the fact that, when he refers to these cases the same principles apply for deduction of losses as apply in the taxability of profits.

It was urged on behalf of appellant that it is the first part of section 13 of the Act incorporating The Economic Trust Company which gives the company the power to acquire, by purchase or otherwise, mortgages, bonds, debentures or capital stock of any incorporated company and to sell or otherwise dispose of them and that there is no restriction contained in the Act in that regard, although it is possible that the company is restricted to certain types of securities in accordance with the sections concerning trust companies in the Manitoba Companies Act.

Counsel insisted that the appellant company is by its charter given just as wide powers to acquire and sell securities as an ordinary trading company would have to buy and sell merchandise. He pleaded that these powers were exercised by the company as part of its business with the object of making a profit for itself. In counsel's view that is the main difference between an ordinary trust company's activities and those of the appellant company. He observed that an ordinary trust company manages its clients' affairs and that it derives its income from transfer fees and management fees, particularly the management of estates with which the appellant has nothing to do.

Counsel submitted that the test for deciding whether or not appreciation or losses in the sale of securities become taxable income is a simple one and has been laid down in a great number of cases. He summed up the test sub-

1946

THE ECONOMIC TRUST COMPANY v. MINISTER OF NATIONAL REVENUE

Angers J.

stantially thus: did the losses result from acts done in the carrying on of a business or in an operation of business in carrying out a scheme for profit making?

Counsel relied on various authorities upon which, I believe, it will suffice to comment briefly. I shall refer to them in their order of citation.

Konstam, The Law of Income Tax, 9th ed., where at page 104 the author says:

> Controversy often arises as to whether the net proceeds of sales of investments in securities, landed property and so on are profits of a trade or accretions of capital. The test is, whether or not a trade is carried on in the buying and selling of the investments. Thus, a man who possesses a collection of pictures for his own enjoyment, and who sells one of them to meet his pecuniary necessities—or even because a tempting offer happens to be made to him—is not taxable for the proceeds of the sale; but a picture dealer who has bought to sell again is liable on his net profits.

The author then quotes an extract from the judgment in the case of *Californian Copper Syndicate* v. *Harris* (1); and also an extract from the judgment in the case of *Jones* v. *Leeming* (2). Konstam thereafter adds:

> In practice the line is often difficult to draw. The buying and selling of investments is a necessity of insurance business; and where an insurance company in the course of its trade realises an investment at a larger price than was paid for it, the difference is to be reckoned among its profits; conversely, any loss is to be deducted. An investment company (so named) which had power to vary its investments was taxable on the profits made by realising securities, though these were not distributed as dividend but were credited to capital account, and although the capital account as a whole showed a loss in the year in question; and a bank was taxable on the profits shown as a result of the conversion of National War Bonds held by it.

Counsel for appellant then referred to the case of *Californian Copper Syndicate* v. *Harris (ubi supra)*, mentioned by Konstam, in which Clerk, L.J. expressed the following opinion (p. 165):

> 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 realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands

(1) (1904) 5 T.C. 159, 165. (2) (1930) A.C. 415, 420.

or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax.

What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

Lord Trayner made these observations (p. 167):

I agree with your Lordships that the determination of the Commissioners is right. This is not, in my opinion, the case of a company selling part of its property for a higher price than it had paid for it, and keeping that price as part of its capital, nor a case of a company merely changing the investment of its capital to pecuniary advantage. My reading of the Appellant Company's Articles of Association along with the other statements in the case satisfy me that the sale on which the advantage was gained, in respect of which Income Tax is said to be payable, was a proper trading transaction, one within the Company's power under their Articles, and contemplated as well as authorised by their Articles. I am satisfied that the Appellant Company was formed in order to acquire certain mineral fields or workings—not to work the same themselves for the benefit of the Company, but solely with the view and purpose of reselling the same at a profit. The facts before us all point to this.

Counsel then relied on the remarks of Lord Dunedin in the case of *Commissioner of Taxes* v. *Melbourne Trust Limited* (1), where at page 1010 is quoted a part of the reasons set forth in *Californian Copper Syndicate* v. *Harris* hereinabove reproduced. Following the quotation Lord Dunedin added:

In the present case the whole object of the company was to hold and nurse the securities it held, and to sell them at a profit when convenient occasion presented itself.

At this point counsel pointed out that Elmer Wood declared that the reason why the appellant company bought the securities with which we are concerned and sold them later was for the purpose of making profits and that it would not have been able to carry out this scheme if it had not been for its wide powers under section 13 of the Act of Incorporation.

(1) (1914) A.C. 1001.

1946

THE ECONOMIC TRUST COMPANY v. MINISTER OF NATIONAL REVENUE

Angers J.

Counsel then referred to the decision of the House of Lords in re *Ducker* v. *Rees Roturbo Development Syndicate, Limited* and *Commissioners of Inland Revenue* v. *Rees Roturbo Development Syndicate, Limited* (1) particularly to the opinion expressed by Lord Buckmaster at page 140:

> My Lords, I think it is undesirable in these cases to attempt to repeat in different words a rule or principle which has already been found applicable and has received judicial approval, and I find that in the case of the *Californian Copper Syndicate* v. *Harris* it is declared that in considering a matter similar to the present the test to be applied is whether the amount in dispute was "a gain made in an operation of business in carrying out a scheme for profit-making." That principle was approved in a judgment of the Privy Council in the case of *Commissioner of Taxes* v. *Melbourne Trust,* and it is, I think, the right principle to apply.

Counsel for appellant then referred to Plaxton, Canadian Income Tax Law, 1939 ed., p. 144, where the author states:

> A profit or gain derived from the realization of a capital asset with a view to substituting some other form of investment should be distinguished, therefore, from a profit or gain realized in the course of carrying on a trade or business. If the profit or gain is merely the result of realizing the enhancement of value of an asset, it is a capital accretion and not subject to tax while if it is a profit or gain made in an operation of business in carrying out a scheme for profit making it is income and subject to tax. The line which separates the two classes is difficult to define and each case must be considered according to its facts, the decisive question being whether or not a trade or business is carried on.

There are many cases cited by Plaxton besides those already referred to, which add very little if anything to the subject under examination.

At page 139 of his book Plaxton makes these comments, which are indeed pertinent:

> Operations contemplated and authorized by the Memorandum of Association or Charter of a Company have been held to be operations in the carrying on of the Company's business, even though speculative and isolated transactions. But the mere fact that the power to sell any part of the undertaking and property of the Company is included in the Company's Memorandum of Association, when taken in conjunction with the ultimate sale of the entire assets of the Company to a new company is not conclusive that the company is carrying on the trade of purchasing and selling land.

The author, at page 144, refers to the case of *Californian Copper Syndicate* v. *Harris (ubi supra);* a passage from the judgment therein is hereinabove quoted. The company,

(1) (1928) A.C. 132.

as appears from the report, had been formed for the object of acquiring and reselling mining properties at a profit. Where the company acquired and sold such properties, even though it was a single transaction, it was held to be taxable.

Reference may also be had to the following cases, which have some relevance to the problem at issue: *T. Beynon and Company, Limited v. Ogg* (1); *Gloucester Railway Carriage* and *Wagon Company, Limited* v. *Commissioners of Inland Revenue* (2).

The facts in the case of *T. Beynon and Company, Limited* v. *Ogg* are set forth in the headnote, which is a fair and adequate summary of the decision; it reads thus:

A Company carrying on business as Coal Merchants, Ship and Insurance Brokers, and as sole selling agent for various Colliery Companies, in which latter capacity it is part of its duty to purchase wagons on behalf of its clients, makes a purchase of wagons on its own account as a speculation and subsequently disposes of them at a profit. It was contended that, this transaction being an isolated one, the profit was in the nature of a capital profit on the sale of an investment and should be excluded in computing the liability of the Company to Income Tax.

Held, that the profit realised on this transaction was made in the operation of the Company's business and was properly included in the computation of the Company's profits for assessment under Schedule D.

At page 133 of the report we find this interesting statement by Mr. Justice Sankey:

My attention was called by the Attorney-General to the case of *Californian Copper Syndicate* v. *Harris* 5 Tax Cases, page 159. Having regard to the remarks which were made on that case in the two subsequent cases to which I have been referred, particularly in the case of *Tebrau (Johore) Rubber Syndicate* v. *Farmer* (5 T.C. 658) I am not sure whether the *Californian Copper Syndicate* v. *Harris* is a case which one ought to follow unless one had facts which were nearly identical with the facts in that particular decision. But I think the present position really goes beyond the Californian case. I think that there was evidence here that this transaction was a transaction, and this profit was a profit, made in the operation of the Appellant Company's business. I do not for a moment intend to endeavour to define where the line ought to be drawn. I do not think it is desirable, and I am perfectly satisfied that I am not capable of doing it, but it is perfectly easy to say whether Case A or Case B falls on the one side or the other; and for the reasons which I have endeavoured to give I think that the Commissioners were right in their determination as to which side of the line this case fell, and in the result I must uphold their determination.

(1) (1918) 7 Tax Cases, 125. (2) (1925) A.C. 469.

1946

THE ECONOMIC TRUST COMPANY v. MINISTER OF NATIONAL REVENUE

Angers J.

In the case of *Gloucester Railway Carriage and Wagon Company, Limited* v. *Commissioners of Inland Revenue* the headnote contains a substantial and comprehensive summary of the facts and decision; it is worded as follows:

A company manufactured railway wagons and dealt with them either by selling them (outright or under hire purchase agreements) or by letting them on hire. In the books of the company the wagons owned by the company and let on hire were capitalized at a sum which included a calculated sum added as profit on manufacture and a certain amount was written off the value year by year for depreciation. The company having decided to sell all the wagons used for letting on hire, sold them at sums larger than the sums at which the wagons then stood in the books. In assessing the company to corporation profits tax the surplus obtained from the sale of these wagons was included as a trade profit of the company, and on appeal the Special Commissioners, in affirming the assessment, found that the business of the company was a single business —namely, to make a profit in one way or another out of manufacturing wagons:—

Held, that the surplus in question was not a capital accretion, but was rightly included as a trade profit for the purposes of the corporation profits tax.

Another case referred to is that of *Anderson Logging Company and The King*. The judgment of the Supreme Court of Canada reported in (1925) S.C.R., 45, was subsequently affirmed by the Privy Council, whose decision is found in (1926) A.C., 140.

The headnote in the Supreme Court reports, fair and sufficiently comprehensive, is in the following terms:

Where the powers of a company, incorporated to take over as a going concern a logging business, included the power to acquire timber lands with a view to dealing in them and turning them to account for the profit of the company, and it bought a tract of timber land and sold it at a profit the same is not a capital profit but one derived from the business of the company and as such assessable to income tax under section 36 of the Income and Personal Property Taxation Act (B.C.) 1921, 2nd Sess., (p. 48):

A quotation from the notes of Mr. Justice Duff, as he then was, later Chief Justice of Canada, seems apposite (p. 48):

The principle of these decisions can best be stated for our present purpose in the language of Lord Dunedin in his judgment delivered on behalf of the Judicial Committee, in *Commissioner of Taxes* v. *The Melbourne Trust, Ltd.* (1914, A.C. 1001, at pp. 1009 and 1010).

It is common ground that a company, if a trading company and making profit, is assessable to income tax for that profit . . . . The principle is correctly stated in the Scottish case quoted, *California Copper Syndicate* v. *Harris* (6 F., 894; 5 T.C. 159). It is quite a well settled principle in dealing with questions of income tax that where the owner

of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of schedule D of the Income Tax Act of 1842 assessable to income tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business;

or, in the language of the judgment from which this quotation is made, which follows in sequence after the passage cited:

What is the line which separates the two classes of cases may be difficult to define and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realizing a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

or, in the form adopted by Sankey J.—in *Beynon* v. *Ogg* (1918, 7 T.C. 125, at p. 132)—from the argument of the Attorney General—was the profit in question a profit made in the operatoin of the appellant company's business?

Mr. Justice Duff then adds:

The appellant company is a company incorporated for the purpose of making a profit by carrying on business in various ways including, as already mentioned, by buying timber lands and dealing in them. It is difficult to discover any reason derived from the history of the operations of the company for thinking that in buying these timber limits the company did not envisage the course it actually pursued for turning these limits to account for its profit as at least a possible contingency; and, assuming that the correct inference from the true facts is that the limits were purchased with the intention of turning them to account for profit in any way which might present itself as the most convenient, including the sale of them, the proper conclusion seems to be that the assessor was right in treating this profit as income.

Counsel for appellant further contended that the securities on the sale whereof the loss was incurred constituted circulating capital and not fixed capital and that as such the profits realized thereon were subject to income tax and the loss resulting from their sale was accordingly deductible. Reference was made to Plaxton's work, where at page 147 are the following observations:

A further means of differentiating the two classes is afforded by the distinction drawn by economists between fixed capital (property acquired and intended for retention and employment for the purposes of production) and circulating capital (property acquired or produced with a view to resale or a sale at a profit). As a general rule, the realization of the enhanced value of fixed capital is not assessable as income, whereas a profit or gain made in the turning over of circulating capital is a profit or gain made from carrying on business, and as such is assessable to income tax.

1946

THE ECONOMIC TRUST COMPANY v. MINISTER OF NATIONAL REVENUE

Angers J.

Counsel observed that, if the loss is sustained in circulating capital it may be deducted as a loss for income tax purposes, as not being capital within the meaning of the Act.

Counsel relied on three cases dealing with the difference between fixed and circulating capital: *Ammonia Soda Company, Limited* v. *Chamberlain* (1); *Atherton* v. *British Insulated and Helsby Cables, Limited* (2); *John Smith and Son* v. *Moore* (3).

A brief excerpt from the judgment of Lord Justice Swinfen Eady in the *Ammonia Soda Company, Limited* v. *Chamberlain* case seems to me proper (p. 286):

> The distinction between "fixed" capital and "circulating" capital is not to be found in any of the Companies Acts; it appears to have first found its way into the *Law Reports* in *Lee* v. *Neuchatel Asphalte Co.* (41 Ch. D. 1), where Lindley L.J. in his judgment adopted the expression which had been used by Sir Horace Davey in argument, derived from writers on political economy. It is necessary to consider the sense in which the expressions "fixed capital" and "circulating capital" were used in that case and in *Verner's Case* (1894, 2 Ch. 239). What is fixed capital? That which a company retains, in the shape of assets upon which the subscribed capital has been expended, and which assets either themselves produce income, independent of any further action by the company, or being retained by the company are made use of to produce income or gain profits. A trust company formed to acquire and hold stocks, shares, and securities, and from time to time to divide the dividends and income arising therefrom, is an instance of the former. A manufacturing company acquiring or erecting works with machinery and plant is an instance of the latter. In these cases the capital is fixed in the sense of being invested in assets intended to be retained by the company more or less permanently and used in producing an income. What is circulating capital? It is a portion of the subscribed capital of the company intended to be used by being temporarily parted with and circulated in business, in the form of money, goods or other assets, and which, or the proceeds of which, are intended to return to the company with an increment, and are intended to be used again and again, and to always return with some accretion. Thus the capital with which a trader buys goods circulates; he parts with it, and with the goods bought by it, intending to receive it back again with profit arising from the resale of the goods. A banker lending money to a customer parts with his money, and thus circulates it, hoping and intending to receive it back with interest. He retains, more or less permanently, bank premises in which the money invested becomes fixed capital. It must not, however, be assumed that the division into which capital thus falls is permanent. The language is merely used to describe the purpose to which it is for the time being appropriated.

(1) (1918) L.R. Ch. Div. 266.
(2) (1925) 1 K.B. 421.
(3) (1921) 2 A.C. 13.

At this point of the quotation counsel for appellant submitted that if the purpose is part of the scheme for profit making the capital is what is known as circulating capital.

Lord Justice Swinfen Eady goes on to say:

> This purpose may be changed as often as considered desirable, and as the constitution of the bank may allow. Thus bank premises may be sold, and conversely the money used as circulating capital may be expended in acquiring bank premises. The terms "fixed" and "circulating" are merely terms convenient for describing the purpose to which the capital is for the time being devoted when considering its position in respect to the profits available for dividend. Thus when circulating capital is expended in buying goods which are sold at a profit, or in buying raw materials from which goods are manufactured and sold at a profit, the amount so expended must be charged against, or deducted from, receipts before the amount of any profits can be arrived at. This is quite a truism, but it is necessary to bear it in mind when you are considering what part of current receipts are available for division as profit.

The same principle was adopted in the case of *Atherton* v. *British Insulated and Helsby Cables, Limited* hereinbefore cited. At page 440 of the report we find these comments in the reasons of Lord Justice Scrutton:

> The Attorney-General started with a definition of capital, which I hope I took down correctly. It was: "Any money expended upon a business which is intended to and does result in an asset is capital." The next time the Attorney-General on one side or the other of a revenue case formulates that definition I hope he will look at Swinfen Eady L.J.'s very careful description in the *Ammonia Soda Co.* v. *Chamberlain* (1918, 1 Ch. 266, 286) of the difference between "fixed" capital and "circulating" capital, because I think there is no doubt that circulating capital as defined by Swinfen Eady L.J. would not come within the terms of the Income Tax Act of money to be employed as capital, but it would come within the terms of the Attorney-General's definition. Without professing or intending for a moment to lay down a definition myself, having in my mind Lord Macnaghten's warning not to embarrass business men. I think it is clear that you must add to the words defining "asset" something to show that you are only speaking of assets in the nature of fixed capital. You expend your capital goods to get back a profit, but the fact that you expend the goods or buy the goods does not make the asset which results a capital asset, because it is not fixed capital, but is something which, in the language of Swinfen Eady L.J., is going to be circulated. I think, therefore, to get capital you must have some permanent extension of the business, which results in some sort of asset.

In the case of *John Smith and Son* v. *Moore,* on page 19 of the report *(in fine),* there is a brief comment by Viscount Haldane regarding the line of demarcation between fixed and circulating capital to which reference may be had beneficially.

1946

THE ECONOMIC TRUST COMPANY v. MINISTER OF NATIONAL REVENUE

Angers J.

Counsel for appellant intimated that the principles applicable in deciding whether or not the profits made or the losses incurred in dealing with investments in securities must be regarded as capital losses or income losses have been clearly laid down but he admitted that the line of demarcation is sometimes difficult to draw, adding that one must confront the particular facts of each case with the principles expounded.

It was urged on behalf of appellant that in the present case we are faced with the task of deciding if the business which the company carried on in dealing with securities was a side of its business or a scheme for profit making and that the question will have to be decided on the basis of the evidence, which I may note is elementary, and having regard to the wide powers allotted to the company by its charter.

Counsel for appellant insisted on the fact that the company, in virtue of section 13 of its charter had the right to acquire, by purchase or otherwise, mortgages upon real estate, etc., with which we are not concerned, and bonds, debentures or capital stock of any incorporated company, and to resell the same. He drew a distinction between the powers given to the company by the first part of section 13 of its charter which, according to him, are not ordinarily allotted to a trust company and those provided for by the last part of the section, dealing with investments. It was contended on behalf of appellant that the power to invest offers no interest in the present case, because the company clearly has this power, which is inherent to every trust company.

Counsel for appellant asserted that his client has not actually carried on as a trust company, that it has not administered estates, but that it has acted as a company having on the one side clients' investments held in a trust account and on the other side its own funds used in the purchase of securities. He pointed out the course of trading exercised by the company, which is shown in the statement filed as exhibit 1 and upon which I do not think necessary to make further comments.

Counsel for appellant further pleaded that the transactions disclosed in the evidence were not done by the company for the purpose of nursing along its capital or

retaining it, but were done specifically with a view to realizing profits; that, in other words, the appellant was looking for ways and means of making the largest amount of money for its own benefit. He observed that during the course of its dealings the company purchased and sold many types of securities and that, if this had been done purely with the object of looking after its capital so that it would not lose it, the appellant would not have bought such a variety of securities, but would have invested its funds, as a trust company usually does, in safe securities, as preferred shares of the highest standard and not, to any large extent, in common stocks.

Counsel for appellant referred to *Plaxton (op. cit.)* with regard to the construction applicable to taxing statutes, where at page 5 the author says:

> In considering whether transactions bring the subject within the terms of the taxing Act, the substance rather than the form of the transaction is looked to.

In counsel's view there is no question, according to the evidence, that the substance of the transactions was that the company was engaged in them for the purpose of making a gain or profit and that for this reason they formed a part of the operations of the company's business.

Counsel concluded his remarks by stating that the case of the appellant is that it was given very wide powers by its charter and that pursuant thereto it purchased securities with a view to making a profit out of them. He submitted that subsequently it sold some of these securities and that, if it had sold them at a profit, the profit would have been subject to taxation. He added that in the present case the appellant, instead of selling at a profit, suffered a loss and that using the converse of the cases relied upon the company is entitled to deduct that loss for the purpose of ascertaining the net profit.

Before opening his argument counsel for respondent, Mr. Hollands, referred to the notice of dissatisfaction, particularly to paragraphs 2 and 3 in which the appellant sets forth "that for the taxation year 1936 the company's income tax return showed a profit made on the sale of bonds, which profit was included in its taxable income, and for which profit the company was assessed and paid income

1946

THE ECONOMIC TRUST COMPANY v. MINISTER OF NATIONAL REVENUE

Angers J.

tax" and "that for the taxation year 1937 the company's income tax return showed a profit on the sale of bonds and a loss on the sale of real estate, both of which were accepted as proper by the taxing authority and were allowed, and the company was not assessed for income tax for that year". Counsel intimated that we are only interested in the assessment for the year 1941 and that, whether the Minister made a mistake, there having been no appeal in either year, the present case should be confined to the year 1941. I may say that I agree with counsel's submission, in spite of the fact that the Minister could unquestionably, as I think, have made a re-assessment in virtue of section 55 of the Income War Tax Act and that he did not see fit to do it.

It was urged by counsel that the name of the appellant company is a trust company and that a trust company is bound to have a capital stock to secure the clients dealing with it. He pointed out that under paragraph 3 of its charter the capital stock is fixed at one million dollars, divided into 10,000 shares of $100 each, and that it may be increased to a sum not exceeding two million dollars by a vote of two-thirds in number of the shareholders present or duly represented at any annual meeting or at a special meeting called for that purpose, provided that stock to the amount of $100,000 shall be subscribed and $35,000 paid thereon, before the company shall start operating.

Counsel stated that the objects of the capital did not appear to him to come within the purview of fixed or circulating profit. He added that the company could not perform its obligations unless it had this income.

Counsel observed that in virtue of section 4 of its charter the company has also the power to guarantee any investment made as agent or otherwise and "for and in respect of all or any of the services, duties or trusts hereinbefore (in the act of incorporation) mentioned, to charge and be allowed to collect and receive all proper remuneration and legal and other customary charges, costs and disbursements, with power to advance money to protect any such estate, trust or property entrusted to them . . . "

Reference was made to section 5, which gives to the appellant, among others, the power to act as executor and administrator. I may note that this is a power usually granted to a trust company.

It was argued by Mr. Hollands that section 13 is in the charter for the sole purpose of assisting the company in carrying out its trust agreements and that it is merely auxiliary to the company's main objects and purposes. Counsel intimated that what the appellant has done was not dealing in stocks, buying them and selling them with a view to making a profit, but in fact substituting securities. He pointed out that the purchases over a period of seventeen years totalled only thirty-three, while the sales numbered twenty-three. The least that can be said is that the appellant's business in dealing with stocks was surely not very active. From this state of affairs counsel concluded that the act of incorporation of the appellant limits it to a trust company business.

Counsel stated that a trust company is different from an ordinary company in that it cannot operate unless it has a foundation, which is its capital. He acknowledged that a trust company can substitute its capital for securities, adding that this is what the appellant did.

Mr. Hollands stressed the point that capital is not taxable and that consequently deductions cannot be allowed for any loss thereon.

He owned that he had no quarrel with the cases cited by his opponent, but said that the company was created as a trust company and that its capital was thereby intended to be fixed. He added that its capital is the foundation upon which rests its business, that it is not the business but is merely security to clients and the public so that they may have a recourse should the company fail in its duties.

Counsel referred to *Hatch* v. *Minister of National Revenue* (1). I do not think that this case has any bearing on the present issue.

Mr. McGrory, on behalf of respondent, stated that the Act of incorporation of the appellant enacts a trust company and that it would be a peculiar feature if the company did not have the power to acquire and sell securities, which

(1) (1938) Ex. C.R. 208.

1946

THE ECONOMIC TRUST COMPANY v. MINISTER OF NATIONAL REVENUE

Angers J.

is a power inherent in every company, trust or otherwise. He thought that it is stretching the interpretation of section 13 of the charter, when read in conjunction with the whole Act, to say that the company was incorporated for the purpose of buying and selling securities, which, in his view, is merely an incidental power to invest its capital.

Mr. McGrory pointed out that, when asked the reason why the three sales of stocks which gave rise to the loss had been made, Woods replied that he did not know. On page 11 of his deposition we find in his answer previously quoted the following statement:

> But I can't tell you what prompted us in making these sales in that way.

Counsel suggested that it was a normal change of investment and for no particular reason other than an attractive investment to be made.

Counsel indicated that the stocks in which the appellant invested are all of the revenue bearing type and that everyone paid dividends during the taxation year 1941, even the three which were sold. According to him these stocks were held for investment by the company and any loss incurred in connection therewith would be a capital loss.

Mr. McGrory thought that the marginal note opposite section 13 of the charter: "Investment of Company's funds" is enlightening and that the whole tenor of the section points to a power to invest the company's funds.

In reply Mr. Smith urged that the marginal note opposite section 13 is not of great advantage because the section is definitely split into two parts and because this is where the appellant differs from an ordinary trust company. He emphasized the fact that the company is given two sets of powers, firstly to deal in securities and secondly to make investments. He repeated that the appellant does not carry on as a trust company and that it has given up the most lucrative business of such a company, to wit the administration of estates.

He agreed that a certain amount of capital had to be paid before the company could start in business, but said that what we are concerned with in the present case is

what the capital was used for. He intimated that the expression "fixed capital" has nothing to do with the fact that the amount of it may be fixed by statute. He expressed the opinion that counsel for respondent has misconceived the meaning of the expression "fixed capital", that it is not fixed in the sense that it is governed by statute, that the term has a technical meaning which is clear and that it applies to that portion of the capital of the company which is represented by fixed assets. He added that it is evident that there was a large revolving fund used for a number of purposes and that it cannot be considered as fixed capital. In his opinion the evidence discloses that, when the company bought securities, it looked to an appreciation in their value so that they would yield a profit.

He pointed out that in some of the cases cited it has been held that even isolated transactions may be taxable if they are part of the company's business. He concluded that the mere fact that the company may carry on several enterprises for the purpose of making money does not prevent a particular transaction from being taxable and that conversely under the authority of these cases, if losses are incurred, they are deductible for the purpose of ascertaining the net profit which is taxable.

The foregoing recapitulation of the evidence and argument is long but I thought advisable to give a complete history of the case.

The question arising for determination may be summed up as follows. Is the loss suffered by the appellant in the year 1941 on the sale of stocks and bonds amounting to $2,607.92 a loss of capital or a loss of profit incurred in the ordinary course of business? If it is the first it is not deductible from the gross profits. On the other hand, if it is a loss of profit it may be subtracted from the profits earned by the company during the year in question in order to establish the net taxable profit.

The evidence discloses that the appellant, although called a trust company, did not administer estates and did not act as executor. It dealt in mortgages, bonds and shares

1946

THE ECONOMIC TRUST COMPANY v. MINISTER OF NATIONAL REVENUE

Angers J.

on its own account with a view to earning profits. It purported to make money through the increase in the market value of the securities purchased and resold at a profit.

In the taxing year 1941 the appellant sold the following securities:

Dominion of Canada bonds at a loss of	$ 12.50
Imperial Oil Company shares at a loss of	946.50
Canadian Northern Power Corporation Limited shares at a loss of	1,800.25
	$2,759.25
Carnegie Finance & Investment Company Limited shares at a profit of	151.33
Leaving a net loss of	$2,607.92

This appears in the deposition of J. D. Reid, auditor for the appellant company (pages 17 and 18).

After a careful perusal of the evidence and of the able and exhaustive argument of counsel and an attentive study of the law and the precedents I have reached the conclusion, with some hesitation I must admit, that the loss made by the appellant in 1941 was incurred in the ordinary course of its business as dealer in securities and that it must accordingly be considered as a loss of profit and not as a capital loss. In the circumstances I believe that the appellant was justified in deducting this loss from its profit for the year 1941. The appeal will consequently be maintained, the decision of the Minister set aside and the assessment declared unfounded, null and void.

The appellant will be entitled to its costs.

Judgment accordingly.

BETWEEN:

PURE SPRING COMPANY LIMITED,... APPELLANT,

AND

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

1944
Oct. 2, 3
1946
Aug. 26

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, secs. 6 (a), 6 (2), 59, 65 (2), 66, 75 (2)—Disallowance of excessive expense—Scope and nature of Minister's discretionary power under sec. 6 (2)—Difference between judicial and quasi-judicial decisions—Minister's discretion under sec. 6 (2) not a judicial discretion but an administrative one—Minister's discretionary determination under sec. 6 (2) an administrative act with quasi-legislative effect—Exercise of discretion on proper legal principles—Difference between Minister's discretionary determination under sec. 6 (2) and assessment—No right of appeal from Minister's discretionary determination under sec. 6 (2)—Determination of excessiveness of expense exclusively within discretion of Minister—Limited nature of Court's jurisdiction in respect of sec. 6 (2)—Difference between Minister's discretionary determination under sec. 6 (2) and decision under sec. 59—Minister need not give reasons for discretionary determination under sec. 6 (2)—Presumption of proper exercise of discretion under sec. 6 (2)—Question of fact whether directors' fees wholly, exclusively and necessarily laid out or expended for the purpose of earning the income.

Part of the salary paid to the president and general manager of the appellant was disallowed as a deductible expense by the Commissioner of Income Tax under the authority of sec. 75 (2) and sec. 6 (2) of the Income War Tax Act, as being in excess of what was reasonable or normal expense for the business carried on by it. Under the authority of sec. 6 (*a*) the Commissioner also disallowed the deduction of the directors' fees paid to the president and his three sons as being not exclusively and necessarily laid out or expended for the purpose of earning the income. The amounts disallowed were added as taxable income to the amounts shown on the appellant's returns.

Held: That section 6 (2) brings any expense within the possible purview of the Minister's discretionary power of disallowance.

2. That the Minister's discretion under sec. 6 (2) extends to a determination both of what is reasonable or normal expense for the business carried on by the taxpayer and what is in excess thereof. The test of the correctness of the disallowance of an expense is not whether it is in excess of what is reasonable or normal as a matter of fact but whether it is in excess of what the Minister determines in his discretion to be reasonable or normal. The standard of correctness is the opinion of the Minister; it is a subjective one belonging exclusively to him; the Court has no right, in the absence of specific statutory authority, to measure it by any standard of its own or by any objective standard such as that of the "ideal reasonable man". Whether an expense is excessive or not is not a question of fact; it is made dependent on the Minister's discretionary opinion.

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

3. That the Minister's discretion under section 6 (2) is not a judicial discretion but an administrative one.

4. That the Minister's discretionary determination under section 6 (2) is not a judicial decision but an administrative act with quasi-legislative effect done in the course of administration and definition of public policy. *Board of Education* v. *Rice* ((1911) A.C. 179) and *Local Government Board* v. *Arlidge* ((1915) A.C. 120) distinguished.

5. That the Minister's discretionary determination under section 6 (2) and the assessment made by him are quite separate and distinct operations in point of time and scope of substance and the Minister's functions in respect of them are fundamentally different in character.

6. That the assessment is the summation of all the factors representing tax liability, ascertained in a variety of ways, and the fixation of the total after all the necessary computations have been made.

7. That the appeal provided by the Income War Tax Act is an appeal from the assessment and that there is no right of appeal from the Minister's determination in his discretion under section 6 (2). *Nicholson Limited* v. *Minister of National Revenue* ((1945 Ex. C.R. 191) followed and *Dobinson* v. *Federal Commissioner of Taxation* ((1935) 3 A.T.D. 150) distinguished.

8. That the determination of the excessiveness of all or part of an expense has been left by Parliament exclusively to the discretion of the Minister; it is his opinion and not that of the Court or of any one else that governs.

9. That the Minister in making his discretionary determination under section 6 (2) is not restricted to the same consideration as would govern a court of law in arriving at a judicial decision; he is not confined to provable facts or admissible evidence, but may obtain his information from any source he considers reliable; he may use his own knowledge and experience or that of his officers in his department and he may take the benefit of their advice; in the field exclusively assigned to him by Parliament he is as free to act as Parliament itself; he may use his own judgment and be guided by the intuition of experience; he may use all the aids which will enable him to carry out honestly the administration and definition of the policy that Parliament has entrusted to him.

10. That neither the opinion of the Minister nor the material on which it was based is open to review by the Court; it has no right to examine into or criticize the reasons that led the Minister to his opinion or question their adequacy or sufficiency; it is not for the Court to lay down the considerations that should govern the Minister's discretionary determination; Parliament requires the Minister's opinion, not that of the Court; the Court has nothing to do with the question whether the Minister's opinion was right or wrong; nor has it any right to decide that it was unreasonable. The accuracy or correctness of the Minister's discretionary determination is outside the Court's jurisdiction.

11. That the jurisdiction of the Court in respect of section 6 (2) is limited to intervening only when it has been shown that the Minister has not applied proper legal principles and in such cases its intervention is limited to sending the matter back to the Minister under section 65 (2). The Court has no other powers.

12. That the respective functions of the Minister under section 6 (2) and section 59 are fundamentally different; when he acts under section 59 his function is solely judicial and his decision is a purely judicial decision.

13. That when the Minister makes a determination in his discretion under section 6 (2) he is not required by law to give any reasons for such determination. *Wrights' Canadian Ropes Ltd.* v. *Minister of National Revenue* ((1946) S.C.R. 139) discussed.

14. That where the appellant has not shown that the Minister has not applied proper legal principles in arriving at his discretionary determination under section 6 (2) and the Minister has not given any reasons for it, the Court should assume that he acted properly; that the presumption of proper exercise of his discretionary power should be applied in his favour until rejected by clear proof to the contrary; that the onus of showing that the Minister did not apply proper legal principles is on the appellant taxpayer and that if he does not discharge it his appeal must be dismissed. No assumption that the Minister acted arbitrarily or improperly should be drawn from the fact that he did not give reasons. He is not required to do so.

15. That the appeals in respect of the disallowance of salaries must fail.

16. That directors' fees paid by a company are not necessarily deductible expenditures for income tax purposes merely by reason of their having been validly paid; it is a question of fact in each case whether or to what extent such fees were wholly, exclusively and necessarily laid out or expended for the purpose of earning the income of the company. *Copeman* v. *Flood (William) & Sons Ltd.* ((1941) 1 K.B. 202) followed.

17. That the appeals in respect of the disallowance of directors' fees should be allowed.

APPEALS under the Income War Tax Act.

The appeals were heard before The Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

J. Mirsky for appellant.

H. H. Stikeman and *Miss M. J. Phillips* for respondent.

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

The President now (August 26, 1946) delivered the following judgment:

These appeals are from assessments under the Income War Tax Act, R.S.C. 1927, chap. 97, and The Excess Profits Tax Act, 1940, Statutes of Canada, 1940, chap. 32, in respect of the appellant's taxation years ending October

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

Thorson P.

1940 and 1941. Its returns showed losses of $147.04 and $45.16 respectively, but for each year two items of expense, totalling $2,800, were disallowed, rendering it taxable under each Act. The items consisted of $2,000 in respect of the salary of David Mirsky, the president and general manager, and $800 for directors' fees paid to him and his three sons. The appellant served notices of appeal on the Minister, who affirmed the assessments, and then, being dissatisfied with the Minister's decision, brought its appeals from the assessments to this Court. The appeals were heard together.

The facts are not disputed. The appellant deals in soft drinks. The business was originally owned by Sadie Mirsky, wife of David Mirsky. In 1927 she sold it to the appellant, receiving 397 out of 400 shares issued in payment, and became its president, her son, Norman Lionel Mirsky, becoming vice-president and general manager and her other two sons, John Mirsky and Mervin Mirsky, becoming directors. In December 1939 Sadie Mirsky died, having bequeathed her 397 shares to her son, Norman Lionel Mirsky. Between 1937 and 1939 the appellant paid the sum of $9,500 per year in salaries to Sadie Mirsky and her three sons. During this time David Mirsky looked after his wife's interests and gave some help at the appellant's plant but drew no salary. After Sadie Mirsky's death a reorganization in management took place. In February 1940 David Mirsky was elected president and made general manager with his salary fixed at $7,000 per year as from October 31, 1939; Norman Mirsky remained as vice-president with an increase in annual salary from $2,760 to $4,000; and John Mirsky and Mervin Mirsky, although remaining as directors, ceased to draw salaries; the total of the annual salaries paid to the directors was thus increased to $11,000. In addition, directors' fees of $200 per year for each of the four directors, which had never previously been paid, were also paid.

David Mirsky and Norman Lionel Mirsky divided the duties of management between them, the former being responsible for the factory and production and the latter for the office. David Mirsky's duties included the blending and mixing of the extracts, acids and oils that went into

the various syrups used by the appellant in its products, management generally of production in the factory and supervision of the machinery. Norman Lionel Mirsky helped occasionally in the factory and with the mixing of syrups, but his main duties were those of office manager, looking after advertising, sales and accounts. The volume of sales, which had grown from $97,093 in 1937 to $105,227 in 1939, continued to grow, after the reorganization, to $120,628 in 1940 and $147,377 in 1941. Yet, notwithstanding such increases, the operations of the appellant, after payment of expenses, including those disallowed, showed the losses mentioned, although the next two years, 1942 and 1943, showed profits.

The disallowance of $2,000 in respect of David Mirsky's salary will be dealt with first.

Before any disallowance was made, the Inspector of Income Tax at Ottawa, on August 28, 1942, wrote to the appellant, referring to David Mirsky's salary of $7,000 in 1940 and 1941 and the fact that in the previous year he had received no salary; stating that, in the opinion of the division, such salary was excessive; giving notice that the discretionary powers under the Act were about to be exercised and that it was proposed to recommend the allowance of a salary of $5,000; and inviting the appellant to submit whatever evidence it thought appropriate to be considered in the exercising of the discretion. On September 23, 1942, Mirsky and Mirsky, solicitors for the appellant, who were also two of its directors, replied to this letter outlining the changes in management after Mrs. Mirsky's death; pointing out that David Mirsky had taken over the duties of Mrs. Mirsky, Mervin Mirsky and John Mirsky; and giving particulars of David Mirsky's duties and responsibilities. Reference was also made to the increasing volume of sales and it was contended that the salary of $7,000 together with the salary presently paid to Norman Lionel Mirsky was not considerably in excess of the total executive salaries paid in 1937. There is also evidence that John Mirsky, in addition to writing the letter referred to, made personal representations to the Department. The evidence also shows that a report was made by the Ottawa inspector but no request was made on

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

Thorson P.

behalf of the appellant to have it produced. On November 24, 1942, the Commissioner determined in respect of each year "that the salary of $7,000 paid to the President, David Mirsky, is in excess of what is reasonable for the services performed and in assessing the taxpayer $2,000 of the said salary is disallowed as a deduction from income". Later, when the assessments were made the amount of the disallowance was added as taxable income to the amounts respectively shown on the appellant's returns.

These disallowances were made by the Commissioner of Income Tax under section 6 (2) of the Income War Tax Act which provides:

6. (2) The Minister may disallow any expense which he in his discretion may determine to be in excess of what is reasonable or normal for the business carried on by the taxpayer, or which was incurred in respect of any transaction or operation which in his opinion has unduly or artificially reduced the income.

and section 75 (2) which reads:

75. (2) The Minister may make any regulations deemed necessary for carrying this Act into effect, including regulations designed to facilitate the assessment of tax in cases where the right of taxpayers to deductions or exemptions has varied during any taxation year, and may thereby authorize the Commissioner of Income Tax to exercise such of the powers conferred upon the Minister, as may, in the opinion of the Minister, be conveniently exercised by the Commissioner of Income Tax.

Under section 75 (2) the Minister, on August 8, 1940, authorized the Commissioner of Income Tax, now the Deputy Minister of Taxation, to exercise the powers conferred upon him by the Act. This authorization was general in nature: *vide Canada Gazette,* September 13, 1941, page 852. In my judgment, the discretionary power conferred by section 6 (2) remains vested in the Minister, although authorized to be exercised by the Commissioner; in any event, for purposes of convenience I shall refer to it as the Minister's power and to its exercise as the Minister's determination.

The subject of the Minister's discretionary power under section 6 (2) presents problems of great importance and considerable difficulty. It is essential that its scope and nature should be clearly understood if the respective jurisdictions of the Minister and the Court in respect thereof are to be defined.

The scope of the power is very wide. In the present case we are concerned only with the first part of section 6 (2) which empowers the Minister to disallow any expense which he in his discretion may determine to be in excess of what is reasonable or normal for the business carried on by the taxpayer. No exception is made for any class or kind of expense and no distinction is drawn between items of expense that are within the control of the taxpayer and those that are not. The fact that the taxpayer has paid the expense under a contractual obligation does not remove it from the scope of the power; there is no such limitation in the section. The obligation to pay the expense results from the contract; the right to deduct it is quite a different thing, for it depends on whether the statutory power of disallowance is exercised; if the Minister disallows an expense within his statutory power to do so, then whatever right there might otherwise have been to deduct it no longer exists, for it has been extinguished pursuant to the Act. It is no answer to the disallowance to say that the item of expense is not "net profit or gain" within the meaning of section 3 of the Act, for section 6 must be read with section 3 before taxable income can be ascertained, and disallowance of it under section 6 (2) makes it taxable. Nor is it any answer to say that the expense was wholly, exclusively and necessarily expended for the purpose of earning the income and, therefore, outside the exclusions of section 6 (*a*); if it were not such, it would be excluded from deduction by section 6 (*a*) itself and there would be no need for resort to section 6 (2); section 6 (2) clearly contemplates the disallowance of an expense that is not excluded by section 6 (*a*); to be deductible an expense must fall not only outside the exclusions of section 6 (*a*) but also outside the exclusion resulting from its disallowance under section 6 (2). Section 6 (2) brings *any* expense within the possible purview of the Minister's discretionary power.

The extent and nature of the discretion were dealt with in *Nicholson Limited* v. *Minister of National Revenue* (1). Counsel for the appellant in that case contended that the Minister's discretion extended only to what is in excess of reasonable or normal expense but that what is reasonable or normal expense is a question of fact in respect of which

(1) (1945) Ex. C.R. 191

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

Thorson P.

the Minister has no discretion. This contention was rejected. It seems obvious that there cannot be any such limitation. There would be no sense in requiring the Minister to ascertain what is reasonable or normal expense as a matter of fact and confining his discretionary power of disallowance to what is in excess thereof, for that would permit the deductibility of such part of the excess as the Minister did not disallow, and no such absurd result could have been contemplated. The Minister's discretion must go further. Parliament clearly intended as a matter of policy that excessive expense should be disallowed as a deduction from taxable income. It is obvious that in a great many cases it would be very difficult, if not impossible, to determine as a matter of fact that a particular expense is in excess of what is reasonable or normal for the business carried on by the taxpayer. Parliament realized this fact and decided to meet it by entrusting the Minister with the power to determine in his discretion in each case the amount of expense to be disallowed as being excessive; it is the determination of the excessiveness of an expense that is left to his discretion. It must, therefore, be within his discretion to determine whether an expense is reasonable or normal for the business carried on by the taxpayer, for otherwise he cannot determine whether it is excessive or not. In my opinion, the Minister's discretion under section 6 (2) extends to a determination both of what is reasonable or normal expense for the business carried on by the taxpayer and what is in excess thereof. The test of the correctness of the disallowance of an expense is not whether it is in excess of what is reasonable or normal as a matter of fact but whether it is in excess of what the Minister determines in his discretion to be reasonable or normal. The standard of correctness is the opinion of the Minister; it is a subjective one belonging exclusively to him; the Court has no right, in the absence of specific statutory authority, to measure it by any standard of its own or by any objective standard such as that of the "ideal reasonable man". Whether an expense is excessive or not is not a question of fact; it is made dependent on the Minister's discretionary opinion.

The Minister's power is a very important one; a basis for it can be found in the view that without some such power the revenue would in many cases be at the mercy of the ingenuity of the taxpayer, and profits that really ought to be taxed would escape taxation through being absorbed by items of expense, that could not be proved as a matter of fact to be in excess of reasonable or normal expense. It was to meet such a situation, no doubt, that section 6 (2) was enacted.

When the Minister makes his discretionary determination that an expense is to be disallowed as excessive he does an administrative act, but, in my view, his determination is more than that. He is acting in respect of a policy which Parliament has indicated but not defined. It has left the limits of the field in which he is to operate to be defined by him in his discretion; the Minister's determination is thus really a definition of policy. The effect is that his determination renders the expense which he disallows subject to tax, which otherwise would be deductible and free from tax. Parliament has thus, in effect, conferred a power of tax imposition upon the Minister. This makes his determination not only an administrative act but also a quasi-legislative one. This must not be overlooked in considering the Court's duty of supervision over it.

The Minister's discretion under section 6 (2), although very wide, has limits, which are inherent in the concept of discretion itself, as indicated by the House of Lords in *Sharp* v. *Wakefield* (1) where Lord Halsbury L. C. said:

> "Discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be according to the rules of reason and justice, not according to private opinion: *Rook's Case* (5 Rep. 100, A); according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself: (*Wilson* v. *Rastall* (4 T.R. at p. 754)

This statement is relative and must be read with reference to the nature of the discretion and the responsibility of the person to whom it has been entrusted. Here Parliament has vested an important discretion of a policy nature in the Minister of National Revenue who is responsible to it for the administration of his department and the Acts

(1) (1891) A.C. 173 at 179.

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

Thorson P.

entrusted to it. That such considerations have an important bearing on the construction of the extent of a discretionary power was stressed in the House of Lords in *Liversidge* v. *Anderson et al* (1), where Lord Macmillan said of the discretionary power there involved:

> The statute has authorized it to be conferred upon a Secretary of State, one of the high officers of state, who, by reason of his position, is entitled to public confidence in his capacity and integrity, who is answerable to Parliament for his conduct in office, and who has access to exclusive sources of information,

And then stated as a principle:

> In a question of interpreting the scope of a power, it is obvious that a wide discretionary power may more readily be inferred to have been confided to one who has high authority and grave responsibility.

It cannot be too strongly emphasized that the Minister's discretion under section 6 (2) is not a judicial discretion. His determination is not a judicial decision; the most that can be said of it is that it is quasi-judicial.

The difference between judicial and quasi-judicial decisions was dealt with in the Report of the Committee on Ministers' Powers. This Committee was appointed by the Lord High Chancellor of Great Britain on October 30, 1929, to consider the powers exercised by or under the direction of (or by persons or bodies appointed specially by) Ministers of the Crown by way of (*a*) delegated legislation and (*b*) judicial or quasi-judicial decision, and to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the Law. The Committee made its report on March 17, 1932, and it was presented to Parliament the next month. At page 73 of the Report the Committee said:

> The word "quasi", when prefixed to a legal term, generally means that the thing, which is described by the word, has some of the legal attributes denoted and connoted by the legal term, but that it has not all of them. For instance, if a transaction is described as a quasi-contract it means that the transaction has some of the attributes of a contract but not all. Perhaps the best translation of the word "quasi", as thus used by lawyers, is "not exactly". A "quasi-judicial" decision is thus one which has some of the attributes of a judicial decision, but not all. In order, therefore, to define the term "quasi-judicial decision", as it is used in our terms of reference, we must discover which of the attributes of a true judicial decision are included and which are excluded.

(1) (1941) 3 All E.R. 338 at 367

A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites:—

(1) the presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law.

A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3), and never involves (4). The place of (4) is in fact taken by administrative action, the character of which is determined by the Minister's free choice.

While this statement has no judicial authority it is reasonably correct. The basic difference between a judicial and a quasi-judicial decision is that no question of policy can arise in respect of a judicial decision; the judicial authority must apply the law to the facts as it has ascertained them and give its decision accordingly; whereas a quasi-judicial decision involving an administrative discretion is in the last resort an administrative act based on policy. The Committee, at page 88, puts the difference as follows:

A quasi-judicial decision differs from a judicial decision in that it is governed, not by a statutory direction to the Minister to apply the law of the land to the facts and act accordingly, but by a statutory direction or permission to use his administrative discretion and to be guided by considerations of public policy after he has ascertained the facts and, it may be, the bearing of the law on the facts so ascertained.

The Minister's discretionary determination, so far as it is an administrative act, and apart from whether it is quasi-legislative, may involve duties of a quasi-judicial nature to be discharged in the manner prescribed by law but at most such duties relate to matters antecedent, ancillary or incidental to the determination, and when the Minister actually makes his determination he passes from the position of a quasi-judge to that of an administrator and his determination is an administrative act based on considerations of public policy with no judicial or even quasi-judicial aspects. If it is also definitive of such policy with legislative or quasi-legislative effect, I am unable to see in principle how even any quasi-judicial duties are involved, whether antecedent to the determination or

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

Thorson P.

otherwise. This was the view of Isaacs J., later Chief Justice of Australia, in the *Moreau* case (*infra*) to which I shall later refer.

As administrative discretionary powers have been increasingly conferred by Parliament the Courts have shown an increasing understanding of the fundamental distinction between the duties of a quasi-judicial nature that may be involved in the exercise of an administrative discretion and the actual exercise of the discretion itself. They have assumed a duty of supervision over discretionary powers with a view to determining as far as possible whether the quasi-judicial duties involved have been performed, but there is no case of which I am aware in which the Court has gone beyond such supervision and assumed a right of review of the actual exercise of the discretion itself, in the absence of specific statutory authority enabling it to do so. The supervision by the Court has been mainly, but not entirely, in cases of applications for mandamus or certiorari.

The principles that should govern a person entrusted with administrative discretionary powers affecting rights have been laid down with varying degrees of precision and clarity. He must not exercise his discretion "in an oppressive manner, or from any corrupt or indirect motive"—Tindal C. J. in *The Queen* v. *Governors of Darlington School* (1). He should act as "a reasonable man desirous of doing justice"—Knight Bruce V. C. in *In re Fremington School* (2). There should be a fair investigation of the facts and just means of explanation and defence should be afforded—Lord Langdale M. R. in *Willis* v. *Childe* (3). The discretion should be exercised "with an entire absence of indirect motive, with honesty of intention, and with a fair consideration of the subject"—Lord Truro L.C. in *In re Beloved Wilkes' Charity* (4). If the authorities charged with discretionary duties have acted in an unreasonable manner, such as acting on a preconceived general resolution when they should have dealt with the particular case before them, they have not exercised their discretion—

(1) (1844) 6 Q.B. 682 at 715
(2) (1847) 11 Jur. 421 at 424.
(3) (1850) 13 Beav. 117 at 130
(4) (1851) 3 MacN. & G. 440 at 447

Wightman J. in *The Queen* v. *Sylvester* (1). In *Hayman* v. *Governors of Rugby School* (2) Sir R. Malins V. C. laid it down that discretionary powers, or arbitrary powers as he described them, should be "fairly and honestly exercised". In *Spackman* v. *Plumstead Board of Works* (3) the House of Lords dealt with a case where an architect had been given power to fix the general line of buildings in a road and the Earl of Selborne, at page 240, thus defined his duty:

> No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter, and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice.

In *The Queen* v. *Vestry of St. Pancras* (4) Lord Esher M. R. said of members of a vestry who had a discretion to grant a superannuation allowance:

> They must fairly consider the application and exercise their discretion on it fairly, and not take into account any reason for that decision which is not a legal one. If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion.

A person entrusted with the formation of an opinion must honestly exercise his judgment—Lord Herschell in *Allcroft* v. *Lord Bishop of London* (5). In *Leeds Corporation* v. *Ryder* (6) Lord Loreburn L.C. said, in the House of Lords, that justices of the peace who had a discretionary power to grant licences "must act honestly and endeavour to carry out the spirit and purpose of the statute" and added:

> The justices . . . act administratively, for they are exercising a discretion which may depend upon considerations of policy and practical good sense—they must of course, act honestly. That is the total of their duty.

and the Earl of Halsbury, at page 424, applied the same test of "an honest desire to carry out what the Act of Parliament intended to be done". The importance and

(1) (1862) 31 L.J. (N.S.) (M.C.) 92 at 95
(2) (1874) 18 Eq. 28 at 68
(3) (1885) A.C. 229
(4) (1890) 24 Q.B.D. 371 at 375
(5) (1891) A.C. 666 at 680
(6) (1907) A.C. 420 at 423

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

Thorson P.

relevancy of this case lies in its emphasis on the fact that the exercise of administrative discretion may depend on considerations of policy and that the administrative officer entrusted with it must honestly carry out the intention of Parliament. In *R.* v. *London County Council* (1) Lord Reading C. J. thought that the Council, which had discretion as a licensing authority, must exercise their discretion "in a judicial spirit" and not allow "extraneous considerations to affect their decisions", and Bray J. said, at page 479, that "they must exercise it fairly and impartially and must act according to the rules of reason and justice." And in *Roberts* v. *Hopwood* (2), where the House of Lords dealt with the discretion of a borough council to allow to servants such wages as the council may think fit, it was held that the discretion conferred upon the council must be exercised reasonably and that fixing an arbitrary sum for wages without regard to existing labour conditions was not an exercise of the discretion.

There are two cases to which reference should be made in view of the fact that certain statements in them have been cited as authoritative pronouncements on the subject of administrative discretion. In *Board of Education* v. *Rice* (3) Lord Loreburn L. C. said of the Board:

> They must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

and this statement was cited with approval by Davis J. in *The King* v. *Noxzema Chemical Company of Canada, Ltd.* (4). These remarks were made in respect of the duties of the Board as an arbitral tribunal dealing with a question in dispute between a local education authority and the managers of a non-provided school, the question being whether the local education authority had fulfilled its statutory duty of maintaining and keeping efficient the non-provided school. The Board purported to give its decision in a document which failed to deal with the

(1) (1915) 2 K.B. 466 at 475.
(2) (1925) A.C. 578
(3) (1911) A.C. 179 at 182
(4) (1942) S.C.R. 178 at 180

matters in issue and on an application for certiorari and mandamus it was held that since the Board had not decided the question referred to it, its decision must be quashed by certiorari and a mandamus must issue commanding it to determine the question. It was in respect of such a situation that Lord Loreburn said, at page 182:

> The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon facts. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari

There was a controversy between two parties; the question in issue was a legal one of law and fact; and the decision required of the Board was a judicial one. The case dealt with a matter quite different from that under review; it did not touch the subject of administrative discretion at all. When the Minister makes his determination under section 6 (2) he is not deciding a legal question in a *lis inter partes* and is not acting in a judicial capacity; his action is an administrative one in a matter of public policy which he defines. Similar remarks apply to *Local Government Board* v. *Arlidge* (1). There Lord Haldane L. C. was speaking of the duties of the Board in deciding an appeal against a closing order made by a local authority and its refusal to determine such order when he said, at page 132:

> When the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice.

and then, later, agreed with the view expressed by Lord Loreburn in *Board of Education* v. *Rice* (*supra*), which he described as an analogous case. Lord Moulton had the same subject in mind when he said, at page 150:

> The legislature has provided an appeal, but it is an appeal to an administrative department of State and not to a judicial body. It is said, truthfully, that on such an appeal the Local Government Board must act judicially, but this, in my opinion, only means that it must preserve a judicial temper and perform its duties conscientiously, with a proper feeling of responsibility, in view of the fact that its acts affect the property and rights of individuals.

(1) (1915) A.C. 120.

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

Thorson P.

The only issue before the Court was whether the Board had validly dealt with the appeal. There had been a public inquiry by the Board's inspector, pursuant to the statute, at which the owner of the house and his solicitor attended and evidence was adduced on his behalf. The inspector, after inspecting the house, submitted his report, together with the shorthand notes of the proceedings to the Board. After consideration of the facts, the evidence given at the inquiry and the report of the inspector, the Board confirmed the refusal of the local authority to determine the closing order. The owner of the house then obtained an order nisi for a writ of certiorari for the purpose of quashing the order of the Board on the ground that it had not determined appeal in the manner provided by law. Three objections were made, (1) that the order of the Board did not disclose by which officer of the Board the appeal had been decided, (2) that the owner was entitled to be heard orally by the Board, and (3) that the owner was entitled to see the report of the inspector. The House of Lords, reversing the Court of Appeal, dismissed all three objections and held that the Board had validly performed its appellate duties. The essence of the judgment is that, although the Board was required to perform a judicial function and must, therefore, act judicially or preserve a judicial temper, it did not, under the statute, have to follow the procedure of a court of law. The Court did not deal with the subject of administrative discretion at all; that question was not before it. It was concerned with entirely different matters. Under the circumstances, my conclusion is that neither *Board of Education* v. *Rice* (*supra*) nor *Local Government Board* v. *Arlidge* (*supra*) can be considered as an authority applicable to the exercise of the Minister's discretion under section 6 (2). The remarks cited might well be applicable to his duty when he considers an appeal from an assessment under section 59, for he is then acting as a judicial officer, and his function in that capacity is fundamentally different from that which he performs under section 6 (2).

Reference may also be made to *Wilson* v. *Esquimalt and Nanaimo Railway Co.* (1), where Duff J., as he then was, delivering the judgment of the Judicial Committee, ex-

(1) (1922) 1 A.C. 202 at 211.

pressly adopted Lord Moulton's statement in the *Arlidge case* (*supra*) as the proper test for the discharge of judicial duties by an authority other than a judge.

It is, I think, clear that the authorities requiring fairness or reasonableness on the part of an administrative officer in his discretionary decision must be read in the light of the nature of the discretion and the position of the person to whom it has been entrusted. It is not to be assumed that the standard by which such attributes should be measured must necessarily be that of the Court, for the nature of the discretionary power may be such that only the person entrusted with it is in a position to be able to judge of the fairness or reasonableness of its exercise, in which case the Court is precluded from passing on the question of the fairness or reasonableness of the decision and is confined in its duty of supervision to an examination of other considerations. In my judgment, the discretionary power conferred by section 6 (2) is of such a nature.

Then there is the decision in *Pioneer Laundry and Dry Cleaners, Limited* v. *The Minister of National Revenue* (1). There Davis J. in the Supreme Court of Canada in dealing with the Minister's discretion in the matter of depreciation under section 5 (*a*) of the Act said, at page 5:

> The appellant was entitled to an exemption or deduction in "such reasonable amount as the Minister, in his discretion, may allow for depreciation". That involved, in my opinion, an administrative duty of a quasi-judicial character—a discretion to be exercised on proper legal principles.

and this statement, in which the Chief Justice, Sir Lyman P. Duff, concurred was expressly adopted by Lord Thankerton in delivering the judgment of the Judicial Committee. What is meant by "proper legal principles" is not stated, but it may, I think, be assumed that the term covers the relevant principles indicated in the cases referred to, and it will be used in this judgment with that understanding. The fact that access is had to the Court by way of an appeal from the assessment and not on an application for certiorari or mandamus does not alter the nature of the court's duty of supervision or the principles to be applied.

Where there is no right of appeal from the decision of an administrative authority, the decision is binding. This

(1) (1939) S.C.R. 1; (1940) A.C. 127.

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

Thorson P.

fundamental principle was settled by the House of Lords in *Spackman* v. *Plumstead Board of Works* (1), where the Earl of Selborne L.C. said:

> 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.

Where the administrative decision involves the exercise of a discretion and it has not been shown that proper legal principles have not been applied the courts have recognized from very early times that in the exercise of his discretion an administrative officer is not governed by the same considerations as those that apply to a court of law in coming to a judicial decision. He need not be confined to provable facts or admissible evidence, but may use his own knowledge and such information as he can obtain. The considerations that may properly influence him depend upon the nature of the function he must perform. Thus, in *The King* v. *Archbishop of Canterbury and Bishop of London* (2) the Court discharged a rule for a mandamus to the Bishop of London to license a clerk to an endowed lectureship in a certain parish church where it was provided by statute that before any lecturer might lawfully preach he had to be approved and licensed by the Bishop or Archbishop. Lord Ellenborough C. J. said, at page 146:

> What scales have we to weigh the conscience of the Bishop? And how are we to know whether he properly or improperly disapproves? May he not properly disapprove of the candidate for a lecturer's license on account of many matters which cannot be conveniently stated to a court of justice? May he not disapprove for matters within his own personal observation and knowledge: for the habits of life and conversation of the person, which might be known to him from residing in the same university or society with him; from his conduct in life down perhaps to the very time when the Bishop is called upon to signify his approbation? Is he to exclude his own knowledge, the most material of any? Does the law say upon what proof he is to act, or that he is to have witnesses upon oath to the facts by which his judgment is to be guided? What authority has he to compel the attendance of witnesses before him? The word of the statute is *approve;* and he must exercise that approbation according to his conscience, upon such means of information as he can obtain; and everything that can properly minister to his conscientious approbation or disapprobation, and fairly and reasonably induce his conclusion on such a subject, though it might not be evidence that would be formally admitted in a court of law, may, I am of the opinion, be fitly taken into his consideration.

(1) (1885) A.C. 229 at 235. (2) (1812) 15 East 117.

And in *The Queen* v. *Governors of Darlington School* (1), where the governing body of a grammar school had power to remove the master according to their sound discretion, Lord Denman C. J. said, at page 697:

> The power of the governors so to remove justifies their so doing; and it is not to be restricted by any opinion which we may form of the reasons on which they may have been induced to exert it.

The inability of the court to control or interfere with the exercise of the discretion, if it has been fairly and honestly exercised, is repeatedly stated by Sir R. Malins V.C. in *Hayman* v. *Governors of Rugby School* (2). That the court has no right to examine or criticize the grounds upon which an administrative discretion has been exercised was emphasized in *Julius* v. *Lord Bishop of Oxford* (3), where the House of Lords had to deal with a discretion vested in the Bishop to issue a commission of inquiry to investigate charges against a clerk in holy orders. Earl Cairns L. C. said, at page 228:

> If I am right in holding that the bishop has, under the statute, a discretion as to proceeding or not proceeding, in the way in which the Appellant calls upon him to do, your Lordships have not, as it seems to me, any occasion or indeed any right to examine into the manner in which, or the principles upon which, that discretion has been exercised. For the exercise of that discretion the bishop, and the bishop alone, is responsible, and it would, in my opinion, be inconsistent to hold that his discretion is an answer to the application for a mandamus, and at the same time, on that application, to criticize the grounds upon which that discretion has been exercised.

Lord Penzance also declined to inquire whether the Bishop's discretion had been well exercised; it was a discretion without appeal and "free from legal control". Lord Blackburn was of the same view; at page 238, he said:

> But if the Legislature gave the bishop power to grant farther inquiry in one of those two ways, trusting that he would always do so where it was proper, but leaving it open to him, when convinced that it was not proper, to decline to act; if, in short, the intention of the Legislature was to make it lawful for him to act, if convinced that it is expedient, but to leave it to his discretion to say whether it is expedient, the mandamus will not lie.

These last remarks are, in my opinion, particularly pertinent to the case under review, for Parliament has left the question of the expediency of disallowing an expense in any given case as being excessive, where perhaps it cannot be proved in fact to be such, to the discretion of

(1) (1844) 6 Q.B. 682.
(2) (1874) 18 Eq. 28.
(3) (1880) 5 A C. 214.

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

Thorson P.

the Minister. And in *The Queen* v. *Vestry of St. Pancras* (1) Lord Esher M.R. said that if the members of the vestry exercised their discretion there was no right to interfere with what they did.

The governing principle that runs through the cases is that when Parliament has entrusted an administrative function involving discretion to an authority other than the Court it is to be performed by such authority without interference by the Court, either directly or indirectly. Where a person has been given jurisdiction to form an opinion and act accordingly, the Court has no right to review such opinion or the considerations on which it was based; the accuracy of the opinion is quite outside its jurisdiction. These principles were strikingly stated by the House of Lords in *Allcroft* v. *Lord Bishop of London* (2), where the right of the Court to review the opinion of the Bishop as to whether certain proceedings should be taken was considered. At page 674, Lord Halsbury L.C. said:

> The bishop, if he had thought proper, might have taken proceedings thereon as provided by the Act; but the bishop has been of opinion that proceedings should not be taken, and the bishop is the only person who by law has jurisdiction to form an opinion on the subject. There is no right of appeal from his judgment. It is a jurisdiction confined by the Legislature to the bishop himself, and there is no power by law to interfere with the judgment which the bishop may form on the subject.

and at page 675:

> Your Lordships have nothing to do with the question whether his judgment is right or wrong. Your Lordships would be exceeding your own jurisdiction if you were attempting to review a judgment, the jurisdiction to form which the Legislature has confined to the bishop and to the bishop alone.

and at page 676:

> Rightly or wrongly, the bishop thinks that there is nothing of any importance in the reredos in question to distinguish it from that which was held to be lawful. My Lords, I only use that phrase "rightly or wrongly" to emphasize the fact that I am not presuming to enter into the question of the accuracy of the bishop's judgment, over which, as I have said, I have no jurisdiction.

And Lord Bramwell said, at page 678:

> Then it is said that there was something he had considered which he ought not to have considered, and something he had not considered which he ought to have, and so he had not considered the whole circumstances and them only. It seems to me that this is equivalent to saying that his opinion can be reviewed. I am clearly of opinion it

(1) (1890) 24 Q.B.D. 371. (2) (1891) A.C. 666.

cannot be. If a man is to form an opinion, and his opinion is to govern, he must form it himself on such reasons and grounds as seem good to him.

Lord Herschell, at page 680, expressed similar views:

I dissent entirely from the view that it is for the Courts or your Lordships to determine what are the considerations which ought to govern the bishop's opinions. If a dozen persons told to consider all the circumstances of a given case, and to form their opinion thereon, were required to state what considerations they have taken into account, I do not believe that any two of them would precisely agree in their statements.

In my opinion, this case should be closely followed in defining the respective jurisdiction of the Minister and the Court with regard to the Minister's powers under section 6 (2).

A similar view is expressed in *R.* v. *London County Council* (1), where Lord Reading C. J. said:

It seems to me to be entirely a matter for the Council in their discretion to say whether or not it is desirable in the interest of the public that licenses should be granted to a company controlled by alien enemies. It is not, in my opinion, an extraneous consideration. The Legislature has thought fit to leave it to the Council to say whether the applicants are fit persons, and we cannot direct them to hear and determine the matter because we might think—and I am far from saying I do so think—that these were fit persons.

The conclusiveness of an administrative determination of policy within discretionary powers was tersely put by Audette J. in this Court in *The King* v. *Imperial Bank of Canada* (2):

The Minister having deemed it advisable to expropriate, as provided by the Expropriation Act, has exercised his statutory discretion, and the Court has no jurisdiction to sit on appeal or in review of such decision. These questions are political in their nature and not judicial. Lewis on Eminent Domain, sec. 239. The Courts cannot inquire into the motives that actuate the executive or governmental authorities or into the propriety of their decision.

and reference may also be made to the judgment of the British Columbia Court of Appeal in *Literary Recreations Ltd.* v. *Sauve* (3), where it was held that since the Post Office Act had given the Postmaster-General the right to determine what is "mailable matter" and he had discretion to prohibit the use of the mails for the sending of non-mailable matter his discretion was not open to review by a Court.

(1) (1915) 2 K.B. 466 at 480.
(2) (1923) 3 D.L.R. 345 at 346.
(3) (1932) 4 D.L.R. 553.

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

THORSON P.

The conclusiveness of a decision made by the Australian Commissioner of Taxation within his statutory powers was clearly recognized by the High Court of Australia in *Moreau* v. *Federal Commissioner of Taxation* (1). Under section 37 of the Income Tax Assessment Act 1922-1925 it was provided that an alteration or addition shall not be made in or to an assessment after the expiration of three years from the date when the tax payable on the assessment was originally due and payable "unless the Commissioner has reason to believe that there has been an avoidance of tax owing to fraud or attempted evasion." The Australian Act contains provisions for appeal from an income tax assessment similar to those in the Canadian Act. In a strong statement Isaacs J. stressed the conclusiveness of the Minister's decision. After expressing his own opinion that Moreau was not guilty of fraud or attempted evasion, he said, at page 67:

> But that in no way shakes the Commissioner's official conclusion that there had been an attempted evasion, and even fraud, on the part of Moreau. His function is to administer the Act with solicitude for the Public Treasury and with fairness to the taxpayers. He is necessarily armed with great powers. Up to three years an assessment is open to his unreserved consideration. After that time it is—as I assume for the purposes of this case and as it certainly is now as a rule—closed, unless he has "reason to believe" the taxpayer has defrauded or attempted to evade the revenue law. If he has such reason, he has the power, and, I would add, it is his duty, to reopen the door and demand the amount legally owing. His conclusion is not a judicial decision, but an administrative decision. It does not determine anything but the Commissioner's own official duty to proceed so as to obtain what the taxpayer was always bound to pay, if the increase is justified at all. The decision is not to be preceded by any judicial or quasi-judicial inquiry; it is not, and could not be, subject to any appeal. His "reason" may be the result of official information, or his own investigation, or may come from any source he considers reliable. He may, if he thinks right, call upon the taxpayer for an explanation, or he may think that unnecessary, inadvisable or useless. Fair play would of course, usually induce him to give the taxpayer the fullest opportunity to explain, but that is not legally inexorable. In this case, having regard to the many communications that had taken place, I do not consider the Commissioner unreasonable in not giving any new opportunity to explain before amending the assessment. The Commissioner is not bound to look for corroboration or further tests. His reason is not to be judged of by a Court by the standard of what the ideal reasonable man would think. He is the actual man trusted by the Legislature and charged with the duty of forming a belief, for the mere purpose of determining whether he should proceed to collect what is strictly due by law; and no other tribunal can substitute its standard of sufficient reason in the circumstances or its opinion or belief for his. Unless

(1) (1926) 39 C.L.R. 65.

the ground or material on which his belief is based is found to be so irrational as not to be worthy of being called a reason by any honest man, his conclusion that it constitutes a sufficient reason cannot be overridden.

In my opinion this clear cut statement is applicable to the exceptional power vested in the Minister by section 6 (2). In *Federal Commissioner of Taxation* v. *Clarke* (1) Isaacs A.C.J., (as he had become), pointed out that the Act trusts the Commissioner and "does not contemplate . . . a curial diving into the many official and confidential channels of information to which the Commissioner may have recourse to protect the Treasury".

That the Court has no right to inquire into the mental operations of the administrative tribunal charged with a particular function was clearly recognized by the Supreme Court of the United States in *Chicago, Burlington & Quincy R. Co.* v. *Babcock* (2), where Mr. Justice Holmes, delivering the judgment of the Court, held that it was wholly improper to cross-examine the members of an assessment board in an attempt to exhibit confusion in their minds as to the method by which the result of their decision was reached. At page 593 he said:

> The members of the Board were called, including the Governor of the State, and submitted to an elaborate cross-examination with regard to the operation of their minds in valuing and taxing the roads. This was wholly improper.

and it is quite clear, in his opinion, that the members of such a board are not confined to facts provable in a court of law but are entitled to use their own judgment and knowledge. At page 598, there is this important passage:

> Various arguments were addressed to us upon matters of detail which would afford no ground for interference by the court, and which we do not think it necessary to state at length. Among them is the suggestion of arbitrariness at different points, such as the distribution of the total value set upon the Chicago, Burlington and Quincy system, among the different roads making it up. But the action does not appear to have been arbitrary except in the sense in which many honest and sensible judgments are so. They express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth. The Board was created for the purpose of using its judgment and its knowledge . . . Within its jurisdiction, except as we have said, in cases of fraud or a clearly shown adoption of wrong principles, it is the ultimate guardian of certain rights. The State has confided those

(1) (1927) 40 C.L.R. 246 at 276. (2) (1906) 204 U. S. 585.

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

THORSON P.

rights to its protection and has trusted to its honour and capacity as it confides the protection of other social relations to the courts of law. Somewhere there must be an end.

Counsel for the appellant strongly contended that the provisions for appeal in the Income War Tax Act gave the Court a wider power of supervision over the Minister's discretionary powers under the Act than it would have had if it had been confined to supervision by way of the prerogative writs of mandamus or certiorari; that the aggrieved taxpayer was always entitled to the protection afforded by the Court's power to issue such writs, but that his right of appeal under the Act gave him a statutory right in addition to his rights at common law; and he argued that under its appellate jurisdiction the Court was vested with the same discretionary power as the Minister, could review its actual exercise by him and substitute its own discretion for his. In my view, no support can be found for these propositions.

Counsel cited *Pioneer Laundry and Dry Cleaners Limited* v. *Minister of National Revenue* (1), but it is quite clear that in that case the Court was not required to decide, and did not decide, whether the Court could review the actual exercise of the Minister's discretion and substitute its opinion for his; that question was not argued before either the Supreme Court or the Judicial Committee, and was not before either court at all. All that was decided was that the Commissioner had applied wrong principles of law in his purported exercise of discretion and that, in so doing, he had not exercised the discretion contemplated by the Act at all. It was held that he had erred in two respects; he had misconstrued the effect of section 5 (*a*) in that, while he had a discretion as to the amount to be allowed for depreciation, he had no discretion to decide whether any depreciation should be allowed or not, since the taxpayer had a statutory right to some depreciation; and he had disregarded the fundamental rule that a company has a separate legal existence from that of its shareholders and that it was the company, and not its shareholders, that was the taxpayer. It was decided that in such cases the proper course for the Court to take is to refer

(1) (1939) S.C.R. 1; 1940 A.C. 127.

the matter back to the Minister for the exercise of his discretion on proper legal principles, or as Davis J. put it in the Supreme Court of Canada, at page 8:

> It is the duty of the Court in such circumstances to remit the case, as provided by sec. 65 (2) of the Act, for a re-consideration of the subject-matter, stripped of the application of these wrong principles.

The assessment was accordingly set aside and referred back to the Minister. Further than this the judgment did not go, but in the Court's action in sending the matter back to the Minister for the exercise of his discretion, "stripped of the application of these wrong principles", there is an implication that the exercise of the discretion on proper legal principles is exclusively the function of the Minister and not that of the Court; so far, therefore, as the case has a bearing on the question, it is rather an authority that there is no appeal from the valid exercise of the Minister's discretion than the reverse, but this is a matter of inference only for the question was not before the Court for judicial decision.

The question did, however, arise squarely for the first time in *Nicholson Limited* v. *Minister of National Revenue* (1), now under appeal to the Supreme Court of Canada. In that case it was not argued before this Court that the Minister, in making his determination in his discretion under section 6 (2), had not exercised his discretion on proper legal principles and there was nothing in the case to indicate or suggest that he had not done so. It was argued on the facts that the Minister did not correctly exercise his discretion, in that he did not give proper consideration to the increase in the appellant's business and profits and did not make a fair allowance for overtime work by the directors. It was the conclusion reached by the Minister, and not any principle applied by him in reaching it, that was under attack. Counsel for the appellant in that case contended that the decisions in certiorari or mandamus cases limiting the Court's right of supervision of discretionary powers to the manner of their exercise had no applictaion since an appeal was provided by the Income War Tax Act and that the Court under its appellate jurisdiction was not restricted to supervision over the manner of exercise of the Minister's discretion under section

(1) (1945) Ex. C.R. 191.

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

THORSON P.

6 (2) but might, and should, review such exercise itself, and substitute its own opinion of the amount of expense to be disallowed, if any, for the determination by the Minister; that the appeal under the Act involved an appeal from the exercise of the Minister's discretion; that the purpose of the appeal to the Minister was to enable him to review such exercise and that he must do so; that his failure to do so would deprive the appellant of a right to which he was entitled under the Act and make the assessment before the Court an improper one, and that the Court under its appellate jurisdiction had the same power of review, and was under the same duty to exercise it, as the Minister, since it was the same appeal that was carried throughout; and that the appeal to the Court was in the nature of a trial *de novo* and that it might examine all the facts that were before the Minister prior to his determination in his discretion since such facts were connected with the assessment, draw its own conclusion from them and substitute such conclusion for the discretionary determination made by the Minister. These arguments were all carefully considered by the Court and rejected. After a review of the provisions of the Act relating to appeals the Court held that the appeal provided by the Income War Tax Act is not an appeal from any decision of the Minister but an appeal from the assessment made by him in the course of his functions in respect thereof; and that the right of appeal to the Court conferred by the Act does not carry with it any right of appeal from the Minister's determination in his discretion under section 6 (2). The reasons given for these conclusions need not be re-stated, but the importance of the subject warrants further observations.

Counsel for the appellant relied mainly on the decision of the Supreme Court of New South Wales in *Dobinson* v. *Federal Commissioner of Taxation* (1). In that case the Commissioner was of the opinion that a partnership which the appellant had entered into with his wife had been formed for the purpose of relieving him from a liability to which he would have been otherwise subject and assessed the partnership as if it were a single person. He had statutory authority for forming such opinion under section

(1) (1935) 3 A.T.D. 150.

29 (2) of the Commonwealth of Australia Income Tax Assessment Act, 1922-33, which also provided that when the Commissioner was of such opinion, the partnership should be assessed as if it were a single person. At the hearing, the appellant, his wife and their accountant, gave evidence that the partnership was not entered into for the purpose of relieving the husband of any liability to taxation to which he would otherwise have been subject. Jordan C.J. accepted this evidence, came to a conclusion different from the opinion formed by the Commissioner and allowed the appeal. This decision was rendered under a state of law quite different from that obtaining in Canada. Sections 50, 51 and 51A of the Australian Act contain provisions for an appeal in several respects similar to those in the Income War Tax Act and it is as clear in the Australian Act as it is in the Canadian one that the appeal is from the assessment. But in 1930 a special section was enacted as section 51B, for which there is no counterpart in Canada.

Section 51B reads as follows:

> 51B. Notwithstanding anything contained in this Act a taxpayer who is dissatisfied with any opinion, decision or determination of the Commissioner under section twenty-one A, paragraph (*n*) of subsection (1) of section twenty-three, or subsection (2) of section twenty-nine of this Act (whether in the exercise of a discretion conferred upon the Commissioner or otherwise) and who is dissatisfied with any assessment made pursuant to or involving such opinion, decision or determination shall, after the assessment has been made, have the same right of objection and appeal in respect of such opinion, decision or determination and assessment as is provided in sections fifty, fifty-one and fifty-one A of this Act.

This section specifically gave a right of appeal in a limited number of cases from an opinion, decision or determination of the Commissioner, in addition to the right of appeal from the assessment already conferred. It is quite clear from the judgment of Jordan C.J. that it was only because of this specific provision in section 51B that the Court had any right to review the opinion of the Commissioner and substitute its own opinion for his and that without it the Court would have had no such power. At page 151, he said:

> In certain special cases, however, the fact that the Commissioner entertains a particular opinion is made the criterion of the existence of liability. In such cases there can, obviously, be no appeal from his opinion unless the Act gives an appeal, although the opinion may be examined within certain limits.

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

THORSON P.

Jordan C.J. is here clearly referring to such an opinion as that formed by the Commissioner under section 29 (2) and its binding effect in the absence of a right of appeal from it. Then he continued:

> Section 51B provides in terms that a taxpayer shall have the same right of appeal in respect of any opinion of the Commissioner under s. 29 (2) and in respect of any assessment made pursuant to or involving such opinion as is provided in ordinary cases. I think it follows from this that the appellate tribunal must consider for itself such material as is placed before it with respect to matter as to which the Commissioner's opinion was formed, and that it is intended that the opinion of that tribunal should be substituted for that of the Commissioner as a criterion of liability if it forms an opinion different from his.

It is clear that, without the specific provision in section 51B, the appellant would have been confined to an appeal from the assessment and the Court could not have reviewed the Commissioner's opinion. The decision recognizes the difference between the Commissioner's opinion and the assessment and, in my opinion, supports the conclusion that the right of appeal provided by the Income War Tax Act, being specifically from the assessment, does not include a right of appeal from the Minister's exercise of discretion under his statutory powers. Before there could be such a right there would have to be specific provision for it, as was found necessary in Australia. There is no such provision in the Income War Tax Act; the appeal there provided is from the assessment; there is no provision for an appeal from the Minister's exercise of his discretion—which is quite a different thing from the assessment.

In the *Nicholson case* (*supra*) I referred briefly to the difference between the Minister's discretionary determination under section 6 (2) and the assessment levied by him under the powers conferred by Part VII, particularly section 55. This difference requires further elaboration. The two operations are quite separate and distinct in point of time and scope of substance and the Minister's functions in respect of them are fundamentally different in character. The Minister's discretionary determination must be made before the assessment operation can be performed. It is, of necessity, antecedent in point of time, for the amount of excessive expense to be disallowed in the assessment cannot be taken into account in the computations involved in it,

until after such amount has been determined by the Minister under his statutory power. The amount so determined is only one of many items entering into the assessment. These are dealt with in a variety of ways. The items of income and deductions in the taxpayer's returns must be checked and verified where necessary. In respect of the amounts claimed as deductions the Minister may have to decide whether they are permitted by the Act. Such decisions involve no exercise of discretion but are either administrative applications of the law to the claims made, or they may involve, as in the case of the disallowances of the directors' fees in the present case, findings of fact to which the law is then applied, in which case the function is really a judicial one which the Minister must perform with a "judicial temper". The Minister may require further information from the taxpayer under several sections. He may have to decide whether a refund should be made under 53. There are many other things that may have to be done before there can be an assessment and many persons may be involved in such various tasks. Then when all the items have been settled there must be a computation of the amount of profit and gain to be assessed less the allowable deductions before the total amount of tax liability can be ascertained and fixed. The two operations are thus distinctly different in point of time and scope of substance involved. In the present case the discretionary determinations were made in respect of each year on November 24, 1942, whereas the assessments were not made until considerably later, as appears from the assessment notices dated respectively January 30, 1942, and February 2, 1943. The two functions also differ fundamentally in character. In so far as the Minister's determination may involve duties of a quasi-judicial nature such as, for example, giving the taxpayer an opportunity to make his representations, he must perform them. In the assessment operation, on the other hand, there are no quasi-judicial duties of any kind to be performed. The operation is solely administrative. There is an even more vital difference. The determination involves the exercise of a discretion of a policy nature, that is legislative in effect. When that function is finished, all that the

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

THORSON P.

Minister need consider in respect of this item, when he comes to the assessment operation, is the amount of his statutory determination. The assessment operation is quite different; no exercise of discretion is involved. When the Minister has exercised his discretion under section 6 (2), he does not exercise it over again when he makes his assessment under section 55; indeed, he cannot do so, for once he has exercised it he is functus officio in respect thereof. Moreover, the assessment operation does not depend upon considerations of policy to be defined by the Minister. He makes it according to the facts as ascertained and the application of the Act thereto.

The assessment is different from the notice of assessment; the one is an operation, the other a piece of paper. The nature of the assessment operation was clearly stated by the Chief Justice of Australia, Isaacs A.C.J., in *Federal Commissioner of Taxation* v. *Clarke* (1):

> An assessment is only the ascertainment and fixation of liability.

a definition which he had previously elaborated in *The King* v. *Deputy Federal Commissioner of Taxation (S.A.); ex parte Hooper* (2):

> An "assessment" is not a piece of paper: it is an official act or operation; it is the Commissioner's ascertainment, on consideration of all relevant circumstances, including sometimes his own opinion, of the amount of tax chargeable to a given taxpayer. When he has completed his ascertainment of the amount he sends by post a notification thereof called "a notice of assesment".... But neither the paper sent nor the notification it gives is the "assessment". That is and remains the act or operation of the Commissioner.

It is the opinion as formed, and not the material on which it was based, that is one of the circumstances relevant to the assessment. The assessment, as I see it, is the summation of all the factors representing tax liability, ascertained in a variety of ways, and the fixation of the total after all the necessary computations have been made.

The Court ought not to construe the appeal provided by the Act, which is specifically an appeal from the assessment, as extending to such a different operation as the Minister's discretionary determination under section 6 (2), in the absence of a clear indication that Parliament so intended. Not only is there no such indication, but quite the contrary is the case; it is clear from section 66 that the

(1) (1927) 40 C.L.R. 246 at 277 (2) (1926) 37 C.L.R. 368 at 373.

Court's appellate jurisdiction is made subject to the provisions of the Act; section 6 (2) is one of such provisions and binds the Court. Nor is it necessary to the Court's discharge of its appellate jurisdiction to read into it discretionary powers of a policy nature. The right of appeal is a substantive right and the Court must not extend it beyond the purpose for which it was conferred. The purpose of providing an appeal from the assessment is to ensure to the taxpayer that it shall be correct in fact and in law. If an item involved in it has been determined by the Minister within his statutory power, how can it be said that, in respect of such item, it is incorrect either in fact or in law? It is not to be assumed, in the absence of clear words to the contrary, that Parliament intended the correctness of such an item to be measured by the Court by a different standard from that required of the Minister, as would be the case if the Court's discretionary determination were substituted for that of the Minister. And certainly it should not be assumed, without most explicit terms, that Parliament intended that the administration and definition of a policy, which it had left to the discretion of a Minister responsible to it, should be left to the discretion of the Court, which is in no way responsible to it. In my opinion, it is quite clear that, under the Income War Tax Act as it stands, there is no right of appeal to the Court from the Minister's determination in his discretion under section 6 (2).

There being no such right of appeal, the respective jurisdictions of the Minister and the Court with regard to section 6 (2) must be defined within the limits indicated by the authorities referred to. As I see it, everything pertaining to the actual function of determining in his discretion the disallowance of an expense as being in excess of what is reasonable or normal for the business carried on by the taxpayer is exclusively within the jurisdiction of the Minister. It is for him to decide whether there should be any disallowance or not; he is not restricted to any kind or class of expense; nor bound by the fact that it was paid under a contractual obligation. The determination of the excessiveness of all or part of an expense has been left by Parliament exclusively to the discretion of the Minister;

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

THORSON P.

it is his opinion, and not that of the Court or of any one else, that governs. Such discretion is not the same thing as an inference to be drawn from proved facts. It was precisely because it was difficult to put the excessiveness of an expense on the basis of its excessiveness in fact that Parliament left its determination to the discretion of the Minister. Under such circumstances, the authorities make it quite clear, in my opinion, that the Minister in making his discretionary determination under section 6 (2) is not restricted to the same consideration as would govern a court of law in arriving at a judicial decision; he is not confined to provable facts or admissible evidence, but may obtain his information from any source he considers reliable; he may use his own knowledge and experience or that of his officers in his department in whom he has confidence and he may take the benefit of their advice if it commends itself to him; in the field exclusively assigned to him by Parliament he is as free to act as Parliament itself; he may use his own judgment and in so doing be guided by the "intuition of experience which outruns analysis", as Mr. Justice Holmes put it; he may use all the aids which will enable him to carry out honestly the administration and definition of the policy that Parliament has entrusted to him.

The authorities are equally clear as to the limited function of the Court in such a case. Before the Minister makes his determination under section 6 (2) he must come to an opinion that the expense in question is excessive and ought to be disallowed. Since it is his opinion that governs, "he must form it himself on such reasons and grounds as seem good to him." In the field exclusively assigned to the Minister, there is no room for the Court; neither the opinion of the Minister nor the material on which it was based is open to review by it; the Court has no right to examine into or criticize the reasons that led the Minister to his opinion or question their adequacy or sufficiency; it is not for the Court to lay down the considerations that should govern the Minister's discretionary determination; Parliament requires the Minister's opinion, not that of the Court; the Court has nothing to do with the question whether the Minister's opinion was right or

wrong; nor has it any right to decide that it was unreasonable; it is the Minister's reason, not that of the Court, that Parliament relies upon, and "no other tribunal can substitute its standard of sufficient reason or its opinion or belief for his"; the accuracy or correctness of the Minister's discretionary determination is quite outside the Court's jurisdiction and it must not interfere with it in any way. This limitation of the Court's function is not only settled by authority but is consistent with principle; the Minister's discretionary determination depends, not on an issue of fact, but on his opinion in a matter of administration and definition of a difficult public policy for which Parliament holds him responsible; it has not sought the opinion of the Court or its aid in the administration or definition of such policy; with such matters the Court is not concerned and ought not to interfere; its duties are solely judicial. The Court is concerned only with the question whether the Minister has actually exercised the discretion that Parliament has vested in him. If it appears that the Minister has applied proper legal principles in arriving at his determination the Court has no further supervisory duty in the matter. If, on the other hand, it is shown that he has acted on improper legal principles, as in the *Pioneer Laundry* case (*supra*), it is the duty of the Court to send the matter back to him for reconsideration "stripped of such wrong principles". But this is the full limit of its power. In the *Pioneer Laundry* case (*supra*) Davis J. made the following statement, at page 5:

> The exercise of the discretion will not be interfered with unless it was manifestly against sound and fundamental principles.

and this was expressly adopted by Lord Thankerton in the Judicial Committee. While the statement is not precisely put, the meaning is quite clear. If the discretion has actually been exercised it cannot be interfered with at all; what is meant is that if the purported exercise of discretion is manifestly against sound and fundamental principles it is not the exercise of discretion contemplated by the Act. It is, therefore, not accurate to describe the Court's action in referring the matter back to the Minister on the ground that he has not applied proper legal principles as an interference with his discretion, for it is no such

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

THORSON P.

thing; the action is consequent on the Court's finding that, in applying improper legal principles, the Minister has not actually exercised the discretion vested in him at all. Further than that the Court cannot go. It cannot itself exercise the discretion; only the Minister can do so. There is still a third situation. Where it is not shown that proper legal principles have not been applied, then it seems clear, from the authorities, that the Court has no ground for interference. As I see it, the Court may intervene only when it has been shown that the Minister has not applied proper legal principles and, even in such cases, its intervention is limited to sending the matter back to him under section 65 (2): the Court has no other powers.

What is the situation where the Minister has not given any reason for his discretionary determination under section 6 (2) and the appellant is unable to show that improper legal principles were applied or that proper legal principles were not applied? It was easy for the Judicial Committee in the *Pioneer Laundry* case (*supra*) to refer the matter back to the Minister, for it was there clearly disclosed that the Minister had misconceived the limits of his discretion under section 5 (*a*), and had applied a wrong principle of law in his disregard of the fact that the company and its shareholders were separate legal entities, and the Court could refer the matter back to him "stripped of such wrong principles". In that case the Minister, when giving his reasons in his decision on the appeal to him, did not confine himself to saying that he had exercised his discretion under section 5 (*a*) but also stated his reasons for his conclusion. Similarly in the second case, *Pioneer Laundry & Dry Cleaners Limited* v. *Minister of National Revenue* (1) it was easy for Robson J. to determine that the allowance of the nominal sum of one dollar for depreciation could not have been arrived at as the result of any exercise of discretion at all. But since then in the cases involving the exercise of discretion that have come to my attention, the Minister has not given any reasons for the exercise of his discretion, but has merely relied upon the ground that it has been exercised. In the present case, the Minister gave the following reason for his decision on the appeals to him:

(1) (1942) Ex. C. R. 179

The Honourable the Minister of National Revenue having duly considered the facts as set forth in the Notices of Appeal and matters thereto relating hereby admits the Appeal in respect of the item of $186.97 written off by the taxpayer as a bad debt and will amend the 1940 Assessment accordingly, and hereby affirms the said Assessments for the years 1940 and 1941 in respect of salary and director's fees as claimed on the ground that Subsection 2 of Section 6 of the Act provides that the Minister may disallow any expense which he in his discretion may determine to be in excess of what is reasonable for the business carried on by the taxpayer; that in the exercise of such discretion he has determined that the salary paid to David Mirsky is to the extent of $2,000 in excess of what is reasonable for the business carried on by the taxpayer and has disallowed as an expense the said amount so determined and further that the directors' fees of $800.00 paid or credited to four of the directors of the taxpayer in each of the years 1940 and 1941 were not expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income according to Section 6 (*a*) of the Act and are properly disallowed for Income Tax purposes. Therefore by reason of the provisions of the said Section 6 (2), 6 (*a*) and other provisions of the Income War Tax Act in that respect made and provided the Assessments are affirmed.

It will be noticed that the reason given for disallowing part of David Mirsky's salary is that the Minister determined the matter in his discretion under section 6 (2); but no reason for the exercise of the discretion itself is given. A very important question thus arises—does the Minister have to give any reasons for his discretionary determination under section 6 (2)? In *Wrights' Canadian Ropes Ltd.* v. *Minister of National Revenue* (1) Kellock J. expressed the view that since under section 59 the Minister is required to notify the appellant of his "decision", reasons are intended to be given, and seemed to assume that the Minister should give reasons for the exercise of his discretion under section 6 (2), although this is not expressly stated. Here it is essential, I think, to draw a clear distinction between the respective functions of the Minister under sections 59 and 6 (2). His decision under section 59 is quite a different thing from his discretionary determination under section 6 (2); perhaps the difficulty arises from the use of the word "decision" to cover both conclusions. When the Minister is acting under section 59 he must duly consider the notice of appeal from the assessment served upon him in pursuance of section 58 and notify the appellant of his decision. Before the appellant can take his appeal from the assessment to the Court, he must first take

(1) (1946) S.C.R. 139 at 169.

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

THORSON P.

it to the Minister. Section 59 thus constitutes the Minister an appellate authority with respect to the assessment "appealed against". When he duly considers the notice of appeal his function is solely judicial, as much so as that of the Court, and his decision on the appeal is a purely judicial decision. No exercise of discretion is involved and the decision has nothing to do with any matter of policy. It may well be, therefore, that when he gives his decision under section 59 he must give reasons for it. But it by no means follows that he must also give reasons for his discretionary determination under section 6 (2). When the Minister acts under that section he is not performing a judicial function and his determination is not a judicial decision. It is an administrative act with legislative effect done in the course of administration and definition of a public policy. The respective functions of the Minister under section 59 and section 6 (2) and their conclusions in respect of each are thus fundamentally different in character. I am quite unable to conclude that because he must give reasons for his judicial decision under section 59 he must also give reasons for such a different thing as his discretionary determination under section 6 (2). Moreover, the weight of authority is overwhelming that an administrative officer exercising an administrative discretion need not, unless he chooses to do so, give reasons for the exercise of such discretion. This was recognized as early as 1704 in *R.* v. *Bailiffs of Ipswich* (1). And in *The King* v. *Bishop of London* (2) Lord Ellenborough C. J. clearly indicated that the Bishop did not have to specify his reasons for exercising his discretion under the Act of Uniformity. At page 422, he said:

> Suppose he should return non idoneus, generally; can we compel him to state all the particulars from whence he draws his conclusion? Is there any instance of a mandamus to the Ordinary to admit a candidate to holy orders, or to specify the reasons why he refused? If indeed it had appeared that the Bishop had exercised his jurisdiction partially or erroneously; if he had assigned a reason for his refusal to license, which had no application, and was manifestly bad, the Court would interfere: but the difficulty that I feel is, that the Bishop, as it now appears, stands only upon his objection to the fitness of this party, of which the statute meant that the Bishop should be the judge.

(1) (1704) 2 Ld. Raym 1232 (2) (1811) 13 East 418

And in *The King* v. *Archbishop of Canterbury and Bishop of London* (1) there is a statement to the same effect. Later, in *In Re Beloved Wilkes's Charity* (2) it was held that where Trustees are appointed to execute a trust according to discretion, they are not bound to state reasons for their conclusion. Lord Truro L.C. said, at page 448:

> If, however, as stated by Lord Ellenborough in *The King* v. *The Archbishop of Canterbury* (15 East 117), Trustees think fit to state a reason, and the reason is one which does not justify their conclusion, then the Court may say that they have acted by mistake and in error, and that it will correct their decision; but if, without entering into details, they simply state, as in many cases it would be most prudent and judicious for them to do, that they have met and considered and come to a conclusion, the Court has then no means of saying that they have failed in their duty, or to consider the accuracy of their conclusion.

And later, at page 449:

> I should say, as a general rule, that the Court ought not to require persons to state reasons for conduct which they are authorized to pursue, because such a statement made in one case, where it may possibly be done without evil and mischief, has a tendency to create an objection against those who, in other cases, do not make it, where a statement of reasons might be most mischievous.

And in *Hayman* v. *Governors of Rugby School* (3), which counsel for the appellant cited, Sir R. Malins V.C., at page 68, summarized the effect of the authorities up to that time in a striking passage:

> I think the clear result of the numerous authorities cited on both sides in the argument of this case is that all arbitrary powers, such as the power of dismissal, by exercising their pleasure, which is given to this governing body, may be exercised without assigning any reason, provided they are fairly and honestly exercised, which they will always be presumed to have been until the contrary is shown, and that the burthen of shewing the contrary lies upon those who object to the manner in which the power has been exercised. No reason need be given, but if they are given the Court will look at their sufficiency.

And later, at page 87, he said of the governing body:

> They are not obliged to give any reason whatever, and the Court must presume that they exercise their discretion properly unless the contrary can be distinctly shewn.

It is quite clear from the judgment that when Sir R. Malins referred to "arbitrary" powers he had in mind "discretionary" powers of various kinds and did not intend to confine his remarks to the power of dismissal at pleasure. Then

(1) (1812) 15 East 117 at 141
(2) (1851) 3 McN. & G. 440
(3) (1874) 18 Eq. 28

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

THORSON P.

the House of Lords dealt with the matter in *Sharp* v. *Wakefield* (1), where Lord Bramwell stated quite clearly:

> The magistrates have a discretion to refuse; they are not bound to state their reason, and therefore their decision cannot be questioned.

And *Allcroft* v. *Lord Bishop of London* (2) also strongly supports the same view. In that case the Bishop was required by the statute to state in writing the reason for his opinion, but it is abundantly clear that in the absence of such a statutory requirement the Bishop would not have been required to state the reasons for his opinion. The citations which I have already given from this case leave such a conclusion free from doubt.

It might be argued that it would be desirable as a matter of policy that an administrative officer should give reasons for the exercise of his administrative discretion. Indeed, the Committee on Ministers' Powers recommended that every Minister exercising a judicial or quasi-judicial function and every Ministerial Tribunal exercising a judicial function should give the decision in the form of a reasoned document. Whether the Minister should give reasons for his discretionary determination under section 6 (2) is a matter of policy for Parliament to determine, on which I express no opinion, but I can see no ground of principle, under the law as it stands and in view of the nature and extent of the power which Parliament has entrusted exclusively to the Minister, on which the Court has any right to require the Minister to give reasons for his discretionary determination or to allow an appeal from an assessment for his failure to do so. If the striking language of the House of Lords in *Allcroft's* case (*supra*) is applied to the present one, as it might well be, the conclusion is clear that the Minister need give no reasons for his discretionary determination under section 6 (2). It is his opinion that Parliament relies upon; it governs and he is empowered to act on it. If, as Lord Halsbury put it, the Court has nothing to do with the question whether his judgment is right or wrong and has no jurisdiction over its accuracy, how can the Court require reasons for it? If, as Lord Bramwell said, he is the person whose opinion is to govern and he must form it himself on such reasons and grounds as seem good to him, what use can the Court

(1) (1891) A.C. 173 at 183 (2) (1891) A.C. 666

make of the reasons if given? If, as Lord Herschell said, the Court has no right to determine the considerations that ought to govern him, what bearing could his reasons have? The same idea is the basis of the judgment of the High Court of Australia in *Moreau* v. *Federal Commissioner of Taxation* (1). If, as Isaacs J. put it, the Minister's reason is not to be judged by a Court by the standard of what the ideal reasonable man would think and no other tribunal can substitute its standard of sufficient reason or its opinion or belief for his, why should he submit his reason to the Court? And a similar idea runs through the judgment of the Supreme Court of the United States in *Chicago, Burlington & Quincy Ry. Co.* v. *Babcock* (2). If it was improper, as Chief Justice Holmes said, to cross-examine the members of an assessment board with regard to the operations of their minds in valuing and taxing the roads, how can it be proper to insist that the Minister tell the Court why he exercised his discretion as he did?

That an administrative officer cannot be required to disclose the grounds upon which he based his opinion where Parliament has vested him with discretion in the matter was dealt with fully by the House of Lords in *Liversidge* v. *Anderson et al* (3). In that case the appellant brought an action for a declaration that his detention by the Secretary of State was unlawful and damages for false imprisonment. The detention was justified on the ground that it had been made under the Defence (General) Regulations, 1939, reg. 18B, which provided:

> If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations.... and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained.

and the detention order recited that the Secretary of State had had such reasonable cause to believe. The appellant applied for particulars of the grounds upon which the Secretary of State had reasonable cause to believe that he was of hostile origin or associations and that it was necessary to exercise control over him. His application was refused by the Master who was confirmed in his decision by Tucker J., the Court of Appeal, and the House of Lords, Lord Atkin dissenting. It was held that the

(1) (1926) 39 C.L.R. 65
(2) (1906) 204 U.S. 585
(3) (1941) 3 All E.R. 338.

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

THORSON P.

Secretary of State did not have to disclose the grounds of his belief, that the question whether he had reasonable cause to believe was a matter for him to determine and that the Court had no right to inquire into it. The administrative discretion was vested in the Home Secretary and belonged exclusively to him without any right of review by the Court. Viscount Maugham approved the judgment of the Court of Appeal in *The King* v. *Secretary of State for Home Affairs, ex parte* Lees (1), which negatived the idea that the Court had any power to inquire into the grounds for the belief of the Secretary of State, or to consider whether there were grounds on which he could reasonably arrive at his belief, and held, at page 348, that there was no preliminary question of fact which could be submitted to the Courts and that, in effect, there was no appeal from the decision of the Secretary of State in these matters provided only that he acts in good faith. Lord Macmillan put the question whether the standard of reasonableness which must be satisfied was an impersonal standard independent of the Secretary of State's own mind or the personal standard of what the Secretary of State himself deemed reasonable, and in construing the regulation, concluded that it was the latter standard that governed. And he drew a sharp distinction between the sphere in which the Court could intervene and that in which it could not. At page 367, he said:

> How could a court of law, however, deal with the question whether there was reasonable cause to believe that it was necessary to exercise control over the person proposed to be detained, which is a matter of opinion and policy, and not one of fact. A decision on this question can manifestly be taken only by one who has both knowledge and responsibility which no court can share.

Lord Wright was of the view that the matter was one of executive discretion beyond the purview of a Court of law. At page 378 he said:

> As the administrative plenary discretion is vested in the Home Secretary, it is for him to decide whether he has reasonable grounds, and to act accordingly. No outsider's decision is invoked, nor is the same within the competence of any Court.

Lord Romer was also of the view that the Secretary of State could not be compelled to disclose the grounds upon which his belief was founded. At page 384, he said:

(1) (1941) 1 K.B. 72.

The materials upon which the Home Secretary founded his opinion would be wholly irrelevant, and could not be inquired into by a court of law.

And further, at page 387:

Not only is the belief to be his, but the estimate of the reasonableness of the causes which have induced such belief is also to be his, and his alone.

And in *Greene* v. *Secretary of State for Home Affairs* (1), Lord Macmillan took the same view:

The Secretary of State is not bound to disclose or justify to any court the grounds on which he conceived himself to have reasonable cause to believe that the appellant was a person of hostile associations and that by reason thereof it was necessary to exercise control over him.

In my opinion, this reasoning, although applied to an emergency regulation involving the safety of the state, is equally applicable in principle to the special discretionary power vested in the Minister by section 6 (2).

That the Court has no right to question the conclusion of the Minister in the exercise of his statutory discretion was stressed by the Court of Appeal in *Point of Ayr Collieries, Ltd.* v. *Lloyd-George* (2). There control of the appellant's undertaking was taken by the Minister of Fuel and Power by an order under the Defence (General) Regulations 1939, reg. 55 (4). The appellants contended that there were no adequate grounds upon which the Minister could find as he stated he had found, namely, that it was necessary to take control in the interests of the defence of the realm and the efficient prosecution of the war and for maintaining supplies and services essential to the community. It was held that there was no jurisdiction to interfere with what was an admittedly *bona fide* decision of the Minister within his delegated authority and that the exercise of executive power under such a regulation cannot be questioned in the courts and can be questioned only in Parliament. Lord Greene, M.R. said, at page 547:

We cannot investigate the adequacy of his reasons. We cannot investigate the rapidity or the lack of investigation, if it existed, with which he acted. We cannot investigate any of these things because Parliament in its decision has withdrawn those matters from the courts and has entrusted them to the Ministers concerned, the constitutional safeguard being, as I have said, the supervision of Ministers exercised by Parliament. That being so, that is the end of the case. The Minister

(1) (1941) 3 All E.R. 388 at 396 (2) (1943) 2 All E.R. 546

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

THORSON P.

put in no evidence. He was not bound to put in any evidence, because his case rested on the basis that even accepting the evidence put in by the appellants, there was no call for him to answer.

and, at page 548:

We do not know the facts, we do not know what matters may have impressed him and what matters of public interest may have made it very desirable to do what he did. In those circumstances I think it very undesirable that any comment should fall from the Bench which might be construed as a criticism of the action of a Minister who has not thought it necessary or right to come and tell the Court, quite unnecessarily, the facts known to him. There may or may not have been facts of great importance of which the appellants do not know. I do not know; we are not told. There was no need for us to be told.

This is a clear cut statement that a Minister entrusted with discretionary powers in a matter of public policy need not tell the Court the reasons for his action. There is no onus on him to justify his conduct.

With the exception of certain opinions expressed in the *Wrights' Canadian Ropes* case, to which I shall refer, I have not been able to find any case where the Court has required, or even suggested, that reasons for the exercise of an administrative discretion should be given. The authorities are the other way. I am, therefore, compelled by the weight of authority and on principle as well to hold that when the Minister makes a determination in his discretion under section 6 (2), he is not required by law to give any reasons for such determination.

What is the situation where the appellant has not shown that the Minister has not applied proper legal principles in arriving at his discretionary determination and the Minister has given no reasons for it, and it is impossible for the Court to determine whether proper legal principles have been applied or not? In my opinion, the law is quite clear that, in such circumstances, the Court should assume that the Minister has acted properly and dismiss the appeal for failure of the appellant to discharge the onus resting on him. I have already cited the views expressed by Sir R. Malins V.C. in *Hayman* v. *Governors of Rugby School* (*supra*) that it will be presumed that discretionary powers have been fairly and honestly exercised "until the contrary is shewn" and that "the burthen of shewing the contrary lies upon those who object to the manner in which the power has been exercised". The same presumption that persons entrusted with discretionary

powers will exercise them properly was stated by the Earl of Selborne L.C. in *Spackman* v. *Plumstead Board of Works* (*supra*). And in *Wilson* v. *Esquimalt and Nanaimo Railway Co.* (1), Duff J., speaking for the Judicial Committee, said:

> It cannot be suggested that he proceeded without any regard to the rights of the respondents and the procedure followed must be presumed, in the absence of some conclusive reason to the contrary, to have been adopted in exercise of his discretion under the statute as a proper mode of discharging the duty entrusted to him. His decisions taken in the exercise of that discretion are, in their Lordships' opinion, final and not reviewable in legal proceedings.

If that is true of a judicial discretion, it is *a fortiori* applicable to such a discretion as that of the Minister under section 6 (2). The same thought is implicit in the statement of Davis J. in the *Pioneer Laundry* case (*supra*) that the Court will not interfere with the exercise of the discretion unless it is "manifestly" against sound and fundamental principles. This must surely mean that departure from such principles is not to be assumed. The Supreme Court of the United States took the same view in *Sunday Lake Iron Company* v. *Township of Wakefield* (2), where it was held that the good faith of tax assessors and the validity of their acts are presumed and that when assailed the burden of proof is upon the complaining party. The same principle appears in *Liversidge* v. *Anderson et al* (*supra*). There Lord Maugham said, at page 348:

> In my opinion, the well known presumption *omnia acta rite esse praesumuntur* applies to this order, and, accordingly, assuming the order to be proved or admitted, it must be taken prima facie—that is, until the contrary is proved—to have been properly made, and it must be taken that the requisite as to the belief of the Secretary of State was complied with.

And later:

> his compliance with the provisions of the statute or the order in council under which he purports to act must be presumed unless the contrary is proved.

And Lord Wright, at page 374, quoted with approval the remarks of Lord Atkinson in *R.* v. *Halliday, Ex. p. Zadig* (3):

> It must not be assumed that the powers conferred upon the executive by the statute will be abused.

(1) (1922) 1 A.C. 202 at 214.
(2) (1918) 247 U.S. 350.
(3) (1917) A.C. 260 at 271.

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

THORSON P.

These authorities lead me to the opinion that where the appellant has not shown that the Minister has not applied proper legal principles in arriving at his discretionary determination under section 6 (2) and the Minister has not given any reasons for it, the Court should assume that he acted properly; that the presumption of proper exercise of his statutory power should be applied in his favour until rebutted by clear proof to the contrary; that the onus of showing that the Minister did not apply proper legal principles is on the appellant taxpayer and that if he does not discharge it his appeal must be dismissed. No assumption that the Minister acted arbitrarily or improperly should be drawn from the fact that he did not give reasons. He is not required to do so. Since Parliament has seen fit to trust the Minister with such extensive discretionary powers of a legislative nature, there is no reason, in my view, why the Court should mistrust him and assume, without clear proof, that he has acted arbitrarily or otherwise abused the trust that Parliament reposed in him.

It would not be proper to conclude this branch of the case without reference to the decision of the Supreme Court of Canada in *Wrights' Canadian Ropes Ltd.* v. *Minister of National Revenue* (1). The appellant had made an agreement with an English company to pay it a commission of 5 per cent upon all cash received in respect of the net selling price of certain products manufactured and sold after the date of the agreement. The appellant paid certain commissions in 1940, 1941 and 1942, but these were disallowed under section 6 (2) except as to $7,500 in each of such years. From the assessments made after these disallowances the appellant appealed to the Minister and then to this Court. Cameron, Deputy Judge, dismissed the appeals but his judgment was reversed by the Supreme Court of Canada, Kerwin J. dissenting, and the assessments were referred back to the Minister to be dealt with by him according to the reasons of the majority of the Court. The decision is not a satisfactory one by reason of the diversity of views expressed and the practical difficulty in which it places the Minister in determining what the reasons of the majority of the Court are and what course he should

(1) (1946) S.C.R. 139.

take accordingly. It does, however, support the view that the actual exercise of the discretionary power under section 6 (2) is exclusively a matter for the Minister and that there is no right of appeal to the Court therefrom.

One of the questions involved in the case was whether a report to the Minister by the Inspector of Income Tax at Vancouver should have been before the Court. The trial judge, relying upon *Local Government Board* v. *Arlidge* (1) had ruled that the report need not be disclosed and it was not produced at the hearing. Three of the judges of the Supreme Court, namely, Hudson, Kellock and Estey JJ., on the other hand, were agreed that it should have been filed in Court under section 63 (*g*) which provides:

> 63. Within two months from the date of the mailing of the said reply, the Minister shall cause to be transmitted to the registrar of the Exchequer Court of Canada, to be filed in the said Court, typewritten copies of the following documents:—
>
> (*g*) All other documents and papers relative to the assessment under appeal.

and that since this section had not been complied with the appeal should be allowed and the matter referred back to the Minister. This is the only ground in respect of which I have been able to find agreement by a majority of the Court for allowance of the appeal. I must confess that I am unable to understand how such majority, without knowledge of the contents of the inspector's report, could have concluded that it was relative to the assessment. Since the discretionary determination and the assessment are separate and distinct operations and different in character, as already indicated, it follows that there is a difference between what is relative to the discretionary determination and what is relative to the assessment. Thus, the facts, documents, information such as confidential reports, knowledge and experience of the Minister and his officers and other considerations of a policy nature that are before the Minister for the purpose of his discretionary determination are clearly relevant to it, but when such determination has been made they have served their purpose and are not before the Minister again when he performs the assessment operation and, that being so, are not relevant to the assessment. The evidence appears to be clear that the

(1) (1915) A.C. 120.

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

THORSON P.

inspector's report was before the Minister, or his deputy, when the exercise of the discretionary power under section 6 (2) was under consideration. That being so, it would appear that it was relevant to the discretionary determination; but if that is so, then I cannot see how it could be relevant to the assessment; I would have thought that its effect would be exhausted when the determination was made and that it would not be before the Minister again on the assessment; all that would then be before him in respect of the item of disallowance of excessive expense would be the amount of his statutory discretionary determination. If this had been put into writing such writing might well be a "document relative to the assessment", but a document having merely a bearing on the exercise of the discretion itself would not be; it would be relative, not to the assessment, but only to the discretionary determination. If, therefore, the inspector's report were made in connection with the exercise of the discretion, it was not a document relative to the assessment within the meaning of section 63 (*g*) and there is nothing to take it out of the rule laid down in the *Arlidge* case (*supra*) that such a report is not producible. If it were not relevant to the exercise of the discretionary power but dealt only with the assessment it could have had no effect on the amount of the discretionary determination under section 6 (2).

With respect to the other various grounds for allowing the appeal I have not been able to find agreement by a majority of the Court in respect of any of them. Rinfret C. J. was of the view that section 6 (2) did not apply at all in that the sums claimed as deductions were not expenses within the meaning of the section, but in such view he was alone. Hudson J. thought that the payments of commissions could not be considered as part of the "net profit or gain" of the appellant under section 3 of the Income War Tax Act, and that there should be special reasons to support such a departure from the general rule and then stated, at page 157:

> The ruling of the Minister does not disclose any reasons. No doubt he had what appeared to him perfectly sound reasons for his decision, but none are before us. It is not for the Court to weigh the reasons but we are entitled to know what they are, so that we may decide whether or not they are based on sound and fundamental principles.

I have already expressed the opinion that it is no answer to the disallowance of an item of expense to say that it is not "net profit or gain" within the meaning of section 3 of the Act, for section 6 must be read with section 3 before taxable income can be ascertained and the disallowance of the item under section 6 (2) makes it taxable, although otherwise it would not be so. That is one of the facts that gives the Ministerial power of disallowance of expense its quasi-legislative character. Nor can I, for reasons already given, agree with the statement that the Court is entitled to know the Minister's reasons for the exercise of his discretion with the implication involved therein that if the Minister does not give such reasons the Court will allow the taxpayer's appeal from the assessment and refer it back to the Minister even without any proof that proper legal principles have not been applied. Kellock J. also made much of the fact that the Minister had not given reasons for his disallowance; he went further, however, than Hudson J. and expressed his view of the Minister's conduct positively in his conclusion that the disallowance could only have been based on unreasonableness and that since the ground of the decision was unexplained the decision itself was made to appear as a purely arbitrary one; but in such conclusion he was alone. Kellock J. took the view that the appellant by section 6 (*a*) was given a statutory right to have deducted in the computation of its "net" profits or gains, "expenses wholly, exclusively and necessarily laid out or expended" for the purpose of earning those profits or gains and that in order that the Minister might disallow any excess over what was reasonable or normal for the appellant's business, he first had to determine what was reasonable or normal. These views must be read subject to the fact that section 6 (*a*) cannot be read as conferring any statutory right excluding the exercise of the Minister's power under section 6 (2), but that an item of expense to be deductible must fall outside not only the exclusions of section 6 (*a*) but also the disallowance under section 6 (2), and also subject to the qualification that the Minister's determination of what is reasonable or normal expense is to be made not on the basis of what is reasonable or normal in point of fact but on what the Minister in his discretion determines to be such. The

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

THORSON P.

difference is fundamental. Kellock J. also stated that it was not open to the Minister to ignore the agreement or its legal consequences and, after certain observations, concluded that the disallowance could only have been based on unreasonableness. Then, after commenting on some of the evidence and on the lack of explanation by the Minister or evidence in support of his action, he held that the ground of the decision was unexplained and the decision itself was made to appear as a purely arbitrary one. Then, at page 168, he made this statement:

> If the present were a case of disallowance of expenses for advertising or for travelling or of similar items within the control of the taxpayer, the grounds of disallowance might more readily suggest themselves. The present case is not of that sort and there is nothing which displaces the agreement and the legal consequences which flow from it. Therefore, where there is nothing before the Court which enables it to see any ground or principle upon which the decision appealed from can be supported, but on the contrary where the evidence substantiates the deduction claimed and therefore the decision appears as a purely arbitrary one, which the Statute does not permit, the appellant, in my opinion, has met the onus resting upon it of showing that the exercise of discretion involved has been "manifestly against sound and fundamental principles" or based upon "wrong principles of law".

The implications involved in these reasons, as I understand them, are startling, namely, that where an expense item has been paid by a taxpayer under a contract and is not the kind of item that is within his control, and such item or any portion of it is disallowed by the Minister under section 6 (2), then, if evidence is adduced that the expense is reasonable and the Minister gives no reason for his discretionary disallowance, the Court will assume that the disallowance was based on unreasonableness and must be regarded as purely an arbitrary decision, will allow the appeal from the assessment and refer it back to the Minister. With the utmost respect, I am unable to find any support in the authorities for such views. Kellock J. did not state specifically, as Hudson J. did, that the Court was entitled to have the Minister's reasons, but the consequences of his finding of unreasonableness and arbitrary decision resulting from their non-production are so serious that there is an implication that reasons must be given if such consequences are to be avoided. To that extent, therefore, Hudson J. and Kellock J. are in agreement as to the necessity for reasons, but their agreement on this point does not make it a pronouncement by a majority of

the Court. So far as I have been able to ascertain, these views are the first departure from the long line of authorities which I followed in coming to the conclusion that when the Minister makes a determination in his discretion under section 6 (2) he is not required by law to give any reasons for such determination. Many of the authorities referred to do not appear to have been brought to the attention of the Court. It may well be that reasons must be given for the exercise of a judicial discretion, as indicated by Jessel M.R. in *Ex parte Merchant Banking Company of London. In re Durham* (1), but the authorities already cited make it clear, in my view, that reasons for the exercise of an administrative discretion need not be given. If that is so generally, then *a fortiori* no reasons need be given for the exercise of such an administrative discretion as that under section 6 (2) with its quasi-legislative effect. I have already expressed my views as to the assumption that the Act contemplates reasons for the exercise of the Minister's discretion under section 6 (2). Even if the Minister must give reasons for his decision when he is acting in a purely judicial capacity under section 59 in considering an appeal from an assessment, it by no means follows that he must also give reasons for the exercise of his discretion under section 6 (2), which is not a judicial but an administrative and quasi-legislative act. There are other respects in which the reasons of Kellock J. require comment. In my view, the suggestion that evidence that a particular item of expense is reasonable can outweigh the statutory discretionary determination of the Minister that it is not, or that it will satisfy the onus cast upon the appellant to prove that the Minister did not act upon proper legal principles or that his action was "manifestly against sound and fundamental principles" is against the weight of the authorities cited. If the Court may not use the standard of reason of the "ideal reasonable man" in determining whether the Minister's discretionary determination was reasonable, how can it set the opinion of the taxpayer or a witness above that of the Minister? Moreover, this reasoning of Kellock J. seems to place the onus of justifying the disallowance on the Minister, which, in my opinion, is clearly against the intent of Parliament. Estey J. pro-

(1) (1881) 16 Ch. D. 623 at 635.

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

THORSON P.

ceeded on quite different lines. His view was that the Deputy Minister, when exercising his discretion, had only the income tax returns, the copy of the agreement and the inspector's report before him; that without a knowledge of the contents of the report it was impossible to determine its validity as a basis for the exercise of the discretion; that it might or might not have been the dominating factor in the exercise of the discretion; but that apart from the report the facts disclosed in the returns and the agreement did not provide a basis upon which a discretionary determination could be made. As I interpret his reasons they are to the effect that, so far as the Court could judge, in the absence of the inspector's report, the Minister had acted upon insufficient grounds. In discussing the respective jurisdictions of the Minister and the Court under section 6 (2) I have already held, for the reasons given and on the authorities cited, that neither the opinion of the Minister nor the material on which it is based is open to review by the Court and that it has no right to examine into or criticize the reasons that led the Minister to his opinion or question their adequacy or sufficiency. If that is so, then it was not open to Estey J. to challenge the sufficiency of the Minister's grounds for his discretionary determination. The Court did not know what considerations might have moved him to his conclusion and he did not have to tell them. Estey J. also expressed the opinion that upon principle it would seem that to act upon insufficient facts or information should in the result be the same as acting upon improper facts. With respect, I suggest that there is a difference. If it can be shown, as in the *Pioneer Laundry* case (*supra*), that the Minister applied wrong principles in his purported exercise of discretion then the Court may, and should, intervene, but where it is not so shown, the sufficiency of the grounds upon which an administrative officer has exercised his discretion is, in my view of the authorities, a matter for him to determine, and outside the jurisdiction of the Court. Estey J. was, no doubt, influenced in his views by his concept of the discretion under section 6 (2) as a judicial one and, indeed, at page 170, he so described it. If it were such a discretion,

then little, if any, exception could be taken to his views; but it seems to me to be clear that it is an administrative discretion, not a judicial one.

Counsel for the appellant quoted the passage from *Hayman* v. *Governors of Rugby School* (1), already cited, in support of his contention that the Minister did not have to give reasons for disallowing part of David Mirsky's salary but that, if they were given, the Court would look at their sufficiency, and argued that the Minister had given three reasons for his disallowance which were insufficient to justify it. The first of such alleged reasons was that David Mirsky had received no salary prior to 1941, and that this was an irrelevant consideration which the Minister should not have taken into account. The answer is that the only reference to this matter is contained in the inspector's letter to the appellant, dated August 28, 1942, where it is stated as a fact; nowhere is it stated or even suggested as a reason for the exercise of the Minister's discretion, for it is clear that before he exercised it he had the explanation given by the appellant's solicitors in their letter of September 23, 1942. The second alleged reason was that all the capital stock of the appellant was held by members of the Mirsky family and it was objected that this was also an irrelevant matter improperly taken into consideration by the Minister. This fact was referred to in one of the preambles to the Minister's decision on the appeal to him from the assessment but is nowhere stated as a reason for the exercise of his discretion. It would not have been possible for the Minister to close his eyes to such fact even if he had tried to do so and, even if he did take it into account as a fact, I see no reason for holding that this vitiates his decision when it is quite clear that he had before him many other facts and considerations on which he could properly form his opinion. The third reason complained of was that the Minister had determined that the salary was in execess of what was reasonable for the services performed; it was argued that this was not permitted by the Act; in that while section 6 (2) empowered the Minister to disallow any expense which he in his discretion might determine to be in excess of what is reasonable or normal "for the business carried on by the taxpayer".

(1) (1874) 18 Eq. 28 at 68.

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

THORSON P.

this did not extend to a determination of what is in excess of what is reasonable or normal "for the services rendered" to the taxpayer. I am unable to agree that there is any substance in this complaint. I would think it quite within the Minister's power to determine the excessiveness of a salary as an expense within the meaning of the section on the ground that such salary was more than the services of the recipient were worth. Counsel also put his client's complaint in another form and argued that the Minister had not exercised his discretion honestly and fairly in that he had not properly investigated the facts of David Mirsky's duties. This seemed to be the real substance of the appellant's complaint. Several of its witnesses gave evidence that the district office assessor who visited the appellant's plant had made no inquiries as to David Mirsky's duties, but it is clear that even if he did not do so the Minister had all the necessary and relevant facts and information before him when he was considering the exercise of his discretion. The appellant has not shown any breach of quasi-judicial duty on the part of the Minister. It had the fullest opportunity of presenting its case; it was invited to submit whatever evidence it thought appropriate and it availed itself of such invitation by making representations both by letter through its solicitors, Mirsky & Mirsky, and personally through John Mirsky, one of its solicitors and also its secretary. If this is not the kind of case in which the discretionary power under section 6 (2) is properly exercisable I am unable to see in what kind of case it could possibly be used. In my judgment, the appellant has no legal ground of grievance. It has not shown that the Minister has in any manner failed to apply proper legal principles or acted against sound and fundamental principles, or that the exercise of his discretion was in any respect otherwise than as contemplated by the Act. It has, therefore, failed to discharge the onus cast upon it and its appeals, so far as the disallowance of salary is concerned, must fail.

There remains the disallowance of the directors' fees. Before any disallowance was made the Inspector of Income Tax at Ottawa, on August 28, 1942, wrote to the appellant referring to the fact that directors' fees were paid or

credited to each of the directors in 1940 and 1941 and that in the previous year no such fees were paid or credited; giving notice that the discretionary powers of the Act were about to be exercised; stating the opinion of the division that the fees were not exclusively and necessarily laid out or expended for the purpose of earning the income; and inviting the appellant to submit whatever evidence it thought appropriate to be considered in the exercising of the discretion. On September 22, 1942, the appellant's solicitors replied stating that directors' fees were first paid for the year ending October 31, 1940; setting out the increase in gross sales from 1937 to 1941; contending that the Company was doing a business of major proportions and was considered one of the largest independent manufacturers of carbonated beverages in Canada; and giving specific information as to the meetings of the directors. On November 24, 1942, the Commissioner of Income Tax, acting under the authorization of the Minister under section 75 (2), determined in respect of each year that "the directors' fees of $800 paid to the Company's four directors were not exclusively and necessarily laid out or expended for the purpose of earning the income and in assessing the taxpayer, the above amount is disallowed in full as a deduction from income." Subsequently, when the assessments were made the amount of the disallowance was added as taxable income to the amounts respectively shown on the appellant's returns. The correctness of this item of the assessments is in dispute. While the letter of August 28, 1942, indicated that the directors' fees might be disallowed under section 6 (2) they were not so dealt with at all; instead, the Commissioner found as a fact that they were not exclusively and necessarily laid out or expended for the purpose of earning the income and, having so found, disallowed them under section 6 (*a*) which provides:

> 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;

Section 6 (*a*) is of general application and no exception is made for any particular kind of expense such as directors' fees. That directors' fees are not necessarily deductible expenses merely because they have been lawfully paid was

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

THORSON P.

clearly laid down in *Copeman* v. *Flood (William) and Sons,* Limited (1). The company was a private one consisting of a man, his wife, two sons and a daughter as sole shareholders and directors. The question involved was whether it could deduct the remuneration paid to two of the directors. This amounted to £2,600 for the daughter, who was 17 years of age and whose duties consisted in answering telephone enquiries, and a similar sum for one of the sons, who was 23 years of age and whose duties consisted in calling on farmers to purchase pigs. The appellant, the inspector of taxes, contended that it was open to the Commissioners to consider whether the sums paid were in fact money wholly and exclusively laid out or expended for the purpose of the company's trade under Schedule D, Case 1, Rule 3 of the United Kingdom Income Tax Act, 1918, which provides:

> 3. In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—
>
> (*a*) any disbursements or expenses not being money laid out or expended for the purposes of the trade, profession, employment, or vocation:

but the Commissioners decided that they could not interfere with the prerogative of the company to pay such sums as remuneration to the directors as it thought fit. On appeal their decision was reversed. Lawrence J. said at page 204:

> The Commissioners have nothing to do with the internal economy of the company, but they can find in a proper case that sums paid by a company as remuneration to its directors are not wholly and exclusively laid out or expended for the purposes of the company's trade, and it is their duty to direct their minds to that question. The Commissioners must see whether the sums deducted by the company in computing the amount of its profits or gains for income tax purposes are sums which the company is permitted to deduct by the Income Tax Acts. A company may have paid to its directors sums as remuneration for their services in accordance with the articles of association and a resolution of the company, but it does not follow that those sums are "money wholly and exclusively laid out or expended for the purposes of the trade" of the company so as to render them properly deductible.

and held, at page 205:

> The case must, therefore, be remitted to the Commissioners to find as a fact whether the sums in question were wholly and exclusively laid out or expended for the purposes of the company's trade, and, if they were not, to find how much of those sums was so laid out or expended.

(1) (1941) 1 K.B. 202.

A similar view was taken in New Zealand in *Aspro Limited* v. *Commissioner of Taxes* (1). Two persons were the sole shareholders and directors of the company. In 1924 it paid directors' fees of £1500 to each of them and each year it increased the amount paid until in 1928 it came to £5,000 each. For that year the Commissioner disallowed £8,000 out of the £10,000 paid. In so doing he acted under section 80 (2) of the New Zealand Land and Income Tax Act, 1923, which provided in part:

> 80. (2) In calculating the assessable income of any person deriving such income from one source only, any expenditure or loss exclusively incurred in the production of the assessable income for any income year may be deducted from the total income derived for that year.

A stipendiary magistrate upheld the Commissioners decision; an appeal from his decision was dismissed by the Court of Appeal of New Zealand, which held that the resolution of the company voting the sum for directors' fees did not *ipso facto* entitle it to the deduction claimed but that under section 80 (2) of the Land and Income Tax Act, 1923, the Commissioner was entitled to call for proof from the company that the expenditure of the fees was exclusively incurred in the production of its assessable income, which onus it had not discharged. The decision of the Court of Appeal was affirmed by the Judicial Committee of the Privy Council. Their judgment makes it clear that the fact that directors' fees are paid in accordance with a valid resolution of the company is not sufficient to exclude enquiry whether the moneys were in fact laid out wholly and exclusively for the production of the assessable income.

The same attitude was taken by the High Court of Australia in *Robert G. Nall Ltd.* v. *Federal Commissioner of Taxation* (2). There section 25 (*e*) of the Commonwealth Income Tax Assessment Act, 1922-1934, provided that "a deduction shall not in any case be made in respect of the following matters . . . (*e*) money not wholly and exclusively laid out or expended for the production of assessable income. Under this section the Commissioner allowed a deduction of only £500 in respect of the remuneration paid to a director, although a much larger sum had actually been paid, on the ground that any amount in

(1) (1930) N.Z.L.R. 935; (1932) A.C. 683.
(2) (1937) 4 Australian Tax Decisions 335.

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

THORSON P.

excess thereof was not laid out or expended for the production of the assessable income." It was held, affirming the judgment of Rich J., that the question was one of fact and that the excess over £500 per annum was not "money wholly and exclusively laid out or expended for the production of assessable income."

These decisions, under legislation similar to section 6 (*a*), warrant the opinion that directors' fees paid by a company are not necessarily deductible expenditures for income tax purposes merely by reason of their having been validly paid; it is a question of fact in each case whether or to what extent such fees were wholly, exclusively and necessarily laid out or expended for the purpose of earning the income of the company.

The test of the deductibility of an expenditure was laid down by the Lord President (Clyde) of the Scottish Court of Session in *Robert Addie & Sons Collieries, Limited* v. *Commissioner of Inland Revenue* (1) as follows:

> What is "money wholly and exclusively laid out for the purpose of the trade" is a question which must be determined upon the principles of ordinary commercial trading. It is necessary, accordingly, to attend to the true nature of the expenditure, and to ask oneself the question, Is it a part of the Company's working expenses; is it expenditure laid out as part of the process of profit earning.

This test was approved by the Judicial Committee of the Privy Council in *Tata Hydro-Electric Agencies, Bombay* v. *Income Tax Commissioner, Bombay Presidency and Aden* (2) and adopted by the Supreme Court of Canada in *Minister of National Revenue vs. Dominion Natural Gas Co. Ltd.* (3). And in *Montreal Coke and Manufacturing Co.* v. *Minister of National Revenue* (4) Lord MacMillan said:

> If the expenditure sought to be deducted is not for the purpose of earning the income, and wholly, exclusively and necessarily for that purpose, then it is disallowed as a deduction.

and later:

> Expenditure, to be deductible, must be directly related to the earning of income.

It is clear that by this is meant the earning of income from the business.

(1) (1924) S.C. 231 at 235.
(2) (1937) A.C. 685 at 696.
(3) (1941) S.C.R. 19.
(4) (1944) A.C. 130 at 133.

It is clear from the cases cited that it was open to the Commissioner to enquire whether the remuneration paid to the directors was out of proportion to the value of their services and if so to disallow the disproportionate part on the ground that such payment was really a distribution of taxable profit in the guise of remuneration for services rendered. On the other hand, it is also clear that reasonable remuneration should not be interfered with. In both the *Aspro* case (*supra*) and the *Nall* case (*supra*) part of the remuneration paid to the directors was allowed as a deduction without any question being raised, but in the present case the Commissioner went farther and disallowed the directors' fees *in toto*. The Court may properly determine whether the Commissioner was right in his findings of fact. Under its appellate jurisdiction the Court may deal with questions of fact as well as of law, and in respect of the Commissioner's findings of fact on which the disallowances were based, it may, on its own view of the evidence, come to the conclusion that such findings cannot be supported and substitute its own findings, with the result that the assessments must be amended accordingly; it need not refer the matter back to the Commissioner.

I have come to the conclusion that the Commissioner's findings that the directors' fees were not exclusively and necessarily laid out or expended for the purpose of earning the income ought not to stand. The uncontradicted evidence shows that directors' meetings were held at least monthly, at which sales and advertising policies were discussed, that such meetings were usually held after business hours, and that a great deal of time and effort was spent in establishing sales policy and directing the general policies of the company. It may fairly be inferred that such meetings were necessary for the proper conduct of the appellant's business and that the services of the directors in shaping and directing its policies were rendered for the purposes of contributing to its success; as such they were part of the process of profit making and directly connected with the earning of the income from the business. That being so, it seems to me that unless it is shown that the directors' fees were unreasonable or disproportionate to the value of the services rendered they should be regarded

1946

PURE SPRING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

THORSON P.

as an expenditure for the purpose of earning the income. The effect of the Commissioner's findings is that the expenditure was not made for the purpose of earning the income but was really a disguised distribution of profits. There is no established basis of fact for such findings; the services rendered by the directors were proper and necessary, and there is nothing in the evidence to show that the amount of the fees paid for them was unreasonable or disproportionate to their value. No real argument was advanced for disallowing the fees paid to John Mirsky; he performed the necessary duties of secretary-treasurer of the appellant, and I see no reason why the fees paid for such performance should not be deducted. It was suggested that the fees paid to David Mirsky and Lionel Mirsky were not deductible because they were full time paid employees. In my opinion, the salaries paid to them for their managerial activities have nothing to do with their duties as directors and I see no reason why reasonable remuneration for their services in such capacity should not be allowed. This leaves only the fees paid to Mervin Mirsky. He carried on his duties as a director until December 1940, when he proceeded overseas as a member of the armed forces. It was no doubt laudable to continue his remuneration while he was in service overseas, but during such time he did not perform the services required of a director. The fees paid to him after he left for overseas cannot be regarded as an expenditure made for the purposes of earning the income, for they were in the nature of a gratuitous payment for services not actually performed. The net result is that in respect of the disallowances of directors' fees the appeal in respect of the year 1940 is allowed and in respect of the year 1941 it is allowed except as to the $200 paid to Mervin Mirsky. The Commissioner's findings of fact are to such extent reversed with the result that the assessments must be revised accordingly. There having been divided success in the appeals, neither party will be entitled to costs.

Judgment accordingly.

BETWEEN:

GERMAIN BENDER ..... SUPPLIANT,

AND

HIS MAJESTY THE KING ..... RESPONDENT.

1943
Nov. 9
1946
Aug. 2

Crown—Petition of Right—Negligence—Workmen's Compensation—Exchequer Court Act, R.S.C. 1927, c. 34, sec. 19 (c)—Government Employees Compensation Act, R.S.C. 1927, c. 30, sec. 3 (1)—Maxim nemo debet bis vexari pro una et eadem causa—Presumption against repeal of an Act by implication—Receipt of compensation under Government Employees Compensation Act not a bar to a claim for damages under section 19 (c) of Exchequer Court Act.

By Order in Council P.C. 37/1038, dated Feb. 9, 1942, with force from Nov. 6, 1940, the Government Employees Compensation Act was made applicable to employees of the Inspection Board of the United Kingdom and Canada. The suppliant, an employee of the Board, suffered personal injuries arising out of and in the course of his employment and claimed and received compensation under the Government Employees Compensation Act. Subsequently, by Petition of Right he claimed damages for his injuries under section 19 (c) of the Exchequer Court Act. Question of law whether the Petition of Right lies.

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 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.

ARGUMENT on question of law ordered to be set down and disposed of before the trial.

The argument was heard before The Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

F. Choquette, K.C. for suppliant.

L. A. Pouliot, K.C. for respondent.

The President now (August 2, 1946) delivered the following judgment:

In order that the question of law set down for disposition before the trial may be properly understood certain facts and documents must be referred to.

1946

BENDER
v.
THE KING

Thorson P.

The suppliant was employed by the Inspection Board of the United Kingdom and Canada as a day labourer at its proof butts at Valcartier in Quebec from February 12, 1941, to June 7, 1941, at which date he suffered the personal injuries for which he claims damages.

In the early part of the war, the United Kingdom and Canada each had its own organization to inspect war munitions and supplies. Later, it was found desirable to co-ordinate the inspection services of the two governments and a Board known as the Inter-Government Inspection Board was established by Order in Council P.C. 5995, dated October 26, 1940, (Exhibit D-1). Later, this Board became known as the Inspection Board of the United Kingdom and Canada, the change of name being formally authorized by Order in Council P.C. 2226, dated April 7, 1941, (Exhibit D-2). Before the establishment of such Board the United Kingdom Technical Mission had on its staff in Canada several groups of employees, including those of the Inspector General, and Order in Council P.C. 5319, dated October 2, 1940, (Exhibit D-3) authorized an agreement between the Governments of Canada and the United Kingdom whereby the employees of such Mission, or of any other agency of the United Kingdom that might be exercising similar functions in Canada, should be brought under the provisions of the Government Employees Compensation Act. The purpose of this agreement was to put United Kingdom employees in Canada on the same basis as Canadian Government employees in the matter of workmen's compensation. The agreement was signed on October 8, 1940, (Exhibit D-4). At the time of his examination for employment by the Board the suppliant signed a document (Exhibit D-5) whereby in the event of his being caused personal injury by accident arising out of and in the course of his employment he agreed to be governed by the provisions of the Government Employees Compensation Act. Subsequently, by Order in Council, P.C. 37/1038, dated February 9, 1942, (Exhibit D-3a), the provisions of the Government Employees Compensation Act were made applicable to all persons employed by the Inspection Board of the United Kingdom and Canada during the period of their employment in Canada and it

was provided that the Order should be deemed to have come into force and operation as of and from November 6, 1940.

On June 7, 1941, the suppliant suffered serious personal injuries arising out of and in the course of his employment at Valcartier and claimed compensation under the Government Employees Compensation Act. The claim was heard by the Workmen's Compensation Commission of Quebec and on June 17, 1942, the Commission found that he was suffering from a total permanent disability and awarded him a monthly allowance of $54.16 from April 8, 1942, (Exhibit D-6). Subsequently, on July 21, 1943, it awarded him an additional allowance of $15 per month from May 7, 1942, for a period of two years, (Exhibit D-7).

On May 23, 1942, the suppliant presented his petition of right in which he claimed damages for his injuries over and above the amount of compensation awarded to him on the ground that they were the result of negligence of officers or servants of the Crown. A fiat was granted and the petition was duly filed in this Court on July 21, 1942. By his statement of defence the respondent denied all allegations of negligence and contended that the suppliant has no rights other than to the compensation he has received.

On the application of the respondent, leave was given to have the following question set down and disposed of before the trial:

> In view of Orders in Council P.C. 5995, dated the 26th October, 1940, and P.C. 2266, dated the 7th April, 1941, referred to in paragraph 21 of the Statement of Defence and filed as Exhibits D-1 and D-2; in view of Order in Council P.C. 5319, dated the 2nd October, 1940, referred to in paragraph 22 of the Statement of Defence and filed as Exhibit D-3; in view of the agreement dated the 8th October, 1940, between the Government of the United Kingdom and of Canada, referred to in paragraph 23 of the Statement of Defence and filed as Exhibit D-4; in view of the consent in writing, referred to in paragraph 25 of the Statement of Defence and filed as Exhibit D-5; in view of the compensation already received by the Suppliant as alleged in paragraph 26 of the Statement of Defence, and assuming the acts or omissions alleged in the Petition of Right herein to be established, does a Petition of Right lie.

In his written argument counsel for the respondent submitted that Order in Council P.C. 5319, dated October 2, 1940, (Exhibit D-3), the agreement dated October 8, 1940, (Exhibit D-4), and the document signed by the suppliant

1946

BENDER
v.
THE KING

Thorson P.

(Exhibit D-5) have nothing to do with the matter in view of Order in Council P.C. 37/1038, dated February 9, 1942, (Exhibit D-3a). With this submission I agree, with the result that the question of law is amended by striking out the references therein to Exhibits D-3, D-4, and D-5, adding the necessary reference to Exhibit D-3a, and identifying the compensation received by reference to Exhibits D-6, and D-7. In effect, the question of law is whether the suppliant, having claimed and received compensation for his injuries under the Government Employees Compensation Act, R.S.C. 1927, chap. 30, as amended in 1931, can have any claim for damages for such injuries under section 19 (c) of the Exchequer Court Act, R.S.C. 1927, chap. 34, as amended in 1938. The question is a novel one.

Section 19 (c) of the Exchequer Court Act, as amended in 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.

The history of this section from its inception as section 16 (c) of the Exchequer Court Act of 1887 was reviewed by the Supreme Court of Canada in *The King* v. *Dubois* (1), and by this Court in *McArthur* v. *The King* (2) and *Tremblay* v. *The King* (3). It is clear that it "not only gave jurisdiction to the Exchequer Court but imposed a liability upon the Crown which did not previously exist", and that such liability is to be ascertained according to the laws in force in the province at the time when the Crown first became liable: *The King* v. *Armstrong* (4), and *Gauthier* v. *The King* (5). It follows also from section 19 (c) not only that it imposed a liability upon the Crown which did not previously exist, but also that it gave birth to a cause of action against it which did not previously exist. Such cause of action—by petition of right—is for damages

(1) (1935) S.C.R. 378.
(2) (1943) Ex. C.R. 77.
(3) (1944) Ex. C.R. 1.
(4) (1908) 40 Can. S.C.R. 229 at 248.
(5) (1918) 56 Can. S.C.R. 176 at 180.

for death or injury resulting from negligence of an officer or servant of the Crown, while acting within the scope of his duties or employment.

The Government Employees Compensation Act, first enacted in 1918, also imposed a new liability upon the Crown and gave birth to a new cause of action against it. Section 3 (1), as amended in 1931, provides:

3 (1) An employee who is caused personal injury by accident arising out of and in the course of his employment, and the dependents of an employee whose death results from such an accident, shall, notwithstanding the nature or class of such employment, be entitled to receive compensation at the same rate as is provided for an employee, or a dependent of a deceased employee, of a person other than His Majesty under the law of the province in which the accident occurred for determining compensation in cases of employees other than of His Majesty, and the liability for and the amount of such compensation shall be determined subject to the above provisions under such law, and in the same manner and by the same board, officers or authority as that established by such law for determining compensation in cases of employees other than of His Majesty, or by such other board, officers or authority, or by such court as the Governor in Council shall from time to time direct: Provided that the benefits of this Act shall apply to an employee on the Government railways who is caused personal injury by accident arising out of and in the course of his employment, and the dependents of such an employee whose death results from such an accident, to such an extent and to such an extent only as the Workmen's Compensation Act of the province in which the accident occurred would apply to a person in the employ of a railway company or the dependents of such persons under like circumstances.

The liability imposed and the cause of action conferred by this Act is for compensation for injury or death by accident arising out of and in the course of the employment of the employee. The basic principle for the compensation is the same as that of the various Workmen's Compensation Acts of the provinces of Canada, which in turn followed the lead of Great Britain. In that country the first Workmen's Compensation Act was that of 1897, the new principle behind the legislation having been borrowed from Germany. By this Act the employer was, for the first time, made liable to compensate his workmen for injuries arising out of and in the course of their employment. The liability was imposed quite irrespective of whether the employer or any one for whose acts he was liable had been guilty of negligence or any other breach of duty or not.

1946

BENDER
v.
THE KING

Thorson P.

It was not, therefore, a tortious or delictual liability at all. In reality, the Act made the employer an insurer of his workmen against the risks of the employment, which previously they had been obliged to take themselves. The employee's cause of action was likewise an entirely new one; it was based upon injury arising out of and in the course of his employment, and had nothing to do with whether any one had been guilty of tort or delict at all. His right to compensation from his employer was a statutory one and similar in effect to the right he would have had against his insurer if he had taken out a policy of accident insurance against the risks of his employment.

This is not a case, therefore, for the application of either of the maxims *nemo debet bis vexari pro una et eadem causa,* or *una via electa non datur recursus ad alteram.* The suppliant has not "one and the same" cause of action under the two Acts in respect of which he has two remedies; on the contrary, he has two entirely separate and distinct causes of action, one based on tort or delict and the other not, each with its own appropriate remedy. His right to damages under section 19 (c) of the Exchequer Court Act, if he can satisfy the onus of proof required by it, remains, therefore, unless it can be shown that it has been taken away. He would not have lost such right if he had insured himself against injury arising out of and in the course of his employment. Why, then, should he lose it by reason of the fact that the Government Employees Compensation Act has effected such a statutory insurance for him?

Counsel for the Crown contended that the Government Employees Compensation Act in respect of the cases to which it is applicable by implication repeals section 19 (c) of the Exchequer Court Act, and that where a person has a claim against the Crown for compensation for injuries arising out of and in the course of his employment, he has no claim against it under section 19 (c) of the Exchequer Court Act, even if his injuries resulted from negligence on the part of an officer or servant of the Crown. I am unable to accept this contention.

1946

BENDER
v.
THE KING

Thorson P.

There is a presumption against the repeal of an Act by implication. In 31 Hals., 2nd Ed., in paragraph 684, the rule is stated:

No statute operates to repeal or modify the existing law, whether common or statutory, or to take away rights which existed before the statute was passed, especially if it involves a drastic departure from the principles of law existing when it was passed, unless the intention is clearly expressed or necessarily implied.

And, in paragraph 685:

Affirmative statutes do not repeal precedent affirmative statutes unless they are contrary or repugnant to them; for without negative or repealing words, expressed or implied, the intention of Parliament to alter what already existed is not apparent, and it is always to be presumed that there was no such intention. Where, however, such intention is evident, as by the introduction of that which is inconsistent with the law as it previously existed, either affirmative or negative language may directly or impliedly repeal what is contrary to the purview of the new statute.

And, in para. 688:

A statute giving a new remedy does not of itself, and necessarily, destroy previously existing rights and remedies to which it does not refer.

Maxwell on the Interpretation of Statutes, 8th ed., at page 139, puts the rule;

An author must be supposed to be consistent with himself, and, therefore, if in one place he has expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it. In this respect, the work of the Legislature is treated in the same manner as that of any other author, and the language of every enactment must be construed as far as possible in accordance with the terms of every other statute which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a statute by construction when the words may be capable of proper operation without it. But it is impossible to construe absolute contradictions. Consequently, if the provisions of a later Act are so inconsistent with, or repugnant to, those of an earlier Act that the two cannot stand together, the earlier stands impliedly repealed by the later. *Leges posteriores priores contrarias abrogant. Ubi duae contrariae leges sunt, semper antiquae abrogat nova.*

And it was laid down by Warrington L.J. in *Wallwork* v. *Fielding* (1) that in order that a subsequent statute, not expressly repealing a previous Act, or the provision of a previous statute, may operate by implication as a repeal, it must be found that the provisions of the subsequent statute are so inconsistent with those of the previous one that the two cannot stand together.

(1) (1922) 2 K.B. 66 at 73.

1946

BENDER v. THE KING

Thorson P.

There is no express reference in either of the Acts in question to the liability imposed or the right conferred by the other and I cannot see any necessary implication for their abrogation. Nor can I see any reason why the two Acts should not stand together. The liabilities imposed and the rights conferred by each of them are separate and distinct and rest upon quite different considerations of policy. Under the Government Employees Compensation Act the employee is entitled to compensation from his employer for personal injury by accident arising out of and in the course of his employment; negligence has nothing to do with the matter; his right is based on grounds of economic policy that he should be insured against the risks of injuries inherent in his employment. I am quite unable to see how the conferring of such a new statutory right of insurance against employment accidents can by itself abrogate an existing right of action for damages for injuries resulting from such a breach of lawful duty as negligence. If the injured person cannot prove that his injury resulted from negligence and cannot, therefore, substantiate his claim for damages, he is nevertheless entitled to compensation for his injury if it arose out of and in the course of his employment. Conversely, I am unable to see how the taking of compensation for injury by accident, to which the injured employee is entitled in any event, whether there is negligence or not, can by itself take away his right of action for damages, which might be greater than the amount of the compensation, if he can prove that his injury was the result of negligence for which the employer is liable. Nor can I see how the imposition of a general obligation on an employer to insure his employees against the risks of their employment, can automatically absolve him from a particular liability where one of them is hurt through the negligence of a person for whose act he is by law liable. In my view, neither the causes of action of the injured person nor the liabilities of the Crown under the two Acts are exclusive of one another, in the absence of statutory provision making them so.

No help is obtainable from the decisions under the English Act or the Acts of the various provinces of Canada, for in such Acts the matter of the two rights and liabilities

has been expressly provided for by statutory enactment. By section 1 (2) (b) of the original Workmen's Compensation Act, 1897, of Great Britain, retained in the Act of 1906, it was provided that nothing in the Act "shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act." Both causes of action were thus open to the injured employee but he was required by the Act to elect which one he would take; he could not take both. In *Edwards* v. *Godfrey* (1) it was held by the Court of Appeal that an unsuccessful plaintiff in an action for damages against his employer could not subsequently take proceedings under the Workmen's Compensation Act. This decision was followed by the same court in *Cribb* v. *Kynoch, Limited (No. 2)* (2). The effect of the statutory provision was put by Cozens-Hardy M.R., at page 555:

> The true meaning of the Act is that a workman cannot proceed to trial under the Act and fail, and then proceed by common law action, and also cannot proceed by common law action and, having failed in that action, then proceed under the act.

In my opinion, these decisions are based upon the express statutory requirement that the employee must exercise his option as to his rights and that having chosen one he could not pursue the other. There is nothing to indicate that the provision as to the exercise of the option is merely declaratory of what the law would have been in any event even without such provision, as suggested by Boyle J. in *McClenaghan* v. *City of Edmonton* (3). Indeed, quite the reverse is the case, for Cozens-Hardy M.R. in *Cribb* v. *Kynoch, Limited (No. 2) (supra)* speaks of the provision as to an option as a remarkable one. At page 558, he said:

> I think that it must have been the desire to guard against an employer being subjected to two lawsuits to recover compensation for the same injury that led to the introducion, immediately after the provision that secures to the workman his old right of action, of the remarkable words "but in that case the workman may at his option either claim compensation under this Act or take the same proceedings as were open to him before the commencement of this Act."

It seems clear that but for the express statutory provision putting the injured employee to his election between his

(1) (1899) 2 Q.B. 333.
(2) (1908) 2 K.B. 551.
(3) (1926) 1 D.L.R. 1042.

1946

BENDER
v.
THE KING

Thorson P.

rights, there would be nothing to prevent him from bringing an action for damages for injuries resulting from negligence, even although he had received compensation on the basis of the Act. There is, however, nothing in the Government Employees' Compensation Act at all similar to section 1 (2) (b) of the English Workmen's Compensation Act of 1897 or 1906.

When the various provinces of Canada adopted the principle of workmen's compensation they followed in the main the model of the English Act. In some cases the provincial Act required the injured employee to elect whether he would proceed against his employer under the Act or independently of it; in others, it was provided that if the Act was applicable to the case, the only remedy of the employee was that given by the Act. We need concern ourselves only with the development in the province of Quebec where the suppliant's injury occurred.

The Quebec Workmen's Compensation Act, R.S.Q., 1941, chap. 160, was first enacted in 1909, Statuts de Québec, 1909, chap. 66. Section 15 provides:

> Accidents happening on or after the 1st of September, 1931, shall be governed by the provisions of this act and the compensation under this act shall be in lieu of all rights, recourses and rights of action, of any nature whatsoever, of the workman, of the members of his family or his dependents against the employer of such workman by reason of any such accident happening to him on or after the said 1st day of September, 1931, by reason of or in the course of his work for such employer, and no action in respect thereof shall lie in any court of justice.

and article 1056a of the Civil Code, as amended in 1941, Statuts de Québec, 1941, chap. 67, provides:

> 1056a. No recourse provided for under the provisions of this chapter shall lie, in the case of an accident contemplated by the Workmen's Compensation Act, 1931, except to the extent permitted by such act.

It is thus clearly established by the law of Quebec that the only recourse which a workman has against his employer for an injury arising out of or in the course of his work is under the Workmen's Compensation Act. If the law of Quebec were the governing law, then the contention of counsel for the respondent to which I have referred would be well founded. Indeed, counsel argued that the Government Employees' Compensation Act had

adopted the provincial law, that there had been a submission to the law of Quebec, that it governed the case and that it was an essential part of such law that an employee injured in the course of his work had only one recourse against his employer, namely, that under the Quebec Workmen's Compensation Act. I am unable to agree. The suppliant's right to compensation does not spring from the Workmen's Compensation Act of Quebec at all, but from the Government Employees' Compensation Act, and Order in Council P.C. 37/1038, dated February 9, 1942, making it applicable to him. All that Parliament has done is to authorize the use of the provincial machinery for the fixing of the liability of the employer and the amount of the employee's compensation.

That the use made of the provincial machinery is a limited one is clearly shown by the judgment of the Supreme Court of Canada in *Ching* v. *Canadian Pacific Ry. Co.* (1). There Rand J., speaking of the Government Employees' Compensation Act, says, at page 457:

> What the latter does is to make full provision for the creation of rights in, and the payment of compensation to, Dominion Government Employees. For the purpose of administration, either the existing machinery under the compensation laws of the various provinces, or new machinery set up under the Dominion Act itself, may be used; . . . The authority given by the Dominion Act to the Provincial Board is strictly limited and, under the language of the principal section, the right to compensation is unencumbered by a referential incorporation of provisions of the Provincial Act dealing with consequential matters.

and then, at page 458, after setting out section 3 (1) of the Act:

> The important words are: "And the liability for and the amount of such compensation shall be determined . . . in the same manner and by the same board". It is the liability of the Dominion Government to pay and the amount of the compensation, the right to which is given earlier in the section, which are to be determined; not the resulting effects upon collateral rights against third parties. To suggest, therefore, that the enactment of a special code of provisions with the powers of carrying them into administration without reference to the Provincial Board, is a submission in any sense of the term to a Provincial Act constituting another code, is to disregard the precise and individual character of the Dominion enactment.

This statement clearly indicates that the Workmen's Compensation Act of Quebec is not incorporated into the Government Employees' Compensation Act, that there

(1) (1943) S.C.R. 451.

1946

BENDER
v.
THE KING

Thorson P.

has been no submission to the provincial law and that the suppliant's case is not governed by it. The substantive right to compensation is created by the Government Employees' Compensation Act; this contains no provision similar either to section 15 of the Quebec Workmen's Compensation Act or to section 1056 (a) of the Civil Code; there is no provision either that an injured employee should elect whether he will proceed under the Act or independently of it, or that if the Act is applicable to his case he shall have only such rights as the Act affords: the Act is quite silent on the subject of the employee's rights against the Crown independently of the Act. In this respect there is, in my opinion, a fundamental difference between the Government Employees' Compensation Act on the one hand and either the English or the Quebec Workmen's Compensation Act on the other.

Under the circumstances I have come to the conclusion 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 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. The question of law is, therefore, answered in the affirmative, with the result that the parties may proceed to trial of the facts in issue. The costs of the argument on the question of law will be costs in the cause.

Order accordingly.

1944

Jun. 28, 29

1946

May 3

BETWEEN:

VALENTINE ARIAL ..... SUPPLIANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

Crown—Petition of Right—Negligence of operator of Army vehicle—Contributory negligence—Determination of degree of negligence—Assessment of damages—Highway Traffic Act, R.S.O. 1937, c. 288, s. 39 (2) (c) and (d)—Highway Traffic Amendment Act, 7 Geo. VI, c. 10, s. 3—An Act respecting Contributory Negligence (Ontario) 20 Geo. V, c. 27, ss. 4 and 5—Doctrine of contributory negligence applicable when cause of action arises in Ontario.

1946

ARIAL
v.
THE KING

Angers J.

Suppliant's infant son was struck and killed by a motor vehicle the property of respondent and operated by a member of the armed forces of Canada acting within the scope of her duties or employment. The Court found negligence on the part of the driver of the motor vehicle and also that suppliant's son was negligent and that such negligence contributed to the accident which caused his death.

Held: That the doctrine of contributory negligence as established in the Province of Ontario in virtue of chapter 27 of the Statutes of Ontario for the year 1930 entitled An Act respecting Contributory Negligence is applicable and that both parties being equally responsible for the accident the respondent should pay to suppliant one half of the damages suffered by her.

PETITION OF RIGHT by Suppliant claiming damages from the Crown for the death of her infant son alleged to have been caused by the negligence of an officer or servant of the Crown in the performance of her duties.

The action was tried before The Honourable Mr. Justice Angers, at Ottawa.

W. Guertin and *J. P. Labelle* for suppliant.

R. Forsyth, K.C., and *C. Stein* for respondent.

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

ANGERS J. now (May 3, 1946) delivered the following judgment:

The suppliant claims from His Majesty the King the sum of $5,203.62, with interest and costs, for damages allegedly suffered by her as mother of François Arial, an infant under the age of 21 years, who was struck and killed by an automobile a short distance east of the intersection of Dalhousie and St. Patrick streets, in the city of Ottawa.

The suppliant, who describes herself as the widow of J. B. Arial, plumber, in her petition of right, alleges in substance as follows:

the suppliant is the lawful mother of François Arial, an infant now deceased, who resided with her and was under her care at the time of his death;

there is no executor or administrator of the said François Arial and the suppliant is entitled under the Fatal Accidents Act of the Province of Ontario (R.S.O. 1937, chap. 210) to act as suppliant herein;

1946

ARIAL
v.
THE KING

Angers J.

on November 5, 1943, at about noon, the said François Arial was proceeding on foot on the sidewalk on the easterly side of Dalhousie street, in the city of Ottawa, in a northerly direction and, after proceeding to cross the said street (should evidently be St. Patrick street), at its intersection, the green light being on, was violently struck in the course of such crossing by a motor truck and hurled a considerable distance easterly on St. Patrick street causing fatal injuries;

the said motor vehicle bearing licence No. 2997F, which struck the said François Arial, was the property of His Majesty the King as vested in the National Defence Department (Naval Service) and was being driven by one Frances M. Thompson, a female soldier of His Majesty serving in the Naval Service, in the course of her duties;

as a result of the said motor vehicle striking the said François Arial, the latter suffered severe injuries on the head, the arms and chest, which caused his death on the same day;

the accident resulted from the negligence of the aforesaid Frances M. Thompson within the meaning of section 19, subsection (c) of the Exchequer Court Act and amendments thereto;

the negligence of the said Frances M. Thompson consisted *inter alia*:

in driving at a too great rate of speed;
in ignoring traffic signals;
in disregarding the provisions of section 39 of the Highway Traffic Act of the Province of Ontario (R.S.O. 1937, chap. 288) and amendments thereto;
in not keeping a proper lookout within the meaning of the said Highway Traffic Act;

as a result of the death of the said François Arial, the suppliant had to pay the sum of $203.62 for funeral expenses;

the said François Arial, at the time of the accident, was 10 years old, was a healthy, strong boy, well developed and intelligent and industrious; he had special aptitudes for the plumbing and tinsmith trade; at the time of his death, he was being supported by the suppliant, was

attending primary school and would have completed his course at the age of twelve years owing to his brilliant and successful studies;

the suppliant is 55 years of age, is the widow of J. B. Arial, plumber and tinsmith, and she has three other children at home which she supports;

the deceased was rendering valuable services for the suppliant and was instrumental in obtaining for her a sum of $10 a week from the firm of J. B. Arial and Sons, plumbers and tinsmiths, on account of said services;

the deceased, as soon as his studies were terminated, would have devoted most of his earnings to help the suppliant for an indefinite time; these earnings would have amounted to $40 a week and would have been paid by the said firm of J. B. Arial and Sons; the suppliant estimates at the sum of $5,000 the pecuniary benefits which she might reasonably have expected to receive from the said François Arial.

In his statement of defence the respondent pleads in substance as follows:

he does not deny that the suppliant is the lawful mother of François Arial now deceased, who resided with her and was under her care at the time of his death;

he admits that on November 5, 1943, a motor vehicle owned by the respondent and driven by Frances M. Thompson, a member of His Majesty's Naval Forces, was proceeding easterly on St. Patrick street, in the city of Ottawa, and after passing the intersection of St. Patrick and Dalhousie streets a boy, said to be François Arial and the son of the suppliant, ran from the sidewalk on the south side of St. Patrick street directly into the path of the respondent's vehicle when he was struck and injured;

he denies all the other allegations contained in the petition of right;

the accident was due entirely to the negligence of the suppliant's son, who attempted to run across the street between intersections without exercising due care and caution;

the respondent's vehicle, at the time of the accident, was operated by the said Frances M. Thompson properly, lawfully and with care and caution;

1946

ARIAL
v.
THE KING

Angers J.

the suppliant's son had the last opportunity of avoiding the accident.

The suppliant filed a joinder of issue.

A brief summary of the evidence seems apposite.

The suppliant Valentine Arial, widow of Jean-Baptiste Arial, plumber, testified that her son François was 10 years old on April 1, 1944, that he was in good health and strong and that he was intelligent.

She declared that, at the time of the accident, she had four minor children to support, the eldest of whom, a boy, was 19 years old.

She stated that she owns the house in which she is living and which is valued at $6,000. She said that her husband left an insurance policy of $2,000 and that she spent this amount to pay his debts, as he had been ill for two years. She added that she also owns furniture to the value of $500.

She asserted that her son François had special aptitudes for his father's trade, viz. plumbing and tinsmithing.

She said that her son, who is 19 years of age, is not educated and that the other son, who is 16 years old, and a girl of 13 years are still at school.

She declared that she paid $153.62 for the funeral of her son François.

In cross-examination she testified that she gave the good will of her husband's trade to two married sons and that the latter give her $40 per month, being $10 for each of the four children at home.

She declared that François would have remained at school until the age of sixteen. She believed that he would have drawn a salary of $10 per week as apprentice as soon as he would have started to work for his brothers.

She said that she has much difficulty in having both ends meet.

Jean Arial, a son of the suppliant, associated with one of his brothers in the plumbing business, testified that they give to their mother $10 a month for each of the children living at home.

He declared that, at the time of his father's death, the trade was not prosperous because his father had been sick for a long while and because labour was scarce.

He asserted that his brother François had natural dispositions for the trade of plumber, that he often came to the shop and that he seemed interested in the work. He stated that when François would have started to work in the shop as an apprentice he would have drawn a salary of between $10 and $15 a week.

In cross-examination the witness declared that before the death of his father he had worked in the shop for thirteen years. He said he is now 29 years old, having started to work at the age of 16.

Roger Tassé, operator for the Ottawa Electric Company, driving tramways and buses, testified that on November 5, 1943, around noon, he was walking north on the west side of Dalhousie street, that, when he reached St. Patrick street, he saw the green light on the north-east corner of Dalhousie and St. Patrick streets and that he had gone about four or five feet across St. Patrick street when he noticed a truck proceeding thereon from west to east at a speed of about 35 miles an hour. He asserted that he had just about time to back up one step and that otherwise he would have been struck; he added that the truck just missed him. He said he heard the squeak of brakes and tires and noticed that the truck was stopped a little past the intersection; about five feet from the east edge of the cross-walk on the east side of Dalhousie street. He stated that he walked towards it and noticed the body of a child lying on the pavement on St. Patrick street, about fifteen to twenty feet from the inside line of the sidewalk on the east side of Dalhousie street and about three feet from the front of the truck.

He estimated that Dalhousie street is about fifty feet wide and that the truck is between twelve and fifteen feet long.

He asserted that the child was François Arial, whom he knew very well, and that the car was a naval truck.

Daniel Patenaude testified that on the day of the accident he was walking down Dalhousie street towards St. Patrick street, that he crossed the latter and that the light was green. He stated that he heard noise behind him,

1946

ARIAL
v.
THE KING

Angers J.

turned round and noticed a blue truck stopped on the intersection. He specified that the rear of the truck was on Dalhousie street at the place where the tramways turn.

He said that it was the time when the children leave school and that there were many of them on the street.

He declared that he saw a sailor and another man pick up a child.

He denied having stated at the coroner's inquest that he had seen the child running and that he felt sure that he would be struck.

Austin Carkner, a city constable, testified that at about noon on November 5, 1943, he was on duty at the corner of Dalhousie and Murray streets, the latter being the first street south of St. Patrick. He said he is always there at that time when school children go out, to look after the traffic on the street.

He declared that a child ran up to him and told him that there had been an accident. He proceeded onto St. Patrick street, where the accident had occurred, and found out that a boy had been hit by a truck and that the rear of the truck, after it had stopped, was slightly past the cross-walk on the east side of Dalhousie street. He said he first went to the south-east corner of Dalhousie and St. Patrick streets and he took the child to the hospital in a jeep, which was then on the north-west corner of Dalhousie and St. Patrick streets. He asserted that the child was unconscious and that a doctor in the hospital examined him and declared that he was dead. He stated that the traffic was then very heavy and that at this time of the day it always is.

In cross-examination he declared that he had made tests to find out in what distance the truck could be stopped and that on the first test, with a Tapley machine, he stopped it in fifteen feet at a speed of twenty miles an hour and that on a second test, at the same speed, with the foot brake he made the stop in seventeen feet.

Counsel for suppliant put in evidence a part of Dr. Klotz's testimony taken before the Coroner, which shows that the child died as a result of the accident.

Frances Thompson, heard on behalf of the respondent, testified that she is in the Naval Service as motor transport driver and has been for fourteen months, that she has driven

cars for thirteen to fourteen years and that on the day of the accident she was driving a truck from west to east on St. Patrick street towards Dalhousie street at a speed of twelve to fifteen miles an hour.

She swore that, when she reached the intersection of Dalhousie street, the light was green and that it changed to amber "just as I started to cross", later changing her version to say: "After I had started to cross". She then specified: "four or five feet passed (sic) the corner."

She stated that she was five or six feet away from the curb of the sidewalk and twelve or fifteen feet east of the cross-walk on the east side of Dalhousie street when she hit the boy. She asserted that she saw the boy appear on her right side running diagonally from the rear across St. Patrick street and that he must have been running faster than the truck; she added that she was slowing down as she intended to stop. She said that at the time of the accident she was going at a speed of about ten miles an hour.

In cross-examination she declared that there were many people, including children, standing on all four corners of St. Patrick and Dalhousie streets but that she did not see Tassé nor Patenaude.

She said she felt safe to cross because the green light was in her favour. She repeated that the light turned to amber after she had started crossing Dalhousie street. She declared that she kept on going over the intersection at a speed of twelve to fifteen miles an hour.

She said she had a passenger with her in front of the car and that others were in the rear.

She asserted that the boy was about ten feet east of the cross-walk on the east side of Dalhousie street when he was hit and that she had then slowed down to about ten miles an hour.

She declared that there were a lot of people standing on the south side of St. Patrick street east of Dalhousie street and that she could not notice the boy. She stated that she saw him for the first time when he was one foot ahead of the right fender of her truck. She said that she did not blow the horn but that she put on the brakes.

She admitted that at the coroner's inquest she had testified that she saw the boy running across St. Patrick

1946

ARIAL
v.
THE KING

Angers J.

street in the path of her car and that he was about four feet ahead of the truck when she first noticed him. Asked which is the correct answer, the one given now mentioning a distance of one foot or the one given at the coroner's inquest mentioning a distance of four feet, the witness, again changing her estimate, replied (p. 35):

> Well, it happened so long ago I cannot remember exactly the distance. I suppose it might be between two and three feet.

George Ross Culley, a member of the Canadian Navy, testified that on November 5, 1943, he was driving with Miss Thompson in a truck proceeding east on St. Patrick street.

He asserted that, when the car entered the intersection, the light was green and that, when the truck had crossed about three-quarters of Dalhousie street, the light changed to amber. He declared that the truck was about ten or fifteen feet from the curb of the sidewalk on St. Patrick street when it struck the boy. He said that the boy was going in the same direction as the truck, that he was hop-skipping in the street about five feet from the sidewalk, that he went towards the sidewalk and later ran in front of the car.

In cross-examination Culley declared that, when he first noticed the boy, the truck had crossed the intersection and that the boy was then about seven or eight feet ahead of it, a little to the right. He said that the boy made two or three steps when hop-skipping, that he went near the sidewalk and then ran in front of the car and that the car ran over him.

Adrien Aubin, operator at the Water Works Department, testified that on the day of the accident he was driving his car from east to west on St. Patrick street and that, when approaching the intersection of Dalhousie street, he saw a navy truck hit a small boy. He declared that the truck started to cross the intersection on the green light and that the latter changed to amber before the truck had finished crossing.

He said that he first noticed the boy on the sidewalk and that the latter began to cross St. Patrick street from south to north at a distance of about $2\frac{1}{2}$ to 3 feet east of the cross-walk. He stated that the victim was running with

another boy on Dalhousie street towards St. Patrick street and that he started to cross the latter and ran right in front of the truck.

He asserted that the truck was going at a speed of 12 to 15 miles an hour, at a distance of about 3 feet from the sidewalk on the south side of St. Patrick street, and that the driver put on the brakes immediately.

In cross-examination Aubin somewhat modified his version and declared that the victim "started from the sidewalk to the path"—obviously meaning the cross-walk—"and right across".

He explained, or at least tried to explain, that the boy had been hit 2½ feet east of the cross-walk because he was hit from the curb. I may say that this explanation is not very satisfactory.

Later Aubin again changed his story by saying (p. 40): "He was hit not directly on the cross-walk but one foot or two feet right this way"—indicating the east—"and he made a little jump to escape that truck".

He said he first saw the naval truck coming towards him when it was at a distance of 15 to 20 feet.

Contrary to what he had declared at the coroner's inquest and which he stated was wrong, Aubin asserted that his car had come to a stop when the accident occurred. He also said that his declaration before the coroner that when he first noticed the movements of the child he was about 200 yards away is wrong and that in fact he was near the curb of the sidewalk on the east side of Dalhousie street.

He said he was interviewed in the afternoon of the accident by a lieutenant and refused to say anything.

Reverting to the question of the distance at which he was when he first saw the navy truck, he repeated that the mention he had made of 200 yards was a mistake and that now his answer is that the distance was between 15 and 20 feet. He admitted that at the time of the inquest he was all wrong in the estimation of the distance.

He declared that the right front fender of the truck hit the child on the left side and that the latter was projected on the pavement; he could not say at what distance the child was thus projected. He stated that the right front

1946

ARIAL
v.
THE KING

Angers J.

wheel of the truck went over the body of the child and that he was able to make this statement because he had seen the body underneath the car behind the wheel.

He estimated that the truck must have gone a distance of 10 feet at the most from the curb of the east sidewalk of Dalhousie street after it hit the boy.

He asserted that, when he first saw the truck, it was "right in the middle of the intersection", but later added that it might have been a little more to the west. He stated that the green light was still on when the truck was getting in the intersection and that it turned to amber while the truck was crossing.

He declared that the truck maintained its speed of 12 miles an hour more or less at the time it entered the intersection.

Asked what there was, if anything, to prevent the driver of the truck from stopping in the distance of 15 feet between the car and the child, the witness replied (p. 54): "Maybe he did not see the kid."

He stated that, as the truck approached the intersection, the light in front of him changed to amber and that that was the reason why he had to stop. It may be noted that the light facing the driver of the truck was of the same colour as the one facing the witness.

Re-examined Aubin declared that when the light changed to amber the truck was on the west side of Dalhousie street and added that "it was just coming into the intersection on the green light when it turned to amber."

The evidence is conflicting, as could be expected. Moreover the testimonies of two of the respondent's witnesses, Frances Thompson and Adrien Aubin, are inconsistent and contain contradictory versions concerning material incidents. A brief review of these discrepancies seems proper and expedient.

Frances Thompson first declared that she reached the intersection as the light facing her was green and that it changed to amber *just* as she started to cross. She then modified her version, saying that the change in the light occurred "after I had started to cross". Later she specified that she was "four or five feet past the corner" when the

light turned to amber. These changes were evidently made with a view to establishing that there was no negligence on her part.

I may note that, regarding the distance covered by the truck in the intersection, Culley stated that it had crossed about three-quarters of Dalhousie street when the light changed to amber.

Aubin testified that the truck started to cross the intersection on the green light and that the light changed to amber before the truck had finished crossing. He does not mention what portion of Dalhousie street the truck had crossed when the light turned to amber. His version on that point corroborates to a certain extent that of Culley, although not quite so precise.

Relating to the manner in which the boy got in the way of the truck, his version differs from that of Miss Thompson and of Culley. He first declared that the victim was running with another boy on Dalhousie street towards St. Patrick street and that he started to cross the latter and ran right in front of the truck. In cross-examination Aubin changed his version and stated that the Arial boy "started from the sidewalk to the path"—evidently the cross-walk—"and right across". I have no reason to doubt Aubin but I am inclined to believe that he did not pay a very close attention to the events preceding the accident.

On the other hand, we have the evidence of Tassé, an independent and disinterested witness, who testified that he started to cross St. Patrick street from south to north on the west side of Dalhousie street with the green light in his favour and that he had gone four or five feet across St. Patrick street when he saw a truck proceeding thereon from west to east at a speed of about thirty-five miles an hour, that he just had time to back up one step and that the truck just missed him. It seems evident that if Tassé was crossing St. Patrick street on the green light the truck must have entered the intersection with the red light facing it. Tassé's version is corroborated by Patenaude.

I am satisfied that the truck started to cross Dalhousie street when the red light was against it and that it was then travelling at an excessive speed. If the driver of the

1946

ARIAL
v.
THE KING

Angers J.

truck had reduced its speed, when it reached the intersection, to the limit prescribed by the statute, she could have come to a stop before hitting the child.

See The Highway Traffic Act, R.S.O. 1937, chap. 288, section 39, subsection 2, clauses (*c*) and (*d*), and An Act to amend the Highway Traffic Act, 7 Geo. VI, chap. 10, section 3.

It seems convenient to quote clauses (*c*) and (*d*) of subsection 2 of section 39, as amended by 7 Geo. VI, chap. 10, section 3:

(*c*) When a red signal-light is shown at an intersection every driver or operator of a vehicle or car of an electric railway which is approaching the intersection and facing such light shall bring his vehicle or car to a full stop immediately before entering the nearest cross-walk at such intersection, and shall not proceed until a green light is shown, provided that such driver or operator may turn to the right after bringing such vehicle or car to a full stop.

(*d*) When green and amber signal-lights are shown simultaneously at an intersection, the driver or operator of a vehicle or car of an electric railway which is approaching the intersection and facing such lights, shall bring his vehicle or car to a full stop immediately before entering the nearest cross-walk at the intersection, provided that where any such vehicle or car cannot be brought to a stop in safety before entering the intersection, it may be driven cautiously across the intersection.

The first paragraph of subsection 3 of section 39, as enacted by 7 Geo. VI, chap. 10, section 3, reads thus:

(3) The operator or driver of every vehicle or car of an electric railway shall before entering or crossing a through highway bring the vehicle or car to full stop immediately before entering the nearest cross-walk.

Dalhousie street is a through highway as designated by by-law of the City of Ottawa duly approved by the Department of Highways. See by-law No. 9080, section 20.

If the victim started to cross St. Patrick street on the cross-walk or two or three feet east of it as has been stated by Aubin with the green light facing him he did not commit an act of negligence. If rather he ran on St. Patrick street, hop-skipping as mentioned by one witness, he was negligent and his negligence very likely contributed to the accident which caused his death.

The doctrine of contributory negligence made its appearance in the province of Ontario somewhat belatedly. It became law in 1930 in virtue of the statute entitled An Act respecting Contributory Negligence assented to on April 3,

1930, being the statute 20 Geo. V, chap. 27. The doctrine however had occasionally been applied prior to the enactment of the statute: *Tabb* v. *Grand Trunk Railway Co.* (1); *Potvin* v. *Canadian Pacific Railway Co.* (2); *Downing* v. *Grand Trunk Railway Co.* (3); *Moran* v. *Burroughs* (4).

I may cite sections 4 and 5 of the Act which are relevant:

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.

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.

After carefully perusing the evidence and considering the argument of counsel I have reached the conclusion that I should assess one-half of the responsibility on the suppliant's child, who was old enough to know that he ought not to have run in the street without paying attention to the traffic, and one-half on the driver of the truck who failed to stop when she reached Dalhousie street notwithstanding by-law 9080 and the red light facing her, proceeded at an excessive speed across the intersection and did not give proper attention to the pedestrian traffic, particularly children who were numerous as usual at the time of the day when the accident happened owing to the exit from the schools for the noon recess.

Regarding the responsibility of children the following decisions may be consulted with benefit: *Yachuk* v. *Oliver Blais Company Ltd. et al.* (5); *Downing* v. *Grand Trunk Railway Co. (ubi supra)*; *Bouvier* v. *Fee* (6); *Tabb* v. *Grand Trunk Railway Co. (ubi supra)*; *Germain* v. *Canadian National Railway Co.* (7); *Potvin* v. *Canadian Pacific Railway Co. (ubi supra)*; *Makins* v. *Piggott & Inglis* (8); *Rowland* v. *Corporation de la paroisse de Rawdon et al.* (9); *Morin* v. *Lacasse* (10); *Burke* v. *Provencher* (11);

(1) (1904) 8 O.L.R. 203.
(2) (1904) 4 O.W.R. 511; 4 Can. Ry. Cas. 8.
(3) (1921) 58 D.L.R. 423; (1921) 49 O.L.R. 36.
(4) (1912) 27 O.L.R. 539.
(5) (1944) 3 D.L.R. 615; (1945) O.R. 18.
(6) (1932) S.C.R. 118.
(7) R.J.Q. (1943) S.C. 226.
(8) (1898) 29 S.C.R. 188.
(9) (1939) R.J.Q. 77 S.C. 477.
(10) R.J.Q. (1931) 69 S.C. 280.
(11) R.J.Q. (1929) 67 S.C. 500.

1946

ARIAL
v.
THE KING

Angers J.

Desroches v. *St.-Jean* (1); *Normand ès-qual.* v. *Hull Electric Company* (2); *Figiel* v. *Hoolahan* (3); *Marquis* v. *Prévost et al.* (4); *Légaré ès-qual.* v. *Quebec Power Company* (5); *Lauzon* v. *Lehouiller* (6); *Moisan* v. *Rossini* (7); *Beauchamp* v. *Cloran* (8); *Houdelman v. Numeroff* (9); *Delàge* v. *Delisle* (10).

The amount of the damages remains to be determined. In my opinion the suppliant has the right to recover the funeral expenses of her son and the loss of revenue she could reasonably expect from him from the time he left school, presumably at the age of sixteen years, to the time when he would have attained the full age of majority, to wit a period of five years.

The evidence shows that the funeral expenses amounted to $153.62; this sum must accordingly be granted. See *Johnson* v. *Antle* (11); *Bégin Limitée* v. *Morin* (12); *Epiciers Modernes Limitée* v. *Sivitz* (13); *Le Roi* v. *Savard et al.* (14).

I estimate the loss suffered by the suppliant as a consequence of the premature death of her son computed on the net earnings, after deduction of his living expenses, he would have devoted to his mother, the suppliant, to $2,600. From this sum must be deducted the cost of the upkeep and education of the child from the age of ten years to that of sixteen, which I estimate at $1,400, less however the wages which the latter would have earned as apprentice during his holidays and spare time which I deem reasonable to fix at $720. The amount to be deducted is accordingly $680, leaving a net loss of $1,920. See *Barnett* v. *Cohen et al.* (15); *Taff Vale Railway Co.* v. *Jenkins* (16); *McKeown* v. *Toronto Railway Co.* (17); *Roy* v. *Piette* (18); *Simoneau* v. *McLean* (19).

(1) R.J.Q. (1928) 44 K.B. 562.
(2) R.J.Q. (1909) 35 S.C. 329.
(3) R.J.Q. (1939) 78 S.C. 179.
(4) (1939) R. de J. 494.
(5) R.J.Q. (1939) 77 S.C. 552.
(6) (1944) R.L. 449.
(7) (1935) 41 R.L. n.s. 300.
(8) (1866) 11 L.C.J. 287.
(9) R.J.Q. (1936) 74 S.C. 498.
(10) R.J.Q. (1901) 10 K.B. 481.
(11) R.J.Q. (1940) 78 S.C. 203.
(12) R.J.Q. (1942) K.B. 549.
(13) R.J.Q. (1944) K.B. 229.
(14) R.J.Q. (1944) K.B. 328.
(15) (1921) 2 K.B. 461.
(16) (1913) A.C. 1.
(17) (1908) 19 O.L.R. 361.
(18) (1939) 45 R.L. 57.
(19) (1939) 46 R.L. 168.

1946

ARIAL
v.
THE KING

Angers J.

Since I have reached the conclusion that there was negligence both on the part of the driver of the truck and of the victim, I deem it fair and reasonable to apportion the responsibility equally between them. As the damages total $2,073.62, the respondent will pay to the suppliant one-half of this amount, to wit $1,036.81.

The suppliant will be entitled to her costs.

Judgment accordingly.

1946

Apr. 13

NOVA SCOTIA ADMIRALTY DISTRICT

BETWEEN:

THOMAS WHITE ..... PLAINTIFF;

AND

THE SHIP *FRANK DALE* ..... DEFENDANT.

Shipping—International law—Vessel registered in United States—Vessel requisitioned by United States Government—Possession of vessel taken on behalf of United States Government—Vessel in Canadian port—Vessel arrested on behalf of private suitor—Motion allowed to set aside writ of summons, service thereof and warrant of arrest.

MOTION to set aside a writ of summons, the service thereof and warrant of arrest of the ship *Frank Dale.*

The motion was heard before the Honourable Sir Joseph Chisholm, Deputy District Judge in Admiralty for the Nova Scotia Admiralty District, at Halifax.

Russell McInnes, K.C., R. L. Stanfield and *L. A. Kitz* for the motion.

Donald McInnes, K.C. contra.

Sir Joseph Chisholm, D.D.J.A., now (April 13, 1946) delivered the following judgment:

The plaintiff caused the ship *Frank Dale* owned by the United States of America, to be arrested in prosecution of a claim for damages for injuries sustained while working

1946

THOMAS WHITE
v.
THE SHIP *Frank Dale*

Sir Joseph Chisholm, D.D.J.A.

on board of her while she lay in Halifax Harbour. An appearance was entered under protest, and notice given to plaintiff to set aside the writ of summons, the service thereof and the warrant of arrest, principally on the ground that at the time of her arrest and at all relevant times she was the property of the Government of the United States of America and was in the possession of and was used by the said Government. She was and is operated under a charter party between the said Government and West India Sales Limited, and is and was used in commercial pursuits.

Mr. Donald McInnes, K.C., in support of the motion relies principally on the *Cristine* case, *Campania Novera Vascongado* v. *S.S. Cristine* (1). The *Cristine,* a trading ship registered in Bilboa, Spain, had been requisitioned by the Spanish Government and while lying in the port of Cardiff in Wales, the Spanish Consul at Cardiff acting under instructions from his government, went on board and took charge of the ship. The owners thereupon commenced proceedings *in rem* claiming possession of their property. The Spanish Government moved to set the writ aside and it was held that the Courts of England will not allow the arrest of a ship, including a trading ship, in the possession of and which has been requisitioned by a foreign sovereign State, inasmuch as to do so would be an infraction of the rule of international law that a sovereign State cannot directly or indirectly be impleaded without its consent.

Lord Akin summarized the law concisely in the course of his speech. He said:

> 1. The courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.
>
> 2. They will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of this second principle as to whether it extends to property only used for the commercial purposes of the sovereign or to his personal private property. In this country it is in my opinion well settled that it applies to both.

In the *Cristine* case the Courts held that the immunity claimed extended and applied to ships engaged in trade and belonging to a foreign sovereign State. The desirability

(1) (1938) A.C. 485.

1946

THOMAS WHITE
v.
THE SHIP *Frank Dale*

Sir Joseph Chisholm, D.D.J.A.

of modifying the accepted rule so far as it concerned trading ships was pointed out by some of their Lordships and particularly by Lord Maugham, but the House was of opinion that in the case the immunity was properly claimed. That seems to be the principle applied in the United States: *Berizzi Bros. Co.* v. *S.S. Pesaro* (2), and until changed must be accepted by our Court. The writ of summons, the service thereof and warrant to seize will be set aside with costs.

Judgment accordingly.

Nova Scotia Admiralty District

1946

Feb. 12

Aug. 26

BETWEEN:

HIS MAJESTY THE KING.....PLAINTIFF;

AND

MARITIME TOWING AND SALVAGE LIMITED and PRICE NAVIGATION COMPANY LIMITED..... } DEFENDANTS.

Shipping—Damage to pier in Halifax Harbour—Defendant's ship not direct or effective cause of damage—Action dismissed.

The ship *Empire Foam* while being towed to a berth in Halifax Harbour was bumped by a tug named the *Chicoutimi* owned by Maritime Towing and Salvage Limited. Subsequently in the effort to berth the *Empire Foam* she struck the marine tower or leg of Pier 25 belonging to the National Harbour Board with resultant damage. The Crown alleges that such damage was due to the injuries sustained by the *Empire Foam* when bumped by the *Chicoutimi*.

Held: That the negligent operation of the *Chicoutimi* was not the direct or effective cause of the damage to the pier, and the action must be dismissed.

2. That since there was no proper look-out on the *Empire Foam* to report to the bridge of such vessel anything that might affect the navigation of the ship the pilot did not know the true situation about many pertinent and relevant circumstances and such lack of knowledge was responsible for the *Empire Foam* striking the pier.

ACTION by the Crown to recover damages for loss sustained through the alleged negligent navigation of a tug owned by defendant Maritime Towing and Salvage Limited.

(2) (1926) 271, U.S. 562.

1946

THE KING v. MARITIME TOWING AND SALVAGE LTD.

The action was tried before the Honourable Mr. Justice Carroll, District Judge in Admiralty for the Nova Scotia Admiralty District at Halifax.

J. E. Rutledge, K.C. for plaintiff.

F. D. Smith, K.C. for defendant.

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

CARROLL D. J. A. now (August 26, 1946) delivered the following judgment:

On the 21st of April, 1942, while the *Empire Foam* a 10,150 ton cargo ship was being towed to Pier 25 of the National Harbour Board's port facilities at Halifax, she came in contact with the leg of the pier and damaged it. The plaintiff asserts that the damage was caused by the negligence of the defendants.

At the trial the action against the Price Navigation Company was dismissed by agreement of counsel.

The *Empire Foam* with pilot Harris H. Mosher was taken from Bedford Basin around Georges Island under her own steam and near the east end of Georges Island two tugs, the *Bansurf* and the *Dupres* were picked up for towing and were made fast about 400 ft. off the mouth of Basin No. 1 in or on which are piers or berths Nos. 23, 24, 25 and 26. The locations are shown on the plan produced in evidence by the plaintiff; 23 and 24 being on one side of the Basin; 25 and 26 on the other or the southerly side. 23 and 26 are on the outer end of the Basin and 24 and 25 on the inside.

On the day in question Berth 25 was clear or vacant, there was a ship at Berth 24 and one at 23 and also a scow and a tug on the outside of this ship. The tug *Dupres* was on the port bow of the *Empire Foam* with a short nose line to the *Foam*. The *Bansurf* had a towing line from the port quarter of the *Empire Foam* so as to tow her stern into the Basin. Owing to the construction of the *Foam* it was necessary that she be towed in stern ahead so that when moored her starboard side would be next to the Dock. The

port anchor was dropped with about 15 fathoms out to keep the bow from drifting off. In addition the *Empire Foam* was using her engines to assist, in reverse of course.

At Pier 26 there was a tug, the *Chicoutimi* under charter or owned by the defendant Maritime Towing & Salvage Ltd., located about the middle of the Pier. She had taken on coal and was waiting for the bill of account for same. The Pier is about 700 ft. long. The tug was sighted by the pilot of the *Empire Foam* when off the Basin and the tug sighted the *Empire Foam* when off the head of the Pier. The Captain of the *Chicoutimi* says that under the circumstances he thought it prudent to leave the Pier and get away before the *Empire Foam* came along, because it was *possible* that the vessel, being towed, might crash into him. I agree that if there was real danger of such crashing that the Captain of the *Chicoutimi* took the proper course for getting away and properly manoeuvred his ship in the attempt, the result of which was that he struck the tow rope of the *Bansurf* and then the rudder of the *Empire Foam.* There was a slight chafe made in one strand of the tow rope (it was a three strand rope) and the contact with the starboard side of the *Chicoutimi* and the rudder of the *Empire Foam* caused a slight dent in the rudder about one foot above the water line. It was in the effort to berth the *Empire Foam* after this accident that she struck the marine tower or leg of Pier 25 with the resultant damage. I find as a fact that the chafing of the tow rope had but very little effect on the serviceability of the rope for towing purposes and the services the tug was hired to perform; that the tow rope was not changed, that is, no other tow rope was substituted for it before the *Empire Foam* was docked and I find too as a fact that the rudder of the *Empire Foam* lost absolutely none of its efficiency through the contact with the *Chicoutimi.* I find those facts notwithstanding some evidence to the contrary.

I think the master of the *Chicoutimi* was not in any real danger by remaining where he was, especially if he moored his ship side on to the Pier, and that he misjudged the speed of the on-coming *Empire Foam* and misjudged

1946

THE KING v. MARITIME TOWING AND SALVAGE LTD.

Carroll D.J.A.

the time necessary to make the manoeuvre which he had undertaken, and that he should have known he was taking a long chance in trying to get out. In other words, his was a negligent action.

However, it was not the negligence of the *Chicoutimi* that was the direct or effective cause of the damage to the Pier.

The *Empire Foam* was in the centre of the Basin at the time of the collision with *Chicoutimi* and coming in parallel with Pier 26 which means that her starboard end was 135 feet from that Pier. When the *Chicoutimi* got clear, the *Empire Foam* was in the same position as regards Pier 26 as she was previously, parallel thereto and approximately 135 feet therefrom. The only change in her position was that she was probably a few feet further out in the Basin—in other words, she was in as good a position to get properly docked as she was previous to the accident and being a bit further out, would I think be an advantage.

There was no proper look-out on the *Empire Foam* whose duty should be to report promptly to the bridge anything that might affect the navigation of the ship and as a result, the pilot did not know the true situation about many pertinent and relevant circumstances. He did not know whether the *Bansurf* was towing and undertook to manoeuvre his ship lacking that knowledge, this in view of the fact that the *Bansurf* was a most important factor in mooring his ship. The pilot practically admits that the manoeuvre of his ship lacking that knowledge of the true situation was the cause of the damage to the marine leg. His evidence follows:

Q. That is you put her ahead and then put her astern and then you put her ahead again. (This after the *Chicoutimi* was clear).

A. I maybe put her ahead first, and put her ahead and put her astern again and probably that is the manoeuvre that brought us in the marine leg.

Q. And this took twenty minutes between the time of the collision and the time you struck the marine leg.

A. I didn't tag it. It seemed to me to be about that length of time.

Q. And you didn't know during that time if the tug *Bansurf* was holding your stern up or not.

A. I can't say if it was, although he was supposed to be fast and I don't know whether he was pulling or not owing to some trouble about the towing line.

Q. You don't know?

A. No.

Previously he had testified as follows:

I seen that (the *Chicoutimi*) going through our tug line and across our stern. It cut our line.

And further on in his evidence he testified:

Q. How did she pass the towing rope of the *Bansurf*?

A. It is a mystery to me. I don't know. She might have gone over it or under it.

The fact of the matter is that the *Bansurf* did not go through or over or under the tow rope but got away on the starboard side of the *Empire Foam*. The pilot signalled the tug to resume pulling after the *Chicoutimi* cleared, says he got no return signal or heard none but he recollects a message came back that there was something wrong with the line, and that at a time when he says himself the tow rope had been cut by the passing through of the tug.

I apprehend that it was necessary to have a tow for this ship to be safely moored and if the pilot was not sure of the service of his tow he should not have taken the chance he did, but should have done as Capt. McRitchie suggested —"gone full ahead and taken your anchor out with you."

The pilot did not get proper information as regards the condition of things or the true situation from the officers of the ship and it looks as if they did not have actual knowledge of the same because there was no proper look-out to advise or instruct.

It seems to me that the pilot must have exercised different manoeuvres after the collision than would be necessary if the *Bansurf* was pulling on her tow. He seemed vague concerning those manoeuvres. In fact, it seems that he was confused—the confusion brought about by the utter lack of knowledge of the situation, knowledge which should have been given him by the ship's officers.

These acts I think resulted in the damage complained of by the plaintiff.

The action will be dismissed with costs.

Judgment accordingly.

1944
Apr. 17
1946
Oct. 23

BETWEEN:

WILLIAM HAROLD CONNELL, ... APPELLANT,

AND

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

Revenue—Income tax—Income War Tax Act, R.S.C. 1927, c. 97 s. 32 (2)—Transfer of property by husband to his wife—Headings may be referred to only where there is ambiguity—No tax liability unless expressly imposed.

Prior to his marriage appellant transferred certain securities to trustees for his intending wife and by a marriage settlement directed the trustees to transfer certain shares to her immediately after the marriage and to hold other securities in trust with the income to be paid to her for life. The respondent sought to assess the appellant on the income derived by the wife from such securities.

Held:—That a tax liability cannot be fastened upon a person unless his case clearly 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. *Partington* v. *Attorney General* (1869) L.R. 4 H.L. 100 at 122 followed.

2 That the Court has no right to assume that a transaction is within the intention or purpose of a taxing Act if it falls outside its words. *Tennant* v *Smith* (1892) A.C. 150 at 154 followed.

3. That a transfer of securities by a taxpayer to trustees for his intending wife with instructions in a marriage settlement, executed prior to the marriage, that immediately after the marriage certain shares should be transferred to his wife and other securities held in trust with the income to be paid to her for life is not a transfer of property by a husband to his wife within section 32 (2) of the Income War Tax Act and the taxpayer is not liable to income tax on the income derived by his wife from such securities.

APPEALS under the provisions of the Income War Tax Act.

The appeals were heard before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

H. E. Manning K.C. for appellant.

R. Forsyth K.C. and *A. A. McGrory* for respondent.

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

1946

CONNELL v. MINISTER OF NATIONAL REVENUE

Thorson P.

THE PRESIDENT, now (October 23, 1946) delivered the following judgment:

These appeals under the Income War Tax Act, R.S.C. 1927, chap. 97, from assessments for the years 1938 and 1939 raise the question whether the appellant is liable to income tax on the income derived by his wife from certain securities which he had transferred to trustees prior to the marriage to be dealt with by them according to the terms of a marriage settlement also executed prior to the marriage.

There is no dispute as to the facts. On September 1, 1938, a marriage settlement was executed by the appellant and Edith Ellen James, who had promised to marry one another, and A. B. Mortimer and John de N. Kennedy as Trustees. The recitals show that on the treaty for the marriage it was agreed that the appellant should transfer certain specified shares to Edith Ellen James for her own absolute use and benefit and should also settle certain other stocks, debentures and bonds in the manner specified in the settlement. It also appears that in part performance of the said agreement the appellant had prior to the execution of the settlement delivered to the trustees share certificates and transfers of the shares that were to be transferred absolutely and had also transferred to the trustees the stocks, debentures and bonds that were to be subject to the trusts of the settlement. The marriage settlement contained, *inter alia*, the following provisions:

5. NOW IN CONSIDERATION of the marriage THIS DEED WITNESSETH as follows:—

Transfer of Assets to Wife

6. The Husband authorizes and directs the Trustees immediately following the marriage to cause the shares mentioned in the second recital to be transferred on the transfer registers of the respective companies into the name of the Wife, whereupon such shares shall become the sole and absolute property of the Wife and shall not be subject to the trusts of this settlement nor subject to any trusts, provisoes or conditions whatsoever.

Transfer of Assets to Trustees

7. The Husband directs that the Trustees shall henceforth hold the stocks, debentures and bonds described in the schedule hereto (all which stocks, debentures and bonds and the investments into which from time to time and under any trust or power herein contained the same may be converted are hereinafter called the TRUST FUND that term being

1946

CONNELL v. MINISTER OF NATIONAL REVENUE

Thorson P.

intended to denote the constituents from time to time of that fund) and the income therefrom upon the trusts and subject to the powers and provisions hereinafter declared concerning the same.

Trusts during Life of Husband or Wife

8. The Trustees shall hold the Trust Fund upon the trusts following:—

(*a*) Until the marriage in trust for the Husband.

(*b*) From and after the marriage to pay the income therefrom to the Wife during her life but so that such income shall, during any coverture, be without power of anticipation.

(*c*) From and after the death of the Wife to pay the income therefrom to the Husband, if surviving her, during his life.

and finally

23. Provided always that if the marriage shall not be solemnized within six calendar months from the date hereof these presents shall be void, and the shares hereby settled shall be transferred to the Husband.

Subsequently, on September 2, 1938, the appellant and Edith Ellen James were married.

On the income tax assessments levied against the appellant for the years 1938 and 1939 the income which his wife had received from the securities referred to was added as taxable income to the amounts respectively shown by him on his returns. Appeals from those assessments were taken to the Minister who affirmed them upon the ground that the securities had been transferred by a husband to his wife within the provisions of section 32 (2) of the Income War Tax Act and that the appellant was liable to be taxed on the income derived therefrom as if such transfer had not been made. Being dissatisfied with the Minister's decision the appellant then brought his appeals from the assessments to this Court where they were heard together.

Section 32 (2) of the Income War Tax Act 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 section is in Part IV of the Act, dealing with "Special provisions relating to the incidence of the tax", and immediately under the heading "Transfers to Evade Taxation".

Counsel for the appellant put forward two arguments, one of which was that only transfers made to evade taxation are covered by section 32 (2); that it does not

apply to transfers made for valuable consideration; that if the transfers made by the appellant in this case can be regarded as transfers from a husband to a wife, as contended on behalf of the respondent, such transfers were not made for the purpose of evading taxation but for the valuable consideration of marriage and are not covered by the section. In support of this argument he relied upon *Molson et al.* v. *Minister of National Revenue* (1). In that case the deceased Molson by his marriage contract on March 28, 1913, had made to his future wife a donation *inter vivos* of the sum of $20,000 and then by a deed on March 23, 1925, being desirous of fulfilling the conditions of his marriage contract, transferred to his wife certain shares which she accepted in full payment of the sum of $20,000. It was sought to assess the deceased's estate in respect of the income from the said shares. From this assessment the executors appealed. In this Court Angers J. allowed the appeal, holding that the object of section 32 (2) was to tax in the hands of the transferor property transferred for the purpose of evading taxation; that the conveyance by Molson to his wife was not a transfer to evade taxation; and that it was not subject to the provisions of the section. An appeal to the Supreme Court of Canada having been taken by the Minister, the appeal was dismissed on grounds quite different from those adopted in this Court. Indeed, Duff C. J., giving the judgment of the majority of the Court, was careful to express no opinion upon them. At page 218 he said:

> It is also contended, and the learned trial judge has acted upon this contention, that the heading "Transfers to evade taxation", which did not appear in the statute of 1926, but appeared for the first time in the Revised Statutes, manifests an intention that section 32 should have no application except to transfers made with such intent; and that in this case such intent is conclusively negatived by the fact that the transfer was executed pursuant to an ante-nuptial contract.
>
> We do not think it necessary to consider either of these questions. We express no opinion upon them.

Under the circumstances the *Molson* case (*supra*) cannot be regarded as authority for holding that section 32 (2) applies only to transfers made for the purpose of evading taxation. The question is left open. It may be that the

(1) (1937) Ex. C.R. 55; (1938) S.C.R. 213.

1946

CONNELL v. MINISTER OF NATIONAL REVENUE

Thorson P.

headings of different portions of a statute may be referred to in order to determine the sense of any doubtful expression in a section ranged under any particular heading: *Hammersmith and City Railway Co.* v. *Brand* (1), but it is also clear that there must be some ambiguous expression in a section before the aid of the heading under which it appears can be invoked: *Fletcher* v. *Birkenhead Corporation* (2). I find no ambiguity in the words of section 32 (2) and see no reason for restricting its application to transfers made for the purpose of evading taxation; nor am I prepared to hold that a transfer made for valuable consideration is necessarily excluded from its scope. But in view of the conclusion I have reached on the other argument advanced it is not necessary in this case to decide the question.

The contention upon which counsel for the appellant really relied was that the dispositions by the appellant and the trustees of the securities referred to were not transfers from a husband to his wife within the express terms of section 32 (2) and that it does not apply to them. The section 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. The liability is a statutory one. It is well established that a tax liability cannot be fastened upon a person unless his case clearly 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. This was laid down by the House of Lords in the leading case of *Partington* v. *Attorney General* (3), 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.

The Court has no right to assume that a transaction is within the intention or purpose of a taxing Act if it falls outside its words. In *Tennant* v. *Smith* (4) Lord Halsbury L.C. stated:

(1) (1869) L.R. 4 H.L. 171.
(2) (1907) 1 K.B. 205 at 214.
(3) (1869) L.R. 4 H.L. 100 at 122
(4) (1892) A.C. 150 at 154.

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 a tax is expressly imposed.

Cases, therefore, under the Taxing Acts always resolve themselves into a question whether or not the words of the Act have reached the alleged subject of taxation.

These are basic principles of income tax law.

The assessments of the appellant for the income received by his wife from the securities referred to can be supported only if it can be shown that it was income derived from property transferred by a husband to his wife. In order that the Minister may bring such income within the letter of the law, so that the words of section 32 (2) may reach it, he must show that the dispositions by the appellant of the securities referred to were transfers of property from a husband to his wife. The only kind of transfer of property that is caught by section 32 (2) is a transfer by a husband to his wife, or *vice versa,* that is to say, a transfer between spouses. At the time of the transfer the transferor and the transferee must be married to one another and the rights to the transferred property must pass to the one spouse by the transfer from the other. Unless a disposition of property meets these requirements it is not within the letter of the law as expressed by section 32 (2) and the income derived therefrom is not reached by its words.

It is established that the appellant had delivered the share certificates and transfers of the shares that were to go to his intended wife after she became such to the trustees before the marriage settlement was executed. He had also transferred to them the stocks, debentures and bonds that were to be subject to the trusts of the settlement. Then by the marriage settlement he gave certain directions to the trustees in respect of the securities he had transferred to them. By these acts he had divested himself of the securities and his control over them before the marriage and no further act on his part thereafter was

1946

CONNELL v. MINISTER OF NATIONAL REVENUE

Thorson P.

necessary. When he became the transferor of the securities in question he was not a husband. Nor did he after he acquired the status of a husband make any transfer of them to his wife. Indeed, he could not do so, for he had already transferred them to the trustees prior to the marriage. The only transfers of securities to which the appellant was a party were transfers by him to the trustees before he became a husband. Moreover, the wife did not become a transferee of any property from her husband. In respect of the stocks, debentures and bonds that were made subject to the trusts of the marriage settlement, they were never transferred to her at all but remained with the trustees. As for the other shares, she became entitled to a transfer of them from the trustees immediately after the marriage. She thus acquired her rights in respect of the shares and the income from other securities not as a transferee from her husband but by her own acquisition of the status of a wife and the action of the trustees. In view of the transfers made by the appellant to the trustees prior to the marriage settlement and the terms of the settlement all she had to do was to go through with the marriage and then automatically as soon as she acquired the status of a wife she became entitled to the income from the securities subject to the trusts and to a transfer of the shares that were to belong to her absolutely, not from her husband, but from the trustees.

Under the circumstances I have come to the conclusion that the dispositions of the securities in question were not transfers of property by a husband to his wife within section 32 (2) and that neither the income from the shares nor that from the other securities was derived from property so transferred. The Minister had, therefore, no right to assess the appellant for income tax in respect of it. To that extent the assessments under appeal are erroneous, and the appeals from them must be allowed with costs.

Judgment accordingly.

1946

May 29

Aug. 30

BETWEEN:

J. K. SMIT & SONS OF CANADA Limited ..... } APPELLANT;

AND

THE REGISTRAR OF TRADE MARKS, RESPONDENT.

Trade Mark—"Superset"—The Unfair Competition Act, 1932, Statutes of Canada, 1932, Chap. 38, s. 26 (1) (c)—Appeal from refusal of Registrar to register word mark.

Appellant applied for registration of "Superset" as a word mark applied to drilling, cutting, grinding tools and appealed from the refusal of the Registrar of Trade Marks to grant such application. Appeal dismissed.

Held: That the tools in question are diamond industrial tools and the diamond must be firmly set if the tool is to perform its proper function and the word is therefore peculiarly descriptive of the character or quality of the wares in association with which it is used.

2. That the Registrar of Trade Marks was right in refusing the application because such registration is excluded by the provisions of section 26 (1) (c) of the Act.

3. That leave is granted to the appellant to proceed with its application under section 29 upon notice.

APPEAL by J. K. Smit & Sons of Canada Limited from the refusal of the Registrar of Trade Marks to register "Superset" as a word mark in association with diamond industrial tools.

The appeal was heard before the Honourable Mr. Justice O'Connor, at Ottawa.

George H. Riches for appellant.

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

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

O'CONNOR J., now (August 30, 1946) delivered the following judgment:

This is an appeal from the refusal of the Registrar to register the appellant's word mark "Superset" on the grounds that the mark is descriptive or misdescriptive of the character or quality of the wares in association with

J. K. SMIT & SONS OF CANADA LTD. v. REGISTRAR OF TRADE MARKS

O'Connor J.

which it is used. The registration of which is excluded under the provisions of section 26 (1) (c) of The Unfair Competition Act, 1932.

The applicant has used the mark since June, 1943, in Canada on wares described as "manual and/or power operated drilling, cutting, grinding and dressing tools".

Webster's New International Dictionary gives these meanings:—

"Super" (adj.) means superfine, excellent, first rate.

"Set" means to place in a setting.

The tools in question are diamond industrial tools. It is obvious that the diamond must be firmly set if the tool is to perform its proper function, and the word is, therefore, peculiarly descriptive of the character or quality of the wares in association with which it is used.

The Registrar was right in my opinion in refusing the appellant's application, and the appeal from his decision is dismissed. The appellant also sought a Declaration of the Court under section 29 of the Act, but was not ready to proceed with the application on the return of the motion. Leave is granted to the appellant to proceed with the motion under section 29, upon notice in the usual manner.

Judgment accordingly.

1946

May 22, 23 & 31.

Sept. 6

BETWEEN:

THE B. MANISCHEWITZ COMPANY,...PLAINTIFF;

AND

HARRY GULA, trading under the firm name and style of "HARRY GULA'S TASTY MATZO BAKERY", and the said HARRY GULA, ... } DEFENDANTS.

Trade Marks—Infringement—Passing off—The Unfair Competition Act, 1932, s 2, ss. (k) & (l), s 11, ss. (b)—Similar wares—Similar marks—Similar cartons—Evidence as to confusion—Trap orders—Insufficient notice given of instances relied on—Test of similarity of trade mark—Descriptive word—Hebrew word or meaning.

The plaintiff registered the word mark "Tam Tam" for use in association with crackers on the 22nd March 1945. On the 22nd October, 1945, the defendant baked crackers and sold them in cartons under the word mark "Tum Tum". Action was taken by the plaintiff for infringement and passing off.

1946

B. MANISCHEWITZ CO. v. HARRY GULA ET AL

Held: That there was a contemporaneous use of both marks in the same area in association with similar (as defined by the Act) wares.

2. That the word "Tam" is not a Hebrew or Jewish word but even if it conveys the meaning of "taste or tasty" to a Hebrew or Yiddish speaking person it would not for that reason be unregistrable. It is not to an English or French speaking person clearly descriptive or misdescriptive of the character or quality of crackers.

3. That no weight can be attached to evidence of trap orders of which the plaintiff does not give particulars to the defendant immediately afterward so as to permit the defendant to investigate *C. C Wakefield & Co. Ltd.* v. *Purser* (1934) 51 R P.C 167 at 171.

4. That the test of similarity of word marks is, not by placing them side by side but by asking whether, having due regard to relevant surrounding circumstances, the defendant's mark as used is similar (as defined by the Act) to the plaintiff's registered mark as it would be remembered by persons possessed of an average memory with its usual imperfections. *The Coca-Cola Co. of Canada Ltd.* v *Pepsi Cola Co. of Canada Ltd.* (1942) 59 R.P C 127 at 133

5. That the defendant's mark as used is similar (as defined by the Act) to the plaintiff's registered mark and the defendants' mark is an infringement of the plaintiff's registered mark.

6. That the defendants have in the course of their business directed public attention to their wares by the use of a similar carton that at the time they commenced so to direct attention to them, it might be reasonably apprehended that their course of conduct was likely to create confusion in Canada between their wares and those of the plaintiff in contravention of Section 11, ss. (b) of the Act.

ACTION by the plaintiff for infringement and passing off.

The action was tried before the Honourable Mr. Justice O'Connor, at Ottawa.

Jack Rudner for the plaintiff.

Hon. A. W. Roebuck, K.C. for the defendant.

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

O'CONNOR J., now (September 6, 1946) delivered the following judgment:

This is an action for infringement of the Plaintiff's registered word mark and to restrain the Defendants from passing off their goods as the goods of the Plaintiff.

The Plaintiff's registered mark consists of the words "Tam Tam". The Defendants used the word mark "Tum Tum". Both were applied to crackers or biscuits.

1946

B. MANISCHEWITZ CO. v. HARRY GULA ET AL

O'Connor J.

The Plaintiff was incorporated in the State of Ohio in 1914 for the purpose of manufacturing and selling Matzos and other Passover articles. The Plaintiff applied for registration of the word mark "Tam Tam", applied to crackers and biscuits, in 1939 and such registration was granted by the United States Patent Office on the 31st March 1942, as No. 394,250. The Plaintiff extensively advertised its crackers under the name "Tam Tam" in the United States and the volume of sales in the United States has exceeded $250,000.00 per year.

In Canada the Plaintiff commenced to use the word mark "Tam Tam" in connection with the sale of crackers on the 30th August 1944. The Plaintiff advertised its crackers under the name "Tam Tam" in Canada both in the newspapers and on the radio. On the 14th March 1945, the Plaintiff applied for registration of the word mark "Tam Tam" applied to crackers and biscuits, and such registration was granted by the Registrar of Trade Marks under the Unfair Competition Act 1932 on the 22nd March 1945, as No. 186,477. The volume of sales by the Plaintiff in Canada for the year ending August 1, 1945, exceeded $40,000.00.

The Defendants operated for many years a bakery in the City of Toronto, manufacturing and selling Matzos and other Passover articles. Between the 22nd and 30th days of October 1945, the Defendants manufactured crackers for two days only and sold them in cartons under the word mark "Tum Tum". These words appear in large white block letters and above them written in script in smaller letters appears the word "Tasty".

The respective rights of the parties are governed by the Unfair Competition Act 1932.

Section 3 (*c*) of that Act provides that no person shall knowingly adopt for use in Canada in connection with any wares, any trade mark which is similar to any trade mark which is in use in Canada by any other person and which is registered pursuant to the provisions of that Act as a trade mark for the same or similar wares.

"Similar" in relation to trade marks is defined by the Act:—

2 (*k*). "Similar", in relation to trade marks, trade names or distinguishing guises, describes marks, names or guises so resembling each other or so clearly suggesting the idea conveyed by each other that the contemporaneous use of both in the same area in association with wares of the same kind would be likely to cause dealers in and/or users of such wares to infer that the same person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they were produced, or for their place of origin.

I find that the wares of the Plaintiff and Defendants are similar within the meaning of section 2 (1) of the Act and there was a contemporaneous use of both marks in the same area in association with wares of the same kind.

The Defendants contend that the Plaintiff's word mark was not registrable because it is a well known Jewish term equivalent to the English word "taste" or "tasty", and therefore a more laudatory term both descriptive and *publici juris.*

There was a distinct conflict of opinion between the Hebrew scholars who gave evidence on this point. After considering their evidence very carefully, I accept the opinion of Mose H. Arnoni that "Tam" is not a Hebrew or a Jewish word and that to a Hebrew or Yiddish speaking person, the words "Tam Tam" do not convey anything.

I think that all that can be said in support of the Defendants' contention is that when pronounced "Tam" is similar in sound to the Hebrew word for "tasty". But even if the word "Tam" does convey the meaning of "taste" or "tasty" to a Yiddish speaking person, it would not be unregistrable for that reason. It is an English word being the usual abbreviation for Tam O'Shanter, meaning a Scotch cap. It is not to an English or French speaking person clearly descriptive or misdescriptive of the character or quality of crackers.

Evidence was given by a detective as to trap orders to storekeepers. But there are two objections to this evidence. First, the Plaintiff did not give particulars to the Defendants immediately afterwards so as to permit the Defendants to investigate the same. In *C. C. Wakefield & Co., Ltd.*, v. *Purser* (1), Farwell, J., said:—

Further, if a person is resorting to a test order or a trap order, even in a case of this kind, where the necessity for such a device may be a real one, that person is bound to carry out the proceedings with the utmost

(1) (1934) 51 R.P.C., 167 at 171.

1946

B. MANISCHEWITZ CO. v. HARRY GULA ET AL

O'Connor J.

fairness to the prospective defendant to the action. It is essential, if the plaintiff is to succeed in the action which he ultimately brings, that he should be able to satisfy the Court that he has acted throughout with the most exact fairness to the defendant and has given him every reasonable chance of investigating the matter for himself, so that he may be in a position to put forward in the action, if one follows, any and every defence properly open to him.

Second, this evidence was not clear as to whether there was any confusion or whether the storekeepers, not having "Tam Tam" crackers, merely substituted "Tum Tum" crackers which they had in stock. This evidence, therefore, does not warrant my attaching weight to it.

A test of similarity of word marks was laid down in *The Coca-Cola Company of Canada Ltd.*, v. *Pepsi-Cola Company of Canada Limited* (1):—

> In these circumstances the question for determination must be answered by the Court, unaided by outside evidence, after a comparison of the Defendant's mark as used with the Plaintiff's registered mark, not placing them side by side, but by asking itself whether, having due regard to relevant surrounding circumstances, the Defendant's mark as used is similar (as defined by the Act) to the Plaintiff's registered mark as it would be remembered by persons possessed of an average memory with its usual imperfections.

A comparison of these word marks in this manner shows clearly that the Defendants' mark as used is similar (as defined by the Act) to the Plaintiff's registered mark.

I am of the opinion that the trade mark used by the Defendants and the registered trade mark of the Plaintiff, are trade marks so nearly resembling each other or so clearly suggesting the idea conveyed by each that the contemporaneous use of both in the same area in association with wares of the same kind, would be likely to cause dealers in and/or users of the same wares to infer that the same person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they were produced or for their place of origin. The Defendants have adopted for use in Canada, in connection with their wares, a trade mark which offends against the provisions of section 3 of the Unfair Competition Act.

(1) (1942) 59 R.P.C., 127 at 133.

1946

B. MANISCHEWITZ CO. v. HARRY GULA ET AL

O'Connor J.

The Plaintiff adopted a carton for the crackers on which the words "Tam Tam" in large white block letters are superimposed on and within a Star of David, having a blue background and an irregular red border; the whole superimposed on a coloured background consisting of representation of the actual biscuit or cracker contained therein. The carton is rectangular in shape with red borders on the four sides and bottom, and printed on the carton are the words, "The distinct flavour of Tam Tam demonstrates the skill of our master bakers in the baking and blending of its ingredients", and "The perfect cracker Kosher Pareve".

The Defendants adopted a carton of exactly the same size. The words "Tum Tum" appear in large white block letters superimposed on a blue background. Above the words "Tum Tum" appears the word "Tasty" in smaller letters written in script. The blue background is in the form of a "V" and occupies the same position on the carton as the Star of David which forms the blue background for the lettering on the Plaintiff's carton. Both the lettering "Tum Tum" in white and the "V" in blue are superimposed on a coloured background, consisting of a representation of the cracker contained in the carton. And this background and the background appearing on the Plaintiff's carton are identical. The red border around the bottom with white lettering and the border appearing on the Plaintiff's carton are also identical. On the carton of the Defendants appears the exact wording (except the words "Tam Tam") as set out on the Plaintiff's carton,—"The distinct flavour of Tum Tum demonstrates the skill of our master bakers in the baking and blending of its ingredients", and "The perfect cracker Kosher Pareve". Not only are the exact words used, but they are placed at the same place in the same type of print and colour as those on the Plaintiff's carton.

Section 11 of the Unfair Competition Act gives a statutory right of action for the same wrongs for which a remedy was given at common law in passing off cases:—

11. No person shall, in the course of his business,

(*a*) make any false statement tending to discredit the wares of a competitor;

1946

B. MANISCHEWITZ CO. v. HARRY GULA ET AL

O'Connor J.

(*b*) direct public attention to his wares in such a way that, at the time he commenced so to direct attention to them, it might be reasonably apprehended that his course of conduct was likely to create confusion in Canada between his wares and those of a competitor;

(*c*) adopt any other business practice contrary to honest industrial and commercial usage.

A comparison of the Defendants' carton with the Plaintiff's carton shows such a striking similarity that confusion between the wares of the Plaintiff and those of the Defendants would be inevitable. The differences that do exist are not such that would avoid confusion.

I am of the opinion that the Defendants have, in the course of their business, directed public opinion to their wares in such a way that, at the time they commenced so to direct attention to them, it might be reasonably apprehended that their course of conduct was liable to create confusion in Canada between their wares and those of the Plaintiff.

The evidence given on behalf of the Defendants is not sufficient to rebut the presumption cast on the Defendants by section 10 of the Act of having knowingly adopted a trade mark or distinguishing guise similar to the Plaintiff's word mark.

The interim injunction granted before the trial will be made permanent.

The Defendants manufactured their crackers for two days only and the total sales made were small. Action was then commenced and an interim injunction granted. The Defendants made some effort to recall the cartons that remained with the distributors. The Defendants' bakery was shortly afterwards destroyed by fire.

Under these circumstances the amount involved does not warrant a further inquiry into damages or an accounting as of profits.

I award the Plaintiff damages in the sum of $100.00 on the claim for infringement and in the sum of $100.00 on the claim for passing off, and costs of the action.

Judgment accordingly.

1946
Sept. 4
Oct. 31

BETWEEN:

GEORGE FREDERICK DANIELS BOND, APPELLANT,

AND

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

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 3, 6 (a) —"Income"—"Net" profit or gain or gratuity—"Ascertained" and "unascertained"—Income of fixed amount not necessarily net—Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income—Annual practising fees paid by lawyers deductible from fixed salary.

Appellant was employed as Counsel to the City of Winnipeg on salary of fixed amount. His duties were mainly those of a barrister but he performed some solicitor duties as well. To entitle him to practise he was required to pay annual practising fees to the Law Society of Manitoba. Non-payment of such fees would result in suspension from practice and striking off the rolls. Thereafter any attempt to practise would be unlawful and subject him to penalty and injunction.

Appellant claimed deduction of practising fees from fixed salary but such deduction was disallowed.

Held: That cases decided under Schedule E, Rule 9, of the Income Tax Act, 1918, of the United Kingdom have no application to the proper interpretation of section 6 (*a*) of the Income War Tax Act or the determination of what disbursements or expenses are deductible under such Act.

2. That the making of an expenditure cannot by itself serve the purpose of earning the income but it may enable the maker of it to earn it and thus be a working expense and part of the process of earning the income, and, therefore, be made for the purpose of earning it.

3. That the payment by a practising lawyer to his law society of his annual practising fees or an obligatory annual assessment is not a disbursement or expense "not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" and is not excluded as a deduction from his remuneration by section 6 (*a*) of the Act.

4. That the test of taxability of an annual gain or profit or gratuity is not whether it is "ascertained" or "unascertained" but whether it is "net". *Samson* v. *Minister of National Revenue* (1943) Ex. C.R. 17 at 24 followed. Dictum of Audette J. in *In Re Salary of Lieutenant-Governors* (1931) Ex. C.R. 232 at 235, that an annual salary from any office or employment, being an amount which is duly ascertained and capable of computation, is therefore of itself a "net" income, disapproved.

5. That an income is not necessarily net annual profit or gain or gratuity and therefore taxable income merely because it is a salary of a fixed amount.

1946

BOND
v.
MINISTER
OF
NATIONAL
REVENUE

6 That the appellant is entitled to deduct from his fixed salary the amount of his Law Society annual practising fees and obligatory assessment and that his right to do so is not affected by the fact that his remuneration is by way of a fixed salary instead of fees.

APPEAL under the Income War Tax Act.

The Appeal was heard before the Honourable Mr. Justice Thorson, President of the Court, at Winnipeg.

W. P. Fillmore K.C. for appellant.

C. B. Philp K.C. and *E. S. MacLatchy* for respondent.

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

The PRESIDENT now (October 31, 1946) delivered the following judgment:

The issue in this appeal under the Income War Tax Act, R.S.C. 1927, chap. 97, is whether a member of the legal profession employed as such on a salary of a fixed amount may, for the purpose of determining his taxable income, deduct from such fixed amount the amount of the Law Society annual practising fees which he must pay to entitle him to practise in the year in which such fees are payable.

The appellant is qualified as a legal practitioner in the Province of Manitoba in both branches of the profession, having been admitted to the rolls as an attorney-at-law and solicitor in October, 1919, and called to the bar as a barrister in March, 1920. Since his admission and call he has been a member in good standing of the Law Society of Manitoba, the governing body of the legal profession in that province. Membership in good standing in the Society, which is governed by The Law Society Act, R.S.M. 1940, chap. 115, as amended, is a prerequisite of the lawful practice of the profession in the province. Section 38 empowers the benchers of the Society to make rules and by-laws for fixing the fees payable annually by each barrister and attorney and for striking off the rolls and suspending from practice any barrister or attorney for non-payment of such fees. By Rule 74 of the Rules, By-laws and Regulations of the Society, dated September 28, 1939, every barrister, solicitor, or barrister and solicitor is required to take out an annual certificate in order to be entitled to

practise in that year, the fee for which is fixed at $20, and it is provided that if such annual fee is not paid by a specified date he shall ipso facto stand suspended from practising his profession unless and until he shall have taken out his certificate and that if he does not do so by a further specified date he shall ipso facto be struck off the rolls. Then section 38 A (1), added by an amending Act in 1943, Statutes of Manitoba, 1943, chap. 29, sec. 2, empowered the benchers to create a special fund, later called the Reimbursement Fund, by the levy of an annual assessment on the members of the Society and by By-law 59, dated April 22, 1943, the benchers fixed an assessment of $5 for the balance of the year 1943 and attached the same consequences of suspension from practice and striking off the rolls for non-payment of such assessment as for non-payment of the annual fees. The unauthorized practice of law is prohibited by section 53, as enacted by section 3 of the amending Act of 1943, and serious consequences are attached to such unauthorized practice. Section 53 (1) provides in part as follows:

> 53. (1) No person shall in the Province of Manitoba
> (a) carry on the practice or profession of barrister or attorney-at-law or solicitor,
> (b) act as a barrister or attorney-at-law or solicitor in any superior or inferior court of civil or criminal jurisdiction or before any justice of the peace,
> (d) hold himself out as or represent himself to be or practise as a barrister or attorney-at-law or solicitor or for gain or reward act as a barrister or attorney-at-law or solicitor,
>
> unless he has been duly called or admitted . . ., or while he is disbarred or struck off the rolls as a barrister or attorney-at-law or solicitor, or while he is suspended from practice.

Section 53 (7) provides that violation of section 53 shall be an offence for which penalties of fine or imprisonment are provided and, in addition, section 53 (10) authorizes an injunction at the instance of the Society against the offending party. The payment of the annual fees is, therefore, necessary to the lawful and continuous practice of the profession in the year in which they are payable.

The appellant is employed as Counsel to the Corporation of the City of Winnipeg having been appointed as such by By-law No. 15489 of the City, dated August 31, 1942. By such by-law he is required to devote his whole time to the duties of his office and to perform such duties in

1946

BOND
v.
MINISTER OF NATIONAL REVENUE

Thorson P.

respect of such office as may be prescribed by by-law. Prior to his appointment there was only one chief law officer of the City, known as the City Solicitor, but on his retirement the duties of his office were divided between the appellant as Counsel to the City and another member of the legal profession as City Solicitor. The duties of the City Solicitor prior to this division of duties are set out in section 119 of By-law No. 15330 of the City, dated June 10, 1941. It will be seen that they include functions that only a barrister can perform as well as those that are ordinarily done by a solicitor. The appellant had charge of and took responsibility for all litigation in which the City was interested, although process was issued in the name of the City Solicitor; he prepared the pleadings, did all the work of preparation and conducted the proceedings in the courts. It was also his duty to investigate claims against the City, to advise whether they should be resisted or settled, and to negotiate settlements. He represented the City on tax appeals before the assessment appeal boards and the courts. He was called upon for legal opinions, both verbal and written, when required by the City Council or its committees. In addition to these duties he also did solicitor's work, such as dealing with tax sale applications and passing on documents affecting real estate or personal property. His functions and duties were thus those of a solicitor as well as those of a barrister.

The appellant paid the annual fees of $20 and the assessment for the Reimbursement Fund of $5 for the year 1943 and on his income tax return for that year claimed the sum of $25 as a deduction. On his assessment this deduction was disallowed and its amount added as taxable income to the amount shown on his return. From this assessment he appealed to the Minister, who affirmed the assessment. Being dissatisfied with the Minister's decision he now brings his appeal to this Court.

The Minister's decision reads:

> The Honourable the Minister of National Revenue having duly considered the facts as set forth in the Notice of Appeal and matters thereto relating hereby affirms the said Assessment on the ground that the taxpayer has been correctly assessed and that the deductions claimed are not permissible under the provisions of the Act. Therefore on these and related grounds and by reason of other provisions of the Income War Tax Act the said Assessment is affirmed.

The ground thus assigned for affirming the assessment does not disclose any specific reasons at all. But the validity or otherwise of an assessment does not depend upon the soundness or unsoundness of the reasons given by the Minister for his decision on the appeal to him under section 58 of the Act or whether reasons are given or not. The appeal to the Court provided by the Act is an appeal from the assessment, not from the Minister's decision or the reasons or lack of reasons for it: *Nicholson Limited* v. *Minister of National Revenue* (1).

Two lines of argument were laid out by counsel for the respondent in support of the disallowance of the deduction. One was that it was excluded under section 6 (*a*) of the Income War Tax Act which provides:

> 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;

Counsel admitted frankly that the appellant could not continue to be Counsel for the City of Winnipeg without continuing to be a member of the Law Society of Manitoba and had to pay the annual fees and special assessment sought to be deducted in order to retain such membership but contended, nevertheless, that this disbursement was not wholly, exclusively and necessarily laid out by the appellant for the purpose of earning the income in that it was made only for the purpose of retaining his professional qualification so that he could earn the income but was not made for the purpose of earning it. The disbursement was said to be related to the maintenance of the professional qualification but not to the earning of the income. It was admitted by counsel that while the taxing authority has not allowed the deduction of Law Society annual fees in the case of practising lawyers in receipt of a salary of a fixed amount it has allowed such deduction in the case of those whose remuneration is by way of fees. It is obvious, of course, that if the contention put forward by counsel is sound then the deduction is no more justifiable in the one case than in the other, for the same argument would apply to both; the deduction is permissible either in both cases or in neither. Moreover, in as much as the fees paid by

(1) (1945) Ex. C.R. 191 at 200.

1946

BOND
v.
MINISTER
OF
NATIONAL
REVENUE

Thorson P.

the appellant were annual practising fees, it would also seem to follow that all similar fees, such as annual licence fees, would have to be disallowed as deductions on the ground that they were paid to entitle the taxpayer to do business but not for the purpose of earning the income.

In support of his contention counsel relied upon *Simpson* v. *Tate* (1). There a county medical health officer joined certain medical and scientific societies in order that by means of their meetings and published transactions he might be aware of all recent advances in sanitary science and keep himself up to date on all medical questions affecting public health and sought to deduct from the amount of his emoluments of office the subscriptions paid by him to these societies. The deductions were claimed under the United Kingdom Income Tax Act, 1918, Schedule E, Rule 9, which reads:

> 9. If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to expend money wholly, exclusively, and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed.

It was held that the subscriptions were not moneys expended "in the performance of his official duties", and the deduction was disallowed. Counsel also cited *Wales* v. *Graham* (1). There a county divisional engineer sought to deduct an annual subscription paid to the Institution of Civil Engineers. Candidates for the appointment had to be members of the Institution or hold other approved qualifications and while it was not specifically required that membership of the Institution should be continued after the appointment there was evidence that relinquishment of membership would render impossible the continued efficient discharge of the full duties of the office. Retention of membership depended upon payment of an annual subscription. The deduction was claimed under Schedule E, Rule 9, but was disallowed with no reasons given. In my view neither of the cases cited has any application to the question under review. Even on the facts the present case is distinguishable. In neither case was payment of the sub-

(1) (1925) 2 K B. 214.

(1) (1941) 24 T C 75.

scriptions sought to be deducted a necessary prerequisite of lawful and continuous practice, whereas in the present case the appellant had to pay the law society fees. They were annual practising fees and if they were not paid the appellant's attempt to carry out his duties, and to earn the income, would constitute unlawful practice and subject him not only to penalty but also to injunction. But there is even a stronger reason for not applying them. Both were decided under Schedule E, Rule 9, of the Income Tax Act, 1918, of the United Kingdom, which differs radically from section 6 (*a*) of the Income War Tax Act. Similar remarks would apply to other English cases decided under Schedule E, Rule 9, or similar prior legislation, such as *Cook* v. *Knott* (1); *Revell* v. *Directors of Elworthy Bros. & Co. Limited* (2); *Friedson* v. *Glyn-Thomas* (3); *Andrews* v. *Astley* (4); *Ricketts* v. *Colquhoun* (5); *Nolder* v. *Walters* (6); *Blackwell* v. *Mills* (7). These show that in the cases under Schedule E the deduction of expenditures from the amounts of the emoluments assessed under the schedule is permitted only to the extent that they fall within the express terms of Rule 9, which are rigidly applied. The deduction is limited to expenditures "in the performance" of the duties of the office; if they are made otherwise than "in the performance" of the duties they are not deductible. If there were any provision in the Income War Tax Act similar to Rule 9 of Schedule E it might be argued that the moneys paid by the appellant to the Law Society of Manitoba were not deductible in that they were not paid in the performance of his duties as a lawyer, but there is no such provision. Section 6 (a) is quite different. In interpreting the terms of a statute it is always dangerous to apply decisions in other jurisdictions upon other statutes that are not *in pari materia*; and nowhere is it more dangerous than in the case of such an Act as the Income War Tax Act. In my view, cases decided in the United Kingdom under Schedule E, Rule 9, of the Income Tax Act, 1918, have no application to the proper interpretation of section 6 (*a*) of the Income War Tax Act, or to the determination of what disbursements or expenses are deductible under such Act.

(1) (1887) 2 T.C. 246.
(2) (1890) 3 T.C. 12.
(3) (1922) 8 T.C. 302.
(4) (1924) 8 T.C. 589.
(5) (1926) A.C. 1
(6) (1930) 15 T.C. 380.
(7) (1945) 2 All E.R. 655.

1946

BOND v. MINISTER OF NATIONAL REVENUE

Thorson P.

If aid is to be obtained from decisions under the United Kingdom Act, such aid should be sought from decisions rendered, not under Schedule E, Rule 9, but under Schedule D, Cases I & II, Rule 3 (*a*), which reads as follows:

> 3. In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—
>
> (a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment or vocation.

And even then such decisions should be read with care in interpreting section 6 (*a*) of the Canadian Act, as indicated in *Siscoe Gold Mines Ltd.* v. *Minister of National Revenue* (1).

In *Strong & Co. Limited* v. *Woodifield* (2) the House of Lords dealt with the corresponding rule under the Income Tax Act, 1842. At page 453, Lord Davey said of the words "for the purposes of the trade",

> These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, &c. I think the disbursements permitted are such as are made for that purpose. 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.

And in *Robert Addie & Sons' Collieries* v. *Inland Revenue* (3) the Lord President (Clyde) of the Scottish Court of Session laid down the following test:

> What is "money wholly and exclusively laid out for the purposes of the trade" is a question which must be determined upon the principles of ordinary commercial trading. It is necessary, accordingly, to attend to the true nature of the expenditure, and to ask oneself the question, Is it a part of the Company's working expenses; is it expenditure laid out as part of the process of profit earning.

and this test was approved by the Judicial Committee of the Privy Council in *Tata Hydro-Electric Agencies, Bombay* v. *Income Tax Commissioner, Bombay Presidency and Aden* (4).

In section 6 (*a*) of the Income War Tax Act, the words "for the purpose of earning the income" take the place of the words "for the purposes of the trade, etc.," in the corresponding English rule under Schedule D, but their effect is, I think, the same. It was so held by the Supreme

(1) (1945) Ex. C R. 257 at 262.
(2) (1906) A.C. 448.
(3) (1924) S. C. 231 at 235.
(4) (1937) A.C. 685 at 696.

Court of Canada in *Minister of National Revenue* v. *Dominion Natural Gas Co. Ltd.* (1), where the test laid down in the *Addie* case (*supra*) for the English rule was expressly adopted as applicable to section 6 (*a*). In the *Addie* case (*supra*) Lord Clyde approved the statement of Lord Davey in *Strong & Co., Limited* v. *Woodifield* (*supra*). The two cases should, I think, be read together and the words "for the purpose of earning the income" in section 6 (*a*) dealt with in the same way as Lord Davey dealt with the words "for the purposes of the trade". It is obvious that the making of an expenditure cannot by itself serve the purpose of earning the income but it may enable the maker of it to earn it, and thus be a working expense and part of the process of earning the income, and, therefore, be made for the purpose of earning it.

Section 6 (*a*) is an excluding section. It prohibits the deduction of disbursements or expenses "not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income". Can it reasonably be said that the amount paid by the appellant to the Law Society falls within the exclusions of the section? I do not think so. The appellant had to pay this amount in 1943 in order to be entitled to practise law in that year. It was an annual practising fee. If he did not pay it he would be suspended and then struck off the rolls. Any attempt on his part thereafter to perform his duties would be contrary to law and constitute an offence for which he would be subject to a penalty and also to an injunction preventing him from continuing his attempt at practice. The payment of the amount was, therefore, necessary to the lawful and continuous performance of his duties and the earning of the income. Moreover, I think it was inherent in the contractual relationship between the appellant and the City of Winnipeg that he should continue to be a lawyer in good standing since his duties could not be performed without such standing. The maintenance of good standing was essential to the valid performance of his contract without which he could not earn the income. In my view, he had to pay the fees to earn the income and could not do so without paying them. The expenditure was an annual one which he could not escape but had to

(1) (1941) S.C.R. 19.

1946

BOND
v.
MINISTER
OF
NATIONAL
REVENUE

Thorson P

make. It constituted a working expense as part of the process of earning the income. Likewise, it was clearly made for the purpose of enabling him to carry on his duties and earn the income. That it was necessarily made for such purpose is quite clear, and there is nothing to indicate that it was made otherwise than wholly and exclusively for such purpose. In my view, the payment by a practising lawyer to his law society of his annual practising fees or an obligatory annual assessment is not a disbursement or expense "not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" and is not excluded as a deduction from his remuneration by section 6 (*a*) of the Act. Moreover, it meets the test of deductibility of expense laid down in the cases referred to. The appellant is, therefore, entitled to a deduction of the amount claimed by him unless he is excluded therefrom for some other reason such as the one advanced by counsel for the appellant.

It was contended that since the appellant had a salary of a fixed amount there could be no deduction of any expenses from it, and that the amount of the income being fixed it was of itself "net" income and, therefore, taxable income. I have already referred to the admission made by counsel that the department has allowed the deduction of the annual fees paid by practising lawyers to their law societies where their remuneration is by way of fees, but has not allowed any such deduction where it is by way of fixed salary. I am unable to see any justification in principle for any such discrimination of treatment, and it ought not to be approved by the Court unless the law clearly so demands. In disallowing the deduction in the case of the lawyer in receipt of a fixed salary the department has consistently relied upon a dictum of Audette J. in the case of *In re Salary of Lieutenant-Governors* (1). In that case the appellant sought to deduct from the amount of his salary the amounts of the sums expended by him as Lieutenant-Governor for social entertainments. Audette J. held against him and it is clear that the *ratio decidendi* of the judgment was that the appellant was under no legal obligation, contractual or otherwise, to make the expenditures sought to be deducted and they were, therefore, "not

(1) (1931) Ex. C.R. 232.

disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income", within the meaning of section 3 (8), now section 6 (*a*), of the Income War Tax Act. Further than this it was not necessary for the Court to go. The dictum upon which the department relies appears on page 235, where Audette J. says of section 3 (8);

> It is quite obvious that this section does not apply to a case of this kind. The disbursements that must be made to earn profit are those in connection with unascertained incomes, unlike a case of salary, where disbursements are made at the discretion and the will of the taxpayer,—and after all are not these disbursements measured by the hospitable disposition of each Lieutenant-Governor, and are they not freely and voluntarily incurred and so not enforceable by law.
>
> What that section means is that in "a trade or commercial or financial or other business or calling," before the amount upon which the tax is to be levied is ascertained, the amounts expended to earn the same must be deducted.

and then the dictum follows:

> But it is otherwise in the case where a person received an annual salary from any office or employment—an amount which is duly ascertained and capable of computation, and which constitutes of itself a net income.

In *Samson* v. *Minister of National Revenue* (1) I expressed the opinion that the dictum of Audette J. in the *Lieutenant-Governor's* case (*supra*), namely, that an annual salary from any office or employment, being an amount which is duly ascertained and capable of computation, is, therefore, "of itself" a "net" income, was not necessary to the determination of the issue before the Court; that it went beyond the *ratio decidendi* of the judgment, namely that there was no legal obligation of any kind on the part of the Lieutenant-Governor to incur the expenses for social entertainments; and that it was, as a matter of law, *obiter*; and I held that the decision is not authority for the view that sums of money received by a taxpayer, "as being wages, salary, or other fixed amount", are necessarily "net" or taxable income. Notwithstanding this statement, the department has continued its practice of disallowing the deduction of the annual practising fees in the case of lawyers receiving a salary of a fixed amount on the ground that it was settled law by the *Lieutenant-Governor's* case (*supra*) that such salary, being duly ascertained and capable of computation, is of itself net income. The law is not so

(1) (1943) Ex. C.R. 17.

1946

BOND v. MINISTER OF NATIONAL REVENUE

Thorson P.

settled; not only is the dictum referred to *obiter*, but it is also, in my opinion, at variance with the definition of "income" in section 3 of the Act, and it ought not to be followed. Section 3 reads in part as follows:

> 3. For the purposes of this Act, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, ...

On the hearing before me counsel for the respondent relied upon the dictum, and contended that under the definition "wages, salary or other fixed amount", being ascertained and capable of computation, was net income. I do not agree. In the *Samson* case (*supra*), at page 24, the following appears:

> The term "net" is an integral part of the statutory definition of taxable income. It is the annual "net" profit or gain that is "income" for the purposes of the taxing statute. The statement made by Audette J. in the *Lieutenant-Governor's* case to the effect that an income, such as an annual salary, which is duly ascertained and capable of computation, constitutes "of itself" a "net" income, is in my opinion at variance with the statutory definition in that it does not give proper effect to the relationship of the word "net" in the statutory definition to the words that follow. The statement assumes that it is only with respect to "unascertained" income that there is any necessity to consider deductions in order to arrive at the amount of the annual "net" profit or gain or gratuity that is taxable income. The statute, in my opinion, shows clearly that it is the "net" profit or gain or gratuity that is taxable income whether the profit or gain or gratuity, of which only the "net" is taxable income, is ascertained or unascertained. The test of taxability of an annual gain or profit or gratuity is not whether it is "ascertained" or "unascertained", but whether it is "net". The word "net" in the statutory definition of taxable income is just as referable to what is ascertained as it is to what is unascertained.

I see no reason for departing from the views thus expressed. Moreover, the words "ascertained" and "unascertained" appear in a parallel construction, namely, "whether ascertained and capable of computation as being . . . .", or unascertained as being . . . ."; and both equally relate to what precedes them. The adoption of the dictum would mean that "ascertained" would relate to "net profit or gain or gratuity" and be synonymous with it, whereas "unascertained" would relate only to "profit or gain or gratuity" or, in other words, that while "ascertained" would relate to "net" profit or gain or gratuity, "unascertained"

1946

BOND
v.
MINISTER OF NATIONAL REVENUE

Thorson P.

would relate to "gross" profit or gain or gratuity. Such a construction would be a distortion of plain language; both words relate to the same thing. There is no grammatical justification for differentiating between them and no ground of principle for doing so. In my view, it is clear that what is to be taxed is the annual "net" profit or gain or gratuity, regardless of whether the profit or gain or gratuity is "ascertained" as being one kind of income or "unascertained" as being a different kind. Such an interpretation is a sound grammatical one; it also removes the unfair discrimination of the present departmental practice. In my judgment, an income is not necessarily net annual profit or gain or gratuity and, therefore, taxable income merely because it is a salary of a fixed amount, and there is nothing in the Income War Tax Act that excludes the deduction of proper disbursements or expenses from such fixed amount in order to determine the amount thereof that is taxable.

That being so and the amount claimed by the appellant not being excluded from deduction by section 6 (*a*), I am of the opinion that the appellant is entitled to deduct it. His right to do so is not affected by the fact that his remuneration is by way of a fixed salary instead of by way of fees. The appeal will, therefore, be allowed with costs.

Judgment accordingly.

1946

Jan. 8

Aug. 30

BETWEEN:

LEONARD MURPHY.....SUPPLIANT;

AND

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

Crown—Petition of Right—Exchequer Court Act, R.S.C. 1927, C. 34, s. 19 (c)—Collision on Highway—Negligence—Negligence Act of Ontario, R.S.O. 1937, C. 115.

Suppliant seeks to recover damages from the Crown for injury to his motor vehicle suffered as a result of a collision on a highway in the Province of Ontario between his motor vehicle driven by a constable of the Ontario Provincial Police and a Field Army Tractor owned by the Crown and driven by a member of His Majesty's Military Forces while acting within the scope of his duties. The Field Army Tractor was the ninth vehicle in a convoy travelling east on Ontario highway No. 17. The convoy was headed by a motorcycle and a

1946

LEONARD MURPHY v. THE KING

O'Connor J.

station wagon both fully lighted and followed by a number of army vehicles with lights blacked out. These vehicles were thirty-five to forty feet apart except the ninth vehicle which was out of place and was nine hundred feet behind the eighth vehicle. The suppliant's vehicle travelling west passed the eighth vehicle in the convoy and attempted to overtake and pass a preceding vehicle with the result that it collided head on with vehicle No. 9.

Held: That the driver of the respondent's vehicle was negligent in driving the vehicle without lights when he was as far out of his proper position in the convoy.

2. That the driver of the suppliant's vehicle was negligent in attempting to overtake and pass another preceding vehicle without first ascertaining that the highway in front of, and to the left of, such vehicle was safely free from approaching traffic.

3. That the damage was occasioned by the negligence of both drivers and the negligence of each was not clearly subsequent to or severable from the act of the other, but was substantially contemporaneous therewith. The degree of fault was apportioned as follows: Driver of the respondent's vehicle 70%—Driver of the suppliant's vehicle 30%.

4. That the liability of the Crown under s. 19 (c) is to be determined by the law of negligence of the province in which such negligence occurred that was in force in such province alleged on June 24, 1938. *Tremblay* v. *The King* (1944) Ex. C.R. 1 at 12 followed and applied.

5. That the provisions of the Negligence Act of Ontario, R.S.O. 1937, C. 115 are therefore applicable.

PETITION OF RIGHT by Suppliant claiming damages against the Crown for injury to his motor vehicle alleged to have been caused by the negligence of a member of His Majesty's Military Forces while acting within the scope of his duties or employment.

The action was tried before the Honourable Mr. Justice O'Connor, at Ottawa.

J. A. Maloney for the Suppliant.

R. Forsyth, K.C. and *H. C. Kingstone* for the Respondent.

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

O'CONNOR J., now (August 30, 1946) delivered the following judgment:

The Suppliant claims damages resulting from a collision between a Field Army Tractor (6 tons) owned by the Respondent, and a sedan owned by the Suppliant. The

collision took place on highway 17 about 4 miles west of Petawawa Military Camp at 9.30 p.m., on the 16th of September, 1943. The highway was dry and the night was clear. At the point of collision the highway is 22 feet in width, almost level and straight for a distance of three-quarters of a mile.

The Suppliant's vehicle had been hired by the police in order to answer a call. Constable Renaud drove the vehicle west on the highway. He was accompanied by Chief of Police, Espey. A station wagon driven by Captain Callendar, accompanied by Sergeant Harland, was also proceeding west ahead of the Suppliant's vehicle.

The Respondent's vehicle was the ninth vehicle in a convoy travelling east on highway 17. The convoy was headed by a motorcycle and a station wagon, both fully lighted, and these were followed by a number of army vehicles with lights blacked out. The black-out consisted of one headlight blocked completely and the other headlight was covered except for a slit 6" across and $\frac{1}{4}$" wide. There was a hood over the slit, which directed the light down on the road for a distance of 10 or 15 feet. There was a small pencil light on each fender and these were described as being about the size of a pencil and were covered with frosted glass. The vehicles in the convoy were travelling about 35 to 40 feet apart. The ninth vehicle, which is the one which came in contact with the car of the Suppliant, was out of place in the convoy, and was 900 feet behind No. 8 vehicle. At the time of the collision it was being operated by Lieutenant Coyle, who was being instructed in blackout driving by an instructor, who was sitting behind him.

As the station wagon driven by Captain Callendar was about to pass the ninth vehicle in the convoy, the Suppliant's vehicle came up behind the station wagon, turned out and attempted to overtake and pass it, with the result that it came into a head-on collision with vehicle No. 9. The impact took place right beside the station wagon.

At the time of the impact the left front wheel of vehicle No. 9 was 4 feet south of the centre of the highway and the collision took place entirely south of the centre line of the highway.

1946

LEONARD MURPHY v. THE KING

O'Connor J.

The impact that took place was very heavy resulting in the death of Chief of Police Espey, and very severe injuries to Constable Renaud. The Suppliant's vehicle was damaged beyond repair. The heavy Field Army Tractor suffered only slight damage.

Because collision took place almost beside the station wagon, Sergeant Harland and Captain Callendar were in the best position to see just what happened.

Their evidence, which I accept, was that when they passed vehicle No. 8 they believed it to be the end of the convoy, and Captain Callendar then raised the headlights and was able to see the silhouette of vehicle No. 9 in the distance. When he lowered the headlight beams again he could not see the vehicle at all, and he did not see it until he was very close to it, although he knew it was there approaching him and he was watching for it.

Their evidence also shows that the vehicle of the Suppliant came up behind them very fast and that when it pulled over to the left to overtake and pass their vehicle, it was travelling too fast for the driver to get a true picture of the road ahead. This was described by Sergeant Harland as, "I saw the lights behind me and they seemed to be closing up very fast", and that, "Yes, he did pull over to the left, but I think he was travelling too fast to get a true picture of the road ahead of him". Their evidence also showed that they were travelling about 35 miles an hour and the Suppliant's vehicle was travelling much faster, probably 15 to 20 miles per hour more. The evidence further showed that after the collision the indicator on the speedometer on the Suppliant's car was in a fixed position registering 55 miles per hour.

I find that the driver of the Respondent's vehicle was negligent in driving the vehicle without lights when he was so far out of his proper position in the convoy. The warning which approaching traffic would get from the motorcycle and the station wagon, which, with their lights on, were at the head of the convoy, would be completely lost in so far as the 9th vehicle was concerned, because of the gap of 900 feet.

I find that the collision was caused by the negligence of the driver of the Suppliant's vehicle in attempting to pass another vehicle going in the same direction on a high-

way, without first ascertaining that the travelled portion of the highway in front of, and to the left of, the vehicle to be passed, was safely free from approaching traffic. I am of the opinion that the driver of the Suppliant's car turned out so fast, and when travelling at such a high rate of speed, he did not get, in the language of Sergeant Harland, "a true picture of the road ahead of him."

The damage to the Suppliant's vehicle was occasioned by the negligence of both drivers. I am not satisfied by the evidence that the negligence of either driver was clearly subsequent to and severable from the act of the other, so as not to be substantially contemporaneous therewith.

I apportion the degree of fault as follows:—

70% to the driver of the car of the Respondent;

30% to the driver of the car of the Suppliant.

The Statement of Defence admits that the Respondent owned the motor car and that it was being operated by a member of His Majesty's forces while engaged within the scope of his duties or employment, and he is, therefore, under section 50 (a) of the Exchequer Court Act, R.S.C., 1927, chap. 34, deemed to be a servant of the Respondent. The motor vehicle of the Suppliant was in the possession of its driver with the consent of the Suppliant.

The Suppliant's motor vehicle was completely destroyed, and I assess his damage at $875.00.

The Suppliant's evidence as to the loss of use he sustained until he was able to replace the vehicle is too meagre. The Suppliant must not only present facts which show that damage of this nature has been suffered, but they must be of a nature from which an amount can fairly be deduced. *Saint John Tugboat Company* v. *The King* (1).

The liability upon the Crown is to be determined by the laws of the Province where the cause of action arose,— *The King* v. *Derosiers* (2), and the liability is such as existed under the laws in force in the Province at the time when the Crown became liable. *Gauthier* v. *The King* (3).

The question of when the Crown first became liable for

(1) (1946) 3 D.L.R., 225.
(2) (1909) 41 S.C.R., 71 at 78.
(3) (1918) 56 S.C.R., 176 at 179.

1946

LEONARD MURPHY v. THE KING

O'Connor J.

negligence of the kind alleged by the Suppliant was considered in *Tremblay* v. *The King* (1). In that case Thorson, P., held:—

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,.....

I adopt the reasoning of Thorson, P., as set out in the judgment, and I hold, therefore, that the provisions of the Negligence Act of Ontario, R.S.O., 1937, c. 115 are applicable in this case.

The damage to the motor vehicle of the Respondent was admitted by counsel at $75.25.

The Suppliant will have judgment for

70% of $875.00	$612 50
Less 30% of $75.25	22 57
	$589 93

The Suppliant is also entitled to costs.

Judgment accordingly.

1946

May 6, 7, & 8.

Oct. 2.

BETWEEN:

WILLIAM BRAUN .....SUPPLIANT;

AND

HIS MAJESTY THE KING, ...RESPONDENT.

Crown—Petition of Right—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19 (c)—Collision at intersection—Within the scope of duties or employment—Servant's frolic—Re-entry on master's business.

Suppliant seeks to recover damages from the Crown for injuries suffered as a result of a collision at an intersection between a bicycle on which he was riding and a truck owned by the Crown and driven by a member of the military forces of His Majesty in the right of Canada. The driver of the truck was instructed to take garbage from the Trade School to a dump and return. The instruction did not define or fix the route to be followed. After leaving the dump instead of returning to the Trade School he drove in the opposite direction to a

(1) (1944) Ex. C.R. 1 at 12.

1946

WILLIAM BRAUN v. THE KING

O'Connor J.

brewer's warehouse where some empty beer bottles were turned in and the refund divided among the members of the party. On the return journey to the Trade School the collision occurred. The Court found the sole cause of the collision was the negligence of the driver of the truck and held the Crown responsible for such negligence.

Held: That while the servant started on the respondent's business he deviated from the course on some business of his own and he did something so contrary to and inconsistent with the respondent's business that it had no connection with it and the servant was then on a frolic of his own.

2. That at the time of the collision the servant's frolic had ended and he had again entered upon the respondent's business. *Merritt* v. *Hepenstal* (1895) 25 S.C.R. 150; *West and West* v. *Macdonald's Consolidated Ltd. and Malcolm* (1931) 2 W.W.R. 657; *Battistoni* v. *Thomas* (1932) S.C.R. 144.

PETITION OF RIGHT by the suppliant seeking damages against the Crown for injuries suffered by himself due to the alleged negligent operation of a motor vehicle owned by the Crown and driven by a member of His Majesty's military forces.

The action was tried before the Honourable Mr. Justice O'Connor at Hamilton.

O. M. Walsh, K.C. and *Donald O. Cannon* for suppliant.

E. D. Hickey and *W. E. Green* for respondent.

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

O'CONNOR J., now (October 2, 1946) delivered the following judgment:

In this Petition of Right the Suppliant claims damages from the Respondent in the respect of injuries suffered by the Suppliant as a result of a collision between a bicycle on which the Suppliant was riding and a truck owned by the Crown, and driven by a servant of the Crown.

The Suppliant in order to succeed against the Respondent must bring his claim within the ambit of paragraph (*c*) section 19 of the Exchequer Court Act as amended, reading as follows:—

Every claim against the Crown arising out of any death or injury to the person or property resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment.

1946

WILLIAM BRAUN v. THE KING

O'CONNOR J.

The collision occurred about 3 p.m., on the first day of June, 1944, at the south-east corner of Sherman Avenue and Biggar Avenue, in the City of Hamilton, in the Province of Ontario. Immediately before the collision the Suppliant was riding on his bicycle parallel with and a few feet westerly from the easterly curb of Sherman Avenue in a northerly direction on Sherman Avenue. The truck driven by Tidey was also travelling north on Sherman Avenue. As the Suppliant reached the intersection of the southerly side of Biggar Avenue with the easterly side of Sherman Avenue, and the truck had overtaken and partly passed the Suppliant, the truck turned to the right into Biggar Avenue. The collision occurred at the south-east corner of the intersection of the two streets. The body of the truck struck the Suppliant, and he was dragged or carried approximately 15 feet on Biggar Avenue.

Tidey's evidence was that when the truck was 125 feet back from the corner, Munro had told him to turn to the right. Both Tidey and Munro swore that the turn was a normal one. The turn was described by Mrs. Dagg and Mrs. Kennedy, witnesses for the Suppliant, who were standing at the north-east corner, as "a very quick turn", and "the truck turned fast as if on an impulse—as if the driver had made up his mind late". Based on the evidence of Mrs. Dagg and Mrs. Kennedy, which I accept and the evidence of the Suppliant as to how the collision occurred, which I also accept, I find that the truck overtook and partly passed the Suppliant as both the truck and the Suppliant reached the intersection, and that the truck turned suddenly to the right. The result, of course, was that while the front of the truck cut across ahead of the Suppliant, the right side of the body of the truck struck the Suppliant. I do not accept the evidence of Tidey as to how the accident occurred. I find that the collision was caused solely by the negligence of the driver Tidey.

The real question in this case is whether the servant, Tidey, was at the time of the collision acting within the scope of his duties or employment.

Tidey was a member of the military forces of the Respondent, and situated at the Trade School at the City of Hamiliton. He qualified as a driver of trucks in August, 1943, and at the time in question was employed as a driver.

1946

WILLIAM BRAUN v. THE KING.

O'Connor J.

On the morning of the first of June he was given a work ticket, which set out the work which he was to do for the day. This work ticket, together with all the other work tickets issued during that month, was destroyed at the end of the month, in accordance with the usual practice of the Trade School.

Private Tidey's evidence as to his instructions (which I accept) was as follows:—That he was to drive a truck from the Trade School and pick up a garbage fatigue party and to drive them around the camp while they collected the garbage and then to take the wet garbage to the dump, (which lies north-west of the Trade School) and then on to take the dry garbage to the incinerator (which in turn lies north-west of the dump) and then to return to the Trade School. The instructions did not define or fix the route which he was to take.

He started out and picked up the garbage detail, consisting of three privates. He drove the detail around the camp while they collected garbage. He then drove the truck to the dump and then to the incinerator, and then back to the camp (Trade School).

After dinner this work was resumed. They drove around the camp picking up the remainder of the garbage and then drove to the dump and then to the incinerator. A number of empty beer bottles had been collected in the garbage that day. The same detail of men, other than the driver, had been collecting garbage on preceding days, and had accumulated a number of empty beer bottles which they had stored in a wagon covered by a tarpaulin. The beer bottles which had been accumulated, and the beer bottles collected on the day in question, were put on the truck. After the truck left the incinerator, marked "I" in blue on Exhibit 1 (a map of the City of Hamilton) the truck proceeded south-west down Plymouth Street to the intersections of Plymouth and Burlington Streets and Gage Avenue. From this point the truck to return to the Trade School (marked "X" on Exhibit 1) could proceed either east on Burlington Street, then south on Kenilworth Avenue and thence east a short distance to the Trade School, or it could have proceeded south on Gage Avenue to Beach Road, and thence easterly on Beach Road to Kenilworth Avenue, and thence east to the Trade School.

1946

WILLIAM BRAUN v. THE KING

O'Connor J.

Instead of taking either of these alternative routes, the driver drove the truck directly west on Burlington Street to Sherman Avenue, and thence south on Sherman Avenue to the intersection of Princess Street where a brewery warehouse was located, (marked with a red dot surrounded by a blue circle on Exhibit 1). Privates Heath and Munro, two of the men on the detail, took the bottles into the warehouse and obtained a refund of $3.00, and this sum was divided among the three members of the garbage detail, and the driver of the truck—each receiving 75c. The driver, Tidey, swore that he knew nothing about the beer bottles being on the truck, or the purpose in driving the truck to the brewery warehouse, and that he drove the truck to the brewery warehouse because Private Reece told him to do so. He stated that he was surprised when Privates Heath and Munro came out of the warehouse and handed him 75c. Again I do not accept his evidence. He knew what his orders were, and he stated that he knew that when they were in front of the brewery warehouse, they were, what he termed, "out of bounds".

After leaving the brewery warehouse Tidey drove the truck west to First Street for the purpose of turning around, and then came back to Sherman Avenue and on entering Sherman Avenue, turned north with the intention and for the purpose of returning to the Trade School. Tidey intended to drive straight north on Sherman Avenue to Burlington Street, and then east on Burlington Street, and this would have taken him back to the corner of Plymouth and Burlington Streets.

On reaching Biggar Avenue, Private Munro, who was sitting beside him told him to turn east on Biggar Avenue, which he did and the collision occurred at that intersection. Munro stated that from the intersection of Sherman Avenue and Biggar Avenue, the shortest and the most direct route to the Trade School was east on Biggar. An examination of the map, Exhibit 1, shows that this is so.

It is quite clear, therefore, from the evidence that the turn east on to Biggar Avenue was made for the purpose of taking the shortest and the most direct route back to the Trade School.

The Respondent contends that Tidey was on a frolic of his own at the time of the collision, and was not then acting within the scope of his duties or employment.

The master is responsible for the consequences of his servant's negligent act while the servant is on his master's business. It is quite clear that when the servant does not start upon his master's business and is in no way in the course of following it, the master is not liable. *Storey* v. *Ashton* (1).

In this case the servant started on the Respondent's business but deviated from the course on some business of his own. Deviations or detours are always a question of degree, but here Tidey in turning west to go to the brewery warehouse in order to obtain a refund on the empty beer bottles, did something so contrary to and so inconsistent with the Respondent's business that it had no connection with it whatever. I hold that Tidey was then on a frolic of his own.

The difficulty, however, in this case is the same difficulty expressed by Lamont, J., in *Battistoni* v. *Thomas* (2):—

> The difficulty, however, is to determine when the master's employment has ended and the servant's frolic has begun, or, as in this case, to determine when the servant's frolic ended and he again entered upon his master's business.

In this case the work for the day was over and all that remained to be done was to return the truck to the Trade School. The route from the incinerator to the Trade School had not been defined or fixed. Tidey could, therefore, return on the route he had taken before, or any other alternative route.

The question is whether or not Tidey can be said to have re-entered upon the Respondent's business before he reached a point on any of the alternative routes between the incinerator and the Trade School.

This question of when the servant's frolic ended and when he again entered upon his master's business has been discussed in a number of cases.

In *Merritt* v. *Hepenstal* (3):—Gorman, a tradesman's teamster, sent out to deliver parcels went home to his supper before completing the delivery. After supper he

(1) (1869) L.R. 4 Q.B. 476.
(2) (1932) S.C.R. 144 at 147.
(3) (1895) 25 S.C.R. 150.

1946

WILLIAM BRAUN v. THE KING

O'Connor J.

started out to finish his work and on the way ran over a child. The Supreme Court of Canada affirmed the decision of the Supreme Court of New Brunswick, that from the moment Gorman started to complete the business in which he had been engaged, he was in his master's employ just as if he had returned to the master's store and made a fresh start. The Chief Justice, Sir Henry Strong, at page 153 said:—

> Another point argued was that Gorman was not in the employ of the defendant when the accident happened. That he was in such employ at the time, there can, in our opinion, be no doubt. *Whatman* v. *Pearson*, (1868) L.R. 3 C.P. 422, was a stronger case than the one before us and I do not think the learned counsel has been successful in his attempt to distinguish it from the present. Although Gorman had for a time abandoned his master's business, he had resumed it when he started out to deliver the remaining parcel just as much as if he had returned to the store and made a fresh start.

In *Battistoni* v. *Thomas* (*supra*), the truck driver was employed to deliver a load of milk from his home on a farm *south* of the City of Vancouver to a dairy in the *southern part* of the City and then to return from the dairy to his home. After he had unloaded the milk at the dairy, instead of going south and returning to the farm, he drove north into the City to the Dominion Hotel, picked up a companion and then drove for a number of hours in Vancouver and eventually drove out to the home of one Smith. Not finding Smith at home he drove his companion back to the Dominion Hotel with the intention of then proceeding back to the farm. The Plaintiff contended that from the time he left the Smith home he was on his master's business, because he was then proceeding with the intention of returning to the farm, and that the drive to the Dominion Hotel was merely a deviation *en route*. The Supreme Court of Canada, affirming the judgment of the Court of Appeal of the Province of British Columbia, held that the servant's frolic did not end until he reached the Dominion Hotel. Lamont, J., in delivering the unanimous judgment of the Court, at page 148 said:—

> In our opinion this frolic cannot be said to have ended until they returned to the Dominion Hotel from whence they started.

It is quite clear from the judgment that the frolic ended at the Dominion Hotel and at that point the driver again entered upon the master's business. Therefore, to re-enter

1946

WILLIAM BRAUN
v.
THE KING

O'Connor J.

upon the service of the master, it was not necessary for the driver to go south to the dairy, or to reach a point on the route between the dairy and the farm.

Once the driver started to return home from the Dominion Hotel, although he was still some distance north of the dairy and also north of the route between the dairy and the farm, he was then on his master's business.

In *West and West* v. *Macdonald's Consolidated Limited and Malcolm* (1), the truck driver completed his deliveries and drove to his home for lunch. He then went to a service station where he made certain repairs to the truck, in accordance with his instructions and with his usual practice, and then he drove home in the truck to his supper. After supper he should have driven the truck to the garage and left it there for the night. He started out to do this, but with the intention before putting it away in the garage of calling for a lady friend. He then drove with his friend as a passenger, from her place of residence to the garage and *en route* the accident happened. Ford, J., after reviewing the decisions in the deviation cases, held that the driver was at all time on his master's business and that this was a mere detour or deviation that would not relieve the master of liability. He also held that, if the action of the driver in going to call for his lady friend was an independent journey or a frolic of his own, the driver had re-entered upon the work he was employed to perform when he started back to the garage by the shortest route from the home of his friend.

It is clear from the *Merritt* v. *Hepenstal* (*supra*) case, that it was not necessary for the servant to either go back to the store or to get back to a point on the route from which he had departed on his own business, and from *Battistoni* v. *Thomas* (*supra*), that it was not necessary for the driver to go back to the dairy, or to reach any point on the route between the dairy and the farm. In *West and West* v. *Macdonald's Consolidated Limited and Malcolm* (*supra*), it was not necessary for the driver to go back to his home, or to the service station, or to reach a point on the route between the garage and his home.

I find that Tidey turned abruptly east at the intersection of Sherman and Biggar Avenues with the intention and

(1) (1931) 2 W.W.R., 657.

1946

WILLIAM BRAUN v. THE KING

O'Connor J.

for the purpose of taking the truck back to the Trade School by the shortest and most direct route, and was engaged in so doing at the time of the collision. I come to the conclusion that while Tidey had for a time abandoned the Respondent's business, he had at the time of the collision, re-entered upon the work he was to perform, and that he was then acting within the scope of his duties or employment.

There remains only the question of quantum of damages.

The Suppliant suffered severe injuries. He was in hospital for three months, and then was at home for approximately two and one-half months.

He was very badly burned on an area of one and one-half square feet on his thighs, and during the time he was in hospital he underwent two major operations for skin grafting during which time one and one-half square feet of skin was taken from his abdomen and grafted to the burned area.

Prior to the collision he was employed as a watchman or guard at one of the plants and he has been able to resume that occupation. He suffered shock and the medical evidence of both the Suppliant and the Respondent showed that immediately prior to the trial of this action he was still suffering from a lack of confidence. While the result of the skin grafting operations was described as nearly perfect, the evidence showed that the grafted skin was not as good as the normal skin, but was much more subject to chafing and infection. The compound fracture of the lower end of the tibia, involving the joint of the ankle, was successfully joined and there will be no permanent disability from this.

Prior to the collision the Suppliant had some kidney trouble, and during his period in hospital it was necessary to remove this kidney. It may well be that either from a blow during the collision or from the burns received, or from lying in bed so long, this condition was aggravated to the extent that necessitated the removal of the kidney.

The medical evidence, however, before me leaves me in doubt as to this and as the onus is on the Suppliant, he had not discharged it.

1946

WILLIAM BRAUN v. THE KING

O'Connor J.

I award the Suppliant general damages in the sum of $3,000.00. The Suppliant has also proved special damages in the sum of $1,720.16 for hospital, medical expenses and for the loss of wages for twenty-five weeks, and is entitled to receive this amount. The Suppliant is also entitled to costs.

Judgment accordingly.

1946

May 28

Aug. 31

BETWEEN:

WILLIAM M. LESTER, LEON REISHER AND COMMERCIAL TRADERS LIMITED, ... } APPELLANTS;

AND

THE COMMISSIONER OF PATENTS, .. RESPONDENT.

Patent—Appeal from Commissioner of Patents—Patent Act, 1935 Chap. 32.

Appellant applied for a patent for an invention of a toy plastic pistol. The toy consists of a representation of a pistol constructed from thermo-plastic material and within the article is an arrangement of walls and passages which form a whistle. The appellant appeals from the decision of the Commissioner of Patents rejecting the application.

Held: That the whistle and pistol were not combined to produce a common result but each part functioned independently of the other and were therefore not a patentable combination.

APPEAL from the decision of the Commissioner of Patents rejecting the application for a patent.

The appeal was heard before the Honourable Mr. Justice O'Connor, at Ottawa.

George H. Riches for appellant.

Respondent not represented.

The facts are stated in the reasons for judgment.

O'CONNOR J., now (August 31, 1946) delivered the following judgment:

This is an appeal from the rejection by the Respondent of an application for Letters Patent for an invention of a toy plastic pistol. The child's toy consists of a representa-

WILLIAM M. LESTER ET AL v. COMMISSIONER OF PATENTS

O'Connor J.

tion of a pistol, constructed from thermo-plastic material and within the article there is an arrangement of walls and passages which form a whistle.

The pistol and the whistle are not combined to produce a common result. Each part performs its function independently of the other. I reach the conclusion that this is not a patentable combination.

The authorities are quite clear that a combination is not patentable where each part performs its function independently of the other and the parts are not combined to produce some common result.

This was expressed by Lord Tomlin in *British Celanese Ltd.*, v. *Courtaulds Ltd.*, (1), as follows:—

> It is accepted as sound law that a mere placing side by side of old integers so that each performs its own proper function independently of any of the others is not a patentable combination, but that where the old integers when placed together have some working inter-relation producing a new or improved result then there is patentable subject-matter in the idea of the working inter-relation brought about by the collocation of the integers.

See also *Terrell on Patents* 8th ed., page 79, and *Robinson on Patents*, Vol. 1, section 154.

The appeal will be dismissed.

Judgment accordingly.

1946

Feb. 7, 8, 11, 12, 13 & 14

Mar. 18 & 19

Oct. 25

BETWEEN:

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

AND

TORONTO TRANSPORTATION COMMISSION ..... } DEFENDANT.

Crown—Claim by Crown—Damages—Negligence—Collision on highway—Clearance lights—Common law—Exchequer Court Act R.S.C. 1927 c. 34 s. 19 (c) and as amended by 1943; c. 25 s. 1 (50A)—Ontario Negligence Act R.S.O. 1937 c. 115.

Plaintiff seeks to recover damages from the defendant for injuries to a Bolingbroke aircraft as a result of a collision on highway between a street-car owned by the defendant and operated by its servant within the scope of his duties and a truck and trailer on which the

(1) (1935) 52 R.P.C. p. 171.

aircraft was loaded, all owned by the Crown. The truck and trailer formed part of a convoy of the Royal Canadian Air Force under the command of a member of His Majesty's Air Force and the truck was driven by a member of His Majesty's Air Force both acting within the scope of their duties. The Court found that the collision was caused by the combined negligence of the servants of the plaintiff and the defendant and the fault was in equal degree.

Held: That the costs of repairs forms the measure of damages and it does not matter that by reason of the repairs the plaintiff finds itself in possession of a better chattel than it previously had.

2. That the Crown at common law is not liable for the negligence of its servants and is therefore in the position of an innocent plaintiff whose harm has been caused by the concurrent acts of negligence of two tort feasors i.e. the defendant and its own servants.

3. That section 19 (*c*) of the Exchequer Court Act R.S.C. 1927, Chap. 34 as amended confers jurisdiction on the Court to hear and determine such claims and in addition creates a liability on the Crown for the negligence of its servants. The liability imposed is only within the limits of the jurisdiction conferred. The liability is therefore only in claims against the Crown and does not extend to actions by the Crown.

4. That section 50A widens the class of servant for whose negligence the Crown is liable under section 19 (c) but does not widen the liability beyond that imposed by section 19 (c).

5. That while the rights and liabilities of the parties are to be determined by the law of negligence in force in the Province of Ontario (in this case), no provincial enactment can reduce the rights or add to the liability of the Crown in right of the Dominion. Therefore the provisions as to contributory negligence in the Ontario Negligence Act R.S.O. 1930 Chap. 115 are not applicable because they would limit the right of the Crown to recover.

6. That the Crown is entitled to recover full amount of its damage from the defendant.

INFORMATION exhibited by the Attorney General of Canada to recover damages from the defendant for injury to an aircraft owned by the Crown alleged to have been caused by the negligence of the defendant.

The action was tried before the Honourable Mr. Justice O'Connor, at Ottawa.

Norman L. Mathews, K.C. and *Miss B. E. Lyons* for plaintiff.

A. H. Young, K.C. for defendant.

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

1946

THE KING
v.
TORONTO TRANSPORTATION COMMISSION

O'Connor J.

O'CONNOR J., now (October 25, 1946) delivered the following judgment:

The Plaintiff claims damage for injury to a Bolingbroke aircraft involved in a collision with a street car owned by the defendant. The motors and main planes had been removed from the aircraft and the aircraft was loaded on a trailer drawn by a truck. The planes were placed along the side of the aircraft on the trailer. The truck and trailer formed part of a convoy of Royal Canadian Air Force vehicles travelling from Picton to London via Toronto. The convoy consisted of 1st and 2nd—two Ontario Provincial Police Cars, 3rd—Truck and Trailer loaded with a Bolingbroke aircraft, 4th—Truck and Trailer in question with a similar load; 5th—Station Wagon. The convoy was proceeding west on Kingston Road in the City of Toronto and the street car was proceeding east on the same road. The collision took place west of the intersection of Main Street and Kingston Road, at about 6.45 p.m., on the 22nd December, 1943. It was dark and the street lights were on. The visibility was clear and the road dry. Kingston Road, at the place of impact, is 46 feet in width and there are two sets of street car tracks on it.

After the head of the convoy passed the intersection, the truck and trailer No. 3 turned out to pass a car parked at the curb on the north side of Kingston Road. This vehicle No. 3 after passing the parked car, swung north and straightened out. The truck and trailer in question No. 4 followed the course of the preceding vehicle, passed the parked car, and the truck itself had straightened out, but the trailer was still at an angle slightly north-west to the street car tracks.

The street car owned and operated by the defendant was east bound on the south set of street car tracks on Kingston Road, and the street car and port side of the centre section of the fuselage on the trailer No. 4 came in collision. At the time of the impact both the truck and trailer were north of centre line of Kingston Road, but the port side of the centre section of the aircraft protruded one or two feet south of the centre line, and at a height of five or six feet from the ground.

The fire-wall on the port side of the centre section came in contact with the left front vestibule window of the street car and then the fire-wall, being flexible, slipped past each upright post between the windows, commencing at No. 1 on Exhibit "G", breaking each window in turn until it came to rest about half way down the street car, protruding in one of the windows with the rear spar of the centre section jammed against the street car.

Both the plaintiff and the defendant contend that the vehicle owned by it had stopped and that the vehicle owned by the other was in motion and ran into its vehicle.

The evidence of the witnesses for the plaintiff, who were present at the collision, is in direct conflict with the evidence of the witnesses given on behalf of the defendant.

In addition expert evidence was given on behalf of each party. On behalf of the defendant, Harold Pollard, Esq., a consulting engineer with great experience and fully qualified, gave a well reasoned and carefully considered opinion, based on an examination of the centre section of the aircraft, and of the street car and of the evidence he heard, that the street car had been stationary and the truck had been in motion at the time of the collision.

Wing Commander Beale of the Royal Canadian Air Force, a graduate in aeronautical engineering from the University of Toronto, and well qualified to give evidence because of his experience and training, gave an equally well reasoned and carefully considered opinion that the street car was in motion and the aircraft was stationary at the time of the collision.

Both opinions were logical and reasonable, but after listening to them both, I found that one completely offset the other and left me no alternative but to decide the question on the evidence of the witnesses who were present at the time of the collision.

I find that the truck and trailer were stationary at the time of the collision, and that the street car having come to a stop on the signal of the Ontario Provincial Police, who were leading the convoy, started up again, and was in motion at the time of the collision. I hold that the driver of the street car was negligent in failing to remain stationary until the entire convoy had passed. Having been ordered

1946

THE KING v. TORONTO TRANSPORTATION COMMISSION

O'Connor J.

to stop by the police, and he knew and he saw the reason for the order, he should have remained there. He started forward when he knew that the entire convoy had not passed. As he moved forward he saw the clearance lights on the truck and trailer No. 4 fifty feet in length, the headlights on the truck No. 4 and the headlights of the station wagon No. 5 both signalling by turning their lights on and off, and sounding their horns, so he knew that part of the convoy was still to pass.

It was admitted that the defendant was the owner of the street car and that the operator, Mr. Smith, was a servant of the defendant acting within the scope of his employment at the time of the accident.

The centre section of the aircraft was approximately nineteen feet in width and the trailer was seven feet in width, so that the centre section extended out six feet on each side of the trailer at a height of five to six feet above the ground. It must have been quite clear at Oshawa, where a conference was held with the police, that if it proceeded, the convoy would reach the City of Toronto after dark. The danger of taking this convoy through the streets of the City of Toronto at night was obvious. It was quite customary for convoys carrying aircraft to use this route and they had been doing so for several years. L.A.C. Jones, who was in the truck in question, said that he had been over the route once or twice a week for several years, but the trips were made in daylight and he had never been over the route at night, and on the other trips the convoys had been transporting Harvard aircraft, which were very much narrower than Bolingbroke aircraft. From the evidence given by the witnesses for the plaintiff, it is clear that they were attempting to transport two very wide aircraft at night through the streets of a large city and doing something that L.A.C. Jones described as not being customary but "an unusual occasion".

The trucks and trailers, of the plaintiff, Nos. 3 and 4, were properly equipped with clearing lights and each aircraft carried checker boards on the engine mounts and red flags at the outside edges of the centre sections. The checker boards and the red flags would convey warning during the day when they could be seen, but were perfectly

useless for that purpose on a dark night. As the operator of the street car approached the point of collision, he would be facing into the headlights of the truck in question and to some extent of the station wagon which was drawn up behind the truck and trailer, which would make it impossible for him to see the overhanging port edge of the centre section. While the clearance lights on the truck and trailer would be clearly visible to him, they would indicate the extreme left of the danger to be apprehended, but not only were they of no value, but they would mislead the operator of the street car or any other traffic coming from the opposite direction into believing that they did indicate the extreme left of the danger, whereas the centre section protruded out six feet from these clearance lights at a height of five or six feet above the ground.

If a truck and trailer loaded with aircraft of this size and forming part of a convoy is to be moved at night, proper precautions must be taken to notify those using the road of the danger to be apprehended. The proper precaution clearly would have been to have placed clearance lights on the outside edges of both the port and starboard side of the centre section of each aircraft. The arrangement of the clearance lights upon the truck and trailer was calculated to mislead the driver of approaching vehicles, and this was particularly dangerous when the port side of the centre section was south of the centre line of Kingston Road.

The position here is similar to the position in *The King* v. *Demers* (1). There the servants of the Crown (Defendant) operated a truck and scraper on the highway with the scraper extending 10″ beyond the left side of the truck. The truck had two headlights and a light at the back of the truck. A red lantern was hung on the left side of the truck. Lamont, J., at page 488, said:—

> With the two headlights shining in his face it would be difficult, in my opinion, for the driver of the automobile (the plaintiff coming from the opposite direction) to see any reflection on the scraper from the light behind the truck, and, in any case, the existence of the red light on the left side of the truck indicated the extreme left of the danger to be apprehended, whereas the danger which caused the accident was the extension of the scraper beyond the red light. In my opinion there was abundant evidence to justify the finding that the accident was due to

(1) (1935) S.C.R. 485.

1946

THE KING
v.
TORONTO TRANSPORTATION COMMISSION

O'Connor J.

the common fault of the driver of the automobile in driving at the rate of speed at which he was going and a failure on the part of the operator of the truck in not having the scraper sufficiently and properly lighted. If the truck and scraper are to be operated at night, proper precautions must be taken to notify those using the road of the danger to be apprehended. The red flag, which was attached to the scraper might convey warning during the day when it could be seen, but it was perfectly useless for that purpose on a dark night.

And Duff, C.J., at page 486, said:—

> I agree with the learned trial judge that the arrangements of the lights upon the vehicle that Bolduc, the servant of the Roads Department, was driving, when the mishap occurred in which the husband of the respondent lost his life, was calculated to mislead the drivers of automobiles met on the road; and that the servants of the Roads Department were guilty of actionable negligence in proceeding along the road in such circumstances.

W/O Bowden, who was in charge of the convoy, held the conference with the police officials at Oshawa, and decided to proceed. He knew that it would be night by the time the convoy reached the City of Toronto. Each trailer had a load 19 feet in width, the outer edges of which were not marked by lights and the clearance lights on the trucks and trailers were six feet back from these edges. He took this convoy in this condition at night into the City of Toronto, on the main east and west highway of the Province of Ontario. He was negligent in doing so in such circumstances.

Sergeant Taggert rode in the second police car. When obstacles were reached he halted the convoy and then guided each vehicle past the obstacle. On this occasion when the convoy was passing the motor vehicle parked on the north side of the street and the street car was approaching, instead of getting out of the car and placing himself in a position where he had control of the situation, he continued in the police car looking back and directing the convoy with signals. He stopped the convoy and then the police car stopped the street car. Sergeant Taggert then signalled No. 3 vehicle to come ahead. The police car continued west until it reached a point one hundred feet west of the street car and at that moment the collision between the street car and vehicle No. 4 occurred. Constable Hefferman, who was driving No. 2 police car, stated that

Sergeant Taggert told him that there had been a collision. The police car stopped and Sergeant Taggert went back. If Sergeant Taggert had got out of the police car after passing the car parked on the north side, and before reaching the street car, he would not have halted the convoy until he had made sure that no part of the load on either trailer extended over the centre line of the street, or if the port edge did extend over the centre, he would have moved the vehicle until the port edge was on the north side of the centre line. Instead of this he continued in the police car and from that position he stated that he could not see the second truck and trailer. When he stopped the convoy the port edge of the aircraft extended south of the centre line of the highway one or two feet and at a height of five or six feet above the ground. Sergeant Taggert was negligent in the circumstances in failing to properly supervise the passing of the convoy and in halting the convoy when the second vehicle was in that position.

Both W/O Bowden and Sergeant Taggert were acting within the scope of their employment. They were members of the Air Force of His Majesty the King in the right of Canada, and are by virtue of section 50 (*a*) of the Exchequer Court Act, 1927, R.S.C., chap. 34, deemed to be servants of the plaintiff.

I find that the injury to the aircraft was caused by the negligence of the operator of the street car, the servant of the defendant, and by the negligence of W/O Bowden and Sergeant Taggert, the servants of the plaintiff. The combined negligence of both caused the damage.

After the truck and trailer stopped and the street car started forward, neither the operator of the street car, nor the servants of the plaintiff could, by ordinary care, have avoided the consequences of the negligence of the other.

I am not satisfied by the evidence that the negligence of the servants of the plaintiff, or the servant of the defendant was clearly subsequent to and severable from the act of the other so as not to be substantially contemporaneous therewith.

1946

THE KING
v.
TORONTO TRANSPORTATION COMMISSION

O'Connor J.

I fix the degree of fault as follows:—

Servants of the plaintiff 50%.

Servant of the defendant 50%.

The collision resulted in damage to the centre section. The evidence showed that the cost of repairing the same would exceed the cost of a new centre section, plus the cost of installation. Central Aircraft of London repaired aircraft for the plaintiff on a cost plus basis, but a separate account was not kept of the cost of the repairs made, which were occasioned solely by this collision. The evidence of the witnesses, Messrs. Lewis and Patterson, was that it required 9928½ man hours to make all the repairs required to the aircraft and that they estimated that 1375 hours of this were required to repair the damage done in this collision. They estimated the cost of labour and overhead, without profit of any kind, was $1.68 per hour. The evidence before me has satisfied me that the estimated costs of the repairs have been arrived at on a proper basis. I fix the sum of $2,310.00 as the cost to the plaintiff of making the repairs necessary and installing the centre section.

New parts for the aircraft were used and I accept the evidence of Norman Armand as to the cost, F.O.B., factory of these items:—

Centre section	$12,279 50
Bulkhead	137 50
Support frame	53 46
Flap	264 00
	$12,734 46

I am satisfied that the total cost of repairs and parts was $15,044.46, and that this damage was the direct result of this accident.

Counsel for the defendant contended that as a new centre section had been placed in the aircraft, the value of the aircraft would be increased and that the defendant should not be compelled to pay the full value of a new centre section.

I think the law is correctly set out in the *4th ed., Gibbs' Collision on Land,* pages 203-4, as follows:—

> Where the accident directly causes damage to a chattel, the true measure of damages is the difference between the market value before and after the accident . . ., but where the chattel can be repaired such difference is equivalent to the cost of repairs . . . But where the damage can be fully repaired nothing will be allowed in name of depreciation . . . in the usual case the cost of repairs forms the measure of damages and it does not matter that by reason of the repairs the plaintiff finds himself in possession of a better chattel than he previously had. (The Pactolus) (1856) Swa. 173.

The plaintiff claimed the sum of $15,662.05 in the Information, but reduced this amount at the trial by $959.34, the salvage of the Nacelle structure, leaving a balance claimed of $14,702.71. The cost of repairs and replacements exceed this amount slightly, so I fix the plaintiff's damage at the amount claimed of $14,702.71.

At common law the Crown is not liable for the negligence of its servants. Therefore, it is in the position of an innocent plaintiff whose damage has been caused by the concurrent acts of negligence of two tort feasors, i.e., the defendant and its own servants. It could proceed against either one or against both.

The only statutory enactment that alters this position is 19 (*c*) of the Exchequer Court Act, R.S.C., 1927, chap. 34, as amended:—

> 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.

This section not only conferred jurisdiction upon this Court, but it created a liability on the Crown for the negligence of its servants. The liability imposed is, however, within the limits of the jurisdiction conferred, i.e., to claims against the Crown, which in turn under section 37 may be prosecuted by a petition of right or referred to this Court by the head of a department. This liability imposed cannot be extended beyond its express limits. The liability imposed would not, therefore, extend to an action taken by the Crown against a subject.

1946

THE KING v. TORONTO TRANSPORTATION COMMISSION

O'Connor J.

Section 50 (*a*) provides:—

> 50 (*a*). 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.

While this section enlarges the class of servants, it does not extend the liability beyond that imposed by 19 (*c*). The liability mentioned in section 50 (*a*) in actions against the Crown is clearly the liability under 19 (*c*). But the liability in this section in actions by the Crown would, of course, be the liability of the defendant, not the liability of the Crown.

While the rights and liabilities of the parties are to be determined by the law of negligence in force in the Province of Ontario (in this case) it is clear that no provincial enactment can reduce the rights or add to the liability of the Crown, in the right of the Dominion. Therefore, the provisions as to contributory negligence in the Ontario Negligence Act, R.S.O., 1937, chap. 115, are not applicable because they would limit the right of the Crown to recover.

No statutory enactment, except that passed by Parliament, can do so. And the only statutory enactment passed by Parliament is S. 19 (*c*), and for the reason which I have already set out, it does not, in my opinion, impose a liability in an action, such as this, taken by the Crown.

I reach the conclusion that the Crown is entitled to recover the full amount of its damage from the defendant.

Assuming the correctness of my conclusion, I feel bound to add that the result is most inequitable.

But in my opinion the liability does not extend beyond the express limits of section 19 (*c*), and any change in the extension of liability must be made by Parliament.

There will be judgment for the plaintiff against the defendant in the sum of $14,702.71, and the costs of the action.

Judgment accordingly.

1946

Sept. 30 & Oct. 1.

Nov. 29.

BETWEEN:

STANDARD BRANDS LIMITED,.....PLAINTIFF;

AND

EDWIN JOHN STALEY,.....DEFENDANT.

Trade Mark—Petition to expunge—Unfair Competition Act, 22-23 Geo. V, c. 38, secs. 2 (h), 4 (1), 6, 10, 30 (1) (a) and 52 (2)—No trade mark right acquired by registration before use of same—"Person interested" —Trade mark "V-8"—Right to trade mark is acquired by "use" and not by invention—Defendant's trade mark ordered expunged from Register of Trade Marks.

Standard Brands Incorporated, a company incorporated in the United States, is the owner in the United States of a trade mark V-8 for use in association with a combination of vegetable juices and on November 29, 1943, applied to register the trade mark V-8 in Canada. The application was refused because of the prior registration of the trade mark V-8 on behalf of the defendant. The plaintiff is the assignee of Standard Brands Incorporated and has used and advertised the trade mark extensively in association with its wares.

In an action to expunge defendant's trade mark from the Register of Trade Marks it was shown that defendant in 1943 had registered the mark V-8 for use in association with a new drink and late in 1944 had commenced using the trade mark in the ordinary course of business. The Court found that the defendant acted in good faith and at the time he made his application he was unaware of the use of the trade mark by Standard Brands Incorporated. It was also admitted that the defendant did not use the trade mark in association with the wares either before registration or until nearly one year after registration of the mark because of certain orders of the Wartime Prices and Trade Board.

Held: That the plaintiff is a "person interested" within the meaning of s. 2 (h) of the Unfair Competition Act and therefore is entitled to maintain this action.

2. That registration under the Unfair Competition Act merely serves to confirm title to a trade mark which has already been established by use, and no trade mark right can be acquired by registration made under the Act before use since valid registration cannot be obtained unless there has been use.

3. That even if defendant had been prohibited from manufacturing a new product and the trade mark invented by him could not be used he would have no right in the trade mark as it is the use and not the invention that creates the right.

4. That the defendant not having acquired any right by the registration of his mark the same must be expunged from the Register of Trade Marks.

1946

STANDARD BRANDS LIMITED v. E. J. STALEY

O'Connor J.

ACTION by plaintiff herein to have defendant's trade mark expunged from the Register of Trade Marks.

The action was tried before the Honourable Mr. Justice O'Connor, at Ottawa.

E. G. Gowling K.C., Andre Forget and *J. C. Osborne,* for plaintiff.

J. M. Bullen, K.C. for defendant.

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

O'Connor J., now (November 29, 1946) delivered the following judgment:

This is an action by the plaintiff to expunge from the Register of Trade Marks maintained under the Unfair Competition Act, 1932, the trade mark "V-8", as applied to non-alcoholic beverages of all kinds, registered on the application of the defendant on the 5th November, 1943, as Number N.S. 17968/68.

This court is given jurisdiction over such matters both under section 22 of the Exchequer Court Act, R.S.C., 1927, chap. 34, and under section 52 of the Unfair Competition Act, 1935.

Standard Brands Incorporated, a Company incorporated in the United States of America, through a series of assignments, became the owner in the United States of the trade mark "V-8" for use in association with a combination of vegetable juices, together with the goodwill of the business associated with the said mark. The business associated with the trade mark had been carried on for a number of years in the United States, and had been extensively advertised. Some of the publications in which the advertisements appeared have a substantial circulation in Canada. Two small sales of its products were made in Canada in 1939. Standard Brands Incorporated assigned all rights in it for the Dominion of Canada to the plaintiff and to the said trade mark and goodwill associated therewith.

On the 29th November, 1943, Standard Brands Incorporated, the plaintiff's immediate predecessor in title, applied to register the trade mark "V-8", and the applica-

tion was rejected because of the prior registration of the trade mark "V-8" which had been made on behalf of the defendant. An appeal from this decision of the Registrar is pending in this court.

In 1940 the defendant originated a food beverage to which was added five vitamins and three minerals, and caused to be registered the trade mark "Vigor 8" to be used in association therewith. He proposed first to adopt the trade mark "V-8" but after consulting with an advertising agency, adopted and registered a trade mark "Vigor 8".

In the spring of 1943, he started to prepare a new drink with a tomato juice base to which was added the same five vitamins and three minerals, and he proposed to use the trade mark "V-8" in association therewith. At that time he called for designs for advertising the product under the trade mark "V-8", but he did not accept the designs which were prepared for him at that time. He completed his experiments in the fall of 1943, but the wares were not produced at that time. Having decided on the trade mark "V-8" he then made application to register the same and his application was accepted by the Registrar.

He commenced using the trade mark "V-8" in association with the wares in the ordinary course of trade and commerce in the fall of 1944. See paragraph 6, Agreement between counsel—Exhibit 1.

The defendant contends that he did not use the trade mark "V-8" before the fall of 1944 in association with the wares by reason of (*a*) the orders of the Wartime Prices and Trade Board, and (*b*) because his product is a seasonal one and he got his registration of the trade mark after the pack in the 1943 season. The relevant provisions of the orders of the board are:—

Order No. 184 of 5th November, 1942:—

3 (1) Except upon obtaining a permit from the Director of Licensing and in accordance with the terms and conditions of such permit;

(*a*) . . .

(*b*) . . .

(*c*) no manufacturer carrying on business on the effective date of this order shall manufacture, convert, assemble or otherwise process for sale any goods of any class and kind unless he manufactured, converted, assembled or otherwise processed for sale the same class and kind of goods during the twelve months preceding the effective date of this order.

(*d*) . . .

1946

STANDARD BRANDS LIMITED v. E. J. STALEY

O'Connor J.

Order No. 284 of 5th June, 1943, under the heading of "New Businesses" provided:—

5. (1) If you wish to form, commence or acquire any business which was not carried on by you on November 2, 1942, you must first obtain a permit from the Director of Licensing appointed by the Wartime Prices and Trade Board, and you must comply with the terms and conditions of any permit that may be granted to you . . .

Under the heading "Changes in the Classes and Kinds of Goods and Services Dealt In" it was provided:—

7. (1) If you carried on business on November 2, 1942,

(*a*) . . .

(*b*) as a manufacturer, you must not manufacture any goods of any class and kind unless you manufactured the same class and kind of goods during the twelve months preceding November 2, 1942;

(*c*) . . .

unless you first obtain a permit from the Director of Licensing.

Counsel for the defendant contends that the plaintiff is not entitled to institute this action under section 52 of the Unfair Competition Act because subsection 2 provides that:

52. (2) No person shall be entitled to institute under this section any proceeding calling into question any decision given by the Registrar of which such person had express notice and from which he had a right to appeal.

And that the plaintiff having appealed from the Registrar's refusal to grant its application to register the trade mark "V-8" because of a prior registration of the trade mark "V-8" by the defendant, that the plaintiff is a person who had express notice and a right of appeal within the meaning of the subsection.

In my opinion the decision that is called into question in these proceedings is the Registrar's decision to grant registration to the defendant of the trade mark "V-8", and of that decision the plaintiff did not have express notice or a right of appeal.

On the facts in this case I can come to no other conclusion than that the plaintiff is clearly a "person interested" within the meaning of section 2 (h) and is therefore a person entitled to bring this action.

Whether the plaintiff is entitled to the trade mark "V-8" in Canada, or whether "V-8" infringes "Vigor 8" are not issues in this action.

The sole issue before the Court is whether or not the defendant is entitled to maintain his registration.

1946

STANDARD BRANDS LIMITED v. E. J. STALEY

O'Connor J.

The first ground of attack is that the defendant adopted and registered the trade mark "V-8" with full knowledge of the rights of the plaintiff and its predecessors in title to the said trade mark and in contravention of the provisions of the Unfair Competition Act.

The evidence given by the witnesses for the plaintiff showed that the plaintiff had used and advertised the trade mark extensively in association with its wares, and the publications carrying these advertisements have substantial circulation in Canada. There was also evidence of two small sales of the plaintiff's wares in Canada during 1939.

Under section 10 there is a presumption that the trade mark was knowingly adopted unless the defendant establishes he was in ignorance of the use of the same mark and that in adopting it he acted in good faith and believed himself entitled to do so.

The defendant's evidence, however, was strongly confirmed by the evidence of independent witnesses. I was impressed by these witnesses, Lloyd G. Janes and G. F. Hayhurst, and I accept their evidence.

I hold on the evidence before me that at the time of the adoption of the trade mark, the defendant was in ignorance of the use of the same by the Standard Brands Incorporated in the United States, and that in adopting it the defendant acted in good faith and believed himself entitled to adopt and use it.

The second ground of attack is that the defendant before applying for registration did not use the trade mark in association with wares, and it should not, therefore, have been granted and should be struck out.

It is admitted that the defendant did not use the trade mark in association with the wares either before registration or until nearly a year after registration of the mark for the reasons already set out.

There is no evidence before me that the plaintiff ever applied for a permit under these Orders, but I agree with the decision of both the defendant and the plaintiff that it would have been contrary to the spirit of these Orders to introduce in Canada a new ware such as the plaintiff was ready to create and such as the plaintiff manufactured in the United States, having regard to the shortage of cans and labels.

1946

STANDARD BRANDS LIMITED v. E. J. STALEY

O'Connor J.

It is quite clear, however, that the defendant had another object in mind in registering this trade mark. That was to prevent anyone using any abbreviation or any adoption of the component elements of his trade mark "Vigor 8". This is set out in paragraph 5 of his statement of defence and admitted in question 164 of the examination for discovery.

But assuming that he intended to use the trade mark "V-8" in association with the new drink, but felt he should not do so in wartime and that he also desired to register it with the object of protecting his registered trade mark "Vigor 8", the fact remains and it is not in dispute that neither before the registration of the trade mark nor until nearly a year after such registration did he use "V-8" in association with such drink or with wares of any kind.

Under the common law the only way in which a trade mark could be acquired was by use.

To what extent has this position been changed by the Unfair Competition Act, 1932? Can trade mark rights be acquired by registration under the Act before use?

Decisions under any other Act are of little assistance in cases under this Act.

Whatever may be or may have been the position under other acts, in my opinion the whole scheme of the Act is based on the acquisition of a trade mark right by use. And in my opinion such right cannot be acquired by registration made under the Act before use for the simple reason that valid registration cannot be obtained unless there has been "use".

Registration under the statute merely serves to confirm the title, which has already been established by use. *Fox on Trade Marks,* pp. 44-5.

Under section 2 (*m*) "Trade Mark" means a symbol which *has become adapted* to distinguish particular wares . . . from other wares . . . and *is used* by any person in association with wares entering into trade and commerce for the purpose of indicating to dealers . . . of such wares that they have been manufactured by him . . .

The Act further provides:—

4. (1) The person who, in association with wares, first uses or makes known in Canada, as provided in the last preceding section, a trade mark or a distinguishing guise capable of constituting a trade mark, shall be

entitled to the exclusive use in Canada of such trade mark or distinguishing guise in association with such wares, provided that such trade mark is recorded in the register existing under the Trade Mark and Design Act at the date of the coming into force of this Act, or provided that in compliance with the provisions of this Act he makes application for the registration of such trade mark within six months of the date on which this Act comes into force, or of the date of his first use thereof in Canada, or of the date upon which the trade mark or distinguishing guise was first made known in Canada, as provided in the last preceding section, and thereafter obtains and maintains registration thereof under the provisions of this Act.

The exclusive use of a trade mark in Canada is given to a person (*a*) who *first uses* the trade mark provided (*b*) that in compliance with the provisions of the Act he makes application for the registration of such trade mark within six months of the date . . . of his *first use* thereof in Canada.

What constitutes "use" is set out in section 6,—

6. For the purposes of this Act a trade mark shall be deemed to have been or to be used in association with wares if, by its being marked on the wares themselves or on the packages in which they are distributed, or by its being in any other manner so associated with the wares at the time of the transfer of the property therein, or of the possession thereof, in the ordinary course of trade and commerce, notice of the association is then given to the persons to whom the property or possession is transferred.

If the "use" as defined in section 6 has been made, the person then and only then can apply to register the trade mark because "the provisions of this Act" mentioned in section 4 (1) include the requirements of section 30:—

30. (1) Any person who desires to register a trade mark under this Act otherwise than pursuant to a judgment, order or declaration of the Exchequer Court of Canada shall make an application in writing to the Registrar in duplicate containing

(a) a statement of the date from which the applicant or named predecessors in title has or have used the mark for the purposes defined in the application and of the countries in which the mark has been principally used since the said date.

So that to obtain registration the applicant must make an application in writing containing a statement of the date from which the applicant . . . has . . . used the mark . . . and of the countries in which the mark has been principally used since the said date.

If a person invents a trade mark and without use makes application to register the same, he would be in the same position as the defendant was when he made application. He would have to state a date from which he had used (as

1946

STANDARD BRANDS LIMITED v. E. J. STALEY

O'Connor J.

defined by section 6) the mark and the countries in which the mark had been principally used since that date and this he could not do.

Only by making a statement that was not true could he obtain registration, because if he stated that there had been no use of the mark, the application would be refused because under the Act "use" as defined by section 6 is clearly a condition precedent.

In this case, however, the defendant stated in his application, Exhibit 2:—

> 3. The applicant has used the mark since October 1, 1943 on wares ordinarily and commercially described by the applicant as non-alcoholic beverages of all kinds.
>
> 4. Such use by the applicant has been principally in the following countries:—Canada.

These statements were not true and were made in order to obtain registration, and resulted in registration being obtained.

Assuming that the Orders of the Wartime Prices and Trade Board absolutely prohibited the manufacture of a new product and that the trade mark invented by the defendant could not be "used" within the meaning of section 6, then it is quite clear that he has no "right" in the trade mark because it is the "use" not the "invention" that creates the "right". Audette, J., in *Jones* v. *Horton* (1). And not having used it he was not in a position to make application to register it under this Act. He did not acquire any "right" in obtaining registration by the method he adopted.

The entry as it appears on the Register does not, in my opinion, accurately express or define the existing rights of the defendant.

There will be judgment ordering to expunge from the Register of Trade Marks maintained pursuant to the Unfair Competition Act, 1932, the trade mark "V-8" in question registered by the defendant on the 5th November, 1943, under Number N.S. 17968/68 with costs.

Judgment accordingly.

---

(1) (1922) 21 Ex. C.R., 330 at 337.

1946

Oct. 17
Nov. 26

BETWEEN:

VANCOUVER TOWING COMPANY LIMITED, ... } APPELLANT,

AND

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

Revenue—Excess Profits Tax—Excess Profits Tax Act, 1940, 4 Geo. VI, c. 32, s. 15 (a)—Controlling interest in company—Distinction between a controlling interest and the controlling interest—Appeals dismissed.

By the Articles of Association of appellant company its managing director was given very extended powers, he having absolute control over the actions of its directors. He also controlled the Vancouver Tug and Barge Company, Limited, which held a majority of the issued shares in the appellant company. At a general meeting of appellant company the voting power is in accordance with the share register and therefore Vancouver Tug and Barge Company, Limited, is more powerful than all the other shareholders put together. On an appeal under the provision of the Income War Tax Act and Excess Profits Tax Act from assessments for the years 1942 and 1943 it was contended that the managing director of appellant company by virtue of the power vested in him by the Articles of Association and his control of Vancouver Tug and Barge Company, Limited, has the controlling interest in appellant company.

Held: That Vancouver Tug and Barge Company, Limited, has *a* controlling interest in appellant company within the intent and meaning of s. 15 (*a*) of the Act, and the appeals from assessments under the Income War Tax Act and the Excess Profits Tax Act for 1942 and 1943 are dismissed.

2. That the person whose shareholding in a company is such that he is more powerful than all the other shareholders in the company put together *in general meeting* has *a* controlling interest in the company.

APPEALS under the provisions of the Income War Tax Act and The Excess Profits Tax Act, 1940.

The appeals were heard before the Hon. Mr. Justice Cameron, at Vancouver.

D. Donaghy, K.C. and *J. A. Macdonald* for appellant.

W. S. Owen, K.C. and *E. S. MacLatchy* for respondent.

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

1946

VANCOUVER TOWING CO. LTD. v. MINISTER OF NATIONAL REVENUE

Cameron J.

CAMERON J. now (Nov. 26, 1946) delivered the following judgment:

This is an appeal from Income Tax and Excess Profits Tax assessments for the years 1941, 1942 and 1943. The usual returns for the various years were made by the appellant, and notices of assessment were mailed to the appellant in each case on March 12, 1945. The appellant gave Notice of Appeal on April 3, 1945, and on November 2, 1945, the Minister gave his decision affirming the assessments throughout. On November 26, 1945, the appellant gave Notice of Dissatisfaction, and on June 12, 1945, the Minister gave his reply affirming all the assessments as originally made. By order of this Court pleadings were directed and a Statement of Claim and Statement of Defence were later delivered.

At the hearing in Vancouver on October 17, 1946, no evidence was taken, the parties agreeing that the allegations in the Statement of Claim admitted in the Statement of Defence should be accepted as the agreed facts.

While the Notices of Appeal and the Statement of Claim indicate that the appeals have to do both with Income Tax and Excess Profits Tax, I am informed that there is now no dispute as to the assessment for Income Tax, and the appeals, therefore, have to do solely with assessments for Excess Profits Tax for the years in question.

It was agreed by Counsel for both parties that the entire problem centred around the interpretation to be placed on Sec. 15 (*a*) of the Excess Profits Tax Act, and in particular on the proper construction of the words "controlling interest" in that section. Sec. 15 (*a*) was added to the Act by Sec. 7, Chap. 13, Statutes of 1943-44, and was made applicable to the profits of the 1942 taxation period, of fiscal periods ending therein, and of all subsequent periods.

Sec. 15 (*a*) is as follows:—

Notwithstanding anything in this Act contained in any case where a company has a *controlling interest* in any other company or companies (hereinafter called controlled company or companies) incorporated in 1940 or thereafter (other than companies incorporated to carry out a contract or arrangement negotiated by the Minister of Munitions and Supply, and in respect thereunder of a management fee or other similar compensation), and the sum of the capital employed by such company and such controlled company or companies at the time of incorporation is not, in the opinion of the Minister of National Revenue, substantially greater than the capital

employed by such first-mentioned company prior to the incorporation of such controlled company or companies, the standard profit of all such controlled companies taken together shall not exceed $5,000 in the aggregate, and shall be allocated to each of such controlled companies in such amounts as the Minister of National Revenue may direct.

In any such case a reference to the Board of Referees shall not be made, notwithstanding the provisions of Sec. 5 of this Act.

It is admitted that the appellant company was incorporated in 1940; and that it was not incorporated to carry out a contract or arrangement negotiated by the Minister of Munitions and Supply. It is also admitted that the sum of the capital employed by the appellant and Vancouver Tug and Barge Company Limited, and Vancouver Tug Boat Company Limited, at the time of incorporation of the appellant is not substantially greater than the capital employed by the two last mentioned companies prior to the incorporation of the appellant company.

I shall deal first with the assessment to Excess Profits Tax for the year 1941. At the hearing it was admitted by Counsel for the respondent that the 1941 assessment as made was made in error, and on the assumption that Sec. 15 (*a*) above recited applied to that taxation year. The department, in making the assessment for 1941, did allow the sum of $5,000 as standard profits for the appellant company, although no fixation of standard profits had then, or has since, been made by the Board of Referees. Because, therefore, of the error in applying Sec. 15 (*a*) to the taxation year 1941, the appellant was deprived of his right under Sec. 5 of the Excess Profits Tax Act to apply to the Board of Referees for the establishment of its standard profits. I think, therefore, that in respect of that year, the appeal must succeed, and the assessment to Excess Profits Tax for that year be set aside.

In respect of the taxation years 1942 and 1943, the appellant's argument is that it is not a controlled company such as is envisaged in Sec. 15 (*a*), that the control of the appellant is not in The Vancouver Tug and Barge Company Limited or the Vancouver Tug Boat Company Limited, but rather in one Harold A. Jones, the Managing Director of the appellant company. This argument is advanced on behalf of the appellant on two grounds. It is alleged first that the Articles of Association by which the appellant was governed were the regulations contained in Table A of the

1946

VANCOUVER TOWING CO. LTD. v. MINISTER OF NATIONAL REVENUE

Cameron J.

first Schedule of The Companies Act as amended by regulations filed and registered with the Registrar of Companies on January 29, 1940, of which the following clauses are a portion of the amendments:—

(*a*) Harold A. Jones shall be the Managing Director of the Company until he resigns his office, or dies, or ceases to hold at least one (1) share of the issued share capital of the Company, and whilst he retains the said office he shall have absolute and sole authority to exercise all the powers, authorities and discretions by these Articles expressed to be vested in the Directors generally, and all the other Directors (hereinafter called "ordinary Directors"), if any, for the time being of the Company shall be under his entire and absolute control, and shall be bound to conform to his directions in regard to the Company's business.

(*b*) If the said Harold A. Jones resigns the office of Managing Director or shall cease to hold at least one (1) share of the issued share capital of the Company he shall become an ordinary Director.

(*c*) If the said Harold A. Jones dies whilst he holds the office of Managing Director, the executor or executors for the time being of his Will, or such other person as the said Harold A. Jones may by his Will appoint as Managing Director (so long as one (1) share of the issued share capital of the Company stands in the name of Harold A. Jones, or in the name of such executor or executors), may exercise the powers vested in the said Harold A. Jones by paragraphs 13 (*a*) and 13 (*f*) hereof.

(*d*) The remuneration of the Managing Director shall from time to time be determined by the Directors of the Company.

(*e*) The qualification of the Managing Director and any ordinary Director shall be the holding of at least one (1) share of the issued capital of the Company.

(*f*) The said Harold A. Jones whilst he holds the office of Managing Director may from time to time, and at any time, appoint any other person or persons to be an ordinary Director or ordinary Directors of the Company, and may define, limit and restrict his, her, or their powers, and may define, limit and restrict his, her, or their remuneration, and duties, and may at any time remove any director howsoever appointed, and may at any time convene a general meeting of the Company. Every such appointment or removal must be in writing under the hand of the said Harold A. Jones.

It will be seen from the above that the Managing Director, Harold A. Jones, by the regulations above recited, has what appears to be absolute control over the actions of the Directors of the appellant company, and throughout the years in question, he was at all times qualified to act as Managing Director as required by the said regulations.

Secondly, it is alleged that the said Harold A. Jones has the controlling interest in the appellant company by reason of the large shareholdings of Vancouver Tug and Barge Company Limited and Vancouver Tug Boat Company

Limited in the appellant company. At all material times there were only 357 shares of the capital stock of the appellant allotted or issued, and they were held as follows:

Harold A. Jones	3 shares
M. T. McLaurin	1 share
Endorsed to and held by the said McLaurin as nominee for Harold A. Jones and controlled by him.	
Vancouver Tug and Barge Company Limited	218 shares
Vancouver Tug Boat Company Limited	135 shares
	357 shares

It will be seen from the above that the Vancouver Tug and Barge Company Limited holds 218 shares out of 357 shares issued by the appellant company, being more than a majority of the said shares.

The Vancouver Tug and Barge Company Limited was incorporated in 1937, and at all material times only 2 shares of its capital were allotted or issued, and they were held as follows:—

Harold A. Jones	1 share
Goldini Webster	1 share
Endorsed in blank and held by the said Webster as nominee for Harold A. Jones and controlled by him.	

It is clear, therefore, that in so far as the Vancouver Tug and Barge Company Limited is concerned, the said Harold A. Jones has what could be called absolute control, and it is argued by Counsel on behalf of the appellant that as Vancouver Tug and Barge Company Limited has the majority of issued shares in the appellant company, and that as Harold A. Jones is in virtual control of Vancouver Tug and Barge Company Limited, that, therefore, Harold A. Jones has a controlling interest in the appellant company, and not Vancouver Tug and Barge Company Limited.

Some reference should also be made to the Vancouver Tug Boat Company Limited which holds 135 shares in the appellant company. That company was incorporated in 1924 and at all material times the said Harold A. Jones had more than a majority of its allotted or issued shares. A further argument of the appellant, therefore, is that since Harold A. Jones has the controlling interest in the Vancouver Tug Boat Company Limited and the Vancouver Tug and Barge Company Limited, that therefore, having control

1946

VANCOUVER TOWING CO. LTD. v. MINISTER OF NATIONAL REVENUE

Cameron J.

of their 353 shares, and three shares issued in his own name, in the appellant company, that he has the controlling interest in the appellant company, and that therefore the appellant company is not such a controlled company as is referred to in sec. 15 (*a*).

The problem, therefore, for decision is to ascertain the true meaning of the words "controlling interest" in section 15 (*a*). Does control of the board of directors mean the same as a controlling interest? Does control by Jones of the Vancouver Tug and Barge Company Limited (the registered owner of the majority of shares in the appellant company) give him a controlling interest in the appellant company? Or is the share register of the appellant company conclusive against the appellant in that it shows the Vancouver Tug and Barge Company Limited to have the majority of the shares and that therefore that company has a controlling interest in the appellant company.

I have not been referred to any cases in our courts where the words "controlling interest" as used in section 15 (*a*) have received judicial interpretation, nor have I been able to find any. But there are several cases in the English courts to which I have been referred and which are of assistance in arriving at my conclusion.

In *B. W. Noble Ltd.* v. *Commissioner of Inland Revenue* (1) the assessment to corporation profits tax had been made by reference to sec. 53 (2) (*c*) of the Finance Act 1920, to include any remuneration in excess of £1,000 per annum paid to a director who has a controlling interest in the company; and on behalf of the company it was contended that none of the directors had a controlling interest in the company within the meaning of the provision referred to. Rowlatt J. in giving judgment says:

> I think that the contention of the Crown is correct. It has been argued by Mr. Konstam with a great deal of ingenuity and industry that the first decision was right, for two reasons. First of all, pointing to a number of the sections, he says that this gentleman was not in a position to control the Company as regards the passing of special resolutions. That is true. Then, secondly, he says that he was not in a position, by virtue of his interest, to control the Board of Directors in the exercise of the powers given to them by the Articles in that behalf. I do not think this Sub-section ((Sub-section) (2) (*c*) of Section 53 of the Finance Act, 1920), is referring to that class of consideration at all. *It seems to me that "controlling interest" is a phrase that has a certain well known meaning;*

(1) (1917) 12 T.C. 926.

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.

The above case was referred to in *British American Tobacco Co. Ltd.* v. *Inland Revenue Commissioners* where the judgment of Lawrence J. in the King's Bench Division is reported in (1). In this case the appellant company held shares in eleven companies operating outside the United Kingdom which were therefore not liable to be assessed to the national defence contribution. In the case of four of these companies the appellant itself controlled more than 50% of the votes. In the case of the remaining seven companies more than 50% of the votes were controlled by the appellant company in conjunction with a company or companies in which the appellant company controlled more than 50% of the votes. It was held that on the proper construction of the section in the Finance Act 1937, "controlling interest" in a company *included* an indirect as well as a direct controlling interest and that the appellant company was subject to the national defence contribution.

In his judgment Lawrence J. stated at page 90:

The Attorney-General, on the other hand, contended that the word "interest" is a word of wide connotation. He cited *Lapish* v. *Braithwaite* (1926) A.C. 275 and *Skinner* v. *A.G.* (1940) A.C. 350 and contended that the words "controlling interest" must be interpreted together, that there can be no reason which could have induced the legislature to exclude the case of an indirect controlling interest, that the Finance Act, 1920, shows that the words can equally well be used to include an indirect or a direct controlling interest, and that in their ordinary meaning they include both. I have come to the conclusion that the contention of the Crown is correct. I do not think that it is a proper inference that, because the Finance Act, 1920, mentions expressly a controlling interest, direct or indirect, when the legislature spoke of "a controlling interest" *simpliciter* in 1937, it meant only a direct controlling interest. The word "controlling" is not a term of art, nor is the word "interest" necessarily so, and, when the word "controlling" is used to qualify "interest", I think that the

(1) (1941) 2 A.E.R. 86.

1946

VANCOUVER TOWING CO. LTD. v. MINISTER OF NATIONAL REVENUE

Cameron J.

phrase in its ordinary meaning covers both direct and indirect control. Counsel for the appellants in the second appeal also argued that companies which held only 51 per cent and less than 75 per cent of the shares in a company have not a controlling interest in such company, but it was conceded that upon this point I am bound by the decision of Rowlatt J., in *Mitchell* v. *Noble (B.W.) Ltd.* (1927) 1 K.B. 719. The Crown's appeal will, therefore, be allowed, and the British American Tobacco Co.'s appeal will be dismissed with costs.

This judgment was upheld in the Court of Appeal (1). There it was held that the word "interest" must be interpreted liberally and that when it is used with the word "controlling" it covers an indirect as well as a direct controlling interest.

The appeal to the House of Lords was dismissed (2).

In the judgment of Viscount Simon, L.C. (concurred in by all the other judges) it is there stated:

> But that is to treat the phrase "controlling interest" as capable of connoting only a proprietary right, that is, an interest in the nature of ownership. 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 none the less have a controlling interest in company X if it owns enough shares in company Y to control the latter.
>
> In my opinion this is the meaning of the word "interest" in the enactment under consideration, and, where one company stands in such a relationship to another, the former can properly be said to have a controlling interest in the latter. This view appears to me to agree with the object of the enactment as it appears on the face of the Act. I find it impossible to adopt the view that a person who, by having the requisite voting power in a company subject to his will and ordering, can make the ultimate decision as to where and how the business of the company shall be carried on, and who thus has, in fact, control of the company's affairs, is a person of whom it can be said that he has not in this connection got a controlling interest in the company.

Counsel for the appellant in the instant case urged upon me that this portion of the judgment was authority for finding that Jones, in full control of the Vancouver Tug and Barge Co. Ltd., which in turn had more than a majority of the shares in the appellant company, had, therefore, the controlling interest in the appellant company. But it must be kept in mind that the sole question in the Tobacco case was whether the controlling interest must be *direct*

(1) (1941) 2 A.E.R. 651. (2) (1943) 1 A.E.R. 14.

ownership or whether indirect ownership of shares would give such *a* controlling interest as would make the Company liable to tax on dividends received by the Tobacco Company from the other companies controlled *indirectly* by shareholding. In the example used, where the appellant company owned one-third of the shares in Company X and the remaining two-thirds were owned by Company Y it is stated that the appellant company would none the less have a controlling interest in Company X if it owns enough shares in Company Y to control the latter. In my view that illustration means only that an *indirect* controlling interest would make the appellant there liable to tax, as well as a holding of sufficient shares in its own name to give it a *direct* controlling interest. I can find nothing in the judgment which states that there is not also a *direct* controlling interest in a company which has registered in its own name a majority of shares of the appellant company.

I am strengthened in my view that this is the proper interpretation of this judgment by the concluding words of the judgment itself which are as follows:

> 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* ((1926) 2 T.C. 911), when construing that phrase in the Finance Act, 1920, s. 53 (2) (c). He said at p. 926 that the phrase had a well-known meaning and referred to the situation of a man whose shareholding in the company is such that he is more powerful than all the other shareholders put together in general meeting.
>
> The owners of the majority of the voting power in a company are the persons who are in effective control of its affairs and fortunes. It is true that for some purposes a 75 per cent majority vote may be required, as, for instance (under some company regulations) for the removal of directors who oppose the wishes of the majority; but the bare majority can always refuse to re-elect and so in the long run get rid of a recalcitrant board. Nor can the articles of association be altered in order to defeat the wishes of the majority, for a bare majority can always prevent the passing of the necessary resolution.

It is to be observed that the interpretation of the words "controlling interest" adopted by Rowlatt J. in the *Noble* case (*supra*) is approved in the House of Lords. There were two propositions put forward by the appellant before the House of Lords. The first one as to indirect control, I have already referred to. The second point was that in

1946

VANCOUVER TOWING CO. LTD. v. MINISTER OF NATIONAL REVENUE

Cameron J.

any event the controlling interest was not constituted by the control of the bare majority of shares (whether directly or through other companies) but that the control must be of such a proportion of shares as will secure the passing of a special resolution for which a special majority is required by the terms of the constitution of the company. The judgment of the House of Lords makes it abundantly clear that the requisite portion of voting power to give a controlling interest is a bare majority. And following the judgment of Rowlatt, J., in the *Noble* case (*supra*) it seems clear that the man (or corporation) whose shareholding in the company is such that he is more powerful than all the other shareholders in the company put together *in general meeting* has *a* controlling interest in the company.

This interpretation of "controlling interest" seems to be a proper and natural one to put on those words as used in the enactment—section 15 (*a*). Scott, J., in the Court of Appeal judgment in the *Tobacco* case (*supra*) sets forth the meaning of the verb "control" and the noun "interest" as found in the Oxford English Dictionary. Moreover, such interpretation seems to meet the situation which section 15 (*a*) was intended to overcome.

Regardless of the very extended powers given to the Managing Director of the appellant Company as above set forth, and of the fact that he, by control of the Vancouver Tug and Barge Company Limited, has indirect control as to how the shares held by the latter company in the appellant company shall be voted, it is abundantly clear to me that at a general meeting of the shareholders of the appellant company the voting power is in accordance with the share register and that the Vancouver Tug and Barge Company Limited is more powerful than all the other shareholders put together. It, therefore, has *a* controlling interest within the intent and meaning of section 15 (*a*).

It should be noted that the words in the section are "*a* controlling interest" not "*the* controlling interest" or "the control". Unquestionably Jones has the ultimate control in the appellant company and has complete control of its board of directors. He also has an indirect controlling interest in the company itself but all the respondent needs

to show is that the Vancouver Tug and Barge Company has *a* controlling interest in the appellant and on the basis of the interpretation given to those words in the cases I have cited and on the agreed facts, I find that such is the case.

Reference may also be made to *Glasgow Expanded Metal Co. Ltd.* v. *The Commissioner of Inland Revenue* (1), and to *Inland Revenue Commissioners* v. *J. Bibby & Sons Ltd.* (2). In the latter case it was held that "controlling interest" referred to the power of controlling by votes the decisions binding on the company in the shape of resolutions passed at a general meeting.

The appeals, therefore, in respect of assessments to Income Tax and Excess Profits Tax for the years 1942 and 1943 will also be dismissed and the assessment confirmed. The appeal as to the assessment to income tax for the year 1941 will also be dismissed and the assessment confirmed. In regard to the appeal in respect of excess profits tax for the year 1941 the appeal will be allowed, the assessment set aside and that item of the appeal will be referred back to the Minister to be dealt with under sec. 5 (2) of the Act, and when the standard profits have been so ascertained, the appellant will be re-assessed to Excess Profits Tax for the year 1941.

Inasmuch as the appellant is only partially successful in its appeal and as most of the argument had to do with matters in which it failed, I am of the opinion that it should be entitled to only one-half of its taxed costs and I so direct.

Judgment accordingly.

---

(1) (1926) 12 T.C. 573

(2) (1945) 1 A.E.R. 667.

1946
Oct. 15 & 16
Nov. 28.

BETWEEN:

PERCY JOHN SALTER.....APPELLANT;

AND

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

Revenue—Income Tax—Income—Income War Tax Act R.S.C. 1927, c. 97, secs. 2 (r), 3 (1), 3 (1) (e)—Admissibility of oral evidence to explain nature of transaction and real consideration for agreement as set forth in written document—Payment for surrender of contract not income—"Personal and living expenses"—Premiums on annuity contract to or for the benefit of the taxpayer or his wife or daughter are personal and living expenses and constitute income.

Appellant having been employed for a great many years by the Sun Publishing Company Limited resigned from his position of President and Director of the Company consequent to a written agreement entered into between them on July 3rd, 1942. The Company by the same agreement undertook to pay to the appellant the sum of $5,000 on the execution of the agreement and the sum of $10,000 in monthly payments of $1,000 each commencing on August 15, 1942. Respondent assessed appellant for income tax on these sums of $10,000 received in 1942 and $5,000 received in 1943. In 1942 and 1943 the Company paid certain premiums on an annuity contract entered into by it with a life insurance company for the benefit of the appellant and, in the event of survivorship, his wife and daughter. The Company also paid the additional income tax of appellant occasioned by the payment of such premiums. For these years there was added to the appellant's income by the respondent for taxation purposes the amounts paid by the Company in respect of the annuity premiums and the income tax in relation thereto.

From these assessments appellant appealed to this Court.

Held: That evidence to show the true nature of the transaction entered into between appellant and the Company and the real consideration for the agreement is admissible and appellant is not estopped by the terms of the written agreement from proving the real considerations as the agreement was *res inter alios* and there is no mutuality.

2. That the payments of $10,000 in 1942 and $5,000 in 1943 were paid entirely for the surrender of appellant's contract with the Company and such payments do not constitute income for the years in question.

3. That the premiums on the annuity contract were payable to or for the benefit of the taxpayer, or his wife or daughter, and were therefore "personal and living expenses" and the payment of such personal and living expenses by the Company constitutes part of the gain, benefit or advantage accruing to the appellant under its contract with the insurer; the annuity contract was entirely for the benefit of the appellant and to the extent of the premiums paid in each year such

premiums and the tax paid in reference thereto constitute part of the annual profit or gain of appellant within the meaning of s. 3 of the Act.

4. That the premiums so paid by the Company are taxable in the hands of the appellant as a gratuity indirectly received by the appellant from his employment with the Company.

APPEAL under the provisions of the Income War Tax Act.

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

C. K. Guild, K.C. and *K. L. Yule* for appellant.

C. L. MacAlpine, K.C. and *E. S. MacLatchy* for respondent.

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

Cameron J., now (November 28, 1946) delivered the following judgment:

This is an appeal in respect of income tax for the years 1942 and 1943. On December 27, 1945, Notice of Assessment for both years was sent to the appellant. On January 16, 1946, Notice of Appeal was given and on April 16, 1946, the respondent gave his decision affirming the assessments. Notice of Dissatisfaction was given on May 6, 1946, and on May 17, 1946, the Minister made his reply affirming the assessment as formerly levied. By order of this Court delivery of pleadings was directed on July 10, 1946. The case came before me for trial at Vancouver on October 15 and 16, 1946, and judgment was reserved.

The main problem in connection with these appeals relates to the sum of $15,000 paid to the appellant by the Sun Publishing Company Limited of Vancouver (hereinafter called "the Company") pursuant to an agreement in writing dated July 3, 1942, $10,000 of which was paid in 1942 and $5,000 in 1943. It is alleged by the respondent that the said sums of $10,000 and $5,000 constituted taxable income in the hands of the appellant for the respective years; and by the appellant that the said sums were not income within the Income War Tax Act but were sums paid to him by the Company in order to secure a release

1946

SALTER v. MINISTER OF NATIONAL REVENUE

Cameron J.

from the unexpired portion of the appellant's five year contract and were received as compensation for loss of office; that such contract was a capital asset and that therefore the payments represented capital rather than income and were therefore free of tax.

The appellant for twenty-eight years prior to 1942 had been in the employ of the Company in various capacities. Mr. R. J. Cromie, the proprietor and chief shareholder, died in 1936 and thereafter the appellant became the President and General Manager and was also a shareholder and director. On November 22, 1938, a contract was entered into by which the appellant's services as President and General Manager were retained for at least five years from that date. His salary at that time was $12,000 but was later raised to $15,000 and so continued until his resignation took effect on July 15, 1942.

Under circumstances which will later be referred to in greater detail, differences of opinion arose between Mr. Donald C. Cromie (the second son of the former publisher R. J. Cromie) and the appellant and a verbal arrangement was entered into between the appellant and the said Donald C. Cromie (who held a power of attorney from his mother who had a controlling share-interest in the Company) as to the retirement of the appellant and the compensation which he would receive. This matter came before the Board of Directors on July 2, 1942. The following is an extract from the minutes (Exhibit 7):

> Mr. Donald C. Cromie reported that he had made an arrangement with Mr. P. J. Salter on the occasion of his resigning from the presidency and directorship of the Company, the arrangement briefly being that Mr. Salter's resignation as Director and President which he tendered should be accepted by the Company as of the 15th of July next, and that the Company should pay to Mr. Salter the sum of $15,000 *in full settlement of all claims against the Company,* the said $15,000 to be paid $5,000 cash and the balance at $1,000 a month. MOVED by Donald C. Cromie, SECONDED by F. R. Anderson that the principle of the arrangement be adopted and that an agreement embodying the terms of the agreement and other clauses necessary for the protection of either party be prepared and submitted to the next meeting of Directors of the Company. CARRIED.

Pursuant to the said minutes above extracted, the solicitor of the Company, Mr. F. R. Anderson (who was also a director) prepared an agreement of which Exhibit 8 is a copy and which was submitted to the directors on July

3, 1942. Exhibit A is a copy of the minutes of that meeting and the following extract therefrom indicates the action taken by the directors in regard thereto:

An agreement having been prepared by the solicitor of the Company between P. J. Salter and the Company regarding settlement of claims between said P. J. Salter and the Company; MOVED by Donald C. Cromie, SECONDED by F. R. Anderson that the terms of the agreement be approved and adopted and that the same be executed under the seal of the Company in the presence of two directors who shall sign the same in witness of the affixing of the seal and that the Agreement be delivered to Mr. P. J. Salter as the act and deed of the Company. CARRIED.

Subsequently the agreement was completed and signed by the parties. (Exhibit 8 is a copy.) Excluding the description of the parties, it is as follows, the Company being the party of the first part and the appellant the party of the second part:

NOW THIS AGREEMENT WITNESSETH that in consideration of the premises and in consideration of the mutual covenants and agreements of the parties hereto hereinafter contained, IT IS AGREED by and between the parties hereto as follows:—

1. The Party of the Second Part has tendered to the Company his resignation as President and Director of the Company to take effect as on the 15th day of July, A.D. 1942, and the Company accepts such resignation to take effect as aforesaid;

2. The party of the Second Part AGREES with the Company to assist and advise the Company as it may require for a period of thirty (30) days from the said 15th day of July, A.D. 1942;

3. The Company will pay to the Party of the Second Part the sum of Fifteen Thousand ($15,000) Dollars payable as follows: Five Thousand ($5,000) Dollars on the execution of this Agreement and the balance at the rate of One Thousand ($1,000) Dollars per month beginning with the 15th day of August, A.D. 1942, and continuing on the 15th day of each and every month thereafter until the full sum of Fifteen Thousand ($15,000) Dollars have been paid and satisfied, and the Party of the Second Part agrees to accept such sum of Fifteen Thousand ($15,000) Dollars when paid in full settlement of all claims that he has or might have in respect of wages or salary up to the 15th day of August, A.D. 1942, the date when the Party of the Second Part finally severs his connection with the Company.

4. The Party of the Second Part will not, during a period of one (1) year from the date hereof and within the City of Vancouver, in the Province of British Columbia, accept employment with any newspaper which can or may compete with the newspaper published by the Company, and will not either directly or indirectly within the time or territory mentioned engage in any employment competitive with that of the Company.

5. Subject to the foregoing agreements between the parties hereto, the parties hereto and each of them doth and do hereby release the other and each of them, their and each of their heirs, executors, administrators, successors and assigns, and their and each of their estates and each

1946

SALTER v. MINISTER OF NATIONAL REVENUE

Cameron J.

of their effects from all sums of money debts, duties, contracts, agreements, covenants, bonds, actions, proceedings, claims and demands whatsoever which any one of them now hath or has against the other for or by reason or in respect of any act, matter, cause or thing whatsoever up to and including the day of the date of these presents, it being the intention of the parties that these presents shall constitute a complete settlement of all matters outstanding between them to date.

THIS AGREEMENT shall enure to the benefit of and be binding upon the parties hereto, their respective heirs, executors, administrators, successors and assigns.

The success or failure of the appeal on the main point depends in large measure on whether the appellant could lead evidence which would in any way add to, vary, modify or contradict the terms of the written agreement.

Counsel for the appellant argued that this was not an action between the parties to a contract and that he was entitled to prove (1) that it did not represent the real agreement between the parties thereto and (2) what was the real agreement and real consideration. Counsel for the respondent argued that the Court could not go behind the agreement itself, that the appellant was estopped from denying the terms of the written contract; that the appellant could not plead his own fraud; that the contract itself was the best evidence, that secondary evidence should not be admitted, and that the contract could only be set aside in an action between the parties themselves on the ground of fraud or mutual mistake; and that, as the Company was not before this Court, rectification could not here be made.

I reserved my finding as to the admissibility of such evidence and shall now deal with it.

The general rule is set out in Halsbury, 2nd Edition, Vol. 13, Article 786 as follows: "extrinsic evidence, whether oral or contained in writings such as instructions, drafts, articles, conditions of sale or preliminary agreements is inadmissible to add to, vary, modify or contradict a written instrument."

In Article 787 the author pointed out that there may, however, be cases where a written instrument is in question, which are not within the rule and where oral evidence is admissible.

The following are instances—to show the true consideration or the existence of consideration or of consideration in addition to that stated; to show the true nature of the transaction, or the true relationship of the parties.

Article 1149 in the 12th Edition of Taylor on Evidence p. 735 is as follows:

1149 (r). It may further be remarked that the rule is applied only in suits between the parties to the instrument, and their representatives, and they alone are to blame if the writing contains what was not intended, or omits what it should have contained. It cannot affect third persons who, if it were otherwise, might be prejudiced by things recited in the writings, contrary to the truth, through the ignorance, carelessness, or fraud of the parties and, therefore, ought not to be precluded from proving the truth, however contradictory it may be to the written statements of others.

In Phipson on Evidence, 8th Edition, exceptions to the rule are dealt with on page 566 under the heading "Private Documents where inter alios" and at p. 567 it is said:

Where a transaction has been reduced into writing merely by agreement of the parties, extrinsic evidence to *contradict or vary* the writing is excluded only in proceedings between such parties or their privies, and not in those between strangers, *or a party and a stranger;* since strangers cannot be precluded from proving the truth by the ignorance, carelessness, or fraud of the parties (*R. V. Cheadle,* 3 B & Ad. 833); nor, in proceedings between a *party and a stranger,* will the *former* be estopped, since there would be no mutuality.

In the instant case it is necessary, in order to reach a proper conclusion as to appellant's assessability to tax, to know the nature of the transaction and what was the true consideration. Was the sum of $15,000 paid in settlement of wages or salary and therefore subject to tax? Or was it a capital sum paid to secure the release of a valuable contract and therefore free of tax? Or was it partly one and partly the other?

Basing my finding on the above, I have reached the conclusion that the evidence introduced by the appellant to indicate the true nature of the transaction and to show the real consideration was admissible. I also find that the appellant is not estopped by reason of the terms of the written agreement from proving the real consideration as the agreement was *res inter alios,* and there is therefore here no mutuality.

If I am in error in the above conclusion and extrinsic evidence could not be lead to contradict, or vary the written agreement, I am of the opinion that the Court is entitled to consider evidence of the surrounding circumstances so that it may know what the agreement is dealing with and understand it. Looking at the agreement itself it is to be observed that the expressed consideration is "the

1946

SALTER
v.
MINISTER
OF NATIONAL
REVENUE

Cameron J.

premises and the mutual covenants and agreements of the parties hereinafter contained". In paragraph No. 3 the Company agrees to pay the appellant $15,000 as therein set out "And the party of the Second Part agrees to accept such sum of $15,000 when paid in full settlement of all claims that he has or might have in respect of wages or salary up to the 15th day of August 1942, the date when the Party of the Second Part finally severs his connection with the Company." This clause, in my view, is capable of several interpretations. It may mean that the consideration of $15,000 is paid entirely for wages or salary; or it may also mean that any claim for wages or salary up to that date would, together with other claims, be extinguished upon payment of that sum. There is no recital that any sums are owing to the appellant by way of wages or salary and the words "might have" could indicate that there was no certainty that there was any such claim.

But paragraph No. 5 is a part of the agreement and forms part of the consideration. It is a general release clause and, among other things, each releases the other from debts, duties, contracts, covenants, proceedings, etc.

My view, therefore, is that in order to resolve the problem before me I should know what is the real meaning of the clauses just referred to; and that to ascertain what part of the consideration is attributable to wages and salary and what part to the release from duties, contracts, etc., I must know the surrounding circumstances, not to vary or contradict the document, but to explain and identify the terms therein used.

As authority for this view, reference may be made to Phipson on Evidence 8th Edition where at p. 601 ff. he deals with the subject of "Rules as to Extrinsic Evidence". At p. 602 under "Contracts" it is stated:

> And the extent, as well as the identity, of the subject matter may be similarly shown. Thus, although prior conversations, negotiations, conditions of sale, draft agreements, and the deleted clauses cannot be proved directly to enlarge or restrict a concluded contract, since they are presumed to be superseded thereby . . ., yet where the language of the contract is vague or general, the state of facts in the knowledge and contemplation of the parties at the time, and about which they were negotiating, may be proved by their conversations or correspondence, *as circumstantial* evidence, in order to apply the words and to show whether their narrower or wider meaning was intended. Thus, the

knowledge of the parties at the time has been received to determine the scope of a release . . . Again, where an agreemnt is ambiguous, the *object* of the parties is generally relevant to determine its scope.

Reference may be made to the recent case of *Carter* v. *Wadman* (1), which was cited by counsel for the respondent. Atkinson J., in his judgment said p. 256:

This is a question which has to be determined on the proper interpretation of this agreement. There have been several warnings in the House of Lords concerning the importance of giving due weight to the terms of the agreement. I refer to *Prendergast* v. *Cameron* (1940) A.C. 549, at page 143, where the then Lord Chancellor, Lord Caldecote, quoted some warnings of Lord Tomlin and others emphasizing the importance of giving effect to the proper legal interpretation of the documents, providing they are bona fide. That does not mean that the Court is not entitled to consider evidence of the surrounding circumstances, so that the judge can know what the agreement is dealing with and understand it. And it does not mean that one can admit evidence for the purpose of contradicting or varying the plain language of the agreement.

That was a tax case where the appellant was employed under a service agreement as residential manager of a licensed hotel. The contract was a valuable one, extended for seven years, and the employer was under an obligation with the appellant not to part with any of the assets of the business during the term of the contract. Subsequently the employer, having run into difficulties, desired to dispose of the business and by agreement with the appellant contracted to pay him £2,000 free of tax in full settlement of all past, present and future claims, and the appellant agreed to the sale of the premises. At the time of this agreement the original contract had many years to run. The question was as to how much of this payment of £2,000 was referable to the commission which the appellant was entitled to up to the time of the release, but which had not then been ascertained (although later determined); and how much was referable to the release from the unexpired term of the contract. The Court sent the matter back to the General Commissioners to apportion it along those lines. What the Court did there was to go behind the agreement itself, not to contradict or vary the plain language of the agreement, but to ascertain the surrounding circumstances so that it might know what the agreement was dealing with and understand it.

(1) (1946) T.R. 255.

1946

SALTER v. MINISTER OF NATIONAL REVENUE

Cameron J.

Having found that such evidence is admissible little more need be said as to the facts, inasmuch as counsel for the respondent quite properly and frankly admitted that if such evidence could be given, then on the evidence so tendered, he could not successfully oppose the appeal on this point. It is sufficient to set out the following which I find as facts.

The appellant had been in newspaper work most of his life and in 1942 was fifty-eight years of age. He had a valuable contract with a company in which he had long been employed. He had no thought of retiring from his employment until that year when Mr. D. C. Cromie, son of the former proprietor, entered the business. The latter held a power of attorney from his mother, who, by her shareholding, controlled the business, and Mr. Cromie was, therefore, in a position to forward his purpose to bring about a change in the management and take over for himself the chief positions. He disapproved of the policies of the appellant and his co-directors. I accept the evidence of the appellant that Mr. D. C. Cromie approached him to secure his resignation and that it was the latter who named the sum of $15,000 as the amount that would be paid to the appellant for a release from his contract which then had about 1½ years to run. It is clear also that at the time of the agreement (Exhibit 8) the Company owed nothing to the appellant by way of wages or salary. Reference to the minutes of July 2, 1942, shows that the sum of $15,000 was to be paid as a release of all claims of the appellant and as he had no possible claims, except under his unexpired contract, the full sum was referable to that alone. In order to effectuate his desire to get control of the management, it was necessary for Mr. D. C. Cromie to secure the resignation of the appellant and it is significant that several other directors of long standing resigned at or about the same time as the appellant.

I was greatly impressed by the evidence of the appellant. His memory as to events was clear and he gave his evidence in a frank and convincing manner. I accept his statement that, relying on what had been discussed with Mr. Don Cromie prior to the Directors' meeting of July 2, 1942, and what took place at that meeting, and on the reliance he placed in his co-director and Company solicitor Mr. Ander-

son, he paid little attention to the contents and wording of the agreement itself, being content to know that, upon his resignation, he would be paid $15,000 in the manner agreed upon.

And I find also that the appellant throughout acted in good faith. Prior to the execution of the agreement (Ex. 8) he had advised the Local Income Tax authorities as to his proposed settlement with the Company, namely, that the payment of $15,000 was for a release of the balance of his contract, and had been assured that in that event it would not be subject to tax. This was not a case where the claim as to the nature of the payment was first raised after the assessment was made; but when the appellant did find that he was assessed to income tax in respect of the payment, he then attended at the office of the Collector to reaffirm what he had previously told him and to indicate that the wording of the agreement was incorrect. To support his contention he took Mr. Anderson with him, and the latter verbally confirmed the appellant's view that the payments were not paid for past services by way of wages or salary. At the trial Mr. Anderson gave evidence to the same effect, stating that the wording of the agreement was probably unfortunate, in that while it would appear as though the payments were for past services, he did not consider his instructions were to that effect.

By Clause 2 of the written agreement of July 3, 1942, the appellant agreed to assist and advise the Company for a period of one month from July 15, 1942. He was not asked to perform any services of any kind after July 15, 1942. Clause 4 prohibited the appellant from employment with any competing newspaper in Vancouver for one year. Neither of these clauses was part of the original verbal understanding with Mr. Don Cromie, or were mentioned at the Directors' meeting of July 2, 1942, when the Directors adopted in principle the verbal arrangement made with Mr. Cromie. They were inserted by the Company solicitor without any specific direction from anyone, pursuant to the resolution of July 2, "that an agreement embodying the terms of the agreement and other clauses necessary for the protection of either party be prepared and submitted."

1946

SALTER v. MINISTER OF NATIONAL REVENUE

Cameron J.

While considerable discussion took place at the trial as to the effect of these two clauses, they do not, in my opinion, affect the issues in any way.

I find, therefore, that the payment of $10,000 made by the Company to the appellant in 1942, and a like payment of $5,000 made in 1943, were paid entirely for the surrender of the appellant's contract with the Company, and that such payments do not constitute taxable income for the years in question.

The appellant also appeals in respect to two items for which he was assessed in 1942 and one in 1943 none of which were shown in his own returns. They all arise in connection with one set of circumstances and may be dealt with briefly.

In 1938 when the appellant was President of the Company, the latter decided to provide annuities for some twenty-five employees (executives, departmental heads and employees who had served for over fifteen years). Arrangements were completed by the President with the Monarch Life Assurance Company, by the terms of which the Company would apply for individual policies for each such employee, the Company to pay all premiums while the employee remained with it. In the case of the appellant Retirement Annuity policy No. 2050 was issued on September 9, 1938, the annual premium being $2,295 payable in advance every twelve months during the lifetime of the annuitant prior to the due date of the first annuity payment. It provided for a payment of $100 per month to the appellant commencing on September 1, 1944, and to continue for his lifetime. It contained a ten year guarantee, the appellant's wife, if she survived him, to be the beneficiary of the balance of the guaranteed period, and if she did not so survive, then to his daughters. The policy year was to be computed as from September 1, 1938.

Clause 18 provided that in the event of the annuitant leaving the services of the Company prior to the due date of the first annuity payment, all benefits of the annuitant and beneficiary should terminate on the date that such service ended; but in that event the insurer would pay to the annuitant in one sum an amount equal to the sum of all premiums then paid, or the cash surrender value of the

policy, whichever should be the greater, less any indebtedness thereon; and such payment to the annuitant would discharge the insurer from all liability.

Following the termination of the appellant's services with the Company, the latter on August 4, 1942, assigned all its control and interest in the policy to the appellant; the appellant paid the last premium which fell due on September 1, 1942, and by application dated November 19, 1942, the appellant directed that upon his death any further benefits in the annuity should go to his wife, if living, and otherwise to his estate, and consented to the cancellation and deletion of clause 18. By provision 19 of the policy it is recited that the insurance contract having been entered into between the Company and the insurer, the annuitant should have the right to deal with the policy as provided by paragraphs 3, 4, 6 and 15, only with the written consent of the Company. These clauses related to guaranteed surrender options, alternative settlement options, policy loans and assignments.

In the Company's income tax return for 1938, made out in 1939, it showed the payment of such premiums, and it appeared to the income tax authorities that such payment would constitute additional taxable income in the hands of the annuitants. The Company, having planned to pay all the costs incidental to the pension scheme, agreed to pay any additional income tax of the annuitants occasioned by the payment of such premiums. The tax authorities computed the tax of the appellant on his own return which did not include the amount of the annuity premium for the year 1938. Then a further computation was made on the basis of further income in the amount of the annuity premium. The difference in the amount of the two tax computations for all such annuitants was then added together, the Company was advised as to such total sum, and then in 1939 it paid the total sum to the income tax authorities, thereby relieving the individual annuitants from all tax occasioned by payment of the premiums. Credit was then given to each individual annuitant taxpayer for the proper amount, under the heading "other payment applied on the assessment". But the income tax authorities

1946

SALTER v. MINISTER OF NATIONAL REVENUE

Cameron J.

then added to the income of the appellant, for the year in which the company paid such tax, an amount equal to such tax so paid.

This procedure was continued throughout the years in question. For the year 1942, there were added to the appellant's declared income, (1) the sum of $1,312, being that year's portion of the annuity premium, the appellant having left the employ of the Company in July, 1942, and (2) the sum of $2,114.58, being the amount paid by the Company to the income tax authorities in 1942, in respect of the appellant's income for the taxation year 1941, in relation to the annuity premium paid in 1941. It is to be noted that the item of $2,114.58 paid as tax in 1942 was in fact credited against the income tax of the appellant for the year 1941 as though he had paid it himself.

Similarly in 1943 there was added to the appellant's declared income for the year 1943 the sum of $977.36 being the amount paid by the Company to the income tax authorities in 1943 in respect of the appellant's income for the year 1942 and representing the tax paid on the annuity premium of $1,312 paid in 1942. Credit for the payment of $977.36 was given to the appellant in the assessment for 1942 under the heading "other payments applied on the assessment."

The question for determination therefore is as to whether these items of premiums and the tax relevant thereto constitute taxable income of the appellant? Counsel for the appellant argues that the liability to pay the premiums was that of the Company; that payment in any one year of that liability could not be considered as the income of the appellant; that he did not receive it directly or indirectly, although at some future date he might (as in fact, he did) receive benefit from it; and also that the tax paid by the Company was never received by the appellant either directly or indirectly and was not therefore taxable income.

With these arguments I cannot agree. I have reached the conclusion that both the amount of the premiums and the tax paid in reference thereto constitute taxable income within the provisions of section 3 of the Income War Tax Act, the relative portions of which are as follows:

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

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

(*e*) personal and living expenses when such form part of the profit, gain or remuneration of the taxpayer or the payment of such constitutes part of the gain, benefit or advantage accruing to the taxpayer under any estate, trust, contract, arrangement or power of appointment, irrespective of when created.

By section 2. (*r*)

"Personal and living expenses."—"Personal and living expenses" shall include inter alia—

(ii) the expenses, premiums or other costs of any policy of insurance, annuity contract or other like contract if the proceeds of such policy or contract are payable to or for the benefit of the taxpayer or any person connected with him by blood relationship, marriage or adoption.

In the instant case the premiums on the annuity contract were payable to or for the benefit of the taxpayer, or his wife or daughters, and were therefore "personal and living expenses". In my opinion also the payment of such personal and living expenses by the Company constitutes part of the gain, benefit or advantage accruing to the appellant under its contract or arrangement made with the insurer (and in which the appellant was a party) to provide an annuity for the appellant. The annuity contract was entirely for the benefit of the appellant, for although in certain particulars the appellant did not have absolute control as to options, loans and assignments, I cannot recall any provisions in the policy under which the Company could at any time receive any benefits thereunder without, at least, the voluntary approval and direction of the appellant. And to the extent of the premiums paid in each year, such premiums constituted part of the annual profit or gain referred to in section 3.

I am also of the opinion that in addition to being taxable as personal and living expenses under section 3 (1) (*e*) the premiums so paid by the Company are taxable in the hands of the appellant as a gratuity indirectly received by the appellant from his employment with the Company. There

1946

SALTER v. MINISTER OF NATIONAL REVENUE

Cameron J.

was no obligation on the Company to provide any pensions for its employees, but, as a matter of grace, it decided to do so in the manner previously outlined and to pay any premiums which fell due while the employee remained in its service; and should the employee leave its service before the first annuity payment fell due, then the Company would pay no further premiums—but the employee would be entitled to receive the benefits mentioned in the policy. The whole scheme, therefore, related to his employment or office, and being gratuitous on the part of the Company and the premiums being paid to the insurer for the sole benefit of the appellant, the amount thereof was a gratuity indirectly received by him. From the very nature of the transaction, the payments of premiums on a policy (the sole benefits of which were for the appellant) were paid as additional compensation to the appellant and in consideration of his services from year to year.

Reference may be made to *In Re Gillespie Estate* (1) where MacDonald J. A. stated at p. 399:

> The situation was the same in effect as if the payments (insurance premiums) had been made direct to the insured and by him paid over to the insurance company.

On appeal (reported in (1943) 1 W.W.R. 26) the judgment of the Court was delivered by Ford, J. A. At p. 28 he stated:

> There can, I think, be no doubt that the payment by Gillespie Grain Company Limited of the premiums in each of the years in question was made for John Gillespie's benefit in consideration of the services as recited in Ex. 7, and the amounts thereof must be treated as if paid to him, and to be income received by him just as much as if he had been paid a salary as president and manager of the company. The fact that they were paid not to him but to the insurance company makes no difference. They were profit or gain indirectly received during each of the years in which the premiums were paid, and were income within the meaning of *The Income Tax Act*, 1932 ch. 5.

The Income Tax Act referred to in the above case was, of course, that of the Province of Alberta, 1932, chap. 5. In that Act the word "income" is given much the same meaning as in the Income War Tax Act.

Reference should also be made to the case of *Hartland* v. *Diggines* (2). In that case a shipping company voluntarily paid income tax over a series of years on the salaries of its employees, including their accountant. It was held that this payment was part of the accountant's profits and

(1) (1942) 3 W.W.R. 396. (2) (1926) A.C. 289.

emoluments as an officer of the Company for which he was assessable to income tax. Viscount Cave L. C. in giving judgment in the House of Lords said at p. 291:

My Lords, the Income Tax Act provides that the duty under Sch. e is to be payable "for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of" the office held by the person to be charged; and by r. 4 in Sch. E "perquisites" are to be deemed to be "such profits of offices and employments as arise from fees or other emoluments". The question therefore is whether the additional £80.5s. comes within the description of "profits", "perquisites", or "emoluments" in that statute. If it does come within that description, it is plain that it is rightly added to the salary for the purpose of assessment. That appears from the case of *Samuel* v. *Inland Revenue Commissioners* (1918) 2 K.B. 553 relating to super tax, and the case of *North British Ry. Co.* v. *Scott* (1923) A.C. 37, and from other decisions.

But is it a profit, a perquisite, or an emolument? That the payment is voluntary makes no difference; that appears plainly from the case of *Blakiston* v. *Cooper* (1909 1 A.C. 104). But it is said—and this is the main argument used on behalf of the appellant—that the sum is not an emolument, because it was not paid to the appellant or at his request, although in fact it was paid regularly over a series of years. I do not agree with that argument. There was that continuity in payment to which reference was made in the case of *Blakiston* v. *Cooper,* and the effect of the payment was in practice and in fact to relieve the appellant year after year from his liability for the payment of the tax. It is true that the appellant did not receive cash in his hands, but he received money's worth year after year. This being so, I cannot resist the conclusion that the payment was in fact a part of his profits and emoluments as an officer of the company for which he has been properly assessed to tax.

While the above judgment has to do with the interpretation of a section in the English Act, it is of interest to note that there the voluntary payments of tax were determined to be profits and emoluments of an officer of the Company.

In any event, if the payment of income tax by the Company on the appellant's income was not part of his profits or gain it was in my opinion, a gratuity indirectly received by the appellant from his office or employment. The Company, being under no obligation to pay any part of the appellant's income tax, but having determined that the appellant should be under no greater tax burden by reason of the payment of the annuity premium, voluntarily paid that portion of the income tax of the appellant referable thereto. It was clearly an additional gratuity and in computing the appellant's income for the year in question the respondent was entitled to add the amount thereof to the assessable income of the appellant. The additional

1946

SALTER v. MINISTER OF NATIONAL REVENUE

Cameron J.

taxes occasioned thereby, have been paid by the Company and proper credits given to the appellant for such payments.

In the result therefore the appellant succeeds as to the sums of $10,000 and $5,000 added to his income for the years 1942 and 1943 respectively, and otherwise the appeals will be dismissed. The assessments are referred back to the respondent to re-assess the appellant for the years in question on the basis of my findings.

The question of costs presents some difficulty. While the appellant is successful on the main points of his appeal the difficulties in regard thereto arose through the fact that he was careless in executing an agreement which did not accurately or clearly set out the actual terms of the agreement. Had the agreement been properly drawn so as to indicate the true arrangement between the Company and the appellant, I think there would have been no difficulty on the part of the taxing authorities in reaching the same conclusion as I have as to the nature of the payments made by the Company to the appellant. To that extent the appellant is the author of his own difficulties. On the whole, therefore, I think justice will be done to the parties if costs are not allowed to either party.

Judgment accordingly.

1946

Mar. 7 & 8
Nov. 27

BETWEEN:

THE NATIONAL TRUST COMPANY LIMITED, Executor of the Last Will and Testament of Edward Rogers Wood, deceased, ... } APPELLANT;

AND

MINISTER OF NATIONAL REVENUE, ... } RESPONDENT.

Revenue—Succession Duties—Succession—The Dominion Succession Duty Act, 4-5 Geo. VI, c. 14 as amended by 6 Geo. VI, c. 25, secs. 2 (a), (e), (j), (k), (m), 3, 6, 10 & 11—Settlement by grantor—Gift of equitable interest in securities—Bona fide possession and enjoyment of securities assumed by trustees for donee immediately upon making of the gift—Retention by trustees to entire exclusion of donor of any benefit—Exemptions under the Act—Subject matter of duty—"Predecessor"—"Gift"—Operation of Act limited to certain kinds of property—Appeal from assessment for duty allowed.

1946

NATIONAL TRUST CO. LTD. v. MINISTER OF NATIONAL REVENUE

By deed of settlement made in 1930 between E. R. Wood as settlor and two trustees it was declared that the trustees should hold certain securities of which the settlor was the owner and which were transferred to the trustees, in trust, to pay the annual income therefrom to the settlor's daughter during his lifetime and, upon his death, to transfer the securities then representing the Trust Fund and the accumulated income to the daughter for her own absolute use and benefit: it was also declared that the settlor had power to direct investments and to change trustees and the trustees had power to accept securities from the settlor in substitution of those in the Trust Fund provided they were of the same value and that they yielded the same annual income and substitutions were in fact made: the trustees also had power to appoint the settlor as their attorney to vote as their proxy in respect of the securities.

The Dominion Succession Duty Act. 4-5 Geo. VI, c. 14 was assented to on June 14, 1941. It was amended by 6 Geo. VI, c. 25, the provisions of the Act applying retrospectively to successions derived from persons dying on or after June 14, 1941. The settlor died on June 16, 1941, domiciled in the Province of Ontario. Appellant is executor of the will of the settlor.

The respondent assessed succession duties on the value of the securities in the Trust Fund at the death of the settlor and from such assessment the executor appealed to this court.

Held: That the subject matter of the duty under the Dominion Succession Duty Act is the disposition and not the property and the value of a disposition is the value of the property in the disposition.

2. That taxation is only imposed on the death of the "predecessor" as defined by s. 2 (*j*) of the Act.

3. That the operation of the Act is limited to (*a*) property owned by the deceased at the time of his death and (*b*) property described in s. 3 of the Act.

4. That s. 2 (*m*) of the Act deals only with property which the deceased owned at the time of his death.

5. That s. 2 (*m*) and s. 3 (1) of the Act are mutually exclusive.

6. That the second part of s. 3 (1) (a) is not separate and apart from the first part but refers to a transfer made in contemplation of the death of the grantor. *Cowan* v. *Attorney General* (1925) 2 D.L.R. 647 at 653, followed.

7. That the settlement is a "gift" within the meaning of "gift" in s. 3 (1) (*d*) and 7 (1) (*g*) of the Act and the interest of the daughter under the settlement in the shares and accumulated income was not an absolute vested interest but a conditional interest, the condition being a condition subsequent and vested subject to being divested, she being given an immediately vested interest, her interest being defeasible if she predeceased the settlor.

8. That the property in the gift was the equitable interest in the securities and such beneficial interest was vested in the donee from the inception of the trust and therefore the gift was made prior to April 29, 1941, and the actual and bona fide possession and enjoyment of the property in the gift were assumed by the trustees for the donee immediately upon the making of the gift.

1946

NATIONAL TRUST CO. LTD. v. MINISTER OF NATIONAL REVENUE

9. That a contingent reversion is not reserved out of the gift, but is something not comprised in the gift and the provision for reversion contained in the settlement did not render the gift one in which possession and enjoyment have not been assumed and retained to the entire exclusion of the settlor or of any benefit to him whether voluntary or by contract or otherwise within the meaning of s. 3 (1) (*d*) of the Act. *Commissioner for Stamp Duties of New South Wales and Perpetual Trustee Co. Ltd.* (1943) A.C. 425; *Re Cochrane* (1905) 2 I.R. 626, (1906) 2 I.R. 200; *Helvering* v. *Hallock* 309 U.S.R. 106; referred to.

10. That neither the power of the settlor to direct investments and to change trustees nor the power of the trustees to accept securities from the settlor in substitutions and to appoint the settlor their proxy to vote the securities in the Fund renders the gift one in which possession and enjoyment were not assumed and retained by the trustees for the donee to the entire exclusion of the settlor or of any benefit to him, wehther voluntary or by contract or otherwise within the meaning of s. 3 (1) (*d*) and s. 7 (1) (*g*) of the Act. *Reinecke* v. *Northern Trust Co.* 278 U.S.R. 339 referred to.

11. That the disposition is not within s. 2 (*m*) or s. 3 (1) of the Act and is exempt under s. 7 (1) (*g*) of the Act.

APPEAL under the provisions of the Dominion Succession Duty Act.

The appeal was heard before the Honourable Mr. Justice O'Connor, at Ottawa.

Wilfred Judson for appellant.

J. W. Pickup, K.C. and *S. Quigg* for respondent.

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

O'Connor J., now (November 27, 1946) delivered the following judgment:

This is an appeal from one item in an assessment dated 17th July, 1945, made under the Dominion Succession Duty Act, 1940-41, Statutes of Canada, chap. 14, as amended. The item in dispute consists of certain securities in a trust fund established by a deed of settlement, made on the 8th of December, 1930, to take effect on the 1st January, 1931, between Edward Rogers Wood (referred to as the settlor) and Messrs. Fisher and Hastie, as trustees and the daughter of the settlor, Mildred P. S. Fleming (now Gilchrist) referred to as the donee. The deed of settlement was amended by an agreement dated 1st February, 1937.

The Dominion Act was assented to on the 14th June, 1941.

The settlor died on the 16th June, 1941, domiciled in the Province of Ontario.

An amendment to the Dominion Act 1942, chap. 42 was assented to on the 1st August, 1942, and the provisions of the amending Act were made to apply retrospectively to successions derived from persons dying on or after the 14th June, 1941.

The Dominion Act must, therefore, be considered in the form in which it stood at the date of the settlor's death, namely the Dominion Succession Duty Act 1941 as amended by Act of 1942.

The deed of settlement provided in part:—

WHEREAS the Settlor is desirous of making provision for the maintenance and benefit of his daughter, the Beneficiary herein;

AND WHEREAS the Settlor being the absolute owner of the securities specified in Schedule "A" hereto has transferred the same to the Trustees to hold as a Trust Fund upon the Trusts hereinafter expressed;

NOW THIS DEED WITNESSETH that in consideration of the natural love and affection which the Settlor has for his said Daughter, the Beneficiary herein, and for divers good causes and considerations, the Settlor hereby directs and has agreed and declared as follows:—

1. The Trustees shall hold the securities transferred to them and set forth in Schedule "A" hereto, hereinafter called the "Trust Fund", on trust to pay the annual income arising therefrom after the 1st day of January 1931 to the Beneficiary in quarterly instalments on the 1st days of January, April, July and October in each year, commencing on the 1st day of April 1931, for and during the lifetime of the Settlor and upon his death shall transfer the securities then representing the Trust Fund and the accumulated income therefrom to the Beneficiary for her own absolute use and benefit; provided that in the event of the Beneficiary dying in the lifetime of the Settlor the Trustees shall transfer such securities then representing the Trust Fund and the accumulated income therefrom to the Settlor for his own absolute use and benefit.

First as to the subject matter of the tax. Rose, C.J., H.C., in re *Flavelle Estate* (1) said:—

In Kerr v. Superintendent of Income Tax and the Attorney-General for Alberta, Kerwin J., with whom Taschereau and Gillanders JJ., concurred, has drawn attention to the fact that Lord Thankerton's statement in Provincial Treasurer of Alberta v. Kerr, that the identification of the subject-matter of the tax is naturally to be found in the charging section of the statute, was made in the course of the consideration of the question whether the tax was imposed on property or a transmission. The fact that the statement was made in that connection led Kerwin J., to the conclusion that it afforded no assistance in the determination of the

(1) (1943) O.R., 167 at 182.

1946

NATIONAL TRUST CO. LTD. v. MINISTER OF NATIONAL REVENUE

O'Connor J.

question with which the Supreme Court of Canada had to deal, but it is to my mind of prime importance in connection with the point under discussion.

Under the Dominion Act, however, in the charging provisions, Part III, section 10 imposes an initial duty at a rate dependent on "the aggregate net value", and section 11 imposes an additional duty at a rate dependent on "the dutiable value" on each succession described in section 6.

Section 6 which is not in the charging provisions levies duties on successions:—

6. Subject to the exemptions mentioned in section seven of this Act, there shall be assessed, levied and paid at the rates provided for in the First Schedule to this Act 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;

(*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.

"Succession" is defined under the Act as:—

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.

The effect then of the charging provisions 6, 10 and 11 and the statutory meaning of succession is that duty is levied upon dispositions of property, devolutions of property and dispositions of property deemed (by section 3 (1)) to be included in a succession.

While 2 (*m*), which defines succession, has been taken from section II of the English Succession Duties Act, 1853, dispositions under 2 (*m*) do not, as they do under section II of the English Succession Duties Act, confer successions, i.e., property chargeable with duty, on successors.

"Succession" under 2 (*m*) is not "property" to which any person has or shall become beneficially entitled upon the death of any deceased person by reason of any past or future disposition, but every past or future "disposition of

property" by reason whereof any person has or shall become beneficially entitled to any property, and it is any "disposition of property" and not "property" that is deemed under section 3 (1) to be included in a succession.

Under section II of the Finance Act of 1894 certain "properties" set out in the subsections are deemed to be included in property passing on the death of the deceased.

While section 3 of the Dominion Act has been taken in part from this section, yet under section 3 of a succession shall be deemed to include, not "property" but the following "dispositions of property".

Rose, C.J., H.C., in re *Flavelle Estate* (*supra*), held that under section 9 (*c*) of the Succession Duty Act of Ontario, R.S.O., 1937, chap. 26:—

> 9 (*c*). Every disposition of any property (other than realty situate outside Ontario) made within Ontario by the deceased person during his lifetime on or after July 1, 1892;

the subject matter of the taxation imposed was the disposition and not the property or the disponee.

I am of the opinion that in the Dominion Act, the subject matter of the tax (applicable in this case) is the disposition and not the property.

Under section 10 an initial duty is levied upon each succession at a rate determined by the aggregate net value, which, as defined by section 2 (*a*), is the value of—(*a*) the property of the deceased, and the value of—(*b*) all property described in section 3, after the debts and allowances are deducted. The duty is then levied at that rate upon each succession, i.e., disposition of property. But no provision has been made by which the value of the disposition can be ascertained. In the Ontario Succession Duty Act, 1937, referred to above, it was provided by section 12 that for the purposes of that Act, the value of a disposition shall be the fair market value of the property in respect of which such a disposition is made . . . While no similar provision is contained in the Dominion Act, in my opinion it can reasonably be inferred from the whole Act, and particularly from the definitions of "aggregate net value" and "dutiable value", that the value of the disposition is the value, at the date of the death of the settlor, of the property in the disposition.

1946

NATIONAL TRUST CO. LTD. v. MINISTER OF NATIONAL REVENUE

O'Connor J.

Under the English Succession Duties Act, 1853, the person whose death gives rise to the liability to succession duty may be anyone and need not be, and often in fact is not, the predecessor. *7th Ed., Hanson Death Duties, p. 42.*

Under section 2 (*j*) of the Dominion Act, "predecessor" means the person dying after the date of the coming into force of this Act from whom the interest of a successor in any property is or shall be derived. Taxation under the Dominion Act is, therefore, only imposed on the death of the predecessor. So that while under the Succession Duties Act, 1853, taxation is imposed when a life interest or something equivalent to it, terminates and the remainder interest falls into possession, that is not the case under the Dominion Act.

The first question is whether or not the disposition of property in this case falls within section 2 (*m*).

The Dominion Act is clearly limited to dispositions of two kinds of property and two kinds only. The initial duty under section 10 is levied at the rate which is determined by the "aggregate net value" which in turn is defined as—

2 (*a*). "Aggregate net value" means the fair market value as at the date of death, of all the property of the deceased, wherever situated, together with the fair market value, as at the said date, of all such other property wherever situated, mentioned and described in section three of this Act, as deemed to be included in a succession or successions, as the case may be, from the deceased as predecessor, after the debts, incumbrances and other allowances are deducted therefrom as authorized by section eight of this Act.

Aggregation is described in Wooley on Death Duties 5th ed., p. 57 as the combining together of all classes of property, which become liable to duty, for the purpose of arriving at the rate of duty on all or any of them. From such aggregate value is deducted the debts, incumbrances and allowances leaving the aggregate net value defined by section 2 (*a*).

The value then of dispositions and devolutions of *all* classes of property, which become liable to duty, under the Act consists of the fair market value, as at the date of death of:—

(*a*) all the property *of the deceased* and of

(*b*) all such other property described in section 3.

Property is defined by:—

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 three of this Act.

Property capable of being devised or bequeathed by will or of passing on death is—(*a*) property which the deceased owned at the time of his death. And any right or benefit under section 3 is—(*b*) property described in section 3.

So that property *of the deceased* in 2 (*a*) "aggregate net value" is property which the deceased owned at the time of his death.

The Dominion Act is, therefore, limited to dispositions of two kinds of property—

(*a*) Property which the deceased owned at the time of his death.

(*b*) Property described in section 3.

As section 3 deals with dispositions of the property described in that section, then 2 (*m*) can only deal with dispositions of property which the deceased owned at the time of his death, because that is all that remains for it to deal with.

The settlor in 1930 transferred all his interest, both legal and equitable, to the trustees so that at the date of his death he had no interest of any kind in the securities in the trust fund. The possibility that the securities might revert to him in the event the daughter predeceased him, is not an interest in property.

As the settlor had no interest in the securities at the time of his death, and as the operation of section 2 (*m*) is limited to dispositions of property which the deceased owned at the time of his death, the disposition in this case does not, in my opinion, fall within section 2 (*m*).

Decisions under the English Succession Duties Act, 1853, are of little assistance in cases under the Dominion Act, for while section 2 (*m*) is taken from part of section II of the Act of 1853, it has been placed in an entirely different context and in my opinion is limited in its operation to dispositions of property owned by the deceased at the time of his death. In addition, as I have already pointed out,

1946

NATIONAL TRUST CO. LTD. v. MINISTER OF NATIONAL REVENUE

O'Connor J.

taxation under the Dominion Act is only imposed on the death of the predecessor, while this is not the case under the Succession Duties Act, 1853.

Mr. Pickup contended that the last part of section 3 (1) (*a*) was ancillary to and clarified section 2 (*m*).

But section 2 (*m*) is a pure succession and in my view is limited to disposition of property which the deceased owned at the time of his death. Section 3 (1) deals with dispositions of property which the deceased once had but parted with in one of the ways described in the subsections but which, for the purposes of the Act, are deemed to be included in a succession. Far from being ancillary, sections 2 (*m*) and 3 (1) are mutually exclusive, just as sections 1 and 2 of the Finance Act of 1894 are mutually exclusive. Under the Finance Act of 1894 section 1 of the Act sets out the property passing on death, and section 2 sets out property deemed to be included in property passing on death. In *Cowley* v. *Commissioners of Inland Revenue* (1), Lord MacNaghten said:—

> Now if the case falls within section 1 it cannot also come within section 2. The two sections are mutually exclusive.

In my opinion the disposition, therefore, cannot be within both sections 2 (*m*) and 3 (1).

The next question to be determined is whether this disposition falls within section 3 (1).

Counsel for the Respondent contends that the case is also within the second part of section 3 (1) (*a*):—

> 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:—
>
> (*a*) property and income therefrom voluntarily transferred by grant, bargain or gift, or by any form or manner of transfer made in general contemplation of the death of the grantor, bargainor or donor, and with or without regard to the imminence of such death, or made or intended to take effect in possession or enjoyment after such death to any person in trust or otherwise, or the effect of which is that any person becomes beneficially entitled in possession or expectancy to such property or income.

That is, that it is property voluntarily transferred by grant, bargain or gift or by any form or manner of transfer . . . made or intended to take effect in possession or enjoyment

(1) (1899) A.C., 198 at 210.

after such death to any person in trust or otherwise . . . Counsel did not contend that the settlement was made "in contemplation of death", and it is clear that in no proper sense can the settlement be said to have been made in contemplation of death. I am of the opinion that the second part of the section "or made or intended to take effect in possession or enjoyment after such death to any person in trust or otherwise" is not something separate and apart from the first part of the section, and the words in the subsection, "after such death" refer quite clearly to a transfer made "in general contemplation of the death of the grantor, bargainor or donor, and with or without regard to the imminence of such death . . ." See judgment of Beck, J., in *Cowan* v. *Attorney-General* (1). The settlement is not, in my opinion, within section 3 (1) (*a*).

Section 3 (1) does not include property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cesser of interest such as 2 (1) (*b*) of the English Finance Act, 1894, and also in a number of the Provincial Acts.

The disposition is either within section 3 (1) (*d*) or it does not attract taxation at all because it is not, in my opinion, within any of the other subsections of section 3 (1). The Appellant contends that the disposition is, in any event, exempt under section 7 (1) (*g*). It is clear, of course, that if the disposition attracts taxation under section 3 (1) (*d*) it would not, for the same reasons, be exempt under section 7 (1) (*g*).

Gifts with reservations of benefits are deemed to be included in a "succession" under:—

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:—

(*d*) property taken under a gift whenever made of which actual and bona fide possession and enjoyment shall not have been assumed by the donee or by a trustee for the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him, whether voluntary or by contract or otherwise.

The exemption section is:—

7 (1). From the dutiable value of any property included in a succession the following exemptions shall be deducted and no duty shall be leviable in respect thereof:—

(1) (1925) 2 D.L.R. 647 at 653.

1946

NATIONAL TRUST CO. LTD. v. MINISTER OF NATIONAL REVENUE

O'Connor J.

(*g*) in respect of any gift made by the deceased prior to the twenty-ninth day of April, one thousand nine hundred and forty-one, where actual and bona fide possession and enjoyment of the property, the subject matter of the gift, has been assumed by the donee or by a trustee for the donee immediately upon the making of the gift and thenceforward retained to the entire exclusion of the donor, or of any benefit to him, whether voluntary or by contract or otherwise.

The questions to be determined are:—

(1) Was there a gift within the meaning of sections 7 (1) (*g*) and 3 (1) (*d*)?

(2) What was the property comprised in the gift? Was it the securities themselves or only a particular kind of interest in the securities?

(3) Had bona fide possession and enjoyment been assumed by the donee or by a trustee for the donee immediately upon the gift?

(4) Had bona fide possession and enjoyment been thenceforward retained by the donee or by a trustee for the donee to the entire exclusion of the settlor and to the entire exclusion of any benefit to him, whether voluntary or by contract or otherwise?

These same questions were determined in *Commissioner for Stamp Duties of New South Wales* and *Perpetual Trustee Co., Ltd.*, (1), hereinafter referred to as the *New South Wales case*, and which is directly in point.

In that case the facts taken from the headnote were:—

By an Indenture of Settlement made in 1917 between the settlor and five trustees, of whom the settlor himself was one, it was declared that the trustees should hold certain company shares transferred by the settlor, who was the owner, to the trustees in trust, to apply during the minority of his son, the whole or any part of the income or corpus as the trustees should think fit for the maintenance, advancement or benefit of the son, and on his attaining the age of twenty-one years, to transfer to him as his absolute property, all the assets and property whatsoever, including accumulations of income. From the date of the Settlement, the settlor never exercised any voting powers in respect of the shares. No part of the income was applied towards the infant's maintenance, any balance which might have been so applied being accumulated and invested. The son attained the age of twenty-one years in 1931, when the assets comprised in the Settlement were transferred to him. A claim was made by the revenue authorities that on the death in 1921 of the settlor, the shares, the subject of the Settlement, had formed part of the settlor's dutiable estate by virtue of s. 102, ss. 2 (*d*) of the New South Wales Stamp Duties Act, 1920.

(1) (1943) A.C. 425.

After reviewing the opinions expressed in the Supreme Court and in the High Court of Australia as to what was the property comprised in the gift and whether or not bona fide possession and enjoyment was assumed by the donee immediately upon the gift, the judgment delivered by Lord Russell of Killowen states, page 439:—

> There is no gift of corpus to the son except in the direction to the trustees to transfer to him on his attaining twenty-one. What have then (and only then) to be transferred are described as "all the property and assets whatsoever including the accumulations of income and all investments held by the trustees", and they are then to be transferred to him "as his absolute property". Until that event had happened they were not, in their Lordships' opinion, his absolute property; until that event had happened he had only a contingent interest. He was only to be absolutely entitled to corpus if and when he attained his age of twenty-one years.
>
> For the reasons hereinafter appearing their Lordships are in agreement with the decision of the High Court in this case. In their opinion the property comprised in the gift was the equitable interest in the eight hundred and fifty shares, which was given by the settlor to his son. The disposition of that interest was effected by the creation of a trust, i.e., by transferring the legal ownership of the shares to trustees, and declaring such trusts in favour of the son as were co-extensive with the gift which the settlor desired to give. The donee was the recipient of the gift; whether the son alone was the donee (as their Lordships think) or whether the son and the body of trustees together constituted the donee, seems immaterial. The trustees alone were not the donee. They were in no sense the object of the settlor's bounty. Did the donee assume bona fide possession and enjoyment immediately upon the gift? The linking of possession with enjoyment as a composite object which has to be assumed by the donee indicates that the possession and enjoyment contemplated is beneficial possession and enjoyment by the object of the donor's bounty. This question therefore must be answered in the affirmative, because the son was (through the medium of the trustees) immediately put in such bona fide beneficial possession and enjoyment of the property comprised in the gift as the nature of the gift and the circumstances permitted.

The language in the New South Wales judgment can be adopted in this case because what was said there applies with equal force here.

There is no gift of the corpus, except in the direction to the trustees to transfer the securities to the donee on the death of the donor.

What have then to be transferred were "the securities then representing the trust fund and the accumulated income therefrom", and they are then to be transferred to her "for her own absolute use and benefit". Until that event had happened they were not her absolute property.

1946

NATIONAL TRUST CO. LTD. v. MINISTER OF NATIONAL REVENUE

O'Connor J.

Until that event happened her beneficial interest was conditional. It was not contingent as in the *New South Wales case*. There was no condition precedent to vesting, but if she died before the death of the settlor, the interest would be taken away. The condition then was a condition subsequent and her conditional interest was, therefore, vested subject to be divested. There was a gift of income until the death of the settlor so that the gift of the corpus does not stand alone. The gift amounts, in substance, to a vested interest divided into two portions for the purpose of protracting, not the vesting, but the possession only. The donee was given, in the language of Lord Russell of Killowen in *Adamson* v. *Attorney-General* (1), an immediately vested interest but her interest was defeasible, i.e., if she died before the settlor.

"Gift" is not defined in the Dominion Act, the Finance Act of 1894, nor in the New Zealand Death Duties Act 1921. It is defined in the New South Wales Stamp Duties Act 1920.

A settlor who declares trusts of property only gives a beneficial interest. The Dominion Act contemplates a gift of a beneficial interest because section 7 (1) (*g*) and section 3 (1) (*d*) expressly provide for possession and enjoyment of a gift being assumed by the donee or *by a trustee for the donee*. The corresponding provisions of the other acts mentioned do not contain the words "or by a trustee for the donee". Moreover section 3 (1) (*c*) provides for a gift "inter vivos whether by way of transfer, delivery, declaration of trust or otherwise . . ."

In this case, in my opinion, there was a gift within the meaning of "gift" in section 3 (1) (*d*) and section 7 (1) (*g*), not of the securities in the trust fund, but of the equitable interest in the securities, and that beneficial interest was vested in the donee from the inception of the trust and the gift was therefore one prior to the 29th April, 1941.

The donee was the recipient of the gift and bona fide possession and enjoyment was assumed by the trustee for the donee immediately upon the gift.

The judgment in the *New South Wales case* held that the resulting trust in that case did not render the gift one in

(1) (1933) A.C., 257 at 290.

which possession and enjoyment had not been retained to the entire exclusion of the donor or of any benefit within the meaning of section 102, subsection 2 (*d*) of the Stamp Duties Act 1920 New South Wales, and in doing so expressly affirmed the decision in the *Cochrane case* (1), in which it was held that an express provision for reversion did not render the gift one in which the donor was not excluded from possession and enjoyment or of any benefit within the meaning of Clause (a) of the Customs and Inland Revenue Act 1881; section 38 (2) as amended by section 11 of the Customs and Inland Revenue Act 1899, and the Finance Act 1894—Clause (*c*) (2). The result of the judgment in the *Cochrane case* is stated in *2nd., ed., 13 Halsbury, 240*:—"That a contingent reversion, reserved to the donor in the corpus of property given upon trusts, is not reserved out of the gift, but is something not comprised in the gift". In the *Adams case* (2), cited in the argument in the New South Wales case, Ostler, J., held that as the provision for reversion in the settlement in that case procured no further result than would follow operation of law on the exhaustion of the objects of the trust that it did not render the gift one in which the settlor was not excluded from a "benefit" by contract or otherwise within the meaning of section 5 (1) (*c*) of the New Zealand Death Duties Act 1921.

The sections of these three acts which correspond with the relevant provisions section 3 (1) (*d*) and section 7 (1) (*g*) of the Dominion Act are in very similar words and there is no difference in substance. The provisions in the New Zealand, New South Wales and Dominion Act have all been taken from the Customs and Inland Revenue Act as amended.

There is no doubt, however, that the majority judgment of the Supreme Court of the United States in *Helvering* v. *Hallock* (3), which overruled its own judgment in the *St. Louis Trust case* (4), held that a provision for reversion rendered the transfer incomplete and reserved an interest in the gift to the settlor which only terminated on the death of the settlor.

(1) (1905) I.R., 626; (1906) I.R., 200.
(2) (1932) N.Z.L.R., 741.
(3) 309 U.S.R., 106.
(4) 296 U.S.R., 39.

1946

NATIONAL TRUST CO. LTD. v. MINISTER OF NATIONAL REVENUE

O'Connor J.

The majority judgment was delivered by Mr. Justice Frankfurther. In his reasons for judgment the following is of interest in this case:—

> The law of contingent and vested remainders is full of casuistries . . . The importation of these distinctions and controversies from the law of property into the administration of the estate tax precludes a fair and workable tax system. Essentially the same interests, judged from the point of view of wealth, will be taxable or not, depending upon elusive and subtle casuistries which may have their historic justification but possess no relevance for tax purposes. These unwitty diversities of the law of property derive from mediaeval concepts as to the necessity of a continuous seisin. Distinctions which originated under a feudal economy when land dominated social relations are peculiarly irrelevant in the application of tax measures now so largely directed toward intangible wealth.

I am of the opinion, notwithstanding the judgment in *Helvering* v. *Hallock* (*supra*) that a contingent reversion is not reserved out of the gift, but is something not comprised in the gift, and that the provision for reversion contained in this settlement did not render the gift one in which possession and enjoyment have not been assumed and retained to the entire exclusion of the settlor or of any benefit to him within the meaning of the sections 3 (1) (*d*) and 7 (1) (*g*).

There are certain provisions in this settlement which must be considered in determining the answer to the last question, viz., had bona fide possession and enjoyment been thenceforward retained by the donee or by a trustee for the donee to the entire exclusion of the donor or of any benefit to him, whether voluntary or by contract or otherwise?

The deed of settlement (1930) with the amendments under the agreement (1937) further provided:—

> 2. The Trustees shall have power to hold the securities set forth in Schedule "A" hereto or any securities substituted therefor as hereinafter provided, notwithstanding that the said securities may not be securities in which trustees are authorized by law to invest trust funds, and shall from time to time upon the direction in writing of the Settlor.

(Amended by the agreement by adding after the word "Settlor"—"and National Trust Company, Limited and/or any Chartered Bank in the Dominion of Canada".)

> During his lifetime sell, call in and convert into money the said securities or any part thereof, and invest the moneys thereby produced in such securities or investments as the Settlor may from time to time direct and notwithstanding that the said securities or investments may not be securities or investments in which trustees are authorized by law to invest trust funds, and shall have power upon the direction in writing

of the Settlor during his lifetime to accept from the Settlor in substitution in part or in toto of the said securities set forth in Schedule "A" hereto other securities in respect of which the Settlor shall certify in writing that the securities so substituted are of a value at least equal to the value of the securities for which the same are to be substituted, and the securities so substituted together with the securities to be retained by the Trustees and constituting the Trust Fund shall yield at the date of such substitution a net income of at least Twenty-four Thousand Dollars ($24,000) per annum after allowing from the gross income from such securities for the payment of all taxes payable by the Beneficiary in respect of the income from such securities which may be assessed or levied by the Dominion of Canada or Province of Ontario, or any other taxing authority.

The Trustees shall be entitled to accept the hereinbefore referred to certificate of the Settlor as the conclusive evidence of the truth of any statement of facts therein contained, and the Trustees shall be completely protected in relying and acting upon any such certificate.

(Amended by the agreement by striking out this paragraph and substituting the following:—)

The Trustees shall be entitled to accept the hereinbefore referred to Certificates of the Settlor and National Trust Company, Limited, or any Chartered Bank in the Dominion of Canada as conclusive evidence of the truth of any statement of facts therein contained, and the Trustees shall be completely protected in relying and acting upon any such Certificates.

5. The Settlor may from time to time and at any time reduce or increase the number of Trustees or substitute any one or more Trustees for either or both of the Trustees and may appoint a new Trustee or Trustees in the event of the death, absence, refusal or incapacity to act of any Trustee or in case any Trustee desires to be released or is discharged by the Settlor from the trusts hereof.

(Under the amending agreement the following proviso was added:—)

Provided, however, and it is expressly understood and agreed that the Settlor shall not be appointed a Trustee hereunder.

The Trustees shall have power to appoint the Settlor or any person named by him as their attorney in their names, places and stead to vote at all meetings and otherwise to act as their proxy or representative in respect of all shares, bonds and other securities which may at any time be held by the Trustees under the terms hereof, with all the powers the Trustees could exercise if personally present.

(Under the amending agreement this provision was struck out and cancelled.)

There was no evidence before me as to whether or not the trustees had ever exercised their power to appoint the settlor as their proxy, nor whether the settlor had as their proxy, voted in respect of any shares or securities in the trust fund.

1946

NATIONAL TRUST CO. LTD. v. MINISTER OF NATIONAL REVENUE

O'Connor J.

In any event this power to the trustees was cancelled approximately five years before the Dominion Act came into force, because by the amending agreement, dated 1st February, 1937, this paragraph was struck out and cancelled.

In the New South Wales case the settlor had the power to vote the shares in the fund, but this does not appear to have affected the decision. It is not mentioned in the judgment.

There is no doubt that under the provision (paragraph 2) the settlor had the power to direct the investment of the trust fund. The Trustees had only the power to hold the securities, and

> . . . *shall* from time to time upon the direction in writing of the settlor during his lifetime, sell . . . and invest the money thereby produced in such securities or investments as the settlor may from time to time direct . . .

Because of the expert knowledge in securities of the settlor, the fund would undoubtedly benefit as a result of his directions of the investments. The power of investment, however, would not prevent the settlor from being regarded as excluded from any benefit.

It was the trustees, however, and not the settlor who had the power to accept substitutions (Paragraph 2):—

> and (the trustees) shall have power upon the direction in writing of the settlor during his lifetime to accept from the settlor in substitution in part or in toto of the said securities set forth in Schedule A hereto, other securities . . .

Paragraph 7 provides:—

> The Trustees shall as regards all the trusts, powers and authorities vested in them herein have absolute and uncontrolled discretion as to the exercise thereof whether in relation to the manner or as to the mode of and time for the exercise thereof.

The effect of these two sections is that the trustees could, in their absolute and uncontrolled discretion, exchange the first securities placed in the fund, for securities which the settlor might have, provided these securities fulfilled the requirements set out in the section.

The result of this provision was merely to release the trustees from any liability that might otherwise arise.

The evidence as to the substitutions that were effected showed that they were effected not for the benefit of the settlor, but, on the contrary, for the benefit of the donee, in order to maintain her net income at $24,000 per year.

That was no doubt the purpose for which the provision was intended. When the companies, whose securities were held in the trust fund, refunded those issues at lower rates of interest, the settlor would either have to put additional capital into the fund to buy more securities in order to maintain the income, or if he had securities which would yield a higher income, the trustees could exchange securities with him.

When the T. Eaton Realty Limited refunded its bonds, the trustees could have turned in the bonds in the old issue, bearing interest at 5% for bonds in the new issue, bearing interest at 4%, but the beneficiary would have lost the difference of 1% in the income. The settlor held bonds of the new issue and the trustees exchanged bonds to the amount of $100,000, bearing interest at 5%, for bonds in the amount of $125,000, bearing interest at 4%, which the settlor had. This substitution was not a benefit to him because it cost the settlor $25,000. This was done to maintain the income of the beneficiary. The same thing is true in the first substitution. The evidence given by one of the trustees was that the value of the Dominion of Canada bonds was obviously more than the value of the shares which the settlor took in exchange. In addition the Dominion of Canada bonds were tax free, so that the net income of the beneficiary would be increased.

In *Reinecke* v. *Northern Trust Company,* (1), the Supreme Court of the United States dealt with the power of a settlor to supervise and direct investments. The facts as set out in the headnote at page 340, and in the judgment at page 344 were:—

> The settlor in that case reserved to himself power to supervise the reinvestment of trust funds; the power to require the trustee to execute proxies to his nominee to vote shares of stock held by the trustee; to control all leases executed by the trustee, and to appoint successor trustees.

The late Chief Justice Stone, then Mr. Justice Stone, in delivering the opinion of the Court said:—

> Nor would the reserved power of management of the trust save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete.

(1) 278 U.S.R., 339.

1946

NATIONAL TRUST CO. LTD. v. MINISTER OF NATIONAL REVENUE

O'Connor J.

In the *New South Wales case* before the Privy Council, counsel advanced the argument, page 432, that having regard to the relationship of the parties and the fact that the settlor was one of the trustees and the settlement gave the trustees the right to delegate all their powers to one of the trustees (which could have been the settlor), the settlor would have a very distinct say in how the trust was to be administered, and there was reason for it to be administered, and administered properly, in such a way that distinct advantages would or might accrue to the settlor.

This argument was clearly rejected by the Board, page 440, and the judgment goes on to state that this (that the settlor received no benefit) was ultimately conceded by the appellant.

A similar contention has been advanced in this case. That is, that because of these powers and the relationship of the parties, the fund could be administered, and administered properly, in such a way that benefits could or would accrue to the settlor.

I do not agree with this contention, because I do not think that it is possible and I am of the opinion that those are not benefits within the meaning of the sections.

Counsel for the Respondent also contended that the settlor had power to substitute securities and that this then placed the trustees in a position where they were holding the securities not for the donee alone but for both the settlor and the donee, and that, therefore, it could not be said that the donee assumed and retained possession and enjoyment to the entire exclusion of the donor. This is not the construction that I place on the section for the reasons which I have already given, and as the settlor had no power to substitute securities, the trustees held the securities only for the donee.

There is no provision in the Dominion Act which would prohibit the settlor from administering the fund through the trustees such as there is in the Quebec Succession Duty Act, R.S.Q., 1925, chap. 29:—

(*a*) Gift . . . where the donor has not reserved to himself, in whole or in part, *the control, administration,* ownership or enjoyment of the property . . .

Nor is there in the Dominion Act any provision which prohibits a settlor from exercising any power of control

over investment, substitution etc., of the securities, such as there is in section 3 (2) (*f*) of the Nova Scotia Succession Duty Act (supra):—

3 (2) (*f*). Property passing under any settlement whereby the settlor is authorized *to exercise any power of control over alteration, conversion, investment, purchase or sale, substitution, etc.*

There is no justification for reading these provisions into the Dominion Act.

In my opinion these provisions in the settlement did not give the settlor possession or enjoyment or benefit such as is contemplated by these sections 7 (1) (*g*) and 3 (1) (*d*), and the question must be answered in the affirmative.

For the reasons indicated, I am of the opinion that there was a gift made by the deceased prior to the 29th April, 1941, and that actual and bona fide possession and enjoyment of the property, the subject matter of the gift, was assumed by the trustees for the donee immediately upon the making of the gift and thenceforward retained to the entire exclusion of the donor, or of any benefit to him, whether voluntary or by contract or otherwise. Therefore, the disposition is not within section 3 (1) (*d*) and is, in any event, exempt under 7 (1) (*g*). The assessment as to this item was erroneously made and the appeal must be allowed with costs.

Judgment accordingly.

BETWEEN:

J. F. M. STEWART & COMPANY LIMITED, ... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE, ... RESPONDENT.

Revenue—Income Tax—Income War Tax Act, 1927 R.S.C., chap. 97, secs. 19, 19A—"Absorb"—"Incorporate"—Company—Sale of assets—Issue of no par common shares subsequently converted into redeemable preference shares—Appeal allowed.

Stewart, Scully Co., Ltd., (Ontario Charter) had on hand an undistributed income at the end of its 1929 taxation period. In 1930 Stewart, Scully Co., Ltd., (Dominion Charter) was incorporated and by an agreement

1946

J. F. M. STEWART & CO. LTD. v. MINISTER OF NATIONAL REVENUE

O'Connor, J.

dated 1st December 1930 purchased the assets of the Ontario Company for $5.00 in cash and 7,495 no par common shares in the Dominion Company and assumed the liabilities of the Ontario Company. The Ontario Company was then wound up and the shares in the Dominion Company distributed among the shareholders of the Ontario Company. In 1938 the Dominion Company converted some of the no par common shares into redeemable preference shares and changed its name to that of the appellant. During the years 1939 to 1943 by both purchase and call appellant redeemed such redeemable preference shares for the sum of $55,075. The respondent assessed the Dominion Company on such redemption under S. 19A of the Income War Tax Act, 1927 R.S.C., chap. 97 and levied a tax of 4 per cent. on the said sum of $55,075 The appellant appealed to this Court.

Held: That "absorb" in S. 19A means to "incorporate" and that in a transaction in which an issue of redeemable shares is given in consideration of the assets of a vendor company which had on hand undistributed income at the end of its 1929 taxation period, the issue of redeemable shares by the purchaser company does absorb the undistributed income of the vendor company.

2. That in this case the issue of no par common shares at the time of the transaction in 1930 by the Dominion Company absorbed the undistributed income in the Ontario Company, and that the subsequent conversion of some of the no par common shares into redeemable preference shares eight years after the Ontario Company had been wound up, did not result in the issue of redeemable shares absorbing such undistributed income because that had already been done by the issue of the no par common shares, and therefore the transaction did not fall within S. 19A of the Act.

APPEAL under the provisions of the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice O'Connor, at Toronto.

Wilfred Judson for the appellant.

E. C. Bogart, K.C. and *E. S. MacLatchy* for the respondent.

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

O'Connor J., now (November 15, 1946) delivered the following judgment:

This is an appeal from an assessment made under The Income War Tax Act, 1927, R.S.C., chap., 97 as amended.

In 1927 section 19 of this Act read:—

19. 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.

Stewart, Scully Company Limited (Ontario Charter) had on hand an undistributed income of $166,138.25 at the end of its 1929 taxation period.

In 1930 section 19 was repealed and re-enacted by adding the words "in the taxation period 1930 and subsequent periods".

In 1930 Stewart, Scully Company Limited (Dominion Charter) was incorporated and by an agreement dated 1st December, 1930, purchased the assets of the Ontario Company for $5.00 in cash and 7,495 no par common shares in the Dominion Company and assumed the liabilities of the Ontario Company.

The Ontario Company was then wound up and the shares in the Dominion Company were distributed among the shareholders of the Ontario Company.

In 1933 section 19A was added:—

19A. (1) Where the assets of a company, which had on hand undistributed income at the end of its 1929 taxation period, have been received by another company, either directly or through an intermediary, and whether by the sale of the assets of such first mentioned company to such other company, or through the sale by the shareholders of the shares of such first mentioned company to such other company, and such other company issues or has issued redeemable shares, bonds, notes, or other like instruments in an amount which in whole or in part absorbs the said undistributed income, then on any redemption of such instruments the company redeeming shall pay a tax of four per centum on the amount of such instruments redeemed to the extent of the said undistributed income.

(2) The tax shall be paid to the Receiver General of Canada at the time fixed for redemption or if no date is so fixed, at the time of redemption. Failure to pay the tax within the prescribed time shall render the company liable for interest thereon at the rate of six per centum per annum until paid.

In 1934 section 19 was amended by striking out the words "in the taxation period 1930 and subsequent periods", leaving the section as it stood in 1927.

In 1938 the Dominion Company passed a by-law which was confirmed by Supplementary Letters Patent which provided that 650 no par common shares which had been

1946

J. F. M. STEWART & CO. LTD. v. MINISTER OF NATIONAL REVENUE

O'Connor, J.

issued were cancelled and the shareholders received $12.50 each and of the remaining issued no par common shares, 3,130 were converted into redeemable preference shares of a par value of $15.00 each.

At the same time the name of the Dominion Company was changed from Stewart, Scully Company Limited to J. F. M. Stewart & Company Limited, the appellant.

In the years 1939 to 1943 the Dominion Company by both purchase and by call redeemed these redeemable preference shares for the sum of $55,075. This left 3,720 no par common shares still outstanding.

A notice of assessment for 1938 was issued on the basis that the whole of the issue had been redeemed in 1938 at $55,075 and levying a tax of 4% on this sum viz., $2,203 and interest, and from this assessment the Appellant appeals.

By agreement the parties have dispensed with new assessments for the years 1939 to 1943.

It was admitted by counsel for the Respondent that the cancellation of the 650 no par common shares does not come within section 19A.

The facts are not in dispute.

The question then to be determined is this: Was the conversion of some of the common shares into redeemable shares by the Dominion Company in 1938 an issue of redeemable shares which, in whole or in part, absorbed the undistributed income which the Ontario Company had on hand at the end of its 1929 taxation period?

The ordinary meaning of the word "absorb" is "to swallow up". The Concise Oxford Dictionary also gives the meaning as "incorporate". The word "absorb" in the section is most inapt.

The section contemplates a transaction in which an issue of redeemable shares is given as consideration for the assets of the vendor company, which company had on hand undistributed income.

Does an issue of redeemable shares in a transaction of this kind incorporate the undistributed income of the vendor company?

I reach the conclusion that it does so, and that this can be best shown by the position after the sale and on the winding up of the vendor company.

The asset side of the balance sheet of the vendor company would show the redeemable shares of the purchaser company in lieu of the assets which it sold. Both before and after the sale the liability side would show the paid up capital and the undistributed income. The undistributed income of the vendor company is then in the form of redeemable shares of the purchaser company and on the winding up when such shares are distributed among its shareholders, the undistributed income is distributed in the form of such shares. So to that extent and in that sense the issue of redeemable shares has incorporated the undistributed income of the vendor company.

Then on the redemption of the shares a tax of 4% is imposed to the extent that the redeemable shares represent the undistributed income.

There must be an issue of redeemable shares in the transaction to come within the section.

In this case, however, an issue of no par common shares was given in consideration of the assets, and the vendor company was then wound up. Eight years later some of the no par common shares were converted into redeemable preference shares and these were subsequently redeemed.

Clearly in this transaction it was an issue of common shares of the Dominion Company that incorporated the undistributed income of the Ontario Company. The conversion of some of the common into redeemable shares eight years after the Ontario Company had been wound up, did not incorporate the undistributed income of the Ontario Company because that had already been done eight years before.

The language of the section does not, in my opinion, reach this transaction.

For the reasons given the appeal must be allowed with costs, with the result that the assessment appealed from will be set aside.

Judgment accordingly.

1946
Oct. 7
Nov. 29

BETWEEN:

ROGER GRUNWALD,.....APPELLANT;

AND

THE COMMISSIONER OF PATENTS, ... } RESPONDENT.

Patent—Filing date—The Patent Act, 1935, 25-26 Geo. V, c. 32, secs. 29 (1), 41 and 43—Patent Rules 5, 12 (a), 13 and 21—Incomplete application—Application substantially complete—Abandonment of application—Appeal from Commissioner of Patents allowed.

The Commissioner of Patents on June 17, 1937, received an application for letters patent forwarded by appellant's attorney, the applicant having been granted a French patent for the same invention on June 19, 1936. The power of attorney did not accompany the application It was received by the Commissioner on September 21, 1937 The Commissioner gave the application the filing date of September 21, 1937 and allotted it a serial number. On October 5, 1937, the Commissioner requested that the oath required by s. 29 (1) of the Patent Act be filed On October 8, 1937, the Commissioner was requested to give the application a filing date of June 17, 1937, and received at the same time an oath sworn by the applicant on July 30, 1937. The Commissioner refused to do so and demanded that another oath be filed. Much correspondence between the Commissioner and applicant's attorney followed and on May 4, 1939, the attorney forwarded a new oath having inserted a filing date of June 17, 1937. On July 17, 1939, the Commissioner finally rejected the application on the ground *inter alia* that it had been abandoned. On September 25, 1939, the applicant filed in this court a notice of appeal from this ruling of the Commissioner. By agreement between counsel the hearing of the appeal was allowed to stand until October 7, 1946.

Held: That the application received by the Commissioner of Patents on June 17, 1937, while incomplete, was substantially complete as to petition, specifications, drawings and fee, and should have been given a serial number and a filing date of June 17, 1937.

2 That the oath of the applicant sworn on July 30, 1937, was a proper oath.

3 That the Commissioner of Patents did not reject the application in the terms of s. 41 of The Patent Act until July 17, 1939, and the applicant having taken his appeal on September 25, 1939, could not be held to have abandoned his application.

APPEAL from a ruling of the Commissioner of Patents.

The appeal was heard before the Honourable Mr. Justice O'Connor, at Ottawa.

E. G. Gowling K.C. for the appellant.

Cuthbert Scott for the respondent.

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

O'CONNOR J., now (November 29, 1946) delivered the following judgment:

The Appellant filed an application, entitled "Improvements in Safety Razors", in France on the 19th June, 1936, and the French Patent No. 807,417 was issued on the 19th October, 1936.

An application for Letters Patent of this invention was received by the Commissioner of Patents on the 17th June, 1937 and the application consisted of a petition, specifications, claims, drawings and fee. The application was made by an attorney for the Appellant, but the power of attorney did not accompany the application.

The power of attorney was received by the Commissioner on the 21st September, 1937 and the Commissioner then gave the application the filing date of 21st September, 1937, and allotted the application Serial No. 445,464. On the 5th October, 1937, the Commissioner requested that the oath required by section 29 (1) be filed.

On the 8th October, 1937, the attorney for the applicant wrote asking that the application be afforded a filing date of 17th June, 1937, in a letter in which he gave the filing date awarded by the Commissioner, 21st September, 1937, Serial No. 445,464; the name of the applicant, Roger Grunwald, and the subject matter of the invention, safety razors, and enclosed an oath in the following form:—

I, Roger Grunwald, a French Citizen, whose address is 23 Rue Des Mathurins—VIII^{E}, Paris, France, whose occupation is MAKE OATH AND SAY:—

1. That I am (the inventor of an invention entitled "Improvements in safety razors" for a patent for which an application was filed on my behalf) on the day of 1937.

2. That I verily believe that the said invention was not known or used by others before it was invented as aforesaid and has neither been in public use or on sale in Canada, nor described in any patent or in any publication printed in Canada or in any other country, more than two years before the filing of the said application.

3. That no application for a patent for the invention as defined in the claims specified in the request for priority in the said petition, has been made by me or any one claiming under me before the date of the earliest application specified in such request.

1946

ROGER GRUNWALD v. THE COMMISSIONER OF PATENTS

O'Connor J.

4. That the several allegations contained in the said application are respectively true and correct.

SWORN before me at Paris, this 30th day of July, 1937.

(Sgd.) *ROGER GRUNWALD*

Signature illegible
Signature of person administering oath
Consulate
General's
Stamp.

H. M. Vice-Consul

CONSULAR STAMPS.

(Official)
(Character)

On the 1st December, 1937, the Commissioner in reply refused to change the filing date to 17th June, 1937.

On 3rd December the Commissioner wrote:—

I beg to inform you that the oath executed 30th July, 1937 is not acceptable under Rule 13. It should also identify the application by its execution or filing date. A new oath is required.

The attorney continued to write protesting the filing date, and requesting a change, and the Commissioner in his replies refused to change the filing date. This correspondence continued until 14th April, 1938, and was resumed again on 12th January, 1939, and continued until 4th May, 1939, when the attorney again asked that the filing date of 17th June, 1937, be accorded or that the application be finally rejected, and he enclosed a new oath in which paragraphs 2, 3 and 4 are the same as those in the oath quoted above but in which paragraph 1 read:—

1.—That I am the inventor of an invention entitled SAFETY RAZORS, for which an application for patent was received in the Patent Office on 17th June, 1937, and according a filing date of the 21st September 1937 and the Serial Number 445,464.

On 25th May, 1939, the Commissioner wrote stating that as the power of attorney was not filed until 21st September, 1937, it was not possible to give a filing date of the 17th June, 1937, and added that as the applicant had the opportunity to refer to the courts and did not avail himself of this privilege, he must, therefore, abide by the ruling.

On 17th July, 1939, the Commissioner finally rejected the application on the following grounds:—

(*a*) That it was filed after the issue of the French Patent No. 807,417 viz., 19th October, 1936, and more than one year after the filing of the application for the French Patent, 19th June, 1936, and

(*b*) that the case was abandoned under Rule 21 as a new oath was called for on the 3rd December, 1937 and was not received until 5th May, 1939.

On the 25th September, 1939, a notice of motion by way of appeal was filed in this court from the decision of the Commissioner, dated 17th July, 1939, on the grounds:—

(*a*) That the applicant was entitled to a filing date of the 17th June, 1937.

(*b*) That the application was not abandoned in view of the fact that a proper oath dated 30th July, 1937 was filed on the 9th October, 1937 so that the letter of the Commissioner of the 3rd December, 1937 requiring a new oath was unauthorized.

By agreement between counsel for both parties the motion was allowed to stand until 7th October, 1946.

The first question that arises is whether the application as presented by the applicant and received by the Commissioner on the 17th June, 1937, was entitled to be given a serial number and filing date, and referred to the examiner for action pursuant to Rule 12 (a), or whether the Commissioner was correct in the construction he placed on this rule, that the application was not so entitled because the power of attorney was not included in the application.

If the Commissioner's construction of Rule 12 (*a*) is correct, then the applicant cannot obtain a Canadian patent because his application would have been filed after the issue of the French Patent and more than one year after the filing of the application for the French Patent, viz., 19th June, 1936.

Rule 12 (*a*) is as follows:—

12. (a) Applications transmitted to the office shall be regarded as incomplete unless they contain a petition, specifications in duplicate, triplicate copies of claims, drawings in duplicate and one set on Bristol board if such are required by the specification, power of attorney if given and appointment of representative if required, all accompanied by the prescribed filing fee. Such applications as are substantially complete as to petition, specification and drawings, and fee shall be given serial numbers and filing dates and referred to the examiner for action.

The Appellant contends that the application shall be regarded as incomplete unless the items specified in the first part are enclosed, but that if the application includes the petition, specifications, drawings and fee, then the application is to be regarded as substantially complete and shall be given a number and filing date and referred to the examiner for action.

1946

ROGER GRUNWALD v. THE COMMISSIONER OF PATENTS

O'Connor J.

The Commissioner contends that all the documents mentioned in the first part of the Rule must be present and if they are present and if the petition, specifications and drawings and fee included in the application are substantially complete, then the application shall be given a number and filing date.

Rule 12 (*a*) in my opinion first describes a general class of applications to be regarded as incomplete but which are, nevertheless, applications and then out of this general class, it carves a particular class, i.e., those substantially complete. So that if an application is in the particular class of applications which can be regarded as substantially complete although in the general class of applications to be regarded as incomplete, it shall be given a serial number and a filing date and referred to the examiner for action.

Whether the application is or is not incomplete is not left to the discretion of the Commissioner. It is purely a question of fact. If the application does not contain the items specified in the first part of the rule it is regarded as incomplete. But while it is to be regarded as incomplete, if it includes the petition, specifications, drawings and fee it is nevertheless substantially complete and *shall* be given a number and filing date and referred to the examiner for action.

In my opinion the application which was received by the Commissioner on the 17th June, 1937, while incomplete, was nevertheless substantially complete as to petition, specifications, drawings and fee, and should therefore have been given a serial number and a filing date of the 17th June, 1937, and have been referred to the examiner for action.

Was the case abandoned under Rule 21 because the new oath called for on 3rd December, 1937, was not received until the 5th May, 1939, or was the oath dated 30th July, 1937, and filed on 9th October, 1937, a proper oath?

Rule 21 is as follows:

21. Any applicant for patent, or for the reissue of a patent, shall proceed with his application with due diligence. In the event of his failure to prepare and complete the application for examination within twelve months after the date of filing of his application or to prosecute the same within six months from a report of an examiner or other subsequent official action of which notice has been duly given to the applicant, such application shall be held to be abandoned, and any fees paid in connection therewith shall be forfeited.

Section 29 (1) of the Patent Act enacts that:—

The inventor shall, at or before the time of filing his application or within such reasonable extension of time as the Commissioner may allow, make oath . . . that he verily believes that he is the inventor of the invention for which the patent is asked, and that the several allegations in the application contained are respectively true and correct.

Rule 13 is as follows:—

13. The oath of an inventor shall show that it has been sworn not earlier than thirty days before the date of the filing of the application for patent to which it relates.

And Rule 5 is as follows:—

5. Forms of proceedings will be found in the Appendix to these Rules. In proceedings for which no form is provided any form conformable to the letter and the spirit of the law will be accepted.

Paragraph 1 of Form 3, Oath of Inventor, is as follows:—

1. That I am (one of (*a*)) the inventor(s) of an invention entitled . . . for a patent for which an application was filed on my behalf (or on behalf of . . .) on the . . . day of . . . 19 . . .

The difficulty of filing the oath with the application arises from Form 3. Section 29 (1) provides that the oath is to be made (*a*) at or before the time of filing his application or (*b*) within such reasonable time as the Commissioner may allow. Form 3 requires the official filing date to be filled in and in paragraph 2 of Form 3 the inventor states that the invention has neither been in public use or on sale in Canada nor described in any patent or in any publication printed in Canada or in any other country, more than two years before the filing of the said application. So that the oath cannot be made at or before the time of filing the application if the filing date must be inserted. There is nothing in section 29 (1) that requires the date of filing of the application to be set out in the oath.

In the conflict between the section of the Act and the form, the section of the Act must prevail. The explanation of the difficulty would appear to be that at the time of the last revision of Rule 13, Form 3 was not revised. To avoid this difficulty I am informed by counsel that the practice is to change the form to read, "for which an application was signed by me on the . . . day of . . . 19 . . ."

The reason for filling in the filing date in the oath is for the purpose of identification.

The oath itself referred to an invention entitled "Improvements in Safety Razors" and the letter from the

1946

ROGER GRUNWALD v. THE COMMISSIONER OF PATENTS

O'Connor J.

attorney enclosing the oath gave the name of the inventor, the filing date and serial number allotted by the Commissioner. The Commissioner identified the oath with the Plaintiff's application because he subsequently required a new oath on the grounds that the first oath did not comply with Rule 13, i.e., that it had been sworn earlier than thirty days before the 21st September, 1937.

The oath was not rejected on the ground that it did not identify the application.

If the Plaintiff had completed an oath by inserting the date which the Commissioner had fixed as the date of filing, 21st September, 1937, then a patent could not have been issued to him and his application must be rejected on the ground that it had been filed more than one year after the filing of the application for the French patent, namely 19th June, 1936. So that he was being asked to make oath on a basis that made it impossible for him to obtain a patent.

In view of the circumstances in this case, I am of the opinion that the oath dated the 30th July, 1937, was a proper oath.

When, after a lengthy correspondence the applicant knew that the Commissioner would not change the filing date nor accept the first oath, should he then have appealed to this court, and in failing to do so, did he abandon the application. The Commissioner stated in his letter of 25th May, 1939, that as the applicant had the opportunity to refer to the courts and not having availed himself of this privilege, he must abide by the ruling. Then on 17th July, 1939, the Commissioner finally rejected the case.

In my opinion the Commissioner did not reject the application in the terms of section 41 of the Patent Act, 1935, until the 17th July, 1939. The Act only provides for an appeal by an applicant from the final rejection of the application by the Commissioner. The applicant having taken his appeal on 25th September, 1939, has complied with section 43 of the Patent Act, 1935.

For the reasons which I have given, I hold that the applicant was entitled to the Canadian filing date, 17th June, 1937, and that the applicant did not abandon the application under the provisions of Rule 21.

Judgment accordingly.

INDEX

77529—2½a

EXPROPRIATION—*Crown—Petition of Right—Fee of streets vested in town—City or town not entitled to compensation for streets expropriated—Town holds streets as trustee for public.*—In 1919 the Crown expropriated certain streets and water lots in the town of Dartmouth, Nova Scotia, to provide for the extension of the Canadian National Railways and its facilities. The action is to determine the value of the property expropriated. At the trial a claim was also made by the suppliant for possible future damage to sewers laid by the town under the portions of streets expropriated. Respondent denied the suppliant's ownership of certain of the streets expropriated since these streets had once formed part of a Common which had been vested in trustees prior to the incorporation of the town of Dartmouth. By various grants and statutes of the Province of Nova Scotia these streets had become vested in the suppliant. The sewers were the subject of a lease entered into between the Crown and suppliant in 1914 and also of an undertaking given by counsel for the respondent at trial that it would bear any additional cost of maintaining them, in the event of a failure to agree on the cost such to be referred to arbitration or to this Court. *Held:* That the fee of the streets is vested in the suppliant; the streets belonged to the suppliant in full ownership together with the adjoining land and were opened through the suppliant's own property for the purpose of passage and the

PATENTS—*Invention—Subject matter—Anticipation—Lack of invention—First inventor—Lack of obviousness is not sufficient to establish invention—Evidence of invention—Patent Act 25-26 Geo. V, c. 32, s. 61.*—The action is for infringement of Canadian patent No. 292,354 for improvements in resinous condensation products granted Canadian General Electric Company, assignee of Roy H. Kienle, the inventor, on August 20, 1929. The Court found Plaintiffs' patent invalid for lack of invention and also on the ground of anticipation. *Held:* That mere lack of obviousness is not sufficient to establish invention, there must be

REVENUE—*Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 3, 6 (a)—"Income"—"Net" profit or gain or gratuity—"Ascertained" and "unascertained"—Income of fixed amount not necessarily net—Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income—Annual practising fees paid by lawyers deductible from fixed salary.*—Appellant was employed as Counsel to the City of Winnipeg on salary of fixed amount. His duties were mainly those of a barrister but he performed some solicitor duties as well. To entitle him to practise he was required to pay annual practising fees to the Law Society of Manitoba. Non-payment of such fees would result in suspension from practice and striking off the rolls. Thereafter any attempt to practise would be unlawful and subject him to penalty and injunction. Appellant claimed deduction of practising fees from fixed salary but such deduction was disallowed. *Held:* That cases decided under Schedule E, Rule 9, of the Income Tax Act, 1918, of the United Kingdom have no application to the proper interpretation of section 6 *(a)* of the Income War Tax Act or the determination of what disbursements or expenses are deductible under such Act. 2. That the making of an expenditure cannot by itself serve the purpose of earning the income but it may enable the maker of it to earn it and thus be a working expense and part of the process of earning the income, and, therefore, be made for the purpose of earning it. 3. That the payment by a practising lawyer to his law society of his annual practising fees or an obligatory annual assessment is not a disbursement or expense "not wholly, exclusively and necessarily

laid out or expended for the purpose of earning the income" and is not excluded as a deduction from his remuneration by section 6 *(a)* of the Act. 4. That the test of taxability of an annual gain or profit or gratuity is not whether it is "ascertained" or "unascertained" but whether it is "net". *Samson* v. *Minister of National Revenue* ((1943) Ex. C.R. 17 at 24) followed. Dictum of Audette J. in *Re Salary of Lieutenant-Governors* ((1931) Ex. C.R. 232 at 235, that an annual salary from any office or employment, being an amount which is duly ascertained and capable of computation, is therefore of itself a "net" income, disapproved. 5. That an income is not necessarily net annual profit or gain or gratuity and therefore taxable income merely because it is a salary of a fixed amount. 6. That the appellant is entitled to deduct from his fixed salary the amount of his Law Society annual practising fees and obligatory assessment and that his right to do so is not affected by the fact that his remuneration is by way of a fixed salary instead of fees. GEORGE F. D. BOND v. MINISTER OF NATIONAL REVENUE..... 577

2.——*Income Tax — Income — Charitable trust—Income War Tax Act R.S.C. c. 97, sects. 2(h), 3(1), 4(e), 11(4) (a)—Income in hands of trustees—Income accumulating in trust for the benefit of unascertained persons—Appeal dismissed.*—The will of the late Honourable Patrick Burns provided for distribution of sixty per cent of the net annual income from his Trust Estate. The balance of forty per cent of the net annual income is to be accumulated until the death of the last annuitant named in his will or the death of the widow of the son of the testator, whichever should last occur. Sixty-seven per cent of this corpus is to be distributed to certain persons named in the will. The balance of thirty-three per cent of the corpus is to be used for the creation and establishment of a trust to be known as the "Burns Memorial Trust". The net annual income from this fund is to be distributed amongst five named institutions. The appeal is from the assessment for income tax in each of the years 1938, 1939, 1940 and 1941 during which years the executors transferred by book entry forty per cent of the net income of the estate from estate income accrued to estate capital account. *Held:* That the Burns Memorial Trust and the five organizations which will eventually benefit by the income from the Burns Memorial Trust Fund, when established, are persons within the meaning of s. 2 (1) *(h)* of the Income War Tax Act. 2. That an estate is a person within the definition contained in s. 2 (1) *(h)* of the Income War Tax Act, and the money received by the executors is income within the meaning of the Income War Tax Act. 3. That the income assessed in the hands of the executors is not income of any

expended for the purpose of earning the income. The amounts disallowed were added as taxable income to the amounts shown on the appellant's returns. *Held:* That section 6 (2) brings any expense within the possible purview of the Minister's discretionary power of disallowance. 2. That the Minister's discretion under sec. 6 (2) extends to a determination both of what is reasonable or normal expense for the business carried on by the taxpayer and what is in excess thereof. The test of the correctness of the disallowance of an expense is not whether it is in excess of what is reasonable or normal as a matter of fact but whether it is in excess of what the Minister determines in his discretion to be reasonable or normal. The standard of correctness is the opinion of the Minister; it is a subjective one belonging exclusively to him; the Court has no right, in the absence of specific statutory authority, to measure it by any standard of its own or by any objective standard such as that of the "ideal reasonable man". Whether an expense is excessive or not is not a question of fact; it is made dependent on the Minister's discretionary opinion. 3. That the Minister's discretion under section 6 (2) is not a judicial discretion but an administrative one. 4. That the Minister's discretionary determination under section 6 (2) is not a judicial decision but an administrative act with quasi-legislative effect done in the course of administration and definition of public policy. *Board of Education* v. *Rice* ((1911) A.C. 179) and *Local Government Board* v. *Arlidge* ((1915) A.C. 120) distinguished. 5. That the Minister's discretionary determination under section 6 (2) and the assessment made by him are quite separate and distinct operations in point of time and scope of substance and the Minister's functions in respect of them are fundamentally different in character. 6. That the assessment is the summation of all the factors representing tax liability, ascertained in a variety of ways, and the fixation of the total after all the necessary computations have been made. 7. That the appeal provided by the Income War Tax Act is an appeal from the assessment and that there is no right of appeal from the Minister's determination in his discretion under section 6 (2). *Nicholson Limited* v. *Minister of National Revenue* ((1945) Ex. C.R. 191) followed and *Dobinson* v. *Federal Commissioner of Taxation* ((1935) 3 A.T.D. 150) distinguished. 8. That the determination of the excessiveness of all or part of an expense has been left by Parliament exclusively to the discretion of the Minister; it is his opinion and not that of the Court or of any one else that governs. 9 That the Minister in making his discretionary determination under section 6 (2) is not restricted to the same consideration as would govern a court of law in arriving at a judicial decision; he is not confined to provable facts or admissible evidence, but

may obtain his information from any source he considers reliable; he may use his own knowledge and experience or that of his officers in his department and he may take the benefit of their advice; in the field exclusively assigned to him by Parliament he is as free to act as Parliament itself; he may use his own judgment and be guided by the intuition of experience; he may use all the aids which will enable him to carry out honestly the administration and definition of the policy that Parliament has entrusted to him. 10. That neither the opinion of the Minister nor the material on which it was based is open to review by the Court; it has no right to examine into or criticize the reasons that led the Minister to his opinion or question their adequacy or sufficiency; it is not for the Court to lay down the considerations that should govern the Minister's discretionary determination; Parliament requires the Minister's opinion, not that of the Court; the Court has nothing to do with the question whether the Minister's opinion was right or wrong; nor has it any right to decide that it was unreasonable. The accuracy or correctness of the Minister's discretionary determination is outside the Court's jurisdiction. 11. That the jurisdiction of the Court in respect of section 6 (2) is limited to intervening only when it has been shown that the Minister has not applied proper legal principles and in such cases its intervention is limited to sending the matter back to the Minister under section 65 (2). The Court has no other powers. 12. That the respective functions of the Minister under section 6 (2) and section 59 are fundamentally different; when he acts under section 59 his function is solely judicial and his decision is a purely judicial decision. 13. That when the Minister makes a determination in his discretion under section 6 (2) he is not required by law to give any reasons for such determination. *Wright's Canadian Ropes Ltd.* v. *Minister of National Revenue* ((1946) S.C.R. 139) discussed. 14. That where the appellant has not shown that the Minister has not applied proper legal principles in arriving at his discretionary determination under section 6 (2) and the Minister has not given any reasons for it, the Court should assume that he acted properly; that the presumption of proper exercise of his discretionary power should be applied in his favour until rejected by clear proof to the contrary; that the onus of showing that the Minister did not apply proper legal principles is on the appellant taxpayer and that if he does not discharge it his appeal must be dismissed. No assumption that the Minister acted arbitrarily or improperly should be drawn from the fact that he did not give reasons. He is not required to do so. 15. That the appeals in respect of the disallowance of salaries must fail. 16. That directors' fees paid by a company are not necessarily deductible expenditures for income tax

SHIPPING——*Petition of Right—Collision in Vancouver Harbour between suppliant's tug boat and respondent's vessel—Liability of respondent—Negligent operation of respondent's vessel—Suppliant entitled to repair its boat.—Held:* That where suppliant's boat was damaged by the negligent operation of respondent's vessel suppliant was justified in having its tug boat repaired in order to get it back at work as soon as possible, and respondent is liable to suppliant for the cost of such repairs. THE CANADIAN PACIFIC RAILWAY COMPANY v. HIS MAJESTY THE KING..... 378

2.——*Damage to pier in Halifax Harbour—Defendant's ship not direct or effective cause of damage—Action dismissed.*—The ship *Empire Foam* while being towed to a berth in Halifax Harbour was bumped by a tug named the *Chicoutimi* owned by Maritime Towing and Salvage Limited. Subsequently in the effort to berth the *Empire Foam* she struck the marine tower or leg of

SHIPPING—*Concluded*

Pier 25 belonging to the National Harbour Board with resultant damage. The Crown alleges that such damage was due to the injuries sustained by the *Empire Foam* when bumped by the *Chicoutimi*. *Held:* That the negligent operation of the *Chicoutimi* was not the direct or effective cause of the damage to the pier, and the action must be dismissed. 2. That since there was no proper look-out on the *Empire Foam* to report to the bridge of such vessel anything that might affect the navigation of the ship the pilot did not know the true situation about many pertinent and relevant circumstances and such lack of knowledge was responsible for the *Empire Foam* striking the pier. HIS MAJESTY THE KING v. MARITIME TOWING & SALVAGE LIMITED ET AL..... 557

3.——*Collision in Inner Harbour of Victoria, B.C.—Failure to keep proper lookout—Failure to become aware of vessel being under way—No practice in Victoria Harbour that three blasts be blown as warning signal—Ship not required by Article 28 to blow three blasts since not on any authorized course.*—Plaintiff and defendant ships collided in the Inner Harbour of Victoria, British Columbia. The Court found the *Princess Norah* was one-quarter to blame and the *Co-Operator 1* three-quarters to blame for the collision. *Held:* That the failure on the part of the *Co-Operator 1* to keep a proper lookout was without any extenuating circumstance and was the primary cause of the collision, and that the *Princess Norah* was at fault since her Master should have become aware of the presence of the *Co-Operator 1* sooner than he did and that she was under way and given her a wider berth. 2. That since the *Princess Norah* was never at any material time going full speed astern nor taking any course "authorized by these rules" she was not called upon to blow three blasts as required by Article 28. 3. That there is no practice in Victoria Harbour calling for three blasts as a precautionary measure or warning signal. THE SHIP *Princess Norah* v. THE SHIP *Co-operator 1*..... 380

4.——*International law—Vessel registered in United States—Vessel requisitioned by United States Government—Possession of vessel taken on behalf of United States Government—Vessel in Canadian port—Vessel arrested on behalf of private suitor—Motion allowed to set aside writ of summons, service thereof and warrant of arrest.* THOMAS WHITE *v.* THE SHIP *Frank Dale*..... 555

SHIP NOT REQUIRED BY ARTICLE 28 TO BLOW THREE BLASTS SINCE NOT ON ANY AUTHORIZED COURSE.

See SHIPPING, No. 3.

SIMILAR CARTONS.

See TRADE MARKS, No. 2.

TRADE MARK.—*Word mark "Food Machinery Corporation"—The Unfair Competition Act, 1932, Statutes of Canada, 1932, c. 38, ss. 26 (1) (b), 26 (2)—Meaning of "constitute or form part of the name"—Meaning of word mark otherwise registrable"—Section 26 (2) not an exception to section (26) (1) (b)—Use of name of firm or corporation as a word mark prohibited but use of part of name permitted—Possible difference between trade mark and name of owner—French version of statute at variance with English version creating ambiguity—Presumption in favour of reasonable interpretation—True meaning of statute prevails over apparent meaning of words—Presumption in favour of consistency and against repugnancy—Repeal by implication not favoured.*—Appellant applied for registration of "Food Machinery Corporation" as a word mark under section 26 (2) of The Unfair Competition Act, 1932, notwithstanding the prohibition of section 26 (1) *(b)*, and appealed from the refusal of the Registrar of Trade Marks to grant such application. Appeal dismissed. *Held:* That subsection (2) of section 26 is not an exception to subsection (1) *(b)* but relates to subject matter that falls completely outside its prohibition. Subsection (2) is simply declaratory that the prohibition against the registration as a word mark of "the name" of a firm or corporation does not extend to the use of a series of letters or numerals constituting or forming "part" of such name. Part of the name may be used although the use of the whole name is prohibited. 2. That where two constructions are advanced for either the French or English text of a statute, one subject to objection and the other free from it, that construction which is free from objection, according to the recognized canons of construction should be adopted, even although the language of the other text is at variance with it and in accord with the objectionable construction; the objectionable construction is not rendered free from objection by

TRADE MARKS—*Continued*

reason of such accord and is not entitled to any support from it. 3. That the proposed word mark "Food Machinery Corporation", being the name of the appellant corporation, is excluded from registration by section 26 (1) *(b)* and does not come within the ambit of section 26 (2). FOOD MACHINERY CORPORATION v. THE REGISTRAR OF TRADE MARKS **266**

2.——*Infringement—Passing off—The Unfair Competition Act, 1932, s. 2, ss. (k) & (l), s. 11, ss. (b)—Similar wares—Similar marks—Similar cartons—Evidence as to confusion—Trap orders—Insufficient notice given of instances relied on—Test of similarity of trade mark—Descriptive word—Hebrew word or meaning.*—The plaintiff registered the word mark "Tam Tam" for use in association with crackers on the 22nd March 1945. On the 22nd October, 1945, the defendant baked crackers and sold them in cartons under the word mark "Tum Tum". Action was taken by the plaintiff for infringement and passing off. *Held:* That there was a contemporaneous use of both marks in the same area in association with similar (as defined by the Act) wares. 2. That the word "Tam" is not a Hebrew or Jewish word but even if it conveys the meaning of "taste or tasty" to a Hebrew or Yiddish speaking person it would not for that reason be unregistrable. It is not to an English or French speaking person clearly descriptive or misdescriptive of the character or quality of crackers. 3. That no weight can be attached to evidence of trap orders of which the plaintiff does not give particulars to the defendant immediately afterward so as to permit the defendant to investigate. *C. C. Wakefield & Co. Ltd.* v. *Purser* (1934) 51 R.P.C. 167 at 171. 4. That the test of similarity of word marks is, not by placing them side by side but by asking whether, having due regard to relevant surrounding circumstances, the defendant's mark as used is similar (as defined by the Act) to the plaintiff's registered mark as it would be remembered by persons possessed of an average memory with its usual imperfections. *The Coca-Cola Co. of Canada Ltd.* v. *Pepsi Cola Co. of Canada Ltd.* (1942) 59 R.P.C. 127 at 133. 5. That the defendant's mark as used is similar (as defined by the Act) to the plaintiff's registered mark and the defendants' mark is an infringement of the plaintiff's registered mark. 6. That the defendants have in the course of their business directed public attention to their wares by the use of a similar carton that at the time they commenced so to direct attention to them, it might be reasonably apprehended that their course of conduct was likely to create confusion in Canada between their wares and those of the plaintiff in contravention of Section 11, ss. (B) of the Act. THE B. MANISCHEWITZ COMPANY v. HARRY GULA ET AL **570**