1967

CANADA
LAW REPORTS

RAPPORTS JUDICIAIRES
DU CANADA

Exchequer Court of Canada
Cour de l'Échiquier du Canada

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Published under authority by Gabriel Belleau, Q.C.
Registrar of the Court
Publié par Gabriel Belleau, C.R.
Registraire de la Cour

ROGER DUHAMEL, F.R.S.C.
Queen's Printer and
Controller of Stationery

ROGER DUHAMEL, m s.r.c.
Imprimeur de la Reine et
Contrôleur de la Papeterie

Ottawa, 1968

94069—A

JUDGES
OF THE
EXCHEQUER COURT OF CANADA

During the period of these Reports:

PRESIDENT:
THE HONOURABLE WILBUR ROY JACKETT
(*Appointed May 4, 1964*)

PUISNE JUDGES:
THE HONOURABLE JOHN DOHERTY KEARNEY
(*Appointed November 1, 1951*)
THE HONOURABLE JACQUES DUMOULIN
(*Appointed December 1, 1955*)
THE HONOURABLE ARTHUR LOUIS THURLOW
(*Appointed August 29, 1956*)
THE HONOURABLE CAMILIEN NOËL
(*Appointed March 12, 1962*)
THE HONOURABLE ANGUS ALEXANDER CATTANACH
(*Appointed March 27, 1962*)
THE HONOURABLE HUGH FRANCIS GIBSON
(*Appointed May 4, 1964*)
THE HONOURABLE ALLISON ARTHUR MARIOTTI WALSH
(*Appointed July 1, 1964*)
THE HONOURABLE RODERICK KERR
(*Appointed November 1, 1967*)

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His Honour VINCENT JOSEPH POTTIER, Nova Scotia Admiralty District—appointed February 8, 1950.
The Honourable ARTHUR IVES SMITH, Quebec Admiralty District—appointed June 16, 1950.
The Honourable ROBERT STAFFORD FURLONG, Newfoundland Admiralty District—appointed October 8, 1959.
The Honourable DALTON COURTWRIGHT WELLS, Ontario Admiralty District—appointed January 28, 1960.
The Honourable THOMAS GRANTHAM NORRIS, British Columbia Admiralty District—appointed September 28, 1961.
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ATTORNEY-GENERAL OF CANADA:
The Honourable PIERRE ELLIOTT TRUDEAU

SOLICITOR GENERAL OF CANADA:
The Honourable L. T. PENNELL

JUGES
DE LA
COUR DE L'ÉCHIQUIER DU CANADA

en fonction au cours de la période de publication de ces rapports:

PRÉSIDENT:
L'HONORABLE WILBUR ROY JACKETT
(*nommé le 4 mai 1964*)

JUGES PUÎNÉS:
L'HONORABLE JOHN DOHERTY KEARNEY
(*nommé le 1er novembre 1951*)
L'HONORABLE JACQUES DUMOULIN
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L'HONORABLE ARTHUR LOUIS THURLOW
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(*nommé le 1er novembre 1967*)

JUGES DE DISTRICT EN AMIRAUTÉ DE LA COUR DE L'ÉCHIQUIER DU CANADA

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L'honorable ARTHUR IVES SMITH, district d'amirauté de Québec—nommé le 16 juin 1950.
L'honorable ROBERT STAFFORD FURLONG, district d'amirauté de Terre-Neuve—nommé le 8 octobre 1959.
L'honorable DALTON COURTWRIGHT WELLS, district d'amirauté d'Ontario—nommé le 28 janvier 1960.
L'honorable THOMAS GRANTHAM NORRIS, district d'amirauté de la Colombie-Britannique—nommé le 28 septembre 1961.
L'honorable GEORGE ERIC TRITSCHLER, district d'amirauté de Manitoba—nommé le 19 octobre 1962.
GORDON R. HOLMES, C.R., district d'amirauté de l'Île du Prince-Édouard—nommé le 24 mai 1963.
L'honorable HAROLD GEORGE PUDDESTER, district d'amirauté de Terre-Neuve—nommé le 4 juin 1963.
L'honorable JAMES DOUGLAS HIGGINS, district d'amirauté de Terre-Neuve—nommé le 28 mai 1964.

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L'honorable CHARLES WILLIAM TYSOE, district d'amirauté de la Colombie-Britannique—nommé le 31 janvier 1963.
Son honneur REGINALD D. KEIRSTEAD, district d'amirauté du Nouveau-Brunswick—nommé le 28 février 1957.
L'honorable ANDRÉ DEMERS, district d'amirauté de Québec—nommé le 26 novembre 1965.

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ALFRED S. MARRIOTT, C.R., district d'amirauté d'Ontario—nommé le 21 février 1957.

PROCUREUR GÉNÉRAL DU CANADA:
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SOLLICITEUR GÉNÉRAL DU CANADA:
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EN SA JURIDICTION DE COUR
DE PREMIÈRE INSTANCE

ET

EN SA JURIDICTION D'APPEL

94065—1

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... PLAINTIFF;

AND

CANADIAN JAVELIN LIMITED ..... DEFENDANT;

AND

WABUSH MINES ..... GARNISHEE.

Ottawa
1964
Nov. 10
1965
Mar. 4

Income tax—Execution—Garnishment (Saisie-Arrêt) in Quebec—Validity of service on joint venturers—Income Tax Act, ss. 119, 120—Quebec Code of Civil Procedure, Arts. 81a, 139, 142, 678—Exchequer Court Act, ss. 54, 56—Exchequer Court Rule 281.

Following registration by the Minister of National Revenue under s. 119 of the *Income Tax Act* of a certificate having the effect of a judgment for debt against Canadian Javelin Ltd, a Newfoundland corporation, a writ of garnishment (*saisie-arrêt*) issued out of the Exchequer Court was served at the Montreal office of a group of companies registered in the name "Wabush Mines" under the *Partnership Declaration Act*, R.S.Q. 1941, c. 277, to carry on the business of iron development in Quebec and Newfoundland as a joint venture. Certain sums were payable by one or more of these companies to Canadian Javelin Ltd under a contract and lease with respect to the acquisition of shares in a railway company serving the iron ore property and the right to mine the ore. On return of the writ of garnishment application was made by the defendant and garnishee for determination of certain matters.

Held: (1) The issue of a writ of garnishment (*saisie-arrêt*) for the enforcement in Quebec of a judgment of the Exchequer Court for debt is authorized by s. 54 of the *Exchequer Court Act*.

(2) Service of the writ at the garnishee's Montreal office is valid under Arts. 81a and 142 of the Quebec *Code of Civil Procedure* if the garnishee is not a partnership, and under Art. 139 if it is a partnership, and it is therefore the mode of service stipulated by s. 56 of the *Exchequer Court Act* provided that the property seized is situated in Quebec—a question not open for decision on this proceeding.

(3) While the writ served may have violated the requirement of Art. 678 of the Quebec *Code of Civil Procedure* in failing specifically to require the defendant to show cause why the seizure should not be declared valid an amendment should be permitted under Exchequer Court R. 281 to remedy the defect.

(4) It is not a valid objection that a method of garnishing debts owing to a delinquent taxpayer is laid down by s. 120 of the *Income Tax Act*.

INTERLOCUTORY APPLICATION.

Vincent W. Kooiman for plaintiff.

Lawrence A. Poitras for defendant.

J. W. Brown for garnishee.

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THURLOW J.:—Upon the return of a Writ of Garnishment (Saisie-Arrêt) issued by the Minister of National Revenue to enforce payment of an amount certified, pursuant to s. 119(1) of the *Income Tax Act*[1], to be payable by Canadian Javelin Limited and not paid, application was made for determination of a number of objections, some raised on behalf of the above-named Wabush Mines and others on behalf of Canadian Javelin Limited. Some of these objections are of a preliminary nature as challenging the availability of such a procedure in this Court or the manner in which it has been carried out and these may, I think, be dealt with conveniently at this stage. However, in so far as the objections have to do with the debt or debts, if any, to which the seizure may apply it is my view that they must be raised in the appropriate manner at a subsequent stage of the proceedings and accordingly I do not propose to deal with them at this time.

By s. 119(2) of the *Income Tax Act* a certificate under s. 119(1) when registered in this Court "has the same force and effect, and all proceedings may be taken thereon, as if the certificate where a judgment" of the Court for a debt of the amount specified therein plus interest.

Section 54 of the *Exchequer Court Act*[2] provides that:

> 54. In addition to any writs of execution that are prescribed by general rules or orders, the Court may issue writs of execution against the person or the goods, lands or other property of any party, of the same tenor and effect as those that may be issued out of any of the superior courts of the province in which any judgment or order is to be executed; and where, by the law of the province, an order of a judge is required for the issue of any writ of execution, a judge of the court may make a similar order, as regards like executions to issue out of the court.

Procedure by writ of garnishment (saisie-arrêt) of the kind issued in this case is a method of attaching and realizing upon debts owing to a judgment debtor which is provided for in the Province of Quebec by Articles 677 et seq. of the Quebec Code of Civil Procedure. Whether s. 54 of the *Exchequer Court Act* makes that procedure available in a case such as this, where the certificate having the effect of a judgment is not one that is necessarily to be executed in the Province of Quebec, is a matter on which I have had some doubt. Read by itself the section appears at first sight to be aimed at providing a procedure for enforcing a judg-

[1] R.S.C. 1952, c. 148. [2] R.S.C. 1952, c. 98.

ment requiring the doing of some act that is to be done within a particular province rather than at providing additional forms of execution for the recovery of money. However, having regard to the provision that the writs of execution referred to in the section are "in addition to" those provided for by general rules and orders and having regard as well to what seems to me to be an overall object of sections 54 to 57 inclusive to make available for the enforcement of the judgments of this Court within each province all the forms of execution in use in that province in the enforcement of the judgments of its superior courts I can see no sufficient reason for restricting the scope of s. 54 to writs of execution to enforce judgments which are concerned only with some act required to be carried out in a particular province. It follows that s. 54 applies to authorize the use of procedure by writ of garnishment (saisie-arrêt) to enforce in the Province of Quebec payment of a judgment of this Court for debt and, in consequence of s. 119(2) of the *Income Tax Act*, to enforce payment of the amount shown to be due by a certificate under s. 119(1) when registered in this Court pursuant to s. 119(2).

The next question is that of the validity of the service of the writ of garnishment (saisie-arrêt) on the above-named Wabush Mines. This appears to me to be closely allied to the question (which, however, was not raised) of how parties may be joined in such a proceeding. By s. 56 of the *Exchequer Court Act* it is provided that:

> 56. All writs of execution against real or personal property, as well those prescribed by general rules and orders as those hereinbefore authorized, shall, unless otherwise provided by general rule or order, be executed, as regards the property liable to execution and the mode of seizure and sale, as nearly as possible in the same manner as similar writs, issued out of the superior courts of the province in which the property to be seized is situated, are, by the law of the province, required to be executed; and such writs shall bind property in the same manner as such similar writs, and the rights of purchasers thereunder are the same as those of purchasers under such similar writs.

In my opinion the effect of this provision, as applied to a case such as this, is that in the absence of any general rule or order providing otherwise, and I know of none, as regards the property to be seized and the mode of seizure, the writ of execution shall be executed in the same manner, as nearly as possible, as a similar writ issued out of a superior court of the province in which the property is situated is,

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by the law of that province, required to be executed. It will be observed that the mode of seizure which is to be followed is that of the province in which the property is situated and where the situs of the property is disputed this will necessarily entail at some stage an inquiry into and a determination of the situs of the property in order to determine whether the mode of seizure which has been followed has been proper. Obviously a mode of seizure which is peculiar to a particular province will not be appropriate unless the property is situated in that province.

At this point several provisions of the Code of Civil Procedure of the Province of Quebec become relevant but before citing them it will be convenient to refer to the nature of the entity named in the present case as the garnishee.

Wabush Mines is the name given to a joint venture in which Wabush Iron Co. Limited, an Ohio corporation, and four Canadian corporations, two of which have their head offices and principal places of business in the Province of Ontario and the other two of which have their head offices and principal places of business in the Province of Quebec, are engaged as parties. The venture was formed for the purpose of completing the commercial development of and eventually operating extensive iron ore deposits at Wabush Lake, Labrador, in the Province of Newfoundland. It is registered under the provisions of the *Partnership Declaration Act*[1] of the Province of Quebec on a declaration, executed by the five corporations, which certifies that they have carried on and intend to carry on the business of iron ore development and production at the City of Montreal and elsewhere in the Provinces of Quebec and Newfoundland in cooperation as parties to a joint venture under the name and style of Wabush Mines and that the said joint venture has subsisted since the first day of November, 1961.

Under a contract and a lease made between Canadian Javelin Limited, a Canadian company having its head office at St. John's, Newfoundland, and Wabush Iron Co. Limited the latter acquired the right to certain shares in a railway company serving the property on which the ore deposits are found and the right to mine the ore and in turn undertook

[1] R.S.Q. 1941, c. 277.

to pay to Canadian Javelin Limited as consideration therefor substantial sums of money, most of which sums have not yet accrued due. By virtue of assignments made by Wabush Iron Co. Limited each of the four Canadian corporations which are parties to the joint venture became entitled to certain undivided interests in the rights accruing to Wabush Iron Co. Limited under the contract and lease and undertook to pay a proportionate part of the consideration payable by Wabush Iron Co. Limited therefor and to indemnify the latter to that extent in respect of its obligations to Canadian Javelin Limited. It is admitted that the obligations of the joint venturers to each other and to Canadian Javelin Limited are several only and not joint.

The joint venturers have employed another Ohio corporation to manage the venture and they maintain an office in Montreal and have a substantial investment in docking and harbour facilities at Seven Islands in the Province of Quebec. The office at Montreal is primarily a construction office for the supervision of the Seven Islands project and deals with engineering, purchasing, accounting and industrial relations matters incidental to that project. About 100 persons are employed at the office some of whom are employees of the joint venturers and others are employees of the managing corporation. The writ of garnishment (saisie-arrêt) named Canadian Javelin Limited as defendant and Wabush Mines as garnishee and it was served on the latter "en parlant et laissant" a copy of the writ with "une personne raisonnable employée et en charge au principal bureau d'affaires" at the address of the Montreal office.

Counsel for the Minister sought to justify this method of proceeding under Articles 81a and 679 of the Quebec Code of Civil Procedure. By Article 81a, as enacted by Statutes of Quebec 1960, c. 99, s. 6[1], it is provided that:

81a. Any group of persons associated for the pursuit in common of objects or advantages of an industrial, commercial or professional nature in this province, which does not possess therein a collective civil personality legally recognized and is not a partnership within the meaning of the Civil Code, may be summoned, for the purposes of any recourse provided by the laws of the province, before the courts of the latter, by serving the action or other proceeding introductive of suit on one of the officers of the

[1] See *International Ladies Garment Workers Union et al v. Rothman* [1941] S.C.R. 388.

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group in question, at his ordinary or recognized office, or by summoning such group collectively under the name by which it designates itself or is commonly designated or known.

Summoning by either of the methods specified in the preceding paragraph shall avail against all the members of the group summoned and the judgments rendered in the cause shall be executory against all the moveable and immoveable property of such group.

The first paragraph of Article 679 is as follows:

Art. 679. The rules concerning the service of ordinary writs of summons apply to seizures by garnishment.

Reference may also be made to Articles 127, 128 and 142 by which it is provided that:

Art. 127. Service is effected by leaving with the defendant a copy of the writ of summons, and of the declaration, if there is one.

. . .

Art. 128. Service must be made either upon the defendant in person, or at his domicile or at the place of his ordinary residence, speaking to a reasonable person belonging to the family.

In the absence of a regular domicile or ordinary residence, service may be made upon the defendant at his office or place of business, if he has one.

Art. 142. Service upon a body corporate is made upon a reasonable person in charge of its head office, of a business office in the Province, or of the office of its agent in the district where the cause of action has arisen.

Assuming that Wabush Mines is not a partnership I am of the opinion that the service of the writ of garnishment (saisie-arrêt) effected at the office of the joint ventures in Montreal was valid service on the five member corporations under Articles 81a and 142 of the Code. How far the garnishment may have operated to effect a seizure of the debts owing to Canadian Javelin Limited under the contract and lease is a separate question which depends on the effect of such procedure under the law of the Province of Quebec and, in view of s. 56 of the *Exchequer Court Act*, on the situs of such debts, and this is a question which in my opinion cannot be determined until some subsequent stage of the proceedings.

Assuming that Wabush Mines is a commercial partnership the service of the writ of garnishment (saisie-arrêt) effected at the Montreal office is I think also valid service under Article 139 and again the question whether any debt has been effectively seized by the garnishment is one for determination at a subsequent stage of the proceedings.

It follows that the service cannot be held to be invalid and that the objection thereto raised on behalf of Wabush Mines must be overruled.

I turn now to the first of two objections raised on behalf of Canadian Javelin Limited. This was based on Article 678 which provides:

Seizure by garnishment is made by means of a writ, issuing from the court which rendered the judgment, and clothed with the formalities of writs of summons.

It mentions the date and amount of the judgment, orders the garnishees not to dispossess themselves of the moveable property belonging to the debtor which is in their possession, or of such moneys or other things as they owe him or will have to pay him, until the court has pronounced upon the matter, and to appear on a day and at an hour fixed to declare under oath what property they have in their possession belonging to the debtor, and what sums of money or other things they owe him or will have to pay him; it also summons the debtor to appear on the day fixed and show cause why the seizure should not be declared valid.

In seizing salaries and wages, the writ must also state the defendant's place of residence, and the nature and place of his occupation.

The writ of garnishment (saisie-arrêt), after reciting the amount certified to be due, read as follows:

WE COMMAND YOU and each of you, the said garnishee (Tiers Saisi) and defendant, to appear before this Court at the Supreme and Exchequer Court Building, in the City of Ottawa, in the Province of Ontario, on the twenty-seventh day of the month of October next, at 11 o'clock in the forenoon, for the said garnishee (Tiers Saisi) to declare upon oath the sum or sums of money, rents, revenues and moveable effects that he has or shall or may have in his hands due or belonging to the said defendant and show the reasons if you have any why the present attachment should not be declared good and valid, and you, the said garnishee (Tiers Saisi) are enjoined not to dispossess yourself of the sums of money or any other assets you may possess belonging to the defendant to the amount of the sum and the interest remaining due as aforesaid, otherwise than as required by law, and of the said revenues, rents and moveable effects until the Court has determined.

In default by the said garnishee (Tiers Saisi) and defendant to appear and by the said garnishee to make the declaration and to comply with the injunctions above mentioned the said garnishee (Tiers Saisi) may be adjudged by default to pay the debt, interest and costs remaining due as aforesaid and also the costs of the present instance to which costs the defendant will be condemned each time that an effective attachment does not suffice to discharge all that he owes.

The point taken was that grammatically read this writ did not call upon Canadian Javelin Limited to show cause why the seizure should not be declared valid and that accordingly the writ did not comply with the requirements of Article 678. In my opinion the writ is not happily worded

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to call upon Canadian Javelin Limited to show cause and it may be that as a matter of strict grammatical construction the contention of counsel is correct but I do not think it follows that the writ must therefore be set aside. I am inclined to think that this objection has been waived by counsel raising his second point and thus electing to show cause despite any defect in the form of the summons to his client but, in any event, I see no reason to think that Canadian Javelin Limited has suffered prejudice by reason of any such defect in the writ and in my opinion the case is a proper one for amendment under Rule 281 of the Rules of this Court. The writ will therefore be amended so as to comply with Article 678 and such amendment will have relation back to the date of the issue of the writ.

The other point taken by counsel for Canadian Javelin Limited was that since s. 120 of the *Income Tax Act* provides a method of garnishment of debts owing to a delinquent taxpayer procedure by garnishment (saisie-arrêt) upon the registration of a certificate under s. 119 was not open to the Minister. In my opinion there is no substance to this point and the objection therefore fails.

This brings me to the remaining point advanced by counsel for Wabush Mines, that is to say, that the situs of the obligations to Canadian Javelin Limited under the contract and lease is not in the Province of Quebec and that accordingly no order for payment to the Minister should be made and in any case no such order should be made without adequate safeguards to ensure that the parties will not be required to pay the amounts again to Canadian Javelin Limited or its assignees in some other jurisdiction. This is in effect an argument as to what property, if any, has been seized by the writ and, as I have already indicated, is one to be made at a subsequent stage of the proceedings.

The costs of the application will be costs in the proceedings on the writ and will follow the result of such proceedings.

BETWEEN:

GEORGE SMITH BUCHANAN ..... APPELLANT;

AND

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

Calgary 1966
April 1
Ottawa May 26

Income tax—Ex gratia payment to dismissed employee—Whether gift or income from employment—Intent of employer—Income Tax Act, s 5(1)(a).

Appellant was employed by a Calgary law firm at a salary of $750 a month. On August 25th 1961 he was informed that his salary would be reduced to $500 a month from September 1st and on September 11th he was summarily dismissed for cause and paid the amount due him to that date, $529. On September 12th he was informed that the firm would make him an *ex gratia* payment of $1,903.80, less deduction for tax on that sum and on the $529 paid previously, by semi-monthly instalments of $317.30 (less such deductions) but that on the request of appellant and his wife the full balance would be paid if they wished to return to Scotland (whence they had immigrated to Canada in 1957). Appellant stayed in Canada and received the $1,903.80 as promised. This sum was in fact equivalent to three months' salary at $750 a month less a deduction for income tax on three months' salary, $2,250, and on $529. In all its office procedures the law firm treated the payment of $1,903.80 as remuneration to appellant, describing it as salary, paying it semi-monthly, and reporting it as such.

Held, appellant's employer intended the payment of the $1,903.80 as remuneration rather than as a gift personal to appellant and the payment was therefore income to appellant from an office or employment under s. 5(1)(a) of the *Income Tax Act*. It was immaterial that the employment had been terminated when the payment was made.

Goldman v. M.N.R. [1953] 1 S.C.R. 211, applied; *Blakeston v. Cooper* [1909] A.C. 104, *Cowan v. Seymour* (1919) 7 T.C. 372, *Seymour v. Reed* [1927] A.C. 554, referred to.

APPEAL from a decision of the Tax Appeal Board.

W. D. Goodfellow for appellant.

D. G. H. Bowman for respondent.

CATTANACH J.:—This is an appeal from a decision of the Tax Appeal Board[1] dated June 28, 1965 whereby an appeal from the appellant's assessment to income tax for his 1961 taxation year was dismissed. The Board held that an

[1] (1965) 38 Tax A.B.C. 449

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amount of $1,903.80 had been properly included by the Minister as part of the income received by the appellant in the taxation year in question.

The appellant, who had been a solicitor in Scotland, came to Canada in the fall of 1957 with a view to bettering his fortunes. He did not have any commitment of specific employment but he was armed with a letter of introduction to the then President of the Law Society of Alberta who was also, at that time, a member of the well known and established legal firm of Chambers, Might, Saucier, Peacock, Jones, Black and Gain of the City of Calgary, in the Province of Alberta. The appellant discussed with the then President of the Law Society the possibility of and requisite steps to qualifying as a barrister and solicitor in Alberta and also inquired concerning any oil companies which might have need for his services. He was offered employment in the above legal firm of a permanent nature as an articled law clerk, at the outset, at a salary of $600 per month which was a salary double his highest expectations. Naturally the appellant accepted that offer forthwith and began his duties in the mortgage department of that firm on September 12, 1957.

There was no written contract of employment, but only an oral agreement.

In October 1957 the appellant forwarded to his wife, who had remained in Scotland, sufficient funds from his own resources to enable his wife and son to travel to Calgary which they did, arriving in Calgary in November 1957. It was not a condition of the appellant's employment that the legal firm should assume any responsibility for the expense to be incurred in moving the appellant's family to Calgary but, if my recollection of the evidence serves me correctly, the firm did accommodate the appellant by assisting him in arranging a loan from a bank, which was a client, by way of endorsement of the appellant's promissory note in order that he might establish living accommodation for himself and family.

After some time the appellant qualified as a barrister and solicitor and continued his duties in the mortgage department of the legal firm with two other solicitors. His salary was raised to $700 per month and later to $750 per month. During the latter portion of the appellant's employment he

became the sole solicitor in the mortgage department. The appellant complained to the management committee of the legal firm that the volume of mortgage work was getting beyond him which might result in delays as well as complaining about the soul-killing monotony of that type of work. He was given other work of a similar nature which was not performed to the satisfaction of the client of the firm and accordingly to the firm's dissatisfaction.

On August 25, 1961 the management committee by memorandum of that date, advised the appellant that his usefulness to the firm was limited as he had not demonstrated qualities which would enable him to take charge of the mortgage department and that if he wished to remain with the firm it would be on the basis that his salary would be reduced to $500 per month as from September 1, 1961, that he would do such mortgage work as was allocated to him under the supervision of a member of the firm placed in charge of the mortgage department and that his employment was henceforth probationary.

Shortly thereafter, on September 11, 1961, Mr. J. J. Saucier, a senior member of the firm and chairman of the firm's management committee received a report of complaints respecting the appellant's personal conduct which was of such a nature as to cause him to convene an immediate and emergent meeting of the committee. The bases of the complaints so made were thoroughly investigated and in the opinions of the members of the committee were substantiated and warranted the appellant's summary dismissal without notice. The appellant was then summoned to Mr. Saucier's office, where, in the presence of Mr. Roberts, the office manager, Mr. Saucier informed the appellant of their findings of his misconduct which were the reasons for his dismissal and thereupon dismissed him effective as of five o'clock, the closing of office hours on that day. The appellant protested the truth of the allegations made against him. He was given a cheque in the amount of $529.53 being the amount of his salary accrued to that date plus two week's salary in lieu of holidays to which the appellant was entitled but had not taken. No deduction was made from this amount for income tax at that time. Mr. Saucier also informed the appellant that he would be written a letter confirming his dismissal.

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The next day, September 12, 1961, Mr. Saucier wrote such confirmatory letter to the appellant which was received by him on September 14, 1961 the text of which reads as follows:

> This will confirm my interview with you yesterday afternoon, at which our Mr. Roberts was present, when I dismissed you from the service of this firm, as of the close of business yesterday, upon grounds which I stated to you, and which our Management Committee considered sufficient to warrant your immediate dismissal without notice.
>
> You received at that time, a cheque for $529 53, being the amount of your salary accrued to that date, plus two weeks' salary in lieu of holidays you had been entitled to but had not taken, (no deduction being made for income tax).
>
> As I indicated to you, we do not consider that you are entitled to any further payment, but we do recognize that you moved your wife and children from Scotland to Calgary, in reliance upon what we had all hoped would be a permanent position with this firm. Notwithstanding the grounds which led to your dismissal, we wish to provide you with some financial assistance, to enable you to seek further employment, or to return to Scotland with your family. Therefore, as a matter of grace, we will pay to you the further sum of $1,903 80 (less deductions for income tax thereon and on the amount you received yesterday), by equal semi-monthly instalments of $317.30 each (less such deduction), on the 15th and last days of each month, commencing the 30th day of September, 1961, on the understanding that, if you wish to move your family in the meantime, we will consider a joint application of your wife and yourself, for prepayment of the balance then outstanding.

The amount of $1,903.80, the taxability of which is the issue in the present appeal, had not been demanded by the appellant, nor had the payment thereof been discussed with him at the time of his dismissal, his first intimation thereof being upon receipt of the above letter.

The matter of an *ex gratia* payment had been discussed by the management committee during its emergency meeting at which it decided to make such payment. Mr. Saucier testified that the appellant's wife was known to the members of the management committee, who held her in high esteem, that they were aware of the precarious cash position of the appellant from their knowledge of an outstanding bank loan they had assisted him to obtain and that the amount of $1,903.80 was a purely arbitrary figure suggested and determined upon by the committee as being an adequate amount to enable the appellant to return to Scotland with his family.

It so happens, however, that this amount of $1,903.80 is also the appellant's salary for three months at the rate of $750 per month less a deduction of $60 per month for

income tax and less a further deduction for income tax which had not been made from the cheque for $529.53 previously given to the appellant and representing accrued salary and holiday pay.

The appellant did not avail himself of the offer in the third paragraph of the letter dated September 12, 1961 quoted above whereby upon a joint application with his wife for prepayment of the entire amount or any balance thereof would be paid forthwith, but rather chose to remain in Calgary. He was unemployed from September 11, 1961 until mid November 1961 at which time, I observe from the appellant's Income Tax Return, he obtained employment. Meanwhile he received semi-monthly payments totalling $1,903.80 in accordance with the undertaking in Mr. Saucier's letter. These payments were recorded upon a form entitled "Employees' Earning Record" completed by the legal firm.

On the T4 form being a statement of remuneration paid, prepared by the appellant's employer, Chambers, Might & Co. and supplied to the appellant in duplicate, one copy of which was attached by him to his Income Tax Return for 1961, it was indicated that the appellant was employed for twelve months and that his salary or wages before deductions totalled $8,433.33. The appellant made corrections thereon in ink, changing the number of months employed from twelve to eight and one-half, substituting $6,529.53 as his total of salary or wages which he arrived at by deducting the sum of $1,903.80 from the sum of $8,433.33 and inserting the figure of $1,903.80 in a space on the form entitled "Lump Sum Payments". In a notation appended to his 1961 Income Tax Return the appellant described the deduction of $1,903.80 as a "Settlement for Relocation".

Counsel for the appellant contended that the payment of $1,903.80 now in question, although prompted by the employer-employee relationship which had subsisted between the appellant and the legal firm until its abrupt termination on September 11, 1961, was a gift or benefaction of an exceptional kind, personal to the appellant and motivated by altruistic considerations of the former employer for the appellant's wife and family.

I assume, as an original premise, that gifts, as such, are not chargeable to income tax. The important question,

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however, is whether the employment of the appellant was the source of the benefit received by him. It does not necessarily follow, as was pointed out by counsel for the appellant, from the fact that an amount is received by an employee from a firm by whom he was employed that it is chargeable to tax (*vide Bridges v. Hewitt*)[1]. Whether a benefit received by a taxpayer was received by him "in respect of, in the course of, or by virtue of the office or employment" must be considered in relation to the particular circumstances in which it was received.

Counsel for the Minister contended that the sum formed part of the appellant's income from his office or employment by virtue of sections 5(1) and 25 of the *Income Tax Act* because,

(1) it constituted salary, wages or other remuneration or other benefit received or enjoyed by him in respect of, in the course of, or by virtue of the office or employment, or

(2) it was an amount received by him from the legal firm on account of, or in lieu of payment of, or in satisfaction of an obligation arising out of an agreement made by the legal firm with the appellant immediately prior to the period that the appellant was in the employment of the firm and accordingly is deemed, for the purposes of section 5, to be remuneration for the appellant's services.

Alternatively counsel for the Minister contended that the sum is to be included in computing the appellant's income by virtue of section 6(1)(*a*)(*j*) as a retiring allowance within the meaning of section 139(1)(*aj*) of the Act.

The provisions of the *Income Tax Act*[2], which I consider pertinent to the present appeal are reproduced hereunder:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

5. (1) Income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities, received by the taxpayer in the year plus

[1] (1957) 37 T.C. 289. [2] 1948, c. 52.

(a) the value of board, lodging and other benefits of any kind whatsoever (except the benefit he derives from his employer's contributions to or under a registered pension fund or plan, group life, sickness or accident insurance plan, medical services plan, supplementary unemployment benefit plan or deferred profit sharing plan) received or enjoyed by him in the year in respect of, in the course of, or by virtue of the office or employment; . . .

I am convinced, on the evidence adduced, that the appellant was dismissed upon grounds which warranted his summary dismissal without notice. In the absence of exceptional circumstances such as prevailed in the present instance, a contract of general or indefinite hiring, such as the oral contract of hiring entered into between the appellant and the legal firm, might be terminated on reasonable notice. What constitutes reasonable notice depends upon the grade of employment. If it were incumbent upon me to do so, which it is not, I would decide that, in the circumstances of the appellant's employment, three months' notice would be reasonable.

While the legal firm paid the appellant an amount equivalent to three months' salary at $750 per month (less income tax thereon) it was under no legal obligation whatsoever to do so and the payment of that amount was purely voluntary. But a payment may be liable to income tax even though it was voluntary on the part of the person who made it.

In *Herbert v. McQuade*[1] Collins M.R. said at page 694:

...a payment may be liable to income tax although it is voluntary on the part of the persons who made it, and that the test is whether, from the standpoint of the person who receives it, it accrues to him in virtue of his office; if it does, it does not matter whether it was voluntary or whether it was compulsory on the part of the persons who paid it.

In *Goldman v. M.N.R.*[2] Rand J. in commenting upon the foregoing extract, had this to say at page 219:

In *Herbert v. McQuade,* it is said that the payment must be looked at from the standpoint of the person who receives it. While that aspect is no doubt relevant, the purpose of the donor or payer can be no less so. It is the latter's mind which determines that the payment be made at all and the object to which it is referred. That, at the same time, we should have, on the part of the receiver, an acceptance in the same understanding furnishes a complementary circumstance which would seem to me to put the matter beyond controversy.

[1] [1902] 2 K.B. 631.

[2] [1953] 1 S.C.R. 211.

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Mr. Saucier testified that the amount of $1,903.80 was a figure arbitrarily arrived at by the members of the management committee as being adequate to permit the appellant to return, with his family, to Scotland, or in the alternative, as put in the letter of dismissal dated September 12, 1961, to enable him to seek further employment. I have great difficulty in following how the amount was merely arbitrary other than in the sense that it need not have been given at all. I should have thought that an arbitrary amount would have been expressed in round figures, for example $2,250, being three months' salary at $750. Further there appears to be an inaccuracy in Mr. Saucier's letter when he states "Therefore, as a matter of grace, we will pay to you the further sum of $1,903.80 (less deductions for income tax thereon and on the amount you received yesterday) . . .". The resultant figure was in fact $1,903.80 from which no deductions were made, but rather the deductions were taken from the figure of $2,250 as well as from the accrued salary and holiday leave of $529.53 paid to the appellant on the day of his dismissal, but from which tax had not been deducted at that time so as to arrive at the figure of $1,903.80. There is no question in my mind that what the appellant was paid, and what the firm intended to pay to him, in addition to his accrued salary, was three months' salary less tax deductions thereon. The firm was also generous in not restricting the amount to the appellant's salary of $500 per month which became effective on September 1, 1961.

Mr. Saucier also testified that income deductions were made as a matter of caution to avoid any penalties under the *Income Tax Act* upon an employer who failed to deduct and remit the tax on employees' salaries. In response to a question from myself Mr. Saucier intimated that the amount paid to the appellant had been included as an expense in arriving at the profits of the legal firm for the year in question.

There is no question that the legal firm in all its office procedures treated the payment as remuneration for the services of the appellant. It was described as salary, it was paid semi-monthly, income tax deductions were made therefrom and it was reported as such.

The English authorities to which I was referred have decided that if the sum in question is received by a taxpayer by reason of his office, even if the payment is made voluntarily, it is taxable, but if it is a gift personal to the taxpayer and not by virtue of his office, then it is not taxable as a profit or gain of the office because it is not income received from the office. Where a gift of money is made by an employer to an employee under circumstances which lead to the conclusion that it was nothing more than extra remuneration to the taxpayer for his work, then that gratuitous payment is taxable.

In *Blakeston v. Cooper*[1] a special Easter offering to augment a clergyman's income was held to be taxable. It was argued that the offerings were personal non-official free will gifts given to the vicar as marks of esteem and respect. While such reasons may have played their part in increasing the offerings, nevertheless, Lord Ashbourne had no doubt that they were given to the vicar as vicar and accordingly formed part of the profits accruing by reason of his office.

In *Cowan v. Seymour*[2] a sum paid to the secretary of a company who had acted as liquidator without remuneration was held not to be taxable, the amount having been paid to him by the shareholders after the winding up as a tribute or testimonial personal to him and not as payment for services.

Later in *Seymour v. Reed*[3] Viscount Cave stated the principle to be that Schedule E of the English Act rendered taxable,

> all payments made to the holder of an office or employment as such, that is to say, by way of remuneration for his services, even though such payments may be voluntary, but they do not include a mere gift or a present (such as a testimonial) which is made to him on personal grounds and not by way of payment for his services.

He held that an award of the proceeds of a benefit match to a cricket player was not a profit accruing to him in respect to his office or employment, but was a personal gift to him. Benefit matches were arranged by a committee of the club which had an absolute discretion as to how the proceeds were to be applied and the player had no right to have them paid to him.

[1] [1909] A C. 104.
[2] (1919) 7 T.C 372
[3] [1927] A C. 554.

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I take the question to be whether a payment is in the nature of a personal gift or is it in the nature of remuneration. In this sense the words "personal gift" are used in contradistinction to remuneration. Therefore, to say that a payment was intended as a personal gift is merely to say that it was not intended to be remuneration. An employer, for the purpose of assisting an employee whom he did, in fact, remunerate for his services, cannot relieve the employee from his obligation to pay income tax by saying that it was intended as a personal gift and not remuneration. This I believe to be the effect of Mr. Saucier's evidence that the amount paid to the appellant was determined upon an arbitrary basis as being adequate to enable the appellant to return to Scotland. The payment was a gift in the sense that the legal firm was under no obligation to pay the appellant anything. But they did. The amount paid was identical to three months' pay in lieu of notice. It was treated by the firm as remuneration and I cannot escape the conclusion that it was intended as such rather than as a gift personal to the appellant.

In my view it, therefore, follows that the payment was income in the hands of the appellant from an office or employment being a benefit received by the appellant in respect of, in the course of, or by virtue of the office or employment within the meaning of section 5(1)(*a*) of the *Income Tax Act*.

Neither do I think, the fact that the appellant's employment had been terminated when the payment was made, prevents the payment being taxable income (see *Cowan v. Seymour* (*supra*)).

Because of the conclusion I have reached it is not necessary for me to consider the remaining arguments advanced on behalf of the Minister.

The appeal is dismissed with costs.

BETWEEN:

AARON'S (PRINCE ALBERT) LIMITED ET ALIOS[1] ..... APPELLANTS;

AND

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

Winnipeg 1966 Apr. 20, 21, 22 Ottawa May 24

Income tax—Associated corporations—Income Tax Act, s. 39(4)—Saskatchewan company—Wholly-owned subsidiary—Whether "controlled" by parent company—Nominee of parent company—Parent company controlling voting right.

A Co was the registered and beneficial owner of two of the three issued shares of *B Co* (both being Saskatchewan companies incorporated by filing a memorandum of association) and the remaining share was registered in the name of *A Co*'s nominee, who was a director of *B Co*. *A Co*'s two shares were voted by a representative of *A Co* who was a director and president of *B Co*. *B Co*'s articles of association provided that all motions at shareholders' and directors' meetings required unanimous consent.

Held, B Co was controlled by *A Co* within the meaning of s. 39(4) of the *Income Tax Act* and therefore disentitled to the lower rate of tax under s. 39. The nominee of the third share was subject to *A Co*'s control with respect to the voting right of that share, and accordingly *A Co* had through its ownership of *B Co*'s shares control of the votes of all three issued shares of *B Co*.

Buckerfield's Ltd. et al v. M.N.R. [1965] 1 Ex. C.R. 299, applied. *I.R.C. v. J. Bibby & Sons Ltd.* [1944] 1 All E.R. 548, [1945] 1 All E.R. 667; *I.R.C. v. Silverts, Ltd.* [1951] 1 All E.R. 703, distinguished, *S. Berendsen Ltd. v. C.I.R.* [1958] Ch. 1; *M.N.R. v. Sheldon's Engineering Ltd.* [1954] Ex. C.R. 507, [1955] S.C.R. 637; *Barclays Bank Ltd. v. I.R.C.* [1960] 2 All E.R. 817, referred to.

Income tax—Associated companies—Income Tax Act, s. 39—Saskatchewan company—Articles of association requiring unanimous consent at meetings—Validity of—Saskatchewan Companies Act, R.S.S. 1953, c. 124, ss. 14(b), 18—Saskatchewan Interpretation Act, R.S.S. 1953, c. 1, s. 3.

A provision in a Saskatchewan company's articles of association that motions at shareholders' and directors' meetings require unanimous consent is valid notwithstanding the provision of s. 14(*b*) of the Saskatchewan *Interpretation Act* as to the power of a majority to bind the minority and various provisions of the Saskatchewan *Companies Act* authorizing or requiring certain things to be done by "special resolution", i.e. by a three-fourths majority. In view of the provisions of s. 3 of the *Interpretation Act* s. 14(*b*) cannot be

[1] The other appellants are: Morgan's Limited, Aaron's (Saskatoon) Limited, Allied Business Supervisions Limited, Miller Building Limited, Aaron Building Limited, Aaron's Renfrew Furs Limited, Career Girl Store Limited, Aaron's Ladies Apparel Limited, I & A Realty Limited.

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considered as overriding the right of incorporators under s 18 of the *Companies Act* to adopt such regulations for the government of the company as they think fit.

Theatre Amusement Co. v. Stone (1915) 50 S.C.R. 32, *Quin & Axtens Ltd. et al v. Salmon* [1909] A.C. 442; *N.-W. Transportation Co. v. Beatty* (1887) 12 App. Cas. 589, referred to.

Income tax—Associated corporations—Income Tax Act, s. 39(4)—Ownership of half voting shares—Right to casting vote vested in chairman of board—Whether "president" of company in control—Saskatchewan companies.

A owned half the voting shares of a Saskatchewan company and was a director and president of the company. *B* owned 74 of the 150 voting shares of another Saskatchewan company and one share was owned by *B*'s husband in trust to vote it as *B* directed. *B*'s husband was one of the company's three directors and president of the company. *A* and *B*'s husband acted as chairman at their companies' meetings but neither had been elected chairman of his company's board of directors. Under the articles of association of both companies the chairman of the board of directors was entitled to preside at general meetings, and the chairman at any meeting had a casting vote in case of a tie.

Held, neither *A* nor *B* was entitled to be chairman of shareholders' meetings of their respective companies and to exercise a casting vote, and therefore neither *A* nor *B* controlled their respective companies within the meaning of s. 39(4) of the *Income Tax Act*. The appointment of *A* and of *B*'s husband as president of his company did not give either of them the right to preside at meetings. The office of president was not mentioned in the Saskatchewan *Companies Act* or in the company's articles. Moreover, *B*'s husband when exercising the casting vote was not bound to vote it as *B* might direct.

Semble, control of a company arising from the right to a casting vote is not the control contemplated by s. 39(4) of the *Income Tax Act* since the situation is not of the kind aimed at by the provision and since the casting vote unlike the votes arising from shareholding which are exercisable without responsibility to the company or to other shareholders is not the holder's property but an adjunct of office.

INCOME TAX APPEALS.

R. B. Slater, F. K. Turner and *A. Anhang* for appellants.

Bruce Verchere and *Gordon Anderson* for respondent.

THURLOW J.:—These ten appeals are from re-assessments of income tax for the taxation years 1961 and 1962, (except those of Miller Building Limited, Career Girl Store Limited and I & A Realty Limited which relate only to the 1962 taxation year) all of which were based on assumptions by the Minister that all ten of the appellant companies

together with Aaron Investments Limited and Miller Men's Wear Limited were at relevant times "associated" with each other within the meaning given that expression for the purposes of section 39 of the *Income Tax Act*[1]. In each case the sole issue raised is whether the Minister's assumptions were correct, or perhaps more accurately the extent to which the assumptions were correct, but this issue has by the terms of an order stating issues to be determined and directing that the appeals be heard together on common evidence, as well as by the positions taken by counsel in the course of the trial, been further narrowed to certain particular issues defined in paragraphs 1 and 2 of the order with respect to the control of particular appellant companies and to a further more general issue stated in paragraph 3 of the order as to whether any and if so which of the companies were associated in either of the taxation years in question. These issues are stated and dealt with later in these reasons. The order also provided that "upon the determination of the answers to the aforesaid questions by the Court, all of the Appeals will be referred back to the Respondent for reconsideration, and if necessary in respect of all or any one or more of the Appellants, allocation pursuant to subsections 3 and 3(*a*) of section 39 of the *Income Tax Act* and re-assessment of all or any one or more of the Appellants in accordance with the Court's determination of the answers to the said questions".

When the appeals came on for trial counsel for the Minister stated that the appeals of I & A Realty Limited and Aaron Building Limited with respect to their re-assessments for the 1962 taxation year had been settled between the parties and by consent an order was granted allowing with costs the appeals of I & A Realty Limited and Aaron Building Limited from the re-assessments for 1962 and referring the re-assessments back to the Minister for reconsideration and re-assessment on the basis that during the 1962 taxation year I & A Realty Limited and Aaron Building Limited were associated only with each other and with Aaron Investments Limited. This has rendered it unnecessary to deal with three of the particular issues defined in the earlier order and with the general issue as well so far as the re-assessments of these appellants for 1962 are involved.

[1] R.S.C. 1952, c. 148.

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Seven other particular issues, and the rest of the general issue, however, remain. For the determination of these the parties put before the Court an agreed statement of facts which together with copies of the articles of association of nine of the appellant companies tendered by counsel for the Minister and the minute books of several of the appellant companies tendered on behalf of the appellants constitute the material on which the issues are to be decided.

Each of the appellant companies was incorporated under the *Companies Act*[1] of the Province of Saskatchewan on the filing of a memorandum of association and each adopted the articles of Table A of that Act either with or without modifications as its articles of association.

As each of the particular issues to be determined includes the preliminary words "Within the meaning of the *Income Tax Act*, R.S.C. 1952, c. 148, as amended" and poses a question whether a particular company or person or group controlled a particular appellant company during a stated period, it will be convenient at this point to review the provisions of the Act under which the problems arise.

Subsection (1) of section 39 provides that the tax payable by a corporation under Part 1 of the Act is 18 per cent of the first $35,000 of the amount of income subject to tax and 47 per cent of the amount by which the income subject to tax exceeds $35,000. By subections (2) and (3) however where two or more corporations are "associated" with each other the aggregate amount of their incomes taxable at the 18 per cent rate is not permitted to exceed $35,000. The reason for this is not hard to discern. Without such provisions section 39(1) would constitute an invitation to those beneficially interested in profitable corporate enterprises to so arrange and multiply corporate structures as to render the whole of a taxable income in excess of $35,000 taxable at the lower rate. To take the simplest situation a person owning the shares of a corporation earning from $35,000 to $70,000 in taxable income might arrange to have half of the amount earned by a second corporation and thus avoid paying 47 per cent on any of the income. By the same process a person or a group of closely related persons might, even if not owning all the shares, accomplish in their own

[1] R.S.S. 1953, c. 124.

interest in a substantial way the same result. The overall purpose of the provisions as to "associated" companies, as I read them, is to prevent the owners of the equity stock in corporations from gaining, whether intentionally or otherwise, such a tax advantage[1]. But the method adopted by the provisions is arbitrary and is made to depend not on the right of shareholders to benefit from profits but on various relationships between shareholders, some of which are particularly defined and others not, and by whom the companies concerned were "controlled"[2].

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[1] *Vide* Jackett P. in *Buckerfield's Ltd. et al v. M.N.R.* [1965] 1 Ex. C.R. 299 at 305. "The course of action that section 39 has been designed to discourage is the multiplication of corporations carrying on a business in order to get greater advantage from the lower tax rate."

[2] 39(4) For the purpose of this section, one corporation is associated with another in a taxation year if, at any time in the year,

(*a*) one of the corporations controlled the other,

(*b*) both of the corporations were controlled by the same person or group of persons,

(*c*) each of the corporations was controlled by one person and the person who controlled one of the corporations was related to the person who controlled the other, and one of those persons owned directly or indirectly one or more shares of the capital stock of each of the corporations,

(*d*) one of the corporations was controlled by one person and that person was related to each member of a group of persons that controlled the other corporation, and one of those persons owned directly or indirectly one or more shares of the capital stock of each of the corporations, or

(*e*) each of the corporations was controlled by a related group and each of the members of one of the related groups was related to all of the members of the other related group, and one of the members of one of the related groups owned directly or indirectly one or more shares of the capital stock of each of the corporations.

(4*a*) For the purpose of this section,

(*a*) one person is related to another person if they are "related persons" or persons related to each other within the meaning of subsection (5*a*) of section 139; and

(*b*) "related group" has the meaning given that expression in subsection (5*c*) of section 139; and

(*c*) subsection (5*d*) of section 139 is applicable *mutatis mutandis*.

(5) When two corporations are associated, or are deemed by this subsection to be associated, with the same corporation at the same time, they shall, for the purpose of this section, be deemed to be associated with each other.

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Subsections (5*a*), (5*c*) and (5*d*) of section 139 are as follows:

(5*a*) For the purpose of subsection (5), (5*c*) and this subsection, "related persons", or persons related to each other, are

(*a*) individuals connected by blood relationship, marriage or adoption;

(*b*) a corporation and

(i) a person who controls the corporation, if it is controlled by one person,

(ii) a person who is a member of a related group that controls the corporation, or

(iii) any person related to a person described by subparagraph (i) or (ii);

(*c*) any two corporations

(i) if they are controlled by the same person or group of persons,

(ii) if each of the corporations is controlled by one person and the person who controls one of the corporations is related to the person who controls the other corporation,

(iii) if one of the corporations is controlled by one person and that person is related to any member of a related group that controls the other corporation,

(iv) if one of the corporations is controlled by one person and that person is related to each member of an unrelated group that controls the other corporation,

(v) if any member of a related group that controls one of the corporations is related to each member of an unrelated group that controls the other corporation, or

(vi) if each member of an unrelated group that controls one of the corporations is related to at least one member of an unrelated group that controls the other corporation.

(5*c*) In subsections (5*a*), (5*d*) and this subsection,

(*a*) "related group" means a group of persons each member of which is related to every other member of the group; and

(*b*) "unrelated group" means a group of persons that is not a related group.

(5*d*) For the purpose of subsection (5*a*)

(*a*) where a related group is in a position to control a corporation, it shall be deemed to be a related group that controls the corporation whether or not it is part of a larger group by whom the corporation is in fact controlled; and

(*b*) a person who had a right under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently, to, or to acquire, shares in a corporation, shall, except where the contract provided that the right is not exercisable until the death of an individual designated therein, be deemed to have had the same position in relation to the control of the corporation as if he owned the shares; and

(*c*) where a person owns shares in two or more corporations, he shall as shareholder of one of the corporations be deemed to be related to himself as shareholder of each of the other corporations.

With respect to the meaning of "controlled" in Section 39(4) Jackett P. in *Buckerfield's Limited et al v. M.N.R.*[1] said at page 302:

> Many approaches might conceivably be adopted in applying the word "control" in a statute such as the *Income Tax Act* to a corporation It might, for example, refer to control by "management", where management and the board of directors are separate, or it might refer to control by the board of directors. The kind of control exercised by management officials or the board of directors is, however, clearly not intended by Section 39 when it contemplates control of one corporation by another as well as control of a corporation by individuals (see subsection (6) of Section 39). The word "control" might conceivably refer to *de facto* control by one or more shareholders whether or not they hold a majority of shares. I am of the view, however, that in Section 39 of the *Income Tax Act,* the word "controlled" contemplates the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the board of directors. See *British American Tobacco Co. v. C.I.R.*, [1943] 1 All E.R. 13, where Viscount Simon, L.C., at page 15, says:
>
> > "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."
>
> See also *M.N.R. v. Wrights' Canadian Ropes, Ltd.*, [1947] A.C. 109 per Lord Greene M.R at page 118, where it was held that the mere fact that one corporation had less than 50 per cent of the shares of another was "conclusive" that the one corporation was not "controlled" by the other within Section 6 of the *Income War Tax Act.*

I turn now to the first of the particular issues to be determined. This is stated as follows:

> Within the meaning of the *Income Tax Act,* R.S.C. 1952, c. 148, as amended,
>
> 1(*a*) during the period commencing on February 1, 1960 and ending on December 31, 1962 did Allied Business Supervisions Limited control Career Girl Store Limited?

Throughout the period mentioned there were three issued shares of Career Girl Store Limited (hereafter referred to as Career Girl) all of which were beneficially owned by Allied Business Supervisions Limited (hereafter referred to as Allied). Two of the three shares were registered in the name of Allied. The other was registered for part of the time in the name of R. N. Hall and during the remainder of the period in the name of Joseph Tomney each of whom in turn was the nominee of Allied. Throughout the period Alexander Aaron was the representative of Allied in respect of its shares in Career Girl and was a director and the president of the latter company. Hall and Tomney in succes-

[1] [1965] 1 Ex C.R. 299.

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sion were also directors. The articles of association of this company consisted of Table A with certain modifications one of which was:

> 6. That all motions put before any meeting of shareholders or directors of the Company shall require the unanimous consent of all its members, and Paragraphs 46, 76 and 82 of the said Table "A" shall be amended accordingly.

Counsel for the Minister challenged the validity of this article on grounds which are considered later in these reasons with respect to the third issue but for the purpose of considering this issue I shall assume that paragraph 6 is a valid article and that it means *inter alia*, as I think it does, that no decision could be taken by the company in general meeting except by unanimous consent of all the members. On this basis it was submitted that Allied nevertheless "controlled" Career Girl during the period in question since Allied was throughout the period the beneficial owner of the two shares held by itself and of the share held by its successive nominees, that as beneficial owner Allied was entitled to call upon the nominee to transfer the share at any time either to Allied itself or to another nominee and thus to put an end to the existing trust and was further entitled to direct the manner in which the nominee should exercise the rights, including voting rights, attaching to his nominal ownership of the share and that Allied was accordingly at all material times in a position to secure unanimous consent of all shareholders to the decisions which it desired Career Girl to make.

Counsel for the appellants on the other hand submitted that a second shareholder was a continuing necessity, that so far as Career Girl was concerned that shareholder was the sole owner of the share registered in his name and was entitled to vote as he saw fit and that Allied being thus unable to control the vote attaching to the nominee's share was not in a position to enforce unanimous consent to its proposals and was therefore unable to control Career Girl.

But for certain expressions of judicial opinion in somewhat similar situations, I should have thought the solution of the question so raised to be too clear for serious argument. Because of the form of the statutory provisions and of what I conceive to be their purpose I do not think the question is to be approached merely from the point of view

of Career Girl or that it is equivalent to asking: "From the point of view of Career Girl did Allied control Career Girl?" On the contrary since both corporations, and possibly others as well, may be affected by the answer the question is I think to be considered objectively and given the kind of practical answer which a businessman might be expected to give. As I see it the situation is plainly one of the kind at which the statutory provisions appear to be aimed and in the absence of anything to the contrary in the facts it is I think to be taken that the nominee was, in the exercise of the voting right attaching to the share held in his name, subject to the control of Allied. Nor do I think it is reasonable to assume that the nominee in this situation would not carry out the instructions of the beneficiary of the share. Allied thus appears to me to have had through its ownership of the shares control of the votes of all three issued shares of Career Girl and therefore to have controlled the company.

The chief expression of opinion relied on by the appellants in support of their position was that of the House of Lords in *Inland Revenue Commissioners v. J. Bibby and Sons Limited*[1] where the question, which arose on the taxation of a particular company rather than on a question of relationship between companies, was whether the directors of a company "had a controlling interest therein". The directors owned beneficially less than half of the issued shares but some of them held additional shares of which they were trustees, (though not bare trustees), and these shares along with the shares held beneficially gave the directors more than 50 per cent of the voting power in the company. Both in the Court of Appeal[2] and in the House of Lords it was held that the directors had a controlling interest within the meaning of the statutory provision under consideration. In discussing the matter, however, Lord Greene, M.R. in the Court of Appeal expressed the view that the case of shares held by a director as a bare trustee would be different and that the voting power attaching to shares so held would reside in the beneficial owner of the shares. In the House of Lords this view was doubted and the question whether even in such a case the voting power attaching to shares so held would reside in the director

[1] [1945] 1 All E.R. 667. [2] [1944] 1 All E.R. 548.

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holding them (for the purposes of the particular statutory provision) was expressly left open. Thus Lord Russell of Killowen said at page 670:

> It is true that the Court of Appeal except the case of what they describe as a bare trustee, but express a view that the control would reside in the beneficial owner of the shares. The case envisaged is no doubt the case of the director who puts shares into the name of a nominee, taking probably a blank transfer executed by the nominee. I prefer to express no definite opinion in relation to this question, but to keep it as an open question to be debated when the necessity for a decision thereon in fact arises

Lord Simonds also said at page 673:

> Those who by their votes can control the company do not the less control it because they may themselves be amenable to some external control. Theirs is the control, though in the exercise of it they may be guilty of some breach of obligation whether of conscience or of law. It is impossible (an impossibility long recognized in company law) to enter into an investigation whether the registered holder of a share is to any and what extent the beneficial owner. A clean cut there must be. It is for this reason that, while respectfully concurring in every other line of the judgment of Lord Greene, M.R, I would reserve further consideration of that part of it which deals with the case of the so-called bare trustee. His case is not yet before your Lordships and perhaps never will be. If and when it is, the validity of the distinction made by Lord Greene, M.R, will have to be considered and I should myself require a more satisfactory explanation than has yet been given of a term which, though it has statutory sanction, has never, I believe, received statutory definition.

These expressions would cause me greater hesitation in reaching my conclusion were it not for the difference between the question which required determination in the *Bibby* case and that presented here. Here the question is: Did Allied control Career? If it did that is the end of the matter and as I see it, it matters not whether its control exists by virtue of its ownership of shares in its own name or by virtue of its ownership of shares in the name of its nominee or by a combination of the two. In the *Bibby* case the question was: Did the directors of the company have a controlling interest therein? The directors had the necessary shares and the necessary votes and the answer was accordingly in the affirmative. But there was no question asking: "Did beneficiaries of a trust 'control' or 'have a controlling interest' in the company?" or "Did directors beneficially entitled to shares held by nominees 'control' or 'have a controlling interest' in the company?" It seems to me therefore not to be inconsistent with the judgment in the *Bibby* case that a person beneficially entitled to all the shares of a company might be said to "control" it or to

"have a controlling interest" in it even though all the shares were held in the names of nominees who, if they were the directors, might also be held to "control" or to "have a controlling interest" for the purposes of the provisions considered in the *Bibby* case[1].

A somewhat similar point was put thus in *I.R.C. v. Silverts, Ltd.*[2] by Evershed, M.R., at page 709 in the course of comparing the *Bibby* case with that of *British American Tobacco Co. Ltd. v. I.R.C.*[3].

> It is, no doubt, true to say that their Lordships in the *Bibby* case had not before them the special case of a trust with custodian and managing trustees, but we see no distinction in principle between that case and the case (say) of an ordinary settlement of shares containing a stipulation that the trustees (as registered holders of the settled shares) should at all times vote in accordance with the directions of the tenant for life. A stipulation of that kind clearly falls to be disregarded under the *Bibby* decision, and the statutory control accorded to the managing trustees over their custodian trustee is equally *res inter alios* so far as the company is concerned.
>
> In our opinion, this result involves no conflict with the *British American Tobacco* case Although (as already stated) the formula "controlling interest" ought to be treated as being used in the same sense in the Acts of 1937 and 1939, namely, in the ordinary sense of the English language, yet (as observed by Romer J.) the questions posed in the *British American Tobacco* case and in the *Bibby* case were different. In neither case was the question the general one: "Who controls the company?" In the *British American Tobacco* case the question was whether (in the ordinary and proper sense of the words) company A held a controlling interest in company C, though the control was exercised, not directly but indirectly through the agency of company B. If the question were raised under some other taxing provision: "Has company B a controlling interest in Company C?" an affirmative answer to that question might be given consistently with the affirmative answer to the first question in the *British American Tobacco* case. So, in the *Bibby* case and in the present case, the question: "Have the directors a controlling interest in the company?" falls to be answered, aye or no, without regard to the possible question (if asked) whether some other person or body has (indirectly) a controlling interest in the same company.

Moreover the statement of Lord Simonds in the *Bibby* case that "Those who by their votes can control the company do not the less control it because they may themselves be amenable to some external control" appears to me to imply that a person, to whose external control a shareholder who can control a company is amenable, is himself in

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[1] Compare Cameron J, in *Vancouver Towing Co. Ltd. v. M.N.R.* [1946] Ex. C.R. 623 at 631.

[2] [1951] 1 All E R 703.

[3] [1943] 1 All E R. 13.

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control of the company, as well. The only difference between the control of such a person and that of the nominal shareholder appears to me to be that the shareholder has the right to control by exercising the voting rights attaching to the shares while the person to whom he is amenable has the right to control by externally controlling the exercise by the shareholder of the voting rights attaching to the shares held in his name. The present case accordingly appears to me to resemble the *British American* case more closely than the *Bibby* and *Silverts* cases and to be distinguishable from them.

This view may not be entirely consistent with the view of the scope of the *British American* case later expressed by the Court of Appeal in *S. Berendsen Ltd. v. C.I.R.*[1] but it seems to me to be in harmony with the view of the Supreme Court of Canada in *M.N.R. v. Sheldon's Engineering Limited*[2]. In that case the question was whether at a particular time Sheldon and Egoff controlled a company. They held proxies from McKay and Baird who were the registered owners of a majority of the shares which they held as nominees of their employer, the Royal Bank of Canada. In this Court[3] Potter J., said at page 519 :

> No authorities were cited by either side relative to the legal effect of control of a meeting of a company by proxies, and the weight of authority is that it is the total of the voting power or shares in the hands of those persons who own the shares that gives control.
>
> A company which holds shares in another company must vote at meetings of such other company by the use of proxies. Nevertheless, on the authorities, particularly the statement of the law by Viscount Simon, L.C., in *British American Tobacco Company v. Inland Revenue Commissioners* it is the holding of the majority of the shares by which one company controls another, and it was not suggested that, because the company holding the majority of shares in another named proxies to vote them, the company was controlled by the proxy holders.
>
> I therefore hold that neither W. D. Sheldon, Jr., George Murray Egoff, Harold William Mogg, nor William Clark Caldwell was a person who controlled directly or indirectly the old company at the time approval was given to the agreement of July 4, 1949, and its execution authorized on behalf of the old company.

In the Supreme Court, however, Locke J., who delivered the unanimous opinion of the Court appears to have gone

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[1] [1958] Ch. 1. See also the remarks of Viscount Simonds in *Barclays Bank Ltd. v. I R.C.* [1960] 2 All E R. 817 at 821.

[2] [1955] S.C.R. 637.

[3] [1954] Ex. C.R. 507.

further and to have held that control was in the Royal Bank of Canada when he said at page 644:

> W. D Sheldon, Jr. alone, did not, nor did he, together with his three associates Egoff, Caldwell and Mogg, control the old company at the time on July 4, 1949, when the resolutions and by-laws authorizing the sale to the new company were adopted by the directors and subsequently confirmed by the shareholders. I cannot accept the contention advanced on behalf of the Minister that, by reason of s. 73 of the *Companies Act* (R S O. 1937, c. 251), Sheldon was entitled to vote upon the shares standing on the share register of the company in the names of McKay and Baird. That section, in my opinion, has no application to a case in which, in addition to the instrument of hypothecation, an actual transfer of the shares to the creditor has been made. It would require an express provision in the *Companies Act* to authorize any person other than a shareholder or a proxy to vote at meetings of the company.
>
> At the time these steps were taken by the old company, *it was completely controlled by the bank.*

(Italics added).

And at page 645:

> While the arrangements which were carried into effect at the meetings of the two companies on July 4 were made in advance and, no doubt, included settling the consideration to be paid for the depreciable assets, *it was the bank and not Sheldon, Jr., either alone, or together with his associates, that was in command of the old company after June 21.*

(Italics added).

This view appears to coincide with that expressed by Denning L.J., in *Barclays Bank Ltd. v. I.R.C.*[1] when he said at page 832:

> A man has control of a company not only when he has the majority voting power by means of shares in his own name; but also when he has it by means of shares in the name of a nominee; and also when he has it by means of some shares in his own name and other in the name of a nominee

The views of Denning L.J., on this point differed from those of the majority but the views of the latter are in my opinion inapplicable in the present situation since under the English statute there under consideration the question was posed from the point of view of the taxpayer company. As already indicated I do not think this is the correct approach in determining control for the purpose of ascertaining whether companies are "associated" for the purposes of section 39 of the *Income Tax Act*.

A further case relied on by the appellants was *Rubenstein v. M.N.R.*[2] but as I was informed that that case is

[1] [1960] 2 All E.R. 817.

[2] (1965) 39 Tax A.B.C. 7.

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presently under appeal to this Court I think it better to refrain from commenting on it beyond observing that it did not arise under section 39.

For the reasons which I have stated I am of the opinion that Allied Business Supervisions Limited was in a position to control all the voting power of Career Girl Store Limited and that the question posed by the issue as stated should be answered in the affirmative.

The second issue, numbered 1(*b*) in the order is:

> Within the meaning of the *Income Tax Act* R.S C. 1952, c. 148, as amended,
>
> 1(*b*) during the period commencing on February 1, 1960 and ending on December 31, 1962 did Aaron's (Saskatoon) Ltd. or Aaron's (Saskatoon) Ltd. and Morgans Ltd. together control Aaron's Renfrew Furs Ltd ?

Throughout the period mentioned there were 6,250 issued shares of Aaron's Renfrew Furs Limited (hereafter referred to as Renfrew) 750 of which were owned beneficially by and registered in the name of Morgans Limited and 5,499 of which were beneficially owned by and registered in the name of Aaron's (Saskatoon) Limited (hereafter referred to as Saskatoon). The remaining share as well was beneficially owned by Saskatoon and during the period was successively registered in the names of Peter A. Mahon, Roy N. Hall and Joseph Tomney in each case as nominee of Saskatoon. The articles of association of Renfrew were similar to those of Career Girl Store Limited and also contained as number 6 a provision requiring unanimous consent of all members for any decision taken in a general meeting.

In respect of this issue counsel put forward the same arguments as had previously been advanced in respect of the first issue and in particular those with respect to the validity of the requirement for unanimous consent and to the right to control through the voting power of the nominee shareholder.

For the reasons already stated with respect to the first issue I am of the opinion that at all material times Morgans controlled 750 votes and Saskatoon controlled 5,500 votes, that when combined the votes of these two companies amounted to complete control of Renfrew and that the question posed by the issue should be answered in the affirmative.

As the next two issues, numbered 1(*c*) and 1(*d*) in the order, are concerned with the control of the same company and raise the same problem they may be considered together. These issues are:

1. Within the meaning of the *Income Tax Act* R.S.C. 1952, c. 148, as amended,

(*c*) during the period commencing on February 1, 1960 and ending on July 14, 1961 did Isidore Aaron and Alexander Aaron together control Aaron's Ladies Apparel Limited.

(*d*) during the period commencing on July 14, 1961 and ending on December 31, 1962 did Aaron's (Prince Albert) Limited control Aaron's Ladies Apparel Limited?

The issued share capital of Aaron's Ladies Apparel Limited (hereafter referred to as Ladies Apparel) consisted of 1,008 common shares of which during the period mentioned in 1(*c*) 349 shares were held by Isidore Aaron, 349 by Alexander Aaron and 310 by Margaret Pratt each being the registered and beneficial owner of the shares so held. Isidore Aaron and Alexander Aaron are brothers. In the period mentioned in 1(*d*) the 698 shares formerly held by Isidore Aaron and Alexander Aaron were beneficially owned by and registered in the name of Aaron's (Prince Albert) Limited (hereafter referred to as Prince Albert).

The articles of association of Ladies Apparel provided:

6. That all motions put before any meeting of shareholders or directors of the Company shall require the unanimous consent of all its members, and Paragraphs 46, 76 and 82 of the said Table "A" shall be amended accordingly.

and the sole question for determination on these issues is whether this article is valid and thus requires, as it purports to do, that unanimous consent of all members of the company be obtained for any decision to be taken by the shareholders. If so, it is plain that the questions must be answered in the negative for at all material times there were 310 shares held by Margaret Pratt the votes of which were not controlled by Isidore Aaron or Alexander Aaron or by Prince Albert. On the other hand, if, as contended on behalf of the Minister, article 6 is invalid, it is equally clear that both questions must be answered in the affirmative.

Briefly, the Minister's contention is that article 6 is repugnant to section 14(*b*) of the *Interpretation Act*[1] of

[1] R.S.S., 1953, c. 1.

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the Province of Saskatchewan, and that it is also inconsistent with a number of sections of the *Companies Act*[1] which specifically authorize or require certain things to be done by "special resolution" an expression which is defined in the statute as being a resolution which *inter alia* is passed by a majority of not less than three-fourths of the members.

Section 14(*b*) of the *Interpretation Act* provides:

14. In an Act words making a number of persons a corporation shall:

(*b*) vest in a majority of the members of the corporation the power to bind the others by their acts;

Similar wording is also to be found in the *Interpretation Act*[2] of Canada. According to Wegenast on Canadian Companies, page 218, this provision is probably intended merely to embody the common law rule.

By section 3 of the Saskatchewan statute it is enacted that:

3. (1) This Act extends and applies to every Act and every regulation now or hereafter enacted or made, except in so far as any provision of this Act:

(*a*) is inconsistent with the intent or object of the Act or regulation;

(*b*) would give to any word, expression or clause of the Act or regulation an interpretation inconsistent with the context thereof or the interpretation section of the Act or regulation or;

(*c*) is by the Act or regulation declared not applicable thereto.

In view of this provision I do not think that section 14(*b*) was intended to override the right, which section 18[3] of the *Companies Act* appears to give to persons seeking incorporation of a company, to adopt such regulations for the government of their proposed company as they think fit. The fact that the rule to which Wegenast refers as the "common law rule" is enacted in section 14(1) will thus not serve to render article 6 invalid if it would not otherwise be invalid.

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[1] R.S.S., 1953, c. 124. [2] R.S.C., 1952, c. 158, s. 30.

[3] 18. (1) There may be registered with the memorandum articles of association prescribing regulations for the company, and such articles may adopt all or any of the regulations contained in table A in the first schedule.

(2) If the articles are not registered or, if articles are registered, in so far as the articles do not exclude or modify the regulations in that table, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered articles.

On the general question whether such an article is valid or not there is a surprising dearth of authority and I was not referred to any case, nor have I been able to find any, in which the point has been decided. On principle, however, I am unable to see any good reason why it should be invalid. By section 24(1) of the *Companies Act* it is provided that:

> 24 (1) The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they had been respectively signed and sealed by each member, and contained covenants, on the part of each member, his heirs, executors and administrators, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act.

If the incorporators of a company or the members of a company wish to have the company's affairs conducted only to the extent that all members agree, and therefore take steps to so provide in the articles of the company the article so providing becomes a contract between them and the company and there appears to me to be no reason why such a contract should not be valid and enforceable.

The nature of articles of association was described by Duff J. (as he then was) as follows in *Theatre Amusement Co. v. Stone*[1].

> The articles of association are binding upon the company, the directors and the shareholders, until changed in accordance with the law. So long as they remain in force, any shareholder is entitled, unless he is estopped from taking that position by some conduct of his own, to insist upon the articles being observed by the company, and the directors of the company. This right he cannot be deprived of by the action of any majority In truth, the articles of association constitute a contract between the company and the shareholders which every shareholder is entitled to insist upon being carried out.

That an article can restrict the right of a mere majority to bind the minority by an ordinary resolution appears from *Quin & Axtens Ltd. et al v. Salmon*[2]. In that case the articles of a company provided that the business of the company was to be managed by the directors who might exercise all the powers of the company subject to such regulations as might be prescribed by the company in general meeting. Another article provided that no resolution of the directors having for its object the acquisition or letting of premises should be valid if either of two particular directors should dissent. A resolution of the kind mentioned was passed by the directors with one of the two particular

[1] (1915) 50 S C.R. 32 at p. 36 [2] [1909] A C. 442

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directors dissenting but it was subsequently approved by a majority of the shareholders in general meeting. The House of Lords held the resolution ineffective and void on the ground that so long as the article remained unrepealed it governed the situation and the vote of a mere majority of the shareholders in general meeting could not override it.

The case of *Edwards v. Halliwell*[1] appears to me to be to the same effect.

The point also seems to have been taken for granted in *North-West Transportation Company, Limited v. Beatty*[2] where Sir Richard Baggallay in delivering the judgment of the Privy Council said:

> The general principles applicable to cases of this kind are well established. *Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated,* the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority,...

(Italics added).

On the other hand I have not found in the cases which I have examined any statement which appears to proceed on the assumption that it is not open to incorporators of a company to provide by the articles that something more than a mere majority should be required in order to bind the minority or that unanimous consent of the members should be required for any decision to be taken by the company.

On the whole therefore I am of the opinion that article 6 is not repugnant to section 14(*b*) of the *Interpretation Act* and that there is nothing in its nature or substance which renders it invalid as a contract between the shareholders and the company or as an article of the company. Nor do I think such an article is inconsistent with the various provisions of the *Companies Act* which provide what may and what must be done by special resolution since the definition of the majority required to pass a special resolution merely prescribes minimum requirements for such a resolution. I shall therefore hold that article 6 is valid and it follows from this that the question posed by the two issues numbered 1(*c*) and 1(*d*) must be answered in the negative.

In the remaining three particular issues defined in the order the question of control turns on whether the person

[1] [1950] 2 All E.R. 1064. [2] (1887) 12 App. Cas. 589 at p. 593.

named in the issue, in addition to the votes to which he was entitled as shareholder, had the right to control the company by the exercise of a casting vote in the case of an equality of the other votes. In each of the three companies the votes of a majority were, under the articles, sufficient to carry an ordinary resolution of shareholders and in each case the articles provided for a casting vote exercisable by the chairman of the meeting in the case of a tie. While this is a point on which opinion may differ, offhand I should have doubted that control arising in that way, if it can be considered to be control at all, was within the meaning of the word "controlled" in section 39(4) of the *Income Tax Act*[1] since the situation seems not to be one of the kind at which I think the provision is aimed and since the casting vote, unlike the votes arising from shareholding, which are exercisable without responsibility to the company or to other shareholders, is, in my opinion, not the property of the holder, but is an adjunct of an office. However, in view of the conclusion which I have reached on the facts respecting the three issues it is not necessary for me to reach a concluded opinion on the question.

The first of these issues, numbered 2(*a*) in the order, is:

Within the meaning of the *Income Tax Act* R.S.C. 1952, c. 148, as amended,

2(*a*) during the period commencing on February 1, 1960 and ending on December 31, 1962 did Alexander Aaron control Allied Business Supervisions Limited?

Throughout the period mentioned Alexander Aaron owned 50 per cent of the voting shares. The remaining shares were owned by Joseph Tomney and Roy N. Hall, until December 20, 1962, when Tomney became the owner of the shares formerly held by Hall. Until December 20, 1960, when Roy N. Hall resigned, all three were directors. The articles provided:

46 In the case of an equality of votes, whether on a show of hands or on a poll, the chairman of the meeting at which the show of hands takes place or at which the poll is demanded, shall be entitled to a second or casting vote

[1] *Vide* Jackett P., in *Buckerfield's Ltd. v. M.N.R.* [1965] 1 Ex. C.R. 299 at 303: "I am of the view, however, that, in section 39 of the *Income* Tax Act, the word 'controlled' contemplates the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the Board of Directors".

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48 On a show of hands every member present in person shall have one vote. On a poll every member shall have one vote for each share of which he is a holder.

41. The chairman, if any, of the board of directors shall preside as chairman at every general meeting of the company.

42. If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting or is unwilling to act as chairman, the members present shall choose some one of their number to be chairman.

To determine whether Alexander Aaron had the right to a casting vote at meetings of shareholders it is therefore necessary to ascertain if he was the chairman of the board of directors of the company. Article 79 provided:

79. The directors may elect a chairman of their meetings and determine the period for which he is to hold office; but, if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the directors present may choose one of their number to be chairman of the meeting

The minute book of the company shows that at a general meeting of shareholders held on December 17, 1959, Alexander Aaron and Joseph Tomney were elected directors and that it was resolved that directors should hold office for an indefinite period until their term of office should be changed by a subsequent shareholders meeting. The minutes recited that "Alexander Aaron acted as chairman". At a further meeting of the directors held later on the same day Alexander Aaron was elected as president and Joseph Tomney was elected as secretary. The president and secretary were then authorized to sign certain documents on behalf of the company. The minutes recite that "the meeting was called to order with Alexander Aaron as chairman". Between that date and December 31, 1962, the minute book records minutes of four meetings of the directors and five meetings of the shareholders in each case either reciting that "the meeting was called to order with Alexander Aaron as chairman" or that "Alexander Aaron acted as chairman". In the minutes of a further meeting of the directors there is no mention of who, if anyone, acted as chairman. Nowhere in the recorded minutes is there record of an election of Alexander Aaron as chairman for any term or of any determination of the period for which a chairman was to hold office. Accordingly while it is clear that Alexander Aaron was in fact chairman during the several meet-

ings recorded in the minutes there is no record of his being elected to the office of chairman of the board of directors for any defined term.

Counsel for the Minister submitted that while there is no minute showing the election of Alexander Aaron as chairman of the board of directors his election to that office should be inferred from the fact that on each of the occasions mentioned he appears to have acted as chairman and that the fact that there is no minute of such an election is not significant. While the minutes may be taken as binding the particular company in respect of the matters recited in them it is worthy of note that in each case these minutes are signed by all the shareholders and directors concerned and having regard to the not uncommon practice by which minutes are signed reciting meetings which are never held I do not think that any inference can safely be drawn from the recitals contained in them. In my view there is no basis for reaching the conclusion that Alexander Aaron was ever elected chairman of the board of directors otherwise than for particular meetings or that he was entitled, by virtue of any such election, to be chairman of any general meeting of the shareholders.

It was also submitted that Alexander Aaron was chairman of the board of directors and entitled to preside at shareholders meetings by virtue of his having been appointed president of the company for an indefinite term and in support of this position reference was made to the remarks of Masten J.A., in *Fremont Canning Co. et al v. Wall & Fine Foods of Canada Limited*[1]. The office of president, however, is nowhere mentioned in the Saskatchewan statute or in the articles of the company and in this respect the Dominion, Ontario and Quebec companies legislation differs from that in provinces having company legislation similar to that in England[2]. There being no definition in the articles of Allied of the duties or powers of an officer to be known as the president, it must I think be taken that the only authority conferred on him was that contained in the minutes of the meeting at which he was appointed,

[1] [1941] 3 D L R. 96 at 107.

[2] *Vide* Rand J, in *Ghimpelman et al v. Bercovici et al* [1957] S.C.R. 128 at 135.

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consisting of authority to sign certain particular documents on behalf of the company, and I can see no basis upon which it can be said that he was, by his appointment as president, constituted the chairman of the board of directors for an indefinite period. In my opinion, therefore, it cannot be said that Alexander Aaron was entitled to be the chairman at any meeting of shareholders that might have been called and to exercise a casting vote in the case of a tie. Regardless, therefore, of whether the right to such a casting vote could be considered as giving him control of the company, I am of the opinion that Alexander Aaron did not control Allied during the period mentioned in the issue as stated and that the question posed by the issue must be answered in the negative.

The next issue, numbered 2(*b*) in the order, is:

> Within the meaning of the *Income Tax Act* R.S.C. 1952, c. 148, as amended,
>
> 2(*b*) during the period commencing on February 1, 1960 and ending on December 31, 1962 did Anne Aaron control Miller Building Limited?

During the period mentioned there were 150 issued shares of Miller Building Limited, 75 of which were held by Wilma, Georgina, Edward and Frank Rawlinson and 74 of which were held by Anne Aaron. The remaining share was also owned by Anne Aaron but was registered in the name of her husband, Alexander Aaron, who was her nominee and held the share under the terms of a trust agreement by which he bound himself to vote according to her direction. The articles of association of this company appear to have consisted of Table A without alteration and contained provisions similar to those already cited in describing the articles of Allied Business Supervisions Limited. Again there is no record of anyone having been appointed chairman of the board of directors, though in what purport to be the minutes of annual meetings of the shareholders held in 1959, 1960, 1961 and 1962 Alexander Aaron is named as having been chairman of the meeting. These minutes also record that Alexander Aaron, E. A. Rawlinson and F. F. Rawlinson were annually elected to be the directors of the company. It is also recorded in what purport to be minutes of meetings of the directors held annually on the same days as the annual meetings of shareholders that A. A. Aaron

was each year elected president but there is no record of anyone having acted as chairman of such meetings. There being three directors Alexander Aaron clearly was not in a position to make himself chairman of the directors.

For the reasons already discussed, I am of the opinion that it cannot be said that Anne Aaron or Alexander Aaron was entitled to be chairman of meetings of shareholders and thus to a casting vote at such meetings. Moreover, while Alexander Aaron may have been bound to cast the vote to which he was entitled as a shareholder in accordance with such directions as Anne Aaron might give him, it is I think apparent that even when he was acting as chairman, (if indeed there ever was a meeting), and even if he was entitled to be the chairman of shareholders meetings and thus entitled to a casting vote in case of a tie he was not bound to cast that vote in accordance with directions given him by Anne Aaron. Accordingly I am of the opinion that it cannot be said that Anne Aaron controlled Miller Business Limited during the period mentioned in the issue as stated and that the question posed by the issue must be answered in the negative.

The remaining particular issue, numbered 2(*c*) in the order, is:

> Within the meaning of the *Income Tax Act* R.S.C. 1952, c. 148, as amended,
>
> 2(*c*) during the period commencing on February 1, 1960 and ending on December 11, 1961 did Alexander Aaron and Isidore Aaron together control Aaron Building Limited?

During the period mentioned there were 2,000 issued shares of Aaron Building Limited, 1,000 of which were held by Abraham Isaac Katz, 500 by Alexander Aaron and 500 by Isidore Aaron. The articles of association consisted of Table A with certain amendments and contained provisions similar to those already cited in describing the articles of Allied Business Supervisions Limited. Again, there is no record of anyone having been appointed chairman of the board of directors. In what purport to be the minutes of a general meeting of shareholders held on December 28, 1959 it is recited that Alex Aaron acted as chairman. In what purport to be minutes of a meeting of provisional directors held earlier the same day it is also recited that he acted as chairman and in minutes of a further meeting of the direc-

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tors held still later on the same day it is recited that the meeting was called to order with Alex Aaron as chairman, and that Isidore Aaron was elected as president. There is no record of minutes of any further meeting of shareholders or directors until December 11, 1961, when in minutes of a meeting of directors it is again recited that Alex Aaron acted as chairman. For reasons similar to those already stated with respect to Allied Business Supervisions Limited I am of the opinion that it cannot be said that Alex Aaron or Isidore Aaron was entitled to be chairman of meetings of shareholders and thus to a casting vote in case of a tie and therefore that it cannot be said that Alexander Aaron and Isidore Aaron together controlled Aaron Building Limited during the period mentioned in the issue as stated. It follows that the question posed by the issue must be answered in the negative.

This brings me to the more general issue, numbered 3 in the order to be resolved on the basis of the answers to the particular issues and the admissions made by the parties. It reads:

> 3. Are any one or more of the Appellants or Aaron Investments Limited associated with each other during the 1961 and 1962 taxation years and if so, which of the Appellants are associated with each other or with Aaron Investments Limited during each of the said taxation years.

This poses a complicated question but it was indicated by counsel in the course of argument that the results to follow from the answers to the particular issues on the alleged associations between the companies would not be contentious once the answers were known. As at present advised the position appears to me to be as follows.

1. In view of the answer to issue 1(*a*), that Allied Business Supervisions controlled Career Girl Store Limited from February 1, 1960 to December 31, 1962, these two corporations were "associated" by virtue of section 39(2)(*a*) during both the 1961 and 1962 taxation years.

2. It is admitted that Isidore Aaron controlled both Aaron's (Saskatoon) Limited and Morgans Limited in both the 1961 and 1962 taxation years and that they were associated companies and on the basis of the answer which I have given to issue 1(*b*), that these two companies together controlled Aaron's Renfrew Furs Limited from February 1,

1960, to December 31, 1962, counsel for the appellants agreed that these three corporations were "associated" with each other during both taxation years.

3. In view of the answers to:

(*a*) issue 1(*c*), that Aaron's Ladies Apparel Limited was not controlled by Isidore Aaron and Alexander Aaron together from February 1, 1960 to July 14, 1961, and to:

(*b*) issue 1(*d*), that Aaron's Ladies Apparel Limited was not controlled by Aaron's (Prince Albert) Limited, (which was admittedly controlled by Alexander Aaron), during the period from July 14, 1962 to December 31, 1962, there is no basis for holding Aaron's Ladies Apparel Limited associated with any other company during the 1961 or 1962 taxation years.

4. In view of the answer to issue 2(*a*), that Allied Business Supervisions Limited was not controlled by Alexander Aaron during the period from February 1, 1960 to December 31, 1962, there is no basis for holding Allied to have been associated with any company other than Career Girl Store Limited during the 1961 and 1962 taxation years.

5. Miller Building Limited and Miller Men's Wear Limited were admittedly associated companies. In view of the answer to issue 2(*b*), that during the period from February 1, 1960 to December 31, 1962, Miller Building Limited was not controlled by Anne Aaron there is no basis for holding Miller Building Limited or Miller Men's Wear Limited associated with any of the other companies during the 1961 and 1962 taxation years. Even if the answer had been in the affirmative I should have been unable to see how the assumed association with any company controlled by Alexander Aaron could be supported under section 39(4)(*c*) since Anne Aaron "owned" no share in any company controlled by Alexander Aaron and Alexander Aaron "owned" no share in Miller Building Limited.

6. In view of the answer to issue 2(*c*), that during the period from February 1, 1960 to December 11, 1961, Aaron Building Limited was not controlled by Alexander Aaron and Isidore Aaron together, there is no basis for holding that company to have been associated with any of the other companies during the 1961 taxation year.

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If these conclusions are not in accord with the views of counsel or are insufficient to dispose of the appeals the matter, as well as the matter of costs, may be spoken to when application is made to settle the judgments. The judgments will not be pronounced in the meantime. Subject to this the appeals will be allowed with costs and the re-assessments will be referred back to the Minister for reconsideration, re-allocation pursuant to subsections 3 and 3(*a*) of section 39 of the *Income Tax Act* where necessary, and re-assessment on the basis of the conclusions in the next preceding six numbered paragraphs.

Toronto 1966 June 13, 14 Ottawa June 24

BETWEEN:

BARBARA B. DeFREES AND BETTS MACHINE COMPANY ..... APPELLANTS;

AND

DOMINION AUTO ACCESSORIES LIMITED ..... RESPONDENT.

Patents—Compulsory licence—Appeal from grant of—Component parts imported—Application for compulsory licence—Subsequent commencement of manufacture in Canada—Whether abuse of rights—Amount of royalty—Commissioner's decision—Appeal from—Patent Act, s. 67 (2)(a) and (b), s. 68.

Appellant company of Pennsylvania, as licensee of the other appellant, owner of U.S. and Canadian patents relating to marker lights for highway trucks, marketed the product in the U.S.A. from 1951 and also in a relatively small way in Canada, employing a distributor located in Montreal. Until 1963 appellant company shipped component parts for assembly in Canada but in 1963 (which was seven or eight years after issue of the Canadian patent) it arranged for manufacture of the components in Canada. Respondent company produced and sold an infringing product in Canada from 1953. In 1960 appellants brought action for infringement against respondent company and obtained judgment in their favour in 1963 and this was affirmed by the Supreme Court of Canada in 1965. In 1962 respondent applied for a compulsory licence of the patent under s. 68 of the *Patent Act* and the Commissioner of Patents granted a compulsory licence at a 3½% royalty in 1965 on the grounds described in s. 67(2)(*a*) and (*b*). Appellants appealed.

Held, it could not be concluded that the Commissioner of Patents acting judicially could not have come to the conclusion he did on the facts before him, and the appeal must therefore be dismissed.

(1) Respondent's own infringing activities could not be held to constitute a working of the invention in Canada on a commercial scale within the contemplation of s. 67(2).

(2) The commencement of manufacture of the invention by appellant in Canada after respondent had applied for a compulsory licence was colourable and not such a working of the invention in Canada as is contemplated by s. 67(2).

(3) On an application for a compulsory licence the activities alleged to constitute the working of the invention both at the time of the application and up to the time it is heard should be considered.

(4) The Commissioner's determination of the royalty at 3½% was supported by the evidence adduced before the Commissioner.

Gordon Johnson Co. et al v. Callwood (1960) 34 C.P.R. 73; *Aktiebolaget Astra. Apotekarnes Kemiska Fabriker v. Novocol Chemical Mfg. Co. of Canada Ltd.* (1966) 44 C.P.R. 15; *Hoffman-LaRoche Ltd. v. Bell-Craig Pharmaceutical Division of L. D. Craig Ltd.* (1966) 32 Fox Patent Cases 106; *Celotex Corporation et al v. Donnacona Paper Co. Ltd.* [1939] Ex. C.R. 128; referred to.

APPEAL from decision of Commissioner of Patents.

David M. Rogers and *R. J. Parr* for appellants.

Donald F. Sim, Q.C. for respondent.

GIBSON J.:—This is an appeal from a decision of the Commissioner of Patents dated February 16, 1965 granting a compulsory licence to the respondent, Dominion Auto Accessories Limited, under Canadian Patent 522,093.

The patent is owned by the appellant, Barbara B. DeFrees of Warren, Pennsylvania, U.S.A., and the appellant, Betts Machine Company of Warren, Pennsylvania, U.S.A., is a voluntary licensee.

The patent relates to marker lights sometimes called clearance lights which are used affixed to the edges and corners of transports, trailers and other like vehicles. These lights are usually attached on the back but also may be attached on the front and sides of such vehicles. The relevant parts of such marker lights to which the patent relates consist of: (1) the lenses, (2) the housing, and (3) the "O" ring.

The appellant, Betts Machine Company, markets a particular marker lamp embodying the invention of this patent under their catalogue number B-50 under the trade name of "snap-seals". The respondent, Dominion Auto Accessories Limited, marketed for some years as an infringer of the said patent and now under the compulsory licence granted to it, which is the subject of its appeal, under its catalogue number VP-235.

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The compulsory licence issued by the Commissioner of Patents is dated September 27, 1965.

Compulsory licences may be issued by the Commissioner of Patents at any time after the expiration of three years from the date of the grant of a patent if he is satisfied that there has been a case of abuse of the exclusive rights of the patent within the meaning of s. 67 of the Act. The abuse with which we are concerned in this appeal is prescribed in s. 67(2)(*a*) and (*b*)[1] of the Act. Section 2(*j*)[2] of the Act defines what is meant in s. 67 by the words "work on a commercial scale".

If the Commissioner of Patents is satisfied that a case of abuse of the exclusive rights under a patent has been established, he may exercise any of his powers as he deems expedient in the circumstances as are prescribed in s. 68 of the Act. If in exercising his powers, he decides to award a compulsory licence and orders the granting of such a licence, in settling the terms of it, the Commissioner must be

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[1] 67. . . .

(2) The exclusive rights under a patent shall be deemed to have been abused in any of the following circumstances:

(*a*) if the patented invention (being one capable of being worked within Canada) is not being worked within Canada on a commercial scale, and no satisfactory reason can be given for such non-working, but if an application is presented to the Commissioner on this ground, and the Commissioner is of opinion that the time that has elapsed since the grant of the patent has by reason of the nature of the invention or for any other cause been insufficient to enable the invention to be worked within Canada on a commercial scale, the Commissioner may make an order adjourning the application for such period as will in his opinion be sufficient for that purpose;

(*b*) if the working of the invention within Canada on a commercial scale is being prevented or hindered by the importation from abroad of the patented article by the patentee or persons claiming under him, or by persons directly or indirectly purchasing from him, or by other persons against whom the patentee is not taking or has not taken any proceedings for infringement;

. . .

[2] 2. . . .

(*j*) "work on a commercial scale" means the manufacture of the article or the carrying on of the process described and claimed in a specification for a patent, in or by means of a definite and substantial establishment or organization and on a scale that is adequate and reasonable under the circumstances.

guided as far as possible by the considerations set out in s. 68(*a*)(i), (ii) and (iii)[1] of the Act.

The formal grounds of appeal of the appellant are as follows:

1. The Commissioner of Patents erred in granting a licence because:

(*a*) manufacturing of the patented article in Canada had been commenced prior to the date of the hearing. The patentee had so far as possible worked the patented invention within Canada on a commercial scale, and under the circumstances there was no abuse.

(*b*) the patented invention was being worked in Canada on a commercial scale by the respondent herein since the date of the patent, and the Commissioner of Patents should have taken the working by the respondent into account

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[1] 68. . . .

(*a*) he may order the grant to the applicant of a licence on such terms as the Commissioner may think expedient, including a term precluding the licensee from importing into Canada any goods the importation of which, if made by persons other than the patentee or persons claiming under him would be an infringement of the patent, and in such case the patentee and all licensees for the time being shall be deemed to have mutually convenanted against such importation; a licensee under this paragraph is entitled to call upon the patentee to take proceedings to prevent infringement of the patent, and if the patentee refuses, or neglects to do so within two months after being so called upon, the licensee may institute proceedings for infringement in his own name as though he were the patentee, making the patentee a defendant; a patentee so added as defendant is not liable for any costs unless he enters an appearance and takes part in the proceedings; service on the patentee may be effected by leaving the writ at his address or at the address of his representative for service as appearing in the records of the Patent Office; in settling the terms of a licence under this paragraph the Commissioner shall be guided as far as may be by the following considerations:

(i) he shall, on the one hand, endeavour to secure the widest possible user of the invention in Canada consistent with the patentee deriving a reasonable advantage from his patent rights,

(ii) he shall, on the other hand, endeavour to secure to the patentee the maximum advantage consistent with the invention being worked by the licensee at a reasonable profit in Canada, and

(iii) he shall also endeavour to secure equality of advantage among the several licensees, and for this purpose may, on due cause being shown, reduce the royalties or other payments accruing to the patentee under any licence previously granted, and in considering the question of equality of advantage, the Commissioner shall take into account any work done or outlay incurred by any previous licensee with a view to testing the commercial value of the invention or to securing the working thereof on a commercial scale in Canada;

. . .

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(*c*) the activities of the respondent since the date of the patent constitute a satisfactory reason for non-working by the patentee, and the Commissioner of Patents should have taken the activities of the respondent into account.

2. The Commissioner of Patents erred in fixing the royalty to be paid under the license because:

(*a*) the evidence before the Commissioner was inadequate to enable him fairly to fix the royalty;

(*b*) the 3½% royalty that was fixed is unreasonably low having regard to Section 68(*a*) of the Patent Act.

As mentioned, the subject patent was infringed by the respondent for some years by the marketing of its said marker lights, their catalogue number VP-235. An infringement and validity action concerning the same was tried in this Court and there was an appeal from the Judgment of this Court to the Supreme Court of Canada. In the result, it was held that this patent was valid. The application for a compulsory licence by the respondent was made at about the same time the action for infringement and validity was commenced, but the hearing before the Commissioner did not take place until after the decision of this Court in the infringement and validity action and before the decision of the Supreme Court of Canada on the appeal from the former decision.

In brief, the chronology of all these proceedings is as follows:

(1) The patent was applied for on November 9, 1951.

(2) The patent issued February 28, 1956.

(3) On May 4, 1960 the appellants instituted suit in the Exchequer Court of Canada against Dominion for infringement of the patent. Dominion contested validity and infringement of the patent.

(4) On May 18, 1962, Dominion filed application for a compulsory license.

(5) ...The infringement action was tried in October, 1962. At trial, Dominion admitted that its lamp model VP 235 infringed, and the only issue at trial was validity.

(6) On October 23, 1963, judgment issued in the infringement action, finding the patent valid and enjoining Dominion from further infringement.

(7) On December 13, 1963, Dominion filed a notice of appeal from the judgment of the Exchequer Court in the patent infringement action.

(8) On February 24, 1964 the hearing in the present compulsory license application took place, and the Commissioner by decision of February 16, 1965 granted a compulsory license to Dominion.

(9) Notwithstanding the grant of a license, Dominion continued to contest the validity of the patent and on March 17, 1965 the appeal in the infringement action was heard by the Supreme Court of Canada.

(10) On June 17, 1965 the Supreme Court of Canada dismissed the appeal, affirming the finding of the Exchequer Court that the patent was valid. ([1965] S C.R. 599).

The inventor of the invention described in this Canadian patent was Joseph H. DeFrees of Warren, Pennsylvania, U.S.A., who is the husband of the appellant, Barbara B. DeFrees, to whom he assigned his rights in this Canadian patent. He also, on September 7, 1951, filed an application in the United States for a patent for the same invention and subsequently a United States patent was issued to him which he in turn assigned to his wife, Barbara B. DeFrees. Barbara B. DeFrees voluntarily licensed the appellant, Betts Machine Company, under both the Canadian and the United States patents for this invention.

The appellant, Betts Machine Company, carries on a most extensive business in the United States and the product produced by this invention is only one part of its business; but it is the volume of sales of this product in the United States when compared with the sales of it made or caused to be made by it in Canada, in relation to all sales of the identical product by the respondent as an infringer of the patent that is relevant.

The appellant, Betts Machine Company, had as its distributor in Canada at all material times, Faucher & Fils Limited, whose head office is in Montreal, Quebec.

The history of the marketing of the product of this invention, both through the instrumentality of the appellant, Betts Machine Limited, and of the respondent, Dominion Auto Accessories Limited, briefly is as follows.

Betts Machine Limited began marketing in the United States the product of this invention shortly after the patent application was filed, namely, September 7, 1951.

In June, 1952, a representative of the respondent visited the plant in Warren, Pennsylvania, U.S.A., of Betts Machine Company and inspected the same and ordered from it 700 of the marker lamps made by it. This was the first and last purchase from Betts Machine Company by the respondent of its lamps.

Thereafter, the respondent copied the product of Betts Machine Company and from about October 1953 until the judgments of the Courts above referred to, continued to

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produce and sell in Canada their own marker lamp under their said catalogue number VP-235. These sales were quite substantial.

Until 1963, Betts Machine Company shipped from the United States three component parts of their marker lights which when assembled in Canada, were sold under their said catalogue number B-50, that is, (1) the lenses, (2) the "O" rings and (3) the housings, through their said distributor Faucher & Fils Limited in Montreal. This assembly was a relatively simple matter, cost very little compared with the total selling price of the product, and it was common ground that such assembly did not constitute "manufacture" of the marker lights in Canada within the meaning of s. 67 of the Act. The sales of the marker light by the appellant, Betts Machine Company, through its distributor Faucher & Fils Limited up to 1963 and also after that date and up to 1964 which was the last date there were figures of sales put in evidence, were relatively small, both in the total dollar volume and also in proportion to the dollar volume of sales by the respondent of its marker lights which infringed the said Canadian patent.

In 1963 pursuant to an agreement dated March 22, 1963 made between the appellant, Betts Machine Company, and its said distributor Faucher & Fils Limited, the three component parts of the marker lights commenced to be manufactured in Canada by Faucher & Fils Limited. The evidence adduced was that Betts Machine Company, since July 28, 1961 had been attempting to get Faucher & Fils Limited to manufacture these three component parts of its marker lights but the latter was apparently reluctant to do so.

Pursuant to this said agreement, however, Faucher & Fils Limited first manufactured the "O" rings in June, 1963, the lenses in August, 1963, and the housings by February, 1964.

This manufacture in Canada therefore was commenced 7 and 8 years after the issue of the patent.

It would seem a reasonable inference also that this decision to manufacture in Canada was inspired solely by the activities of the respondent and the proceedings taken by it, having in mind the power of the Commissioner of Patents under ss. 67 and 68 of the *Patent Act*.

The said licence agreement between the appellant, Betts Machine Company, and Faucher & Fils Limited was the subject of comment by the Commissioner of Patents in his decision on the application for a compulsory licence. I might add in supplement, that this agreement is curious in that, although it is called a licence, there is no provision in it for a fixed royalty payable. Instead the royalty payable is the differential in the purchase and sale price of Betts Machine Company for the parts that go to make up this marker light and it has absolute control over what the selling price of it will be from time to time to Faucher & Fils Limited. This has vital significance when read in the light of the evidence before the Commissioner given by Mr. J. Vaillancourt, Sales Manager of Faucher & Fils Limited, when he said that it was possible to do so and they did lower their selling price of their marker lights to the customers in Canada after the parts for the marker lights were obtained from manufacture in Canada and not from importation from the United States from the appellant, Betts Machine Company. The significance is that manufacture in Canada permitted a lower selling price of the patented product to the public in Canada, and so long as the respondent was a competitor in the field of some financial substance and of merchandising efficiency, the public in Canada did benefit from such lower prices. If the respondent was removed from competition, then the price paid for these marker lights in Canada would solely be in the discretion of the appellant, Betts Machine Company and it is a reasonable inference that such price to the public would increase.

At the hearing before the Commissioner of Patents, the appellants, in evidence and in argument, submitted that there was no abuse of the exclusive rights under this Canadian patent within the meaning of s. 67 of the Act and relied in the main for the same on the manufacturing of the respondent from 1952 of its infringing marker lights under their said catalogue number VP-235; and in the event that the Commissioner of Patents considered this application a case for the granting of a compulsory licence that the royalty fixed by him should not be any lower than the 10% royalty paid by Betts Machine Company to the patent owner Barbara B. DeFrees under the said voluntary

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licences, notwithstanding the fact that the original inventor Joseph H. DeFrees without other consideration devoted part of his time within the scope of his talents for Betts Machine Company to the promotion of the sales of these marker lights. (The inventor Joseph H. DeFrees was also the inventor of an invention, the product of which were certain valves in respect of which Betts Machine Company was a licensee also. The royalties from the valves were paid to Joseph H. DeFrees and as stated the royalties on the marker lights were paid to his wife Barbara B. DeFrees by arrangements among these parties which are not disclosed in total in the evidence but which are irrelevant to the decision of this appeal.)

On an appeal such as this, under s. 73 of the *Patent Act*, from a decision of the Commissioner of Patents and an order for the granting of a compulsory licence under ss. 67 to 72 of the Act, the Court must consider the same not only with regard to the questions of law which arise, but also on the facts. (See Thurlow, J., in *Gordon Johnson Co. et al v. Callwood*[1]). But an appellant to succeed must establish that the same were against manifestly sound and fundamental principles; or as it has been put, the Court on such an appeal as this will not allow the appeal unless it comes to the conclusion that no person properly instructed as to the law and acting judicially could have come to the conclusions that the Commissioner did on the facts before him, and this is so even though the Court itself on those same facts might have come to a different conclusion. (Compare Jackett, P., in *Aktiebolaget Astra, Apotekarnes Kemiska Fabriker v. Novocol Chemical Manufacturing Co. of Canada Ltd.*[2]; and Abbott J., in *Hoffman-LaRoche Limited v. Bell-Craig Pharmaceutical Division of L. D. Craig Limited*[3].)

Employing such criteria, the grounds of appeal for decision are:

(1) whether the commencement of manufacturing of the patented article in Canada after the date of the application of the respondent for a compulsory licence, but before the date of the hearing of such application, constituted working the invention within Canada on a

[1] (1960) 34 C.P.R. 73 at 77. [2] (1966) 44 C.P.R. 15 at 19.
[3] (1966) 32 Fox Patent Cases 106 at 108.

commercial scale so that there was no abuse within the meaning of s. 67(2)(*a*) of the Act;

(2) whether the activities of the respondent (an infringer) constituted working the patented invention in Canada on a commercial scale;

(3) whether such activities by the respondent constituted a satisfactory reason for non-working of the patented invention by the appellants;

(4) whether the relevant date to consider, if the patented invention was being so worked, is at the time of the respondent's application or at the time of the hearing of such application; and

(5) whether there was evidence before the Commissioner of Patents to have enabled him to fix the royalty pursuant to the provisions of s. 68 of the Act.

As to grounds of appeal numbered 1, 2 and 3 above, I am of opinion (*a*) that since under the *Patent Act* patents are granted for new inventions not only to encourage inventions, but also to make sure that there be attained without undue delay a working of the invention on a commercial scale within Canada adequate and reasonable under the particular circumstances, (cf. Maclean, P., in *Celotex Corporation et al v. Donnacona Paper Company Limited*[1]) that it would be incongruous to hold that the activities of the respondent in this matter, while an infringer of the patented invention, constituted such working of the invention as to result in there being no abuse by the appellants within the meaning of s. 67(2)(*a*) of the Act; and (*b*) that the activities of the appellants in respect to their working of the invention within Canada on a commercial scale were clearly colourable and collusive; and accordingly there is no reason in respect to these three grounds of appeal to interfere with the decision and order of the Commissioner of Patents.

As to ground of appeal numbered 4 above, I am of opinion that the manufacturing activities constituting working the invention in Canada both at the time of the application for the compulsory licence and during the interval up to the hearing of such application by the Commissioner should be considered, although naturally the manufacturing activities during such interval will be looked at

[1] [1939] Ex. C.R. 128 at 138.

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by the Court with greater scrutiny. The Commissioner considered the activities at and between both these times, and accordingly in respect to this ground of appeal also there is no reason to interfere with his decision and order.

As to the final ground of appeal numbered 5 above, I am of opinion that the appellants elected, at the hearing of the application before the Commissioner, to adduce evidence as to the matter of the quantum of the royalty, and that the factual evidence so adduced, coupled with the factual evidence adduced by the respondent, was sufficient in law to support the Commissioner's conclusion. This is not a case, therefore, where the question of royalty should be sent back for the adducing of further evidence before the Commissioner. (Clearly, however, the better practice to have followed in this case and all similar cases would have been for the appellants to request the Commissioner to permit them to elect not to call any evidence, on the hearing of the application for a compulsory licence, on the matter of royalty until the Commissioner had decided whether or not the case was one for a licence, as was suggested by Jackett, P., in *Aktiebolaget Astra, Apotekarnes Kemiska Fabriker v. Novocol Chemical Manufacturing Co. of Canada Ltd.* (*supra*))

The findings of abuse and the order of the Commissioner of Patents in this case, therefore, are well founded in fact and in law.

Abuse of a Canadian patent of invention, it is clear, often arises from the fact that a foreign owner of a patent or those claiming under him usually do not act in the same way as a Canadian owner of a patent because there are important differences between what is in the best interests of the public in Canada and what is in the best interests of the public in such foreign country; and in such circumstances, the latter interests usually prevail. This manifests itself, for example, by the foreign owner of a Canadian patent concerning himself primarily with increasing his profits in the foreign country in which he resides because all normal influences and pressures on him from third parties in his foreign country will be directed to that end, where it helps the interests of the public in that foreign country, and at the same time such are in conflict with the interests of the public in Canada; and so if abusing a patent of invention in Canada within the meaning of s. 67

of the *Patent Act* happens to accomplish this, such foreign owner of a Canadian patent will act on such incentive to the detriment of the public in Canada.

In this case, although the total sums involved in relation to the annual gross national product in Canada are relatively insignificant, and therefore not too important in the overall picture, it is nevertheless clear that the abuse of this Canadian patent came about for the above reasons. The appellant, Betts Machine Company, caused the product of the Canadian patent to be marketed by the importation of the three component parts from the United States by its Canadian distributor, Faucher & Fils Limited from 1952 until 1963; and during all this period (or at least after the patent issued) that it did so cause this importation, it could have caused the product of this patent to be manufactured in Canada, which is one of the precise duties of the owner of a patent who is given an exclusive monopoly under the *Patent Act*. Only the activities of the respondent and the knowledge of the power of the Commissioner of Patents under the Act caused the manufacture in Canada in 1963 with resulting lower prices to the public in Canada. The peculiar so-called licenced arrangement between Betts Machine Company and Faucher & Fils Limited, it is obvious, would not assure a lower price of the product of this patent to the public if the respondent was prevented from selling its product under this compulsory licence to the public in Canada.

In the result, therefore, the appeal is dismissed with costs.

BETWEEN:

IMPERIAL CHEMICAL INDUSTRIES LIMITED ..... APPELLANT;

AND

THE COMMISSIONER OF PATENTS .... RESPONDENT.

Toronto 1966
June 7-8
Ottawa June 29

Patents—Substance used in "medicine"—Meaning of—Prohibition of claim for—Patent Act, s. 41(1)—General anaesthetic.

Appellant appealed from the decision of the Commissioner of Patents refusing to issue a patent to appellant with respect to a claim for a general anaesthetic commercially known as "Halothane" on the ground that it was "intended for medicine" within the meaning of s. 41(1) of the *Patent Act*.

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Held, the word "medicine" in its broad meaning includes "halothane", a medical drug or agent used in medicine in the treatment of patients and an integral essential part of surgical therapy of disease, a part of the therapeutic regimen.

APPEAL from decision of Commissioner of Patents.

Harold G. Fox, Q.C. for appellant.

C. R. O. Munro, Q.C. and *B. D. Collins* for respondent.

GIBSON J.:—This is an appeal from the decision of the Commissioner of Patents refusing to issue a patent to the appellant containing certain claims numbered 9, 10 and 11 for a substance known commercially as Halothane[1] on the

[1] HALOTHANE—$CHBrCl\text{-}CF_3$ Mol. Wt. 197.4

Halothane is 2-bromo-2-chloro-1,1,1-trifluoroethane.

It contains 0.01 per cent w/w of Thymol.

Description. A colourless, mobile, heavy liquid; odour, characteristic, resembling that of chloroform; taste, sweet, burning. Non-inflammable.

Solubility. Soluble, at 20°, in 400 parts of *water;* miscible with *dehydrated alcohol,* with *chloroform,* with *solvent ether,* with *trichloroethylene,* and with fixed and volatile oils.

Identification. A. Ignite 0.3 ml. with molten *sodium,* cool extract with 2 ml. of *water,* filter, and add 0 5 ml. of *glacial acetic acid.* Add 0.1 ml. of this solution to a mixture of 0.1 ml. of a freshly prepared 0 1 per cent w/v solution of *sodium alizarinsulphonate* and 0.1 ml. of *zirconyl nitrate solution;* the red colour becomes clear yellow.

B. To 5 ml. add 5 ml. of *sulphuric acid;* the acid forms the upper layer (distinction from chloroform and from trichloroethylene).

Acidity or alkalinity. Shake 20 ml. with 20 ml. of *carbon dioxide-free water* for three minutes; the aqueous layer requires for neutralisation not more than 0.1 ml. of N/100 *sodium hydroxide* or 0.6 ml. of N/100 *hydrochloric acid, bromocresol purple solution* being used as indicator.

Distillation range. Distils completely between 49° and 51°, not less than 95 per cent v/v distilling within a range of 1°, page 1009.

Refractive index. At 20°, 1.3695 to 1 3705, page 1016.

Weight per ml. At 20°, 1.869 to 1.874 g., page 1017.

Chloride and bromide; Free chlorine and free bromine. Complies with the test for Chloride; Free chlorine described under Tetrachloroethylene, page 819.

Thymol. Complies with the test described under Tetrachloroethylene, page 819, using a 0.225 per cent w/v solution of *thymol* in *carbon tetrachloride.*

Non-volatile matter. Complies with the test described under Tetrachloroethylene, page 819.

Storage. Halothane should be kept in a well-closed container, protected from light, and stored in a cool place.

Action and Use General anaesthetic. (*The British Pharmacopoeia,* 1963, p. 353)

grounds that such is prohibited by s. 41(1)[1] of the *Patent Act*, R.S.C. 1952, c. 203.

The facts are as follows:

The application to the Commissioner of Patents of the appellant for a patent relates to a substance known commercially as Halothane and processes for its preparation.

Claim 1 of the application as filed reads:

"The new chemical compound 1:1:1-trifluoro-2-bromo-2-chloroethane".

Claims 2-6 were for processes for the manufacture of the substance.

After several objections by the Examiner and consequent amendments a Supplementary Amendment was filed on June 25, 1964, in which the following claims were asserted:

1. A process for the manufacture of 1:1:1-trifluoro-2-bromo-2-chloroethane which comprises reacting a compound selected from the group consisting of 1:1:1-trifluoro-2-chloroethane and 1:1:1-trifluoro-2-bromoethane with a halogen selected from the group consisting of bromine in the case of 1:1:1-trifluoro-2-chloroethane and chlorine in the case of 1:1:1-trifluoro-2-bromoethane.

2. A process as claimed in claim 1 wherein 1:1:1-trifluoro-2-chloroethane is reacted with bromine in the gaseous phase at a temperature in the range of 350°-600°C.

3. A process as claimed in claim 2 wherein the reaction temperature is in the range 425°-475°C.

4. A process as claimed in claim 3 wherein the molar ratio of 1:1:1-trifluoro-2-chloroethane to bromine is in the range of 1.5:1 to 2:1.

5. A process as claimed in claim 1 wherein 1:1:1-trifluoro-2-bromoethane is reacted with chlorine in the gaseous phase at a temperature in the range 300°-475°C.

6. A process as claimed in claim 5 wherein the reaction temperature is in the range 350°-400°C.

7. A process as claimed in claim 6 wherein the molar ratio of 1:1:1-trifluoro-2-bromoethane to chlorine is in the range 5:1 to 1:1.

8. A process as claimed in claim 7 wherein the molar ratio of 1:1:1-trifluoro-2-bromoethane to chlorine is in the range 3:1 to 2:1.

9. 1:1:1-trifluoro-2-bromo-2-chloroethane.

10. A respirable gaseous anaesthetic mixture comprising 1:1:1-trifluoro-2-bromo-2-chloroethane in admixture with oxygen, said oxygen being present in a proportional amount proper for respiratory purposes.

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[1] 41(1) In the case of *inventions relating substances* prepared or produced by chemical processes and *intended* for food or *medicine*, the specification shall not include claims for the substance itself, except when prepared or produced by the methods or processes of manufacture particularly described and claimed or by their obvious chemical equivalents.

(Italics are mine).

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11. A respirable gaseous anaesthetic mixture comprising 1:1:1-trifluoro-2-bromo-2-chloroethane in admixture with oxygen and at least one other inhalation anaesthetic, said oxygen being present in a proportional amount proper for respiratory purposes.

By this amendment the appellant requested that claims 10 and 11 be left in abeyance pending the decision of this Court as to the patentability of product claim 9 in the form asserted in the said Supplementary Amendment.

By Official Letter dated December 24, 1964, claim 9 was finally rejected, the Examiner pointing out that claims 10 and 11 would be unallowable if claim 9 is unallowable.

From this Final Rejection the Appellant appealed to this Court by Notice of Motion dated January 22, 1965.

It is agreed that Halothane is a substance prepared or produced by chemical processes within the meaning of section 41(1) of the *Patent Act*, and that it may be characterized as a general inhalant, volatile anaesthetic.

The only question for decision on this appeal, therefore, is whether or not Halothane as claimed in claim 9 of the said application of the appellant is "a substance . . . intended for medicine" within the meaning of s. 41(1) of the *Patent Act*.

In *Loi sur les brevets*[1], the word employed in s. 41(1) is "médication".

The word "medicine" and the word "médication" as so used are not terms of art. Instead they are words of the vernacular, of common parlance, and must therefore be interpreted in their ordinary sense.

The court was referred to definitions of the word "medicine" and the word "médication" contained in a great number of dictionaries in both the English and French languages published from 1868 to practically the present time and to certain judicial decisions defining the same, for the purpose of assisting in judicially defining the meaning in this statutory context[2].

The correct judicial approach to the question for decision has been definitively stated by the Supreme Court of Canada. (See Martland J. in *Parke, Davis & Company v.*

[1] S R.C. 1952, c. 203.

[2] See Schedule "A" to these Reasons for some of the dictionaries and other definitions.

Fine Chemicals of Canada Limited[1] where he said, "I agree with Thurlow, J. that the word 'medicine', as used in s. 41 of the Act, should be interpreted broadly. . .").

One particular part of the evidence that perhaps should be mentioned is the affidavit evidence of Dr. Ridley Keneford, filed on this appeal. It established that he was an expert in anaesthetics and that he had studied 39 publications, which he listed, dealing with anaesthetics and as a result stated, "During my studies of the publications set out in paragraphs 3-42 above, I have not seen any anaesthetic agent described or referred to as a 'medicine'."

This finding of Dr. Keneford is exactly what one would expect, as will be explained in greater detail in these reasons. But putting the matter briefly now, it should be noted that experts dealing with specific medicines always refer to them specifically in terms appropriate to their specialty and do not refer to them when writing or speaking of them by the broad genus of "medicine". Laymen, however, sometimes do so.

A perusal of dictionary definitions, judicial decisions and text book authorities leads to the conclusion that there is both a restricted definition and a broad definition of "medicine" commonly and generally understood and used. The method by which this conclusion is reached may be stated briefly:

1. A "medicine" in modern parlance has come to mean, *inter alia*, a drug, a therapeutic agent, a bioligical agent, and a pharmaceutical specialty.
2. "Medicines" are to-day categorized under specifics such as antihistamines, anti-infectives, autonomic drugs, cardiovascular drugs, antianemia agents, hemostatics, diagnostic agents, expectorant and cough preparations, gastrointestinal drugs, hormones, local anaesthetics, oxytocics, vitamins, anaesthetics, and spasmolytic agents and so forth. In other words, generally speaking, it is seldom that anyone speaks of "medicines" anymore. And in this connection, it is interesting to note that in the Vade-mecum International of Canada in its list of "pharmaceutical specialties and biologicals" available to doctors in

[1] [1959] S C.R. 219 at 226.

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Canada, "Halothane" is listed described by Hoechst Pharmaceuticals of Canada Ltd. as an "inhalation anaesthetic".

3. All of these specifics may be referred to merely as medical drugs or medical agents, without further categorizing as in 1 above.

4. Some of these medical drugs or medical agents are used to cure or heal a patient *per se,* and are sometimes referred to as therapeutic agents (even though there are many therapeutic agents which do not cure or heal *per se,* but are used for a particular purpose in the treatment of a patient), while others are used in the course of the whole treatment of the patient. In this connection, for instance in the case of the former kind of medical drugs or medical agents, an antibiotic, say, e.g., penicillin, comes closest perhaps, but even then, it often happens that other medical drugs or agents are necessary as supportive therapy when the antibiotic appears to be specific for a particular type of infection.

5. The former kind of medical drugs or agents are "medicines" in a restricted meaning, while the latter kind are "medicines" in the broad meaning.

"Halothane" is not a medical drug or agent that cures *per se,* but instead is a medical drug or agent used in medicine in the treatment of patients and is an integral essential part of surgical therapy of disease, a part of the therapeutic regimen.

Therefore in my opinion, "Halothane" is a substance intended for "medicine" within the meaning of s. 41(1) of the *Patent Act,* and as a consequence, the appeal is dismissed with costs.

SCHEDULE "A"

DEFINITIONS

ANAESTHETIC

A. 1. Insensible, deprived of sensibility.
3. Producing, or connected with the production of, insensibility.

B. An anaesthetic agent; an agent which produces insensibility.
(*Oxford Dictionary* Vol. I, page 301)

FUNDAMENTALS OF INHALATION ANESTHESIA

Theoretic Considerations.

With the exception of trichloroethylene, which is partially changed in the body, inhalation anesthetics are absorbed, transported, and excreted without change in chemical constitution. Thus anesthetic gases and vapors are inert or nonreactive substances. They are almost entirely recoverable from the lungs save for small quantities lost by diffusion through the skin and surgical wound, or through solution in the urine. (*Introduction to Anesthesia, The Principles of Safe Practice,* Second Edition, 1961)

Anesthetic—

General—An agent which produces general anesthesia either by injection or by inhalation. (*Blakiston's Illustrated Pocket Medical Dictionary,* Second Edition)

Anaesthetic

2. Any drug or chemical used to produce anaesthesia. (*The British Medical Dictionary*)

Anesthesiology by John Adriani, M.D.

To be surgically useful, an anesthetic drug or method of producing anesthesia must fulfill two purposes: it must abolish reflex activity and other responses to stimuli and it must provide muscle relaxation. A third requirement, loss of consciousness, is desirable but not always necessary.

General Anesthetics

The general anesthetics are volatile substances which are administered by inhalation, or nonvolatile drugs which are administered by routes other than inhalation. The volatile drugs differ in pharmacologic characteristics from the nonvolatile. The members in each group are similar pharmacologically and are used for the same purposes.

The volatile drugs are complete anesthetics. They cause a blockade along the path from the periphery to the pain perception centers. The loss of sensibility is accompanied by a loss of consciousness. Loss of muscle tone of varying degrees is obtained, depending upon the potency of the drug Volatile anesthetics are inert; that is, they are not altered by the cells. They are eliminated unchanged by exhalation. They are gases, or highly volatile liquids, which boil below 60°C. With the exception of nitrous

oxide, currently used drugs are hydrocarbons, ethers, halogenated hydrocarbons or halogenated ethers. Three gases, nitrous oxide, ethylene and cyclopropane, and a variety of liquids, among which are ether, vinyl ether, fluroxene, chloroform, ethyl chloride, halothane, methoxyflurane and trichlorethylene, are used.

Anesthetics are protoplasmic poisons with three notable characteristics: they have a special predilection for nervous tissue, they ultimately affect all protoplasm as concentrations are increased and their action is reversible within limits. Once the drug is removed, the physiologic state of the cell reverts to normal. (*Christopher's Textbook of Surgery,* Eighth Edition, 1964)

Anesthetic, anaesthetic—A drug which causes the loss of sensation general—A. which affect consciousness, hence deaden the sensations of the whole organism; such as, ether, chloroform, nitrous oxide, etc. (*Hackh's Chemical Dictionary,* Third Edition).

Halothane (CF_2-CHClBr) (Fluothane)

It seems very probable that halothane leaves the body by the same route as it enters it, namely the lungs, but the exact mode of excretion, and the possibility of any metabolic breakdown, have not been reported. (*A Practice of Anaesthesia* by W. D. Wylie, M.A., M.B. (Cantab.), M.R.C.P., F.F.A.R.C.S. and H. C. Churchill-Davidson, M.A., M.D. (Cantab.), F.F.A.R.C.S., 1961)

Anaesthetic, Anesthetic—

1. Having no perception or sense of touch. 2. A medicine having the power of rendering the recipient insensible to pain. An anaesthetic is *general* or *local* according as it produces general or local anaesthesia. (*Lippincott's Medical Dictionary,* 1897).

Anaesthetic—...

B. *As substantive* (Pl): A class of medicines which, when inhaled in the form of vapour, destroy consciousness for a time, and with it the sense of pain. Garrod makes anaesthetics the third order of his sub-class, defined as medicines acting especially upon the brain proper, but probably also upon other portions of the central nervous system. Among the uses to which they are put are the alleviation of pain and spasm, the production of unconsciousness during surgical operations or parturition, and the procuring of sleep in delirium. The best known are chloroform, ether, and nitrous oxide. . . . (*The Encyclopaedic Dictionary,* Vol. 1 Special Edition, 1903)

Order 3—Anaesthetics.

Substances which when inhaled in the form of vapour possess the property of destroying consciousness, and at the same time causing insensibility to pain: they are therefore soporifics and anodynes, but their effect is more immediate and much less persistent than that of ordinary narcotics.

Chloroform.	Bichloride of methylene.
Ether.	Protoxide of nitrogen (nitrous oxide).
Tetrachloride of carbon	

Effects of Anesthetics.

These have been sufficiently detailed under the respective heads of the above anaesthetic agents

Therapeutic applications of Anaesthetics.

1 To alleviate pain and spasm.

2 To produce unconsciousness and insensibility to pain during surgical operations and parturition

3. To procure sleep and diminish violence in delirium tremens and some other forms of cerebral disturbance.

4. To cause relaxation of the muscular system, in order to facilitate the reduction of dislocations and of hernia.

. . .

(*The Essentials of Materia Medica and Therapeutics* by Sir Alfred Baring Garrod, M.D, F.R.S., Third Edition, 1868)

Anaesthetics—Medical agents employed for the production of insensibility, especially during surgical operations . . . (*Winston's Cumulative Loose-Leaf Encyclopedia,* 1920)

Anaesthetic—A. 1. Insensible, deprived of sensibility . . . 2. Unfeeling, unemotional . . . 3. Producing, or connected with the production of, insensibility. B. An anaesthetic agent; an agent which produces insensibility. (*The Oxford English Dictionary,* 1933)

Anesthetic—...

3. A drug that produces local or general anesthesia . . . general—a drug that produces general anesthesia. (*Stedman's Medical Dictionary,* Twentieth Edition, 1961)

Anesthetic—1. Pertaining to or characterized by anesthesia. 2. Producing anesthesia. 3. A drug that causes insensibility. (*The Putnam Medical Dictionary,* 1961)

Anesthetic—1. Pertaining to, characterized by, or producing anesthesia. 2. A drug or agent that is used to abolish the sensation of pain. general—an agent which produces general anesthesia. (*Dorland's Illustrated Medical Dictionary,* 24th Edition, 1965)

DRUG

Food and Drugs Act, R.S.C. 1952, Ch. 123 Section 2(*j*)

"Medicine" means any substance or mixtures of substances that may be used in restoring, correcting or modifying organic functions.

This statute was repealed in 1953 by 1 & 2 Elizabeth II Ch. 38. In that statute the word "medicine" was not defined but the word "drug" was defined in section 2(*f*) as follows:

(*f*) "drug" includes any substance or mixture manufactured, sold or represented for use in

(i) the diagnosis, treatment, mitigation or prevention of a disease, disorder, abnormal physical state, or the symptoms thereof, in man or animal,

(ii) restoring, correcting or modifying organic functions in man or animal, or

(iii) disinfection in premises in which food is manufactured, prepared or kept, or for the control of vermin in such premises;

Drug—1 Any chemical substance, synthetic or extracted from plant or animal tissue and of known or unknown composition, which is used as a medicament to prevent or cure disease. (*The British Medical Dictionary*)

Drug—(1) A substance used as medicine. It is assumed that drugs contain a pharmacophore and anchoring group (q.v.). (2) A material derived from vegetable or animal sources. crude—The commercial form of a drug which requires refining before use. inorganic—Inorganic salts, acids, or bases used as medicines; e g, sodium bicarbonate, mercury salts. official—D. listed in Pharmacopoeias. (*Hackh's Chemical Dictionary,* Third Edition)

Drug—Any substance used in the composition of medicine; a substance used to stupefy or poison or for self-indulgence; (*Chambers' Twentieth Century Dictionary,* 1952)

Drug—1. Any substance used as a medicine in the treatment of disease.

2. To give medicine, usually with the sense of giving medicine in unnecessarily large quantities. 3. To narcotize. (*Stedman's Medical Dictionary,* Twentieth Edition, 1961)

Drug—A substance use as a medicine, or in the compounding of a medicine. crude d, an unrefined drug containing all its ingredients. (*The Putnam Medical Dictionary,* 1961)

MEDICINE

Medicine—1 Art of restoring and preserving health, especially by means of remedial substances and regulation of diet etc. as opp. to surgery and obstetrics; substance, esp one taken internally. (*The Concise Oxford Dictionary* 4th Ed. 1950, reprinted 1954.)

"Medicine" is that department of knowledge and practice which is concerned with the cure, alleviation and prevention of disease in human beings and with the restoration and preservation of health. Also, in a more restricted sense, applied to that branch of this department which is the province of the physician in the modern application of the term; the art of restoring and preserving health of human beings by the administration of remedial substances and the regulation of diets, habits and conditions of life. (*In re Ontario Medical Act* (1906), 13 O.L.R. 501 (C.A.))

"Medicine"—1. That department of knowledge and practice which is concerned with the cure, alleviation, and prevention of disease in human beings, and with the restoration and preservation of health. Also, in a more restricted sense, applied to that branch of this department which is the province of the physician, in the modern application of the term; the art of restoring and preserving the health of human beings by the administration of remedial substances and the regulation of diet, habits, and conditions of life; distinguished from Surgery and Obstetrics. (*Oxford English Dictionary*, 1933, Vol. VI, p. 295)

"Medicine"—1. The science and art concerned with the cure, alleviation and prevention of disease, and with the restoration and preservation of health. Also, *less widely*, that branch which is the province of the physician; the art of restoring and preserving health by means of remedial substances and the regulation of diet, habits, etc., dist. from *surgery* and *obstetrics*.

2. A medicament, especially one taken internally; also medicaments generally, "physic" ME (*Shorter Oxford Dictionary*, 1933 reprinted 1939)

"Medicine"—1. Any substance used for treating disease.

2. The science of treating disease; the healing art. In a restricted sense, that branch of the healing art dealing with internal disease, which can be treated by a physician. (*New Gould Medical Dictionary* 1951; *Blakiston's New Gould Medical Dictionary*, Second Edition, 1956)

"Medicine"—1. A drug. 2. The art of preventing or curing disease; the science which treats of disease in all its relations. 3. The study and treatment of general diseases or those affecting the internal parts of the body, distinguished from surgery. (*Stedman's Medical Dictionary* 1942)

"Medicine": any substance used in the treatment of disease; the science of healing and prevention of disease, esp. by remedies other than surgical treatment. (*Collins New English Dictionary*, 1956)

"Medicament" (1) A substance used in curative treatment. (*Oxford English Dictionary*, 1933, Vol. VI, p. 293)

A medical witness stated that by "medicine" is meant anything which will influence the functions of the body. The definition of "medicine" in Webster's Dictionary is: "any substance administered in the treatment of disease; a remedial agent; a remedy" and the definition of "disease" is: "an alteration in the state of the body or of some of its organs interrupting or disturbing the performance of the vital functions and causing or threatening pain or weakness" The two definitions seem to coincide if disease is the failure of some function to operate normally and medicine is something which is intended to restore the normal working of the affected function. (*Nairne v. Stephen Smith & Co. Ltd et al*, (1943) 1 K.B. 17 at 21 per *Atkinson*, J.)

The word "medicine" . . . in English is equivalent to the word "physic". (*Royal College of Physicians of London v. General Medical Council* (1893) 68 L.T. 496 at 499, per Smith L.J.)

The word "medicine" is comprehensive enough to include everything which is to be applied for the purpose of healing, whether externally or internally. (*Berry v. Henderson* (1870) 5 Q.B. 296 at 304 per Lush J.)

This was a case under the Pharmacy Act, 1868 which related to the labelling of a "medicine" supplied by an apothecary to his patient.

2. any substance or preparation used in the treatment of disease; medicament; also medicaments generally, "physic". Now commonly restricted to medicaments taken internally. (*Oxford Dictionary* Vol. VI, p. 295.)

The latter term "medicine" includes remedies used externally upon the body as well as internally. (*M's Application* (1922) 39 R.P.C. 261 at 262 per Sir Edward Pollock, S.G.)

Medicine—1 Any substance used for treating disease.

Anatomic—That system which deals with the anatomic changes in diseased organs and their connection with symptoms manifested during life. (*Blakiston's Illustrated Pocket Medical Dictionary,* Second Edition)

Medicine—1. The art of preserving and restoring health, esp. the non-surgical branch of this 2. Drugs, potions, used in medicine, any such drug. (*The Pocket Oxford Dictionary,* 1942)

Medicine—1. The science and art of the treatment of disease and maintenance of health. In particular, the branch concerned with the non-surgical aspects of treatment of disease. 2. Any drug or other substance given or taken for the above purpose . . . (*The British Medical Dictionary*)

Medicine—(1) The science and art of healing. (2) A drug or substance administered to the body to correct a disturbance of its normal function clinical . . . (*Hackh's Chemical Dictionary,* Third Edition)

Medicine—1. The art and science of healing or curing disease by the administration of drugs. 2 A medicinal substance or preparation. (*Lippincott's Medical Dictionary,* 1897)

Medicine—

I. Ordinary Language:

1. Literally:

(1) Physic, a remedy, a remedial agent, an antidote to disease; any substance prescribed for the alleviation or removal of disease.

Medicines are administered, as a rule, by the mouth, but sometimes also by the rectum, by inhalation into the lungs, by hypodermic injection into the cellular tissue, or in some rare cases by injection into the veins. Garrod makes three divisions of medicines: (1) Internal remedies, administered for their effects upon the system, both before and after absorption into the blood; (2) external remedies, which act locally, and are not intended to affect the constitution; (3) chemical agents used for other than their medicinal properties. . . .

(2) A science and art directed first to the prevention of diseases, and secondly to their cure; the practice of medicine as distinguished from that of surgery or midwifery, but not entirely separable from either, involving also a sound knowledge of anatomy, physiology, pathology, chemistry, and allied subjects.

. . .

II. Technically:

1. Science: In the same senses as I (1) & (2). (*The Encyclopaedic Dictionary,* Vol. I Special Edition, 1903)

CLASSIFICATION OF MEDICINES.

Medicines have been very differently classified, at different times, by authors on Materia Medica and Therapeutics; some adopting a chemical and natural historical division, as is the case with the previous part of the present volume; others a physiological and therapeutic classification. For the purpose of rendering a complete account of the action and use of each medicine, the former method is, doubtless, the more convenient and instructive, as all the facts pertaining to the action of individual drugs are thereby brought before the mind and easily retained; but when a knowledge of the value of remedies is required for practical purposes, to effect a desired object in the treatment of disease, then a classification based upon some physiological grounds will be found to be the more feasible.

In the following classification, the author has been guided by a desire to make it one of practical utility rather than of scientific interest; and he feels assured that in the present imperfect state of our knowledge of the action of medicines upon the animal economy, he shall best effect this by referring his arrangement to the organs and structures of the body which are influenced by the drugs rather than to the character of the action thereby exercised.

It has been the object of the author to retain such grouping of medicines as experience has long confirmed and ratified, and to avoid such subtleties of division as serve only to perplex the mind and lead to no useful results.

Class II.—Medicines whose principal effects are seen upon the nervous system.

Subclass 1. Medicines acting especially on the brain proper, but probably also upon other portions of the central nervous system.	Order 1. Exhilarants. 2. Narcotics, sporifics, and anodynes. 3. Anaesthetics.
Subclass 2. Medicines acting especially upon the spinal cord.	Order 1. Spinal stimulants. 2. Spinal sedatives.
Subclass 3. Medicines acting upon some portions of the central nervous centres, and on the ganglionic system.	Order 1. Antispasmodics. 2. Nervine tonics and antiperiodics
Class III.—Medicines acting chiefly on the heart and circulating system; probably often through the sympathetic system of nerves.	Order 1. Vascular stimulants. 2. Vascular sedatives. 3. Vascular tonics.

Therapeutic applications of Alteratives.

Class II.—Medicines whose principal effects are upon the nervous system.

(*The Essentials of Materia Medica and Therapeutics* by Sir Alfred Baring Garrod, M.D., F.R.S., 1868)

Medicine—2. Any substance or preparation used in the treatment of disease; a medicament; also, medicaments generally, 'physic'. Now commonly restricted to medicaments taken internally. (*A New English Dictionary on Historical Principles*, Vol. VI, 1908)

Medicine—2. Any substance or preparation used in the treatment of disease; a medicament; also, medicaments generally, 'physic'. Now commonly restricted to medicaments taken internally. (*The Oxford English Dictionary*, Vol. I, 1933)

Medicine—Any substance used (esp. internally) for the treatment or prevention of disease: a drug: . . . (*Chambers' Twentieth Century Dictionary*, 1952)

Medicine—1. Any substance or preparation used in treating disease. 3. A drug or the like used for a purpose not curative, as a love potion, a poison, the alchemists' elixir, etc. (*Webster's New International Dictionary of the English Language,* Second Edition, 1952)

Medicine—1. The science of the treatment of disease, more especially that branch of it which deals with non-surgical diseases of internal organs. 2. Any substance given for the prevention or treatment of disease. (*The Faber Medical Dictionary,* July 1953)

Medicine—1. The science and art concerned with the cure, alleviation, and prevention of disease, and with the restoration and preservation of health. Also, *less widely,* that branch which is the province of the physician; the art of restoring and preserving health by means of remedial substances and the regulation of diet, habits, etc.; dist. from *surgery* and *obstetrics.* 2. A medicament, esp. one taken internally; also, medicaments generally, 'physic'. (*The Shorter Oxford English Dictionary on Historical Principles,* Third Edition, 1959)

Medicine—1. The science and art of diagnosing, treating, curing, and preventing disease, relieving pain, and improving and preserving health. 2. The branch of this science and art that makes use of drugs, diet, etc., as distinguished especially from surgery and obstetrics. 3.a) Any drug or other substance used in treating disease, healing, or relieving pain. (*Webster's New World Dictionary, College Edition,* 1960)

Medicine—1. A drug. 2. The art of preventing or curing disease; the science that treats of disease in all its relations. 3. The study and treatment of general diseases or those affecting the internal parts of the body, distinguished from surgery. (*Stedman's Medical Dictionary, Twentieth Edition,* 1961)

Medicine—1. A drug or remedy. (*The Putnam Medical Dictionary,* 1961)

Medicine—1. Any drug or remedy. (*Dorland's Illustrated Medical Dictionary,* 24th Edition, 1965)

Médication—(du lat. *medicatio,* même signif. fait du v. *medicari,* soulager, dérivé du gr. . . . soin, traitement). Thérap. Effet produit par l'action des médicaments après leur administration. Modification des propriétés vitales. Médications externes. Médications internes.—Système, mode de traitement d'une maladie. (*Dictionnaire national ou Dictionnaire universel de la langue française, Tome second,* 1883, par M. Bescherelle)

Médication—Administration d'un ou plusieurs agents thérapeutiques, pour satisfaire à une indication déterminée, pour produire telle ou telle modification dans la structure ou les fonctions de l'organisme. Médication locale, générale. Médication tonique, astringente.

—Syn. Médication, Traitement—Le traitement a pour but définitif, plus ou moins prochain, de guérir ou de pallier une maladie. La médication a seulement pour but de provoquer un effet particulier qui n'est qu'une sorte d'intermédiaire pour arriver au but définitif. Il est rare qu'un traitement ne comporte pas l'emploi de médications, souvent fort différentes. (*Dictionnaire de la langue française, Tome troisième,* par E. Littré, 1885)

Médication—Emploi d'un ou plusieurs agents thérapeutiques pour produire une action déterminée: faire cracher, vomir, suer, etc. La médication est une partie seulement du *traitement,* qui comprend tous les moyens mis en œuvre pour guérir une maladie. (*Larousse médical illustré,* 1924)

Médication—(de *médicateur*). Thérap. Emploi systématique d'un ou plusieurs agents médicaux dont l'action synergique vise un but thérapeutique déterminé. (*Larousse du XX*e siècle, *Tome quatrième,* 1931)

Médication—«Emploi systématique d'...agents médicaux» (Garnier dans une intention précise. V. Thérapeutique. *Médication calmante, fébrifuge ... Médicaments, remèdes employés dans une médication. Le traitement d'une maladie comporte en général plusieurs médications* (*Dictionnaire alphabétique et analogique de la langue française,* par Paul Robert, Tome quatrième, 1959)

Médicament—. . .

Principaux médicaments: (d'après leur action spécifique). V. Allopathique, homéopathique; curatif (cit) préventif; abluant, absorbant, abstergent (ou abstersif), adjuvant, adoucissant, altérant, analgésique, anesthésique, antibiotique. (Cf. Supplément), antiseptique, antispasmodique, antipyrétique, antithermique, aphrodisiaque, astringent, balsamique, calmant, cardiaque, carminatif, cholagogue, cicatrisant, dépuratif, diurétique, drastique, emménagogue (cit.), épithème, errhin, excitant, fébrifuge, fomentation, fortifiant, helminthique, hémostatique, hypnotique, laxatif, liniment, purgatif, rafraîchissant, réconfortant, reconstituant, relâchant, remontant, résolutif, révulsif, sédatif, sialagogue, somnifère, sternutatoire, stomachique, stomatique, stupéfiant, tonique, topique, vésicatoire, vulnéraire. (*Dictionnaire alphabétique et analogique de la langue française,* par Paul Robert, Tome quatrième, 1959)

Médication—. . .

Encycl. Comme cette définition l'indique, *médication* n'est pas synonyme de *traitement,* et souvent un traitement se compose de plusieurs médications successives... (*Nouveau Larousse illustré, Tome cinquième, Dictionnaire universel encyclopédique*)

Médicament—. . .

1. *Modificateurs de l'appareil digestif* (purgatifs, etc.); 2 *modificateurs de la nutrition* (arsénicaux, phosphoriques, antimoniaux); 3. *modificateurs du sang* (ferrugineux, etc.); 4. *modificateurs du cœur et de la circulation* (digitale, caféine, massages); 5. *modificateurs de l'appareil respiratoire* (térébenthines, kermès, etc); 6. *modificateurs du système nerveux* (anesthésiques, hypnotiques, etc); 7. *modificateurs de la peau* (soufre, sulfureux, etc.); 8. *modificateurs de la sécrétion lactée* (sudorifiques, diurétiques, massages, etc.); 9 *modificateurs de l'appareil urinaire* (diurétiques, anurétiques); 10. *modificateurs de l'appareil génital* (omménagogues, abortifs, etc.); 11. *modificateurs sans élection* particulièrement spéciale, tels que les modificateurs des tissus (caustiques, etc.) et les modificateurs généraux (électricité, cures d'air, cures de bains de mer, etc.). Un même médicament peut d'ailleurs, suivant les cas, répondre à une, deux ou plusieurs de ces indications. (*Nouveau Larousse illustré, Tome cinquième, Dictionnaire universel encyclopédique*).

REMEDY

Remedy—(1) A cure for a disease or other disorder of body or mind; any medicine or treatment which alleviates pain and promotes restoration to health. (*Oxford English Dictionary* Vol. VIII, p 422)

THERAPY

Therapy—The medical treatment of disease; curative medical treatment. (*Oxford English Dictionary,* Vol. XI, p. 280)

Thérapeutique—Qui a rapport au traitement des maladies Moyens thérapeutiques. 2. La thérapeutique, partie de la médecine qui a pour objet le traitement des maladies, c'est-à-dire qui donne des préceptes sur le choix et l'administration des moyens curatifs des maladies et sur la nature des médications. Cours, manuel de thérapeutique. (*Dictionnaire de la Langue Française* par E Littré, Tome troisième, 1885)

Thérapeutique—. . .

La *thérapeutique symptomatique* cherche à faire disparaître les troubles actuels par des médicaments appropriés sans s'occuper de leur origine, quitte à s'occuper ensuite de celle-ci; la fièvre, par la quinine ou l'antipyrine; la douleur, l'insomnie, par le chloral ou la morphine; les sueurs, par le tanin ou l'atropine; la toux, par l'opium ou les balsamiques; la constipation, par un lavement ou un purgatif; la diarrhée, par du laudanum ou du bismuth. (*Larousse Médical Illustré,* 1924)

Thérapeutique—. . .

Partie de la médecine, qui s'occupe de la connaissance des agents curatifs et de leur emploi rationnel pour soulager ou guérir les malades. (*Larousse du XX^e^ siècle, Tome quatrième,* 1931)

BETWEEN:

DOW CHEMICAL CO. .... PLAINTIFF;

AND

KAYSON PLASTICS & CHEMICALS LTD. .... DEFENDANT.

Ottawa 1966
June 9
June 30

Patents—Pleadings—Process patent—Infringement—Particulars of one infringement given—General allegation of additional infringements without particulars—Order for particulars—Exchequer Court R. 20.

In an action commenced in 1966 for infringement of a process patent issued in 1956 plaintiff in para. (1) of the particulars of breaches alleged that defendant had infringed the patent since its issue by manufacturing in Canada rubber reinforced styrene polymers by an infringing method or methods and by selling in Canada products manufactured in accordance with such method or methods. In para. (3) of the particulars of breaches plaintiff alleged that the precise number and dates of all defendant's infringements were unknown to plaintiff but that defendant's high impact polystyrene marketed by it since early 1963 under the designation "KHI" was an infringement as alleged in para. (1). Defendant moved for further particulars of para. (1) of the particulars of breaches and for the identification of the "rubber reinforced styrene polymer" referred to therein.

Held, plaintiff must supply the particulars sought before obtaining discovery of defendant

Aktiengesellschaft Fur Autogene Aluminium Schweissung v. London Aluminium Co. [1919] 2 Ch. 67, applied; *Tilghman v. Wright* (1804) 1 R.R.C. 103; *Haslam v. Hall* (1887) 4 R.P.C 203; *Mandleberg v. Morley* (1893) 10 R.P.C. 256; *Brennan v. Poslums* (1956) 16 Fox P C. 98, not followed; *Marsden v. Albrecht* (1910) 27 R P C. 785; *Philipps v. Philipps,* (1878) 4 Q B D. 127, *Schuster v. Hine Parker & Co.* (1935) 52 R P.C. 345, referred to.

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DOW CHEMICAL CO. v. KAYSON PLASTICS & CHEMICALS LTD.

APPLICATION.

J. A. Devenny for plaintiff.

Edwin A. Foster for defendant.

JACKETT P.:—This is an application by the defendant for an order requiring the plaintiff to provide further particulars of paragraph 1 of the Particulars of Breaches.

The action was instituted by a Statement of Claim filed on March 9, 1966, which states that the plaintiff is the owner and patentee of Canadian Letters Patent No. 525,041, issued May 15, 1956, for an invention entitled "Method of Polymerizing Vinyl Aromatic Compounds with Rubber" and alleges that "The defendant has infringed the rights of the plaintiff under the said letters patent" as set out in the Particulars of Breaches served with the Statement of Claim.

The Particulars of Breaches are furnished in such an action by virtue of Rule 20 of the Rules of this Court, which reads as follows:

> In an action for infringement of a patent the plaintiff must deliver with his statement of claim particulars of the breaches complained of.

The "Particulars of Breaches" filed by the plaintiff read as follows:

> The following are the particulars of breaches complained of in the Statement of Claim herein:
>
> 1. The defendant has since the date of issue of Canadian Letters Patent No. 525,041 infringed the said letters patent by manufacturing or producing in Canada rubber reinforced styrene polymers by a method or methods which infringes the said Canadian letters patent and by selling in Canada products manufactured or produced in accordance with such a method or methods.
>
> 2. The plaintiff will rely on claims 1 to 6 inclusive of Canadian Letters Patent No. 525,041.
>
> 3. The precise number and dates of all the defendant's infringements are at present unknown to the plaintiff and the plaintiff will claim to recover full compensation in respect of all infringements. The plaintiff specifically alleges, however, that the defendant's high impact polystyrene marketed by it since at least as early as 1963 under the defendant's designation "KHI", "Kayson Impact Polystyrene" are infringements for the reasons set out in paragraph 1 hereof.

The Notice of Motion is for an order requiring the plaintiff to provide further particulars of paragraph 1 of the

Particulars of Breaches, and, more specifically, particulars identifying the "rubber reinforced styrene polymers" referred to therein.

There are various points of view from which it might be contended that the Statement of Particulars filed by the plaintiff in this action fails to set out "particulars" of the breaches complained of. The only complaint made by the defendant on this application is, however, that, while the plaintiff has particularized by saying that the defendant has manufactured or produced "the defendant's high impact polystyrene marketed by it since at least 1963 under the defendant's designation 'KHI', 'Kayson Impact Polystyrene' " by a method or methods which infringe the plaintiff's letters patent and by selling in Canada products manufactured in accordance with such a method or methods (last sentence of paragraph 3 of the Particulars of Breaches read with paragraph 1 thereof), the plaintiff has not given particulars of what other rubber reinforced styrene polymers the defendant is alleged to have manufactured or produced and sold. That is, therefore, the only complaint with which I shall deal in these reasons.

The parties are agreed that the question that I have to decide is whether the plaintiff's pleadings sufficiently comply with the Rules if, at this stage of the proceedings, that is before discovery, they state one particular of a type of infringement and claim in respect of other types of infringement that are unknown to the plaintiff but are known to the defendant.

Counsel for the plaintiff takes the position, in effect, that the plaintiff, if it has information of one type of infringement of its patent, is entitled to launch proceedings for infringements of that type and for anything else that the defendant may have done that constitutes infringement of the same patent, so that he will be in a position, in the course of obtaining discovery from the defendant, to explore the possibility of there having in fact been types of infringement of which he did not know when he launched his action. He concedes that, some time before trial, he must, if the defendant then insists, amend his Statement of Particulars by adding allegations of any other infringements of which he has become aware in the meantime and

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upon which he proposes to rely, so that he will then be restricted at trial to his Statement of Particulars as amended.[1]

He limits this contention, at least for the purpose of this application, to alleged infringements of a process patent by a manufacturer, who should know what processes he has employed, and thus excludes infringements consisting only of selling, since a seller of goods of which he is not the manufacturer would not ordinarily know by what process the goods sold by him were made.

Generally speaking, I think it is correct to say that an action under our judicial system is a device to settle disputes where the plaintiff asserts certain facts which the defendant denies, or where the plaintiff asserts that on undisputed facts the law entitles him to relief that the defendant says the law does not entitle him to, or where there is some combination of such disputes between the plaintiff and the defendant. The assumption is that, at the time that the proceedings are instituted, the plaintiff has grounds on which his professional advisors are of the view that he can assert certain facts.[2] This he is required to do by his pleadings—see Rules 88 and 96A of the Rules of this Court for the general requirement, and Rule 20, *supra*, re actions such as the present.

It may well be, of course, that the plaintiff, at the time that an action is instituted, has grounds for asserting that the defendant has done certain things although he is not in a position to say precisely when or where or how the defendant did such things. These details in the circumstances of a particular case may be entirely within the knowledge

[1] An amendment to particulars or to the pleadings after any important step such as discovery has been completed should not be permitted, in my view, unless it is quite clear that it does not involve the possibility of substantial injustice to the other party. The pleadings, including particulars, fix the lines within which discovery is conducted, evidence is prepared for trial and evidence is adduced at trial. Had the pleadings been in the amended state before the opposing party conducted the various steps in the case, it might have resulted in his discovery, preparation for trial and evidence at trial being substantially different. The danger of amendment during argument after the evidence is closed is greater than after discovery but it is a matter of degree. Compare *Esso Petroleum Co. Ltd. v. Southport Corporation*, [1956] A.C 218.

[2] For a useful discussion of the difference between facts constituting the cause of action and facts that are relevant as evidence to prove such facts, see *Philpps v. Phillips*, [1878] 4 Q B D. 127.

of the defendant. For example, the plaintiff may be in a position to show that a manufacturer sold a certain class of goods that had been manufactured by his patented process. Only the defendant can know, however, when and where they were so manufactured. In such a case, it obviously would not be necessary for the plaintiff to give such particulars, at least before discovery had taken place. There may also be circumstances in which the plaintiff's knowledge is sufficient to warrant commencing proceedings but it is appropriate to give him an order for inspection of the subject matter of the action under Rule 148A before he is required to settle his Particulars of Breaches. Compare *Edler v. Victoria Press Manufacturing Company.*[1]

If, however, the plaintiff has *no* ground for asserting that the defendant had done any particular act that, according to him, constituted an infringement of his rights, I should have thought that he has no basis for institution of proceedings for such an infringement. If the plaintiff does not know what his claim is, "he has no right to make a statement of claim at all".[2] A bare assertion that the defendant has *infringed* the plaintiff's rights is not an allegation of facts constituting a cause of action and a statement of claim in which that is the only assertion of infringement could be struck out as being an abuse of the process of the Court. See *Marsden v. Albrecht*[3] per Buckley L.J. at pages 788-9. The facts must be alleged in such a way that the Court can be satisfied that, assuming the truth of what is alleged, the plaintiff has an arguable cause of action.[2] It would be no answer to an application to strike out in such a case for the plaintiff to say that, if he is allowed to have unrestricted discovery of the defendant, he may then be in a position to plead a cause of action. In *Schuster v. Hine Parker & Co. Ld.*[4] where, in the course of upholding an order dismissing an action with costs because it disclosed no cause of action as the Particulars of Breaches did not allege facts constituting an infringement, Romer L.J., in the Court of Appeal, said at page 352:

> I assume . . . that the truth of the matter is this: The Plaintiff actually has instituted this action without knowledge of any infringement

[1] (1910) 27 R P C. 114.
[2] *Philipps v. Philipps,* (1878) 4 Q B D. 127.
[3] (1910) 27 R P C. 785 (C.A.)
[4] (1935) 52 R.P.C. 345

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by the Defendants of the Plaintiff's Patent in the hope that in the course of the proceedings and by diligent interlocutory exploration he might discover something that would assist him. Such proceedings as those are not encouraged by the Courts, and, in my opinion, Mr. Justice Farwell was well justified in putting a summary end to them by striking out the Statement of Claim as disclosing no cause of action and dismissing the Plaintiff's action with costs.

Is the position any different, if the plaintiff links with the allegation of one cause of action a general allegation of other infringements which, so far as the plaintiff knows, do not exist but which may be revealed by an unrestricted discovery? This is the question, as I see it, that is raised by this application.

I cannot recall, and I have not been referred to, any type of case outside the realm of industrial property litigation where there has been a tendency to endeavour to turn an action for damages into a general "Royal Commission" type of inquiry as to what infringements of the plaintiff's property rights the defendant has been committing.[1]

In connection with industrial property litigation, it is obvious that, once it has been established that the defendant has been infringing the plaintiff's rights by one course of conduct, there is a natural desire on the part of the plaintiff to be allowed scope to ascertain, by the judicial process, what other infringements, if any, the defendant has been committing. The question that I have to determine is whether that form of relief is open to him under our judicial system or whether such a course of action is subversive of the principle on which our system is based, namely, that the function of the Courts is to settle existing disputes.

Strictly speaking, the plaintiff must allege in his Statement of Claim the facts that, according to him, constitute the infringement or infringements of his rights under his patent in respect of which he claims relief. Rule 20 requires, in addition, a separate statement of "particulars" of such "breaches".

[1] It is important, in my view, that particulars should play their proper role of keeping each action within proper bounds. ". . . it is the purpose of such particulars that they should help to define the issues and to indicate to the party who asks for them how much of the range of his possible evidence will be relevant and how much irrelevant to those issues. Proper use of them shortens the hearing and reduces costs." Per Lord Radcliffe in *Esso Petroleum Co. Ltd. v. Southport Corporation*, [1956] A C 218 at page 241.

As I have already indicated, an allegation that the plaintiff has "infringed" the plaintiff's rights, as opposed to an allegation of facts constituting an infringement of his rights, is not such an allegation of fact at all.

If there is no allegation of facts which, if true, constitute or might constitute an infringement of the plaintiff's patent, the action can, as I have already indicated, be disposed of summarily on a point of law, either on a motion to strike out or otherwise. Strictly speaking, such a situation is not one for a motion for further particulars but I am inclined to the view that such a motion is an appropriate manner of bringing the matter to a head, having regard to the common practice of pleading conclusions as though they were allegations of the facts on which the conclusions are based, which practice, while not strictly speaking correct, is not too unsatisfactory in some circumstances.

Assuming that there is an allegation of facts that, if true, constitutes or might constitute an infringement, the question as to whether the plaintiff should be required to furnish further particulars is one to be decided as a matter of discretion having regard to the facts and circumstances of each particular case. For example, as already indicated, if the plaintiff's information is such that he knows, or has grounds for believing, that the defendant, who is a manufacturer, has been selling a certain type of goods that have been made by the plaintiff's patented process, the plaintiff should not, at least before discovery, be asked to give particulars as to where or when such goods were so made. Again, if a defendant manufactures only one line of goods, and the plaintiff has grounds for believing that those goods were made by his patented process (which embraces several possible variants), the plaintiff cannot be expected to give particulars as to the precise method employed by the defendant, at least before discovery. On the other hand, if the plaintiff's patent is for some process or improvement on a process which might conceivably be worked into any one or more of several hundred different operations in the defendant's plant, it would probably be incumbent upon the plaintiff to give sufficient particulars so as to limit not only the trial but discovery to the particular operation of the defendants which, according to the information upon which the plaintiff based his decision to commence his action, constitutes an infringement of the plaintiff's patent.

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Probably, applications for further particulars calling for an exercise of discretion are applications in which the Court should insist upon the supporting affidavits by both parties giving a reasonably full and frank disclosure of the grounds upon which the action was commenced and of the actual problems with which the parties are faced from the point of view of pleading, discovery and preparation for trial.[1]

In my view, however, none of these problems arise when the plaintiff, in addition to particularizing as to the facts constituting an infringement that are known to him, attempts to bring within the ambit of his Statement of Claim facts that are unknown to him and which, as far as he has any ground for belief, do not exist. Such an attempt to include in a Statement of Claim causes of action based upon no known facts must fail. Either the plaintiff can show that there are facts that justify including a second cause of action in the Statement of Claim or the references to such a possible cause of action are not relevant to any cause of action and should be struck from the pleading.

For the above reasons, I am of opinion that the application for further particulars should be granted in the terms sought and that the action should be stayed until such particulars are supplied or the Particulars of Breaches are amended so as to limit it to the breaches of which particulars are given.

In coming to this conclusion, I regard the decision of the Court of Appeal in England in *Aktiengesellschaft Für Autogene Aluminium Schweissung v. London Aluminium Company*[2] as being directly in point. While that was a decision as to whether interrogatories were to be answered, the decision turned upon a conclusion that a particular paragraph in a Statement of Objections in a patent infringement action, which I regard as indistinguishable in principle from paragraph 1 of the Particulars of Breaches in this case, was not "a particular of any breach whatever," so that it did not form a basis for discovery. See per Swinfen Eady M. R. at page 74:

> The plaintiffs by para. 2 of their particulars of breaches do give particulars of an alleged infringement. [His Lordship read the paragraph and continued:] In my opinion that is the only particular contained in the

[1] Cf. *Mersey Chemical Works Ld. v. Levenstein Ld.*, (1912) 29 R P C. 677.

[2] [1919] 2 Ch. 67.

document headed "Particulars of Breaches." Paragraph 1 is merely a general allegation that the defendants have infringed the patents, and does not condescend to give any detail, or any particular of the breach. It must be remembered that the function of particulars of breaches is to point out to the defendant what specific act on his part is complained of so as to prevent surprise at the trial, and, if this is so, how can it be said that para 1 of the plaintiffs' particulars of breaches complies with that provision? It is a mere repetition in general terms of the allegation in the statement of claim that the defendants have infringed the patents "prior to the issue of the writ in this action and subsequent to the 17th day of November, 1909"—that is to say at some time between November 17, 1909, and July 18, 1918, an interval of something like nine years. [His Lordship read the paragraph and continued:] There are no particulars and no details at all. In my opinion that paragraph does not amount to a particular of any breach whatever.[1]

Having regard to the fact that this motion was argued on the basis that the point involved is whether a plaintiff in such an action is entitled to include in his Statement of Claim breaches of a kind of which he has no information, it is worthwhile referring to what the Master of the Rolls said at page 75:

The first and second interrogatories are general interrogatories of a roving or fishing character to endeavour to find out whether the defendants have committed some other breach. They are not directed to any breach of which any particulars are given; and in my opinion it is not the practice in a patent action to allow interrogatories to travel outside the particulars, and to embrace questions generally of a roving and fishing character

and at page 76:

Then it was said that, if the plaintiffs were able to obtain an answer to the interrogatories in the present case, it was quite possible that the answer might disclose some other breaches, and that then the plaintiffs could apply to amend their particulars of breaches, and bring them into

[1] The paragraph to which the Master of the Rolls referred read as follows:

> "1. Prior to the issue of the writ in this action, and subsequent to the 17th day of November, 1909, the defendants have infringed each of the letters patent referred to in the statement of claim by the use in this country for welding objects made of aluminium of fluxes made in accordance with the descriptions in the complete specifications of each of the said letters patent and as claimed in all the claiming clauses thereof, and have in this country used the processes therein described, and sold, supplied, and offered to sell objects made of aluminium so welded."

See also Warrington L.J. at page 78. In the subsequent decision of Eve J. in *The Mullard Radio Valve Co., Ld. v. Tungsram Electric Lamp Works (Great Britain), Ld.* (1932) 49 R.P C. 279, the point decided in this Court of Appeal decision does not appear to have been raised. As I read the decision of *Salopian Engineers Limited v. The Salop Trailer Company Limited,* (1954) 71 R.P.C. 223, Lloyd-Jacob J. applies this Court of Appeal decision to say that the additional causes of action must be pleaded before discovery.

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the action by amendment. For that the case of *Sykes v. Howarth*, 12 Ch. D. 826 was relied upon; but it really only comes to this: that, if a plaintiff alleges, as an instance of a breach, a sale to A. and the defendant admits the sale of an article, exactly similar, to B. then the sale to B. will be admissible in evidence. In the particular case the defendant seems to have voluntarily admitted a sale not only to Samuel Shaw & Co. and Charles Smith, in the particulars of breaches mentioned, but also to "other persons"; so that there was an admission that he had sold to other persons an exactly similar article, and then the name of one of them was mentioned.

In my opinion those authorities are no justification for allowing the interrogatories to travel outside the particulars, and by interrogatories of a sweeping character to endeavour to find out whether any further breach has, at any time and under any circumstances, been committed by the defendants.

In so far as certain cases cited by counsel for the plaintiff are inconsistent with the Court of Appeal decision upon which I rely, as they are all decisions of inferior courts, I cannot regard them as authoritative. I refer to *Tilghman's v. Wright*[1], *Haslam v. Hall*,[2] *Mandleberg v. Morley*,[3] and *Brennan v. Posluns*.[4]

My conclusion is therefore that, left as it is, paragraph 1 of the Particulars of Breaches in this case is, as a particular of a breach of the plaintiff's patent rights, a mere nullity. Unless, therefore, the plaintiff supplies the particulars sought (I am not deciding whether the defendant would have been entitled to other relief if he had sought it), the Particulars of Breaches are not a satisfactory compliance with Rule 20 and are embarrassing. The order is therefore, as already indicated, for the further particulars in the terms sought and that the action be stayed until such further particulars are supplied or the Particulars of Breaches are amended so as to limit it to the breaches of which particulars are given. The defendant is to have the costs of the application in any event of the cause.

That concludes all that I have to say with regard to the application. I wish to add a few words to raise a question that has arisen in my mind in the course of my consideration of the application.

In general, under our system of pleading, a Statement of Claim for an infringement of a right should clearly show

(*a*) facts by virtue of which the law recognizes a defined right as belonging to the plaintiff, and

[1] (1884) 1 R.P.C. 103.
[2] (1887) 4 R.P.C. 203.
[3] (1893) 10 R.P C. 256 at 260.
[4] (1956) 16 Fox P.C. 98.

(*b*) facts that constitute an encroachment by the defendant on that defined right of the plaintiff.

If the Statement of Claim does not disclose those two elements of the plaintiff's cause of action, it does not disclose a cause of action and may be disposed of summarily.

While, as far as I know, there is no special rule in relation to claims for infringement of a patent that would exempt such proceedings from this elementary requirement, there appears to be a practice, which is not peculiar to this country, whereby the Statement of Claim does not describe the particular monopoly right of the plaintiff which he claims to have been infringed but is limited to an assertion that the plaintiff is an owner of a patent bearing a certain number and having a certain title. This patent is not part of the pleadings so that the pleading tells neither the Court nor the defendant anything about the rights of the plaintiff that, according to him, have been infringed. Furthermore, if the Court or the defendant acquires a copy of the patent, which can be done at a price, more often than not, it will be found that the patent purports to grant to the plaintiff a large number of monopolies and the Court and the defendant are left to guess which one or more is the subject matter of the action.

It seems to follow from this departure from the ordinary rules of pleading that the plaintiff then adopts the device found in the Statement of Claim in this action of omitting to allege any facts that would constitute an infringement of the plaintiff's rights and the Statement of Claim is limited to a bare assertion that the plaintiff's rights have been "infringed".

The question that occurs to me is whether there is any possible basis upon which such a Statement of Claim can be supported under our Rules.

Moncton 1966
June 8, 9
Ottawa July 19

BETWEEN:

M. F. ESSON & SONS LTD. ..... APPELLANT;

AND

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

Income tax—Associated companies—Income Tax Act, s. 35(4)—Control—What constitutes—Overlapping fiscal periods—When control must exist—Casting vote given company president by statute—Whether relevant to control.

Appellant company was assessed to tax for 1963 and 1964 as a company associated with Esson Motors Ltd within the meaning of s. 39 of the *Income Tax Act*. Appellant company's fiscal period comprised the year ending on March 31st in each year whilst the fiscal period of Esson Motors Ltd was the calendar year. All of appellant company's shares were owned by three men who also owned all the shares of Esson Motors Ltd prior to May 9th 1962, on which day they transferred half of their shares to another man pursuant to a *bona fide* contract under which he was to take over the company's management and to have an option to acquire the remaining shares. One of the group of three shareholders was president of Esson Motors Ltd, whose by-laws provided that the president should be chairman at shareholders' meetings. The relevant *Companies Act* provided that the chairman at shareholders' meetings had a casting vote.

Held, the two companies were not associated companies within the definition of s. 39.

1. It was irrelevant that prior to May 9th 1962 all the shares of both companies were owned by the same three men for though the period April 1st to May 9th 1962 fell within appellant company's 1963 taxation year it preceded the other company's 1963 taxation year and the two companies were therefore not controlled by the same group at "any time in the year" within the meaning of s. 39(4).

2. The ownership by the group of three shareholders of half the shares of Esson Motors Ltd coupled with the right of one of them to a casting vote at shareholders' meetings did not constitute control of the company.

Alpine Drywall & Decorating Ltd. v. M.N.R. [1966] Ex. C.R. 1148 followed. *Pender Enterprises Ltd. v. M.N.R.* [1965] C.T.C. 343 at 357, referred to. *Buckerfield's Ltd. v. M.N.R.* [1965] 1 Ex. C.R. 299; *British American Tobacco Co. Ltd. v. I.R.C.* [1943] 1 All E.R. 13; *B. W. Noble Ltd. v. C.I.R.* (1926) 12 T.C. 923; and *C.I.R. v. Monnick Ltd.* (1949) 29 T.C. 379, discussed.

APPEAL from income tax assessments.

George B. Cooper for appellant.

L. R. Olsson for respondent.

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THURLOW J.:—The issue in this appeal, which is from re-assessments of income tax for the years 1963 and 1964, is whether the appellant and Esson Motors Limited were, in the taxation years in question, "associated with each other" for the purpose of section 39 of the *Income Tax Act*.[1] The issue turns on whether at relevant times both corporations were controlled by the same group of persons.[2]

For each of the years in question the appellant's fiscal period ended on March 31, and for it these taxation years accordingly ran from April 1, 1962 to March 31, 1963 and from April 1, 1963 to March 31, 1964. Throughout both periods the whole of the issued share capital of the appellant was owned and registered in the names of Miller F. Esson, Sr., Miller H. Esson, Jr. and John F. Esson, the three of whom admittedly constituted a related group which controlled the company.

From April 1, 1962 to May 9, 1962, that is to say, during part of the 1963 fiscal period of the appellant the same three persons were the registered owners of all the issued shares of Esson Motors Limited. On the latter date, pursuant to a contract dated May 7, 1962 and made between the members of the group and Esson Motors Limited, of the one part, and Edward Earle McKenna, Jr., of the other part, the members of the group transferred to McKenna, who was not related to any of them, 50 per cent of the issued shares of Esson Motors Limited to hold as his own. By the terms of the contract they also gave McKenna an irrevocable option to purchase the remaining issued shares of the company during a period of one year commencing on May 29, 1965 at a price to be determined according to a formula set out in the contract. It was also provided that if McKenna should fail to exercise the option the shares transferred to him should revert to and again become the property of the members of the group.

The object of these arrangements was to induce McKenna to undertake the management of the company. The company had been losing money and by May 1962 was

[1] R S C. 1952, c. 148 as amended by S. of C. 1960, c. 43.

[2] Section 39(4). For the purpose of this section, one corporation is associated with another in a taxation year if, at any time in the year,

(*b*) both of the corporations were controlled by the same person or group of persons.

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in poor financial condition. Its property was heavily mortgaged and in addition Miller F. Esson, Sr. had given personal guarantees of its indebtedness to the extent of about $100,000. The contract provided that the company should immediately delegate to McKenna complete and exclusive authority to conduct the affairs of the company (with certain minor exceptions in which the concurrence of McKenna and the Essons was required) during the three year term of the contract. The Essons as shareholders, directors and officers of the company also waived their rights to allowances to be paid by the company by way of salary, bonuses, dividends, directors' fees or otherwise during the term and they further undertook not to cause the issue of any new shares. That the contract was a *bona fide* transaction and that it was carried out in accordance with its terms are not challenged.

Esson Motors Limited had been incorporated in 1953 by letters patent issued under the *Companies Act*[1] of the Province of New Brunswick and its 1963 and 1964 fiscal periods ran in each year from January 1 to December 31. Section 102 of the *Companies Act* provided that:

> In the absence of other provisions in that behalf in the letters patent or by-laws of the company,
>
> (*c*) all questions proposed for the consideration of the shareholders at such meetings shall be determined by the majority of votes, and the chairman presiding at such meetings shall have the casting vote in case of an equality of votes.

The letters patent and by-laws of the company contained no "other provisions in that behalf" but the by-laws did provide that

> The President shall preside at meetings of the board He shall act as Chairman of the Shareholders' meetings if present.

From the time of the making of the contract with McKenna to the end of the period material to these proceedings the three Essons continued to be the directors of the company, the remaining 50 per cent of the issued shares continued to be registered in their names and Miller F. Esson, Sr. continued to be the president of the company, an office to which he had been elected in 1953. It thus appears that Miller F. Esson, Sr., if present, was entitled to act as chairman of any meetings of the shareholders that might be held and that under section 102(*c*) of the Act he was

[1] R.S.N.B. 1952, c. 33.

entitled to exercise a casting vote in case of a tie though he was never at any material time aware that he had a casting vote and he never had occasion to cast one.

As the re-assessments are based solely on section 39(4)(*b*) of the Act the question to be resolved is whether the three Essons, who at all material times controlled the appellant, also controlled Esson Motors Limited at material times. The Minister's case for upholding the re-assessments is that prior to May 9, 1962 Esson Motors Limited was controlled by the three Essons by reason of their holding 100 per cent of the issued shares of the company and that after that time the company was controlled by them by reason of their holding 50 per cent of the issued shares coupled with the power of Miller F. Esson, Sr., as chairman of shareholders' meetings to exercise a casting vote in the case of a tie and that by reason of such control by the Essons of Esson Motors Limited and their admitted control of the appellant the two companies were associated with each other for the purpose of section 39 in both of the taxation years in question. In support of his position counsel for the Minister raised and argued three submissions.

It was said first that the appellant and Esson Motors Limited were associated for the 1963 taxation year by reason of the admitted control of both companies by the Essons during the period from April 1, 1962 to May 9, 1962. Since under section 39(4) of the *Income Tax Act*[1] corporations are "associated with each other" if the appropriate control exists "at any time in the year" this submission is unanswerable if the period from April 1, 1962 to May 9, 1962 was a material time with respect to the 1963 taxation year. Plainly the period was part of the appellant's 1963 fiscal period but it was not part of the 1963 fiscal period of Esson Motors Limited.

What then is the material period? Counsel for the Minister urged that the word "year" in the expression "if at any time in the year" in section 39(4) refers to the expression "taxation year" appearing earlier in the subsection, that the latter expression can refer only to the taxation year of the particular corporation whose taxation is being considered and that it is immaterial whether the period of association is also within the fiscal period of the other

[1] R.S.C. 1952, c. 148 as amended by S. of C. 1960, c. 43, s. 11(1).

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company for the same taxation year. While the manner in which section 39(4) is worded lends some colour to the submission, particularly when the subsection is read by itself, in my opinion the submission cannot prevail. In section 39(2) and section 39(3) two or more corporations are referred to and the taxation years of all of them are referred to by the expression "in a taxation year". Two or more corporations as well are involved in the allocations of $35,000 between them contemplated by section 39(3) and section 39(3*a*) for the purpose of fixing the taxation of their incomes for the same taxation year. Two corporations also, not merely one, are referred to by the expression "one corporation is associated with another" in section 39(4) and the taxation of both for the same taxation year is affected thereby. When therefore section 39(4) refers to "any time in the [taxation] year" it is, I think, to be interpreted as referring to any time that is in the taxation year of both corporations and where their fiscal periods do not coincide the subsection can, in my opinion, refer only to a time that is in such portion of the fiscal periods of the two corporations for the taxation year as is common to both.

In my opinion therefore since the period from April 1, 1962 to May 9, 1962 was not within the fiscal period of Esson Motors Limited for the 1963 taxation year the control of both that corporation and the appellant by the Essons during that period is immaterial. The Minister's submission accordingly fails.

The second submission was that the fact that section 139(5*d*)(*b*) might, because of section 39(4*a*)(*c*), be applicable to McKenna so as to cause it to be deemed that he had the same position in relation to the control of Esson Motors Limited as if he owned the shares which he had an option to purchase in the future, could not affect the application of section 39(4) when considering whether the Essons "controlled" Esson Motors Limited for the purpose of section 39. This submission was raised in answer to the main submission of the appellant that the effect of section 39(4*a*)(*c*) coupled with section 139(5*d*)(*b*) was that McKenna must be deemed to have been in control of Esson Motors Limited at all material times from which it followed that the Essons could not be regarded as having

"controlled" the company for the purpose of section 39. I am not persuaded that the appellant's position on this point is sound but in view of the conclusion which I have reached on the first and third submissions, which are sufficient to dispose of the appeal, it is not necessary to decide the point.

The third submission was that the Essons continued to control Esson Motors Limited at all material times after May 9, 1962 by reason of their ownership of 50 per cent of the issued shares and the right of Miller F. Esson, Sr., if present, to preside as chairman of shareholders' meetings which, having regard to section 102(*c*) of the *Companies Act* and to the letters patent and by-laws of the company, conferred on him power to exercise a casting vote in case of a tie.

A similar contention was put forward in this Court in *Pender Enterprises Limited v. M.N.R.*[1] where Noël J., after referring to the judgment of the President of this Court in *Buckerfield's Limited v. M.N.R.*[2] dealt with the point as follows:

> Now although this interpretation was given in connection with Section 39 of the *Income Tax Act*, I can see no reason why it should not apply as well to Section 139(5*a*) of the Act in which case Lee could not have control of the appellant corporation as he held only 50% of its shares and, therefore, could not be said to have a number of shares such that he carries with it the right to a majority of the votes in the election of the board of directors or that his shareholding in the company was such that "he was more powerful than all the other shareholders in the company put together in general meeting" as set down by Cameron J. in *Vancouver Towing Company Limited v. M.N.R.*, [1946] Ex. C.R. 623 at 632; [1947] C.T.C. 18. It indeed appears to be clearly settled that control of a corporation requires at least a bare majority in shareholding and as Lee here has not this majority, he cannot be considered as controlling the appellant and I say this notwithstanding the articles of association adopted by the appellant which gives its president a preponderent vote in the case of an equality of votes at every general meeting of the company. Indeed, such a power given to the president of the present corporation, in view of the particular circumstances of the instant case, could not, in my view, give Lee effective control over the appellant corporation which he would not otherwise have by virtue of his shareholdings because any control he would wish to exercise by virtue of his preponderent vote could not, in practice, be implemented. There being two shareholders only, Lee could not hold a general meeting of the appellant corporation without Wong's consent and as one director cannot constitute a meeting, he could not use his preponderant vote.

[1] [1965] C.T.C. 343 at page 357. [2] [1965] 1 Ex. C.R. 299

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The contention was again raised in the *Aaron cases*[1] where though it was unnecessary to decide the point I expressed a doubt as to its validity.

More recently in *Alpine Drywall & Decorating Ltd. v. M.N.R.*[2] (Cattanach, J., while expressing doubt that there was any basic distinction between the case before him and that of *B. W. Noble Ltd. v. C.I.R.*[3], held the contention invalid on the basis of the earlier expressions of opinion in this Court, including that of the President in the *Buckerfields'* case as to the meaning of "controlled" in section 39(4) of the Act. In view of the decision of Cattanach J., and in the absence of any expression of opinion to the contrary by the Supreme Court I think that in this Court the matter should be taken as decided but it may be useful nevertheless to make some further comment on the point.

The meaning of "controlled" in section 39(4) of the *Income Tax Act* was considered in *Buckerfield's Limited v. M.N.R.*[4] where the President of this Court said at page 302:

> Many approaches might conceivably be adopted in applying the word "control" in a statute such as the *Income Tax Act* to a corporation. It might, for example, refer to control by "management", where management and the Board of Directors are separate, or it might refer to control by the Board of Directors. The kind of control exercised by management officials or the Board of Directors is, however, clearly not intended by section 39 when it contemplates control of one corporation by another as well as control of a corporation by individuals (see subsection (6) of section 39) The word "control" might conceivably refer to *de facto* control by one or more shareholders whether or not they hold a majority of shares. I am of the view, however, that, in section 39 of the *Income Tax Act*, the word "controlled" contemplates the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the Board of Directors. See *British American Tobacco Co. v. I.R.C.* [1943] 1 A E R. 13 where Viscount Simon L C., at page 15, says:
>
> > 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.
>
> See also *Minister of National Revenue v. Wrights' Canadian Ropes Ltd.* [1947] A.C. 109 per Lord Greene M.R. at page 118, where it was held that the mere fact that one corporation had less than 50 per cent of the shares of another was "conclusive" that the one corporation was not "controlled" by the other within section 6 of the *Income War Tax Act*.
>
> Where, in the application of section 39(4) a single person does not own sufficient shares to have control in the sense to which I have just referred, it becomes a question of fact as to whether any "group of persons" does own such a number of shares.

[1] [1966] C.T.C. 330.
[2] [1966] Ex. C.R. 1148.
[3] (1926) 12 T.C. 923.
[4] [1965] 1 Ex. C.R. 299.

The definition of control as that arising from shareholding is supported by the opinion of the House of Lords in *British American Tobacco Co. Ltd. v. I.R.C.*[1], a decision which has on several occasions been referred to and applied in decisions of this Court[2] both in cases arising under the *Income War Tax Act* and in cases arising under the *Income Tax Act*. In the *British American Tobacco* case Lord *Simon*, L.C. in considering the meaning of "controlling interest" said at page 15:

> It is true that in such circumstances company No. 1 owns none of the assets of company No 2, and *a fortiori* owns none of the assets of company No. 3, and that in that sense neither owns, nor has an interest in, company No 3 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.
>
> 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* 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.

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[1] [1943] 1 All E.R. 13.

[2] *Vancouver Towing Company Limited v. M.N.R.* [1946] Ex. C.R. 623. *Sheldon's Engineering Limited v. M.N.R.* [1954] Ex C.R. 507. *Vineland Quarries and Crushed Stone Ltd. v. M.N.R.* [1966] C.T.C. 69.

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The definition of "controlling interest" as referring to the man whose shareholding is such that he is more powerful than all the other shareholders put together in general meeting seems to me to coincide precisely with the definition of "controlled" formulated by the President of this Court in the *Buckerfield's* case and to be inapt to describe the position of the Essons as a group with respect to Esson Motors Limited during the material period. Their *shareholding* plainly was not such that they were more powerful than McKenna in general meetings. Moreover, Viscount Simon's expression "the *owners* of the majority of the voting power" also seems inappropriate to characterize the casting vote of a chairman since it is not a subject of ownership at all but is, as I view it, a mere adjunct of the office exercisable, not as his personal interest alone may dictate, but *bona fide* in the interest of the company as a whole. Its nature is also such that it is exercisable by whoever happens to occupy the chair at a meeting when the occasion to exercise such a vote arises and it is then exercisable only by the person himself and not by anyone on his behalf. I do not think it was intended by Parliament to make the taxation of corporations vary according to exigencies of that nature and reading the provisions of section 39 and giving the word "controlled" in section 39(4) what appears to me to be its ordinary meaning I do not think that anything but a sufficient number of votes arising from shareholding to dictate decisions to be taken by the company can be regarded as within the generally understood meaning of control in the sense in which the word "controlled" is used in the statute. Moreover, even if the matter were regarded as doubtful in the sense that the word used in the statute was such that it might or might not have been intended to cover a case of this kind the situation would seem to me to be one for the application of the principle that clear words are required to authorize taxation and that any doubt as to the meaning of the expression used should be resolved in favor of the taxpayer.

The principal case relied on by the Minister in support of his position was that of *B. W. Noble Limited v. C.I.R.*[1], a

[1] (1926) 12 T.C. 923.

decision of Rowlatt J., rendered in 1926 on the meaning of "controlling interest" in section 53 of the *Finance Act*, 1920. In that case the appellant company had been formed to acquire and operate an insurance business carried on by Noble. Half of the company's voting shares were held by Noble and the remainder by two others but, under a contract made at the time when the company was organized and to which all three shareholders and the company itself were parties, Noble was entitled as against the other shareholders and the company itself to be chairman of shareholders' meetings and thus under the articles of the company to a casting vote in case of a tie. Rowlatt J., said:[1]

> It seems to me that "controlling interest" is a phrase that has a certain well known meaning; it means the man whose shareholding in the Company is such that he is the shareholder who is more powerful than all the other shareholders put together in General Meeting. That is really what it comes to. Now, this gentleman has just half the number of shares, but those shares, in the circumstances of this case, are reinforced by the position that he occupies of Chairman, a position which he occupies not merely by the votes of the other shareholders or of his Directors elected by the shareholders but by contract; and, so reinforced, inasmuch as he has a casting vote, he does control the General Meetings—there is no question about that—and inasmuch as he does possess at least half of the shares he can prevent any modifications taking place in the constitution of the Company which would undermine his position as Chairman.
>
> Therefore, on the whole, giving what I think is the most obvious meaning to these words in the Sub-section and having regard to the object of the Section, I think the contention of the Crown is right,...

It will be observed that Rowlatt J., did not hold that as a general proposition half the shares of a company plus the right to be chairman and to exercise a casting vote in case of a tie, would give a "controlling interest" in the company. What he appears to me to have said is that half the shares plus the right arising *by contract* with both the company itself and the other shareholders to be chairman and thus to exercise a casting vote in case of a tie *in the circumstances* enabled Noble to control general meetings of the company, that in the circumstances he was, because of his shareholding, in a position to prevent constitutional changes that might undermine his position and that *on the whole* and *having regard to the object of the section* under consideration he was of the opinion that Noble had a "controlling interest" in the company.

[1] (1926) 12 T.C. at 926.

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Thurlow J.

The statement of Rowlatt J., with respect to the meaning of "controlling interest" was approved by the House of Lords in the *British American Tobacco* case[1] already referred to but so far as I am aware his application of it to the facts of the particular case has not been discussed in any higher Court. It does seem to me that after stating the meaning of "controlling interest" by reference to shareholding Rowlatt J., proceeded to his conclusion by taking into account additional facts chief among which was that of the contract between Noble and the company and the other shareholders under which Noble was entitled to be chairman of the company and thus to exercise a casting vote. As I view the matter it is not necessary to decide in the present case whether it is permissible in cases arising under section 39 of the *Income Tax Act* to take into account the casting vote of a chairman where the chairman is entitled by contract to exercise such a vote because here there was no contract giving Miller F. Esson, Sr., any such right. However, if the implication of the decision on its particular facts of the *Noble* case is that a casting vote is to be taken into account and I am thus faced with a choice between the decision in the *Noble* case and the principles to which I have referred including those which have been established by this Court and by the House of Lords since the decision in the *Noble* case I think the principles so established should be followed rather than the implication from a decision on its own particular facts.[2]

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[1] See also the judgment of Viscount Simonds in *Barclays Bank Ltd. v. I.R.C.* [1960] 2 All E.R. 817 at 820.

[2] If, however, I am wrong in this view and additional facts with respect to the situation in the particular company may be taken into account in determining control, as was done in the *Noble* case, it would appear to me that the contract between McKenna and the Essons to which the company was itself also a party tended to restrict rather than to reinforce the rights of the Essons to dictate decisions to be made by the company. I would infer that at least one of the purposes of transferring 50% of the shares to McKenna was to ensure that his voice in the company's decisions would thereafter be as strong as that of the Essons and in view of both the authority conferred upon him and of the restrictions upon the powers of the Essons I do not think either that the voting rights of the Essons were exercisable to override the will of McKenna in order to dictate decisions to which he was opposed or that the casting vote in these circumstances could be regarded as a reinforcement of the Essons' shareholding so as to put them in control of the company as it was held to be of Noble's shareholding because of the contract in the *Noble* case.

Another case relied on was *C.I.R. v. Monnick Ltd.*[1] where in the course of holding on particular facts that the respondent company was not one the directors whereof had a controlling interest therein, though two persons who for the purpose of the statute under consideration were to be regarded as directors held half the shares, Croom-Johnson J., said at page 385:

> It is perfectly true that if this Company had a board of directors—and it has not—and if that board of directors had appointed a chairman, and if that chairman had happened to be Mr. Mark Monnickendam, the result would no doubt have been that he would have been in control. I do not shut my eyes to that as a possibility.

To my mind this was no more than a description for purposes of illustration of a possible situation which was not then before the Court and though the learned Judge at one point used the expression "no doubt" it is noticeable that he also referred to "a possibility". Accordingly, apart from the statement being *obiter*, I do not think that it should be regarded as expressing a concluded opinion on the point.

I am accordingly of the opinion that the proposition that the casting vote of the chairman in a situation such as the present confers control of the company is not sustainable as a general proposition in view of the principles which have been established for determining control in cases arising under section 39 of the *Income Tax Act* and that the shareholding of the Essons, upon which control for the purpose of section 39 depended, was not such as to afford them control of Esson Motors Limited at any time material to these proceedings. The Minister's submission therefore fails.

The appeal will be allowed with costs and the re-assessment will be referred back to the Minister for re-assessment on the basis that the appellant and Esson Motors Limited were not "associated" for the purpose of section 39 of the Act in either of the taxation years in question in the appeal.

[1] (1949) 29 T C. 379.

St. John's 1966
June 15
Ottawa
July 28

BETWEEN:

MUNN AND COMPANY LIMITED .....PLAINTIFF;

AND

THE MOTOR VESSEL *SIR JOHN CROSBIE* . ...} DEFENDANT.

ON APPEAL FROM DISTRICT COURT OF NEWFOUNDLAND ADMIRALTY DISTRICT

Shipping—Ship pressed against wharf by gale—Damage to wharf—Whether ship negligent—Findings of trial judge—Appeal—New cause of action put forward on appeal—Absolute liability—Harbours, Docks and Piers Clauses Act U.K., (1847) 10 & 11 Vic., c. 47—Whether applicable in Newfoundland.

Defendant ship which was moored to plaintiff's wharf in Harbour Grace Newfoundland after discharging a cargo of coal for plaintiff was pressed against the wharf by a gale, causing damage to the wharf. Plaintiff sued for damages alleging that defendant was negligent in failing to remove the ship from the wharf. The trial judge found that defendant was not negligent and dismissed the action. Plaintiff appealed and put forward as an alternative ground of appeal that defendant having deliberately preserved the ship at the expense of the dock was liable for the damage to the dock.

Held, the appeal must be dismissed.

(1) The finding of the trial judge that the defendant was not negligent was supported by the evidence.

(2) At common law a ship moored to a wharf at the invitation of the wharfinger is not under an absolute liability not to damage the wharf but is subject to the same duty of care with respect to the wharf as is a ship under way. *River Wear Comm'rs v. Adamson et al* (1877) 3 Asp. 521 applied; *Vincent v. Lake Erie Transportation Co.* (1910) 124 N.W. 221, discussed and distinguished.

(3) Sec. 74 of the *Harbours, Docks and Piers Clauses Act* (1847 U.K.) 10 and 11 Vic., c. 47, is not applicable in Newfoundland.

(4) The alternative ground of appeal founded on a cause of action not set up by the pleadings was not open to plaintiff. *Lamb v. Kincaid* (1906) 38 S.C.R. 516; *Esso Petroleum Co. Ltd. v. Southport Corp.* [1953] A.C. 218, referred to.

APPEAL from decision of Puddester D.J.A., Newfoundland Admiralty District, dismissing action for damages.

T. A. Hickman, Q.C. for appellant (plaintiff).

Hon. P. J. Lewis, Q.C. for respondent (defendant).

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JACKETT P. (THURLOW J. *concurring*):—This is an appeal from a judgment delivered by Puddester J., one of the District Judges in Admiralty for the District of Newfoundland, on June 30, 1964, in an action for damages sustained by the plaintiff's wharf, as the result of the defendant ship being pressed against the wharf by a wind of gale force. The defendant ship was at all material times moored at the wharf, where she had been discharging a cargo of coal belonging to the plaintiff. When the storm arose the strong southeasterly wind tended to push the ship away from the wharf but after some hours the wind shifted to southwest and west and at that stage caused the ship to be pressed against the wharf and thus to occasion the damage.

The action as pleaded, and as tried before the trial Judge, was clearly understood by all concerned to be an action based upon the negligence of the defendant in failing to remove the ship from the wharf and in failing to take in due time unspecified measures for avoiding damage to the wharf. The learned trial Judge held that the plaintiff had failed to establish that its damages were caused by negligence of the defendant and, accordingly, dismissed the action. On the appeal to the Exchequer Court of Canada, after hearing the submissions of counsel for the appellant on the question of negligence, we intimated to counsel for the respondent that we did not require to hear him on that question. In our view the findings of the learned trial Judge that the damage did not result from negligence on the part of those in charge of the defendant ship are well supported by the evidence. While the opinions of mariners may differ as to what might have been feasible or reasonable in the circumstances that prevailed at Harbour Grace on the occasion in question and while neither of us would necessarily have reached the same conclusion as the learned trial Judge had we tried the action and had the advantage of seeing the witnesses, it is impossible to say that it was not open to the learned trial Judge to reach his conclusion on the evidence before him.

Counsel for the appellant put forward an alternative argument in support of the appeal. This argument was based upon an alternative cause of action, which, admittedly, was not in the minds of the professional advisors of the appellant at the time of the proceedings before the Dis-

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trict Judge in Admiralty. It would appear that it first occurred to the appellant's advisors that an alternative cause of action was available to it when, upon Mr. Justice Puddester's judgment being reported, comments were made such as that which appears in connection with the report of his decision in 52 D.L.R. (2d), at pages 48 and 49. That reads as follows:

> EDITORIAL NOTE: This case may be usefully compared with a decision of the Supreme Court of Minnesota, *Vincent v. Lake Erie Transportation Co.* (1910), 124 N W. 221 (see also *Wright's Cases on Torts*, 3rd ed., p. 125) which, although virtually identical on the facts, reached an opposite conclusion on the question of liability for the damage occasioned. In the *Vincent* case defendant's ship was moored to the plaintiff's wharf for the purpose of discharging cargo when a severe storm blew up and there too the captain deliberately decided to keep it moored to the wharf, rather than cast off, with the result that the wharf was damaged when the ship was thrown against it by the wind and waves. The plaintiff complained that it was negligence on the part of the captain to remain moored at the wharf when it became apparent that the storm was to be more than usually severe but, as in the instant case, the Court decided that, on the contrary, such a course would have been highly imprudent and that it was only good judgment and prudent seamanship to hold the vessel fast to the dock. However, the Minnesota Court held that the defendant was nevertheless liable to pay for the damage that was caused. In other words, although the defendant's ship was privileged to remain at the wharf and use it as a sanctuary (and if the plaintiff had cast it off, to its damage, the plaintiff would be liable therefor), the defendant could not also demand that the plaintiff should bear the expense of so preserving the defendant's property. Such a solution, conferring only an "incomplete" privilege upon the defendant, as distinct from an absolute immunity, seems to be both sound and just. As stated by O'Brien J., in the *Vincent* case (p 222):
>
> > "...here those in charge of the vessel deliberately and by their direct efforts held her in such a position that the damage to the dock resulted, and, having thus preserved the ship at the expense of the dock, it seems to us that her owners are responsible to the dock owners to the extent of the injury inflicted...
> >
> > This is not a case where life or property was menaced by any object or thing belonging to the plaintiffs, the destruction of which became necessary to prevent the threatened disaster. Nor is it a case where, because of an act of God, or unavoidable accident, the infliction of the injury was beyond the control of the defendant, but is one where the defendant prudently and advisedly availed itself of the plaintiffs' property for the purpose of preserving its own more valuable property, and the plaintiffs are entitled to compensation for the injury done."

The appellant has two hurdles to pass in order to succeed on this alternative ground. First, it has to be decided whether the alternative cause of action can be put forward as a ground for judgment when it was not raised in the

Court below. Second, it must be decided whether there is such an alternative cause of action and whether it is applicable to the facts of this case.

We find no support in the authorities referred to by counsel for the appellant for his submission that a rule of absolute liability applies in a situation of this kind and we have come to the conclusion that, apart from statute (and no statute has been brought to the Court's attention which would have any application to the facts in this case), the responsibility or duty of the defendant ship to take reasonable care to avoid damage to the plaintiff's property, to which it was at the plaintiff's invitation or with its permission moored, was no greater than that which would have been applicable had the ship at the material time been under way. With respect to a ship under way the common law is set out in *River Wear Commissioners v. Adamson and Others*[1] per Lord Blackburn at page 528, where he says:

> The common law is, I think, as follows: Property adjoining a spot in which the public have a right to carry on traffic is liable to be injured by that traffic. In this respect, there is no difference between a shop the railings or windows of which may be broken by a carriage on the road, and a pier adjoining a harbour, or a navigable river, or the sea, which is liable to be injured by a ship. In either case the owner of the injured property must bear his own loss, unless he can establish that some other person is liable to make it good; and he does not establish this against a person merely by showing that he is owner of the carriage or ship which did the mischief, for that owner incurs no liability merely as owner; but he does establish such a liability against any person who either wilfully did the damage, or neglected that duty which the law casts upon those in charge of a carriage on land, and a ship, or a float of timber, on water, to take reasonable care, and use reasonable skill to prevent it from doing injury, and that this neglect caused the damage; and if he can prove that the person who has been guilty of this negligence stood in the relation of servant to another, and that the negligence was in the course of his employment, he establishes a liability against the master also.

The question to be decided, therefore, is whether the defendant "wilfully did" the plaintiff's damage or whether it "neglected that duty which the law casts upon those in charge of . . . a ship . . . to take reasonable care, and use reasonable skill to prevent it from doing injury, and that this neglect caused the damage; . . . "

In this case, there is no suggestion that the defendant wilfully did the damage. The plaintiff's submission throughout was simply that the defendant master had

[1] (1877) 3 Aspinall's Reports of Maritime Cases, 521 (H.L.).

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failed to move the ship from the wharf which in our opinion is in substance an allegation of neglect of a duty to remove her. We have already reached the conclusion that the finding of the learned trial Judge, that the appellant failed to establish that the respondent was guilty of negligence in that respect, must be affirmed. There is, therefore, no liability apart from statute.

Some question arose during the course of argument as to whether the statute under consideration in the *River Wear Commissioners v. Adamson et al* case—namely, section 74 of the *Harbours, Docks and Piers Clauses Act*,[1] might be part of the laws of England which were introduced into Newfoundland and might therefore be part of the laws of Newfoundland. However, an examination of that statute, particularly the preamble thereof, shows that it was only to apply to such harbours, docks and piers as were authorized by an Act of Parliament passed after 1847 where such Act contained a declaration that the 1847 Act was to be incorporated therewith. We were informed that a legislature was established in Newfoundland in 1832 and it seems unlikely that the Act of the British Parliament passed in 1847 would ever have been made effective in Newfoundland. In any event, we were not referred to any enactment purporting to make it applicable in Newfoundland generally or to the plaintiff's wharf.

In so far as *Vincent v. Lake Erie Transportation Company,* the Minnesota decision referred to by the Dominion Law Report editor, is concerned, upon a careful reading of the judgment of the Court delivered by O'Brien J., we are satisfied that it has no application to the facts of this case. The portion of his judgment which sets out his view of the law reads as follows:

> The situation was one in which the ordinary rules regulating property rights were suspended by forces beyond human control, and if, *without the direct intervention of some act by the one sought to be held liable,* the property of another was injured, such injury must be attributed to the act of God, and not to the wrongful act of the person sought to be charged. If during the storm the Reynolds had entered the harbor, and while there had become disabled and been thrown against the plaintiffs' dock, the plaintiffs could not have recovered. Again, if while attempting to hold fast to the dock the lines had parted, without any negligence, and the vessel carried against some other boat or dock in the harbor, there would be no

[1] 1847, 10 and 11 Victoria, chapter 27.

liability upon her owner. But here those in charge of the vessel deliberately and by their direct efforts held her in such a position that the damage to the dock resulted, and, having thus preserved the ship at the expense of the dock, it seems to us that her owners are responsible to the dock owners to the extent of the injury inflicted.

(Italics added).

In that case, therefore, liability was based upon the fact that those in charge of the vessel "deliberately and by their direct efforts held her in such a position that the damage to the dock resulted". The principle applied was that the ship, having been preserved at the expense of the dock, the owners of the ship were responsible to the dock owners to the extent of the injury inflicted.

In this case, not only was there no allegation in the pleadings, but it was not established, that at any point of time those in charge of the vessel took any steps to preserve the ship at the expense of the wharf. There was evidence that additional bow and stern lines were made fast when the wind was still southeasterly and tending to push the ship away from the wharf but it does not appear that this was done to protect the ship at the expense of the wharf or that in the circumstances of wind and weather then prevailing damage to the wharf was to be expected from further securing the ship in her position. On this point the trial Judge found that it was by no means certain at that time that to ride out the storm at the wharf would necessarily cause damage to the wharf. The defendant ship was there as an invitee and it would not be trespass for her to be pushed by the wind into contact with the wharf. Save on the possible hypothesis that damage to the wharf was to be expected by such pressing there could, as we see it, be no liability arise therefrom, and even if damage were to be expected from the ship remaining there and such a liability could arise it would, in our view, sound in negligence rather than in trespass. On the question of what was reasonably foreseeable, it is not without significance that no action was taken by the plaintiff either to terminate the defendant's invitation to remain moored to its property or to require the ship to leave the wharf. Nor is it established that the ship would not have been held without the additional lines. In fact the additional lines had nothing to do with the damage since they had no effect in pressing or even holding

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the ship against the wharf. In the *Vincent* case, the damage was caused by pounding, and the renewing of the lines as they chafed or parted held the ship in a position where she could pound against the wharf. Here there is no evidence of renewal of lines to hold the ship in position to press against the wharf after she began to do so, and there is thus no material fact upon which liability might be based beyond that of the master's decision in the circumstances not to move the ship away from the wharf. A decision not to move may be evidence of neglect if in the circumstances there is a duty to move, but it is not in itself an act of trespass.

In the circumstances, it is not necessary to come to any conclusion as to whether the principle upon which the *Vincent* case was based is part of the law applicable in the province of Newfoundland. If we had to come to any conclusion on this point, we are inclined to the view that we would adopt the position taken by the dissenting judges in the *Vincent* case, Lewis and Jaggard JJ., as indicated in the judgment of Lewis J., where he said:

> I am of the opinion that one who constructs a dock to the navigable line of waters, and enters into contractual relations with the owner of a vessel to moor the same, takes the risk of damage to his dock by a boat caught there by a storm, which event could not have been avoided in the exercise of due care, and further, that the legal status of the parties in such a case is not changed by renewal of cables to keep the boat from being cast adrift at the mercy of the tempest.

However, even if the principle upon which the *Vincent* case was decided were otherwise applicable in this case, we are of opinion that the point is not open to the appellant on this appeal because the facts constituting the cause of action, that is to say, acts done by the defendant in the emergency for the preservation of the ship at the expense of the wharf, were not pleaded and were not in issue when the case was being tried before Mr. Justice Puddester. Had those facts been alleged, they might have been put in issue by the statement of defence and the defendant might have adduced with regard thereto evidence that would have completely altered the conclusions that one might otherwise draw from the evidence now before the Court. That evidence, it must be remembered, was adduced with regard to the issues raised by the pleadings as presently constituted

and it is to be presumed that the attention of the parties and of their counsel was on those issues and not on issues that had not been raised. Compare *Lamb v. Kincaid*[1] per Duff J. (as he then was) at page 539, and see also *Esso Petroleum Co. Ltd. v. Southport Corporation.*[2]

We are therefore of the opinion that the appeal fails. It is dismissed with costs.

[1] (1906) 38 S.C.R. 516. [2] [1953] A.C. 218.

Ottawa
1966
May 19
July 29

BETWEEN:

ROY A. HUNT *et al.* .....SUPPLIANTS;

AND

HER MAJESTY THE QUEEN .....DEFENDANT.

Estate Tax—Situs of company shares—Decedent domiciled in U.S.A.—Company incorporated in Canada—Stock transfer registries in Canada and U.S.A.—Writ of fi. fa.—Seizure in Canada—Whether effective.

Rachel Hunt died in Pittsburgh, Pa. in 1963 domiciled in the U.S.A. Her estate was assessed to Canadian estate tax in respect of 43,560 shares of Aluminium Limited, a company incorporated under the *Companies Act* of Canada and having its head office and principal place of business in Montreal. The company maintained a register of share transfers in Montreal and there were branch registries in the United States. The certificates for the 43,560 shares were physically situate in Pittsburgh. The estate tax assessed was not paid and a *fi fa* was issued out of the Exchequer Court to the sheriff of Montreal and seizure there made of the 43,560 shares. The executors of the estate petitioned for a declaration that the *fi fa* did not attach the estate's shares.

Held, the shares were situate in the province of Quebec at the time of the seizure and were therefore validly seized. The situs of shares for the purposes of judicial seizure is either the place or places where they can be effectively dealt with as between shareholder and company, i.e. where the company's books on which a transfer has to be registered are situated, in this case both Canada and the U.S.A., or at the domicile of the company, in this case Canada. The special rules for attributing the situs of shares to a province for purposes of provincial legislative jurisdiction to levy estate tax and succession duties do not apply to the determination of the situs of shares for purposes of judicial seizure.

Brassard v. Smith [1925] A.C. 371; *Braun v. Custodian* [1944] Ex. C.R. 30; [1944] S.C.R. 339, applied. *Rex. v. Williams* [1942] A.C. 541, distinguished.

PETITION OF RIGHT.

John de M. Marler, Q.C. and *R. J. Cowling* for suppliants.

D. S. Maxwell, Q.C. and *D. G. H. Bowman* for defendant.

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JACKETT P.:—This is a Petition of Right by the Executors of the Estate of Rachel McM. M. Hunt seeking a determination that a writ of *fieri facias* issued out of this Court did not attach certain shares of Aluminium Limited belonging to the Estate.

Other relief was sought by the Petition of Right but counsel for the suppliants at the hearing limited his claim for relief to a claim for such a declaration.

I doubt whether a Petition of Right is the appropriate procedure to raise that question for determination, but, as I have no doubt that the Court has jurisdiction to determine that question and as the parties were agreed that the Court should determine that question in these proceedings, I propose to determine the question as though it had been raised by whatever procedure would have been appropriate.

The late Rachel McM. M. Hunt died at Pittsburgh in Pennsylvania, one of the United States of America, on February 22, 1963 at which time, she was resident and domiciled in the United States. At the time of her death, she owned, and there was registered in her name in the books of Aluminium Limited, 43,560 shares in the capital stock of that company having a value of $1,038,155.61. There was also, at that time, an unpaid dividend of $5,982.50 payable on such stock.[1]

Aluminium Limited was incorporated under the *Companies Act of Canada,* which is now consolidated in R.S.C. 1952, c. 53. By virtue of section 38(*e*) of the *Estate Tax Act,* c. 29 of 1958, shares of a corporation (subject to certain irrelevant exceptions) are deemed, for the purpose of Part II of that Act, to be situated in the place where the corporation was incorporated. Part II of the Act levies an estate tax on property situated in Canada and belonging to a person domiciled outside Canada at the time of his or her death. An assessment was accordingly made against the estate in the sum of $156,620.73. The validity of this assessment has not been attacked. The tax has not, however, been paid.

[1] These are the figures on the "Calculation of Tax" form attached to the Estates Tax Assessment. Counsel for the suppliants, at the trial, appeared to accept it that for the purposes of estates tax, there was, at the time of Mrs. Hunt's death, property in Canada to the value of $1,044,138.20.

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The situation is that the Estate has been validly made subject to tax under and by virtue of Canadian law but a judgment for the tax is enforceable only in Canada as, of course, the Courts of another country will not lend their assistance to enforce payment of taxes owing to the Government of Canada. The Government of Canada can only enforce payment of this tax debt, therefore, if it can find property of the Estate subject to execution in Canada.

Recognizing the correctness of this position, the Minister of National Revenue took the necessary steps to have a writ of *fieri facias* issue out of this Court directed to the Sheriff of the Judicial District of Montreal in the Province of Quebec, who is, by virtue of section 74 of the *Exchequer Court Act,* R.S.C. 1952, c. 98, *ex officio* an officer of this Court. The Sheriff took the steps appropriate to the seizure of the aforesaid shares in Aluminium Limited in accordance with the requirements of that writ.

These proceedings are to determine whether those steps were effective. Counsel at the hearing were in agreement that

(*a*) if the shares were, at the time that the Sheriff took such steps, situated, so as to be subject to seizure under judicial process, in the province of Quebec, the seizure was effective, and

(*b*) if the shares were not, at such time, situated, so as to be subject to seizure under judicial process, in the province of Quebec, the seizure was not effective.

The following additional facts are regarded by one party or the other as having relevance to the determination of this question:

4. The individual Suppliants are, and have at all relevant times been, citizens of and domiciled in the United States of America and the Suppliant Mellon National Bank and Trust Company is an American company and has no office or place of business in Canada.

* * *

6. Aluminium Limited is a company incorporated under the Companies Act of Canada and has its head office and principal place of business in the City of Montreal. Almost all of the meetings of Directors and all meetings of shareholders of Aluminium Limited are held at the Company's head office in the City of Montreal and the central management of the Company is located there.

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7. Aluminium Limited at the time of the death of the deceased maintained, and still maintains,

(*a*) its register of transfers of shares in its capital stock and all books required to be kept by it pursuant to section 107 of the Companies Act in the said City of Montreal; and

(*b*) branch registers of transfers of shares in the Cities of Pittsburgh, New York, London (England), Toronto and Vancouver;

* * *

9. At all relevant times shares in the capital stock of Aluminium Limited were listed on the Montreal, Toronto, Vancouver, New York, Midwest, Pacific Coast, London, Paris, Basle, Geneva, Lausanne and Zurich Stock Exchanges, being recognized stock exchanges.

10. The share certificates . . . were at the death of the deceased physically situated in the said City of Pittsburgh.

Counsel for neither party based his submission on any decision or line of decisions dealing explicitly with the question as to what constitutes *situs* of shares within the geographical jurisdiction of a Court so as to subject them to seizure under process issuing out of that Court.

Counsel for the suppliants put his case squarely on the well known line of cases concerning *situs* of shares, for purposes of state tax and succession duties levied by the legislatures of Canadian provinces,[1] of which representative ones are *Brassard v. Smith*,[2] *Rex v. Williams*,[3] *Treasurer of Ontario v. Aberdeen*.[4]

Counsel for the Crown did not seriously contend that, if the rules developed by those cases applied to the determination of the *situs* of the shares in this case for the purpose of this seizure, the shares have been effectively subjected to the process of the Court.

His position was, however, that those cases laid down rules developed for determining the limits of the application of provincial estates tax and succession duty laws and

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[1] I do not overlook his reference to *Stern v. The Queen*, (1896) 1 Q.B. 311, and *In re Clark*, (1904) 1 Ch. 294, in each of which there is a recognition that, in certain circumstances, share *certificates* are property where they are situate. They do not decide that *shares* cannot be situate at some place other than the *situs* of the *certificates*. There is no question here of a seizure of share certificates so endorsed as to be marketable such as were the Canadian Pacific share certificates that were subject matter of the decision in *Secretary of State of Canada v. Alien Property Custodian for the United States*, (1931) S.C.R. 170, in which event the question would be whether the seizure of the certificates gave rise to a right to be registered as owner if the shares. The question here is whether the shares themselves were seized.

[2] [1925] A.C. 371.

[3] [1942] A.C. 541.

[4] [1947] A.C. 24.

have no application to the determination of the problem in this case. He submitted that there were a number of possible tests to be derived from *Braun v. The Custodian*[1], *Bradbury v. English Sewing Cotton Co.*[2], and other cases, any one of which placed the *situs* of the shares in Canada from the point of view of executing a judgment. Alternatively, he relied on section 38(*e*) of the *Estate Tax Act*—read with section 47 of that Act—as determining the matter.

I found it difficult to accept it that the question as to what rules are applicable to determine what shares are subject to judicial seizure in any particular jurisdiction had not previously arisen for decision. For that reason, I delayed rendering my judgment so that I might, myself, endeavour to find some authority where the particular question has been decided. As I might have expected, having regard to the experience and competence of counsel engaged on both sides of this case, my search has been fruitless. I must, therefore, decide this matter by application of the principles evolved for the determination of other matters in so far as, in my view, they are applicable.

As nearly as I can ascertain, having regard to my perusal of the textbooks and cases dealing especially with the law of Quebec[3], and to the argument of counsel in this case, the principles applicable to the determination of this matter, even though it arises in the province of Quebec, may be sought in the authorities applicable in Canada generally.

Having regard to the survey of the authorities contained in the judgment delivered by President Thorson in *Braun v. The Custodian, supra,* to which I am much indebted, I do not propose to review the authorities in detail.

Although there seems to have been little or no occasion to enunciate it, the rule, as I understand it, is that judicial process operates in relation to property situated within the geographical limits of the jurisdiction of the Court from which it issues. This would seem to be a corollary of the principle of private international law that the validity of changes in ownership of property, whether it is moveable or

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[1] [1944] Ex. C.R. 30, (1944) S.C.R. 339.

[2] [1923] A.C. 744.

[3] See, for example, *The Black-Clawson Company v. Montreal Locomotive Works Limited,* (1960) B.R. 514.

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immoveable property, is regulated by the law of the place where the property is at the time of the transaction or action in question.[1] Little difficulty arises in applying the rule to tangible property. It applies equally to some intangible property at least. See *Alcock v. Smith*[2] and *Crosby v. Prescott*[3], in each of which it was found, dealing with a bill of exchange, that the validity of a transaction was regulated by the physical *situs* of the piece of paper constituting the bill of exchange.

In the case of shares in a company, such as one incorporated under the *Canadian Companies Act*, while there are physical pieces of paper—the share certificates—which are capable of ownership and of being transferred in a particular manner from hand to hand, they are something different from the shares. (See Thorson P. in *Braun v. The Custodian, supra,* at pages 38 *et seq.*) It is clear that the *situs* of a share certificate does not of itself determine the *situs* of the shares as a bundle of rights.[4]

In one sense at least, the *situs* of a share in this latter sense is something less than real[5] and must therefore be fixed by arbitrary conventional rules of law.

The earliest approach to *situs* of shares to have been reflected in Canadian jurisprudence seems to have been that of the English Courts when determining *situs* for purposes of probate duty (*Attorney General v. Higgens*)[6]. The rule so developed was adopted for purposes of deciding what shares were situate in a Canadian province for estate tax or succession duty purposes (*Brassard v. Smith, supra*). While it was variously stated in different cases, the rule became settled as being that a share was situate for such

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[1] *Cammell v. Sewell,* 5 H. & N. 728; *Castrique v. Imrie,* L.R. 4 H.L. 414.

[2] [1892] 1 Ch. 238.

[3] [1923] S.C.R. 446.

[4] A share, as I understand it, is the bundle of rights that the statutory law, company charter and other instruments constituting the company's constitution, expressly or impliedly confer on the holder of the share. These are ordinarily (*a*) the right to vote at company meetings, (*b*) the right to receive dividends when declared, and (*c*) the right to participate in a winding-up.

[5] "Shares in a company are 'things in action' which have in a sense no real situs . . ." per Viscount Maugham in *Rex v. Williams,* [1942] A.C. 541 at page 549.

[6] (1857) 4 M. & W. 171.

purposes in the place where it could be effectively dealt with as between the shareholder and the company (*Rex v. Williams, supra,* at page 558), which is where the books of the company on which the transfer has to be registered to be effective are situate.

If that were the rule applicable in this case, I should have to find that the shares of Aluminum Limited in issue here were situate both in Canada and in the United States because there were company books both in Canada and in the United States, at any of which the shares could have been effectively dealt with. That being so, I see no reason why, for purposes of seizure under judicial execution, the shares might not be regarded in law as having been situated in both countries. (Obviously, if shares may have a dual *situs,* once they have been divested from one owner and vested in another on one register, that would operate to prevent any further dealing with them on that or any other register except as the shares of the new owner.)

There is, as I see it, no reason in principle why shares should not be regarded as being situated in more than one country for purposes of seizure under judicial process just as they may be so situated for purposes of transfer of ownership. It is, however, quite a different situation when *situs* of shares is being considered for purposes of provincial legislative jurisdiction to levy estates tax or succession duties. In *Braun v. The Custodian, supra,* at pages 42-3, President Thorson shows why it was regarded as necessary that there be found some basis for allocating *situs* for such taxation purposes to some one of the places where the shares could be effectively dealt with as between the shareholder and the company.[1] For such purposes, under the further rule developed in *Rex v. Williams* to resolve the provincial succession duty problem raised by the facts of that case, the shares here in question would be situate in the United States. The necessity for additional rules for the specific allocation of *situs* for such cases has no application except in the sort of taxation case for which the additional rules were developed. In particular, it has no application to the determination of *situs* for the purposes of judicial execution. As such additional rules were not held to have any

[1] The necessity is based on the desirability of avoiding double or multiple taxation.

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application for purposes of the regulations concerning enemy property in the *Braun* case, and as I can see no reason in principle for holding them applicable for purposes of judicial seizure, I hold that they have no such application. That conclusion, in effect, disposes of the foundation of the suppliants' contention.

Having thus reached the conclusion that the additional rule developed in *Rex v. Williams* has no application, I am left with the rule applied in *Smith v. Brassard* (under which, as I have indicated, I would find that the shares in issue are situated in Canada as well as in the United States) or the rule enunciated by the Supreme Court of Canada in the *Braun* case, (1944) S.C.R. 339, per Kerwin J. delivering the judgment of the Court at page 345, which is that the stock of a corporation has its *situs* at the domicile of the corporation, which in this case is Canada.[1] Whichever rule is the correct rule for this case, the shares were situate in the province of Quebec at the time of the seizure and were therefore effectively seized. (I regard the rule based on residence of the corporation worked out under English income tax legislation, in such cases as *Bradbury v. English Sewing Cotton Co. supra*, as depending on the scheme of that legislation and as having no application for other purposes.[2]

Having regard to the conclusion that I have thus reached, it is not necessary for me to consider the alternative argument based upon sections 38(*e*) and 47 of the *Estate Tax Act*.

At some time convenient to the parties, I should be glad to consider a motion for judgment in the light of these reasons.

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[1] See also *Brown, Gow, Wilson et al v. Bileggings-Societeit N.V.*, [1961] O.R. 815.

[2] In the absence of any authority concerning the *situs* of company shares, I should have thought, having regard to the nature of an ordinary share (conditional claims against the company for dividends and on winding-up and the right to vote at company meetings) that there would be much to be said for the rule that the share is situated where the company—the conditional debtor—resides. It is the residence of the conditional debtor (which might be regarded as invoking the basic rule that a simple debt is situate where the debtor resides) and the place where the company meetings are most likely to occur.

BETWEEN:

BRITISH COLUMBIA POWER CORPORATION, LIMITED ..... APPELLANT;

AND

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

Vancouver 1966
July 5-8, 11-12
July 26

Income tax—Costs of litigation—Provincial statute expropriating holding company's shares in subsidiary—Action to declare expropriation ultra vires—Whether costs deductible—Income Tax Act, s. 12(1)(a) and (b).

Appellant incurred litigation costs of more than $1,150,000 in 1962 and 1963 in connection with an action which it brought against the Attorney General of British Columbia and others to declare *ultra vires* a British Columbia statute expropriating the common shares of B.C. Electric Co, all of which were owned by appellant (constituting over 90% of its assets). The action was successful and appellant obtained in consequence a much higher price for the shares.

Held, the litigation costs were barred from deduction by paragraphs (*a*) and (*b*) of s. 12(1) of the *Income Tax Act* in computing appellant's income for 1962 and 1963.

Sutton Lumber & Trading Co. Ltd. v. M.N.R. [1953] 2 S.C.R. 77; *M.N.R. v. Dominion Natural Gas* [1941] S.C.R. 19; *M.N.R. v. The Kellogg Co. of Canada, Ltd.* [1943] S.C.R. 58; *M.N.R. v. L. D. Caulk Co. of Canada Ltd.* [1954] S.C.R. 55; *B.C. Electric Railway Co. v. M.N.R.* [1958] S.C.R. 133; *Montreal Coke and Mfg. Co. v. M.N.R.* [1944] A.C. 126; *Siscoe Gold Mines Ltd. v. M.N.R.* [1945] Ex. C.R. 257; *Farmers Mutual Petroleums Ltd. v. M.N.R.* [1966] C.T.C. 283; *Evans v. M.N.R.* [1960] S.C.R. 391; *Premium Iron Ores Ltd. v. M.N.R.* [1966] S.C.R. 685; *Imperial Oil Ltd. v. M.N.R.* [1947] Ex. C.R. 527; *Rolland Paper Co. v. M.N.R.* [1960] Ex. C.R. 334; *Hudson's Bay Co. v. M.N.R.* [1947] Ex. C.R. 130; *British Insulated & Helsby Cables, Ltd. v. Atherton* [1926] A.C. 205; *Southern v. Borax Consolidated, Ltd.* [1941] 1 K.B. 111; *Portland Cement Mfg. Co. Ltd. v. I.R.C.* [1946] 1 All E.R. 68, referred to.

APPEAL from income tax assessments.

D. McK. Brown, Q.C., H. H. Stikeman, Q.C. and *D. M. M. Goldie* for appellant.

P. N. Thorsteinsson and *D. G. H. Bowman* for respondent.

SHEPPARD D.J.:—The appeal is by the British Columbia Power Corporation, Ltd. (called B.C. Power) against an assessment by the Minister of National Revenue; a cross-appeal by the Minister has been withdrawn.

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The B.C. Power was incorporated by Letters Patent of Canada of the 9th of May, 1928 (Ex. A-12) to engage in the utility business through the ownership of shares in public utility companies, and to engage in similar or associated activities. At material times B.C. Power had as a subsidiary the British Columbia Electric Company Ltd. (called B.C. Electric), a public utility incorporated in 1926 under the *Companies Act* of British Columbia, which generated and distributed electricity, distributed gas, and operated a railway, motor bus and trolley coach systems in the lower mainland and Vancouver Island.

The B.C. Power held all the common shares of B.C. Electric; the preference shares and the debentures, including Debenture Series B were issued to the public. The value of the common shares of the B.C. Electric represented over 90% of the assets of B.C. Power, and the B.C. Electric supplied all dividends paid by B.C. Power to its shareholders (Ex. A-14). B.C. Power had other subsidiaries ancillary to such public utility of the approximate value of $11,000,000.00.

On 3rd August, 1961, the Provincial Legislature by Statute (*Power Development Act, 1961,* B.C. 1961 (2nd Sess.) Cap. 4) expropriated all the common shares of B.C. Electric at the fixed price of $110,985,045.00, vested such shares in the Crown, terminated the appointment of the existing directors to be replaced by others appointed by the Lieutenant-Governor-in-Council and also created an option to B.C. Power to sell its remaining undertaking worth $11,000,000.00 at approximately $68,500,000.00 (Ex. A-19), that is, $38.00 per share less the sums paid for the expropriated shares.

The expropriation was reported to the meeting of directors of the 3rd August, 1961 (Ex. A-17) and these directors decided to improve the terms of the compensation as they considered the price paid inadequate (Ex. A-18), and later outlined a plan for full compensation for the expropriated shares and decided to look into new lines of business.

On the 21st September, 1961, B.C. Power submitted for fiat a proposed petition of right asking that full and complete compensation of the shares be determined by the Court but the Provincial Secretary refused it.

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On the 13th November, 1961, B.C. Power issued a writ in the Supreme Court of British Columbia against the defendants, the Attorney-General of B.C., the B.C. Electric, the Royal Trust Company and C. James Copithorne, which asked a declaration of the rights in respect of the Series B Debentures and of the effect of the option contained in the Statute of August, 1961.

In December of 1961, B.C. Power reduced its capital and paid its shareholders $18.70 per share. On the 29th March, 1962, the Legislature enacted two statutes:

(*a*) 1962, Cap. 50 which amended the Statute of 1961 by increasing the compensation for the expropriated shares in B.C. Electric to $171,833,052.00, and by vacating the option of the remaining undertaking (Ex. A-42);

(*b*) 1962, Cap. 8, which created the B.C. Hydro and Power Authority and amalgamated in one corporation the assets of the B.C. Electric and of the other utilities under that Commission (Ex. A-44).

In April of 1962, the B.C. Power amended the Statement of Claim and asked for a declaration that the 1961 Statute was *ultra vires* and complete compensation for the expropriated shares, and a declaration of the rights in regard to the Series B Debentures.

After numerous interlocutory motions of which two went to the Court of Appeal and one to the Supreme Court of Canada, the action went to trial on the 1st May, 1962 before Chief Justice Lett of the Supreme Court of British Columbia, who sat for 144 days until the 25th February, 1963, and on the 29th July, 1963 (44 W.W.R. (N.S.) 65) delivered reasons for judgment holding all three Statutes to be *ultra vires* of the Legislature and the value of the expropriated shares to be $192,828,125.00.

By telegram of the 29th July, 1963, the B.C. Power informed the Premier of British Columbia that their principal concern was to obtain fair compensation. By telegram 1st August, 1963, the Premier replied that he accepted the amount found due by the Chief Justice (Ex. A-68). Eventually under date of 26th August, 1963, by agreement between B.C. Power, B.C. Electric and the B.C. Hydro and Power Authority, the parties referred to Chief Justice Lett the question ,"What amount of money should be paid to

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B.C. Power for the common shares of the capital of the Electric Company?" That amount he found to be $197,114,-358.00, and by agreement of the 27th September, 1963, between those same three parties the B.C. Power recited that the expropriated shares were entered on the register of members of the B.C. Electric and owned and controlled by the Crown (Recital B, Ex. A-81), and that the operations, undertaking and property of the B.C. Electric were in the possession and control of the directors appointed under the 1961 Statute (Recital C, Ex. A-81), and in consideration of the sum paid released and quit claimed to Her Majesty the expropriated shares with a general release to Her Majesty and Servants for all acts pursuant to the Statute of 1st August, 1961.

On the 1st November, 1963, the shareholders resolved that B.C. Power be wound up and by the Order of the 6th November, 1963, the Royal Trust Company was made liquidator.

A. Bruce Robertson gave evidence which may be summarized as follows. The expropriation was considered by B.C. Power, its directors and shareholders, to be a sum below the fair value and therefore the immediate desire was to obtain an adequate or fair compensation. Also, Debenture Series B provided that the debenture holders could surrender their debentures for shares in B.C. Power, that B.C. Power would receive therefor shares in B.C. Electric. Hence, B.C. Power had some concern over its liability after B.C. Electric had been expropriated, particularly after a notice to convert had been received by the trustee. Under those circumstances, the petition of right was drafted and when received B.C. Power began action alleging the expropriation to be *ultra vires* of the province and asking a declaration of *ultra vires* or, alternatively, value of the shares; that the writ was begun with more courage than hope of success; that the possibility of the expropriation being held *ultra vires* was discussed.

After the two Statutes of 1962 the hopes of B.C. Power to a declaration of *ultra vires* increased considerably and after April, 1962, the discussion was not merely of compensation but of a desire for a declaration of *ultra vires* to improve the bargaining position of B.C. Power. If the Statutes were so declared, the Company was prepared to settle at a fair compensation, but if the Province would not

pay that sum, then the Company would continue to operate B.C. Electric though it would prefer not to do so. Further, the public relations people had frequently warned B.C. Power against publicizing any intention to operate B.C. Electric. However, B.C. Power was prepared to agree to B.C. Electric continuing to be a government owned utility provided B.C. Power received what it considered fair compensation.

B.C. Power contends that the costs of such litigation should be deducted from income, while the Minister contends the costs are not so deductible.

The remaining issues arose under the following circumstances. Prior to the expropriation of B.C. Electric shares, B.C. Power had neither office space nor employees. These were supplied by B.C. Electric, a wholly owned subsidiary which provided offices and services generally as required and without charging therefor. After the expropriation, B.C. Power had numerous expenses formerly paid by B.C. Electric, and the issue arises over the deductibility of those expenses. B.C. Power contends that they are properly deductible under Section 12(1)(*a*). The Minister contends that they are not deductible by reason of Section 12(1)(*b*) or 12(1)(*a*), as for example, being incidental to expenses of litigation.

B.C. Power made income tax returns for the years 1962 and 1963, and the Minister made assessments refusing to allow various sums as deductible. B.C. Power served notice of objection and the Minister, by notification of the 15th December, 1964, confirmed the assessments. B.C. Power thereupon appealed to this Court and the Minister cross-appealed but the cross-appeal has now been abandoned (Ex. R-24).

As to the costs of litigation, the Minister in his assessment has disallowed their deduction which amounted to, for the year 1962, $742,023.85 (Ex. A-1), and for the year 1963, $414,199.81 (Ex. A-1). From that disallowance B.C. Power has appealed on the ground that such expenses are deductible under the exception in Section 12(1)(*a*) of the *Income Tax Act*. The Minister contends that such expenses are not deductible expenses but excluded by Section 12(1)(*a*), and alternatively as capital outlays excluded by Section 12(1)(*b*).

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There is considerable evidence as to whether the purpose of the action was to recover the shares, which was the contention of B.C. Power, or to recover damages as contended by the Minister. It is immaterial which view is taken, as the shares were capital assets of B.C. Power within the express objects of the Letters Patent (Ex. A-12), and by the litigation B.C. Power obtained a declaration of the right to those shares by reason of the expropriating Statute of 1961 being held to be *ultra vires* of the Province, and that right B.C. Power released for the sum paid pursuant to the finding of Chief Justice Lett, which sum B.C. Power has treated as capital, as was done in *Sutton Lumber & Trading Company Ltd. v. Minister of National Revenue.*[1]

Legal expenses are recoverable on the same basis as other expenses: *Minister of National Revenue v. Dominion Natural Gas*[2]. Duff C.J. at p. 25:

> In the ordinary course, it is true, legal expenses are simply current expenditure and deductible as such; but that is not necessarily so.

and *Minister of National Revenue v. The Kellogg Company of Canada, Ltd.*[3] Duff C.J. at p. 60:

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

and at p. 61:

> It was pointed out in the *Minister of National Revenue v. The Dominion Natural Gas Company, supra,* at p. 25, that in the ordinary course legal expenses are simply current expenditures and deductible as such.

In the following judgments litigation costs were held to be capital outlays and therefore now excluded by Section 12(1)(*b*) and not for the purpose of gaining or producing income within the exception to Section 12(1)(*a*).

In the *Minister of National Revenue v. Dominion Natural Gas, supra,* the company's right under a franchise to supply natural gas to an area then a part of the City of Hamilton was challenged by an action which the company successfully defended and it was held that the costs were

[1] [1953] 2 S.C.R. 77.
[2] [1941] S.C.R. 19.
[3] [1943] S.C.R. 58.

not to be deducted from its taxable income. That action arose under Section 6 of the *Income War Tax Act* which reads:

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

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

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

Duff C.J. for himself and Davis J., held that it was capital expenditure as follows (p. 24):

Again, in my view, the expenditure is a capital expenditure. It satisfied, I think, the criterion laid down by Lord Cave in *British Insulated v. Atherton* [1926] A C 205 at 213. The expenditure was incurred "once and for all" and it was incurred for the purpose and with the effect of procuring for the company "the advantage of an enduring benefit". The settlement of the issue raised by the proceedings attacking the rights of the respondents with the object of excluding them from carrying on their undertaking within the limits of the City of Hamilton was, I think, an enduring benefit within the sense of Lord Cave's language. As Lord Macmillan points out in *Van den Berghs Ld. v. Clark* [1935] A C. 431, at 440:

> "Lord Atkinson indicated that the word "asset" ought not to be confined to 'something material' and, in further elucidation of the principle, Romer L.J. has added that the advantage paid for need not be "of a positive character" and may consist in the getting rid of an item of fixed capital that is of an onerous character: *Anglo-Persian Oil Co. v. Dale* [1932] 1 K.B. 146."

Kerwin J. also held it to be capital expenditure and at p. 31 said:

It was a "payment on account of capital," as it was made (to use Viscount Cave's words) "with a view of preserving an asset or advantage for the enduring benefit of a trade".

That judgment was referred to in *Minister of National Revenue v. L. D. Caulk Co. of Canada Ltd.*[1] by Rand J. at p. 57 as follows:

The judgment of this Court in *The Minister v. Dominion Natural Gas,* is clearly distinguishable as having been a case of expenses to preserve a capital asset in a capital aspect.

While Section 6(*a*) of the *Income War Tax Act* has been said to be "less stringent" under Section 12(1)(*a*) by omitting the words "not wholly, exclusively and necessarily":

[1] [1954] S.C.R. 55.

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B.C. Electric Railway Co. v. Minister of National Revenue[1] nevertheless Section 6(*b*) is the equivalent of Section 12(1)(*b*) and therefore those legal expenses are capital outlays whose deductibility is prohibited by Section 12(1)(*b*).

In *Montreal Coke and Manufacturing Company v. Minister of National Revenue*[2] the company redeemed certain bonds before maturity and reissued them at a lesser rate of interest which increased the net revenue, and the Court held that the company could not deduct expenses of those financial operations.

In *Siscoe Gold Mines Ltd. v. Minister of National Revenue*[3] the company was engaged in gold mining and incurred legal expenses in retaining its title to mines which expenses it sought to offset against its income, but the Court held these to be capital expenditures, and in *Farmers Mutual Petroleums Ltd. v. Minister of National Revenue*[4] the company incurred legal expenses in defending 250 actions attacking the company's title to mineral claims, and in appearing on a Royal Commission to inquire into its method of obtaining the titles. Those legal expenses were held to be a capital expenditure.

On the other hand, litigations costs have been allowed as deductible from income under Section 12(1)(*a*) in two instances:

(1) When the taxpayer has to sue to recover the income. In *Gladys Evans v. Minister of National Revenue*[5] Evans deducted from revenue the costs of recovering from trustees the income bequeathed to her by will. It was held not an expenditure on account of capital within Section 12(1)(*b*) but an expenditure properly incurred for the purpose of gaining an income, of which she was unable to obtain payment without incurring the outlay. The case was referred to in *Premium Iron Ores Limited v. Minister of National Revenue*[6] by Martland J. as follows:

> Such expense was made in order to protect her right to receive income, not only in 1955, but in each of the years in which income became available for distribution from the estate. This right was held not to be a capital asset, and the expense in question did not fall within s. 12(1)(*b*).

[1] [1958] S.C.R. 133.
[2] [1944] A.C. 126.
[3] [1945] Ex. C.R. 257.
[4] [1966] C.T.C. 283.
[5] [1960] S.C.R. 391.
[6] [1966] S.C.R. 685 at 705.

Such expense was held to be properly incurred within s. 12(1)(*a*) for the purpose of gaining an income to which the appellant was entitled.

(2) When the taxpayer as defendant has incurred the expenditure for an alleged liability in contract, tort or otherwise created by an act done in the course of normal operations to produce income, and hence "made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business" within Section 12(1)(*a*).

In *Minister of National Revenue v. The Kellogg Company of Canada, supra,* the company was permitted to deduct from income its costs of successfully defending an action for selling its goods under the term "shredded wheat". Duff C.J. at pp. 60-61 said:

> The right upon which the respondents relied was not a right of property, or an exclusive right of any description, but the right (in common with all other members of the public) to describe their goods in the manner in which they were describing them.

In *Minister of National Revenue v. L. D. Caulk Company of Canada Ltd., supra,* Rand J. at p. 30 said about the *Kellogg* judgment:

> The payment arose from what were considered the necessities of the practices to the earning of the income . . . . That use was likewise part of the day-to-day usage in marketing the company's products and the expenses were held to be deductible.

In *Imperial Oil Limited v. Minister of National Revenue*[1] the company was permitted to deduct from revenue the amount paid for damage claims and "fees" arising out of collision at sea through the negligent operation of its tanker. Thorson P. in stating the rule at pp. 545-6 said:

> This means that the deductibility of a particular item of expenditure is not to be determined by isolating it. It must be looked at in the light of its connection with the operation, transaction or service in respect of which it was made so that it may be decided whether it was made not only in the course of earning the income but as part of the process of doing so.

and at p. 546 said:

> The fact that a legal liability was being satisfied has, by itself, no bearing on the matter. It is necessary to look behind the payment and enquire whether the liability which made it necessary—and it makes no

[1] [1947] Ex. C.R. 527.

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difference whether such liability was contractual or delictual—was incurred as part of the operation by which the taxpayer earned his income.

In *Rolland Paper Company v. Minister of National Revenue*[1] the company defended charges of selling by illegal trade practices contrary to *Code* Section 498(1)(*d*) which it was allowed to set off, and in *Minister of National Revenue v. L. D. Caulk Company of Canada Ltd., supra,* the company was represented by a solicitor on investigation under the *Combines Investigation Act* of charges of selling contrary to *Code* Section 498. It was held that the right upon which the company relied was the right to conduct its operations in a certain manner and was not a right of property or any exclusive right of any description.

In *Premium Iron Ores Limited v. Minister of National Revenue, supra,* the company was allowed to deduct the cost in the United States of America of defending a claim of that government for income tax. Martland J. at p. 5 said:

> I have great difficulty in seeing how, in principle, this expense for legal services, made as it was for the purpose of protecting the appellant's income, can be regarded as being different from that which was held to be properly deductible in the Kellogg case and also in the Evans case. The disbursement made was not an outlay or replacement of capital, nor a payment on account of capital, within s. 12(1)(*b*). The claim of the American government was not in respect of the appellant's capital, but a claim which, if established, would have created a liability in relation to its income.

At p. 7 he said:

> The resistance of the claim is an attempt to protect Canadian income, and it matters not, so far as the Canadian taxing authority is concerned, that the nature of the claim is one for income tax.

and at p. 8:

> In my opinion a payment made for legal services in an attempt to protect income against encroachment by a third party is, in principle, on the authority of the Kellogg and Evans cases in this Court, properly deductible.

On the other hand, in *Hudson's Bay Company v. Minister of National Revenue*[2], the company incurred costs of an action in the United States of America to restrain another marketing its goods under a name which included Hudson's Bay, and the Court held that they were deductible

[1] [1960] Ex. C.R. 334.

[2] [1947] Ex. C.R. 130.

from current income under Section 6(*a*) of the *Income War Tax Act*. Angers J. at p. 176 said:

> The legal expenses and costs laid out by the appellant to protect its trade name, business and reputation were not incurred with the object of creating or acquiring any new asset but were incurred in the ordinary course of protecting and maintaining its already existing assets. On the other hand, I do not believe that these expenses and costs can be considered as being a capital outlay or loss.

There Angers J. in holding that the expenses were not incurred with the object of creating or acquiring any new asset were therefore not a capital outlay, appears not to have observed that under the Canada *Income Tax Act* to preserve an asset was sufficient to create a capital expenditure: *Minister of National Revenue v. Dominion Natural Gas, supra,* Kerwin J. at p. 31; *Minister of National Revenue v. The Kellogg Company of Canada Ltd., supra,* at p. 61 and *Minister of National Revenue v. L. D. Caulk Company of Canada Ltd., supra,* Rand J. at p. 57.

Further, in the *Kellogg* case the taxpayer was not asserting an exclusive right and therefore it was held to be deductible, but in the *Hudson's Bay* case the taxpayer was asserting an exclusive right. In any event, assuming that an expenditure is not within Section 12(1)(*b*), it does not follow that it is deductible under the exception to Section 12(1)(*a*). Accordingly, the *Hudson's Bay* case does not appear to conform to the other judgments and today would probably be held a capital expenditure following *Minister of National Revenue v. Kellogg Company of Canada Ltd., supra,* at p. 60.

In the present instance, the litigation costs claimed by B.C. Power were not incurred for the recovery of income but for the recovery of the shares in B.C. Electric, a capital asset of B.C. Power, nor were the costs incurred in defending an action alleging liability from an act occurring in the normal course of carrying on the business. Here the outlay could rather be described in the words used by Martland J. in *Premium Iron Ores Limited v. Minister of National Revenue, supra,* as:—

> . . . . a payment on account of capital, within s. 12(1)(*b*).

not in respect of "a liability in relation to its income". Hence on the authorities it would appear that the litigation costs in question are a capital outlay unless there is good reason to the contrary.

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B.C. Power contends as a first and principal submission:

> .... that money that you spend in defending your title to a capital asset which is assailed unjustly is obviously revenue expenditure.

Counsel for B.C. Power cited *British Insulated and Helsby Cables, Limited v. Atherton*[1] where Lord Cave at p. 213 said:

> But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital

and contended that the shares were claimed by B.C. Power in the same form as when taken and nothing was acquired or added thereto, therefore it was not a capital outlay but an expense deductible from income.

Counsel for B.C. Power also cited *Southern v. Borax Consolidated, Limited*[2] where the company through a subsidiary owned land with buildings and wharves thereon which title the City of Los Angeles attacked and the company was held entitled to take from revenue the costs of defending such action, and *Portland Cement Manufacturing Company Ltd. v. Inland Revenue Commissioners*[3], where the company paid to two retiring directors sums of monies for their covenants not to compete, which sums the company was held entitled to deduct from revenue as a revenue expenditure.

Those cases and the result are distinguishable from the case at bar for the following reasons:

(1) Two cases, the *Southern* case and the *Portland Cement* case are distinguishable on the facts. In those cases the judgment did not confer "the advantage of an enduring benefit". In the case at bar the judgment did acquire and add a material benefit to B.C. Power's right to the shares.

   (i) The judgment by declaring the Statutes to be *ultra vires* settled the issues of the right to the shares and therefore such judgment did bring into existence an asset or advantage that was enduring.

[1] [1926] A.C. 205. [2] [1941] 1 K.B. 111.
[3] [1946] 1 A.E.R. 68.

In *Minister of National Revenue v. Dominion Natural Gas, supra,* Duff C.J. at p. 24 said:

> The settlement of the issue raised by the proceedings attacking the rights of the respondents with the object of excluding them from carrying on their undertaking within the limits of the City of Hamilton was, I think, an enduring benefit within the sense of Lord Cave's language.

That equally applies here in that the judgment of Lett C.J. had the effect of providing the B.C. Power with "the advantage of an enduring benefit", that is, a favourable judgment determining the issue raised on the pleadings and which judgment was once and for all in determining the Statutes invalid and that the B.C. Power was entitled to the shares.

(ii) Following the expropriating Statute of 1961, the Crown in place of B.C. Power was registered on the register of B.C. Electric as the owner of all the outstanding common shares of B.C. Electric (Recital B. Ex. A-81), and thereafter B.C. Power was deprived of asserting the rights of owner of those shares, and particularly could not vote the shares to elect directors or otherwise, could not collect dividends in respect thereof and could not sell the shares. The judgment of Lett C.J. gave B.C. Power the right to go on the register and hence restored those rights previously divested. That was "an advantage for the enduring benefit".

(iii) While registered as owners of the shares, B.C. Power received dividends from B.C. Electric which were free from income tax. In 1960 the dividends received amounted to $7,790,000.00 of which B.C. Power paid out $6,711,728.00. The purchase price received when lent at interest incurred liability to income tax. By the declaration of *ultra vires* B.C. Power had the right to revert to the former position which right B.C. Power released pursuant to the finding of Lett C.J. (Ex. A-80, September 27, 1963) for the sum of $197,-114,358.00 less the amount which had previously been received, and therefore by the judgment and consequential reference B.C. Power received an additional sum of $25,281,306.00.

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The judgment did bring into existence "an asset or an advantage for the enduring benefit" within the definition of Lord Cave in the *Atherton* case.

(2) The two judgments cited are distinguishable in law. The cited cases were decided under the English Act and under the words appearing therein, "money wholly and exclusively laid out and expended for the purposes of trade", whereas the words now in question are those under Section 12(1)(*a*) of the Canada *Income Tax Act* reading in part: "an outlay or expense . . . made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer", and under the Canada *Income Tax Act* an expenditure to preserve a capital asset is a capital outlay.

The word "preserving" was used by Kerwin J. in *Minister of National Revenue v. Dominion Natural Gas, supra,* at p. 31, and in the *Minister of National Revenue v. The Kellogg Company of Canada, Ltd., supra,* Duff C.J. in delivering the judgment of the Court said at p. 60:

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

In *Minister of National Revenue v. L. D. Caulk Company of Canada Ltd., supra,* Rand J. at p. 57 said:

> The judgment of this Court in *The Minister v. Dominion Natural Gas* is clearly distinguishable as having been a case of expenses to preserve a capital asset in a capital aspect.

Hence, assuming that *Southern v. Borax Consolidated, Limited, supra,* and *Portland Cement Manufacturing Company Ltd. v. Inland Revenue Commissioners, supra,* did correctly state for England the meaning of the words in the English Act, it does not follow that they purported to give the meaning of those other words in Section 12(1)(*a*) of the Canada *Income Tax Act.* Under the Canada *Income Tax Act* a capital outlay may be made either to acquire or to preserve a capital asset: *Minister of National Revenue v. Dominion Natural Gas* and *Minister of National Revenue v. The Kellogg Company of Canada, Ltd.,* both *supra.*

Moreover, it is of no advantage to B.C. Power to have escaped the prohibited deduction of capital outlay under Section 12(1)(*b*) unless it bring itself within the exception to Section 12(1)(*a*) "to the extent . . . made or incurred . . . for the purpose of gaining or producing income", otherwise the deduction would be preluded by the general words of Section 12(1)(*a*).

The word "income" in Section 12(1)(*a*) also appears in Section 2(3) to define taxable income. Under the *Income War Tax Act,* Lord Macmillan in *Montreal Coke and Manufacturing Company v. Minister of National Revenue, supra,* at p. 133 said:

> Expenditures to be deductible must be directly related to the earning of the income.

While Section 12(1)(*a*) may be less stringent than the former section it at least requires that the deductible expenditure shall be made "for the purpose of gaining or producing income" and the Statute intends that the "income" after the permitted deduction is the taxable income under Section 2(3). That is, the deduction is to be made from taxable income.

In all the cases where the deduction of costs of litigation was allowed against income the expenditure was related to the earning of the income, as for example, where the litigation was to recover the income, as in the *Evans* case, or to protect the income from alleged liability from an act which occurred in the normal course of gaining or producing the income, for example, in *Minister of National Revenue v. The Kellogg Company of Canada Ltd., Imperial Oil Limited v. Minister of National Revenue, Minister of National Revenue v. L. D. Caulk Company of Canada Ltd., Premium Iron Ores Limited v. Minister of National Revenue,* all *supra.*

In the case at bar the expenditure was not for the purpose of gaining or producing income but to recover a capital asset.

It was contended by B.C. Power that the purpose of the action was in substance to receive the dividends from the shares. That is not the evidence. The primary purpose of the action was to obtain fair compensation for the shares.

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By telegram of the 29th July, 1963, A. Bruce Robertson to the Premier (Ex. A-65), stated in part:

> Their principal concern has been to obtain fair compensation for the common shares in the B.C. Electric . . . . They continue willing, as they have been since August, 1961, to enter into negotiations looking toward a mutually satisfactory arrangement for the acquisition by the Province of the common shares in the B.C. Electric.

and Robertson in his Discovery said in questions 44 and 45:

> 44. We felt, and our public relations people were hammering at me all the time on this, that if we were to retake possession it must only be after the government had turned down the chance to make a fair deal for the shares, and so I felt it was not necessary or wise for me to draw attention to the claim for repossession.
>
> 45.Q What was the ultimate purpose of the action?
>
> A. I think I can sum it up this way, that if the government wished to continue its power policy it would have to deal with B.C. Power as the owner of the largest utility. Failing that, we would resume operations.

In their evaluation by Lett C.J. at trial (44 W.W.R. (N.S.) 198) the shares were not valued on the basis of future dividends but on the basis of the value of the assets of B.C. Electric both as organized into a system and the value in breaking up, the possible future earnings of B.C. Electric, and that was not restricted to the part thereof used for dividends. Further, the purpose of the action was to acquire the shares in order to obtain a declaration of *ultra vires* of the Province to provide a basis for negotiation for a reasonable settlement.

Notwithstanding the contention of B.C. Power to the contrary, Section 12(6) does not authorize the deduction of litigation costs. This section merely removes the restriction of Section 12(*c*), and when that restriction is removed the onus remains on B.C. Power to bring the litigation costs within the permitted deduction under Section 12(1)(*a*).

The Minister has contended that the primary purpose of B.C. Power in continuing its existence after the expropriating Statute of 1961 was to obtain more compensation for the shares or to recover the shares, but in either instance it would be a capital purpose, therefore all the expenses in issue should be disallowed under Section 12(1)(*a*) and (*b*) as made for such purpose. That contention should not succeed.

The alleged purpose of the continued existence of B.C. Power is merely a motive for continuing in business. Under the exception to Section 12(1)(*a*) the questions are:

(1) Did the company carry on business?

and

(2) Was the expenditure for the purpose of earning income?

One may go into business for many reasons, as for example, to make capital gains or merely to provide succession, but those are merely preceding motives. Having gone into business the question then arises whether an outlay or expense is "for the purpose of gaining or producing income". If for such purpose the expense is deductible from income, otherwise it is excluded by Section 12(1)(*a*) or (*b*), or may be prohibited by both sections as appears to have been the case in *Minister of National Revenue v. Dominion Natural Gas* and *Montreal Coke and Manufacturing Company Ltd. v. Minister of National Revenue,* both *supra.*

Here, B.C. Power did continue in business and the question therefore is whether the expenditures in issue were for the purpose of gaining or producing income within the exception to Section 12(1)(*a*), of which the onus is on B.C. Power.

There remains to order a reference with the requisite direction as the parties have agreed that the assessment be referred back to the Minister (Ex. R-24), and the expenditures in issue will be those mentioned in Exhibit A-2.

The onus is on B.C. Power to prove error of the Minister in disallowing all or some part of each expenditure. That onus is subject to the following:

(*a*) The parties have agreed "that the said expenditures were incurred in the taxation years indicated, and that the nature of the expenses is as described, subject to amplification by oral testimony to be adduced at trial". (Ex. A-1)

(*b*) Certain expenses are admitted or abandoned (Exs. A-2, R-24). Apart from the expenditures not in issue the onus is on B.C. Power to prove error in the assessment

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by proving the purpose of the expenditure when not shown by the heading, or that some greater allowance should be made than appears in the assessment.

The only issue affirmatively raised by the Minister is that found against.

Items in both years 1962-1963 (Ex. A-1)

Litigation Costs:—These are not deductible and are properly disallowed for the reasons given. It is to be observed that the costs of Bull, Housser and Tupper in the amount of $24,092.85 are agreed to be not deductible (Ex. A-2) but that is immaterial as the whole item is disallowed.

Public Relations for 1962-1963 (which includes such matters as shareholders' inquiries, press clippings):—These expenses have not been proven to be for the purpose of producing income within Section 12(1)(*a*) and therefore are properly disallowed.

Office and Equipment Rental:—Prior to the expropriating Statute, B.C. Power had neither office nor employees but those were supplied by B.C. Electric, a wholly owned subsidiary. When B.C. Electric had been expropriated it was then necessary for B.C. Power to rent offices and furniture from the Royal Trust Company. It is conceded that $2,955.94 was properly disallowed for 1962 as a public relations expense, but on the evidence, the balance in 1962 would appear to be properly deductible from the income.

In 1963 the item for office and equipment rental appears under the general administrative expenses. This item does not include anything for public relations and, therefore, is subject only to the contention of the Minister that it should be disallowed on account of the purpose of continuing in business. This contention is not upheld and the item is properly deductible.

Telephone and Telegraph:—The deduction for public relations is properly disallowed. The balance is subject only to the objection as to the purpose on behalf of the Minister and therefore should be allowed.

General Administration Expenses:—The objection of the Minister to that purpose is set out in Exhibit A-2, namely, that during the years in question they were directed

primarily or essentially to the conduct of the law suit and other matters flowing from the purported expropriation of the common shares of B.C. Electric.

The evidence does not support that contention and generally these items should be allowed save and excepting in respect of salaries and incentive bonuses which are really part of the salary. The onus is on B.C. Power to prove that the disallowance was in error either in whole or in part and the evidence does not permit the Court saying to what extent there has been error on the part of the Minister, but the evidence does indicate that there should be some disallowance of salaries, and as a reference back is necessary, therefore the salaries should be dealt with as follows:

As pointed out, prior to August, 1961, the B.C. Power had no staff. It relied for help upon officers and employees of the B.C. Electric. After August, 1961, it was necessary for B.C. Power to employ its own staff, and therefore it should be allowed the salaries of those employed to carry on its business in the normal manner, and hence for earning the income within the exception (Section 12(1)(*a*)). Hence if any of such employees who were employed for the purpose of the business in the normal manner did give additional assistance to the litigation but thereby caused no additional expense to B.C. Power, then the whole salary should be allowed. Such would appear to be the case of Robertson and McLean. On the other hand, if the employee be employed solely for the purpose of litigation or if he be employed in the normal manner but subsequently devote the whole of his time to litigation, then the amount of time so devoted to litigation should be disallowed as an expenditure. Such would appear to be Patterson, who was employed solely for litigation, and Goldie, who may have been secretary performing certain services for the company, but essentially during the period of litigation was acting as solicitor for litigation. Others may fall into either category and should be determined on the reference.

Items in the year 1962

Legal Fees:—Three are expressly abandoned by B.C. Power, namely, Stikeman Elliott, Linklater Paines and Sullivan Cromwell. The remaining two on the evidence have

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nothing to do with litigation but are part of the normal, general expense of B.C. Power and should be allowed.

Professional Fees:—It is conceded by Exhibit A-2 that $1,400.00 was properly disallowed. The balance is ordinary corporate auditing and the objection of the Minister is only to the purpose of expenditure which has been held against. The balance should be allowed.

Shareholders Committee Expenses:—The committee was formed in October of 1961 to obtain fair and appropriate terms for the shares expropriated. This item is properly disallowed as relating to capital assets and not for the purpose of income within Section 12(1)(*a*).

Special Shareholders Meeting expenses—$1,645.87:—This the Minister concedes should be allowed.

Letters to Shareholders:—That is on the evidence due to an extraordinary happening, namely, to inform the shareholders of the expropriation and inquiries. The item was properly disallowed as relating to capital and not to earning income within Section 12(1)(*a*).

Items in the year 1963

Legal Fees—$528.95:—This was conceded as not to be allowed (Ex. A-2).

Letters to Shareholders:—Properly disallowed as not within Section 12(1)(*a*).

Professional Fees:—These are subject only to the contention of the Minister which has not been upheld, therefore the balance should be allowed.

Loss of Office Payments:—These were abandoned by B.C. Power and are conceded to be properly disallowed (Ex. R-24).

The cross-appeal is abandoned (Ex. R-24).

As to costs of the appeal, the principal item was the costs of litigation on which the Minister has been successful, on the remaining items the success is divided. The costs should be 2/3 to the Minister and 1/3 to B.C. Power.

BETWEEN:

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

AND

JAMES KARFILIS ....RESPONDENT.

Toronto 1965 Nov. 29

Ottawa 1966 Aug. 19

Income tax—Income Tax Act, R.S.C. 1952, c. 148, Sections 3, 4, 10(1)(j), 83(2)(3)—Proceeds from sale of "mining property"—Exemption for prospectors—Whether property acquired as a result of prospecting—Whether income exempt.

The respondent, although a layman in prospecting business, had an active interest in mining. Having met a prospector named Byles, together they formed a partnership in April 1956. Both agreed that Byles, the prospector, was to devote his full time to the venture. Karfilis agreed to keep Byles in funds and both were to divide proceeds equally.

Having heard of a copper discovery in Raglan Township (Ontario) the partners decided to stake claims in the neighbourhood area wherever possible and, when the land was under ownership to acquire the mineral rights, subject to royalty rights in favour of the owner of the land.

Partners above thus acquired a number of claims and rights. A short time later some of these were disposed of to mining interests in two transactions, from which $46,000 were realized.

In the taxpayers' view any profit so derived was exempt from tax under section 83(2) or (3) but the Minister denied the applicability of those provisions on the ground that the property had not been acquired as a result of prospecting efforts.

The Minister accordingly treated the profits as derived from a "business" within the meaning of sections 4 and 139(1)(*e*). He allowed some $12,000 for expenses, added about $35,164 to the taxpayer's declared income.

The taxpayer claimed that in any event a deduction should be allowed for additional expenses incurred by him relating to the venture.

Held, That the mere staking of claims did not constitute "prospecting".

2 That the evidence failed to establish that the properties in question had been acquired after prospecting had been carried out; neither did it establish that an employer-employee relationship existed between the respondent and Byles.

3 That as a result of that prospecting, whether by Karfilis himself as prospector, or by Byles as in the employ of or as grubstaked by Karfilis, neither section 93(2) nor (3) applied.

4 That the profit was therefore taxable.

5 That the Minister failed to allow all of the relevant expenses and the profit should therefore be reduced from $35,164 to $19,260.

6 That the Minister's appeal was allowed in part.

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APPEAL from a decision of the Tax Appeal Board.

D. J. Wright, Q.C. and *J. E. Sheppard* for appellant.

W. G. Cassels for respondent.

KEARNEY J.:—The present appeal is from a decision of the Tax Appeal Board dated May 25, 1964[1], which maintained the respondent's appeal from an assessment imposed by the Minister on July 13, 1961, whereby the sum of $34,887.50, which allegedly represented the net profit realized by the respondent in 1956 on two separate sales of mining properties located in the province of Ontario, was declared taxable in virtue of ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act*, R.S.C. 1952, c. 148.

The aforesaid profit was accordingly added to the respondent's otherwise taxable income in respect of his taxation year 1956.

In maintaining the respondent's appeal, the Chairman of the Board, Mr. Cecil L. Snyder, Q.C., found, as alleged by the respondent, that none of the profits arising from the two aforesaid sales were subject to tax because they fell within the exemption referred to in s. 10(1)(*j*) and the relevant provisions of s. 83 of the Act which stipulate:

10(1) There shall not be included in computing the income of a taxpayer for a taxation year.

. . .

(*j*) an amount received as a result of prospecting that section 83 provides is not to be included,

83(1) In this section,

(*a*) . . .

(*b*) "mining property" means a right to prospect, explore or mine for minerals or a property the principal value of which depends upon its mineral contents, and

(*c*) "prospector" means an individual who prospects or explores for minerals or develops a property for minerals on behalf of himself, on behalf of himself and others or as an employee.

(2) An amount that would otherwise be included in computing the income of an individual for a taxation year shall not be included in computing his income for the year if it is the consideration for

(*a*) a mining property or interest therein acquired by him as a result of his efforts as a prospector either alone or with others, or

(*b*) shares of the capital stock of a corporation received by him in consideration for property described in paragraph (*a*) that he has disposed of to the corporation.

[1] 35 Tax A.B.C. 373.

(3) An amount that would otherwise be included in computing the income for a taxation year of a person who has, either under an arrangement with the prospector made before the prospecting, exploration or development work or as employer of the prospector, advanced money for, or paid part or all of, the expenses of prospecting or exploring for minerals or of developing a property for minerals, shall not be included in computing his income for the year if it is the consideration for

(*a*) an interest in a mining property acquired under the arrangement under which he made the advance or paid the expenses, or, if the prospector was his employee, acquired by him through the employee's efforts, or

(*b*) shares of the capital stock of a corporation received by him in consideration for property described in paragraph (*a*) that he has disposed of to the corporation.

The case for the appellant is set out in the statement of facts contained in the notice of appeal, commencing at paragraph 5.

5 The assessments with respect to the respondent's 1956 taxation year, Notices of which were mailed to the respondent on July 13, 1961, and July 18, 1963, are based upon the following assumptions of fact:

(*a*) the respondent entered into an agreement with Georges Byles dated the 20th day of April, 1956;

(*b*) as a result of the agreement described in paragraph 5(*a*) herein, the respondent acquired options on the minerals or mining rights of certain patented properties;

(*c*) the respondent entered into an agreement with Kenneth A. Wheeler dated the 17th day of July, 1956, and conveyed his interest in some of the options on mineral rights described above to Kenneth A. Wheeler for a cash consideration of $29,000 and 75,000 shares of Van Doo Consolidated Explorations Limited;

(*d*) by an agreement dated the 20th day of August, 1956, duly amended by an agreement dated the 9th day of October, 1956, the respondent conveyed his interest in some of the other options on mineral rights described above to Libby Investments Limited for the sum of $7,500.00;

(*e*) the minerals or mining rights of the patented properties, referred to in paragraph 5(*b*) herein, had not been reserved by the Crown in the location, sale, patent or lease of such properties;

(*f*) the patented properties referred to in paragraph 5(*b*) herein had been sold, located, leased or included in a license of occupation prior to 1956 without reservation of the minerals;

I need not set out the remaining subsections of paragraph 5 consisting of (*g*) to (*k*), inclusive, as they refer to the value of the 75,000 Vandoo shares mentioned in subsections (*c*) and (*d*) *supra,* nor to subsection (1) which concerns the various amounts expended by the respondent in acquiring the properties in question, because—for reasons which appear later—they ceased to be an issue.

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6. In purchasing and selling the options on the mineral rights of certain patented properties during the spring and summer of 1956, the respondent engaged in the business of dealing in mineral rights.

B. THE STATUTORY PROVISIONS ON WHICH THE APPELLANT RELIES AND THE REASONS WHICH HE INTENDS TO SUBMIT

7. The appellant states that the consideration which the respondent received from Kenneth A. Wheeler and Libby Investments Limited was properly included in the respondent's income for 1956 within the provisions of Sections 3, 4 and 139(1)(*e*) of the *Income Tax Act,* R.S.C. 1952, Chapter 148

8. The appellant states that the consideration which the respondent received from Kenneth A. Wheeler and Libby Investments Limited was properly included in the respondent's income for 1956 because the mining property sold to Kenneth A. Wheeler and Libby Investments Limited was not acquired in the manner contemplated by subsections 2 and 3 of Section 83 of the *Income Tax Act,* R S C. 1952, Chapter 148.

THE RESPONDENT'S REPLY

A. STATEMENT OF FACTS

1. The respondent admits the statement of facts as contained in paragraphs 1 to 5(*e*) inclusive and 5(*k*) of the appellant's notice of appeal.

2. The respondent does not admit the allegations contained in paragraph 5 (*g*) (*h*) (*i*) (*j*) and (*l*) and paragraph 6 of the appellant's notice of appeal.

3. The respondent acquired options on patented property and mining rights by staking on unpatented property in the County of Renfrew. Mineral rights only were acquired in the patented property, surface rights always being specifically excluded.

4. The respondent further alleges that the purchase price payable pursuant to the agreement with Mr. Wheeler dated the 17th of July, 1956, was reduced from $29,000 by the sum of $4,160.

5. The respondent spent additional sums totalling $20,903.94 by way of expenses incurred in the course of these transactions.

B. STATUTORY PROVISIONS AND REASONS

1. The respondent submits that any profits realized from the above transaction should be excluded from income in accordance with Section 83 s s. 2(*a*) and Section 83 s.s 3(*a*) as provided by Section 10 s.s. (1)(*j*).

2. In the alternative the respondent submits that the expenses incurred were incurred for the purpose of gaining or producing income from these transactions and should therefore be allowed as a deduction from the gross income.

3. The respondent alleges that the shares he received were never sold or liquidated and accordingly no income was ever received with respect to same and should not be included as income of the respondent in the year 1956.

4 The respondent also relies on the reasons of the Income Tax Appeal Board.

In their opening remarks, counsel for the parties declared that the facts were "fairly sufficiently described in the pleadings" and later they filed as Ex. A-1 this agreed statement of facts:—

For the purpose of the appeal it is agreed that:—

1. (*a*) The total purchase price of all the Raglan claims was $3,716.
   (*b*) The total purchase price of the Raglan claims sold Vandoo and Rowan was $2,331 67.
2. (*a*) The total legal account rendered in respect of the acquisition of the Raglan claims was $3,500 and was rendered in 1956.
   (*b*) of the said sum of $3,500, $2,500 was paid in 1956 and $1,000 in 1957.
3. (*a*) There was paid to George Byles in 1956 by monthly payment, the sum of $2,000.
   (*b*) There was paid to George Byles in 1956 under the September 7, 1956 agreement, the sum of $8,500.
4. There was paid in 1956 for day labour in respect of all the Raglan claims, the sum of $250.
5. There was paid in 1956 for transportation expenses in respect of all the Raglan claims, the sum of $700.
6. Karfilis paid to Walters in connection with his obligations under the Wheeler agreement, the sum of $3,760.
7. Karfilis paid various miscellaneous expenses in connection with all the claims, the sum of $313 94.
8. Karfilis made the following payments in March, April and May of 1957 in connection with work done on all of the Raglan claims during the year 1956:
   (*a*) Bryson the sum of $1,275;
   (*b*) Mintern the sum of $1,000; and
   (*c*) Thompson the sum of $725.

As a result, the field of factual disagreement has been greatly narrowed. There remains, however, a vital point in dispute on a mixed question of fact and law, namely, whether or not the evidence discloses that the mining properties which the respondent sold at a profit were acquired as a result of his efforts as a prospector. In resolving the question, much depends on the appraisal of the respondent's testimony having regard to the requirements of s. 83(2)(3) of the Act.

I might here observe that although the parties had, in their pleadings, described the agreements entered into by the respondent with the owners of the patented lands in issue as options, it is clear that each of their agreements was for the acquisition of a vested right to a mining property as that expression is defined in Section 83.

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No witnesses were called on behalf of the appellant and apart from the respondent's testimony on his own behalf the only other verbal evidence consisted of a short statement by Mr. Robert S. Montgomery, who was then legal adviser to the taxpayer. The balance of the evidence was made up of documentary evidence filed by counsel for the parties respectively.

I will have occasion later to refer in some detail to the respondent's testimony which has a bearing more particularly on his qualifications, his alleged prospecting efforts, his negotiations in acquiring the mining claims in issue and the factors which prompted him to do so. The following, however, is a résumé in broad outline of some facts which are not in dispute.

The respondent, who, as a side line, had made some study of geology, was interested in mining. He had met George Byles who was a full-time prospector and, at the latter's suggestion, on April 20, 1956 (Ex. R-2) they decided to form a partnership to explore for minerals and share the profits equally. The partners heard of what appeared to be a new copper discovery in Raglan Township (Ontario) and decided to investigate it. Mr. Byles staked unpatented claims which were open for prospecting near the above-mentioned find. The respondent negotiated more than twenty purchase contracts (not merely options), for good and valuable consideration, with owners of nearby patented properties.

On July 17, 1956, the respondent entered into an agreement (R-6) with one Kenneth A. Wheeler (hereinafter sometimes referred to as "the Wheeler sale") whereby the respondent conveyed his interests in 28 patented claims and one unpatented claim for $1,000 per claim, or $29,000, plus 7,500 shares of Vandoo Consolidated Explorations Limited, the then value thereof, by agreement of counsel, amounted to $9,250, making a total price in round figures of $38,000.

The respondent next arranged to sell eleven patented lots (Ex. R-8), each of which being the equivalent of two mining claims, to a subsidiary of Rowan Consolidated Mines Ltd. named Libby Investments Ltd. (hereinafter sometimes referred to as "the Libby sale"), originally for $7,500,

and certain shares of Rowan Consolidated Mines Limited (cf. Ex. R-7 dated August 20, 1956), but delivery of the said shares was later waived by the respondent (Ex. R-8 dated October 9, 1956). Thus, from the two herein above-mentioned sales (with which we are here concerned) the respondent realized about $46,000 on which the Minister allowed some $12,000 as cost of sales and assessed the respondent on a net profit of some $34,000.

Following the Wheeler and Libby purchases mentioned in Exhibits R-7 and R-8, a dispute arose between Karfilis and Byles because the respondent contended the unpatented properties described in the said exhibits belonged to him alone and did not form any part of the grubstaking and partnership agreement Exhibit R-6, while Mr. Byles contended that they did and that he was entitled to his share of the proceeds in both instances.

In order to resolve their differences, the partners, as appears by Exhibit R-9, entered into an agreement dated September 7, 1956, whereby Mr. Byles relinquished all his right, title and interest arising from the aforesaid partnership agreement of April 20, 1956, in consideration of the receipt of $8,500 and certain further undertakings by the respondent as set out therein. About two years later, to wit, on September 4, 1959, George Byles instituted, as plaintiff, an action for an accounting against the respondent, as defendant, in the Supreme Court of Ontario, alleging that following the settlement of September 7, 1956 (Ex. R-9), the respondent had received monies, stocks and bonds with respect to the mining properties referred to in Exhibit R-9 and has failed to deliver to the plaintiff his just share thereof. The said action was settled out of court.

To conclude this preliminary summary, I should add that no further sale of any of the remaining properties was effected.

Before the end of 1956, however, the drilling carried out by the owners of the original discovery disclosed that it petered out about a foot below its surface. Nothing worthwhile was ever discovered on any of the mining properties which the partners had disposed of or on the mining claims which they retained, so the partners "dropped" their claims.

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For a more ready appreciation of the testimony of the respondent, which follows, I propose here to set out the respective submissions of counsel for the parties.

Counsel for the appellant, in support of what he termed his main submission, urged that the evidence offered by the respondent was inconsistent, vague, uncorroborated and insufficient to discharge the burden of establishing that he acquired the properties in issue as a result of or through *bona fide* prospecting efforts of himself or Mr. Byles. On the contrary, it is claimed that the respondent and his partner having learned of a copper strike in the Raglan Township, rushed into the area without any previous genuine prospecting and, relying solely on the strength of the said strike, proceeded to blanket the area. This was done by Mr. Byles staking all the unpatented properties which had not already been staked and the respondent acquiring the mining rights on as many privately owned properties as he could afford to buy and which ran in a north-easterly direction and as close as possible to the said strike. The purpose and intent of the respondent in doing so was not to discover or develop a mining property but to quickly dispose of his mining rights at a profit. Furthermore and most important, that any prospecting done by the aforesaid parties having taken place after the acquisition of the properties in issue the provisions of s. 83(2)(*a*) are consequently inapplicable.

In so far as the applicability of Section 83(3) is concerned, it was submitted that in order to obtain relief thereunder it would be necessary to establish that Mr. Byles prospected on the patented properties sold and the evidence establishes that he was only engaged in staking the unpatented properties.

Alternatively, even if the Court should find that the respondent were entitled to relief by reason of Section 83(3), such relief would not extend to the one-half interest in the partnership which the respondent acquired from Mr. Byles, as this arose not from prospecting but as a result of an independent agreement between the parties, which would render it taxable under ss. 3, 4 and 139(1)(*e*) of the Act.

As not infrequently happens in cases such as this, counsel for the respondent takes issue with the main submission of

counsel for the appellant on grounds diametrically opposed to those invoked by him. The case for the respondent may be briefly stated as follows:

(1) The appellant's main contention is unfounded in fact and in law, because the testimony of the respondent affords clear and uncontradicted evidence that the various efforts which he exercised in acquiring the properties in issue were the very things which constituted prospecting in the true sense of the term.[1]

(2) The appellant's alternative submission is equally unfounded, because the so-called independent agreement, which is dated September 7, 1956, was not, as alleged by the appellant, an agreement whereby the respondent acquired Mr. Byles' original half-interest in the partnership dated April 20, 1956, but an agreement between Mr. Byles and the respondent to divide the proceeds of those properties which had been disposed of six months previously; it did not change, in the slightest degree, the interest which the two parties originally held; it was merely an accounting of the proceeds thereof and has no bearing on the instant case.

(3) Alternatively, even if the respondent is taxable on the net profits realized by him of the Wheeler and Libby sales under ss. 3, 4 and 139(1)(*e*) of the Act, as claimed by the appellant, his reassessment of approximately $35,000 is excessive and unwarranted, because it fails to make proper allowance for the expenditures made by the respondent in acquiring the aforesaid mining claims, which exceeded $25,000 instead of $12,000 allowed by the appellant.

I might here add a few particulars to those already mentioned at page 7 *supra* as to the respondent's background. As appears by his income tax return, in 1956 he was a self-

[1] The Court was referred to various dictionaries re the meaning of "prospector". These definitions are naturally very much the same. According to *The Oxford Universal Dictionary*, the word "prospect" is of American origin and "to prospect" means "to explore a region for gold or other minerals." *Webster's Third New International Dictionary* defines "prospecting" as "exploring an area for mineral deposits, to make preliminary developments" and "to explore" means "to seek for or after; strive to attain by search, to search through or into."

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employed restaurateur in Toronto, where he resided. In his examination in chief, he stated that he was 38 years old, that in 1947 he became a school-teacher and that in the same year he took out his first mining licence and visited during summer vacations several mining areas particularly in Ontario. At university he had taken a course in geology and prior to 1956 he had, on one occasion, staked a mining property in the Red Lake district.

The Byles-Karfilis agreement Exhibit R-2 *supra*, in which Mr. Byles is described as "Party of the First Part" and the respondent as "Party of the Second Part", is short and reads as follows:—

> Whereas the Party of the First Part and the Party of the Second Part are desirous of forming a partnership for the purpose of obtaining interests in mining claims and properties.
>
> Witnesseth that in consideration of the mutual premises herein, the Party of the First Part hereby agrees to devote his full working time commencing the 1st of May 1956 to the exploration of mining properties and obtaining mining rights on these properties by the staking of claims, purchasing of claims or any other manner whatsoever.
>
> All mining rights to property and any other interests obtained during the term of this agreement or subsequent thereto but directly or indirectly a result of activities pursuant to this agreement shall be the property of both parties as tenants in common, each owning an undivided one-half interest in same and any monies made from the disposal of such interests shall be split equally between each party
>
> The Party of the Second Part will provide the sum of $500 per month by the 1st of each and every month during the term of this agreement for the use of the Party of the First Part provided that the Party of the First Part is actively carrying out the terms of this agreement.
>
> This agreement shall extend to the end of the normal prospecting season.

The witness was asked:

> Q What was your intention of the activity that should be carried out under the terms of that agreement?

The question was objected to and the objection reserved. The witness answered:

> . . . . I felt I could learn a great deal from him and I also saw an opportunity of getting involved in prospecting in a very interesting way The only way Byles could do this, he said, was I could grubstake—it was his idea that we enter into a grubstake agreement whereby I would provide him with a monthly payment of $500 per month and he was to devote his full time to prospecting anywhere that he saw fit or anywhere that I thought would be interesting, we would work together on it, the agreement that we have a sharing on an equal basis 50-50 on the things that he himself would find I told him at that time that I was interested in

prospecting on my own also and that he would not—or at least I thought I had made it clear to him at that time that I was free to enter into any other grubstake agreement with anyone else that I wished and I was also free to prospect on my own and he would not share in what I had prospected, but I would share into what he had prospected because I was paying him $500 per month to do this, sir.

Q. When did you first hear of the Raglan property?

A. I don't remember the exact date but I think it was in the early spring of 1956. By this time I had become very interested in the mining business, very interested in prospecting, and I had made—I was going to say many contacts but that would be exaggerating—I had made several contacts in the mining business with mining engineers, mining geologists and prospectors. One of my acquaintances was Mr. Murray Watts who is one of the Canadian foremost geologists and explorers and he is a friend of mine. He had told me that there were some interesting developments happening in Raglan Township. He said that he thought the area would be a great prospecting area and that he had—his company had discovered what he thought at that time was a major copper find He told me where the area was. By this time it was general knowledge I guess, or most of the good prospectors knew about it, and I am not sure whether Byles knew about it at the same time or whether I had told Byles or just what happened, but our attention was focussed on Raglan Township. My first job was to get maps of the area, geological maps I went up to the Department of Mines and got a geological map of Raglan Township, Lyndock Township, and I had two other townships. We looked at the maps, we looked at the geology of the maps. We found out what was open for staking and what was not open for staking.

Asked to clarify who he meant by "we", the witness said:—

Well, I suppose initially I would say that myself. Subsequently I think I would likely have had discussions with Mr. Byles and other geologists in the area who had been working up there. And then I went up on the property and I was one of the people to see the original discovery and when I walked on the original discovery, my lord, it really looked very interesting. They had stripped the area and it was—on surface it appeared like a real big find.

HIS LORDSHIP: Had anything been done on it?

A. Yes, but at the time they had stripped the overburden on it, they took the trees down and the earth on top and exposed the strike.

Q. Where was this in relation to the claims you purchased?

A. That was in Raglan Township near a place called Heart Lake. We discussed with the geologist there which way the strike was going and I discovered that if there were going to be any other finds in the area the strike was going in an easterly, north-easterly direction, there was a fault that appeared on the map going from Raglan Township across to Lyndock Township.

And this according to Watts and according to other mining men, they said there could be something interesting somewhere along the line.

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. . . . I wanted to find out just what structure there, through the copper strike, what kind of rock bore this copper, whether there were any quartz in it So on looking at the map we found there was some area open and I instructed Byles to stake the open property, it was in the tip of Lyndock Township in there and we staked and I went up there and staked myself, I think I staked one or two claims myself in the 29 claims that we staked and that was the only property that was open for staking. Following that I went up there at least, I flew up there at least eight times that I can remember, and I drove out there practically every day and spent my weekends there and spent weeks there. I travelled the area generally myself. I went on these farmers' properties, I wanted to find out just what the area was like. It is a very hilly country. And I told them what I was looking for and I found out that they had owned their property and I told them that I was interested in prospecting their farms. They were very good about it, they brought me samples of rocks that they had found on their property and that area, my lord, is a great iron ore, great iron ore deposits was in that area,—I was not concerned in iron ore deposits, we were interested in copper—a great many rock samples bearing iron ore When I finished prospecting I decided on certain properties that I liked I based my decision on the fact that I thought this would be the best place to prospect, and the other factor was the closeness to the Raglan strike.

Q Well, now, Mr. Karfilis, when you went on these properties did you have permission to go on these properties?

A Well, not the first time I went on I don't think I did. I don't think I asked for any permission. Subsequently I think, yes, we did. If we bumped into the farmer we would ask him if we could go on the property and just if he could see a rock sample, or our first question to them was "Are there any rock exposures on your property" and if there were we would—

Q. Who is "we"?

A Well, again I am talking of myself. On many occasions I had other prospectors with me and actually just day labourers that would help me pick some of these rocks up. We had a couple of pick and shovel men.

Q Who were some of these prospectors you had?

A. Well, George Byles was one of them, he came on with me on this property. Mintern was another. I guess those are the only ones that I can think of right now. Mr. Montgomery was with me one time

Q. Why did Mr. Montgomery come up with you?

A. After I decided, when there was certain (ones) that I wanted, I would suggest to Mr. Montgomery that we option these things on an option basis from the farmers and Mr. Montgomery was there to draw up the necessary papers.

Q. I show you an agreement dated July 19, 1956, between Arthur Liedtke and R S Montgomery. Can you identify that agreement?

A. Yes, I can.

Q. What is that agreement?

A. Arthur Liedtke was one of the farmers up there who owned lot 32 in concession 7 and part of lot 35 in concession 8, and we agreed to

give Mr. Liedtke $125 for an option upon signing and then a percentage of the mine if and when it was found, I think.

Q. Is that agreement typical?

A. Yes.

Q. Of the type of agreement that you got from any farmer?

A. Yes, they were all the same.

Q The agreement says that the party of the second part is R. S. Montgomery as trustee Why were these agreements taken in the name of R. S Montgomery as trustee?

A. Well, that is to make it—to make it a little easier to process the things through. I would not be around and Mr. Montgomery was, I would be out in the bush, and I wanted him to be able do that.

Q. Who was Mr. Montgomery a trustee for?

A. He was my trustee.

Q. He was your trustee?

A. Yes.

Q. Exclusively your trustee?

A. Yes.

The witness was asked to file as Exhibit R-4 a sketch of all the properties acquired which the witness thought consisted of 150 claims but he was not sure.

Q. Have you any comment with respect to why you acquired that many claims?

A. I could not say. I just wanted to protect what I thought was the strike, take the strike area. On the claims that we staked I thought these were the—and they happened to be at the end, at the very end of the find, I thought they were the best bet for prospecting. There was a great deal of exposed rock on them.

Q. Now you finally acquired all these claims. What did you do with the claims once you had them?

A. Well, I—by this time the area became a very exciting area in the mining community. Once it became known that I had acquired these properties I had a great many people that contacted me. So I decided to sit on them for a while before I made any move. I went up—

Q. Excuse me, you say they contacted you?

A. Yes.

Q. Did you contact them?

A. No, I contacted no one

Q. O.K.

A. I decided not to deal with these claims immediately. I thought we were millionaires at the time, that the property looked very exciting. So I picked what I thought were the very best prospects and we did a considerable amount of trenching and grab sampling and essaying over the whole area actually, and Mining Corporation—I decided to have a holiday, as a matter of fact, I left

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Toronto and I went up north of Haileybury, my wife was expecting at the time, and they found where I was. The Mining Corporation of Canada phoned me, Noranda group phoned me, and a great many of the people interested in mining business tried to get some of these properties for the companies. And do you want me to go on, sir?

Q. Please.

A I finally decided to make a deal with Mr. Wheeler whom I happened to—I am not sure whether—where and how I first met him, whether I met him in a business way or whether I met him on the street. Mr. Manley was acting for him and they took me to dinner in the old club One-Two but I—

The witness described how, on July 17, he had agreed with Wheeler to sell him the 29 claims referred to in Exhibit R-6. The latter's lawyer dictated the terms of the agreement to the respondent, who wrote them by hand, whereupon the parties affixed their signatures.

What has been referred to as "the Rowan" or "the Libby" sale was briefly dealt with.

Q. Now, going on from the Wheeler transaction did you make any further transactions with respect to these claims?

A. Yes, I did I met Arthur White who was then controlling a company called Rowan Consolidated Mines. I agreed to sell them, I think it was 30 but I am not sure of the number of claims, for $7,500

Q. I produce an agreement which is dated the blank day of August 1956 between James Karfilis, Libby Investments Limited and Robert Stanley Montgomery. Can you identify that agreement?

A. Yes, sir This was the agreement that we entered into in our deal with Rowan Consolidated.

The witness then stated he did not enter into any other transactions with respect to the properties in question.

The witness described how his disagreements with Byles arose and how they were settled. See Exhibits R-9 and R-10.

Libby Investments Limited was a subsidiary of Rowan Consolidated and, as appears by Exhibit R-7, it provided for a payment of $2,500, which was acknowledged, and a further payment of $5,000 on subsequent dates and 100 shares of Rowan Consolidated Mines Limited.

By a later agreement dated October 9, 1956 (Ex. R-8), to which the respondent, the Libby Investments company and the Rowan company were parties, the respondent acknowledged receipt of $5,000 and waived any claim in respect of the Rowan shares.

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On cross-examination the witness was asked if his idea in entering the mining field was to pick up some claims and turn them over at a profit.

A. I don't think so, sir. I think if I had found a mine—I could have sold the claims, the best claims in the area for a lot more money than I did . . . . I could have made a lot more money than I did. Now, my intention was if I could find a mine, fine, but I had no intention, I did not go into this thing with the idea that we will go in there and find and sell That was not my intention.

Q. Well, did you have the money yourself to finance a mine or anything of that nature?

A No, I don't think anybody has enough money to really finance a mine Once the discovery is made the financing is not a difficult matter, you soon have the money.

Q What did you do with the proceeds of the sale to Mr. Wheeler under the agreement?

A. Well, we used part of that money to pay the expenses we were involved in. We used part of that money for work that we did on some of the property that we were going to keep ourselves

Q. Well, you spent quite substantial amounts, didn't you?

A. Yes.

Q On developing your own property?

A. That is right, sir.

Q. What work did you do?

A. Well, the first job was to bare, to take the overburden from the area that we prospected, that was the job, was to trench and get down to the rock surface.

Q Who was working with you when you were doing this?

A. Well, this went on over a period of time I had people from the area. I had farmers, I had a geologist up there, Byles was up there.

Q. You were doing some fairly intensive work and used this money that you would get from the sale of parts of the claims to finance it, is that right?

A Well, we did some work prior to this too.

Q But I am talking about subsequently?

A. Yes, that is what it was.

Q . . . you paid some couple of hundred dollars or so for day labour and you had your expenses of getting you back and forth to this property And you paid a Mr. Bryson $1,275, is that right?

A. Yes

Q And Mintern $1,000?

A Yes, sir

Q And Thompson $725 And they were all doing this work that you have just been referring to, were they?

A. That is correct

Q You are saying that they worked on these claims that you had kept and had not sold?

A. That is correct, yes.

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The witness stated that staking was carried out before he "went and negotiated the purchase".

Q. And I don't suppose you would waste any time, would you?

A. No, we would do it pretty quickly.

Q. Sure. So would you say within a week or two of the time you had picked up these options that you had done the staking?

A. Yes, I think that would be fair to say.

Q. Now, then, your agreement with Byles you said I think at the time that you entered into the agreement your idea was that he would be going out as a prospector and finding, using his own initiative, and I suppose doing geological work, and you hoped that he would hit on prospects somewhere and stake some claims?

A. Yes

Q. But you say that that was not covered by this transaction because all you did in this transaction was to go where you told him to go and stake the claims that you told him to stake, is that what your position is?

A. Well, no, I am not certain who heard about the strike . . . . I could not say, Mr. Wright, whether I heard about the strike first or whether Mr Byles heard about the strike first.

The respondent was questioned as to what, in his opinion, constituted prospecting.

Q. . . . . Now, then, from your knowledge would you agree with me that prospecting is the search for valuable mining occurrences?

A. I agree, sir.

Q. And what that involves is looking for a property, is that right?

A. That is correct, sir.

Q. And taking specimens, is that right?

A. Yes.

Q. And maybe making certain tests on the specimens and then assaying tests and things of that sort?

A. Yes.

Q. And then you also have the possibility of geochemical prospecting?

A. That is right.

Q. I think you can do that without a magnetometer, or do without electrical methods of testing resistivity and activity and by means of geochemical methods?

A. That is right

Q. So this is all related to looking for mineral deposits?

A. Yes.

Q. Now, would it be right to say that in many cases, or should I say there are probably two particular ways of acquiring mineral properties and one is first of all for a prospector to go out in an area which he may have decided he wants to go and prospect and examine the area?

A. Yes.

Q. And he combs over that area having no idea whether there is anything there or not and hits his axe on the rock and picks samples off the rocks, he decides he may have come across something that looks interesting?[1]

A Well, before the prospector decides that that is the area he is going to investigate the land this is information of something interesting.

Q And I appreciate he has some idea which takes him to this area he wants to look into?

A. Yes, sir.

Q. And he may just have a geological map and he may decide that looks interesting and—

A. Or throughout similar areas of the same character.

Q. That is one way to go about acquiring mining property, is that correct?

A. That is correct, sir.

Q And then the other way in which it can be done is where there has been a strike in some particular area and then we have what is a sort of rush, isn't it?

A That is correct, sir.

Q Into that area?

A That is correct.

Q And in that case the practice is not so much to go in but to look for claims that are open in that area, stake them as fast as you can and to look afterwards to see if you have got anything, is that right?

A. That is true, yes.

Q And I think that sort of thing is called blanket staking? And he just goes into an area and covers a whole area that is available willy-nilly regardless of what he might find there?

A. That is true.

Q. And what you do I suppose, if this is referred to as a hot area or I think you used—it has been used, I think the expression "a hot area"?

A. Yes.

Q Yes, and the problem that you may encounter if you find that some of these properties are patented properties is that instead of staking you have to purchase?

A. That is correct.

Q. The rights from the original owner?

A. Correct, sir.

Q. So that what you are primarily concerned with in a hot area is getting the best claims you can and should I say getting whatever claims you can as close as possible to the original strike, right?

---

[1] Although the witness agreed that various acts are involved in prospecting, he made no attempt to indicate whether and when any of these acts were carried out particularly on the properties sold to Wheeler and Libby—which, as appears later in the evidence, he sold within a fortnight of when he first saw them.

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A. That is a factor, sir.

Q And otherwise if you take the time to look carefully at it first you are liable to find somebody else goes in and acquires it ahead of you?

A. That is true.

Q And it might quite often be too late, once you do the prospecting. You could then find, and once you want an agreement, the owner turns around and says, "Well, I think it looks much more interesting" and he wants a high price or else somebody else has already bought it

A. That is right, sir.

Q. Now, in connection with your arrangement with Mr. Byles he was a completely—to use a little legal word and since you are a law student, we can agree that he was an independent contractor, can we?

A. Yes, sir

Q. And then you didn't control his hours of work or anything of that nature?

A. No, sir

Counsel for the appellant directed the attention of the witness to a reference in a publication entitled "PROSPECTING IN CANADA" by A. H. Lang and stated that he was going to read it to the witness and ask him if there was anything in it which he would like to comment upon or disagree with. The following extract was then read:—

Prospectors and others often rush to areas where new discoveries are reported This is understandable, but unless one "gets in on the ground floor" he will probably find that the area is fully staked for a long way around the discovery. Rushes generally result in staking bees participated in by persons who are merely speculators who hope to sell their claims promptly, as well as by prospectors who feel that they have to stake first and investigate afterwards for fear there will be no open ground left. Latecomers have to prospect on the fringes of the district or wait for claims to lapse. These are not always disadvantages, because discoveries may be made miles away from the original one, or on hurriedly-prospected claims that are abandoned. However, careful consideration should be given before joining the more popular rushes, because so many persons participate, transportation and other services may be taxed to the limit, and many of the early reports may be exaggerated.

Counsel asked:

Does that sound like a fair statement to you?

A. I think that is a fair statement, sir.

The witness added:

I will draw this to your attention there. Mr. Wright, the statement where they said "unless—" your first two lines there which—

Q Yes, "unless one gets in on the ground floor"?

A. Yes, ... In our particular case we were the first ones on the scene.

Q. You felt you were in on the ground floor?

A. Well, we were opening up the area, more so than anyone else I think.

The question was asked:

How close were these claims that you staked to the original discovery?

A. I think we had some claims less than a half a mile, ...

Q. You came in and you purchased your claims as close as you could get it?

A. Yes.

Q To the original find?

A. Yes, that is true.

Q Now, going back a little bit, this whole expedition of yours in that area resulted from your hearing of this copper discovery at Raglan, is that right?

A. Yes, sir.

Q. And as a matter of fact you ultimately abandoned the whole project yourself because you heard that the Raglan find didn't turn out to be anything after all, I think you told his lordship that, didn't you?

A. Yes, but there was other work in the area around here up to the west, on which claims were the ones on which they also did a considerable amount of drilling on the property and the area we abandoned we eventually abandoned after the results became known.

Q. But you told his lordship . . . . that the Raglan discovery proved the find was only about 12 inches deep after considerable drilling they found it was not commercial copper and we dropped our claims, is that right?

A. That is correct, sir.

Q. You referred to a gamble, you didn't base your decision on what your actual findings were but rather on what was found by the people that originally interested you in the area?

A. Well, no, sir, I made my own decision. In other words, I don't want to leave you with the impression we dropped that because Raglan became—I suppose we stopped work because economically it proved it would not be worth the gamble to drill our property because of the drillholes that surrounded our property and the best geological advice impelled me to say that if we drilled the chance of finding anything would be very small. So I dropped it on that basis.

Q. Now, you took the so-called options such as Exhibit R-3 at the time because you were worried that if you didn't take them somebody else could take them, is that right?

A. I didn't consider that. I just wanted to get what I thought we could get. I was not in competition with any one else at the time we went in there.

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Q. No, but the reason you picked them up at the time you did was because you were aware that if you didn't somebody else could get them?

A. I think that was one of the factors. I think the other factor was we looked at the area we wanted to get before we got it. We didn't just go in there and blanket the area with—claims, because we had to pay and I didn't have the money at the time. You had to pay a certain amount of money for these, the tax. So we wanted to be sure that what we did get was worth getting.

Q. . . . . I will ask you if you were asked this question and made this answer—it is on page 11:

Mr. WRIGHT (question 105—on discovery):

Why did you bother at this stage getting options? What was new that you felt that rather than just go on this laissez faire approach you needed to have them tie it up under an option?

A. Well, if I did not acquire them someone else could have come in and got them.

Q. Now, then you heard about this Raglan find and you went up and you told his lordship earlier you went up and you saw where the original find was and you examined the way they had taken off the overburden and so on and then I think you phoned Byles and you said, "Get down in Raglan it looks pretty hot". Is that right?

A. Well, I am not sure of that point, Mr. Wright. I don't know whether I called Byles, whether he knew about it or not, I am not sure.

Q No, between the two of you you found that some land was open for staking and others was patented property?

A. Yes, sir.

Q. So on the property that was open for staking you called Byles and he came in and you showed him where the property was and you staked that?

A. Yes

Q. Rather he staked, you didn't do any staking there?

A. I think I staked one or two—I think I staked at least one claim or two claims of that there.

Q. I will ask you if you were asked this question and made this answer—it is question 41 to 43, my lord, at page seven—

"You say you went up first of all yourself and saw the property where the original find was, is that right?

A. Right.

Q. Then did you go up with Byles following that?

A. Yes. After my first visit we ascertained that the area—there was some land that was open for staking and other land that we looked at was patented property.

Q. Yes?

A. So on the property that was open for staking I called Byles He came in. I showed him where the property was and we staked that—rather, he staked it; I did not do any staking there."

Q. Would your memory have been better when you were examined for discovery in October or now, Mr. Karfilis?

A Well, I have had an opportunity of going over this thing many times, Mr. Wright.

I wish to add that I came across some corroborative evidence as to his staking of one claim and I am prepared to accept his statement that he did so. It was not, however, among those staked by Mr. Byles but the one and only unpatented claim included in the group of 29 sold to Mr. Wheeler. I say that because of item *c*) on page 3 of Exhibit R-6, which reads as follows:

> *c*) 1 claim staked by JK.
> W. ½ of Lot 27 Con VII
>
> (I think "JK" signifies James Karfilis, the respondent)

The said claim may be seen on Exhibit R-4 and is located between the "East ½ of Lot 27, Concession VII" which the respondent bought from Henry Bardofsky and "Lot 26, Concession VII" acquired from Edward Keller (referred to in Exhibit R-6 as Items *d*) and *b*) respectively). I should add that although I think that the respondent staked the aforesaid patented claim nowhere in the evidence is there any suggestion that he prospected it. It is clear, I think, and counsel agreed, that staking alone does not constitute prospecting. It follows therefore that the $1,000 which the respondent received for this one claim is not subject to exemption under Section 83.

Q Now, would it be fair then to say that you really followed the same procedure in connection with the patented properties as in the properties that had to be staked, except that you could not stake them so you purchased them?

A. Yes, sir

Asked if what he did would be called "blanket staking", he answered:

No, it is not true because there was property available just below the fault that we didn't bother going to at all. In fact, there was property there surrounding the find that was available here that we did not take.

Q. When I said "blanket" you were betting you had claims on the location and following the location of the strike, is that right?

A. Yes, sir.

Q. Now, would it be fair to say that by far the larger part of the work that you did on these properties was done after they had been staked and purchased?

A In the overall picture I don't think so, Mr. Wright. I think we spent more money deciding on what we were going to take than

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what we spent afterwards. By the time we were really able to work it didn't take long to come to the conclusion that maybe this is not as good an area as we thought.

Q. You don't have any written record or anything to indicate what work was done prior to—

A. That is correct.

Q. —prior to the purchase and what work was done afterwards?

A. That is true

Q. And you agreed with me earlier that it looked like common sense to tie the property up first and do your exploratory work afterwards, didn't you?

A. Yes, I did with this qualification that we knew what area we were after and we did go on the property before we made any deal with any of the farmers. We looked at rocks.

Q. You didn't do anything, you didn't go on the property, you told Byles I think you said to just go up and stake those properties right away?

A Yes, the property that was open for staking we thought we would stake it and get it.

Q And you didn't do any prospecting at all?

A. No, that was open for staking and so we staked it. It was in the general area of the strike so—

Q. . . . . then would it be fair to say that—what brought you up into this area was this Raglan discovery?

A. Yes, that would be fair to say, sir.

Q. And that was the reason that you were in there looking for these claims?

A. That is true, yes.

Q. And it was really the thing that motivated you in acquiring the claims?

A. That is true, sir, that would be one of the factors.

Q. Well, it was the major factor?

A. It was the major factor getting me interested in the area, yes

The witness was asked if he had any reports or maps or anything of that kind showing the work that he had done in the area at any time.

A. I did have, Mr. Wright, but I don't know where they are.

Q. There is nothing available now that we can look at today?

A. No, sir.

Q. . . . . but there is no written evidence of any kind to show what work was done, is that right?

A. No, what happened to those is either Rowan Consolidated or Van Doo or somebody did take my reports and I just never got them back.

Q. Yes. And you don't even have any invoices for the transportation expenses that you had up to the property or anything like that?

A. No, sir, I do not.

Q Or any receipts from—

A. No.

Q. Any of these prospectors?

A No, sir, I do not.

Q. For payment, and actually three of the prospectors, Mintern and two others, Thompson I think was one, I have forgotten the name of the other, you didn't pay them until 1957?

A That is true, sir.

Q. Now, then, when you refer to these agreements that you obtained as options would I be right in saying that—his lordship can look at them anyway—but really what they were for is that you become the grantee of the mineral rights in connection with the property which you took these so-called options on?

A. Yes, an option to become the grantee of that property.

Q. . . . . I am talking about your agreement with the different land owners, I understand that for the type of agreement that you have, that terminology refers to it as an option but all I am getting at is it is really not an option, it gives you the exclusive and sole right to set up mining operations and to extract ore and you agree to pay so much a ton for the ore.

A But it also says under that agreement, Mr. Wright, it gives us a considerable time to decide whether or not we will make payments on those claims from the time—in other words, it gives us an opportunity to go in there and do any other further work we wanted to and then after a time we found there was nothing there, the moment we stopped payment the option ceased.

Q Well, could I have Exhibit R-3, please, just so we will be clear.

A. . . . . here is one clause, Mr. Wright:

"Provided that the optionee shall—"

Q. This is on page what?

A. Page three of the agreement. This would involve a lot of money, and on this one was $125.

"Provided that the optionee shall pay the municipal taxes commencing next January 1st on the said property during the time he desires to retain the exclusive mineral rights on said property and—"

Q. There you are right there, you had the exclusive mineral rights?

A. Yes.

> "and upon ceasing to pay the municipal taxes the optionee's interest in the said mineral rights shall cease and no further claims may be made by either party under this agreement."

So actually it gave us a year to decide whether or not there was anything in the property.[1]

---

[1] This, no doubt, refers to the 40 days of work required to be performed by the holder of a mining claim within a year of its registration and during four consecutive years thereafter to maintain the owner's title in good standing, as prescribed by the *Mining Act*, R.S.O. 1950, c. 236, s. 80.

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Q. Well, all I was getting at is that I would think under an option you would make a paymennt of $20 and there is an option to purchase the mineral rights, but that is not the way this reads, but this was a payment by you and you had the mineral rights and you simply paid a royalty when you took the ore out of the ground, that is all. I don't think there is anything unusual or anything about it, but I just want to make it clear that it is not an option as I think most people would think of it as an option.

A. May I—it was the intention, Mr. Wright, when we decided to buy this property, we wanted to get as long a time as we could to investigate this property, and upon ceasing, if we didn't pay the taxes, Mr. Montgomery, my solicitor, said that will give us a year in which to decide, and I don't know anything about it. I accepted his advice on it.

Q. You just lost the mineral rights if you didn't pay the taxes. In the meantime you had them?

A. My understanding is we dropped them at that time.

Q. That may be the terminology in the trade, that is all

A. Yes.

Q. For instance here is a receipt. Before you got those formal agreements my understanding is that you went around and took informal agreements and the different landowners signed a receipt?

A. Yes, I did, sir.

Q And I am showing you one dated June 29th, 1956, and that is one such, is it?

A Yes, that is one such.

Q. And it says:

"Received $100 for full payment on mining rights for Carl Klott's two lots".

A. Yes.

The witness stated that there were other similar agreements. One of these was that of Mr. Shutte, who decided to sign an agreement only after his lawyer had approved of it (cf. Ex. A-3), in which he was called "the vendor" and Mr. Montgomery, acting as trustee for the respondent, was called "the purchaser".

Another agreement was that of Otto Liedtke, who signed it on July 23, 1956, in which he is called "the grantor" and Robert S. Montgomery is called "the grantee" (see Ex. A-5).

I might add that Mr. Henry O. Flequel signed an amended agreement on July 6, 1956 (Ex. A-4), in which the parties reverted to the form used in the majority of cases

and where he is referred to as optionor and Robert S. Montgomery as optionee.

The witness was asked to file as Exhibit A-6 a list of all the patented properties which he acquired, i.e. over 20 transactions, containing the date of purchase, the date of registration, a description of the properties and the price which he paid. The earliest purchase by the respondent occurred on June 28, 1956, and the last one, which was the Liedtke property, on July 19, 1956. Thirteen of the transactions were registered on July 6, five on July 12 and five on July 30, 1956.

Q. Now, then, it is a fact, isn't it, Mr Karfilis, that you sold these properties, some of them off to Mr. Wheeler, before you had final agreements from the landowners in some cases? I mean you had original agreements, as I understand it, but then you found they were not too good, some of them didn't have bars of dower and so on and you got new ones and you obtained a number of new ones that you sold after you sold them to Wheeler?

A. Yes, there were some aspects of it that we had not completed right.

Q. And you sold to Wheeler within days or weeks of the time when you were first up on the property?

A. Well, not days, I think weeks would be—

Q. Two weeks maybe. It was some time in the middle of July that you sold to him?

A. Yes.

Re-examined by Mr. Cassels, the witness stated that in saying that he had acquired 150 claims from various property owners he was guessing at the figure. Mr. Wright, counsel for the appellant, said:

Is the witness saying that he made a mistake, that there were 60 claims instead of 150?

THE WITNESS:

Well, 60, sir, plus, that would make it 89, or approximately.

Q. 89?

A. I am not sure of that figure, sir.

Q. Well, it will be closer than the other?

On resumption of the hearing Mr. Cassels asked the respondent the following question:

Am I correct in my understanding then that you did not bother to tie up the land owners at all until you had done your investiga-

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tion and found what you thought was some favourable indication on these properties.

A. Yes.

Mr. Robert Stanley Montgomery, whose evidence was very brief, stated that he went up to the Raglan Township mining claims area on several occasions to assist the respondent in securing valid title to the patented properties he acquired. It was in the month of July that he went for the first time. The second occasion was when the Shutte agreement was signed at the office of Mr. James Maloney because Mr. Shutte wanted to have his own attorney examine the document which Mr. Montgomery had prepared. The document which was signed is dated at Renfrew July 6, 1956 (Ex. A-3). The witness noted that the respondent obviously knew his way around the country, which was very hilly, and he introduced him to a number of the local people with whom he was dealing, went up to assist the respondent in negotiating agreements with local landowners and particularly those who wished the documents be drawn by their own solicitors, as was the case with Mr. Shutte.

He did not remember how many agreements he negotiated but there was a very considerable number. He identified himself as the R. S. Montgomery named in the agreements as trustee and stated that he was acting as trustee for the respondent and nobody else.

As I have already observed, the respondent possessed a dual quality: He was both a qualified prospector and grubstaker—and if the circumstances so warranted, was entitled to invoke both s-ss. (2)(*a*) and (3)(*a*) respectively of s. 83.

I think the applicability of s. 83(2)(*a*), wherein the respondent claims relief on the grounds that he acquired the properties as the result of his own prospecting efforts, may be decided on the facts.

In order to succeed under s. 83(2) the onus was on the respondent to establish that the mining properties in question were acquired by him as a result of his efforts as a prospector. This, in my opinion, the respondent did not do, because he failed to establish to my satisfaction that

a) he had expended efforts as a *prospector* in relation to the mining properties in question *before he acquired them*; or

b) he acquired such properties "as a result of" any such efforts.

I have already reviewed the relevant evidence at length and, in my view, it is sufficient to say that such evidence did not establish the probability of either of these facts being true.

Now, with respect to Section 83(3)(*a*), which envisages the case where, such as in the instant one, the respondent, as a grubstaker or the person who financed the venture, claimed relief by reason of the prospecting done by a prospector under an arrangement made with him before prospecting and also by reason of the existence of an employer-employee relationship between the grubstaker and the prospector, in this case the prospector being Mr. Byles. What I have said *mutatis mutandis* in respect of the inapplicability of Section 83(2)(*a*) applies. It is thus incumbent on the respondent to establish that Mr. Byles, who was not called as a witness, carried out prospecting on the groups of patented claims in issue prior to their acquisition and that it was through these prospecting efforts that the respondent acquired the said claims.

In my opinion, the respondent has failed to put evidence before the Court of prospecting by Mr. Byles sufficient to discharge such onus and therefore failed to establish that he is entitled to invoke the aforesaid subsections. A further reason for the inapplicability of Section 83(3) is to be found in the admission by the respondent that no employer-employee relationship existed between himself and Mr. Byles.

In view of the above-mentioned holding, it is unnecessary for me to adjudicate on the appellant's alternative argument referred to on page 136 herein.

Subject to the under-mentioned adjudication in respect of the respondent's alternative submission, the appeal is maintained in part.

There remains for consideration the respondent's alternative submission, namely, that even if the profits made by the respondent were in no respect exempt in virtue of Section 83 but taxable under Section 139(1)(*e*) the re-

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spondent is entitled to deduct some additional expenses incurred in the earning of the said profits which the appellant failed to take into account when he added $35,164.17 to the respondent's otherwise taxable income for his taxation year 1956.

This aspect of the case presents no difficulty because, as appears by the under-mentioned schedule which was delivered to the Court by counsel for the appellant, subject to a small amendment which I will refer to later, counsel for the parties agreed on the amount of expenditures incurred by the respondent, assuming that he was not entitled to any benefit under Section 83:

SCHEDULE TO REFLECT PROFITS REALIZED UPON PURCHASE AND SALE OF RAGLAN CLAIMS, ASSUMING THE RESPONDENT IS TAXABLE ON THE WHOLE PROFIT REALIZED

Proceeds of sale:	
(a) To Wheeler $29,000 cash	$ 29,000.00
To Wheeler 75,000 escrowed shares of Vandoo valued at $9,250	9,250 00
(b) To Rowan $7,500 cash	7,500.00
Total cash value of proceeds of sale	$ 45,750 00
Less cost of sales:	
Total expenses including $8,500 paid to Byles	25,739.94
Profit	$ 20,010 06

Counsel for the appellant declared that owing to an oversight he did not include under the title of "Cost of sales" 5,000 Vandoo shares the agreed value of which was $750. Consequently, after deduction of the said $750 the amount of the respondent's otherwise taxable income for 1956 amounts to $19,260.06 instead of $35,164.17 as assessed by the appellant. The respondent's alternative submission is justified.

The assessment will be referred back to the Minister for reassessment accordingly. As success is divided there will be no order as to costs.

BETWEEN:

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

AND

KENNETH A. WHEELER ..... RESPONDENT.

Toronto 1965 Nov. 30
Ottawa 1966 Aug. 19

Income tax—Income Tax Act, R.S.C. 1952, c. 148, sections 3, 4, 10(1)(j), 83(3)—Proceeds from sale of "mining property"—Exemption for prospectors and grubstakers—Whether property acquired as a result of prospecting—Whether income exempt.

One must consider the application of sections 4, 83(3) and 139(1)(*e*) of the Act, when the taxability of profits derived from the sale of two parcels of mining properties was in issue.

One of the transactions related to the purchase and resale of property acquired from one Karfilis, as described in the concurrent reasons for judgment in *M.N.R. v. Karfilis ante* p. 129 in respect of which a profit of $52,300 was realized. This income had been considered exempt under section 83 by the Tax Appeal Board.

The Minister now appeals from that decision.

Kenneth A. Wheeler testified that he had first obtained a ten-day option to acquire this property and that during that interval he had discovered flaws in most of the titles of sufficient importance to enable him, if he had wished, to repudiate the purchase.

However, after hiring the services of a prospector to inspect the properties, he had decided to perfect the titles at his own expense and complete the transaction.

The other transaction related to the sale of claims that the taxpayer and a partner, Whalen, had had staked after learning that the existing claim holder was allowing them to lapse. These claims were sold shortly afterwards for $125,000 of which Wheeler's original half-interest (or $62,500) was considered exempt under section 83.

However, the Minister considered that the taxpayer had, in the meantime, acquired his partner's half-interest for a cash payment of $9,000. After allowing a deduction for that amount, the Minister treated the remaining portion of the profit as taxable in the taxpayer's hands on the ground that it arose not from prospecting but by purchase from his partner.

The Board confirmed that section 83 did not apply to render the second half of the taxpayer's profit exempt and the taxpayer now cross-appeals from that decision.

Held, That the property acquired from Karfilis was not acquired as a result of prospecting efforts that took place before the agreement was entered into and the exempting provision of section 83 did not apply.

2. That the other property had been acquired merely by staking, without any antecedent prospecting, and section 83 did not apply.

3. That as to the amount deductible in respect of the alleged payment to Whalen, the taxpayer failed to discharge the onus of proving the Minister's calculation incorrect.

4. That the appeal was allowed and the cross-appeal dismissed.

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APPEAL and CROSS-APPEAL from a decision of the Tax Appeal Board.

D. J. Wright, Q.C. and *J. E. Sheppard* for appellant.

R. M. Sedgewick, Q.C. and *D. G. Mathewson* for respondent.

KEARNEY J.:—We are here concerned with an appeal and a cross-appeal from what in effect were two separate decisions rendered in a single judgment by the Chairman of the Tax Appeal Board on September 13, 1963[1].

The Minister's appeal is from a judgment of the Board which held that the profits realized by the respondent on the sale to Vandoo Consolidated Explorations Limited (hereinafter sometimes referred to as "Vandoo") of certain mining claims located in the Township of Raglan, province of Ontario, and which were assessed to tax by the appellant were exempt from tax in virtue of section 83 of the *Income Tax Act*.

The respondent's cross-appeal is from the second part of the Board's decision which in confirming the reassessment of the Minister held that one-half of the profits realized by the respondent on the sale also made to the aforesaid Vandoo company of certain other mining claims situated in the North West Territories near Dismal Lake were not tax exempt under s. 83 and were subject to tax by reason of ss. 3, 4 and 139 (1)(*e*) of the Act.

As appears more fully by the notice of appeal, the reply thereto and the transcript, the present case is in part a sequel to *Minister of National Revenue* v. *James Karfilis*[2] in which I have this day rendered judgment, since the same Ontario Raglan claims are a subject-matter of litigation in both cases.

As set out in the judgment appealed from, the respondent, who was an employer of prospectors or a grubstaker, did not file any return for his taxation year 1956. By reassessment dated March 16, 1961, the Minister held the respondent taxable for 1956 on $103,731.05. Of this amount $52,301.05 was attributed to the taxable income which the respondent derived from resale of the aforementioned

[1] 33 Tax A.B.C. 231. [2] *Ante* p. 129.

Raglan claims and the remainder of $51,500 to the sale of what, for brevity's sake, is sometimes referred to as N.W.T. or Dismal Lake claims.

At the opening of the hearing, counsel for the appellant, by notice of motion, made an application to amend the notice of appeal by adding thereto a new paragraph reading as follows:

2A. Notwithstanding the assumptions in paragraphs 2(*a*) and 2(*b*) above on which the appellant acted when making the assessment of March 16, 1961, the appellant now alleges and states:

(*a*) the said agreement between the respondent and James Karfilis was not an agreement to grant an option, but was a firm agreement to purchase the property in or near Raglan Township;

(*b*) the said Anthony Plexman was not a prospector and was not employed by the respondent;

(*c*) alternatively, if the said Anthony Plexman was by profession a prospector, then he was not employed by the respondent.

In support of the amendment set out in paragraph 2A(*a*) of the motion, counsel for the appellant stated that it was by error that the agreement entered into between the respondent and James Karfilis was referred to in paragraph 2(*a*) of the notice of appeal as an option to purchase, instead of a firm agreement to purchase; that the error only came to light on examination of the respondent for discovery; and that everybody before the Board had proceeded on the basis of this erroneous assumption.

Counsel for the appellant concurred in the above statements and the amendment to paragraph 2A(*a*) was allowed by consent.

Counsel for the respondent, however, took exception to the amendment contained in subsections (*b*) and (*c*), and the Court suggested, if he so desired, that the case be adjourned for further hearing in order to afford him an opportunity to give additional consideration to his argument, but counsel for the respondent stated that he was ready to proceed immediately. After hearing the argument of the respective counsel, I allowed the proposed amendments with costs in any event in favour of the respondent.

I considered that their purpose was so that counsel for the appellant would not be estopped from submitting that, although Mr. Plexman's occupation was that of a prospector, it did not follow that he was necessarily acting in that capacity in the present instance; and similarly, so that he

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would not be estopped from contending that the relationship between the respondent and A. Plexman was that of employer and independent contractor and not that of master and servant.

As amended, the relevant portions of the notice of appeal to the Raglan claims read as follows:

A. STATEMENT OF FACTS

1. By Notice of Re-assessment dated March 16, 1961, the Appellant added to the reported income of the Respondent for the 1956 taxation year the sum of $103,731 05; and assessed income tax thereon in the amount of $51,940 56.

2 In re-assessing the Respondent on the 16th day of March, 1961, with respect to his 1956 taxation year, the Appellant acted upon the following assumptions of fact:

(a) during the month of July 1956 the Respondent entered into an agreement with one James Karfilis whereby the Respondent paid to Karfilis $1,000 in consideration for an option to purchase 29 mining properties in or near Raglan Township in the Province of Ontario;

(b) after obtaining the option from James Karfilis, the Respondent employed a prospector, Anthony Plexman, to examine the mining properties in or near Raglan Township;

(c) upon receiving Anthony Plexman's report, the Respondent proceeded to pay the balance of the purchase price to James Karfilis and obtained title to the mining properties in or near Raglan Township;

(d) subsequently, in September 1956, the Respondent sold the above described mining properties to Vandoo Consolidated Mines Limited for a consideration of $60,000 and 200,000 shares of the capital stock of Vandoo Consolidated Mines Limited;

(e) by a letter to the Respondent dated June 2, 1955, one James A. Whalen acknowledged receipt of $250 from the Respondent as consideration for a one-half interest in the grub-staking of two prospectors named Ernest Boffa and Leonard E. Peckham;

2A Notwithstanding the assumptions in paragraphs 2(a) and 2(b) above on which the Appellant acted when making the assessment of March 16, 1961, the Appellant now alleges and states:

(a) the said agreement between the Respondent and James Karfilis was not an agreement to grant an option, but was a firm agreement to purchase the property in or near Raglan Township;

(b) the said Anthony Plexman was not a prospector and was not employed by the Respondent;

(c) alternatively, if the said Anthony Plexman was by profession a prospector, then he was not employed by the Respondent.

3. With respect to the profit which the Respondent realized on the sale of the mining claims in the area of Dismal Lake, N.W.T., the Appellant assessed income tax on only one-half of such profit.

B. THE STATUTORY PROVISIONS ON WHICH THE APPELLANT RELIES AND THE REASONS WHICH HE INTENDS TO SUBMIT

4. The Appellant states that the Respondent did not acquire his interest in the mining properties in or near Raglan Township as a result of his efforts as a prospector; under an arrangement with a prospector made before the prospecting; or through the efforts of a prospector who was the Respondent's employee.

7. The Appellant relies, *inter alia*, on Sections 3, 4, 83 and 139(1)(*e*) of the *Income Tax Act*.

With respect to the respondent's reply and cross-appeal, the following are the relevant statement of facts and statutory provisions on which the respondent relies:

A. STATEMENT OF FACTS

1. The Respondent admits the allegations of fact contained in paragraph 1, clauses (*a*), (*b*), (*c*) and (*d*) of paragraph 2 thereof, and paragraph 3.

I will presume that the respondent admits sub-paragraph (*a*) and does not admit sub-paragraphs (*b*) and (*c*) of paragraph 2A.

B. STATUTORY PROVISIONS ON WHICH THE RESPONDENT RELIES AND THE REASONS WHICH HE INTENDS TO SUBMIT

3. The Respondent states that the learned Chairman of the Tax Appeal Board was correct in finding that the Respondent acquired his interest in the mining properties in or near Raglan Township through the efforts of a prospector who was the Respondent's employee and that as such, the proceeds of disposition of such interest are entitled to the benefit of the exemption created by subsection 2 of Section 83 of the *Income Tax Act*, and are not required to be included by the Respondent in including his income for the 1956 or any other taxation year.

5. The Respondent relies, *inter alia*, on Section 83 of the *Income Tax Act*.

I propose to deal first with the most important issue, namely, the acquisition of the mining properties located in Ontario.

The evidence applicable to the aspect of the case is to be found in the testimony of Kenneth A. Wheeler the respondent, Anthony Plexman and John S. Grant, the latter of the legal firm of Manley and Grant.

Counsel for the parties agreed that there is no dispute as to the figures involved in the reassessment and that the only issue is whether the instant transaction is exempt under s. 83 of the Act. If the Court finds that it is exempt, the appeal must be dismissed, and if not, the respondent must be held taxable on the profit of $52,231.05 as claimed by the appellant.

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On examination in chief the respondent testified that he was engaged in the grubstaking and mining business. He described what was involved in the occupation of grubstaking by stating that it involved sending prospectors out to stake claims in various mining areas of the country and in turn disposing of those claims. And in so far as his dealings with the prospector were concerned he stated:

> Well, I finance him to go into these various areas I designate and stake certain claims in my behalf, pay his expenses in and pay him so much per claim for his work.
>
> When the prospector stakes claims they belong to me. He is acting on my behalf.

He had been in the grubstaking business since approximately 1950. The witness described how he first became interested in the Raglan Township area.

> Raglan Nickel, which is a mining company, in the summer of 1956 had properties in the Raglan Township and was pretty active in the area.

The witness learned that Mr. Karfilis had substantial holdings of mining claims in that area and he made a point to contact him. He had only known him casually before and had never previously transacted any business with him.

> Q. How far were they from Raglan Nickel properties?[1]
>
> A. Well, they were practically adjacent. I believe they were one group removed from Raglan Nickel.

Mr. Wheeler said that Mr. Karfilis had a total of 100 claims and "had a deal on with 30 of them with Mining Corporation and that he was free to deal on the balance of the 70".

The witness said that they talked about the whole of the claims initially, but that, as he recalls, it came down to one particular group that, locationwise, appealed to him, consisting of 29 claims, and Mr. Karfilis "had two offers to give me". The first of these, which was filed as Exhibit R-1, was a photostatic copy of the same agreement dated July 17, 1956, which was filed in the Karfilis case as Exhibit R-6, whereby the latter agreed to sell 29 Raglan Township claims for $29,000 and 75,000 shares of escrowed stock of Vandoo Consolidated Explorations Ltd. The respondent

[1] The evidence makes no reference to any relationship which existed between Raglan Nickel and Raglan Mining Co. Ltd, but, as appears later, the same two names are used to describe the mining property on which the copper discovery had been made previously.

accepted this offer, paid $500 on account and agreed to pay the balance on or before July 28, 1956. The other, which was filed as Exhibit R-2, consisted of an irrevocable option given by Mr. Karfilis to the respondent, which entitled the latter to acquire for one dollar, receipt of which was acknowledged, and $50,000 cash payable on or before July 23, 1956, all the mining claims, totalling not less than seventy, owned by Mr. Karfilis in the Townships of Raglan and Lyndock, save 30 claims in respect of which he was then carrying on negotiations with Mining Corporation.

Mr. Wheeler stated that he accepted the offer relative to the 29 claims mentioned in Exhibit R-1.

The witness had no personal knowledge about the Raglan area. He said:

> . . . The only thing I knew about Raglan was that Raglan Nickel were getting some very stimulating results and it had been a stock market feature. That is what attracted me to the—

Q. Had you ever been to the Raglan area yourself?

A. I had never been there.

Q. And why did you agree to buy 29 claims for $29,000 with so little knowledge on the subject?

A. Well, that is exactly what I would like to get to.

Following the meeting, the witness called Mr. Anthony Plexman in Burlington, who was a prospector whom he had been using for several years whenever there was any work relative to staking or prospecting. His evidence as to what happened during this period is reflected by the following extracts from his testimony:

> . . . my words to him were that I had acquired a ten-day option on 29 claims in Raglan Township, that I was fighting time, I wanted him to pick up his bush clothes. I asked him at the same time that I told him this was a copper-nickel situation, if he had any powder available for taking nickel tests. He said he had. It is called—I don't know whether it is of any interest to the court—dimethyl gloxian.

[He requested Plexman to pick up a geological map and a claim map of Raglan Township and to meet him as early as possible.]

Q. ... Did you have a meeting with him the next day?

A. Yes, the following morning, and we plotted these various lot numbers, etc. on the claim map, and I instructed him I wanted him to leave immediately for the property, and I specifically instructed him, No. 1, to go on the Raglan property proper, that is Raglan Nickel, see what kind of geology the property had, correlate that with these 29 claims I had under option. If he came across any outcrops to make a field test for nickel.

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Q. Did you ask him to make any tests for sulphides?

A. Well, you can't—I don't think you can actually make a test for sulphides Sulphides are something that you can find on the surface. They would be apparent to a man like Mr. Plexman.

Q. Oh, you can recognize them if they are showing?

A. Yes.

Q. Now, what was he supposed to do after he completed this operation?

A. Well, as I explained to him I was fighting time, I only had ten days, and I impressed that on him that he had to be pretty diligent and go over this thing with a fine-toothed comb to the best of his ability within that period of time and he was to report to me within approximately a week if not sooner.

Q. What arrangements did you have or did you make with him for payment for his work?

A. I told him I would pay him $500 in cash for his work plus his expenses, and as I recall I gave him $250 the morning he left to defray his expenses. And he left to see the property the same day.

Q. Now, at that time did you take any steps or issue any instructions concerning the question of title to the 29 claims involved?

A Yes, I instructed my solicitor, Mr. Manley, I advised him that I had already dispatched Mr. Plexman to the property and that I wanted him to make a title search of these various claims that I had optioned, or properties. And as I recall he retained a firm of Chown and Cooke who were located in Renfrew, for that purpose.

Q Now, when did you hear back from Plexman?

A. Well, I didn't hear from him directly, I was out of town, and while I can't pinpoint the date, I would assume it was approximately a week later, and Mr. Grant of the firm of Manley, Grant and Armstrong advised me that Mr. Plexman had phoned him from this Raglan area, that he was pretty excited, he had found a sulphide—

Q. He Plexman or he Grant?

A. Well, Plexman was excited but I think Mr. Grant was a little enthused too because of what Plexman had told him. And the message he relayed to me was that Mr. Plexman had said that the geology was identical with what they were getting the results in in the Raglan Nickel He had found a significant sulphide showing on the south end of the property.

Q. Is a sulphide showing significant in the grubstaking or mining business?

A. Well, it is. It is indicative of mineralization. It is a good indicator.

Q. Now, you were answering a question about the same time that Mr. Manley had a telephone conversation with someone?

A. Well, apparently he had also advised Chown and Cooke that time was of the essence, we had to have an answer on these things within ten days or my option would have expired, and they advised him that—

MR SEDGEWICK:

Q. Did you receive advice from Mr. Manley in relation to the title of the properties?

A. Yes, sir.

MR. SEDGEWICK: I think I can go that far.

Q. And based upon the advice that you received were you under the impression that you were obliged to complete the purchase in the letter of July 17th or otherwise?

A. Not at all.

Q. Did you subsequent to the 26th of July, Mr. Wheeler, complete the purchase of these claims from Mr. Karfilis?

A. Well, the sequence of events that followed was that I had been advised by my attorneys that there was a fault in every one of the titles with the exception of one claim—

THE WITNESS: But on the strength of what I had heard from Mr. Plexman in my humble opinion this had the nucleus of a good mining bet. So I instructed Mr. Manley to contact, I believe it was, a Mr. Montgomery who was acting for Mr. Karfilis, explain to him that the titles were in a mess, you might consider hopeless, but nevertheless I was prepared to go ahead and acquire that property if he would give me a further ten-day extension, I would go ahead at my own expense and try to put the titles in shape.

The respondent added that a further $350 was paid by Mr. Manley to Mr. Karfilis to give him a further extension, which payment Mr. Karfilis acknowledged on July 27 (Ex. R-3). The purchase was closed, the witness said, on August 3. In answer to the question

> In the interval between July 26 and August 3 what did you do or what instructions did you give that action be taken?

the witness said that he talked to Mr. Manley and that pursuant to Mr. Manley's advice he sought the aid of the late James Maloney, who was a Member of Parliament for Renfrew. His evidence concerning Mr. Maloney's part in the matter is as follows:

Q. Do you know whether Maloney took some steps in the interval?

A Yes, Maloney was responsible for putting these various documents in shape, getting their necessary signatures in order to make them—so that they could deliver title.

Q. And what was involved as far as the landowners were concerned? Did they receive any additional consideration?

A. Yes, Maloney apparently knew them all personally or most of them and he got them together and he advised Manley that it would cost $3,000, which was $500 for each landowner, and that if the property was sold into a mining company he wanted them each to receive 5000 shares of stock in whatever company acquired these claims.

Q. Was the $3,000 paid?

A. I paid the $3,000.

Q. To whom?

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A. Mr Maloney.

Q And at a subsequent date were the landowners issued 5,000 shares?

A. They all received 5,000 shares of stock.

Q Did this take place before August 3rd or after?

A. They received the $3,000 as I recall August 1st, because this was all a condition that he couldn't clear the claims or guarantee that he could get us proper conveyances without this money, plus Manley's representations that they would get stock. They got the money on August 1st and subsequently they got 5,000 shares of stock.

Subsequently, a transfer of the various properties concerned from Mr. Karfilis was made to Mr. Hutchison, who was a nominee of the respondent.

As appears by Exhibit R-4 dated August 7, 1956, Geo. S. Hutchison as nominee of the respondent offered to sell the 29 Raglan mining claims to Vandoo Consolidated Explorations Limited for $60,000 and 200,000 shares of the said company's stock, which was accepted by the company and attested under seal with two signatures. In this connection, the following portion of his evidence is of interest:

Q Now, when did you first make the decision to resell the claims you acquired from Karfilis to Vandoo?

A. After I received Plexman's report, which was a bullish one, I had a problem because my attorney had reported to me that all these documents had a defect in the title with the exception of the claim that Karfilis had staked. But nevertheless I approached Mr. Bishop who was the president of Van Doo, told him I had this certain property and that I was making attempts to acquire it subject to clearing up title and asked him if he would have any interest if I was successful in getting title and acquiring it. So he told me to make a written submission to the board for their consideration, if, as and when I had title.

The witness later stated:

I had no guarantees that Van Doo would acquire these claims.

Q. No, I didn't say whether you had any guarantee—as a matter of fact that is my point, I don't think you did have a guarantee, but I am suggesting that you knew perfectly well that you were going to make every effort to turn these claims over to Van Doo at a profit at the time you acquired them from Karfilis?

A. Well, Van Doo or other companies.

Further relevant testimony was given by the appellant on cross-examination:

Q. All right, then, I will ask you if you were asked these questions and made these answers on your examination for discovery.

Question 190, my lord, at page 27. Does your lordship have that?

"Q. Were these claims—he showed you what he had and you picked these out as being particularly attractive?

A. No, I couldn't pick them out I said as far as I knew it could have been a sugar bush. It was merely something that was relatively close in to this particular find, and the fact that Mining Corporation evinced interest according to him or had optioned a group of his, I figured if it was good enough for a major it was good enough for me."

Were you asked that question and did you make that answer?

A. Yes, I guess.

Q. Was it true?

A. Well, I think your question is kind of unfair Your original question asked me if my desire to acquire these claims was predicated wholly upon the fact that Mining Corp was in there and it was not That was a contributing factor.

Q. Just a minute, Mr. Wheeler. Would you answer my question first and then you can have an opportunity to explain it. I said were you asked that question and did you make that answer?

A. Yes.

Q. And was it true?

A. I have no alternative but to say yes.

Q All right Well, then, would you like to make your explanation to his lordship?

A Well, in any camp when a major evinces interest it is just natural that it is going to stimulate thinking and interest in the area. The reason that I was interested in these particular claims—that was a contributing factor certainly—the fact was that the thing that—and the only reason I went through with this deal was the fact that Plexman went up there and found something.

Q. Well, I know that is your story now, Mr. Wheeler, but what my point is, that when you were dealing with Mr. Karfilis you couldn't care less about those claims. You knew there was a strike in there, you knew the area was hot, you knew that Karfilis had some claims and you wanted to get your hands on them, isn't that right?

A. True

Re-examined, the respondent testified as follows:

Q. When you closed your deal with Mr. Karfilis, Mr. Wheeler, how did you pay him the moneys that were due him under the July 17th agreement?

A. That was paid in cash.

Q. Did you get any receipt from him?

A. No, sir.

Anthony Plexman, aged 50, in answer to the question as to his occupation, stated:

Presently I work for Butler manufacturing in Burlington in the welding department. I was a prospector up until about three years ago.

The witness stated that he was a prospector almost continually, about 80 per cent of the time, from about 1937,

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except for the war, when he served in the Air Force as a navigator until three years before the trial and explained what was involved as follows:

Q. What is involved in being a prospector? What work do you do?

A. Well, primarily it is looking for minerals and staking of claims and looking at showings and things like that.

Q. On whose behalf did you carry on these activities?

A. Many people. I have worked for companies, I worked for individuals and I have worked for myself.

The witness went on to say that during a period of over seven or eight years he had worked for Mr. Wheeler about fifteen or twenty times in Quebec, Ontario, North West Territories, Saskatchewan, Manitoba, New Brunswick. He testified in that connection as follows:—

Q. And without directing your mind specifically to the Raglan Township property, can you tell the court the type of work that you would normally perform for Mr. Wheeler?

A. It would be staking or going into—say going into a property and investigating it for him and advise him whether it was worth something or perhaps actually prospecting on the one property.

Q. Are you a geologist by any chance?

A. No, but I have studied mineralogy and geology. I was in arts course at Queen's for awhile, I took courses outside, and my background is such that I come from up north, I was born there, and I worked in many, many mines—not many, many mines, but I worked in, I would say, 10, 15 undergrounds, you know, hardrock mines and had considerable experience in prospecting.

He generally got $500 a month plus expenses out of Toronto.

Dealing specifically with his work on the property in Raglan Township in July of 1956 and as to how he first became involved in it, the witness stated:

A. Well, I used to do a lot of work, like I say on my own, I would be cruising around the country and prospect. Anyway the Raglan claims came along and I found myself in a place or somehow or I was here, anyway somehow it came along and Mr. Wheeler called me and asked me to go up there and look at the Raglan showing and see what the possibility was of acquiring claims Now, in this particular area most of the ground is patented, it belongs to farmers, and the chances of staking a group on Crown lands were, you might say, negligible, you couldn't get enough. You might get a claim here and perhaps a claim there.

And I went in and I saw the showing on Raglan Mines Limited, a surface showing, and very little work had been done on it. But it was an impressive showing. It was probably about 20 or 30 feet of mineralization, chalco-pyrite in gabbro, and there was a couple of trenches on it which showed a length of say 30 to 50 feet and a width say of 20 feet. Subsequently of course after it was drilled this

showing lay in about this angle (indicating) possibly 15 degrees from the horizontal, and what we were looking at in a cross-section, say 20 feet, actually turned out to be much narrower. I mean this is a condition that happened a few months later, I mean during the diamond drilling, at the time we didn't know.

Speaking about the instructions he received from Mr. Wheeler in relation to this trip, the witness said:

He told me to look at the Raglan showing To assess it and get an idea of whether it had a potential and if so that he had an option on some claims and I was to look at those during the same trip.

Q And did you look at those?

A. Yes, I did.

Q What did you do on those claims?

A. I walked around, as you do, with a hammer and you are looking for sulphides, you are looking for this same basic intrusive that is gabbro which was present on the Raglan property. And this area had been mapped geologically, on the geological maps, and it showed bits of intrusive in several places. In other words, the potential of the area was centred around this intrusive and it had an aerial extent of probably, I would say, six, eight square miles. This was the potential on the outside of this gabbro body.

The witness stated that he probably spent four or five days in examining the properties. Concerning the results of his examination, he testified as follows:

Q. And did you make a report on what you had found from your examination?

A. What I did do was suggest that—whether it was a report or not I mean at this time I am not certain.

Q. I am talking about an oral report, not written?

A. Yes, and I suggested that this Raglan Mine had a big potential, apparently it appeared that way on top Of course since that it was not proven as a mine, so you never can tell. But suggested being so close and in this area, it was such a good showing—I mean you can walk the bush for years and not see anything at all—and you can only know this showing was there, it was on top, and you didn't see enough of it, and this being an impressive thing, and it did impress me that it had a potential at that time.

Q. Would you say you were enthusiastic about it?

A. I was.

Q. Do you remember to whom you spoke on your findings.

A. It is a long time, I wouldn't want to commit myself on that.

Mr. SEDGEWICK:

Q. Do you recall whether the ground that you looked at was Crown land or patented land?

A. It was patented land, Crown land. It was farms and actually there were buildings, farmers living in them at that particular time.

Q. What do you have to do in relation to prospecting on patented land?

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A. Well, you have to ask the owner if you can go on it.

Q. That is the owner of the land?

A. Yes, or get permission from whoever has the option to do it or sometimes, however, it is, you have to have permission someway, you cannot trespass on private land.

Q In relation to the work you were doing up there did you ask permission of the landowners to go on the property?

A. Some of them I did, yes.

Q. How did you know which properties you were to examine for Mr. Wheeler?

A. Well, I was told somewhere along the line. I mean I was given instructions, if they have an option, or you see in that particular area it is the lot and concession and you pick up a blueprint and you see what concession this is and so on. I mean this is your guide and this is all you need. You don't need the claim numbers or anything else.

Q Did you have a map?

A. I did.

Q And were these properties marked on the map?

A. Well, they were, yes, they were on the blueprint.

Q. Were you ever told how long a period of time you had to complete this work?

A. Well, the work involved many things and I imagine from one end to the other, from examining the Raglan to looking at this ground, to the actual prospecting, would probably take a month, five weeks, somewhere in that range, three weeks to five weeks.

Q. But when Mr Wheeler gave you his instructions did he give you any time limit within which you had to report back?

A. This is something I don't want to commit myself on this, I don't know I imagine there was but like I say—

Q. Well, don't guess at it Thank you, my lord.

Cross-examined, the witness was asked:

Q. Mr Plexman, I guess you have pretty well given his lordship the extent that you can recall of the instructions from Mr. Wheeler in connection with this transaction?

A. I believe so.

John Stewart Grant, a lawyer, testified that he acted for Mr. Wheeler in relation to the acquisition of certain properties in Raglan Township in 1956 and received from him certain instructions to have the title to certain properties in Raglan searched. In answer to the question "Did you give advice to Mr. Wheeler concerning the state of the title to the properties?" the witness said:

> My best recollection, Mr Sedgewick, is that Mr Manley and I discussed this letter and I wouldn't want to be sure that I gave the opinion to Mr. Wheeler that the titles needed correcting I am satisfied however that Mr. Manley and I discussed that and I am satisfied

that Mr. Manley conveyed that to Mr. Wheeler. I may have been present at the time. It was within the office and I don't exactly recall who told the client that we had this search which showed certain deficiencies I wouldn't want to take credit for that personally.

Q. And what was your opinion concerning the state of the title?

A. There were paper deficiencies. The prior search indicated that, to our knowledge at that time, there were no bars of dower. This was common to a great number of the lots. They purport to be made by farmers, property owners up in the area, and there was no evidence that the wife had barred dower. They were patented land and we had to have a deed. There were other deficiencies which I would not presume to remember now ten years after the fact, but I can recall that both Mr. Manley and myself were quite upset about this search and it didn't seem to be one that was going to be able to be resolved without some remedial work, the title itself, that is.

Q . . . was the title matter discussed with Mr. Wheeler with reference to his obligations under that agreement? [Karfilis agreement Ex. R-1]

A. Yes, Mr. Manley and myself discussed this and one of us, I wouldn't say who again, certainly conveyed to Mr. Wheeler that he could back out of that transaction if he wanted to without bothering to remedy the title and have it come back, by reason of deficiencies.

Q. Did he nevertheless complete the purchase of the property?

A. Yes, he did, sir.

Q Did you receive instructions from him with respect to completing?

A. Yes, I did.

Q. Can you tell me what those instructions were?

A. To do what we could to perfect the title, if it was perfectable and as quickly as possible, so that he could make title again if he chose to resell them.

Q. And can you tell me whether or not the title matters were clarified by the time the purchase was concluded?

A Yes, they were. We wouldn't have let him buy it I don't think in view of our previous opinion unless he had wanted to waive our opinion, sir So my recollection is that we did remedy the deficiencies.

The witness confirmed that to have the title matters cleared up it cost $3,000 and 5,000 shares to each of the parties concerned. And he added:

> We relayed this to Mr. Wheeler. It was also our opinion that he didn't have to make those payments because really it was perfecting the vendor's title, but he seemed very anxious to have the claims and stand the extra charge.

The witness said that he received a phone call from Mr. Plexman during the period that the titles were being worked on. His memory was a bit hazy on it but he thought it was in the last two weeks of July 1956.

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A. I certainly had a telephone call from Mr. Anthony Plexman, I recall it vividly, one afternoon in my office, and he was calling from Renfrew, and I would place it any time—certainly between the time that Mr. Wheeler made his agreement with Mr. Karfilis and the closing of the transaction.

The subject matter was that he didn't know where to get Mr. Wheeler to report to him and that he had been sent up there and wanted me to know that he had found something that was highly interesting and I had to get Mr. Wheeler to get in touch with him, which I did. I told Wheeler about it, I presume he got in touch with him.

The facts, in so far as they are necessary for the determination of the question relating to the profit from the purchase and resale of the Raglan properties, as I view the matter, may be stated—in a manner that is as favourable to the respondent as possible—quite simply, as follows:—

1. The respondent having entered into certain agreements whereby he was entitled to certain rights falling within the definition of "mining property" in s. 83 of the *Income Tax Act*, in July, 1956, entered into an agreement to purchase such properties from Mr. Karfilis.

2. After entering into such agreement, the respondent employed a prospector (whether as an employee or as an independent contractor, I need not decide) to examine the mining properties that were the subject matter of the agreement. Concurrently, the respondent had his solicitors search the titles to these properties and received certain advice as a result of which he believed that he was entitled to repudiate the agreement with Mr. Karfilis.

3. After receiving a favourable report from the prospector, the respondent decided not to repudiate the agreement and proceeded to acquire the mining properties in accordance with it at some expense to himself in addition to the consideration contemplated by the agreement.

4. The respondent subsequently, i.e. a few weeks later, resold the mining properties at a profit, being the amount that I have already referred to as being in dispute.

On these facts, the respondent claims that he is exempt from income tax on the profit in question by s. 83 of

the *Income Tax Act*. It is to be noted that s. 10 (1)(*j*) reads:

10 (1) There shall not be included in computing the income of a taxpayer for a taxation year

. . .

(*j*) an amount received as a result of prospecting that section 83 provides is not to be included,

and s. 83 stipulates in part:

83 (1) In this section,

. . .

(*b*) "mining property" means a right to prospect, explore or mine for minerals or a property the principal value of which depends upon its mineral content, and

(*c*) "prospector" means an individual who prospects or explores for minerals or develops a property for minerals on behalf of himself, on behalf of himself and others or as an employee.

(2) An amount that would otherwise be included in computing the income of an individual for a taxation year shall not be included in computing his income for the year if it is the consideration for

. . .

(3) An amount that would otherwise be included in computing the income for a taxation year of a person who has, either under an arrangement with the prospector made before the prospecting, exploration or development work or as employer of the prospector, advanced money for, or paid part or all of, the expenses of prospecting or exploring for minerals or of developing a property for minerals, shall not be included in computing his income for the year if it is the consideration for

(*a*) an interest in a mining property acquired under the arrangement under which he made the advance or paid the expenses, or, if the prospector was his employee, acquired by him through the employee's efforts, or

. . .

In my view, apart from certain other possible objections to this claim for exemption, with which I do not propose to deal, the claim fails because it cannot be said the mining properties that the respondent agreed, in July 1956, to purchase were acquired as a result of prospecting efforts that took place before the agreement was entered into. The waiver of a right to repudiate an agreement to purchase certain properties is, in my opinion, not the acquisition of the properties and, therefore, even if such waiver were caused by the report of a prospector, it cannot be regarded as acquisition of the properties as a *result* of efforts of a prospector.

I will now proceed to consider the respondent's cross-appeal, which concerns his dealings and those of the late

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Mr. Whalen in respect of the North West Territories claims, sometimes referred to as the Dismal Lake or Copper Mine area claims.

With one or two exceptions (referred to later), there is little dispute as to the facts in respect of this aspect of the case and the issues can be reduced to rather narrow proportions.

Apart from the documentary proof produced which speaks for itself, the evidence in the case consists of the respondent's own testimony and that of Mr. John Stuart Grant, Attorney-at-law. Mr. C. R. Duncanson of the Taxation Division of the Department of National Revenue was called for the appellant in relation to this cross-appeal.

As appears by two letters dated June 1 and 2, 1955, respectively (Ex. R5), Mr. Whalen, acting on his own behalf and on behalf of Mr. Wheeler, entered into a grubstaking agreement relating to a so-called expedition being undertaken by two prospectors named Ernest Boffa and Leonard E. Peckham, of Yellowknife, N.W.T., wherein it was provided that, in the event of the expedition being successful, Messrs. Boffa and Peckham, in consideration of approximately $11,000 and an interest in Vandoo shares later referred to, would transfer all such mining claims to Mr. Whalen and an unnamed partner (Mr. Wheeler) and each of them would be entitled to an equal share therein. The prospectors obtained title to five groups of mining claims and, on May 1, 1956, Messrs. Boffa and Peckham assigned the said claims to Mr. James A. Whalen (Ex. R7) for $11,000 and 15% of any share consideration for which the said claims, or any part thereof, may be sold by the purchaser.

On May 10, an agreement was entered into between Messrs. Whalen and Wheeler, called the assignor and the assignee respectively, whereby the former acknowledged that he was holding the said mining claims in trust as to a full and undivided one-half interest in the same for the assignee (Ex. R6).

As appears by paragraph 2(*h*) and (*i*) of the notice of appeal, the appellant alleges:

> (*h*) subsequent to May 10, 1956, the respondent paid $9,000 to James A Whalen as consideration for Whalen's remaining one-half interest in the mining claims referred to in paragraphs (*f*) and (*g*) above;

(*i*) in the summer of 1956, the respondent sold the mining claims, acquired through the grubstaking arrangements with James A. Whalen, to Vandoo Consolidated Mines Limited for a consideration of $125,000

As may be seen by the reply and the cross-appeal, the respondent, while neither admitting nor denying paragraph (2)(*h*)(*i*) of the notice of appeal, alleges, *inter alia*, that

(*d*) By an unwritten arrangement between the said James A. Whalen and the respondent concluded during the spring of 1956, it was agreed that each of them would endeavour to sell the said mining claims and that whichever of them succeeded in so doing would be entitled to receive an additional 30% of the net consideration received in the sale.

(*e*) In the summer of 1956 the respondent, acting for himself as to an undivided half interest, and for James A. Whalen as to the balance, sold the mining claims to Vandoo Consolidated Mines Limited for a consideration of $125,000. The said consideration was divided and paid after expenses 80% to the respondent and 20% to the said James A. Whalen.

In paragraph 2 of his reply to the notice of cross-appeal, the appellant denied the allegations set out in paragraph 2(*d*) of the notice of cross-appeal and denied the respondent only received 80% after expenses of the total consideration of $125,000.

The respondent's position was, if his submission as contained in subsection (*e*) is accepted, that the amount which Mr. Whalen was entitled to receive and did receive for his 20% interest was the sum of $25,500 and not $9,000 as claimed by the appellant.

It is to be noted that the basis on which the Minister assessed Mr. Wheeler was as follows:

Proceeds from sale of Dismal Lake Claims	$ 125,000
Deduct Kenneth A. Wheeler's ½ interest exempt from tax under Section 83. Per agreement dated May 10, 1956	62,500
Balance of Proceeds from Sale subject to tax	$ 62,500
Less amount paid to James A. Whalen for his ½ interest in Dismal Lake Claims	9,000
	$ 53,500

Note:

In the schedule attached to the Notice of Re-assessment dated March 16, 1961, the Minister of National Revenue—through an oversight—added only $51,500 in respect of the Dismal Lake (Mountain Area) Claims

Counsel for the Minister agreed that the amount of the taxable profit claimed, instead of $53,500, should remain at $51,500.

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The above-mentioned assessment of $51,500 was maintained by the judgment of the Board on the ground that the profit realized by Mr. Wheeler through the acquisition of Mr. Whalen's half interest in the N.W.T. claims was subsequent to prospecting and as a result of a business transaction between him and Mr. Whalen.

Counsel for the respondent submitted that the learned Chairman of the Board erred in not finding that the entire proceeds of the sale of the Dismal Lake claims were amounts received as consideration for mining properties or interests therein acquired as a result of his efforts or the efforts of a prospector employed by him and are amounts not required to be included in computing income for the year 1956 or any other taxation year by reason of the provisions of s. 83(3) previously cited of the *Income Tax Act*.

As an alternative argument, counsel for the respondent submitted that if the Court should find that the additional profit realized by the respondent arose from a business transaction with Mr. Whalen, and not as the result of the prospecting efforts of Messrs. Boffa and Peckham, nevertheless the reassessment of $51,500 was unjustified and should be reduced by the amount of $25,500, which he paid to Mr. Whalen from the proceeds of the sale, instead of the sum of $9,000 as allowed by the appellant as a deduction.

In support of his main submission counsel for the respondent stated that the applicability of s. 83(3) is admitted in the sense that the original 50% to which the respondent was entitled to receive from the proceeds of the sale of the claims, which amounted to $62,500, was treated as exempt from tax in the appellant's reassessment; consequently, we are here concerned only with the other half of the proceeds.

With regard to the aforesaid remaining half interest, counsel for the appellant observed that, while conceding that the Minister is precluded from opening up for reconsideration the taxability of the $62,500 which he did not assess to tax in his reassessment of March 16, 1961,* he is in no way estopped or restricted from pleading that the remaining $62,500 is subject to tax.

* In view of what follows, the respondent might well consider himself fortunate that this issue is closed.

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In support of this contention it was submitted that Messrs. Boffa and Peckham did not at any time prospect the N.W.T. claims, but even conceding that prospecting was carried out, it was unavailing, because the additional interest was acquired as the result of a business transaction entered into between the respondent and Mr. Whalen after the prospecting had been completed and not beforehand as stipulated in s. 83(3).

It is claimed, in addition, that the respondent is not entitled to any exemption because no employer-employee relationship between the respondent and the aforesaid prospectors existed as required by s. 83(3).

In respect of the respondent's alternative argument concerning the deductibility of either $25,500 or $9,000, which I will leave for later consideration, counsel for the appellant submitted that the only deduction to which the respondent is entitled is the sum of $9,000 as assessed by the Minister.

I propose to deal first with the evidence in connection with prospecting.

The following evidence is relevant to the ascertainment of whether or not any prospecting was carried out on the N.W.T. claims. It also indicates the nature of the work performed by Messrs. Boffa and Peckham and when it was completed.

The respondent, when asked to explain, generally speaking, his dealings with prospectors, stated:

> Well, I finance him to go into these various areas I designate and stake certain claims in my behalf, pay his expenses in and pay him so much per claim for his work.

In regard to the N.W.T. claims and how he first became involved in them, the witness stated that "on June 2, 1955, Mr. Whalen, a mining promoter, since deceased, approached me and told me that he had knowledge of five groups of claims located in the Copper Mine area, North West Territories."

As appears by the letter written by Mr. Whalen to Mr. Wheeler on June 2, 1955 (Ex. R5), the writer stated:

> I hope that the staking and recording will be completed during this summer and when we come to prepare a proper assignment from Messrs. Boffa and Peckham to myself I will call on you for your one-

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half share of the additional money as agreed upon by us and will give you at that time a more formal acknowledgment of your one-half interest

BY THE COURT: What date was that?

A That was June 2nd, 1955, my lord. He explained to me that the claims in reference were currently at that time being held by a major mining company, American Metals; that he had been advised by one Dr. C P Jenny, who was their chief geologist, that they were going to abandon these claims when the expiry date came about, which was sometime later that fall. They had developed a small tonnage high grade ore body that was not of sufficient interest to American Metals but in Jenny's words it could be of great interest to a small mining company.

Asked what happened in respect of the above-mentioned claims after June 2, 1955, the witness replied:

> They were staked apparently in the fall of that year although I wasn't aware of it. The next I knew was that Whalen approached me in May of '56, explained that he had these claims, they had been staked, and we had a formal document made up and I advanced him $2,750 which was my end under the particular grubstake at that time

Again the witness was asked:

Q In whose name were the claims registered, Mr Wheeler?

A. Mr. Whalen.

Q. Around what date did the transfer to Mr. Whalen take place?

A. I am not sure I believe it would be in the fall of '55 after they were staked

As appears by the two letters dated June 1 and 2, 1955 (Ex. R5), no mention whatsoever is made in regard to prospecting but solely to staking and recording.

The above evidence indicates that we are not dealing with a situation where prospectors are sent out to prospect or search for minerals, since the claims in question had already been mined and the task given to Messrs. Boffa and Peckham was to acquire title to a developed mining property, by means of restaking and recording, as soon as possible after the existing mining rights had been allowed to expire.

Counsel for the parties agree, and as I observed in the *Karfilis* case *supra*, staking is one thing and prospecting is another, and in my opinion since nowhere in s. 83(3) of the Act can be found any reference to staking, it alone, in the absence of any regulation to the contrary, is insufficient to constitute prospecting and entitle the respondent to obtain the benefit of the exemption claimed.

I will pass on to the additional submission of counsel for the respondent, namely that the taxpayer cannot invoke the provisions of s. 83(3) even conceding that prospecting has been carried out. In this latter connection, it is important to determine when the oral agreement was entered into and the respondent testified that it occurred "sometime between May 10 and June 27, 1956", being the date on which the claims were sold to the Vandoo Company. Since, as we have seen, Messrs. Boffa and Peckham had completed their task long before, namely, prior to the end of 1955, it follows that the provisions of s. 83(3) are inapplicable.

In the course of argument, counsel for the respondent claimed that according to the evidence given by the respondent he did not, at any time after June 22, 1955, *buy* the whole of Mr. Whalen's original half interest in the claims, as alleged by the appellant, or any part thereof, and that the verbal agreement did not alter the original 50% interest of the respective parties thereto but only altered the proportional interest which they were entitled to receive upon the sale of the claims.

Even if I were disposed to accept the respondent's version of the nature of the verbal agreement rather than that of the appellant, in my opinion, it would be immaterial whether or not the verbal arrangement is called a sale agreement, because it is admitted that, as a result of it, the respondent automatically became entitled to receive 30% additional profit, which amounted to about $50,000, for the services he rendered in disposing of the claims. Moreover, it constituted a trading agreement which occurred in 1956 in the ordinary course of the type of business carried on by himself and Mr. Whalen and in which any prospecting which had been carried out in the previous year could play no part.

In any event, the respondent failed to establish that Messrs. Boffa and Peckham were engaged under employer-employee relationship and not as independent contractors. The respondent on cross-examination said in this connection:

> Q Then, as far as your arrangement with these prospectors is concerned, the way, the method how they do their work and the hours that they work and when they take their meals and whether they work on Sundays or not, that is entirely up to them?
>
> A Well, I give them specific jobs to do I exercise as much control as I can but I can't control a man in the bush

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Q. You don't attempt to control how they do the job, do you?

A. Well, everything—time is of the essence in all these things. I will pinpoint a certain group of claims in a certain area and then—

Q. And tell them to go out and stake them?

A. Yes.

After the witness stated that he remembered being examined for discovery, counsel for the appellant read to him the following questions and answers from p. 78 of the discovery proceedings:

Q. So far as how the prospector carries out work or what hours he works or anything of that nature, do you concern yourself with that?

A. No, that is of no relevance. I usually make a deal whereby I place a certain evaluation on him acquiring me a certain number of shares.

it says—I think that should be "claims", should it not?

A. Yes, I think so.

MR. WRIGHT: It should be "claims", my lord.

Q. And how he goes about doing it, that is his business?

A. Yes.

Now, were you asked those questions and did you make those answers?

A. Yes.

Q And were they true?

A. If I said it, they must be true.

Q All right. Now then, the same would apply with regard to Mr. Boffa and Mr. Peckham. I don't think you had any dealings with them at all, did you, personally?

A. No, they were dealing strictly with Whalen, I never met them.

Q. They had a job to do, to go out and stake some claims and how they did it and how they got there and what hours they worked and so on, that was their business, you just wanted the results of having those claims staked, is that right?

A. In that particular instance, yes.

For the foregoing reasons, I find that any profits realized by the respondent as a result of this disposition of the N.W.T. claims to Vandoo Consolidated Explorations Ltd. are not exempt under s. 83(3) and are subject to tax under the provisions of ss. 3, 4 and 139(1)(*e*) of the Act.

Having found that the profits realized by the respondent are subject to tax, there remains to be dealt with the question concerning the amount of the profit after allowance for properly deductible expenditures.

As we have seen by his alternative argument, counsel for the respondent submitted that the deduction of $9,000 allowed by the appellant should be made to read $25,000—and I will now consider the evidence and surrounding circumstances concerning this issue.

The witness, in his examination in chief, described the manner in which it came about that, as he alleges, he acquired an 80% interest in the N.W.T. claims as follows.

He recounted that, under duress by Mr. Whalen, he had agreed that whichever of them was successful in effecting a sale of the Dismal Lake claims would be entitled to an 80% share of the proceeds, whether of cash or shares, leaving 20% as the share of the other party. According to the respondent, Mr. Whalen's attempts were unsuccessful but the respondent succeeded, on June 27, 1956 in selling the claims to Vandoo Consolidated Explorations Limited for $125,000 cash. As a result, he says, he received $125,000, out of which he paid to Mr. Whalen $25,500 for the 20% interest and a further $5,500 to be remitted to Messrs. Boffa and Peckham, being the final payment owing to them. Thus, according to the respondent, he realized a net profit of $94,000 on the transaction. He testified as follows:

> Q. Did you ever make any arrangement with Mr. Whalen for the purchase of any part of his interests?
>
> A. None whatsoever.

The respondent says that he was aware that the $5,500 which he paid to Mr. Whalen was sent by the latter the next day, June 28, 1956.

Asked on cross-examination if it were not true that Mr. Whalen agreed to accept repayment in cash about the sum of $9,000, the respondent stated:

> A. That most certainly is not true.
>
> Q. And if that was said by Mr. Whalen that was an untrue statement, is that right?
>
> A. Exactly.

When asked, on cross-examination, what he did with the cash payment, the respondent's story was that he received the money in hundred dollar bills and that he put it in a safety deposit box. He then took $31,000 which was the amount to be paid to Mr. Whalen, put it in a package, took it to the legal office of Manley and Grant and asked Mr. Grant to hold it for him as the respondent was going to

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contact Mr. Whalen and they would come in to straighten out the matter. Later, when Mr. Whalen went to Manley and Grant's office, he handed the money to him in the board room. He says that nobody else was present when he did so and that he did not receive any receipt from Mr. Whalen. He further testified as follows:

Q Why didn't you get a receipt?

A It was a gentleman's deal. I have made deals like that before. He was satisfied That was our arrangement

Q Why was the change to 80% and 20% not in writing?

A Just a gentleman's agreement, at his instigation, not mine

Q. And then you turn over a rather large amount of money like $31,000 cash to him and you get no receipt from him?

A No.

Q There is no writing, no cancelled cheques, no nothing, is that right?

A No, sir

Q And you say you just cannot account for that. You say it is just because you give people $31,000 quite often, do you, without any receipt or anything in writing or anything at all from them?

A I won't do it again after this

After correcting previous statements made on his examination for discovery as to when the verbal change was made in the original agreement of May 10, 1956, the respondent stated that it was made between May 10 and the date of sale to the Vandoo Company on June 27, 1956.

The witness Grant was the lawyer in whose office, according to the respondent's story, the money was paid by the respondent to Whalen. He says that he received a parcel from Mr. Wheeler but he could not recollect the date on which it was received. He was also able to recall the surrounding circumstances of the occurrence. Mr. Wheeler told Mr. Grant he was getting Mr. Whalen to come to Mr. Grant's office because he had to make a payment to him of his portion of certain monies to which he was entitled as a result of the resale of these claims to the Vandoo Company. Mr. Grant was advised by the respondent that Mr. Whalen would be coming in and either the day before or that morning the respondent asked him to keep an envelope until he and Mr. Whalen got together. His testimony reads in part as follows:

Q Did he tell you what was in it?

A Money

Q Did he say how much money was in it?

A I wish I could I don't think so

MR. WRIGHT: I wonder—we are not getting the answer to that question.

A I don't recall it was cash and I wouldn't know.

Q Then what did you do with the parcel?

A I locked it in my desk drawer

Q. Until when?

A Until, I think, it was the very same afternoon when Mr. Wheeler came in and said "Whalen is coming down from upstairs and he will come in", and I gave the envelope back to Mr. Wheeler and he went down the hall and met Mr. Whalen who I saw come in and they both went into the board room and closed the door.

Q Did you see them come out?

A Yes I did I didn't see them both come out I went back into my own office and Mr Wheeler then came back into my office I didn't see Mr. Whelan come out but he isn't still there.

Q. At that time did you have any information of any description on the question of whether or not Mr Whelan had disposed of his interest in the Dismal Lake claims other than in connection with the Vandoo sale?

A. No

Messrs. Manley and Grant addressed a letter dated June 27, 1956 (Ex. R13), to Mr. Staples, who was acting on their behalf, in which was enclosed a cheque for $5,500 from Mr. Whalen, requesting him to distribute this amount between Messrs. Boffa and Peckham.

The witness produced as Exhibit R14 a letter dated February 28, 1957, *re* James A. Whalen and Boffa and Peckham. This letter contained, *inter alia,* a release to be signed by Messrs. Boffa and Peckham as regards the 15,000 shares of stock of Vandoo Company which they had not received because the said Company was not satisfied with the staking done by Boffa and Peckham.

The witness stated that at the date the letter was written, Mr. Whalen was still interested in this property and that "he was in a rather precarious position perhaps legally of acting for Mr. Wheeler and Mr. Whalen", but that at all times he had addressed his correspondence to Mr. Staples on behalf of Mr. Whalen, because he had made the original agreements and that was the way it was done. The witness did not know whether Mr. Staples knew Mr. Wheeler.

Mr. C. R. Duncanson, called on behalf of the appellant, stated that he had occasion to inquire from Mr. Wheeler with regard to a transaction which he had with Mr. Whalen dealing with the Dismal Lake claims and that Mr. Wheeler

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had stated that he had made certain payments to Mr. Whalen in connection therewith amounting to $25,500.

Q. Did you ask him for any evidence that he had to support such payment?

A. Yes, I did.

Q. Did he produce any?

A. No, he did not.

Q. Did you make any further investigations? Did you speak to Mr. Whalen to inquire as to the amount of payment, if any, that had been made by Mr. Wheeler to him in connection with these claims?

A. Yes. I had a number of conversations at his office with Mr. Whalen as to the amount of money.

Q. . . . I want to know what you did as a result of what Mr. Whalen told you following your conversations with Mr. Whalen?

A. I asked Mr. Whalen to go to his bank with me that I might check certain accounts which he had there.

Q. As a result of your investigation of Mr. Whalen's account and your conversation with him, then what did you do with regard to Mr. Wheeler, if anything?

A. I assessed Mr. Wheeler on the basis of the information which I had secured from Mr. Whalen.

By the Court:

Q. What did you find in the account.

A. Well, I did not . . . . I could not find anything in respect to the money that was supposedly paid by Wheeler to Whalen.

Q Of any amount, $25,500, or anything else?

A. That is correct.

The witness went on to say that following his investigation and conversations with Mr. Whalen he assessed Mr. Wheeler, allowing him a deduction of $9,000.

The witness was then asked if he could identify a letter addressed to the Minister of National Revenue, dated September 9 and signed by Mr. J. A. Whalen. Requested to say how he came to receive the letter, the witness stated:

> Well, following several conversations with Mr. Whalen, I asked him to give me a letter in writing addressed to the Department setting forth what he had actually told me and as a result this letter was received.

Objection was taken by counsel for the respondent on the ground that it was hearsay and that it relates to Mr. Whalen's tax affairs, not to the tax affairs of the respondent. Counsel for the appellant submitted that the letter was admissible, as it constituted a declaration against the inter-

ests of the late Mr. Whalen. The letter was admitted under reserve of objection and reads as follows:

70 Front Street,
Oakville, Ontario,
September 9th, 1959

C. R. Duncanson, Esq.,
Department of National Revenue
Taxation Division
1 Front St. W.
Toronto, Ontario

Re: Mineral Claims—
Coppermine N.W.T.

Dear Mr. Duncanson:

You have requested me to recount the history of my interest in certain mining claims located in the Coppermine area of the Northwest Territory in which claims I formerly held an undivided one-half interest, with Kenneth A. Wheeler holding the remaining interest.

I have searched the records at the office of my solicitors, and I have made all of these records available to you. From a study of these records, and from my best recollection, I am setting out the facts surrounding my interest.

Mr. Wheeler and I had knowledge of a potentially interesting copper showing near the Dismal Lakes, in the Coppermine area. In June 1955, acting on our joint behalf I advanced funds to prospectors to grubstake them in the staking of a known copper deposit which I knew was to be abandoned by one of the larger mining companies The prospectors were to receive additional cash if the expedition secured the desired ground and they were also to get a stock interest. In fact, as I recall, these prospectors moved into the area during late summer 1955 and later advised us that they had staked sufficient ground to cover the known deposits.

In the spring or early summer of 1956, we paid the prospectors $11,000 to satisfy their cash consideration and the delivery of their stock was deferred pending some mining company evincing an interest. As I recall, the claims were then transferred to my name, to prevent the prospectors dealing with them.

I executed and left with my solicitors transfers in blank covering these claims in keeping with standard practice. Attempts were made by me to interest certain companies in a purchase of this ground, but I was unsuccessful. Mr. Wheeler then agreed to take over the full interest in the claims, and I accepted from him repayment in cash of the *sum I had invested (about $9,000)*. In addition I understood that I would get one-half of any share consideration which any company purchasing the ground might issue (after giving effect to the commitment to the prospectors).

I later learned that the claims had been bought by a listed mining company, Vandoo Consolidated Mines. I did not enter into any direct agreement with that company to transfer title, but assume that delivery of title was handled by the ultimate vendor, using the blank transfers I had previously signed. I did not know at the time who the vendor was, nor did I know what consideration he received. Later on I learned that a considerable sum had been spent by the company to diamond drill the ground, during which it was learned that the prospectors had not staked the known deposit, at all. As all dealings with the prospectors had been in my name, I permitted my solicitors to use my name in recounting to the

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prospectors the situation regarding the faulty staking, and the sale to the company and the consequences thereof. As a result no stock was ever delivered to the prospectors

I never received any consideration of any type for my former interest in these claims, other than the above-stated cash.

I recall being extremely upset about the trend of events as I had hoped to realize something from my share entitlement. The bad staking cost me that, and I realized I had no chance of any action against the prospectors I consequently forgot about the whole matter until I was asked to answer questions and explain my position. Then for the first time I learned some of the facts of the acquisition of these claims by Vandoo Consolidated.

I do not consider in the circumstances that I have any enforceable right to demand any shares of that company from anyone, and I do not intend to make any claims. I have no further cash entitlement, as I was pleased at the time to recover my investment and to hope for the best on the stock.

This is my recollection of the matter and I believe is substantiated by the documents which I have been made available for your examination

Yours very truly,

(signature) J. A. Whalen
James A. Whalen

In respect of the admissibility of the Whalen letter of September 19, 1959 (Ex. A5) it might be said that, since under his original one-half interest in the N.W.T. claims, he would have been entitled, on their resale, to receive $62,-500, he was acting against his own interest in admitting that he was only entitled to $9,000. It must be borne in mind, however, that we are here dealing with the impact of income tax where it is in the taxpayer's interest to minimize his profits and, consequently, his letter would constitute a self-serving declaration. In the circumstances, I consider that Exhibit A5 was inadmissible and if admissible has no weight as against the respondent and I disregard it. Part of the contents of the letter, however, is already in the record, as appears from the following cross-examination of the respondent by counsel for the appellant:

Q . Now, I want to put to you a state of facts and I want to ask you whether or not you agree with them: that following the acquisition of these claims by you and Mr. Whalen attempts were made by him to interest certain companies in the purchase of those claims in the Dismal Lake area, but he was unsuccessful, is that true?

A That is true.

Q Then that you and he then agreed to take—no, I am sorry—you agreed to take over the full interest in the claims and he accepted from you repayment in cash of the sum you had invested, about $9,000 Is that true?

A. That most certainly is not true

Q. And if that was said by Mr. Whalen that was an untrue statement, is that right?

A. Exactly.

The witness also stated that, as set out in the original agreement, Mr. Whalen was a 50 per cent partner.

Q Well, was that true after the arrangement, under the arrangement which you said you made with him I think you said it was an 80 per cent, 20 per cent sharing?

A. Well, that would apply to stock and cash.

Q Well, then, it wouldn't be true to say that you were to get one half the share consideration, that he was too?

A. No, that is not correct.

The burden of rebutting the Minister's assumption as to the nature of the transaction between the respondent and Mr. Whalen was on the respondent. Due to the manner in which he deliberately arranged to carry out the transaction, which was tantamount to what has been sometimes referred to as "an under the table payment", and as a result, the respondent has none of the documentary evidence or the evidence of corroborating witnesses that would be available to him if the transaction had been carried out in the manner which is customary among businessmen engaged in transactions of the magnitude of this particular transaction. That being so, the respondent has had to undertake the burden of disproving the validity of the Minister's assumption by his own unaided testimony of a transaction between himself and a person who is now dead.

Notwithstanding the fact that his testimony is not directly contradicted by other evidence, verbal or documentary, after the most anxious consideration of his story, which was completely unsupported, as I have already indicated, and taking the evidence as a whole and the circumstances surrounding it, I am not satisfied that the respondent, in fact, paid $25,500 to Mr. Whalen and I consider that he has failed to discharge the burden of proof which rests upon him to do so.

For the foregoing reasons the appeal by the Minister in respect of the Ontario claims will be maintained with costs and the cross-appeal in respect of the North West Territories claims by the respondent Kenneth A. Wheeler will be dismissed with costs.

Ottawa
Aug. 24

BETWEEN:

TENNECO CHEMICALS INC. .....PLAINTIFF;

AND

HOOKER CHEMICAL CORPORATION ...DEFENDANT.

Patent—Patent Act, R.S.C. 1952, c. 203, s. 45(2)(5)(7)(8)(d)—Prior inventor—Question of law to be heard and determined before trial—Scope of subsection (7) of section 45.

The Commissioner of Patents disposed of the matter under subsection (7) of section 45 of the *Patent Act* insofar as claim C23 is concerned, by deciding that the claim was refused to both parties "because another party had invented species before the date at which the broad claim C23 was conceived by either of these parties".

On July 14, 1966, the Court made an order to determine before the trial the question whether this action is properly constituted in relation to claim C23.

The Commissioner had to decide under subsection (7) which of the applicants was the "prior inventor". It was essential to the determination of that question for him to make a finding as to what acts by each of the alleged inventors constituted the creation of the invention so that he could decide which of them did such acts first. If he had information which satisfied him that what was done by each of the applicants did not constitute the making of an invention, he was then bound to answer the question under subsection (7) by a determination that neither of them was the prior inventor.

Held, That the determination by the Commissioner regarding claim C23, was a determination under subsection (7) of section 45, even though it may have been incorrect, just as much as an incorrect determination that one of the applicants was the first inventor would have been.

2. That this action is properly constituted in relation to claim C23 insofar as the relief sought by paragraphs (*a*) and (*b*) of the Prayer for Relief are concerned.

G. A. Macklin and *K. H. E. Plumley* for plaintiff.

J. D. Kokonis and *R. H. Barrigar* for defendant.

N. D. Mullins for Commissioner of Patents.

Reasons delivered orally at conclusion of Argument on Question of Law set down to be heard and determined before trial.

JACKETT P.:—In these conflict proceedings, the Commissioner of patents disposed of the matter under subsec-

tion (7) of section 45 of the *Patent Act*[1] insofar as claim C23 is concerned, by deciding that the claim was "refused" to both parties "because another party has invented species before the date at which the broad claim C23 was conceived by either of these parties". The "inventors" referred to in the defendant's application were held to be the prior inventors of claim C24.

The plaintiff thereupon brought these proceedings under subsection (8) of section 45 and claimed *inter alia*, in respect of claim C23 the relief contemplated by paragraph (*d*) of subsection (8) of section 45, and, as well an order remitting the applications to the Commissioner of Patents for a determination of priority pursuant to subsection (2) of section 45 in relation to claim C23.

On July 14, 1966, I made an order setting down for hearing and determination before trial the question whether this action is properly constituted in relation to claim C23.

The arguments of counsel for the parties and of counsel for the Attorney General of Canada revolve around the requirements of subsection (7) of section 45, which reads in part as follows:

> (7) The Commissioner, after examining the facts stated in the affidavits, shall determine which of the applicants is the prior inventor to whom he will allow the claims in conflict and shall forward to each applicant a copy of his decision;
>
> . . .

The contention is that a decision by the Commissioner, in effect, that none of the applicants is the prior inventor to whom he will allow the claims in conflict (at least if it is based on evidence not found in the affidavits filed under subsection (5)) does not fall within subsection (7) and is therefore a nullity, that the statutory condition precedent for proceedings under subsection (8) in relation to claim C23 is therefore lacking, that the Commissioner has not therefore complied with the requirement of subsection (7) and that the matter should be remitted to him so that he may do his duty in relation thereto.

[1] R.S.C. 1952, c. 203.

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TENNECO CHEMICALS INC. v. HOOKER CHEMICAL CORP.

Jackett P.

Whether or not this Court has jurisdiction to make such an order I need not decide having regard to my views about the scope of subsection (7) of section 45.

In my view, what the Commissioner had to decide under subsection (7) is which of the applicants was the "prior inventor" and it was essential to the determination of that question for him to make a finding as to what acts by each of the alleged inventors constituted the creation of the invention so that he could decide which of them did such acts first. If, by the time he came to make that decision, he had information—no matter where it came from—which satisfied him that what was done by each of the applicants did not constitute the making of an invention, it seems clear to me that he was bound to answer the question under subsection (7) by a determination that neither of them was the prior inventor. To require the Commissioner to decide that one of the applicants was the prior inventor when he is satisfied that neither of them was would be to require him to embark on a farce that I cannot conclude was intended by Parliament in the absence of specific language.

I am of the view that the determination by the Commissioner regarding claim C23 was a determination under subsection (7) of section 45, even though it may have been incorrect, just as much as an incorrect determination that one of the applicants was the first inventor would have been. The proceedings in this Court under subsection (8) are based on the assumption that a decision by the Commissioner under subsection (7) may have been wrong.

My decision is that this action is properly constituted in relation to claim C23 insofar as the relief sought by paragraphs (*a*) and (*b*) of the Prayer for Relief are concerned.

THE QUEBEC ADMIRALTY DISTRICT

Quebec 1966
Aug. 25-26
Ottawa Aug. 31

BETWEEN:

JEAN BERNIER and DEVONA LAROSÉE ..... APPELLANTS;

AND

THE MINISTER OF TRANSPORT ..... RESPONDENT.

Shipping—Canada Shipping Act, 1952 R S.C., c. 29, sections 558, 568(1)(a) —Contravention of the appropriate rules of the International Regulations for Preventing Collisions at Sea, 1954 and amendments, Rules 16(a)(c), 22, 25—Erratic and illegal manoeuvring—Appeal allowed—Order of the Commissioner, Justice François Chevalier, revoked.

This is an appeal from the decision of the Commissioner, Justice F. Chevalier, appointed by the Minister of Transport, to hold a formal investigation pursuant to section 558 of the *Canada Shipping Act*, 1952, R S C c. 29, into the circumstances of the collision which occurred on the St. Lawrence River between the *M/V Lawrencecliffe Hall* and the *SS. Sunek*, on November 16, 1965.

The Commissioner's decision rendered on March 16, 1966, held that the collision was contributed to by the wrongful acts or defaults of the Master and Pilot of the *SS Sunek* and also of the Master and Pilot of the *M/V Lawrencecliffe Hall* Devona Larosée and Jean Bernier, the only appellants herein.

As a result of this decision, *inter alia*, Pilot Bernier of the *M/V Lawrencecliffe Hall* lost his right to pilot ships for a period of six (6) months to commence from the 19th of March, 1966, and his pilotage license was suspended for that period of time.

Then, Captain Devona Larosée, Master of the *M/V Lawrencecliffe Hall*, was penalized by a suspension of his Master's certificate for a period of four (4) months, said suspension to commence from the 19th day of March, 1966.

The above decision was appealed only by the Pilot and the Master of the *M/V Lawrencecliffe Hall*.

The suspension of the certificate of the appellants by the Commissioner was based on the authority of section 568(1)(*a*) *Canada Shipping Act*, 1952, R S.C. chapter 29.

Held, That in the Court's view the determination of the position of the *M/V Lawrencecliffe Hall* on the south side of the channel at the time of the collision by the Commissioner based on the course recorder only, leaves much to be desired, and does not possess the cogency required to establish this point with any certainty.

2. That the course reflected in the course recorder chart is in conflict with the evidence of seven witnesses, two of whom are independent witnesses, the pilot and assistant pilot of another vessel, the *Chios*. They both stated that the *Chios* had no trouble meeting the *M/V Lawrencecliffe Hall* shortly before the collision, said *M/V Lawrencecliffe Hall* was well on its side of the channel at a lateral distance of some 800 feet.

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3 That the course recorder chart is further subject to caution in view of the additional evidence supplied at this appeal by Marcel Deschenaux who was in charge of the course recorder on the *M/V Lawrencecliffe Hall* and who stated under oath that on the day of the collision the repeater was one to three degrees low and had to be adjusted from time to time. That indicates that she was on her side of the channel

4. That evidence throws some doubt on the accuracy of the recorder chart, and this document is not of sufficient cogency to lead to the conclusion that the *M/V Lawrencecliffe Hall* was on her wrong side of the channel and was crossing ahead of the *SS Sunek* in violation of Rule 22.

5. That Rule 16(*c*) applies only to cases where a vessel "detects the presence of another vessel forward of her beam before hearing her fog signal or sighting her visually in order to avoid a close quarters situation". The preponderance of the evidence is that the *SS Sunek* had been sighted by the *M/V Lawrencecliffe Hall* one and a half miles away upstream on her wrong side of the channel, and even at times beyond its northern limit, and this rule therefore would have no application here

6 That the *SS Sunek* would not have collided with the *M/V Lawrencecliffe Hall* had she not suddenly changed her course to starboard in an attempt to cross over to her side of the channel.

7. That it appears that the *M/V Lawrencecliffe Hall* was, prior to the collision, on the starboard side of the channel and therefore there can be no application of Rule 25 which requires that in a narrow channel a vessel should keep to the starboard side of such channel.

8. That the *M/V Lawrencecliffe Hall* at the time of the collision was navigating at a moderate speed "having careful regard to the existing circumstances and conditions" and therefore did not violate Rule 16(*a*) of the *Regulations for Preventing Collisions at Sea.*

9 That it would appear that the *M/V Lawrencecliffe Hall* took one of the very limited means of action available to avoid the *SS Sunek* in the very short period of time at its disposal, which would have been successful had not the *SS Sunek* in another erratic and dangerous manoeuvre and in direct contravention of the appropriate Rules of the *International Regulations for Preventing Collisions at Sea,* suddenly altered course to starboard.

10. That the suspension of Pilot Bernier's pilotage license and of the certificate of competency of Captain Larosée therefore appears to be unwarranted under section 568 of the Act.

11. That this appeal is allowed and the Order of the Commissioner is hereby revoked with costs against the respondent.

APPEAL from the decision of the Commissioner, Justice François Chevalier, penalizing Pilot Jean Bernier and Captain Larosée by a suspension of his right to pilot and of his Master's certificate.

Hon. Léopold Langlois, Q.C. and *Reynold Langlois* for appellants.

Kenneth C. Mackay for respondent.

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NOËL J. (*concurred in by* DUMOULIN J.):—This is an appeal from the decision of the Commissioner, Mr. Justice François Chevalier, appointed by respondent, the Minister of Transport, to hold a formal investigation pursuant to section 558 of the *Canada Shipping Act*, 1952 R.S.C., chapter 29, into the circumstances of the collision which occurred on the St. Lawrence River between the *M/V Lawrencecliffe Hall* and the *S.S. Sunek* on November 16, 1965. This decision which was rendered on March 19, 1966, held that the collision was contributed to by the wrongful acts or defaults of the Master and Pilot of the *S.S. Sunek* and also of the Master and Pilot of the *M/V Lawrencecliffe Hall*, Devona Larosée and Jean Bernier, the appellants herein. As a result of this decision, Pilot Bender of the *S.S. Sunek* lost his right to pilot ships for a period of nine (9) months and his pilotage license was suspended for that period of time; Captain Syversen, Master of the same ship, was penalized by a suspension of his Master's certificate for a period of six (6) months, said suspension to commence from the 19th of March, 1966; Pilot Bernier of the *M/V Lawrencecliffe Hall* lost his right to pilot ships for a period of six (6) months to commence from the 19th of March, 1966, and his pilotage license was suspended for that period of time. Captain Larosée, Master of the *M/V Lawrencecliffe Hall*, was penalized by a suspension of his Master's certificate for a period of four (4) months, said suspension to commence from the 19th day of March, 1966.

The above decision was appealed only by the two appellants, the Pilot and Master of the *M/V Lawrencecliffe Hall* and the Court here in this appeal will deal only with those matters relative to their particular and respective cases.

It should be mentioned that the two appellants were suspended between March 19 and April 12, 1966, at which date an order was made by this Court staying execution of the terms of the suspension order.

The conclusions reached by the Commissioner with regard to the appellants are recited at pages 44, 45 and 46 of his Report reproduced hereunder:

CONCLUSIONS DERIVED FROM THE EVIDENCE:

From all these facts, the Court draws the following conclusions as to the cause of the collision:

1—Both ships were, when it occurred, on their wrong side of the channel;

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2—Both ships were driven at an excessive speed, considering the visibility and the weather conditions prevailing in that area;

3—In the case of the *Sunek*, she followed an erratic and dangerous course, first, by passing outside of the channel, then, trying to re-enter into it too fast and at an angle which would normally, because of her length, make her reach for the Northern limit of the channel, and force her to try, at the same speed, another sharp turn to the right, when poor visibility precluded such a speed and such a manoeuver;

4—In the said case of the *Sunek* she has also contributed to the unavoidability of the collision by not reducing immediately her speed when it was found that no sounding devices were in operating condition;

5—In the case of the *Lawrencecliffe Hall*, she was directed in a course which was irregular, and in the false assumption that the *Sunek* was outside of the channel, and North of the Northern buoy

. . .

5—THE CONDUCT OF THE CREWS

IN THE CASE OF PILOT BERNIER:

The Court finds that he violated *Rule 16, Paragraphs (a) and (c)* of the Regulations for Preventing Collisions at Sea, which enacts as follows:

> "A) Every vessel, or sea plane when taxiing on the water, shall, in fog, mist, falling snow, heavy rainstorms or any other conditions similarly restricting visibility, go at a moderate speed, having careful regard to the existing circumstances and conditions.
>
> . . .
>
> C) A power driven vessel which detects the presence of another vessel forward of her beam before hearing her fog signal or sighting her visually, may take early and substantial action to avoid a close quarters situation but, if this cannot be avoided, she shall, so far as the circumstances of the case admit, stop the engines in proper time to avoid collision and then navigate with caution until danger of collision is over."

He also violated *Rule 25* of the said Regulations, which stipulates that:

> "In a narrow channel, every power-driven vessel when proceeding along the course of the channel, shall, when it is safe and practicable, keep to that side of the fairway or midchannel, which lies on the starboard side of such vessel."

He also acted contrary to *Rule 22*, which states:

> "Every vessel, which is directed by these Rules, to keep out of the way of another vessel, shall so far as possible, take positive action to comply with this obligation and shall, if the circumstances of the case admit, avoid crossing ahead of the other"

IN THE CASE OF CAPTAIN LAROSÉE:

The same faults reproached to Pilot Bernier are to be retained against him He was the Master of the *Lawrencecliffe Hall* and he was on the bridge when the manoeuvres were made. He had a duty to obey the above mentioned regulations and his default, in particular, to order a reduction of the speed of the vessel when visibility became dangerously low, are delicts that contributed to a major extent to the collision.

The suspension of the certificate of the appellants by the Commissioner was based on the authority of Section 568(1)(*a*), *Canada Shipping Act*, 1952 R.S.C., chapter 29, reproduced hereunder:

> 568. (1) The certificate of a master, mate, or engineer, or the license of a pilot may be cancelled or suspended
>
> (*a*) by a court holding a formal investigation into a shipping casualty under this Part, or by a naval court constituted under this Act. If the court finds that the loss or abandonment of, or serious damage to, any ship, or loss of life, has been caused by his wrongful act or default, but the court shall not cancel or suspend a certificate unless one at least of the assessors concurs in the finding of the court;

The matters involved in this appeal were presented in two well prepared factums by both parties and argued very ably by Counsel. The pertinent evidence was reviewed by the Court assisted by two competent and experienced assessors, Pilot Richard Albert Barrett and Captain Ian MacDiarmid, both of whom hold a certificate of competency as master foreign going.

From such material and after due deliberation, the Court is of the view that the determination of the position of the *M/V Lawrencecliffe Hall* on the south side of the channel at the time of collision by the Commissioner based on the course recorder only, leaves much to be desired, and does not possess the cogency required to establish this point with any certainty, having regard to the fact that the course reflected in the course recorder chart (D-56) is in conflict with the evidence of seven witnesses, two of whom are independent witnesses, the pilot and assistant pilot of another vessel, the *Chios*, which, coming downstream, shortly before the collision, met the *M/V Lawrencecliffe Hall* coming upstream, opposite the St. François wharf. They both stated that the *Chios* had no trouble meeting the *M/V Lawrencecliffe Hall* which was well on its side of the channel at a lateral distance of some 800 feet. The course recorder chart is further subject to caution in view of the additional evidence supplied at this appeal by Marcel Deschenaux who was in charge of the course recorder on the *M/V Lawrencecliffe Hall*, and who stated under oath that on the day of the collision the repeater was one to three degrees low and had to be adjusted from time to time.

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A variation of one degree in this recorder would indicate that the *M/V Lawrencecliffe Hall* was on a true course of 213° prior to the collision, which would indicate that she was on her side of the channel. This does throw some doubt on the accuracy of the recorder chart, and evidence based on this document is not of sufficient cogency to lead to the conclusion that the *M/V Lawrencecliffe Hall* was on her wrong side of the channel and was crossing ahead of the *S.S. Sunek* in violation of rule 22.

Rule 16(*c*) in our view applies only to cases where a vessel "detects the presence of another vessel forward of her beam before hearing her fog signal or sighting her visually in order to avoid a close quarters situation". The preponderance of the evidence is that the *S.S. Sunek* had been sighted by the *M/V Lawrencecliffe Hall* one and a half miles away upstream on her wrong side of the channel, and even at times beyond its northern limit, and this rule therefore would have no application here. The *S.S. Sunek* indeed would not have collided with the *M/V Lawrencecliffe Hall* had she not suddenly changed her course to starboard in an attempt to cross over to her side of the channel.

In view of the conclusion reached by this Court on the doubtful reliability of the course recorder chart, and relying on the evidence adduced at the inquiry, it appears that the *M/V Lawrencecliffe Hall* was, prior to the collision, on the starboard side of the channel and therefore there can be no application of rule 25 which requires that in a narrow channel a vessel should keep to the starboard side of such channel.

We now come to rule 16(*a*) which the Commissioner held had been violated by both the appellants. This rule states that "every vessel . . . shall . . . in falling snow . . . or any other condition similarly restricting visibility go at a moderate speed having careful regard to the existing circumstances and conditions".

The evidence establishes that the *M/V Lawrencecliffe Hall* maintained throughout its course to the time of collision a constant speed of approximately 14 knots which the Commissioner, under the prevailing circumstances, held to be excessive, notwithstanding the fact it was a ship that

could be slowed down at once because it had a variable pitch-propeller as well as a bridge-control type of engine control. There is no question that this is the speed at which the vessel was maintained and the only matter to be determined is whether such speed was a contributive cause of the collision as it is admitted that the main cause or causes of the collision are the defaults and wrongful acts of those navigating the *S.S. Sunek* which proceeded on an erratic course down the North Traverse Channel, on its wrong side of the channel, and at times beyond its northwesterly limit, which it could do although its draft was 31 feet 2 inches (31'2") as the depth at this point is 30½ feet (30½'), the tide had been rising for one hour, pushed by a north-east wind which would have allowed sufficient depth for navigation.

That the *S.S. Sunek* was partly or largely beyond the northwesterly limit of the North Traverse Channel immediately prior to the collision is further substantiated by the fact that she came across the channel from its northwesterly side to its south-easterly side on a course of 055° and struck the *M/V Lawrencecliffe Hall* in the latter's starboard side.

In the extremely embarrassing position in which the *M/V Lawrencecliffe Hall* was placed as a result of the erratic courses followed by the *S.S. Sunek* from the time the latter entered the North Traverse Channel to the point of the collision (which courses apparently took her from outside the channel on its south-eastern side to its northwestern side and at times even beyond that limit), it would appear that the *M/V Lawrencecliffe Hall* took one of the very limited means of action available to avoid the *S.S. Sunek* in the very short period of time at its disposal (i.e. approximately 50 seconds—as the combined speed of both vessels was 24 knots and the distance which separated both ships was 2,000 feet—which was to alter course to port, which she did, and which would have been successful had not the *S.S. Sunek*, in another erratic and dangerous manoeuvre and in direct contravention of the appropriate Rules of the International Regulations for Preventing Collisions at Sea, suddenly altered course to starboard to a final heading of 055° in an attempt to re-enter the North Traverse Channel and reach its proper side.

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It would further appear from the evidence that an attempt to stop the *M/V Lawrencecliffe Hall* may not have been successful within the distance of 2,000 feet, at which distance the *S.S. Sunek* was apparently when it commenced its final and fatal manoeuvre, as it would take the *M/V Lawrencecliffe Hall* one half mile to stop at the speed then being maintained.

Until that moment, the personnel on the bridge of the *M/V Lawrencecliffe Hall* had no reason to believe that a collision was imminent or even possible because although the *S.S. Sunek* was following an illegal course in coming downstream, that course was not a converging course to the *M/V Lawrencecliffe Hall.*

It would also appear than an attempt to crash stop the *M/V Lawrencecliffe Hall* at this stage may not have been anymore successful and might even have resulted in creating a worse danger under the prevalent circumstances, in that her manoeuvrability and control would have been seriously impaired, her bow would have tended to swing to port or to starboard, and if struck by the *S.S. Sunek* in either position it would, in all probability, have sunk and largely blocked the channel.

Under the existing circumstances a reduction of speed may not have been successful either in assisting the *M/V Lawrencecliffe Hall* to avoid the collision which then instead of occurring amidships as it did might well have occurred somewhere further towards its bow. In such an event she might have been struck in her forward accommodation thus possibly causing loss of life as well as of ship.

Although a reduction of speed by the *M/V Lawrencecliffe Hall* upon entering the channel would have been a good precautionary measure, a finding under the circumstances of this particular case that the speed of the *M/V Lawrencecliffe Hall* was a contributing cause as required by section 568(1)(*a*), *Canada Shipping Act,* R.S.C. 1952, chapter 29, can, in our view, be nothing more than mere speculation.

The situation created by the erratic and illegal manoeuvring of the *S.S. Sunek* placed the *M/V Lawrencecliffe*

Hall in an impossible position from which it could attempt to extricate itself by a last minute manoeuvre only, which might have been the manoeuvre adopted, or one of a very limited number of others, none of which however, regardless of the speed of the vessel, could, under the circumstances be attempted with any significant degree of success.

The suspension of Pilot Bernier's pilotage license and of the certificate of competency of Captain Larosée, under the particular circumstances of the present case, therefore appears to be unwarranted under Section 568 of the Act.

It therefore follows that this appeal is allowed and the order of the Commissioner that Captain Devona Larosée's Master certificate be suspended for a period of four (4) months from March 19, 1966, and that the Pilotage license of Jean Bernier be suspended for a period of six (6) months from March 19, 1966, be and is hereby revoked with costs of the present appeal against the respondent.

BETWEEN:

J. HAROLD WOOD ..... APPELLANT;

AND

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

Toronto 1966
June 16
Ottawa Sept. 7

Income—Income Tax Act, R S C. 1952, c. 148, ss. 3, 4(a)(b), 139(1)(c)(e) —Nature of capital gain and the relation of these gains to ordinary income—Whether a gain is one of capital or income—"Discounts" received under mortgage contracts—Whether these "discounts" were "interest" within the meaning of s. 6(1)(b) of the Act—Profit from transaction was income, a "source" within the meaning of s. 3 of the Act—Appeal dismissed.

The appellant practised law as a general practitioner and part of his practice consisted of mortgage transactions. From his personal savings he purchased mortgages, and also certain stocks and bonds during the material time. As to mortgages, between 1956 and 1963, he acquired thirteen (13), eleven (11) of which were so-called bonus or discount mortgages, six (6) of which were second mortgages, and seven (7) of which were first mortgages

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The respondent in assessing the appellant's 1962 income, categorized the excess of receipts over outlay realized on a specific first mortgage purchased in 1957 at a discount and paid off at face value in 1962, as income and not a capital gain.

In considering income from a "source" that falls outside the statutory definition of "business", the Court adopted the concept of "income" under the *Income Tax Act* stated by Noël J. in *George H. Steer v. M.N.R.* [1965] 2 Ex. C.R. 458 viz. that "it should be noted that it is '. . . not merely the aggregation of one's incomes from all sources from which there were incomes in the year, but it is made up of the gains from all sources minus the losses from these sources or, expressed otherwise, the net income from all sources of income taken together.' ".

In considering the concept of capital gains the Court noted that capital gains in the main arise from capital assets, and that the most noteworthy and main sources are (1) from increases in land values, (2) from investment in the stock market, and (3) from the creation and expansion of industrial empires; and that an expected rise in the value of an asset is ordinary income and an unexpected rise in value is a capital gain; and that pure capital gains are unforeseen increases in the real value of a man's existing property, not directly attributable to his efforts, intelligence, capital and risk-taking or in other words, windfall additions to his assets.

Held: Adopting in the main, the economist's concept of "money income" as the meaning of "income" under the *Income Tax Act*, namely that it includes three items, (1) pure interest, (2) risk and (3) liquidity, all of which are respectively reflected in yield, and that yield, in a situation of perfect competition, or in other words, no uncertainties, will take into consideration any discount or premium involved in the price of any security;

That since there was no perfect competition in the market in which and when this subject mortgage contract was entered into and sold, which provided for a yield of 11 18%;

That since also there was nothing fortuitous, unsought, uncalculated and unexpected about this gain;

That since also the appellant entered into perfectly normal transactions with one purpose in mind when he purchased this mortgage, the other mortgages, the stocks and the bonds during the relevant period, and "put to work" his excess fees from his earnings from the practice of law, so that he might have what is called a "second income" by various stock brokerage houses and other persons who sell securities in the various financial markets to-day;

That therefore this "second income" from this subject mortgage transaction was identical with and was income as meant in the *Income Tax Act*;

And that (obiter) probably this "discount" was not "interest" within the meaning of s. 6(1)(*b*) of the Act; and that (also obiter)

probably the gain from this mortgage transaction was income from a "business" within the meaning of s. 139(1)(*e*) of the Act;

But that in any event, and as the ratio of the decision in this case, the profit from this transaction was income from a "source" within the meaning of the opening words of s. 3 of the *Income Tax Act* as judicially considered by Noël J. in *George H. Steer v. M.N.R. (supra)*, whether or not it was profit from a "business" within the meaning of s. 139(1)(*e*) of the *Income Tax Act*, or "interest" within the meaning of s. 6(1) of the Act, adopting for the purpose of this result the economist's concept of money income;

That the appeal be dismissed with costs.

APPEAL from a decision of the Tax Appeal Board.

J. W. Goodchild for appellant.

B. Verchere and *S. A. Hynes* for respondent.

GIBSON J.:—This is an appeal from the decision of the Tax Appeal Board as to the appellant's 1962 income tax assessment wherein the excess of receipts over outlay realized on a first mortgage purchased in 1957 and redeemed and paid off in 1962 was found to be income and not a capital gain.

The appellant in his formal Notice of Appeal puts his grounds for appeal in this way:

A. STATEMENT OF FACTS

In the month of July, 1957, the taxpayer in association with a client bought through another solicitor a first mortgage on the property known as 90 Campbell Avenue, Toronto, Ontario. The amount then owing on the mortgage was Eight thousand five hundred dollars ($8,500 00) for principal with interest at the rate of six and one-half per cent (6½%) per annum from the 5th July, 1957. The taxpayer and his client paid the sum of Seven thousand one hundred dollars ($7,100 00) with each of them putting up one-half of the purchase price. The source of the taxpayer's share of the funds used for the purpose of acquiring the mortgage was his personal savings. The mortgage was paid off in full in July, 1962.

B. REASONS THAT THE TAXPAYER INTENDS TO SUBMIT:

Any and all profits (apart from the interest provided for in the mortgage) which were received by the taxpayer during the year 1962 from the investment made by him in this mortgage were not profits from a business carried on by the taxpayer during the said year within the meaning of Sections 3, 4, and 139(1)(*e*) of the Income Tax Act, were not in satisfaction of interest within the meaning of Section 6(1)(*b*) of the Act, and were not income from property within the meaning of Sections 3

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and 4 of the Act, but were the realization by the taxpayer of a capital accretion on a mortgage investment made by him.[1]

. . .

3 The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

4 Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

. . .

6 (1) Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year

. . .

(*b*) amounts received in the year or receivable in the year (depending upon the method regularly followed by the taxpayer in computing his profit) as interest or on account or in lieu of payment of, or in satisfaction of interest;

. . .

139 (1) In this Act,

. . .

(*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment;

The respondent submits that the difference[2] between the amount advanced by the appellant on the security of the said mortgage and the amount received by him upon its subsequent redemption during the appellant's 1962 tax year is a profit from a "business" carried on by the appellant during the said year and is income within the meaning of ss. 3, 4, and para. (*e*) of s-s. (1) of s. 139 of the *Income Tax Act*; or, in the alternative, that this amount was an amount received by the appellant during his 1962 taxation year as interest or on account or in lieu of payment of or in

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[1] *Income Tax Act.*

[2] (Speaking generally, considering this type of gain as income all in one year and not as accruing over the term of the mortgage contract is unfair to the taxpayer and not in accord with reality. It may not be administratively simple or even practicable to apply an accrued scheme of taxation; but instead of lumping the gain into a single tax period, some system of averaging after over the period during which the gain accrued would eliminate some of the inequity in the taxation of this type of gain)

satisfaction of interest and, therefore, is income from property within the meaning of ss. 3, 4 and para. (*b*) of s-s. (1) of s. 6 of the *Income Tax Act*.

The relevant facts in this matter briefly are as follows:—

The Appellant between 1956 and 1963 acquired thirteen (13) mortgages, eleven (11) of which were so-called bonus or discount mortgages, six (6) of which were second mortgages, and seven (7) of which were first mortgages.

The appellant's law office, in which there were two other partners, as part of its solicitor practice at the time of the hearing, managed the collection for clients of mortgages which had an aggregate principal value of over four and a half million dollars. In 1957 it was not that much but still the aggregate principal value of the mortgages then managed was substantial.

The appellant acquired these mortgages for his personal account during the period when he was carrying on his practice and all of them came to his attention by reason of the fact that he was practicing law as a general practitioner and the fact that part of his practice consisted of mortgage transactions.

The mortgages acquired for his personal account are not large in number; and the evidence is that the appellant also purchased some stocks and bonds for his personal account during this same period of time.

The purchase of these mortgages and the stocks and bonds were made from savings of the appellant and such purchases in total were not substantial.

The specific mortgage, the gain on which is the subject of this appeal, was on the premises known as 90 Campbell Avenue, Toronto. The circumstances surrounding its acquisition were as follows: One Williams, who was described as a speculator, purchased 90 Campbell Avenue, Toronto, on June 11, 1957 for $10,000. In July 1957 he sold these premises to one Lawrence for $13,700. Lawrence paid Williams $2,200 cash and gave him back a first mortgage and second mortgage in the respective sums of $8,500 and $3,000. These mortgages were drawn obviously for the purpose of immediate resale. The first mortgage of $8,500 was then

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purchased by the appellant and a client in July 1957 for $7,100 (and therefore at a discount of $1,400 from its face value). This mortgage bore interest at 6½% per annum on its face value of $8,500 and was paid off in 1962.

This subject mortgage, and all of the mortgages acquired by the appellant according to his evidence were purchased by the appellant after he had inspected each proposed mortgaged premises and had made a decision that each purchase was a safe investment for him.

It is the gain of the appellant resulting from the acquisition of this mortgage at a discount and the holding of it until it was paid off at face value that is the subject matter of this appeal.

As a perusal of the cases shows, it is often difficult to determine the exact nature of a receipt, whether income or capital gain. This is especially true when a distinction is sometimes made between the gain realized from the acquisition and holding to maturity of a discount mortgage, such as the subject mortgage in this case, and the gain realized from the acquisition of and holding to maturity of so-called "discount bonds".

To assist in the determination of whether a gain is one of capital or income in my view, it is helpful to consider the economist's conception of the nature of capital gains and the relation of these gains to ordinary income.

Before mentioning such economist's concepts, as I understand them, however, it should be noted that the nature of the gain from "discounts", that is the face value less the amount advanced or paid, received under mortgage contracts have been the subject of many judicial decisions. In *James Frederick Scott v. M.N.R.*[1] Judson J. reviewed the two kinds of results of such cases in which the issue in each was resolved by deciding whether or not the taxpayer was in a "business" within the meaning of s. 139(1)(*e*) of the Act, and said at p. 225:

> This diversity of opinion is understandable when the decision must depend upon a full review of the facts in each case for the purpose of determining whether the discounts can be classified as income from a business Even on the same facts, there is room for disagreement among

[1] [1963] S.C.R. 223.

judges on the conclusions that should be drawn from these activities of a taxpayer, for the Act nowhere specifically deals with these discounts, as it does, for example, in s. 105(*a*) with shares redeemed or acquired by a corporation at a premium. It is possible to deal expressly with the problem and the Act has not done so.

and concluded in that case (p. 228) that the taxpayer was in

> . . . the highly speculative business of purchasing these obligations at a discount and holding them to maturity in order to realize the maximum amount of profit out of the transactions, and that the profits are taxable income and not a capital gain.

And it should also be noted that such "discounts" received under mortgage contracts have been also the subject of consideration in many cases as to whether they were "interest" within the meaning of s. 6(1)(*b*) of the Act.

As to the latter, it may be that the Parliament of Canada when it referred to "interest" in s. 6(1)(*b*) of the *Income Tax Act* had in mind the same meaning of the word as in the *Interest Act*[1]. If that is so, there may be serious doubt that such "discounts" are "interest" within the meaning of s. 6(1)(*b*) because of the decision of the Supreme Court of Canada in *Attorney-General for Ontario v. Barfried Enterprises Limited*[2]. In my view the Court when it referred in that case to "discounts" as synonymous with "interest" under the *Interest Act* was referring to the gain from the type of discounts arising in Canadian financial markets from such sources as (1) Canada Treasury Bills sold by the Government of Canada every Thursday at a discount and maturing at par; (2) the loans made by way of the purchase of non-interest bearing post-dated Bankers' Acceptances of Canadian Chartered Banks[3]; and (3) the mechanical application by Canadian Chartered Banks of their "call loan" or collateral security loan business.

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[1] R.S.C. 1952, c. 156.

[2] [1963] S.C.R. 570 (In that case there was discussed the meaning of the word "interest" in interpreting s. 6 of the *Interest Act* in relation to a mortgage transaction, relief from which had been granted under *The Unconscionable Transactions Relief Act*, R.S.O. 1960, c. 410).

[3] (See s. 18(1)(*f*) and (*g*) of the *Bank of Canada Act*, R.S.C. 1952, c. 13 as amended by S. of C. 1953-54, Vol. 1, c. 33).

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"Discounts" from such sources not only are all "interest" within the meaning of the *Interest Act* but are also all "income" within the meaning of the *Income Tax Act*, being income from a "source" within the meaning of the opening words of s. 3 of the *Income Tax Act* and also specifically "interest" within the meaning of s. 6(1)(*b*) of the *Income Tax Act*.

Preliminary also to recording the reasons for the decision in this case, I mention that I would have no difficulty in finding that the gain arising out of this discount mortgage transaction was income, being profit from a "business" within the meaning of s. 139(1)(*e*) of the Act but do not choose to do so; and for the reasons just stated, I do not wish to say whether the discount from this particular mortgage was "interest" within the meaning of s. 6(1)(*b*) of the Act.

I prefer instead, to found my decision in this case by resolving the question of whether or not this gain was income from a "source" within the meaning of the opening words of s. 3 of the *Income Tax Act*.

And as far as I know, there is no decision of this Court or of the Supreme Court of Canada in which a question of this kind has been resolved by deciding that such a discount was income from a "source" within the meaning of the opening words of s. 3 of the Act, without deciding whether it was income from any of the particular sources detailed in s. 3 or elsewhere in the Act.

In considering income from a "source" that falls outside the statutory definition of "business" (as was said by Noël J. in *George H. Steer v. M.N.R.*[1]) it should be noted that it is ". . . not merely the aggregation of one's incomes from all sources from which there were incomes in the year but it is made up of the gains from all sources minus the losses from these sources or, expressed otherwise, the *net income* from all sources of income taken together".

In other words, in determining such income for the purpose of the *Income Tax Act* as was held in that case, there must be allowed ". . . the deduction of any outlay or

[1] [1965] 2 Ex. C.R. 458.

expense involved in earning income from a 'source' that falls outside the classes of sources of income specifically named in section 3 (i.e., businesses, property, and offices or employments), . . .".

Relating this to the economist's concepts, and beginning the consideration of such concepts as I understand them, relevant to this matter, it should first be noted that when economists speak of "income", they refer to "net income" in the same sense as it is used in that case. All proper charges therefore must first be deducted, which in the case of acquisition of securites would include commissions paid, legal fees and so forth.

Secondly, as I understand the matter, the conceptional distinction made by economists between capital gains and income is as follows.[1]

An economist when he speaks of "money income" is talking about what he refers to as "social income"[2]. And the interest portion of "money income" the economist says includes three items, namely (1) pure interest, (2) risk, and (3) liquidity.

Pure interest is the price paid for waiting. Risk is the cause of the reward which exists because there is a possibility of there being a loss of the capital advanced. Liquidity

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[1] Lawrence H. Seltzer, in *The Nature and Tax Treatment of Capital Gains and Losses* (New York, 1951) p. 3, describes this conceptional distinction as follows:—"In both law and common speech, capital gains are generally regarded as the profits realized from increases in the market value of any assets that are not a part of the owner's stock-in-trade or that he does not regularly offer for sale; and capital losses, as the losses realized from declines in the market value of such assets *Ordinary* profits and losses, in contrast, are realized on the sale of goods and services that *are* a part of the seller's stock-in-trade or that he regularly offers for sale. . . ."

[2] ("Social income" is not identical with income as meant in the *Income Tax Act* because income under the *Income Tax Act* also includes what the economists call "transfer payments", that is for example, government pensions, etc, in respect to which the recipient does not render any concurrent services to the government or its citizens in exchange, or in other words, has not provided any labour, land or capital in exchange. Transfer payments, however, are not relevant to the matter in issue in this case.)

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is self-explanatory and includes the range, market and time of availability of potential purchasers for the particular security contract.

The economist considers that pure interest, risk, and liquidity of a security are always respectively reflected in yield; and that in speaking of yield, as opposed to contractual interest rate, he means the net result having regard to such interest rate and the price of the security. Yield, therefore, in his view, takes into consideration any discount or premium involved in the price of any security.

Thirdly, one other qualifying factor the economist says, must be introduced and that is that there must exist a perfect market or, in other words, that there must be no uncertainties. Under such conditions, that is an absolute guarantee of perfect market conditions, the market capitalization of assets according to the economist would equal their present discount value. In other words, anyone could borrow or lend as much as he wished at a single competitive market rate of interest. Every asset would be yielding the same market rate of interest. This equality of yield would result from the way competitors bid up or bid down the market price of any asset—whether it be a bond, a stock, a mortgage, a patent, a going business, a piece of real estate, or any earning stream of other income whatsoever.

Because, however, there is no perfect competition and there are no certainties, the economist recognizes that there do result in certain circumstances capital gains or losses. They are bred by uncertainty and they cannot be predictably expected to occur again and again.

The perfect competition or condition of absolute certainty that the economist speaks of means the situation that would obtain if each seller had absolutely no control over price; in other words, it means that each seller's demand curve is perfectly horizontal and infinitely elastic; it means that no person is able to control any significant fraction of the total of any category of productive resource.

But in the individual case histories of many of these so-called capital gains or losses, among economists there will be wide divergence of opinion as to whether the "gain" or "loss" was an income receipt or loss or a true capital gain or loss.

The origins of substantially all capital gains are not, however, the subject of diversified opinions.

Capital gains in the main arise from capital assets. Buying and selling such income producing rights as corporate securities, real estate, leases and contracts and disposing of these assets at prices higher than the original cost produce gains which are not related to the income flows associated with these assets. Capital gains from increases in land values, from investment in the stock market and from the creation and expansion of industrial empires are the most well known sources of such capital gains.

The unexpected nature of a capital gain is the main thing that most economists stress in expressing the conceptual difference between capital gains and ordinary income.[1] In other words, they say that the expected rise in the value of an asset is ordinary income and an unexpected rise in value is a capital gain.

Therefore, in this view, pure capital gains are windfall additions to one's assets or, as put by Seltzer, "Unforeseen increases in the real value of man's existing property not directly attributable to his efforts, intelligence, capital or risk-taking".[2]

The main kinds of changes which affect the value of assets which give rise to capital gains may be grouped into three general types: Changes in expectations regarding the net receipts to be obtained from a capital asset, unexpected changes in interest rates, and changes in the disposition of investors to face uncertainties.

As previously mentioned, in a situation of perfect competition the present value of a capital asset is based on the discount value of the expected flow of receipts of the asset over its life; and because there is no such thing as perfect competition and there is no such thing as certainty, any potential investor must estimate these receipts and then discount them having regard to the basis of his experience

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[1] Compare A. C. Pigou, *A Study in Public Finance,* Third and Revised Edition, London, 1947, p. 156; and J. M. Keynes, *The General Theory of Employment Interest and Money,* London, 1936, pp. 52-61.

[2] Seltzer, *The Nature and Tax Treatment of Capital Gains and Losses* (*supra*) p. 53; and see also A. C. Pigou on "Windfalls" in *A Study in Public Finance* (*supra*) pp. 56 and 64.

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and knowledge of the present which inevitably yields unstable results.[1]

The investors' estimates of future yields are therefore in practice forever changing for a variety of reasons, many of which are subjective.

As a result, capital gains in a pure sense do arise, according to the economist, from unanticipated changes in the value of capital assets. This is because, putting it in other words, this latter value is obtained by discounting the expected stream of income of an asset over its life, and unexpected changes in the stream or in the discounting factors will affect the capitalized value.

These, as I understand them, are the economic origins of capital gains.

Again they differ from ordinary income only by virtue of their unexpected character.

In law, however, the meaning of capital gain is not as refined and narrow as the economist's concept.

In law, as the cases indicate, a capital gain is not always completely unanticipated and it is often a mixture of the other types of factor returns—wages, rents, interest and profits.

Relating these concepts to the matter in issue, it should first be noted that a market condition which approaches in some degree perfect competition and approaches absolute certainty, does exist in the sale of certain securities through recognized stock exchanges and other traditional financial markets. The business community recognizes that in respect to securities which are traded on such recognized stock exchanges or in such other traditional financial markets, that there will be from time to time fortuitous gains which the business community categorizes as capital gains and not as income receipts. The business community explains that these gains happen because the market does not

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[1] J. M. Keynes, *The General Theory of Employment Interest and Money* (*supra*) pp 149-50 " . . Our knowledge of the factors which will govern the yield of an investment some years hence is usually very slight and often negligible If we speak frankly, we have to admit that our basis of knowledge for estimating the yield ten years hence of a railway, a copper mine, a textile factory, the goodwill of a patent medicine, an Atlantic liner, a building in the City of London amounts to little and sometimes to nothing; or even five years hence. . . . "

always reflect the true worth of such securities and therefore such gains are expressed in the form of capital.

It is this type of capital gain that the English Court of Appeal in *Lomax (H. M. Inspector of Taxes) v. Peter Dixon and Son, Limited*[1] discussed.

Its relevance to the Canadian market, as I understand it, briefly is as follows:

In Canada about 1958 there developed a money market for so-called discount bonds. This became especially pronounced after a very substantial market break in the fall of 1959.

The money market for these discount bonds, in the main, was utilized by corporate investors who had idle surplus funds for temporary investment.

The Government of Canada, for example, in March of 1959 sold a 2¼% issue due in thirteen months at $97.90 to yield 4.6%. This issue, in the main, as stated, was purchased by such corporate investors and such corporate investors treated the gain arising from this discount to maturity or the difference between the buying and selling price if sold prior to maturity as a capital gain or at least non-taxable income and paid corporate tax on the interest or coupon only.

Provincial Governments in Canada, also about this time, began to issue bonds at a discount.

They also looked, in the main, for corporate investors who considered these bonds to afford a high degree of safety of principal and interest and a high degree of liquidity. (Compare the economists' concept of money income above mentioned).

Between early 1958 and December, 1960 the Canadian Provinces and their authorities raised millions of dollars through the sale of discount bonds or notes with terms ranging from six months to two or three years. In the vast majority of cases a 2% coupon was used and the gross yield ranged from 2.40% to 5.65%.

Then finally, in December, 1960 a three million dollar issue was done by a province. This issue was in two parts and each bore a 2% coupon. One part had a ten year term and was priced at $76.28 to yield 5.05%. The other was a fifteen year term and was priced at $66.95 to yield 5.20%.

[1] [1943] 1 K.B. 671.

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This led the Government of Canada to enacting s. 7(2) of the *Income Tax Act*.[1] This section then provided (and now provides) that for any new bonds issued where the coupon rate was less than 5% the gross or total yield on which the bond could be sold could not exceed the coupon by more than $\frac{1}{3}$. If this gross yield exceeded the coupon by more than $\frac{1}{3}$, then the whole of the discount would be deemed to be income in the hands of the first Canadian resident taxable holder of the instrument. This meant, for example, to avoid the income tax implication of s. 7(2) for a bond bearing a fixed or coupon rate of 2% the highest gross rate at which it could now be sold was 2.66%.

The enactment of s. 7(2) of the *Income Tax Act* therefore brought an end to the issuance of these "deep discount" bonds.

But the issuance and sale of securities to taxable corporations for investing of surplus funds has continued. All these

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[1] (2) Where, in the case of a bond, debenture, bill, note, mortgage, hypothec or similar obligation issued after December 20, 1960 by a person exempt from tax under section 62, a non-resident person not carrying on business in Canada, or a government, municipality or municipal or other public body performing a function of government,

(*a*) the obligation was issued for an amount that is less than the principal amount thereof;

(*b*) the interest stipulated to be payable on the obligation, expressed in terms of an annual rate on

(i) the principal amount thereof, if no amount is payable on account of the principal amount before the maturity of the obligation, or

(ii) the amount outstanding from time to time as or on account of the principal amount thereof, in any other case,

is less than 5%; and

(*c*) the yield from the obligation, expressed in terms of an annual rate on the amount for which the obligation was issued (which annual rate shall, if the terms of the obligation or any agreement relating thereto conferred upon the holder thereof a right to demand payment of the principal amount of the obligation or the amount outstanding as or on the account of the principal amount thereof, as the case may be, before the maturity of the obligation, be calculated on the basis of the yield that produces the highest such annual rate obtainable conditional upon the exercise of any such right) exceeds the annual rate determined under paragraph (*b*) by more than $\frac{1}{3}$ thereof; the amount by which the principal amount of the obligation exceeds the amount for which the obligation was issued shall be included in computing the income of the first owner of the obligation who is a resident of Canada and is not a person exempt from tax under section 62 or a government, for the taxation year of the owner of the obligation in which he became the owner thereof.

new issues have been and are now tailored to comply with the "coupon plus $\frac{1}{3}$" requirements of s. 7(2) of the *Income Tax Act*, that is they provide an effective yield to maturity or to the earliest call date that does not exceed the contractual rate by more than one third. Corporate investors who buy these securities and hold them, apparently treat the gain arising as a capital gain on the basis that they are investing temporary surplus funds and are not in a "business" within the meaning of s. 139(1)(*e*) of the Act.[1]

So much for the discussion of discount bonds.

Reverting now to the subject matter in this case, it is clear that no such similar market situation obtains in the case of the mortgage in this action.

As stated, this was a first mortgage purchased at a discount and it did not come into existence in a market which in any way approached a situation of perfect competition. Instead, this mortgage was tailor-made by the parties and no free forces of the market obtained which caused this discount to arise. (There may be cases in respect of mortgage discounts where the concept of the decision in the *Lomax* (*supra*) case may apply but these would be exceptions in my view, especially in the light of the knowledge of how the usual type of mortgage contract is entered into in this country.)

The yield to the appellant on this mortgage amounted to 11.18%.

The gain on this particular mortgage, I am of the opinion that no economist would categorize as a capital gain. Every economist would say that there was not perfect competition in the market when this mortgage contract was entered into and sold, that there was substantial control over the market by the persons concerned, that there was nothing fortuitous, unsought, uncalculated and unexpected about this gain, and that therefore the receipt was all income.

In my view the appellant entered into perfectly normal transactions with one purpose in mind when he purchased this mortgage, the other mortgages, and the stocks and

[1] (The Department of National Revenue apparently recognizes these gains as similar to gains discussed in the *Lomax* (*supra*) case. Whatever the reason, there would be a loud cry in the business community if this type of gain was taxed as income receipts.)

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bonds during the relevant period. "He put to work" his excess fees from his earnings from the practice of law so that he might have what is called a "second income" by various stock brokerage houses and other persons who sell securities in the various financial markets to-day. This "second income" from this subject mortgage transaction was identical with and was income as meant in the *Income Tax Act*.

In the result, therefore, I am of opinion and found my decision on the grounds that the profit from this transaction was income from a "source" within the meaning of the opening words of s. 3 of the *Income Tax Act* as judicially considered by Noël J. in *George H. Steer v. M.N.R.* (*supra*), whether or not it was profit from a "business" within the meaning of s. 139(1)(*e*) of the *Income Tax Act*, or "interest" within the meaning of s. 6(1)(*b*) of the *Income Tax Act*. In doing so, I am adopting for this purpose the economist's concept of income as described above.

Accordingly, the appeal is dismissed with costs, and the matter is referred back for reassessment, not inconsistent with these reasons, for the purpose of deducting all proper charges and thereby correctly computing the net income received by the appellant from his mortgage transaction.

Ottawa 1966

Sept. 16

Sept. 23

BETWEEN:

PRECISION METALSMITHS INC. ... .PLAINTIFF;

AND

CERCAST INC., VESTSHELL INC., and FRANK VALENTA ..... } DEFENDANTS.

Patents—Pleading—Allegation of infringement not supported by allegation of material facts—Insufficiency of.

A plaintiff's pleadings (statement of claim and particulars of breaches) which allege that defendant has infringed plaintiff's patent rights (1) by constructing and using apparatus and moulds covered by product claims of the patent, and (2) by using processes covered by process claims of the patent, fail to allege the material facts necessary to show a cause of action, *viz* a description of the apparatus and moulds and of the processes referred to which will show that they fall within the claims of the patent.

Dow Chemical Co. v. Kayson Plastics & Chemicals Ltd. [1967] 1 Ex. C.R. 71 applied: *Exchequer Court Rules* 20, 88, referred to.

APPLICATION to strike out statement of claim.

Donald N. Plumley for plaintiff.

Kent H. E. Plumley for defendants.

JACKETT P.:—An application herein was argued before me on Friday, September 16, 1966. The application was for an order that the Statement of Claim be struck out either in whole or in part on any one or more of several different grounds. While I indicated when I disposed of the matter that I did not intend to give reasons, I have since decided that I ought to do so. This, as it seems to me, is advisable both because they may be necessary when further applications are made in this action and because the questions that I had to consider may arise in other actions.

The Statement of Claim, which was filed on April 5, 1966, alleges that the plaintiff is the owner of one Canadian patent (hereafter referred to as the "product patent") "for an invention of Claude N. Watts entitled 'Sprue Form and Method of Precision Casting' " and is also the owner of another Canadian patent (hereafter referred to as the "process patent") "for an invention of Claude N. Watts entitled 'Process and Slurry Formulation for Making Precision Casting Shells' ". No other information is given by the Statement of Claim concerning the nature of the inventions in respect of which such patents were granted. Copies of the patents were put before the Court during argument but they have not been filed as part of the Statement of Claim or otherwise made part of the Court record.

The Statement of Claim further alleges that "The defendants have infringed the rights of the plaintiff under both of the said letters patent as set out in the particulars of breaches delivered herewith". The body of the Particulars of Breaches filed at the same time as the Statement of Claim reads as follows:

1 The defendants have infringed letters patent No 704,693 by making, constructing and using apparatus and moulds covered by claims 1 to 6, 8 and 9 of the said letters patent.

2 The defendants have infringed letters patent No. 719,635 by using the processes covered by claims 1 to 8 of the said letters patent.

3. The precise number and dates of all the defendants' infringements are at present unknown to the plaintiff, but the plaintiff will claim to recover full compensation in respect of all such infringements.

4 The plaintiff will rely on claims 1 to 6, 8 and 9 of letters patent No 704,693 and claims 1 to 8 of letters patent No 719,635.

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Pursuant to a demand made by the defendants upon the plaintiff for particulars of the Particulars of Breaches, the plaintiff filed a document entitled "Reply to the Demand for Particulars of the Particulars of Breaches" bearing date May 5, 1966, the body of which reads as follows:

1. As to paragraphs 1, 2 and 3 of the said demand, the plaintiff says that in a visit to the plant of Cercast Inc., in Montreal on or about September 20, 1965, representatives of the plaintiff observed hollow sprue moulds which the plaintiff alleges were made, constructed and used in infringement of claims 1-6, 8 and 9 of the said Letters Patent No. 704,693 but, as alleged in paragraph 3 of the particulars of breaches, the precise number and dates of all the defendants' infringements are at present unknown to the plaintiff.

2. As to paragraphs 4-9 of the said demand, the plaintiff alleges that the processes used by the defendants to prepare the moulds referred to in paragraph 1 are within the knowledge of the defendants and the plaintiff alleges that the said processes have been used in infringement of claims 1-8 of Canadian Letters Patent No. 709,635 but, as alleged in paragraph 3 of the particulars of breaches, the precise number and dates of all the defendants' infringements are at present unknown to the plaintiff.

3. As to paragraphs 1-9 of the said demand, the plaintiff alleges that the participation of each of the defendants in the making, constructing and using of the moulds referred to in paragraph 1 hereof and the processes referred to in paragraph 2 hereof, is within the knowledge of all the said defendants, the defendant Valenta being an officer and director of each of the other defendants.

On May 19, 1966, an application was made by the defendants to my brother Noël for an order requiring the plaintiff to provide further particulars of paragraphs 1 and 2 of the Particulars of Breaches. In effect, the application was, *inter alia*, for particulars identifying "the specific apparatus and moulds which the Plaintiff alleges have been made, constructed and used . . . in infringement of claims 1 to 6, 8 and 9 of Canadian Letters Patent 704,693" and for particulars identifying "the specific process or processes which the Plaintiff alleges have been used . . . in infringement of claims 1 to 8 of Canadian Letters Patent 719,635". The application for particulars identifying "the specific apparatus and moulds" was dismissed but the plaintiff was ordered to provide the defendants with

1. particulars identifying the specific process or processes which the plaintiff alleges have been used by the defendant, Cercast Inc., in infringement of claims 1 to 8 of Canadian Letters Patent 719,635;

2. particulars identifying the specific process or processes which the plaintiff alleges have been used by the

defendant Vestshell Inc., in infringement of claims 1 to 8 of Canadian Letters Patent 719,635;

3. particulars identifying the specific process or processes which the plaintiff alleges to have been used by the defendant, Frank Valenta, in infringement of claims 1 to 8 of Canadian Letters Patent 719,635.

Pursuant to this order, a document dated July 13, 1966, and entitled "Further Particulars of Paragraph 2 of the Particulars of Breaches Delivered Pursuant to the Order of the Honourable Mr. Justice Noël Dated May 19, 1966" was filed. The body of that document reads as follows:

1. The specific processes which the plaintiff alleges have been used by:—

(*a*) the defendant, Cercast Inc;

(*b*) the defendant, Vestshell Inc; and

(*c*) the defendant, Frank Valenta;

in infringement of claims 1-8 of Canadian Letters Patent 719,635 are the following:

(i) as to claim 1—the process of building a shell mold around a disposable pattern having restricted passages comprising applying a first refractory coating to said pattern, drying said first coating, applying another refractory coating to said pattern by dipping the pattern into a refractory slurry bath, said refractory slurry bath being characterized by having a viscosity thin enough so that it can be forced into the restricted passages, viscosity high enough so that it will remain in the restricted passages during subsequent draining operations to provide a solid and continuous shell mold, and having sufficiently large refractory grains so that the slurry packed into said restricted passages will not crack on hardening, applying a vacuum to said slurry bath with the pattern immersed therein until substantially all occluded air is removed, said vacuum being great enough that the slurry will be forced into the restricted passages of the pattern and will be caused to substantially uniformly coat said pattern when the vacuum is released and the slurry bath is restored to atmospheric pressure, restoring said slurry to atmospheric pressure so that the slurry is forced into the restricted passages to substantially uniformly coat said pattern, removing the pattern from the slurry bath, draining excess slurry from the pattern, and applying a stuccoing material to said another coating of slurry, drying said another refractory coating, and thereafter continuing to build up the shell mold by the steps including dipping the pattern into a refractory slurry, stuccoing, and drying;

(ii) as to claim 2—the process referred to in paragraph (i) hereof wherein said refractory slurry bath is further characterized by a viscosity within a range of from about 7,000 centipoise to about 10,000 centipoise;

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(iii) as to claim 3—the process referred to in paragraph (1) hereof wherein the first refractory coating is applied to said pattern by dipping said pattern into a slurry bath of from about 1,300 centipoise to about 1,500 centipoise, draining excess slurry, and thereafter stuccoing said pattern with refractory material to arrest further draining;

(iv) as to claim 4:

A. the process referred to in paragraph (i) hereof wherein said refractory slurry bath used to apply said another refractory coating is a silica sol binder type with an addition of from about .5% to about 2% by weight polyvinyl alcohol;

B. the process referred to in paragraph (ii) hereof wherein said refractory slurry bath used to apply said another refractory coating is a silica sol binder type with an addition of from about .5% to about 2% by weight polyvinyl alcohol;

C. the process referred to in paragraph (iii) hereof wherein said refractory slurry bath used to apply said another refractory coating is a silica sol binder type with an addition of from about .5% to about 2% by weight polyvinyl alcohol;

(v) as to claim 5—the process of forming a shell mold around a disposable pattern and simultaneously forming a solid core within restricted passageways of the pattern, comprising, providing a slurry capable of flowing by gravity into all interstices of the pattern, dipping the pattern into said slurry and draining excess slurry followed by stuccoing all surfaces including the interstices to arrest excess draining, thereafter providing a second slurry having a binder consisting principally of silica sol with from about .5% to 2% by weight of polyvinyl alcohol and having a viscosity substantially within the range of from 7,000 centipoise to 10,000 centipoise, determining the existence of any internal cavities from which such second slurry would drain if filled with such slurry and reducing such cavities by a further dip in thin slurry followed by stuccoing, and thereafter placing the pattern into a bath of such second slurry and reducing the atmospheric pressure surrounding the bath and thereafter restoring the atmospheric pressure to drive the second slurry fully into any remaining interstice, and finally finishing the building of the external shell by dipping and stuccoing;

(vi) as to claim 6—the process referred to in paragraph (v) hereof in which the said further dip to reduce the cavity size is a vacuum fill of the first slurry followed by draining and stuccoing;

(vii) as to claim 7—the process of building a shell mold around a disposable pattern and simultaneously forming a solid core within restricted passageways of the pattern comprising the steps: (1) providing a refractory powder plus binder slurry of about 1,300 to 1,500 centipoise and a separate stucco means having a very fine granular refractory; (2) dipping a pattern to be cored and coated into said slurry, draining excess slurry, and thereafter applying the very fine stucco to arrest further draining; (3) providing a second slurry of refractory powder

with a combination of silica sol and polyvinyl alcohol as binders and adjusted in viscosity within a range between 7,000 centipoise and 10,000 centipoise; (4) placing said disposable pattern under a bath of said second slurry and evacuating the atmosphere around the bath, thereafter restoring the atmospheric pressure to drive said second slurry fully into any remaining interstice, and (5) finishing the shell by conventional methods of dipping and stuccoing;

(viii) as to claim 8—the process referred to in paragraph (vii) hereof in which the said second slurry has a silica sol binder type with an addition of from about .5% to about 2% polyvinyl alcohol by weight.

2. The processes hereinbefore referred to and used by the defendants and alleged by the plaintiff to infringe the said Letters Patent No. 719,635 as referred to in paragraph 2 of the particulars of breaches are practised by the defendants within the confines of their own plants and the said processes are within the knowledge of the defendants.

I have set forth at some length the state of the plaintiff's pleadings because it was on an appraisal of them that I had to make a decision as to what disposition to make of the defendants' application that the Statement of Claim be struck out.

In *Dow Chemical Co. v. Kayson Plastics & Chemicals Ltd.*,[1] I made a comment concerning pleadings in actions of this claim, which reads as follows:

In general, under our system of pleading, a statement of claim for an infringement of a right should clearly show

(*a*) facts by virtue of which the law recognizes a defined right as defined right of the plaintiff.

(*b*) facts that constitute an encroachment by the defendant on that defined right of the plaintiff.

If the Statement of Claim does not disclose those two elements of the plaintiff's cause of action, it does not disclose a cause of action and may be disposed of summarily.

While, as far as I know, there is no special rule in relation to claims for infringement of a patent that would exempt such proceedings from this elementary requirement, there appears to be a practice, which is not peculiar to this country, whereby the Statement of Claim does not describe the particular monopoly right of the plaintiff which he claims to have been infringed but is limited to an assertion that the plaintiff is an owner of a patent bearing a certain number and having a certain title. This patent is not part of the pleadings so that the pleading tells neither the Court nor the defendant anything about the rights of the plaintiff that, according to him, have been infringed. Furthermore, if the Court or the defendant acquires a copy of the patent, which can be done at a price, more often than not, it will be found that the patent purports to grant to the plaintiff a large number of monopolies and the Court and the defendant are left to guess which one or more is the subject matter of the action.

[1] [1967] 1 Ex. C.R. 71.

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It seems to follow from this departure from the ordinary rules of pleading that the plaintiff then adopts the device found in the Statement of Claim in this action of omitting to allege any facts that would constitute an infringement of the plaintiff's rights and the Statement of Claim is limited to a bare assertion that the plaintiff's rights have been "infringed".

The question that occurs to me is whether there is any possible basis upon which such a statement of claim can be supported under our Rules.

I am informed by counsel that the product patent contains claims in respect of apparatus known as a "sprue" used in making moulds for ferrous and non-ferrous casting and also contains claims for moulds for use in such casting. I am further informed that the process patent contains a number of claims each of which is for a process for making a mould for ferrous and non-ferrous casting.

At this point, it may be well if I re-state the basic principle involved. A statement of claim must contain a concise statement of the "material facts" upon which the plaintiff relies as giving him a cause of action; it must not contain "the evidence". (Rule 88) Put another way, a statement of claim must contain a statement of the facts that give him a cause of action but must not contain the facts upon which he relies to prove those facts. If the material facts stated by a statement of claim clearly reveal no cause of action, it should be struck out.

In an action for infringement of a patent under the *Patent Act*, there must therefore be in the Statement of Claim allegations

(*a*) of facts from which it follows as a matter of law that the plaintiff has, by virtue of the *Patent Act*, the exclusive right to do certain specified things, and

(*b*) that the defendant has done one or more of the specified things that the plaintiff has the exclusive right to do.

It is not a compliance with the requirement that the material facts be alleged merely to state the conclusions that the Court will be asked to draw, which are

(*a*) that the plaintiff is the owner of one or more specified Canadian patents, and

(*b*) that the defendant has infringed the plaintiff's rights under such patents.

On this application, no attack was made upon that part of the Statement of Claim that set up the plaintiff's rights under the *Patent Act*, and I am not to be taken as suggesting that there should have been such an attack. The attack was restricted to the adequacy of the allegations upon which the plaintiff bases its claim that the defendants infringed those rights.

Reference should be made to Rule 20, which provides that, in an action for infringement of a patent, a plaintiff must deliver with his statement of claim "particulars" of the "breaches complained of". Strictly speaking, this rule and Rule 88, when read together, require that the Statement of Claim should allege the specific things that the defendant has done and that the plaintiff has the exclusive right to do, and the "particulars" delivered under Rule 20 should contain merely "particulars" of such breaches, or, in other words, "particulars" of the "breaches" that have been "complained of" in the Statement of Claim. However, I would not encourage applications by a defendant in relation to the operation of this requirement so long as the Statement of Claim and the statement of "particulars", read together, contain an allegation in sufficient particularity of the acts complained of as "breaches".

In considering whether there has been such a sufficient allegation of breaches in a patent infringement action, it is necessary to examine the elements of the cause of action. By virtue of section 46 of the *Patent Act*, a patent grants to the patentee the exclusive right "of making, constructing, using and vending to others to be used" the "invention" that is the subject matter of the patent. While the statute contemplates that a patent is to be for only one invention, it is not invalid if it is granted for more than one invention (section 38) and in practice patents frequently are granted for several inventions, each of which is defined by one of the several claims at the end of the specification. An invention may be *inter alia* a process, a product or a machine (section 2(*d*)). In any particular case, the plaintiff's cause of action may be *inter alia* that the defendant has made a product that falls within a claim in the plaintiff's patent, or has used such a product or has sold such a product to others to be used; or it may be that the defendant has used a process that falls within a claim in the plaintiff's patent. The defendants' application in this case,

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is, in effect, based upon the ground that there had been no sufficient allegation of any such fact or of any other fact that constitutes the doing of something that, by virtue of the patents in question, the plaintiff has the exclusive right to do. Obviously, if the Statement of Claim read with the Particulars contains no allegation of any facts constituting any breach of the patents, no cause of action has been pleaded.

I propose first to examine the pleadings to determine whether any breach of the product patent has been pleaded.

Paragraph 6 of the Statement of Claim says that the defendants have infringed the rights of the plaintiff under the letters patent "as set out in the particulars of breaches delivered herewith". As already indicated, the allegation that the defendants have "infringed" the plaintiff's rights is not, in my view, an allegation of any facts constituting infringement or branch of the plaintiff's rights but is a mere statement of the conclusion of law that the plaintiff proposes to ask the Court to find on unstated facts. However, paragraph 6 is an indication that the Particulars of Breaches delivered with the Statement of Claim is to be read with it and that document contains one paragraph that may be regarded as an allegation concerning the product patent. That paragraph reads as follows:

> The defendants have infringed letters patent No. 704,693 by making, constructing and using apparatus and moulds covered by claims 1 to 6, 8 and 9 of the said letters patent.

In effect, this is an allegation that the defendants have made *and* used apparatus "covered" by all the four "sprue" claims in the patent and an allegation that the defendants have made *and* used moulds "covered" by four of the five mould claims in the patent. This, in my view, is not an allegation of "material facts". The only allegation of fact it contains is that the defendants have made and used apparatus and moulds. The balance of the allegation is that the undescribed apparatus and moulds that the defendants are alleged to have made are "covered" by all but one of the claims in the patent. What this means, as I understand it, is that, when the character of the apparatus and moulds is discovered and the meaning of the claims is settled (which meaning is a question of law), it will be found that the apparatus and moulds fall within some one or other of

the claims. Obviously, this allegation does not contain such a description of the apparatus and moulds that the defendants are alleged to have made and used as will show (assuming the correctness of the allegation) that they are in fact within the boundaries established by one or other of the claims. In the absence of such a description, there is no allegation of the material facts necessary to show a cause of action for infringement. I turn, therefore, to the Reply to the Demand for Particulars of the Particulars of Breaches where the relevant statement reads:

> . . . the plaintiff says that in a visit to the plant of Cercast Inc., in Montreal on or about September 20, 1965, representatives of the plaintiff observed hollow sprue moulds which the plaintiff alleges were made, constructed and used in infringement of claims 1-6, 8 and 9 of the said Letters Patent No. 704,693 but, as alleged in paragraph 3 of the particulars of breaches, the precise number and dates of all the defendants' infringements are at present unknown to the plaintiff.

The fact that certain persons "observed" certain "moulds" at a certain place is not a material fact in an infringement action. It may or may not be a fact that tends to prove a material fact. However, that is not the real vice in this further and last allegation by the plaintiff upon which it seeks to support a claim for infringement of the product patent. An examination of the "mould" claims in the patent makes it plain that merely describing a mould as a "hollow sprue mould" is not a sufficient description to place it within the boundaries of any of such claims. Obviously, the plaintiff's representatives saw something else in the moulds that made them conclude that the moulds fell within the boundaries of one or more of the claims in the patent. Whatever it was that they so observed is presumably the characteristic of the moulds in question that should be alleged so that it may be apparent on examination of the Statement of Claim that a cause of action has been alleged. It would appear that, while the plaintiff has not so alleged, it is possible that it may be in a position to allege that the defendant Cercast Inc. has either used or made or has both made and used moulds of a specified description and that it may then be in a position to argue that moulds of that description fall within the boundaries of one or more of the mould claims. Counsel for the plaintiff further suggested that the observations made by the plaintiff's representatives of the "moulds" in the Cercast Inc. plant may, having regard to the role played by sprues in the construction of

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moulds, have put the plaintiff in a position to make allegations that the defendant Cercast Inc. made or used or made and used sprues of a specified description and that it may then be in a position to argue that sprues of that description fall within the boundaries of one or more of the sprue claims in the product patent. Nothing in the pleading indicates, even indirectly, any fact upon which it might be concluded that either of the defendants, Vestshell Inc. and Frank Valenta, did any act constituting a breach of the product patent.

I therefore concluded that the Statement of Claim could not be allowed to stand in so far as the product patent is concerned but that the plaintiff should be allowed an opportunity to apply for leave to substitute proper allegations of breaches in which such particulars are given as the plaintiff can give at this stage. An application for such leave will have to be supported by material establishing that the new allegations are based upon a proper factual basis and are not a mere re-framing of the pleading to meet the views herein expressed.

I turn now to the similar attack made on the pleading in respect of the allegations of breaches of the process patent.

In so far as the process patent is concerned, the commencement point is again paragraph 6 of the Statement of Claim which, as already indicated, is merely a cross-reference to the Particulars of Breaches. That document states merely that

> The defendants have infringed letters patent No. 719,635 by using the processes covered by claims 1 to 8 of the said letters patent.

I need not repeat here the analysis of the vice of such an allegation that I made above with reference to the corresponding allegation in the same document about the product patent. The only allegation of fact in this allegation is that the defendants used certain "processes" that are not described. The balance of the allegation is, in effect, a statement that, when the character of such processes is discovered and the meaning of the claim is settled (which meaning is a question of law) it will be found that the processes fall within one or more of the claims. Obviously, this allegation does not contain any description of the processes that the defendants are alleged to have used and it is therefore not a sufficient allegation of material fact to show

that the plaintiff has an arguable cause of action in respect of the process patent. Turning to the Reply to the Demand for Particulars of the Breaches of Particulars, it appears that the plaintiff adds nothing except the statement that "the processes used by the defendants . . . are within the knowledge of the defendants". This still leaves a complete gap so far as any allegation of the character of the processes alleged to have been used by the defendants is concerned. The plaintiff was then ordered to identify the processes that it alleged were used by the defendants in infringement of the process patent and, according to counsel for the defendants, who was not challenged by counsel for the plaintiff—I have not compared the language myself—its reply purports to identify the process used by the defendants by applying to it the language of the claims in the patent without any change. In my view, such an allegation is merely another way of saying that the defendant used a process, that is not described, which is "covered" by the claims in the patent. It is therefore not a description of the particular process that the defendants are alleged to have made or used.[1]

I therefore concluded that the Statement of Claim could not be allowed to stand in so far as the process patent is concerned. Inasmuch as none of the particulars given in respect of the alleged breaches of the process patent gave

[1] If it were conceivable that there is a product claim that is not so worded as to "cover" many different products so long as they fall within a specified class, it might be conceivable that a cross-reference to such a claim would be an adequate description of the particular product that the defendant is alleged to have made or used in breach of the plaintiff's exclusive right under the patent. None of the claims in the patents in question is such a claim.

The alternative to the view that I have adopted—that this type of pleading is not an allegation of the material facts at all and therefore discloses no cause of action—is that it is an allegation of material fact but in such broad and vague terms that neither the Court nor the defendants know what the plaintiff's real cause of action is, in which event, it must be struck out as being embarrassing. Compare *Philipps v. Philipps*, (1878) 4 Q.B.D. 127.

Where there is a failure of the plaintiff to allege a material fact except in the terms of the legal definition of a particular element in his cause of action and such failure persists notwithstanding a demand for particulars, the obvious inference is that the cause of action does not exist in fact. Compare *Davey v. Bentinck*, [1893] 1 Q.B. 185, per Lord Esher, M.R : "The conclusion is irresistable that there were no such services . . . and without these there is no cause of action and the action is frivolous and vexatious and oppressive".

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any indication of any factual basis for such allegations, my first inclination was not to allow any opportunity for substitute pleading. Upon reconsideration, however, I decided to allow the same opportunity therefor as I had decided to allow in respect of breaches of the product patent.

In the result, I ordered

(1) That paragraphs 2 to 8 inclusive, of the Statement of Claim and all statements of particulars of breaches be struck out;

(2) That the plaintiff be granted leave to apply for leave to substitute other pleading for that that is so struck out;

(3) That, if no such application be made within four weeks from the date of the order, the defendants may apply to have the action dismissed;

(4) That the defendants have the costs of the application to strike out in any event of the cause.

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Ottawa Sept. 13-16, Sept. 19-21.

Sept. 28

BETWEEN:

FLORENCE REALTY COMPANY LIMITED and FLORENCE PAPER COMPANY LIMITED ... SUPPLIANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Crown—Agreement to compensate subject—Exchequer Court Act, s. 18(1)(g)—Loss of rail services on redevelopment of capital area—Calculation of amount of compensation—Estoppel—Interest on award—When payable by Crown.

In 1964 suppliant paper company, which carried on a waste paper processing business in a building in Ottawa leased from the other suppliant, lost the use of a private railway siding pursuant to an order of the Board of Transport Commissioners made on the application of the National Capital Commission (which was redeveloping the area). The National Capital Commission agreed to pay suppliants compensation to be fixed by the Exchequer Court under s. 18(1)(*g*) of the *Exchequer Court Act* and offered to sell them land in an industrial park which it owned at a price 20% less than market value. The suppliants purchased land in the industrial park and erected thereon a new up-to-date waste paper processing plant. Under suppliant's agreement

with the National Capital Commission compensation was to be calculated on the following basis: if the Exchequer Court determined that suppliant paper company was required to relocate its business as a result of the loss of rail services it should be paid the amount which a prudent owner would pay rather than be forced to relocate, but if the court determined that suppliant paper company was not required to relocate it should be paid the amount a prudent owner would pay rather than lose the rail services on the assumption that it would have the use of the rail services for 10 further years. The court found that the only sensible business decision for suppliants was to remain where they were and that they decided to relocate for reasons unrelated to the loss of railway services. The court also determined that the amount of compensation payable if suppliants had remained where they were would be $91,300.00, but that compensation determined on the basis that they were required to relocate would be $152,802 00.

Held: (1) The amount of compensation payable was $91,300.00.

(2) The National Capital Commission was not estopped from disputing suppliants' decision to relocate because it offered to sell them land: it had made no representation to them of an existing fact, it did not intend to induce them to act upon its representation, and suppliants did not act upon its representation.

(3) Suppliants were not entitled to interest on the amount of the award from the date of their petition to the date of judgment. Interest is only allowed against the Crown if there is an express or implied contract to pay interest or by virtue of a statute. *The King v. MacKay* [1930] S.C.R. 130, applied.

ACTION to determine compensation payable by respondent pursuant to section 18(1)(*g*) of the *Exchequer Court Act*.

Roydon A. Hughes, Q.C. and *R. J. Kealey* for suppliants.

K. E. Eaton for respondent.

GIBSON J.:—This is an action to determine the compensation payable by the respondent to the suppliants pursuant to paragraph (*g*) of subsection (1) of section 18 of the *Exchequer Court Act* based on an Agreement between the parties dated May 5, 1964.

The suppliants are companies incorporated under the *Ontario Corporations Act* with common shareholders. The suppliant company, Florence Realty Company Limited, owns and at all material times owned a six storey building built about 1918, and adjoining land on Boteler Street in the City of Ottawa; and the suppliant, Florence Paper Company Limited, leased at all material times the subject lands and premises from it and carried on a business as a

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dealer in waste paper, being a business which included the procuring, sorting, grading and selling of graded paper to paper mills, and it also leased at all material times from the Canadian Pacific Railway Company certain other lands contiguous to the said building which they said were essential to the business operation. This waste paper plant of the suppliant company, Florence Paper Company Limited, was serviced by a private siding under an agreement in writing with the Canadian Pacific Railway Company.

In connection with its programme of redevelopment of part of lower town Ottawa involving among other things the construction of the Macdonald-Cartier Bridge connecting that area with part of the City of Hull, the National Capital Commission and the Canadian Pacific Railway Company made an application to the Board of Transport Commissioners for an Order permitting the abandonment of that part of the Canadian Pacific Railway Company's Sussex Street sub-division from Beechwood Avenue, mileage 5.6 to the end of the said sub-division, mileage 6.7 and an Order was so made on April 21, 1964 and the same was abandoned on June 15, 1964. As a result, the suppliant company, Florence Paper Company Limited, along with other businesses ceased to enjoy a private railway siding and rail service to its plant.

At the time of the said proceedings before the Board of Transport Commissioners, the National Capital Commission offered to enter into an agreement with any person whose business would cease to have a railway siding and rail service by reason of the Order resulting from such proceedings. A *pro forma* draft of that agreement was prepared and made available to such persons, of whom the suppliant company, Florence Company Limited was one, and they were invited to enter into such an agreement if they wished to do so. A copy of this *pro forma* agreement was filed as Exhibit P-69 at this trial.

There was no legal requirement for the National Capital Commission to enter into such an agreement with the persons who would lose private railway sidings and rail services, and therefore, except for such an agreement, none of these persons would have had a claim for compensation of the kind that is the subject matter of this action.

The suppliants executed such an Agreement with the National Capital Commission and it is dated May 5, 1964 and is substantially in conformity with the said *pro forma* agreement, but it is tailored in certain minor ways to meet the requirements of the businesses of the suppliants. The particular clauses in this Agreement which are especially relevant in determining the compensation payable in this action are clauses 1, 3, 4, 6, 7 and 8 of paragraph numbered 4 which read as follows:

4. . . .

1. For the purposes of this agreement the Commission acknowledges that but for the Memorandum of Understanding between the Commission, the Canadian Pacific Railway Company and the Canadian National Railway Company dated the 17th day of October, A.D. 1963, the siding agreements or leases which the Company has with the Canadian Pacific Railway would have been renewed from time to time and the Canadian Pacific Railway Company and/or the National Capital Commission would not have made an application to the Board of Transport Commissioners to abandon the operation of that part of its Sussex Street Subdivision from mileage 1.2 to the end of the Subdivision at mileage 6.7, and/or for abandonment of railway sidings used by the Company in connection therewith for ten years from the 24th day of March, A.D. 1964.

. . .

3. In the event that the Court determines that the Company is required to relocate its business as a result of the removal of the railway services, including the cancellation of the lease of land, if any, and other agreements with the Canadian Pacific Railway Company relating to railway services on the Sussex Street Subdivision, then the compensation to be paid shall be an amount which the Company, as a prudent owner, would pay rather than be forced to relocate and shall include all damage suffered by the owner by reason thereof.

4. If the Court determines that the Company is not required to relocate its business then the compensation shall be an amount which a prudent owner would pay rather than lose such rail services and shall include business disturbance (which includes the cost of re-adapting the plant) and the present value of any anticipated loss of profits.

. . .

6. The compensation, if any, shall be determined on the basis that the Company was the absolute owner of the lands and premises upon which the business operations are being carried on, and the amount of compensation so determined shall be apportioned by the Court as to the portion payable to the Company and the portion payable to the Landlord.

7. The parties hereto agree that the compensation shall be determined as of the 24th day of March, A.D. 1964.

8. The Commission on behalf of the Crown agrees to pay the Company and the Landlord the amount, if any, so determined.

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The National Capital Commission made available to any industry that prior to April 21, 1964 was "served by private siding trackage which [was] to be removed as a result of the [National Capital Commission] Relocation Plan," the opportunity:

a. to purchase, for its re-establishment only, land owned by the Commission. The price for this land to be 20% less than the market value as set by the Commission; or

b. to lease land owned by the Commission at a rental based on the market value less 20%.

The National Capital Commission also offered to provide "to the National Railways, the Pacific Railway or the Terminal Railway private siding trackage for the use of those industries whose private siding trackage is removed as a result of the Relocation Plan". In that offer, it also stated that "The new trackage will be of equal serviceable capacity to that which the industries previously enjoyed and will be provided at no installation cost to the industries or the Railways."[1]

The suppliants decided to take advantage of the offer of the National Capital Commission to purchase land on which to relocate their business and by letter dated May 14, 1964 (Exhibit P-71(*f*)) from their solicitors to the National Capital Commission advised the latter that the shareholders and directors of the suppliant company, Florence Realty Company Limited, had decided to purchase certain lands from the National Capital Commission in the Sheffield Road district which was being set up as an industrial park area by the National Capital Commission; and subsequently the National Capital Commission sold to the suppliant company, Florence Realty Company Limited, six acres for $36,000 by deed dated January 4, 1965 which was registered in the Registry Office for the Registry Division of the County of Carleton on May 7, 1965 as instrument number 65081. The suppliant company, Florence Realty Company Limited, built a new up to date waste paper processing plant on these lands occupying three acres of the six; and the National Capital Commission at its cost built a railway siding into this plant which occupied part of another acre of the six. This new plant according to the

[1] (See Statement of Policy, National Capital Commission, 1962, attached as Schedule A to *pro forma* Agreement, Exhibit P-69).

evidence cost about $300,000. It was built after investigation was made of how up to date plants in Canada and the United States were built and was designed by architects.

The suppliant, Florence Paper Company Limited, moved into this new plant in the early part of 1965 and completely vacated the Boteler Street plant about the end of 1965. The suppliant company, Florence Realty Company Limited, still owns the building at Boteler Street.

Prior to moving into its new plant, for some months in 1965, the suppliant, Florence Paper Company Limited operated from a so-called team track at the yards of the Canadian Pacific Railway Company, on Broad Street in the City of Ottawa, after their private siding and the rail facilities were no longer available to it. This was about five miles from its Boteler Street plant, and to load and unload into railway cars, it had to truck paper over this five miles.

The determination of the quantum of compensation payable to the suppliants in this matter is predicated in the main on the true interpretation of clauses 1, 3 and 4 of paragraph numbered 4 of the said Agreement between the parties dated May 5, 1964.

The suppliants claim the following sums and they categorize the same in the manner following:

A. The sum of $862,656.21 particulars of which are as follows:

(a) The sum of $450,000.00 for the depreciated loss of the building and improvements;

(b) the sum of $8,709.43 to defray the cost of moving stock and equipment;

(c) the sum of $1,128.42 to cover the cost of disconnecting and installing nine machines from Boteler Street to Sheffield Road;

(d) the sum of $8,015.00 to cover moving, dismantling and re-assembling five balers plus work performed and parts delivered re an elevator;

(e) the sum of $187,355.72 for additional costs of operating from the new site as compared to the old site based on an outlay of certain costs for a period of ten years, which are calculated at a rate of 6% in order to arrive at a present worth;

(f) the sum of $60,000.00 for demolition of the building;

(g) the sum of $82,351.16 being the re-financing charges of the bank loan and a mortgage in the amount of $260,000.00 at a present worth calculated on an interest rate of 6%;

(h) the sum of $25,000.00 for experts, consultants and legal fees;

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(i) the sum of $40,096.48 for extra costs and losses in operating the plant from June 15, 1964 until May 20, 1965 made up as follows:—

(i) team track operation	$ 9,159.73
(ii) cost of dual operation at two sites	25,486.76
(iii) re-lettering trucks	450 00
(iv) loss of executive time	5,000.00
	$40,096.49

(j) the sum of $10,000.00 for loss of rental income.

B. Interest on the said sum of $862,656 21 from June 1, 1965 until the date of Judgment.

C. Costs of this action.

The interpretation of clause 1 of paragraph numbered 4 of the said Agreement of May 5, 1964 is basic to the determination of the compensation payable in this matter.

The suppliants had two leasehold interests, one a private siding and the other of certain lands adjoining their plant premises, from Canadian Pacific Railway Company. The siding Agreement (Exhibit P-18) provided for cancellation of it on two months' notice, subject to leave being granted by the Board of Transport Commissioners; and the lease of land (Exhibit P-19) provided for cancellation on one month's notice. Neither gave the suppliants any right of renewal. The land leased was vital to the business operation of the suppliants. Both leasehold interests therefore, could be terminated readily within the ten year period after March 24, 1964.

The suppliants' reasonable expectation of continuing in possession or of having this siding agreement and lease renewed is not a legal interest in them that can be considered in assessing compensation in this matter. (See *Sunderland v. Municipal Corporation of Town of Brockville*[1]; and *Gagetown Lumber Co. Ltd. v. Her Majesty The Queen*[2]).

The effect therefore, in my view, of clause 1 of paragraph numbered 4 of the said Agreement is to give the suppliants a legal interest in the said siding agreement and the said lease for ten years, that is until March 24, 1974, for the purposes of assessing the compensation payable to them, whether the same is payable pursuant to clause 3 or clause 4 of paragraph numbered 4 of the said Agreement of May 5,

[1] [1961] O R. 660 [2] [1957] S.C.R. 44.

1964, or otherwise. Except for clause 1, the legal interest in the same would be for a much lesser period. And, as stated, except for the fact that the agreement was entered into, the suppliants would have no claim at all against the Crown.

In interpreting clauses 3 and 4 of paragraph 4 in relation to the facts in this case, it is necessary to decide whether or not in the circumstances of this case the suppliant company, Florence Paper Company Limited was required to relocate its plant by reason of the loss of this railway siding and railway services to the Boteler Street plant.

The significant words in clauses 3 and 4 of paragraph 4 of the said Agreement of May 5, 1964 are as follows:

Clause 3: "In the event that the Court determines that the Company is required to relocate its business as a result of the removal of the railway services,"..."the compensation to be paid shall be an amount which the Company, as a prudent owner, would pay rather than be forced to relocate and shall include all damages suffered by the owner by reason thereof."

Clause 4: "If the Court determines that the Company is not required to relocate its business then the compensation shall be an amount which a prudent owner would pay rather than lose such rail services and shall include business disturbance (which includes the cost of re-adapting the plant) and the present value of any anticipated loss of profits."

This language of clauses 3 and 4 indicates that the parties had in mind the principles in expropriation jurisprudence. But this was not an expropriation matter, and the problem therefore is to what extent expropriation principles are to be applied in interpreting clauses 3 and 4.

It is conceded that it is value to the owner that must be considered in this matter.

In an expropriation matter where all the owner's land is taken, or where part is taken and no damage is sustained to the balance, the leading case is *Woods Manufacturing Company v. The King*[1]. In that case, Rinfret C.J., delivering the unanimous judgment of the Supreme Court Bench

[1] [1951] S.C.R. 504.

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of Seven Judges, reviewed certain of the earlier decisions, including *Diggon-Hibben Ltd. v. The King*[1] and concluded (p. 508):

> . . . The proper manner of the application of the principle so clearly stated cannot, in our opinion, be more accurately stated than in the judgment of Rand J. in the last-mentioned case at p. 715.
>
> ". . . the owner at the moment of expropriation is to be deemed as without title, but all else remaining the same, and the question is what would he, as a prudent man, at that moment, pay for the property rather than be ejected from it."

Clause 6 of paragraph 4 of the said Agreement dated May 5, 1964 provides that in determining the compensation payable the two suppliant companies are to be treated as one, in that the suppliant, Florence Paper Company Limited, for such purpose is to be considered to be "the absolute owner of the lands and premises upon which the business operations are being carried on".

In my view therefore, the manner of the application of expropriation principles in interpreting clauses 3 and 4 of paragraph 4 of the said Agreement of May 5, 1964, may be stated in this way:

Both suppliant companies as of March 24, 1964 are to be deemed as without a private railway siding and rail services, but all else remaining the same, the question is what would they, as prudent persons, pay for a private railway siding and rail services until March 24, 1974, rather than suffer the consequences of such loss of private railway siding and rail services, whether such consequences involve (a) the necessity of relocating the business, or alternatively (b) operating the business without a private railway siding and rail services for ten years until March 10, 1974, or in the further alternative (c) closing down the business entirely.

In applying this principle to the facts of this case, the test is one of "loss to the owner". The owner in the case of the suppliants is the "prudent owner" in possession.

In other words, it is necessary to determine as accurately as is possible, what the suppliants would pay out in total dollars rather than be deprived of the private railway siding and rail services they had on March 24, 1964 and could expect to have for ten years after. To determine this, it is

[1] [1949] S.C.R. 712.

obvious that all factors have to be considered, and not just certain individual factors; that is all the advantages and disadvantages must be taken into consideration in reaching the decision a prudent person would make.

Having made such a determination, such a prudent person would adopt the course of action that would be least expensive in the net result. It follows therefore, that this might involve (*a*) relocation of the business (as envisaged in clause 3 of paragraph 4 of the said Agreement of May 5, 1964), or (*b*) carrying on at the Boteler Street, Ottawa plant for ten years until March 24, 1974 without a private siding, and rail services (as is envisaged by clause 4 of paragraph 4 of the said Agreement) or (*c*) closing down the business entirely.

Taking the above three alternatives in order, on the evidence I am of opinion that the respective dollar values in each case are as follows:

A. RELOCATION OF THE BUSINESS (AS ENVISAGED IN CLAUSE 3 OF PARAGRAPH 4 OF THE SAID AGREEMENT OF MAY 5, 1964).

The suppliants in their Petition categorize their claim for compensation under this heading by items number (*a*) to (i) as follows, which are now considered seriatim.

(*a*) Building

The suppliants' claim is for $450,000. Mr. Allan Kelly, real estate broker of J. Allan Kelly Realties Ltd. for the suppliants gave evidence of the value of the buildings on Boteler Street, Ottawa. His evidence was addressed to finding the value of the building only and not the land, and he did so by applying various physical depreciation rates to the various parts of the buildings after having obtained the reconstruction cost of the building from Mr. George Edmund Crain of the firm of Geo. A. Crain & Sons Ltd., contractors and engineers, namely the sum of $422,728. In doing so, he found the depreciated value of the buildings alone to be $297,000 (see Exhibit P-37). He was not qualified to speak about the functional or economic obsolescence of the building.

Mr. George A. Crain also gave evidence of the value of the building and also based his evaluation on physical

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depreciation only. He found the depreciated cost to be $302,890 (see Exhibit P-36). He knew nothing about functional or economic obsolescence of the building.

The only expert witness who had made a study and gave evidence and who took in all factors of depreciation was Mr. W. S. Button of C. A. Fitzsimmons and Company Ltd. He considered depreciation in its broad sense, applicable to all influences attaching real estate, both land and improvements that result in a lessening of value and desirability in use, a diminution in price, and similar phenomena, resulting from age, physical decay, a vast array of changing conditions in neighbourhoods, and numerous other causes, all of which are usually categorized as follows:

1. Obsolescence, or economic depreciation.
2. Loss in utility, or functional depreciation.
3. Deterioration, or physical depreciation.

He made his evaluation based on the income approach on the basis of value to the owner in that he assumed the continued occupancy of the premises by Florence Paper Company Limited. He stated, as is obvious, that the rental factor takes into consideration all types of depreciation and the rental figures he used, in my view, are quite reasonable and if anything, on the high side, so that the conclusions he comes to are probably correct and are certainly not on the low side. He found that the value of the lands and buildings as of March 24, 1964, based on the assumption that it could have been used by the Florence Paper Company Limited as a waste paper business until March 24, 1974, as $245,000; and on the assumption that it could not have been used for a waste paper operation after June 15, 1964, he found a value of $108,000 for the land only. He therefore found the value of the building on this basis to be $137,000. He also found the market value of the property for land value as of January, 1966 at $162,000 which is an increment of $54,000. In my view, if the suppliant company is to be compensated for the loss of the building, then there should be a set off based on the increased value of the land depending on whether the building is valued as having a useful life of ten years or whatever number of years is chosen. But for the purpose of these proceedings, I propose to apply such set off against the cost of demolition of the

building which the parties have agreed to be $56,000 and which is hereinafter referred to.

(*b*) Moving Stock and equipment;

(*c*) Disconnecting and installing 9 machines;

(*d*) Moving, dismantling and re-assembling 5 balers.

These claims are in the respective sums of $6,826.88, $1,179.90 and $2,930.00. The accuracy of these sums is not disputed by the respondent but because this claim is made on the basis that the suppliant company, Florence Paper Company Limited, would have to relocate in any event in ten years, then it is not entitled to the full amount of these claims but only to the present value of the same discounted at 6% for nine years which calculated are respectively $3,686.49, $637.00 and $1,420.20.

(*e*) Additional costs of operating from new site for a period of 10 years. Present worth at 6%.

This claim is in the sum of $190,038.11. The evidence of the suppliant on this claim is most unsatisfactory. It is predicated solely on the extra mileage of trucking from the new plant on the Sheffield Road as opposed to the old plant on Boteler Street to and from their sources of supply of paper and their main customer for the sorted paper. This extra mileage was pointed out to Mr. A. W. Quayle, chartered accountant by Mr. Frank Florence, Vice-President of Florence Paper Company Limited and the former made this calculation. Mr. Quayle admitted he did consider any advantages from savings that might accrue from operating in the new plant on the Sheffield Road. It is a reasonable inference in my opinion to assume that there are substantial savings in the handling of paper in the new plant which is modern and undoubtedly in it are employed the latest techniques and automatism generally must have helped to make this operation more efficient. It is also a reasonable inference that with the larger land area, the trucking in and out of the plant is much more efficient and that the new highways, and new streets and throughways contiguous to the new plant joining up most of downtown Ottawa would result in substantial economies and time which far outweigh any additional mileage. It is also a reasonable inference that there is an economy in operating from the new plant on the Sheffield Road because land cost alone to the suppliants is much cheaper.

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Clearly, there was substantial functional and economic depreciation in the Boteler Street plant, which do not exist in the new plant.

In my opinion therefore, no part of this item of additional cost has been established.

(*f*) Demolition of Building

The parties agreed that the cost of demolishing the Boteler Street building is $56,000 but as indicated above, this should be offset by the increased value of the land for the reasons stated, and so I am of opinion that nothing should be allowed under this item of claim.

(*g*) Re-financing charges

The claim is for $75,856.80. First of all the cost of the additional capital to finance the building of the new premises on the Sheffield Road which is undoubtedly superior in so many economic ways to the Boteler Street plant makes it impossible to make any practical comparison. In addition, there is no sound basis for assuming these costs will continue over the ten year period, especially when it is obvious that some monies will shortly come into the hands of the suppliants which will eliminate the necessity of borrowing some of these monies. In any event, adjustment would have to be made because interest only at 6% on this amount for the ten years is possible because the suppliant would have to meet the same problem in ten years. In my view, this item is too remote and no part of it has been proven.

(*h*) Fees, experts, consultants and legal

The claim which is for $25,230.03 which seems has already been paid; and for additional fees of at least $10,000, making a total of $35,230.03.

The claim under this heading is for work done in respect of two matters, namely, for the hearing before the Board of Transport Commissioners concerning the application for the closing of part of the Sussex Street sub-division and in preparation for this hearing. Mr. Quayle said that the solicitor's bill was solely for the matters concluding with the appearance before the Board of Transport Commissioners. He recited the wording of the bill from his firm, Riddell, Stead, Graham and Hutchison which did not tell anything because it consisted of two block bills. Mr. Quayle

was engaged preparing material for the Board of Transport Commissioners hearing and also for this trial.

In my view, none of the fees incurred for the purpose of the hearing before the Board of Transport Commissioners are allowable in these proceedings and any fees of experts that are fees in connection with the preparation for this hearing are properly chargeable only as part of the costs of these proceedings as may be awarded and taxed by the taxing officer in the usual fashion and therefore nothing is allowable under this item.

(*i*) Extra costs and losses in operating

(i) The first claim is for team track operation in the sum of $8,544.28. In my view, it should be reduced by at least 50% because among other things, there should not be required the supervision charges that are built into this item and also because I think that this operation would become more efficient than the two sample operations which were detailed in evidence, were. This results in a figure of $4,272.14.

(ii) This is a claim for the extra costs occasioned by dual operations at the two sites in the sum of $10,265.17. It is only the present value discounted at 6% for nine years which should be claimed in this item, namely, $5,544.

(iii) This is a claim for re-lettering trucks in the amount of $450. Again this should be the present value discounted at 6% for nine years or $243.

(iv) This is a claim for loss of executive time and of rental income in the sum of $33,900. The only evidence on this was hearsay evidence. It has not been proven at all. In any event, it is grossly over-inflated and bears no possible resemblance to the truth of the matter. In this connection, it is interesting to note that in the amended Petition which was made in January, 1966 this item of claim was $5,000 only.

In my view, under this heading, there is also no proof of loss of any rental income. In any event, loss of rental over the ten year period is taken into account in the evaluation by Mr. Button when he found the value of the building above referred to.

The total of all these sums is $152,802.63.

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B. CARRYING ON AT THE BOTELER STREET, OTTAWA, PLANT FOR TEN YEARS UNTIL MARCH 24, 1974, WITHOUT A PRIVATE SIDING AND RAIL SERVICES (AS ENVISAGED BY CLAUSE 4 OF PARAGRAPH 4 OF THE SAID AGREEMENT).

Mr. Albert William Quayle, chartered accountant, sometime partner of Riddell, Stead, Graham and Hutchison, for the suppliants, estimated that the yearly increase in direct annual costs to the suppliants if operating from a team track, loading and unloading paper would be $26,200, and that the impact of these additional costs on the suppliants' operating profits (before investment income and income taxes) which averaged $28,192 for the five years 1960 to 1964, would reduce this average to $1,992 for a decrease of 92.9% (See Exhibit P-63).

Mr. Quayle's estimate was predicated in the main on two test railroad car unloadings done by Canadian Pacific Railway Company in 1964. These unloadings were obviously staged for the purpose of preparing for this hearing (see Exhibits P-2 to P-17). No care was taken to make either of them a representative sample of what might occur if the team track was regularly used for loading and unloading, and in my view, all the evidence predicated thereon is unreliable and I do not accept the conclusions from the calculations made thereon by Mr. Quayle. I also do not accept any conclusions from calculations made by Mr. Quayle from hearsay evidence of the operations of Florence Paper Company Limited given to him by officers of Florence Paper Company Limited. And in so far as the same is based on the evidence of Mr. Frank Florence given in the witness box, I say it is also unreliable, because he exaggerated the difficulties of the operation, and made extravagant and unconscionable claims for compensation, and minimized the obvious greater efficiency of the new plant on Sheffield Road.

On the other hand, Mr. James Ross, in my view, gave a realistic and believable estimate of the probable additional costs to the suppliant, Florence Paper Company Limited, of operating from a team track as compared to a private siding, for a ten year period. This evidence I accept. This he estimated at $16,100 per year, after having allowed $5,000 per year for additional supervision and cost of contingencies, which is probably on the high side, or $118,000 being the present value at 6% of $16,100 for ten years (see

Exhibit D-6). Then he assumed that but for this team track expense, the five year average of profits would continue, and the income tax rate on same would continue at about 23%, and therefore with the said additional expense of $118,000 there would be a saving in income tax of approximately $27,200 so that the present value of this ten year additional cost would be reduced to $91,300. It was correct to consider the impact of income taxes in this case, because what we are considering here was a business decision, and no reasonable business man to-day would make any decision without considering the matter of income tax in the course of action decided upon.

The evidence of Mr. Ross is supported in many ways by the evidence of Mr. John Gallagher, Plant Manager of Buscombe & Doods Ltd., Toronto, a waste paper plant, who, *inter alia,* gave evidence that automation had substantially replaced the "bull gangs" of workmen, such as the Florence Paper Company Limited employed at their Boteler Street plant, (but probably not at their new Sheffield Road plant, about which operation they refrained from telling the Court), and the evidence that there were a number of waste paper plants throughout Canada and the United States that operated successfully by using team tracks and did not have private sidings or rail services to their plants.

C. CLOSING DOWN THE BUSINESS ENTIRELY

Mr. James Ross, for the respondent, also computed the value of the business of Florence Paper Company Limited as a going concern, predicated on the five year average of profits (1960-64) of $28,200, before income taxes and any investment income, on the assumption from his knowledge and experience which is substantial, that a purchaser would want a return on his investment of about 12½%. He computed this at $225,000, which figure includes goodwill at about $75,000 and all other assets such as cash on hand, accounts receivable, inventory, but no lands or buildings.

So much for the details of how these three alternatives work out in dollars and cents.

The question is which of these alternatives would Florence Paper Company Limited as a prudent owner, based on the premises earlier stated, choose as of March, 1964. It

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is clear that any reasonable consideration of these proposals would lead them irresistibly to the conclusion that they should remain in the Boteler Street premises for the ten year and operate from a team track. This would be the only sensible business decision.

There are many reasons why the suppliant, Florence Paper Company Limited, herein did not make this choice but, in my view, they are unrelated to the loss of the private railway siding and rail services. For example, they obviously were aware that they could not carry on forever relying on obtaining and using $1.05 to $1.65 labour. The evidence of Mr. Quayle was that there was only one person paid $1.65 and the others' wages ranged from $1.05 to $1.40 and that the wages paid by Florence Paper Company Limited were 23.4% less than those paid in comparable industries in the Ottawa area. They obviously must have considered that they could not rely for too much longer on the "bull gang" as opposed to automation by using lift trucks, conveyor belts and other modern equipment. They knew that their Boteler Street plant could not be adapted to use this modern equipment. They knew that substantial functional depreciation, and economic depreciation had taken place. They also would consider that this cheaper site which they got at a most reasonable price from the National Capital Commission would in the long run effect further economies in rental alone. In addition, they knew that more economies would result because of the larger land area resulting in easier manœuverability of incoming and outgoing trucks. They also knew that they could more efficiently handle paper in a new plant especially when they incorporated the new techniques carried out in other more modern plants in Canada and the United States in their new building and obtained the services of an architect to make certain that they had a modern efficient and more functional building. These are some, but there were undoubtedly many other reasons why they decided to relocate, which again are unrelated to the issue in this action.

In my view therefore, the suppliants are entitled to compensation under clause 4 of paragraph 4 of the said Agreement made between the parties dated May 5, 1964 which I find to be in the sum of $91,300.

The suppliants also raise the issue of estoppel in paix against the respondent.

To constitute any estoppel in paix requires certain constituent elements: firstly "in order to constitute a representation on which an estoppel may be founded, the statement must be one of 'existing fact' "[1]; secondly, "There must have been an intention, actual or presumed, on the part of the representator to induce the particular representee, . . . to act upon the representation . . ."[2]; and thirdly "The onus is on the representee to prove that the belief ultimately entertained materialized in conduct, and caused him to act upon the representation in a manner prejudicially affecting his temporal interest."[3]

In my view, firstly, there is no representation within the meaning of that term as used in estoppel jurisprudence. The National Capital Commission's Statement of Policy on Industrial Relocation Resulting from the Railway Relocation Plan attached to the Agreement dated May 5, 1964 (Exhibit P-29) was supplied to the suppliants long prior to any decision of them to relocate and it does not say anything about the suppliants having to relocate, nor does the Order-in-Council dated March 12, 1964 authorizing the sale to the suppliants at a discount of 20% the six acres on the Sheffield Road industrial area. The suppliants were free to make their decision to relocate or not and the Order-in-Council had nothing to do with the suppliants' decision. The letter of the National Capital Commission under the signature of D. L. McDonald, Director of Planning and Property dated December 12, 1963 to Mr. F. H. Florence of the suppliant company, Florence Paper Company Limited (see Exhibit P-44) does not in my view state that the National Capital Commission was of opinion that the suppliants had to relocate. Mr. McDonald would have no means of knowing whether or not there was any necessity to relocate by the suppliants as he was merely in charge of selling property to persons who made representations to the National Capital Commission that they were required to relocate.

Secondly, there was no intention on the part of the National Capital Commission to induce the suppliants to act. The National Capital Commission was merely selling land at 20% to persons who had lost rail services. The issue of whether it was necessary to relocate or not was not the

[1, 2, 3] (see Spencer Bower and Turner, *The Law Relating to Estoppel by Representation*, Second Edition, Butterworths, 1966, pp. 29, 89, 96)

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subject of any representation on its part in so far as the suppliants were concerned. This is amply proven by the letter from the solicitors for the suppliants Florence Realty Company Limited addressed to the National Capital Commission dated May 14, 1964 (Exhibit P-71 (*f*)) wherein it is unequivocally stated that at the meeting of the shareholders and directors of that company it was at that time decided to purchase certain lands from the National Capital Commission in the Sheffield Road area which was being set up as an industrial area.

Thirdly, there is no evidence at all that the National Capital Commission in any way induced the suppliant, Florence Realty Company Limited, to act and certainly no evidence that that company paid any attention to relocate as a result of the said letter from Mr. McDonald dated December 12, 1963 (Exhibit P-44). The evidence of how the decision was arrived at is again contained in the said letter from the solicitors of that company to the National Capital Commission dated May 14, 1964 (Exhibit P-71 (*f*)). This decision was reached after the execution of the Agreement between the parties dated May 5, 1964 and by reason of the inclusion of both clauses 3 and 4 of paragraph 4 in that Agreement, it is clear that the parties felt that the issue of relocation was still open and was a matter that might subsequently be the subject of a hearing to determine compensation such as is the case in these proceedings.

As discussed earlier in these reasons, why the suppliants relocated was for many other reasons personal to them, and entirely divorced from anything said or done by the National Capital Commission in this regard.

The suppliants also claim interest in the amount of compensation awarded from June 1, 1965 until the date of judgment.

Interest is only allowed against the Crown on the ground of express or implied contract or by virtue of a statute. (See *The King v. Adam B. MacKay*[1]). Neither is present in this case.

In any event, this is a claim for unliquidated damages, and the rule is that interest does not run upon them until they are assessed.

Accordingly, no allowance is made for interest.

[1] [1930] S C R. 130.

The suppliants also claim costs.

In these proceedings pursuant to rule 104 of this Court, the respondent on February 21, 1966 made confession of judgment in the amount of $100,000 in satisfaction of all claims arising out of the said Agreement between the parties dated May 5, 1964. Therefore, the provisions of rule 105 apply.

In the result, therefore, there will be judgment declaring that the suppliants are entitled to compensation in the sum of $91,300 with a set-off for costs in favour of the respondent pursuant to rule 105 of this Court.

BETWEEN:

HAZELDEAN FARM COMPANY LIMITED ..... APPELLANT;

AND

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

Ottawa 1966

June 6-8, 24 & 28

Sept. 30

Income tax—Company with farming objects purchasing land—Whether possible sale contemplated—Sale of lots over long term—Sale of remainder—Whether trading transaction.

In 1944 the three promoters of appellant company bought a 619 acre farm on the outskirts of Ottawa for $26,500, transferred it to appellant company which they incorporated with the declared object of carrying on farming. The company subdivided 67 acres of river frontage into 187 lots and 120 of these and in addition other parcels totalling approximately 70 acres were sold to various purchasers over the next 14 years. The remaining property was leased to two farmers successively at annual rentals ranging from $500 to $850 a year until 1959, when it was sold to the National Capital Commission. Appellant company was assessed to income tax of $145,336 on the price received for the land sold in 1959.

Held, the profit on the sale of the land in 1959 was not taxable. The inference to be drawn from the evidence was that appellant did not have the intention of selling the land at a profit when it acquired it.

Paul Racine, Amédée Demers, François Nolin v. M.N.R. [1965] 2 Ex. C.R. 335; [1965] C.T.C. 150 at 159; [1965] D.T.C. 5102, referred to.

Practice—Exchequer Court Rules 146 and 147—Notice to admit facts—Making admissions part of record at trial—Procedure.

1. The reply to a notice to admit documents or facts pursuant to Exchequer Court Rules 146 and 147 should together with the notice be filed at the trial as part of the case of the serving party in order (*a*)

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to prove a fact whether admitted absolutely or qualifiedly, or (*b*) to prove refusal to admit in order that an application for costs may be made under the Rules.

2. Where the admission is qualified the opposing party should when filing it elect for the record whether he treats it as a refusal to admit.

3. A document admitted pursuant to notice under Rule 146 may be tendered as an admitted document. Documents, plans or schedules mentioned in the reply to a notice to admit facts should also be tendered as admitted. In such case, to avoid unnecessary costs, the document should not be proved by a witness.

4. Where a document has not been admitted pursuant to a notice to admit the notice and the reply may be filed in order to found an application for costs under Rule 146.

5. If there has been no reply to the notice to admit documents or facts service of the notice and of the failure to reply must be proved to found an application for costs under Rule 146 or 147.

6. Questions as to the relevancy or otherwise as to admissibility of the evidence should be raised when the evidence is submitted.

7. A party who has failed or refused to admit a fact or a document should ask the court prior to the completion of the hearing to certify that the refusal to admit was reasonable on penalty of paying the costs of proving the fact or document.

APPEAL from a decision of the Tax Appeal Board dismissed for want of prosecution.

Hyman Soloway, Q.C., C. S. Bergh and *David McWilliam* for appellant.

G. W. Ainslie and *Bruce Verchere* for respondent.

NOËL J.:—This is an appeal from a decision of the Tax Appeal Board, dated October 21, 1964, dismissing the appellant's appeal for want of prosecution from an assessment to income tax dated November 8, 1960, whereby a tax in the amount of $145,336.37 was levied on the appellant's income for its 1959 taxation year. The sole issue in this appeal is whether the profit arising from a sale made by the appellant in 1959 of certain real property was income or a capital gain.

In the early part of the year 1944, three Ottawa citizens, Louis Baker, Alexander Betcherman and the latter's brother, Meyer Betcherman, who had been partners in the scrap business, purchased from J. R. Booth, through a real estate agent, Clayton Fitzsimmons, a farm located in the area

now known as Crystal Beach or Crystal Bay, and situated at the time some six or seven miles from the western outskirts of the City of Ottawa. This property was acquired for the sum of $26,500 and included, according to the deed (Ex. A-3), some 708 acres of land (which however appear from the evidence to be less than this amount, i.e., 619.3 acres) with buildings and equipment. The northern part of this land (67 acres) fronted on the Ottawa River. Highway 17 runs through the property and almost bisects it with land on both sides of this road. The purchase included the land and buildings and certain stock in trade which had been used by the J. R. Booth family as a farm. In the summer of 1944 an application for a plan of subdivision (No. 444) of the northern part of the farm abutting the Ottawa River was made, filed and registered on November 16, 1944.

The appellant was incorporated in Ontario under the name of Hazeldean Farm Company Limited in the fall of 1944 and letters patent were issued on September 23, 1944. The objects of the appellant are as follows:

> to operate and carry on the business of farming, gardening, dairy producing and the raising of horses, cattle and dairy stock including buying, selling, distributing and generally trading by wholesale or retail, all kinds of farming and dairy products, cattle, horses, sheep and all materials and products used or which can be used or are usually used or are usually employed in connection with such business as aforesaid.

By an indenture dated October 13, 1944, Louis Baker, Alexander Betcherman and Meyer Betcherman, sold to the appellant for the sum of $20,000 the farmlands and premises situated in the Township of Nepean comprising 619.3 acres, although the total consideration for the assets of land, buildings, equipment and goodwill owned by the three partners was $50,000 in return for the shares of the corporation which were held equally by the three principal shareholders, Louis Baker, Alexander Betcherman and Meyer Betcherman.

For a proper understanding of the various transactions which took place with regard to the appellant's property, it will be useful to reproduce hereunder a plan showing the various parcels of land involved in this appeal and produced as Ex. R-1.

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One hundred and twenty of the 188 river abutting lots of plan No. 444 were sold over a period of 14 years and 67 were taken over by the National Capital Commission, in 1958, or an average of eight lots a year, at an average price of approximately $500 a lot for a total price of approximately $60,000 as follows: 13 lots were sold in 1944 at a total price of $6,650; 23 lots in 1945 at a price of $8,000; 16 lots in 1946 at a price of $5,850; 5 lots in 1947 at a price of $2,300; 13 lots in 1948 at a price of $4,425; 10 lots in 1949 at a price of $5,600; 6 lots in 1950 at a price of $4,300; 5 lots in 1951 at a price of $2,615; 5 lots in 1952 at a price of $2,675; 2 lots in 1953 at a price of $1,200; 9 lots in 1954 at a price of $5,600; 6 lots in 1955 at a price of $4,900; 2 lots in 1956 at a price of $3,000; 2 lots in 1957 at a price of $3,000 and, finally, 2 lots in 1958 at a price of $2,000.

The appellant also sold a number of lots from its land south of subdivision No. 444 as follows:

Purchaser	Date	Lots	Price of Sale
H. McDowell	14 Nov. 1944 reg. 16 Dec. 1944	5 acres of land situated on the right bottom and marked as No. 1 on Ex. R-1	$1,250
H. McDowell	8 May 1945	1 acre, marked as No. 2 on Ex. R-1	$ 250
Isobel M. McDowell		4.35 acres marked as No. 3 on Ex. R-1	$ 900
F. A. Fleming & D. M. Fleming	15 Nov. 1946	50 acre parcel marked as No. 4 on Ex. R-1 (which was sold to the following):	
E. Glatt & A. L. Achbar	19 June 1953		$8,000
P. V. Little	18 Oct. 1948 Agreement to sell to P. V. Little assigned by the latter to one Gadbois and then to:	10 1 acres marked as No. 5 on Ex. R-1	
A. L. Achbar & E. M. Glatt	on June 16, 1954	for	$2,500
Board of Trustees of the Roman Catholic Separate School	29 Feb. 1952 reg. May 7, 1952	parcel of land adjacent to lot marked as No. 7 on Ex. No. 7 on Ex. R-1	$ 900

PLAN

SHOWING

EAST HALF LOT 7, LOTS 8, 9 & 10 CONCESSION 'A' OTTAWA FRONT
PART OF LOTS 8, 9 & 10 CONCESSION I OTTAWA FRONT
TOWNSHIP OF NEPEAN
COUNTY OF CARLETON

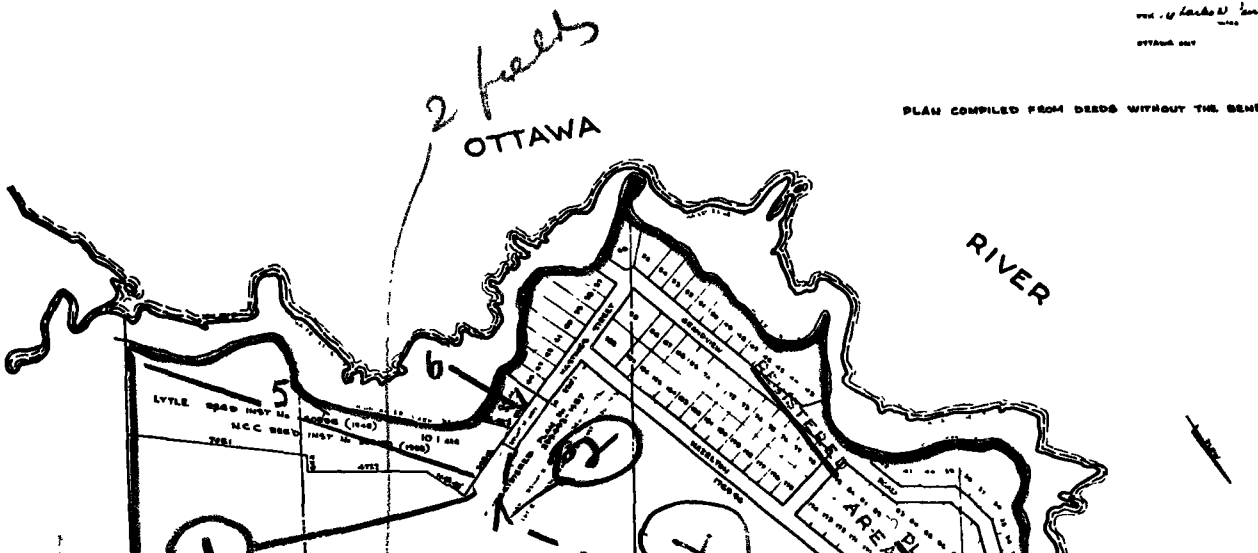
SCALE 1in = 200ft

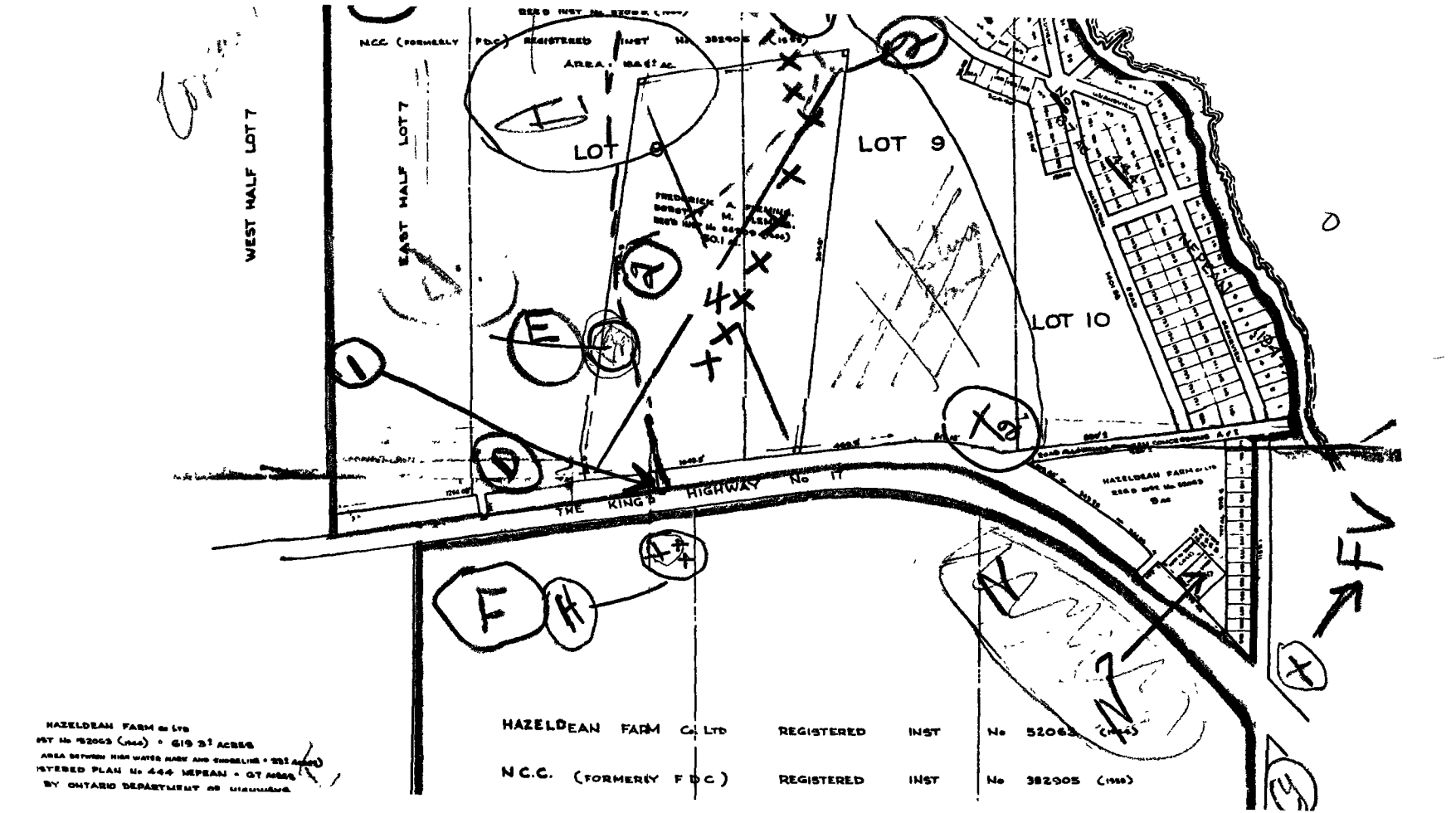
R-1

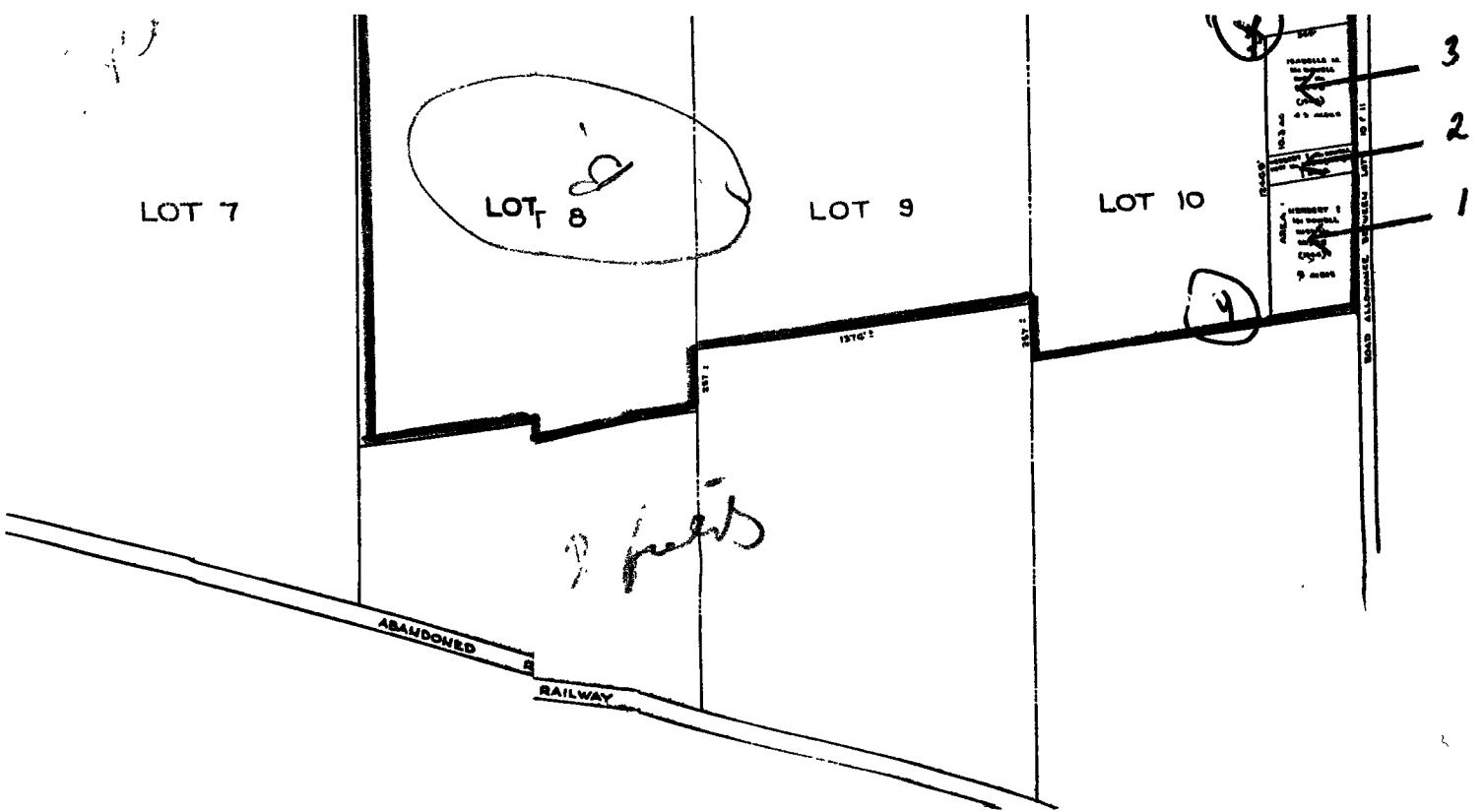
Schedule A

H. ROSTIE MacLEAN & FAIRHALL
ONTARIO LAND SURVEYORS.

PLAN COMPILED FROM DEEDS WITHOUT THE BENEFIT OF FIELD WORK.




WEST HALF LOT 7
EAST HALF LOT 7
LOT 8
LOT 9
LOT 10
AREA 18.61 AC.
N.C.C. (FORMERLY F.D.C.) REGISTERED INST No 382905 (1960)
THE KING'S HIGHWAY No 11
HAZELDEAN FARM & LTD
INST No 52063 (1944) • 619.21 ACRES
AREA BETWEEN HIGH WATER MARK AND SHORELINE • 23.1 ACRES
REGISTERED PLAN No 444 NEPEAN • 0.7 ACRES
BY ONTARIO DEPARTMENT OF PLANNING
HAZELDEAN FARM & LTD REGISTERED INST No 52063 (1944)
N.C.C. (FORMERLY F.D.C.) REGISTERED INST No 382905 (1960)


LOT 7
LOT 8
LOT 9
LOT 10
ABANDONED
RAILWAY
3
2
1

The appellant then sold two lots situated next to plan No. 444 and marked as No. 6 on plan No. 289493 registered on March 15, 1951, as follows:

Purchaser	Date	Lots	Price of Sale
S. B. Handleman	20 March 1953	2	$1,000
C. A. Boggild F. A. E. Boggild	reg. 29 March 1953	1	$2,000

Starting in the year 1954 and up to the year 1959, a number of attempts were made by a corporation called Glabor Realty Limited which was in the business of subdividing, developing and trading in land, and of which Emmanuel M. Glatt, the president of the appellant, was part owner, to obtain approval of several subdivision plans comprising, in some cases, land belonging to the appellant which, however, according to Glatt, the owners of the shares of the appellant knew nothing of. One only of these attempts was successful, (Ex. R-6), in 1957, but was not acted upon. Glatt and the shareholders of the appellant all stated that the shareholders of the appellant had no knowledge of the inclusion of the appellant's land in these plans or of the steps taken to have the property subdivided and were annoyed and opposed to their inclusion.

The evidence of Glatt that the appellant's shareholders knew nothing of the inclusion of some of the appellant's land in the subdivision plans, is not too satisfactory nor convincing and these attempts to subdivide must be considered in order to enable a total and complete examination of the conduct of the taxpayer for the purpose of drawing inferences as to what was the original intent of the purchaser. The fact, however, that these attempts to subdivide, which started in 1954 and ended in 1959, occurred between 10 and 14 years after the purchase of the property and long after the original partners had either died or left the corporation greatly reduces whatever significance this evidence might otherwise have had. One sole attempt to subdivide, however, was made in 1957 by the appellant for the purpose of opening Hazelton Road as an extension of No. 444, and although this plan provided for future extension as mention is made of "Block B" and "Block C" both of which were reserved for a future street which indicates, of course, that the sale of future parcels of land encroaching upon the

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farmlands were then contemplated, this also took place in 1957, long after the purchase of the property.

The appellant's land was then sold to the National Capital Commission when a 60-day purchase-compensation option dated October 1, 1958, executed by the appellant was accepted by the Federal District Commission on October 1, 1958.

It therefore appears that of a total acreage of approximately 619.3 acres, subdivision plan 444 contained 67 acres, i.e., 187 lots, of which 68 had remained unsold in October 1958, when the Federal District Commission exercised its option to purchase. The Fleming parcel (marked as No. 4 on Ex. R-1) contained 50 acres, the three McDowell parcels (marked as Nos. 1, 2 and 3 on Ex. R-1) contained a total of 10.35 acres and the Little property (marked as No. 5 on Ex. R-1) contained 10.1 acres.

The balance of the property, i.e., approximately 481.85 acres, therefore, remained available for whatever the owners could use it for. According to Fitzsimmons, the real estate agent who sold the land to the incorporators of the appellant corporation "of the 600 acres, approximately 200 acres was considered to be tillable. The rest would be described as bush land and rocky where, however, cattle would graze". The appellant claims that the remaining land was used for farming and grazing from the date of the purchase in 1944 to the date it was taken over by the Federal District Commission in the fall of 1958, i.e., a period of some 14 years.

The evidence discloses that the farmlands purchased by the three partners, Louis Baker, Alexander Betcherman and Meyer Betcherman, were indeed operated as a farm by them and subsequently by the appellant corporation when the three partners transferred their interest to the latter. Although both Alexander Betcherman and his brother, Meyer, knew nothing of farming, Louis Baker had had some experience on farms prior to his arrival in this country sometime after the turn of the century and had owned and operated, although unsuccessfully, a farm in Cantley, Quebec, in the years 1908-1911.

A Mr. Samuel Whetherton, who was hired by Louis Baker to work the farm, remained there for four years. He

states that when he moved to the farm with his family in 1944, there were two or three fields of barley (10½ acres) which had to be harvested, two on the north side of highway 17 and one on the south side (10 acres) and a field of 12 acres of corn. The barley field on the northside did not appear satisfactory and Louis Baker obtained assistance from the Department of Agriculture. Samples of the ground were obtained and a fertilizer was supplied which resulted in what Whetherton stated was a wonderful crop. The barley was fed to the cattle and most of the oats was sold.

Whetherton, with his family, lived in the farm-house which was on the property, where there were a stable, a barn, a pig-pen and a garage or shed. There was an old henhouse and he built a new one. There were also, at the time, over 70 head of cattle, all beef shorthorns, and six or eight sows, and Baker purchased a registered boar with the result that in 1945, there were 82 pigs and the offspring were sent to market; there were also four horses, a black team and a white team. The second year Whetherton was on the farm, Mr. Baker purchased turkeys and geese.

In 1945, all the young cattle (steers) were sold and the older ones retained to raise stock. In 1945, there were on the farm approximately 38 to 40 cows and calves.

In 1946, the pig stable was turned into a hen-house and a couple of thousands of chickens were raised on the farm instead of pigs on the instigation of Alexander Betcherman, another partner, who did not like pigs and who, according to Whetherton, came often to the farm. The choice chickens were killed off and sold and the pullets were retained for laying and a considerable number of eggs were sold. A good number of the geese died in a wind storm in 1945. Five or six dozen turkeys bought by Baker were raised by Whetherton and then sold.

Louis Baker never lived on the farm but was there often. The first couple of months after the arrival of Whetherton, he was there sometimes twice a day but after he would come twice a week. Whetherton was paid a salary for his services of $100 a month and given free milk and meat and his wife kept one dozen of eggs for every ten dozen she would collect. He was directed by Louis Baker with regard to what he had to do and as to what was to be grown or

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raised on the farm. Whetherton, who was raised on a farm, stated that from his knowledge and his observation of Mr. Baker, the latter knew quite a bit about farming and was very interested in farming and cattle.

During the four years Whetherton was on the farm, from 1944 to 1948, close to 300 acres of land was cultivated in the sense that hay was cut and the land was worked and the cattle grazed in the pastures.

Whetherton described the nature of the area in which this farm was situated during this period as having farms on both sides with three farms between the Hazeldean farm and Ottawa. There was a streetcar that came out to Britannia Bay and Whetherton would get to the bay by means of a horse-drawn wagon, a distance of some 3 miles. Between Britannia Bay and Westboro, there were, according to Whetherton, not many houses nor much development at the time "just bush and grown-up stuff until you crossed the highway at Woodroffe". Going west towards a sawmill and the Hazeldean farm, there were, in 1944, four or five cottages before crossing the railroad track and on the beach there were also a few houses. When he came to the farm in 1944, there was not too much equipment and in the fall of 1944, Baker bought a new manure spreader and on May 1 of the following year, he bought a big new tractor. In the summer of 1945, he bought a combine, one of the first automatic ones in the area. He states that he built some fences at Baker's request to keep the cattle in.

Whetherton remained on the farm until Mr. Baker took ill sometime in 1947 or 1948 when he was told either to look for a job elsewhere or rent the farm. He, however, left to take another job.

Prior to his departure, in 1947 or 1948, most of the machinery was disposed of by auction and the livestock was taken by the butcher.

It was in the course of the year 1948, when Louis Baker's health was failing, that the latter and his two partners, the Betcherman brothers, decided to divide their holdings and as they held another property in common, an apartment building called the Athlone Apartment, situated on McLaren Street, in Ottawa, it was agreed that the Betcherman brothers would take the apartment building and

Baker would have the farm. Alexander Betcherman explains this at p. 294 of the transcript:

> Q. You met him and you decided to take the apartment in the city?
>
> A. Well, I had the preference. He is a farmer. He knew more about land than I did and I figured it would be the best thing for him so he took the farm and I took the apartment.

In April 1948 the appellant, through Louis Baker, leased the farm to one David Corrigan, a farmer who remained thereon for 19 years and is still living there. The first lease, Ex. A-11, was dated March 10, 1948, and was for a term of four years from April 1, 1948. The second lease, dated May 1951, was of one year and was renewed from year to year. Corrigan stated that when he took over the farm in 1948, there wasn't as much ploughed as was advertised in the newspaper but that there were some 25 to 26 acres ploughed. His description of the farm is that "on the west side near Davidson, there is 100 acres there as good a land as the sun ever shone on and on the other side it is log land".

When Corrigan leased the farm he bought a grinder and a seed drill from Mr. Glatt, the appellant's president and in July bought the combine. Corrigan made the arrangement with Mr. Glatt and it was approved by Mr. Baker who was then in the hospital.

When Corrigan arrived on the farm in the spring, the farm had been idle from the preceding fall and there was no livestock. Baker, in 1948, came out of the hospital and would visit Corrigan sometimes twice a week and, according to the latter, remained interested in the farm as on these visits he would remain talking to Corrigan for long periods of time. "I suppose it was he would like to get out to the farm, there is no doubt about that. His heart and soul was in the farm. He was always enquiring every time you were in the office about the farm". He added that Louis Baker had quite a bit of knowledge of farming and had an interest in everything "more so than practically any other landlord would have".

Baker offered to lend Corrigan money to buy cattle and stock the place and loaned him $1,000 to repair the barn and make it possible to house dairy cattle. Baker then, in 1948, obtained pipes to put in a water system and a 500 gallon water tank was supplied and water boles were set up

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in the barn. Corrigan paid the appellant $500 a year plus $250 a year in reimbursement of the $1,000 loan, which took four years to repay. He states that in 1948 the area was a farming area and he raised a good number of cattle in which Louis Baker maintained a lively interest. The latter died sometime in the year 1949 and the shares in the appellant from then on were held equally by Jacob Baker (Louis Baker's brother), Lena Glatt (Emmanuel G. Glatt's wife and Louis Baker's daughter), Harry Baker and Jack Baker (Louis Baker's two sons). It is at this stage that Glatt became president of the appellant corporation in which he held one qualifying share.

When Corrigan leased the property there were two cattle barns on the property and also a log hen-house which burnt in 1951.

Sometime around 1956 one of the barns was destroyed by fire and upon Corrigan's request, the appellant, through Mr. Glatt, agreed to rebuild it at a cost of $5,300, supplied by Mr. Glatt (Ex. A-18) from an amount of $13,000, the proceeds of a fire insurance policy. It was rebuilt ten feet larger than the former barn and the appellant paid the difference.

Corrigan paid a rental of $500 a year for the first four and possibly six years and then his rent was raised to $850 a year. He now pays the National Capital Commission $750 although there is 70 acres less.

During the ten years he spent on the farm, from 1948 to 1958, date of the acquisition by the National Capital Commission, he never saw any sale signs on the farm portion of the property. He admitted, however, that there were many people looking for lots adding: "I referred them to Mr. Glatt. He never sold any. There was a choice of lots there right on the south side. There was hundreds in looking to it just on the height of the land there and there was a lot of people desired to build there but never sold".

The statements of profit and loss for the farming operations of the Baker-Betcherman partnership from February 1, 1944 to September 30, 1944, as well as for the appellant's farming operations for the years 1944 to 1948, although indicating considerable farming activity, disclose an operating loss for each year of the above period.

The partnership statement (Ex. A-32) shows purchases of livestock and sales thereof and although a gross profit of $766.76 is shown, as expenses charges and taxes exceed the profit, a net loss of $2,466.49 is shown for the period.

The statement for the year 1945 (Ex. A-25) shows sales of $2,526.47 with cost of sales of $2,241.83 disclosing, therefore, a gross profit of $284.64 against which expenses of $5,852.69 must be deducted, thus showing a loss of $5,518.05.

The 1946 farming operations show sales of $5,184.73 and cost of sales of $442.79 with a gross profit therefor of $4,205.94 from which expenses must be deducted, thus disclosing a loss of $1,847.72.

In 1947, sales were in an amount of $8,543.12 and the cost thereof was $9,562.19, showing a gross trading loss of $1,018.98, to which must be added expenses of $6,762.93, thus giving a loss of $7,781.91.

In 1948 the statement discloses sales from farming and lumbering activities of $7,568.74 with cost thereof of $7,557.88, giving a gross profit of $10.86 with expenses of $3,310.57, thus disclosing a loss of $3,299.71.

Exhibit R-12, on the other hand, which contains the figures setting forth sales of land less cost of land, cost of sales and development costs, indicates that for each of the years involved, there was a profit. There was a gross profit of $9,906.59 for the year 1945, $7,475.40 for 1946, $6,006.44 for 1947, $5,309.60 for 1948, $5,190.26 for 1949, $2,175.24 for 1950, $1,760.73 for 1951, $3,427.07 for 1952, $3,063.17 for 1953, nil for 1954, $6,238.50 for 1955, $3,858 for 1956, $3,858.01 for 1957 and $1,231.28 for 1958.

It is against the above background that the respondent has assessed the appellant.

Although there have been many decisions as to whether profits on the sale of land are of a capital or income nature, it is still practically impossible to define with certainty the boundary line between income and capital gains. A solution to many of these problems has been found in a combination of factors, such as the intent of the taxpayer, the fact that it was an isolated transaction, the relationship to the taxpayer's ordinary mode of business and the nature of the transaction, each of which alone may not lead to inferences of trade but which, taken together with many other

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circumstances in their totality, may convince a court that the transaction under investigation is one of a capital nature.

To ascertain here whether the profits made by the appellant with respect to its farmlands are profits from a venture in the nature of trade, it is necessary to ascertain whether the exclusive purpose in the appellant's mind when it embarked on the acquisition was to exploit it as a farm or whether it was acquired also with a view to reselling it at a profit depending on the opportunities that would arise.

There is no question that the 67 acres of water frontage were purchased for the purpose of reselling them at a profit and that is what the appellant did consistently from the year of acquisition 1944 to 1958, when the land was sold to the National Capital Commission.

The only matter remaining is, therefore, to determine whether having embarked upon the purchase and sale of the 67 acres abutting the river (which is less than 10 percent of the total area purchased) as it did was the appellant's intention as far as the balance of the land was concerned, exclusively to farm it, or had it a dual intent as suggested by counsel for the respondent of holding this land and developing it until it became ripe for profitable disposition and in the interim deriving some income from some farming activities and rental of the property.

In considering the question whether the appellant had, at the time of acquisition, what is sometimes referred to as a "secondary intention" to resell the farmland when circumstances made that desirable, it is important to consider (as I had occasion to mention in *Paul Racine, Amédée Demers, François Nolin v. M.N.R.*[1]) just what that involves. It is not sufficient to find merely that, if the purchaser had at the time of the purchase, stopped to think about it, he would have had to admit that, should a sufficiently strong inducement be presented to him at some time after acquisition, he would resell.

As mentioned in the above case:

> ...Every person buying a house for his family, a painting for his house, machinery for his business or building for his factory would be obliged to admit, if the person were honest and if the transaction were not based exclusively on a sentimental attachment, that if he were offered a sufficiently high price a moment after the purchase, he would resell.

[1] [1965] 2 Ex C.R. 335; [1965] C.T.C. 150 at 159; [1965] D.T.C. 5102.

It therefore appears that the fact a person purchasing property for some capital purpose could be induced to resell if a sufficiently high price were offered to him is, however, not sufficient to turn a capital acquisition into a venture in the nature of trade. It is not a "secondary intention", if one chooses to use that terminology. To give a capital acquisition transaction the dual character of being at the same time a venture in the nature of trade, the purchaser must have had at the time of the acquisition, the possibility of resale in mind as an operating motivation for the acquisition. As a finding that such motivation existed will have to be based on inferences from the surrounding circumstances rather than direct evidence of what was in the purchaser's mind, the whole course of conduct of the appellant has to be examined and assessed.

When a taxpayer has, upon purchasing a farm, sold over a period of 14 years, 123 river lots for approximately $60,000 and approximately 60 acres of choice farmland and has retained 80 percent of the land on which it has farmed, the eventual sale of the farmland, and the inferences drawn from the farming operations tend to become somewhat muddied by the trading operations of the river lots as well as the sales made of the farmland.

It then takes very cogent evidence indeed to clear up the murky waters in order to find, if the evidence so enables, a true and sole intent on the part of the taxpayer to farm that part of the land retained for 14 years and on which farming operations were conducted and farming rental revenue was received during that period of time.

The farming intent here of the appellant can be found only in the actions and intent of its incorporators Louis Baker and the Betcherman brothers and it is through these people only, and in their conduct, that a solution lies.

When, however, one has regard to the fact that the taxpayer is a closely held company none of whose shareholders or officers had, at any time prior to the transactions under review, speculated in real estate (the Baker brothers were engaged in the distribution of lumber and the purchase and resale of scrap material and the Betcherman brothers were in the scrap business only) and to the fact that its shareholders and officers, one of whom had a background of farming, out of an avowed inclination and desire to farm

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and carry on as gentlemen farmers (this was corroborated by Mr. Fitzsimmons, a real estate broker), caused it to buy a large area of farmland, situated some seven miles from the outskirts of a city, together with all the equipment and stock comprising 80 head of cattle, with the declared purpose of farming, and to the fact that farming operations were carried on on the farm by the corporation itself for four years (although without making any profits) and then because, through illness, the main incorporator, Baker, was no longer able to supervise the farming operation, by a tenant farmer from whom a rental was obtained commencing at $500 a year and subsequently increased to $850 a year, and to the fact that, such land acquired in an area at some distance from a metropolitan area was (notwithstanding numerous requests from potential purchasers) held for 14 years and then sold to the National Capital Commission because of anticipated expropriation, the almost irresistible inference must be that the taxpayer did not have in mind as an operating motive, when it acquired the land, the idea of selling it at a profit.

Retention of the land for 14 years by the appellant was, however, subjected to a strong attack on the part of the respondent in that refusal to part with the farmland during this period would be equally consistent with the view that the incorporators also had a speculative intent because, under the provisions of the *Ontario Planning Act,* when an area has reached the stage where it is covered by a subdivision control by-law (and Ex. R-31 indicates that on August 31, 1947, all of the northerly and southerly portions of the appellant's land were covered by a subdivision control by-law) then one is prohibited from selling any parcels of land less than 10 acres in size unless it is from a registered plan of subdivision. If the appellant had wanted to start selling any frontage on the highway, for instance, there would be a prohibition unless it registered a plan of subdivision and, if such a plan was registered, taxes on the property would jump considerably. Respondent suggested that it would, therefore, be more advisable to work on the scheme whereby the appellant would try to dispose of all land on No. 444 before subdividing any further portions of its lands.

There appears to me to be a simple answer to the above submission in that numerous witnesses stated that from the

year 1945 up to the actual sale of the property, and particularly during the life of Louis Baker and up to his death in 1949, there were a great number of requests by people interested in purchasing lots. Had the appellant wanted to enter into a plan of disposing of lands by way of subdivision, or otherwise, there was ample opportunity for it to do so particularly during the years 1944, 1945 and 1946 when there were no subdivision restrictions nor zoning or control by-laws. The lots were in such demand during that period, or even later, that their sale would have enabled the appellant to sell parcels of land or even subdivide profitably without incurring municipal taxes. The holding of the land by the appellant under these circumstances would be consistent with the appellant's intent to use it for farming purposes.

Both of the leases to Corrigan contained a clause reserving appellant's right to sell any portions of concession I closely abutting the highway with a *pro rata* reduction of rent according to the acreage sold which, of course, would tend to indicate that at this stage, i.e., four years after the purchase and at a time when Louis Baker was ill, the incorporators were giving some thought to the possibility of selling some of the highway abutting farm lots. They, however, made no sales of these parcels of land although, as already mentioned, they could well have done so in view of the numerous people interested in purchasing lots and the above clause must, under these circumstances, be considered as a simple measure of caution.

The intent of the appellant to retain the land for farming purposes or for whatever rental it could get from it is further confirmed by the manner in which it dealt with the farm section of its property. As late as in 1956, one of the barns burnt down and although the appellant had no obligation to rebuild it, it spent $5,300 of the insurance monies received to have it rebuilt on a larger scale. In 1957, the buildings were repainted and money was expended to provide a watering system for the purpose of breeding cattle or for irrigation purposes and this also is consistent with the purpose for which the farmland was acquired originally.

Now, although losses were sustained in the appellant's farming operations, this is not too surprising as in most

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cases where gentlemen farmers are concerned, the monetary profits are never too rewarding. Mr. Baker and Mr. Betcherman gratified their desire to farm and this was their sole intention of running this farm as a hobby, of being able, with their family, to go there on weekends or Sundays and of allowing Mr. Baker, who had had an interest in farming for a long time, to keep up this avocation. The evidence discloses that the initial investment in the farming end of the land was substantial and considerable funds were invested in livestock, fowls, equipment and in tilling the soil and ploughing many acres and this sufficiently indicates the seriousness of the interest of the principals of the appellant in farming.

The speculative intent of the original incorporators is further negated in that it is most unlikely that they could have foreseen, in 1944, the changes that would take place in relation to this land located some six to seven miles from the city of Ottawa, surrounded by farms with no subdivision of land adjacent, close to only a small settlement of mostly summer cottages and with no transportation facilities. It appears to me that one would have had to have an amazing degree of prescience to have foreseen in 1944 the creation of the Green Belt in the west part of the city, the actual boundaries of which were defined in 1953 only. If Fitzsimmons, a man engaged in the real estate business for a great many years, and the Booth people, had had that foresight, they would not have accepted an offer of $26,000 for the property.

The statement of the sole surviving incorporator, Alexander Betcherman, that when the purchase was made the sole intention of the incorporators was to farm it as gentlemen farmers and that this was their sole motivation at the time, has remained uncontradicted; nor was he cross-examined on this point and, therefore, given an opportunity of accepting or meeting a conflicting version of the reasons given to justify or explain this transaction.

Furthermore, there would seem to be here no surrounding circumstances from which the inference could be drawn that at the time of the acquisition, there was a secondary motivation or that the farmlands were acquired as a speculation or that there was an intent formed to purchase these lands for the purpose of turning them into a profit (which

here clearly falls within the category of a windfall gain) and it, therefore, follows that this appeal succeeds.

Before parting with this case, I should now, as promised to counsel at trial, deal with a matter of procedure in respect of the manner in which admission of facts and of documents should be dealt with at the trial.

Under Rules 146 and 147 of the General Rules and Orders of this Court, any party may call upon the other party to admit any document as well as any specific fact or facts mentioned in a notice to the other party and in case of refusal or neglect to admit, after such notice, the cost of proving such document or fact or facts, whatever the result of the action may be, shall be paid by the party so neglecting or refusing, unless at the hearing or trial, the Court certifies that the refusal to admit was reasonable.

The parties in the present instance took full advantage of this procedure for which they must be commended as it certainly shortened the trial considerably. A notice to admit facts was served on each party and a response was obtained from each of them.

The appellant listed and repeated in his response all the facts specified in the notice to admit. In some cases, he made no comment opposite a particular fact or facts (in which case it or they were admitted). In other cases, he noted some qualification opposite a fact or facts. In still other cases, he merely denied the admissibility of such fact or facts as being irrelevant.

The respondent, on the other hand, listed those facts which he was prepared to admit outright and those which he was prepared to admit subject to some qualification. He refrained from referring to those facts that he was asked to admit which, for some reason, he did not wish to admit.

Having thus obtained the admissions in the above form, a question was raised as to what to do with them at trial in order to insure that they form part of the record. There was a further question as to what to do with the schedules, plans, documents or exhibits referred to in some of the admissions.

The reply to a notice to admit facts, as well as the notice itself, should both be filed as part of the case of the party

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who served the notice to admit if that party chooses to use the reply for one or both of the following purposes:

(*a*) as proof of a fact that is part of the case that he is proving whether such fact has been admitted as demanded or has been admitted as a qualified form of the fact demanded, or

(*b*) as proof of the refusal by his opponent to admit a fact upon which proof he may, at the appropriate time, found an application for costs under the second paragraph of Rule 147.

If the reply contains a qualified admission that he does not accept, counsel should, when filing it, indicate for the record that he elects to treat that response as a refusal to admit the fact that his opponent was asked to admit.

If a party receives a reply to a notice to admit that he decides not to use for either of the above purposes, he should not file it.

When a document has been admitted pursuant to a notice under Rule 146, the party may tender the document as having been so admitted. Documents, plans or schedules related to the facts the other party is called upon to admit and mentioned therein or mentioned in the qualifications to the facts admitted which counsel requesting the admissions of facts is also prepared to accept, should also be tendered as admitted. In such a case, the document should not be proven by a witness as such proof unnecessarily increases the costs.

Where there has been a refusal to admit a document pursuant to a notice to admit, the party who served the notice may file the notice to admit and the response in order to found an application for costs under Rule 146.

When there has been no response to a notice to admit documents or facts, a party who wishes to apply for costs under Rules 146 or 147 will have to be in a position to prove service of the notice and also his opponent's failure to respond.

Questions as to relevancy or other questions as to admissibility of evidence should be raised by the objecting party when proof is submitted based upon admissions in exactly the same way as when evidence is tendered in any other way.

In all such cases where facts required to be admitted are admitted but are contested as being irrelevant or as being for some other reason inadmissible, an objection should be made to their acceptance. Such objection can either be resolved immediately by the Court or the decision can be reserved. If the matter is resolved immediately and the objection maintained, the admission does not go in. If the decision is reserved, such facts go in, subject, however, to the subsequent decision of the Court as to their admissibility.

In every case where a party has failed or refused to admit a fact or a document, he should ask the Court to determine and certify before the completion of the hearing or trial, that he was reasonable in so failing or refusing to admit. Otherwise, such failure or refusal will result in the costs of proof being payable by the party who failed or refused to admit.

In this case the admissions were dealt with in conformity with the views that I have just expressed, which, in my opinion, encompass a proper and suitable procedure.

The appeal is therefore allowed with costs.

ENTRE:

FLORENT GAGNÉ .....REQUÉRANT;

ET

SA MAJESTÉ LA REINE .....INTIMÉE.

New Carlisle
1966
août 17, 18
Ottawa
oct. 24

Couronne—Pétition de droit—Réclamation en dommages-intérêts contre la Couronne pour blessures corporelles—Chute sur trottoir à l'entrée d'un bureau de poste, propriété du gouvernement du Canada, ministère des Travaux publics—Action positive et fautive de l'employé et préposé du ministère des Travaux publics du Canada, agissant dans l'exécution de ses fonctions—Obligation et responsabilité du commettant, la Couronne—Manque de soins (nonfeasance) ou simple abstention de l'employé dans l'entretien du trottoir en question—Responsabilité de l'intimée sous la Loi sur la responsabilité de la Couronne, ch. 30, S. du C. 1952-53, articles 3(1)(a)(b) et 4(4)(5)—Action maintenue pour $9,729.75, avec dépens.

Dans sa chute sur le palier recouvert de glace donnant accès aux marches du bureau de poste de Bonaventure, P.Q., propriété du gouvernement du Canada, le requérant se serait infligé, le 19 décembre 1964, «une fracture luxuation du cou du pied gauche» (sic). Au moment de l'accident, «l'entretien de ce bureau de poste et du trottoir y conduisant incombait à Gérard Bourdages, employé et préposé du ministère des Travaux publics du Canada».

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Jugé, Cet accident est dû non seulement au défaut d'entretien du palier et du trottoir donnant accès au bureau de poste, mais également à la manœuvre dangereuse du concierge Gérard Bourdages qui, par son intervention fautive en déposant et piétinant de la neige mouillée sur le palier, augmenta le danger que constitue toujours une surface glacée, créant ainsi un état dangereux des lieux sans prendre les moyens nécessaires pour protéger les piétons contre ce danger.

2 L'action positive et fautive du préposé de l'intimée, dans l'exécution de ses fonctions, suffit pour entraîner la responsabilité de l'intimée pour les dommages subis par le requérant.

3 Il semble qu'une simple abstention (nonfeasance) ou manque de soins de la part d'un préposé ne peut disculper le commettant que si ce préposé n'a des devoirs qu'à l'égard de son employeur et aucun devoir envers les tiers Priver quelqu'un par incurie d'une aide ou assistance doit être considéré comme lui infligeant un tort plutôt que lui refusant un bienfait ou avantage, et c'est d'ailleurs ce que paraît avoir décidé la Cour suprême du Canada dans *Crossman v. The King* (1952) R.C.S. 571 à 603.

4 La faute positive que le préposé de l'intimée a commise en piétinant de la neige mouillée, comme il l'a fait, sur une surface glacée, a entraîné sa responsabilité en même temps que celle de son commettant pour les dommages éprouvés par le requérant.

5 La blessure, dans le présent cas, n'ayant pas été causée par la neige ou la glace ni par la neige accumulée par suite d'une tombée ou d'une glace formée à la suite de conditions climatériques normales, tel que prévu par l'article 4, sous-paragraphes 4 et 5 de la *Loi sur la responsabilité de la Couronne,* mais bien par une situation créée par la main de l'homme, soit l'intervention fautive du préposé de l'intimée, l'omission de donner l'avis selon l'article 4, sous-paragraphe 4, dans les 7 jours après la naissance de l'action n'est pas fatale.

6 D'ailleurs, le défaut d'avis ne semble pas avoir préjudicié d'aucune façon à la défense de la Couronne; son préposé ayant eu connaissance de la chute du requérant, de même que le maître de poste, qui a déclaré avoir été informé de l'accident le lendemain.

7 L'argument de part et d'autre ayant porté sur la cause d'action découlant de la faute positive du préposé de l'intimée ayant eu pour effet de créer un état dangereux des lieux, permission est donnée d'amender la pétition de droit de façon à y inclure cette cause d'action.

8. Action maintenue pour $9,729.75, avec dépens

PÉTITION DE DROIT pour dommages subis par suite de blessures corporelles.

Lucien Grenier, c.r. pour le requérant.

Raymond Roger pour l'intimée.

NOËL J.:—Par sa pétition de droit, le requérant, un instituteur domicilié à Bonaventure, dans les comté et district de Bonaventure, P.Q., représente que se rendant au bureau de poste de Bonaventure, le 19 décembre 1964 vers les 7:45 heures de l'après-midi, il aurait fait une chute sur le palier qui précède immédiatement les marches qui con-

duisent à l'entrée du bureau de poste à cet endroit et se serait infligé «une fracture luxuation du cou du pied gauche». (sic)

Il allègue ensuite que «le bureau de poste et le trottoir y conduisant appartenaient au Gouvernement du Canada, ministère des Travaux publics» et qu'au moment de l'accident, «l'entretien du Bureau de poste de Bonaventure et du trottoir y conduisant incombait à Gérard Bourdages, de Bonaventure, employé et préposé au ministère des Travaux publics du Canada».

Le requérant allègue ensuite aux paragraphes 6, 7, 8 et 9 de sa pétition, les faits qui donnent lieu à la responsabilité de l'intimée comme suit:

6. Au jour dudit accident la présence de glace avait rendu le trottoir glissant et très dangereux.

7. L'accident ci-haut décrit fut causé par la faute, négligence, imprudence, manque de soins et précautions dudit Gérard Bourdages, alors en exercice de ses fonctions comme employé et préposé du Ministère des Travaux Publics, en ce qu'il a négligé de répandre du sable ou autres substances anti-dérapantes pour assurer la sécurité des usagers du bureau de Poste.

8. L'accident fut aussi causé par la faute du Ministère des Travaux Publics, en permettant aux usagers du bureau de Poste de circuler sur un trottoir glacé, non recouvert de sable ou autres substances anti-dérapantes, et en laissant la garde et l'entretien dudit trottoir à un employé négligent et incompétent, voir Gérard Bourdages.

9. L'Intimée est également responsable dudit accident et des dommages qui en résultent: *a*) à titre de commettant de Gérard Bourdages, *b*) à titre de propriétaire dudit trottoir.

Le requérant soutient qu'avant l'accident il était en excellente santé et gagnait, comme instituteur à l'École des Arts et Métiers de Bonaventure, un salaire annuel de $4,800; qu'il a été dans un état d'incapacité totale jusqu'au 1er avril 1965, a souffert d'une incapacité partielle temporaire de 50% jusqu'au 1er juin 1965 et demeure avec une incapacité partielle permanente de 18%, que les parties à l'enquête, par leur procureur respectif, ont cependant convenu d'établir à 15%. Comme résultat de cet accident, il réclame de l'intimée une somme globale de $24,374.75, (l'addition cependant des sommes réclamées donne plutôt $24,384.75, soit $10 de plus), dont $784.75 pour frais médicaux, dépenses pour intervention chirurgicale, dépenses de voyages à l'hôpital à Maria et à Québec, lequel montant fut admis par le procureur de l'intimée à l'enquête; $1,200 pour incapacité totale temporaire du 20 décembre 1964 au 1er avril 1965, soit trois mois à $400 par mois, que le requérant,

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par l'entremise de son procureur à l'enquête, consentit à réduire à l'équivalent du préjudice résultant de la perte d'environ 60 à 65 jours de congé de maladie, puisqu'ayant accumulé ces jours de congé avant l'accident et ayant dû les prendre à la suite de l'accident, la perte de ces journées de congé correspond au préjudice subi; la valeur de ces journées de congé de maladie se chiffre d'ailleurs à environ $1,200 si l'on s'en tient au revenu annuel du requérant à la date de l'accident; $400 pour incapacité partielle temporaire de 50% du 1er avril au 1er juin à $200 par mois; ayant cependant reçu son plein salaire pendant cette période, il peut difficilement réclamer ce montant; $2,000 pour souffrances physiques, inconvénients, diminution de jouissance de la vie et, enfin, $20,000 pour incapacité partielle permanente.

Le requérant en plus réclame une somme de $1,000, montant qu'il a consenti à réduire à $500, pour frais médicaux à venir qu'il ne semble pas cependant avoir ajouté au montant global réclamé. A l'enquête, il fut permis au requérant d'amender sa pétition en ajoutant au paragraphe 14 de sa pétition les mots «et pour le préjudice lui résultant de la perte de ses jours de congé de maladie du 20 décembre au 1er avril 1965» et en ajoutant les paragraphes 15(*a*) par lequel il réclame pour l'intervention future deux voyages à Montréal à raison de $100 le voyage soit la somme de $200, et 15(*b*) par lequel il réclame la perte de quatre mois de salaire à raison de $450 par mois, soit la somme de $1,800 pour quatre mois de perte de revenu à prévoir lors de l'intervention chirurgicale à venir; en effet, ayant déjà épuisé ses congés de maladie, il serait sans revenu pendant la période requise pour l'intervention à venir. Les frais médicaux suivants furent de plus ajoutés du consentement du procureur de l'intimée: Clinique St-Louis, $125; compte du Dr Benoît Martin, $10 et compte du Dr Louis-Philippe Roy, $10.

Le requérant réclame donc de l'intimée, si l'on fait les corrections qui s'imposent, et en déduisant le $400 réclamé pour incapacité partielle temporaire, du 1er avril au 1er juin 1965, auquel il n'a aucun droit, une somme globale de $26,629.75 avec intérêts à compter de la production des présentes procédures, et les dépens.

L'intimée d'autre part nie les reproches formulés à son égard et soutient que le requérant est tombé en face du

bureau de poste de Bonaventure à un endroit qui n'était pas sa propriété ou sous son contrôle; que son terrain, trottoir ou escalier, n'était pas dans un état dangereux au moment de l'accident et que l'employé qui devait voir à l'entretien des lieux a agi en bon père de famille compte tenu de la situation de ces lieux et des conditions climatériques.

L'intimée allègue de plus qu'à tout événement, cet employé agissait du chef de Sa Majesté la Reine et non comme employé chargé de la sécurité des tiers.

L'intimée soulève de plus le fait que Sa Majesté la Reine ne peut être recherchée en responsabilité vu que l'avis requis d'après la *Loi sur la responsabilité de la Couronne* (article 4, sous-paragraphes 4 et 5) n'a pas été donné.

L'intimée allègue ensuite que l'accident et les dommages en résultant sont dus uniquement à la faute, négligence et inhabilité du requérant et plus particulièrement parce que *a*) il était distrait; *b*) il marchait trop rapidement vu les conditions de la température et la quasi-obscurité; *c*) il n'a pas pris les précautions nécessaires pour éviter une telle chute en raison des conditions climatériques qu'il connaissait très bien. Elle soutient enfin que les dommages réclamés sont exagérés, ne correspondent pas à la réalité des blessures subies et que de toute façon il n'y a aucun lien entre le requérant et l'intimée.

Le 19 décembre 1964 vers les 7:30 p.m., soit l'heure où il présuma que le courrier était arrivé, Florent Gagné, se rendit en automobile au bureau de poste de Bonaventure. Il descendit de sa voiture et s'avança vers le bureau de poste. En posant son pied gauche sur le palier qui précède les marches conduisant à l'entrée du bureau de poste, son pied gauche glissa et se tordit à la cheville. Il tenta de ramener son pied droit pour reprendre son équilibre, mais en vain, car la chaussée était glacée et trop glissante et il fit une chute se cassant la jambe gauche. Il déclare qu'il se blessa d'abord lorsqu'il se tordit la cheville et se cassa ensuite la jambe au premier tiers inférieur en tombant. La surface où il glissa et tomba était, d'après Gagné, non seulement glacée mais aussi raboteuse. Le pavé était, dit-il, «assez dangereux, il n'était pas lisse». Le requérant à ce moment portait, ce qu'on appelle couramment des bottes «après-ski» avec semelles anti-dérapantes. L'état de la chaussée où tomba le requérant est aussi décrit par trois témoins,

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Réginald Fournier, Raymond Lambert et Roméo Forest, qui étaient sur les lieux, aidèrent le requérant à se relever et le transportèrent chez lui. Tous trois affirment que la surface du palier où eut lieu l'accident était très glacée et glissante.

Fournier suivit le requérant au moment de sa chute. Il confirme que Gagné est tombé à l'entrée du bureau de poste un peu avant d'atteindre les premières marches, sur un palier d'une longueur d'environ six à sept pieds, situé entre la rue et ces marches. Ce témoin n'a pas trop remarqué l'état du palier au moment de la chute de Gagné, parce qu'il s'occupa surtout à le relever et à le transporter chez lui. Il déclare, cependant, que l'après-midi du même jour, vers les quatre heures p.m., il était allé au bureau de poste et le palier était glacé à ce moment. Il se souvient qu'il y avait du sable sur les marches, mais ne se souvient pas qu'il y ait eu du sable sur le palier.

Raymond Lambert au moment de l'accident était dans sa voiture stationnée du côté du bureau de poste, à environ 15 pieds de l'entrée. Il déclare avoir vu Gagné tomber et d'après ce qu'il a pu voir, il lui semble que c'est en posant son pied sur le palier que Gagné est tombé et lorsqu'il s'est affaissé par terre, il reposait sur le palier. Il a, à ce moment, en aidant Gagné à se lever, constaté l'état du palier. C'était, dit-il «très, très glacé; par après moi-même, en soutenant M. Gagné, j'ai moi-même perdu le pied. Je n'ai pas tombé, mais j'ai glissé en bas du palier...il était très, très glissant». Il ne croit pas non plus avoir vu de sable ou de sel, ou autres anti-dérapants, sur le palier. Stationné devant le bureau de poste dix minutes avant l'arrivée de Gagné, il a pu, dit-il, constater que quelques personnes eurent de la difficulté à se tenir debout sur le palier où est tombé Gagné.

Roméo Forest eut connaissance également de la chute de Gagné. Il était dans sa voiture stationnée le long du remblai de ciment près des marches qui conduisent à l'entrée du bureau de poste et, par conséquent, à proximité du palier où tomba Gagné, lequel palier, d'après le témoin, faisait «partie du talus du terrain du bureau de poste». Il est sûr que Gagné tomba sur le palier parce que, dit-il «la rue se trouvait en avant de mon char, lui était à ma gauche». Il constata aussi l'état glissant du palier parce que, dit-il, «en arrivant moi, j'étais allé au bureau de poste,

la «malle» était pas finie pour Bonaventure, ça fait que je suis rentré, en descendant là, j'ai remarqué qu'il était glissant, parce que je me suis «ramassé» sur mon char». Ce témoin déclare que pendant qu'il fut là, plusieurs personnes qui empruntèrent le palier pour se rendre ou revenir du bureau de poste eurent de la difficulté à y circuler et manquèrent de tomber.

Maurice Arsenault arriva sur les lieux de l'accident peu après le départ de Gagné et constata à son tour l'état des lieux. D'après ce témoin, «l'entrée du bureau de poste, les abords de la rue ainsi que le premier palier étaient dans un état assez dangereux en ce sens que je ne sais pas, sur le palier même, je ne sais pas si ce sont les piétons qui avaient défoncé la glace avec leurs pieds, en marchant ou que cela avait été brisé avec une hache, mais j'ai remarqué que c'était très dangereux, c'était très glissant». Il est convaincu, dit-il, qu'il n'y avait pas de sable, parce qu'il fallait, dit-il, «surveiller où on mettait les pieds pour ne pas glisser».

Armand Savoie, observateur en météorologie à la ferme expérimentale de Caplan, située à neuf milles de Bonaventure, décrivit les conditions atmosphériques de la région pour le 19 décembre 1964 et les jours qui précédèrent cette date. Quant à la température dans la nuit du 18 au 19 décembre 1964, il constata un minimum de zéro dans la nuit et un maximum de 12 au-dessus de zéro dans la journée du 19 et à cette date il n'y eut pas de chute de neige. Il a, par conséquent, fait très froid ce jour-là et il ne peut être question ici d'un adoucissement de la température suivi d'un gel. Il constata un minimum de 20 pour la nuit du 17 au 18 et le mercure descendit à 8 durant le jour, le maximum se rendant à 20 durant la journée du 18. Il enregistra un demi-pouce de neige le matin du 18. Le 17, il enregistra une précipitation de .2, soit deux dixièmes de pouce. Il semble donc qu'il n'y eut pas, le jour de l'accident, ou les quelques jours qui le précédèrent, de chute de neige d'importance qui ait pu empêcher l'intimée de voir au bon entretien de l'accès qui conduit au bureau de poste.

Gérard Bourdages, de Bonaventure, rentier, âgé de 69 ans, fut entendu de la part du requérant. Au mois de décembre 1964 il était concierge à l'emploi du ministère des Travaux publics et s'occupait de l'entretien de l'intérieur et de l'extérieur, les trottoirs compris, du bureau de poste de

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Bonaventure. Au moment de la chute du requérant, il était à l'intérieur du bâtiment et de la fenêtre il vit un homme étendu par terre en avant du bureau de poste. Il confirme que le palier qui précède les marches fait partie du terrain du bureau de poste. Il ne peut cependant préciser exactement à quel endroit se trouvait l'homme tombé. De l'endroit où il était, soit à environ 50 pieds de l'endroit où l'homme était tombé, il a vu deux hommes lui porter secours. Il ne s'est pas rendu cependant sur les lieux parce qu'il était sous l'impression que l'homme était tombé sur la rue et non sur le terrain du bureau de poste. Il décrit comme suit l'état du trottoir, des marches et du palier du bureau de poste le jour de l'accident:

> Sur le trottoir en haut et les marches, il y avait pas de glace; en bas, c'était pas une glace vive, il y avait de la neige plus haut et c'était imbibé d'eau, c'était gelé; le dessus, il y avait du sable.

En réponse aux questions du procureur du requérant, il commença par déclarer qu'il avait mis du sable sur le palier en bas mais ne peut préciser quand il a mis ce sable, se contentant de déclarer qu'il en mettait «quand il y en avait besoin» mais il ne se souvient pas s'il en avait mis le jour de l'accident.

En face des déclarations assermentées du requérant et de trois témoins visuels qui tous déclarent qu'il n'y avait pas de sable sur le palier, et du témoignage incertain du concierge de l'intimée, la Cour ne peut que conclure qu'à la date de la chute du requérant, ledit palier n'avait pas été ensablé ni autrement traité.

Il y a cependant plus et c'est le concierge qui nous le révèle tout bonnement dans son témoignage lorsqu'il explique qu'il avait l'habitude, sur le palier où tomba Gagné, d'y piler la neige avec ses pieds afin d'empêcher l'eau de la rue de s'y écouler—«L'eau du chemin» dit-il, «rentrait dans ce palier-là quand il faisait soleil, quand il faisait doux, l'eau rentrait, ça formait de la glace. Moi je pilais de la neige et puis je mettais du sable là-dessus.»

Un peu plus loin dans son témoignage, il explique encore pourquoi il déposait de la neige sur ce palier: «C'était» dit-il «pour empêcher l'eau de rentrer, je pilais de la neige. Ça gelait quand il faisait doux, ça allait en descendant, l'eau rentrait dans ce palier-là. Je pilais de la neige.» Il ajoute un peu plus loin que s'il n'avait pas laissé de neige sur le palier, il y aurait toujours eu quatre ou cinq pouces

d'eau à cet endroit qui s'y rendait à cause de la neige accumulée dans la rue. A une question du procureur du réquérant s'il était allé voir sur les lieux dans quel état était le palier en question, il répondit: «Ah, oui, je fais le tour tous les jours, c'est mon ouvrage, les trottoirs, comme je vous l'ai dit tout à l'heure, c'était de la neige pilée, quatre, cinq pouces de neige pilée . . .».

Questionné sur l'état du palier le lendemain de la chute du requérant, il déclare: «il y avait pas de glace vive, c'était de la neige pilée durcie et gelée, il y avait du sable dessus.» Enfin, la Cour lui demanda quand il avait mis du sable sur le palier avant l'accident. Sa réponse, toujours imprécise, fut «Oh, dans le courant de la semaine, quand ça en avait besoin, j'en mettais». Et un peu plus loin il déclare au procureur du requérant qui s'enquérait de l'état du palier, que ce dernier était gelé et qu'on y mettait habituellement des voitures.

De ces témoignages il ressort clairement, je crois, que l'état du palier le 19 décembre 1964 était non seulement glacé et glissant, mais également raboteux par suite de la neige mouillée que le concierge y avait pilée avec ses pieds pour empêcher l'eau de la rue de venir s'y installer. Si Gérard Bourdages y a jeté du sable, ce sable dans les circonstances ne pouvait être très efficace; en effet, jeté sur une neige pilée imprégnée d'eau, ce sable devait s'y enfoncer pour ne laisser, une fois gelé, qu'une surface glacée, glissante et dangereuse pour les piétons qui s'y hasardaient. Il appert donc que le préposé de l'intimée, Bourdages, non seulement ne vit pas à assurer le bon entretien du palier par où devaient passer les personnes qui se rendaient au bureau de poste, mais par un geste positif en augmenta le danger que pouvait comporter en hiver l'utilisation par des piétons de cet accès en déposant et en piétinant sur le palier une neige mouillée qui ne pouvait que résulter en une surface qui, par le gel, devenait raboteuse et glissante. Il n'est pas, par conséquent, étonnant que le requérant, en y plaçant le pied gauche, se tourna la cheville et se cassa la jambe et ne put, à cause de la surface glacée, ramener son pied droit et reprendre son équilibre. L'accident est donc dû non seulement au défaut d'entretien du palier, mais également à la manœuvre dangereuse du concierge qui, par son geste, augmenta le danger que constitue toujours une surface glacée.

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Le requérant, après sa chute, fut transporté à l'hôpital de Maria où il reçut des calmants (soit de la morphine) jusqu'au 26 décembre 1964. Pendant cette période, il déclare avoir été dans un état d'incohérence causé par ces médicaments. Après sa sortie de l'hôpital, du 26 décembre au 30 décembre 1964, il fut anesthésié deux fois et il déclare avoir, pendant cette période, déliré assez souvent. De la date de l'accident jusqu'au mois d'avril 1965, soit pendant la période d'incapacité totale temporaire, il a quand même continué à recevoir son salaire mais en épuisant, cependant, les congés de maladie qu'il avait accumulés. Il dut utiliser des béquilles du mois de janvier 1965 jusqu'au 1er avril 1965. Il se remit à l'ouvrage le 1er avril 1965, mais comme temporaire cependant, travaillant à l'administration. A ce moment, il marchait difficilement à l'aide d'une canne faisant, dit-il, de gros efforts pour se rendre à son travail. Du mois de décembre 1964 à la fin de juin 1965, il déclare avoir ressenti des douleurs continuelles assez vives qu'il continue, dit-il, à ressentir encore, bien que moins prononcées. Il recommença ses fonctions complètement au mois de septembre 1965. Il doit envisager une nouvelle intervention prochainement qui consistera à lui barrer la cheville complètement par le moyen de plaques d'argent. Il lui a été difficile, dit-il, parce que boitant, d'affronter une classe d'élèves, et il doit abandonner la pratique du ski à laquelle il s'adonnait avant son accident.

S'il est possible que Gérard Bourdages ne puisse être poursuivi en dommages par le requérant (tel que l'exige le recours sous l'article 3(1)(*a*) de la *Loi sur la responsabilité de la Couronne, 1953*) si son manque de soins (nonfeasance ou simple abstention) dans l'entretien de l'accès qui conduit au bureau de poste avait été la seule cause de l'accident, tel que le soutient le procureur de l'intimée, il semble, cependant, qu'il ne puisse y avoir de doute sur l'issue d'une poursuite engagée par le requérant contre le concierge personnellement pour le geste négligent et dangereux (activité positive) qu'il posa en pilant une neige mouillée, comme il le fit, sans s'assurer que la surface était lisse et que le sable qu'il y jetait serait efficace. La faute positive du préposé de l'intimée dans l'exécution de ses fonctions suffirait au besoin pour entraîner, par conséquent, la responsabilité de l'intimée pour les dommages subis par le requérant. D'ailleurs, une simple abstention de la part d'un préposé ne

pourrait disculper le commettant que si ce préposé n'a des devoirs qu'à l'égard de son employeur et aucun devoir envers les tiers. Priver quelqu'un par incurie d'une aide ou assistance doit être considéré comme lui infligeant un tort plutôt que lui refusant un bienfait ou avantage et c'est d'ailleurs ce que paraît avoir décidé la Cour Suprême dans *Grossman v. The King*[1] tel qu'exprimé par le juge Taschereau:

> What this Court held in these two cases clearly indicates that the employees of the Crown failed in their duty to third parties, that their negligence, although arising only out of an omission to act, entailed *their personal liability,* and consequently the vicarious liability of the Crown. The Court was not merely confronted with cases of nonfeasance of acts which should have been done by the servant, as the result of a contract between the employer and the employee, and which would not involve the personal liability of the latter to third persons, but with the failure to perform a duty owed to the victims. (Halsbury, Vol. 22, page 255)

Il ne me semble pas douteux, et le témoignage d'ailleurs du préposé Bourdages le révèle, que ce dernier n'avait pas que des devoirs à l'égard de son employeur mais il avait bien un devoir à remplir envers les usagers de l'accès au bureau de poste soit celui d'assurer la sécurité des piétons empruntant cet accès, qu'il n'a pas ou a mal exécuté. A tout événement, la faute positive qu'il a commise en ajoutant par son geste au danger que comportait déjà une surface glacée en y accumulant et y piétinant de la neige mouillée, comme il l'a fait, ne peut qu'entraîner sa responsabilité en même temps que celle de son commettant pour les dommages subis par le requérant.

Cette faute positive du préposé de l'intimée, le requérant ne l'a pas plaidée. La preuve cependant des faits concernant les activités de Bourdages à ce sujet a été faite sans objection et les parties se sont comportées comme si ces faits avaient été plaidés et formaient partie du débat, l'argument de part et d'autre ayant porté sur cette cause d'action basée sur l'article 3(1)(*a*) de la *Loi sur la responsabilité de la Couronne*. Dans les circonstances, me prévalant de la règle 115 de cette Cour, il ne me reste qu'à permettre au requérant d'amender sa pétition de façon à y inclure comme cause d'action additionnelle le moyen qui lui est donné par l'action positive et fautive du préposé de l'intimée.

Ayant accepté la responsabilité de l'intimée sous l'article 3(1)(*a*) de la *Loi sur la responsabilité de la Couronne,*

[1] [1952] 1 R C S 571 à 603

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chapitre 30, il ne m'est pas nécessaire de la déterminer sous l'article 3(1)(*b*), soit en vertu d'un quasi-délit:

> (*b*) à l'égard d'un manquement au devoir afférent à la propriété, l'occupation, la possession ou le contrôle des biens.

Qu'il me suffise, cependant, de dire que si le requérant n'avait pu rejoindre l'intimée sous l'article 3(1)(*a*) de cette même Loi, j'aurais pensé qu'il pouvait se prévaloir d'un recours en vertu de l'article 3(1)(*b*) même s'il avait omis de donner l'avis dans les sept jours que la réclamation a pris naissance, bien que cet avis soit exigé par le sous-paragraphe (4) de l'article 4 de ladite Loi parce que si le défaut d'avis est fatal en vertu du sous-paragraphe (5) de l'article 4 dans tous les cas où «la blessure a été causée par la neige ou la glace», la blessure dans le présent cas n'a pas été causée par la neige accumulée par suite d'une tombée ou d'une glace formée à la suite de conditions climatériques normales, tel que prévu par cet article, mais par une situation créée par la main de l'homme, soit l'intervention fautive du préposé de l'intimée. Par son geste positif, il a créé un état dangereux des lieux sans prendre les mesures ou moyens nécessaires pour protéger les piétons contre ce danger. D'ailleurs cette omission de donner l'avis ne me semble pas avoir préjudicié d'aucune façon à la défense de la Couronne, son préposé ayant eu connaissance de la chute du requérant, mais sous la fausse impression qu'il était tombé sur le trottoir plutôt que sur le palier, il ne s'en est pas préoccupé et ne s'est rendu que le lendemain pour examiner les lieux après avoir été avisé de la chute du requérant sur le palier par un M. Babin. Le maître de poste, Lionel Cayouette, lui aussi, déclare avoir été informé de l'accident le lendemain.

Ayant ainsi déterminé la responsabilité de l'intimée pour les dommages subis par le requérant, il ne me reste plus qu'à fixer le quantum de l'indemnité auquel il a droit. Les parties, par leur procureur respectif, se sont entendues sur certains postes de dommages et il suffira maintenant d'accepter ces montants:

Frais médicaux	$ 784.75
Préjudice résultant de la perte de 65 jours de congés de maladie payés pendant son incapacité totale temporaire soit du 20 décembre 1964 au 1er avril	$1,200.00
	$1,984.75

Le requérant réclame $2,000 pour souffrances physiques, inconvénients, diminution de jouissance de la vie et $20,000 pour incapacité partielle permanente.

Quant au poste de dommages désigné comme souffrances physiques, perte de jouissance de la vie et inconvénients, le requérant réclame $2,000 et je n'ai pas d'hésitation à lui allouer ce montant. Il a souffert considérablement lors de sa chute, à l'hôpital pendant sa convalescence et encore maintenant, et il devra, en effet, toute sa vie réduire ses activités tant sportives que sociales par suite de sa blessure.

L'établissement de l'indemnité au poste d'incapacité partielle permanente basée sur une perte ou diminution de gain est plus difficile parce qu'il est possible qu'elle ne se traduise pas nécessairement par une perte ou diminution de revenus ou de salaire. La Cour doit, en effet, afin de déterminer le préjudice subi, examiner la preuve, tenir compte, non seulement du degré d'invalidité que souffre le requérant, mais surtout des conséquences de cette invalidité sur la capacité de la victime de gagner sa vie dans le milieu et suivant le métier qui est le sien.

Le requérant est un instituteur qui continuera quand même sa carrière malgré la blessure qu'il a subie. Il l'admet volontiers, il a même suivi des cours de perfectionnement cet été à cette fin. Durant l'année 1966, bien que son pied lui ait causé des inconvénients, il admet avoir quand même enseigné. Il recevra quand même des augmentations de salaire au fur et à mesure que ses années d'enseignement s'accroissent et qu'il se perfectionnera par des études. Ce sont là autant d'éléments dont la Cour doit tenir compte dans l'établissement de l'indemnité sous ce chef. Le requérant avait 26 ans au moment de son accident et gagnait un montant annuel net d'environ $4,500. Il semble bien que pour le moment, la blessure subie par le requérant ne lui occasionne pas une perte de revenus. Il reste toujours possible, cependant, que cette blessure le gêne dans la poursuite de sa carrière et qu'il subisse une perte de revenus à l'avenir. Un montant de $4,000 sous ce poste ne me paraît pas exagéré et rendrait justice aux parties.

Le requérant réclame de plus un montant de $1,000 qu'il a cependant consenti à réduire à $500 sous le poste de frais médicaux à venir pour intervention future ainsi qu'un montant additionnel de $200 pour deux voyages à Montréal pour cette intervention à venir. Il réclame également la

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perte de quatre mois de salaire à raison de $450 par mois, soit $1,800 pour quatre mois de perte de revenus à prévoir lors de l'intervention chirurgicale future.

La preuve de la nécessité d'une intervention future n'est peut-être pas aussi concluante qu'on pourrait le désirer; cette preuve a été faite par le requérant lui-même qui déclare que le Dr Roy lui a laissé entendre qu'il devait subir une autre intervention et on lui a dit «verbalement que je devais être trois mois dans le plâtre et un mois parce qu'on va me barrer la cheville complètement avec des plaques d'argent». Quant à la date précise de cette intervention, le réquérant ne la sait pas davantage. «Cela» dit-il «va dépendre du médecin. Je ne pourrais pas préciser pour le moment, il m'a dit d'attendre. D'ailleurs, il m'a demandé encore une visite, si possible, dans le temps des fêtes. Alors j'imagine que s'il demande encore une visite à son bureau, peut-être qu'il pourra déterminer la date précise. Pour le moment il n'a pas déterminé la date précise quand cette intervention aura lieu.»

Le requérant n'a pas été transquestionné sur ce point ni n'a-t-il été contredit. D'autre part, il est possible que l'intervention se fasse pendant l'été et, alors, il ne perdrait pas de revenus comme instituteur et il est possible aussi qu'il ne perde pas de congé de maladie, tout dépendra, dit le requérant, de l'attitude du Ministère à son égard. Dans les circonstances, il me semble qu'un montant de $900, correspondant à deux mois de salaire, en plus des frais de voyages, au montant de $200, et le montant de $500 pour frais médicaux, soit en tout $1,600, seraient plus que suffisants pour prévoir la perte de revenus possible et les dépens relatifs à cette intervention. Il faudrait également ajouter les montants de $125 pour la clinique St-Louis, $10 pour le Dr Martin et $10 pour le Dr Roy, admis par le procureur de l'intimée.

La Cour, par conséquent, maintient la réclamation du requérant et déclare qu'il a droit de recouvrer de la Couronne la somme de $9,729.75 avec dépens.

Le jugement formel ne sera rendu, cependant, que lorsque le requérant aura amendé sa pétition de façon à y inclure comme cause d'action les moyens résultant de l'action positive prise par le préposé de l'intimée, moyens qui ont eu pour effet de créer un état dangereux des lieux où est tombé le requérant.

BETWEEN:

HASSENFELD BROS., INC., and HASSENFELD BROS. (CANADA) LIMITED ..... PLAINTIFFS;

Ottawa 1967
Mar. 2
Mar. 13

AND

PARKDALE NOVELTY CO. LIMITED .... DEFENDANT.

Pleadings—Action for infringement of industrial design, trade mark and copyright—Material facts not alleged—Whether cause of action disclosed—Motion to strike out.

Industrial Designs—Infringement—Design not executed by authors for other person—Design not assigned—Action restricted to proprietor—Insufficient description of infringing article.

Trade Marks—Infringement—Pleading—Trade Marks Act, s. 7(b) and (e)—Confusing wares not infringement of trade mark.

Copyright—Infringement—Pleading—Whether work copyrighted in Canada—Whether foreign authors citizens of Treaty country—Copyright Act, s. 4.

Costs—Security for—Resident and non-resident plaintiffs—Whether joint cause of action.

A United States company and a Canadian company sued defendant alleging that the United States plaintiff was registered owner of a Canadian industrial design for a toy figure, of the Canadian trade mark "G. I. Joe" as applied to dolls etc, and of the Canadian copyright in the G. I. doll, the work of two citizens of the U.S.A. where it was first published; that the Canadian plaintiff was the United States plaintiff's exclusive licencee in Canada of the said industrial design; that the United States plaintiff manufactured and sold dolls etc. under the above industrial design, trade mark and copyright; that the Canadian plaintiff sold the United States plaintiff's product in Canada under the trade mark "G. I. Joe". Plaintiffs alleged that the defendant imported, sold and distributed in Canada dolls simulating the plaintiffs' under the name "Johnny Canuck etc." and thereby infringed the plaintiffs' industrial design and copyright and caused confusion between its wares and those of the Canadian plaintiff, and acted contrary to honest commercial usage.

Defendant moved (1) to strike out the statement of claim as not disclosing a cause of action, and (2) for security for costs by the United States plaintiff.

Held: (1) Since it was not alleged that the two American authors of the industrial design had executed it for or assigned it to a plaintiff in accordance with secs. 12 and 13 of the *Industrial Design and Union Label Act*, R.S.C. 1952, c. 150, neither plaintiff could maintain an action for infringement of the design since sec. 15 only authorized such an action by the proprietor of the design.

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(2) The allegation that the industrial design was infringed by the importation, sale and distribution of defendant's "Johnny Canuck" doll did not contain a sufficient description of the said doll. [*Precision Metalsmiths Inc v. Cercast Inc et al* [1966] 1 Ex C.R. 214 applied.]

(3) The allegations based on sec. 7 (*b*) and (*e*) of the *Trade Marks Act*, R.S.C. 1952, c. 49, that defendant caused confusion between its and the plaintiffs' wares and acted contrary to honest commercial usage did not allege facts constituting infringement of plaintiffs' trade mark.

(4) The allegation that the Canadian plaintiff sold the United States plaintiff's product in Canada under the trade mark "G. I. Joe" disclosed no cause of action.

(5) Plaintiffs failed to allege that copyright subsisted in Canada in a named work or that the authors were citizens of a country covered by s. 4 of the *Copyright Act*, R.S.C. 1952, c. 55. Moreover their allegations of infringement of copyright lacked sufficient description.

(6) As each plaintiff could have brought a separate action against defendant their claims were not joint claims and accordingly the United States plaintiff must furnish security for defendant's costs.

APPLICATION to strike out statement of claim and for security for costs.

Weldon F. Green for plaintiffs.

Kent H. E. Plumley for defendant.

NOËL J.:—The present application for an order that the statement of claim herein be struck out on the grounds that it fails to contain sufficient material facts to support a cause of action was argued before me on Thursday, March 2, 1967.

The statement of claim which was filed on December 4, 1966, alleges that the plaintiffs, Hassenfeld Bros., Inc., an American corporation, is the owner of the industrial design registration No. 204, folio 26805, registered on November 30, 1964, for "toy figure" and the other plaintiff, Hassenfeld Bros. (Canada) Limited, is the exclusive licencee in Canada of the other plaintiff, the American corporation, in respect of the said industrial design registration.

The plaintiff, Hassenfeld Bros., Inc., the American corporation, further alleges that it is the registered owner of Canadian trade mark registration No. 138,153, registered September 13, 1964, and registration No. 140,484, registered May 28, 1965, both consisting of the trade mark "G. I. Joe" as applied, *inter alia*, to toy military kits, dolls having articulated arms and legs, sets of military clothing and military equipment for dressing and supplying the same.

The plaintiff, Hassenfeld Bros., Inc., also alleges that it is the owner of the copyright in Canada in the G. I. doll as an original artistic work adding that "the said doll was created by Walter H. Hansen, of Cranston, Rhode Island, U.S.A., and Phillip Krackzkowski, of Attleboro, Massachusetts, U.S.A., both of whom were at the time of creation and are citizens of the United States of America, and the said work was first published by distribution of copies thereof in the United States.

The plaintiffs allege that Hassenfeld Bros, Inc., manufactures and sells, *inter alia,* male dolls under the above mentioned copyright, industrial design and trade mark, and military clothing and equipment therefor and Hassenfeld Bros. (Canada) Limited sells the product of the plaintiff, Hassenfeld Bros., Inc., in Canada and has done so since at least as early as September 25, 1964, under and in association with the trade mark "G. I. Joe".

The plaintiffs claim that the defendant, Parkdale Novelty Co. Limited, a Canadian corporation, located in Toronto, Ontario, a vendor of toys, has imported or caused to be imported, sold and distributed in Canada, dolls simulating and copying those of the plaintiffs under the name "Johnny Canuck Canada's Fighting Soldier Fully Jointed Move Into 1001 Positions" with knowledge of the subsistance of copyright in Canada on the male G. I. Joe doll owned by the plaintiff, Hassenfeld Bros., Inc.

The plaintiffs also claim that by such importation, distribution and sale of its "Johnny Canuck" doll the defendant has infringed the plaintiff, Hassenfeld Bros., Inc.'s industrial design registration No. 204, folio 26805, and its Canadian copyright in its "G. I. Joe doll and by such infringement of copyright has converted to its own use the plaintiffs' proprietary interest in the G. I. Joe doll as an original artistic work".

There are also two allegations against the defendant (*a*) of directing public attention to its wares or business in such a way as to cause or be likely to cause confusion between its wares and business and the wares and business of the plaintiff, Hassenfeld Bros. (Canada) Limited, and (*b*) of doing acts contrary to honest industrial and commercial usage in Canada.

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The plaintiffs then claim

(*a*) damages in the amount of $100,000;

(*b*) a reference to determine profits made by the defendant by reason of the wrongful acts and an order directing the payment of such profits to the plaintiffs;

(*c*) an injunction restraining the defendant from further infringing industrial design registration No. 204, folio 26805, and the copyright of the plaintiff, Hassenfeld Bros., Inc.

(*d*) an injunction restraining the defendant from further distribution of the "Johnny Canuck Canada's Fighting Man Fully Jointed Move Into 1001 Positions";

(*e*) an order requiring the defendant to deliver up to the plaintiffs all "Johnny Canuck Canada's Fighting Man Fully Jointed Move Into 1001 Positions" in the possession or control of the defendant;

(*f*) its costs, and

(*g*) such further or other relief as may seem just.

Although counsel for the defendant argued that a number of allegations were irrelevant, I intend to restrict the present motion only to striking out the statement of claim either in whole or in part if it does not contain sufficient material facts to support a cause of action.

In order to deal with this matter without too much confusion, I intend to consider in turn the various causes of action contained in the statement of claim.

The plaintiffs rely in paragraph 3 of the statement of claim on the American corporation's registration of a Canadian industrial design and a licence given by the American corporation to the Canadian corporation, Hassenfeld Bros. (Canada) Limited, to use the said design, which design, from paragraph 5 of the statement of claim, appears to have been created by two American citizens, Walter H. Hansen and Phillip Krackzkowski. It is on the above basis alone that the plaintiffs claim damages and the issuance of an injunction restraining the defendant and its servants and agents from further infringement of its industrial design.

The above, in my view, recites no material facts which can support a right of action based on one of the plaintiffs

being the proprietor and the other being the licencee of an industrial design which would entitle them, or either of them, to the relief claimed in the conclusions of the action.

Paragraph 5 of the statement of claim sets out clearly that the author or authors of the design are two Americans and not the American plaintiff corporation and as there is no material allegation that these two gentlemen "have executed the design for the plaintiff for a good or valuable consideration" as required by section 12 of the *Industrial Design and Union Label Act*, chapter 150, the American corporation would have no basis to claim as the proprietor of the design under section 15 of the said Act. There is also no allegation that the said design has been assigned under section 13 of the above Act.

It also follows that the American corporation not being the proprietor cannot grant a licence to the Canadian corporation. In any event, even if the Canadian corporation has a valid licence herein, it still would have no basis to claim under the above mentioned Act the relief it is claiming in the present statement of claim because under section 15 of the Act, the proprietor of a design only can maintain such an action.

The statement of claim is further defective in my view however in that there is no allegation of the material facts necessary to show a cause of action for infringement (Cf. *Precision Metalsmiths Inc. v. Cercast Inc., Vestshell Inc., and Frank Valenta*,[1] September 23, 1966, by Jackett P. at p. 13). The allegation of infringement contained in the statement of claim that the defendant "by reason of its importation, distribution and sale of its 'Johnny Canuck Canada's Fighting Soldier Fully Jointed Move Into 1001 Positions' doll . . . has infringed the plaintiff, Hassenfeld Bros., Inc.'s industrial design registration No. 204, folio 26805" is not sufficient as this allegation does not contain such a description of the design or alleged fraudulent imitation thereof that the defendant is alleged to have imported, distributed and sold, as will show that they are in fact an infringement of the plaintiffs' rights. In the absence of such a description, there is, therefore, no allegation of the material facts necessary to show a cause of action for infringement.

[1] [1966] 1 Ex C R 214

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It therefore follows that the statement of claim herein cannot be allowed to stand insofar as the cause of action based on the alleged infringement of the industrial design is concerned and paragraphs 3 and 8 of the statement of claim shall be struck out.

It also appears that there are no conclusions on behalf of the Canadian plaintiff corporation as licencee of the industrial design with the possible exception of that conclusion dealing with damages. However, as under section 15 of the Act the proprietor only can maintain an action based on the statute, there would be no sufficient cause of action here for this additional reason.

I now turn to paragraph 4 of the statement of claim whereby plaintiff, Hassenfeld Bros., Inc., claims some relief as the registered owner of two Canadian trade mark registrations of the trade mark "G.I. Joe" as applied, *inter alia,* to toy military kits, dolls having articulated arms and legs, sets of military clothing and military equipment for dressing and supplying the same".

There is no distinct allegation of infringement under the alleged trade mark rights of the plaintiff in the sense in which such material facts should be alleged as referred to under the alleged infringement of the industrial design. The only reference to a possible infringement of its trade mark rights is by way of paragraphs 11 and 12 of the statement of claim which merely reproduce section 7, subparagraphs (*b*) and (*e*) of the *Trade Marks Act*. This is not an allegation of any facts constituting infringement or breach of the plaintiff's rights but is a mere statement of the conclusions of law that the plaintiff asks the Court to find on unstated facts.

As the plaintiff's allegations reveal no cause of action herein, it follows here also that paragraphs 4, 11 and 12 should also be struck out.

There is also an allegation that the plaintiff, Hassenfeld Bros. (Canada) Limited, the Canadian company, sells the product of the plaintiff Hassenfeld Bros., Inc. in Canada and has done so since at least as early as September 25, 1964, under and in association with the trade mark "G.I. Joe".

Such a statement on its very face reveals no right or cause of action whatsoever in favour of the Canadian com-

pany or even in favour of the American company. As a matter of fact, it tends to confuse the issues further if there are any in casting some doubt on the distinctiveness of the said trade mark.

I now come to paragraph 5 of the statement of claim which deals with the plaintiff, Hassenfeld Bros., Inc.'s copyright rights in Canada. The American company here merely alleges that it is the owner of the copyright in Canada in the G.I. dolls as an original artistic work and that this doll was created by two Americans who still live in the United States of America.

It appears clearly from the statement of claim herein that there is no allegation that a copyright subsisted in Canada in a named work. There is also no allegation that the authors of such work are British subjects or subjects of a named country which meet the requirements of section 4 of the *Copyright Act* (as a matter of fact the authors are alleged by plaintiff to be Americans) and no indication whatsoever that citizens of the United States come within the meaning of section 4 (2) of the *Copyright Act*. Indeed, if their country is not a party to a treaty they may have no right to a copyright in Canada at all.

No facts are indeed alleged which can support the title of copyright in plaintiff, and consequently, here also paragraph 5 of the statement of claim cannot remain and must also be struck out.

Furthermore, the general allegation of infringement, as contained in paragraphs 7, 9 and 10 of the statement of claim, suffers from the same defect as plaintiffs' other allegations of infringement in that it does not contain such a description of the copying and simulating that the defendant is alleged to have imported, made, distributed in Canada as will show that same falls within the plaintiffs' copyright rights and paragraphs 7, 9 and 10 must, therefore, also be struck out.

The defendant herein further moves for security for costs to be supplied by the plaintiff Hassenfeld Bros., Inc.

As the plaintiffs could have brought a separate action herein, the plaintiffs' claims are not joint claims, and not being joint claims, an order should go requiring the plaintiff residing out of the jurisdiction, Hassenfeld Bros., Inc., to furnish security for costs.

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In the result I therefore order:

(1) that paragraphs 3, 4, 5, 7, 8, 9, 10, 11 and 12 of the statement of claim be struck out;

(2) that the plaintiff, however, be granted leave to apply for leave to substitute other pleading for that that is so struck out;

(3) that, if no such application be made within four weeks from the date of the order, the defendant may apply to having this action dismissed;

(4) that the plaintiff Hassenfeld Bros., Inc., be ordered to furnish security for costs in the sum of $300 in cash or by surety bond of a recognized surety company within four weeks;

(5) that the defendant has the costs of the application to strike out in any event of the cause.

Ottawa 1966

June 30

July 28

BETWEEN:

UNDERBERG G.m.b.H. .....PLAINTIFF;

AND

BONEKAMP CORPORATION LTD. .....DEFENDANT.

Trade marks—Expungement—Consent judgment—Corporate defendant wrongly described in proceedings—Reg. no. of trade mark incorrectly stated—Amendment of judgment—Clerical error—Exchequer R. 175B

In 1958 a trade mark was registered in the name of Bonekamp Corporation under reg. no. 109596, but in proceedings brought by plaintiff to expunge the mark defendant was incorrectly described as Bonecamp Corporation Ltd. and the registration number incorrectly given as 109566 and these errors were repeated in documents filed by defendant's solicitors. In October 1963, on the filing of a consent executed by Bonekamp Corporation, countersigned by its secretary and bearing its corporate seal, judgment was delivered for the expungement of trade mark reg. no. 109566 On a subsequent motion by plaintiff to substitute the correct registration number in the judgment this Court ordered that reg. no. 109566 be struck out. Plaintiff moved to substitute the correct reg. no. 109596, in the judgment and filed a consent executed by Bonekamp Corporation countersigned by its secretary but not bearing its corporate seal.

Held, upon filing evidence, that defendant is not represented by a solicitor and a properly executed consent by defendant, the Court will order that the pleadings and judgment be corrected to correct obvious clerical errors, viz. the name of defendant and the trade mark's reg. no.

Note, however, that under the new Exchequer Court Rule 175B the practice of acting on a consent signed by the consenting party is no longer acceptable.

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UNDERBERG G m.b.H. v. BONEKAMP CORP. LTD.

MOTION.

James D. Kokonis for plaintiff.

JACKETT P.:—This is an application by the plaintiff for an order correcting the consent judgment delivered herein on October 17, 1963.

As established by the filing of a certified copy of the record of registration, it appears that, on March 7, 1958, there was registered in the name of Bonekamp Corporation of 6990 Marseille Street, Montreal, the trade mark "Underbergsche" under Registration No. 109,596.

The Statement of Claim in this action, as amended on October 14, 1960, wherein the defendant is described as "Bonekamp Corporation Ltd." of 7705 18th Avenue in the Town of Ville St. Michel in the Province of Quebec, alleges that the defendant registered as a trade mark the word "Underbergsche" under Registration No. 109,566 on March 20, 1958, in respect of "alcoholic cordials, alcoholic extracts and flavors for food", the wares referred to in the record of registration already referred to. The Prayer for Relief sought *inter alia* an order that trade mark registration No. 109,566 on the register of trade marks maintained under the *Trade Marks Act* be struck out.

On November 28, 1960, a Statement of Defence was filed by Gregory Charlap of counsel for "the Defendant" and on July 7, 1961, an affidavit was filed that had been sworn by Charles H. Caprarie-Melville, who swore that he was a Director and General Manager of "Bonekamp Corporation Ltd.", the "Defendant in the present action". An affidavit of documents was filed on September 22, 1961, in which the same gentleman again made the same statement. The first of these affidavits purports to come from the office of Slapack & Charlap, Barristers & Solicitors, of Montreal.

On October 16, 1963, a consent was filed purporting to be signed by "C. H. Caprarie-Melville" as "Secretary" and sealed with a seal bearing the name "Bonekamp Corporation" and the words "Incorporated 1956". This consent appears to have been prepared in the offices of Messrs. Smart & Biggar, who are solicitors for the plaintiff, and says simply that

The undersigned defendant hereby consents to judgment in this action in terms of the attached draft.

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The "attached draft" contains *inter alia* a clause providing that "the defendant's trade mark Registrations No. 109,566 and No. 112,218 on the Register of Trade Marks . . . be struck out".

Judgment was delivered in accordance with that Consent on October 17, 1963.

According to a certified copy of the record of registration of trade mark Registration No. 109,566, it is a registration in the name of Isotope Products Limited of the trade mark "Aquatel".

On June 28, 1966, there was filed a "Consent" signed "Bonekamp Corporation C.H.C. Melville Secretary" (and not sealed by any corporate seal), reading as follows:

> The undersigned, the defendant in this action, when it executed the consent to judgment herein filed in this Honourable Court on October 16th, 1963, intended to consent to a judgment striking out not only its registration No. 112,218 of the word UNDERBERG, but also its registration No. 109,596 of the word UNDERBERGSCHE.
>
> The defendant recognizes that the reference throughout the proceedings in this action to the registration of UNDERBERGSCHE as No. 109,566 was a clerical error and that the correct number of its registration of the said word is and always was 109,596.
>
> The defendant accordingly consents to the making of an order correcting the judgment herein by inserting, on the second line of the first paragraph on page 2 of the said judgment, the number 109,596 in place of the number 109,566.
>
> DATED at St. Michel this 18th day of March, 1966.

On January 11, 1966, a motion was made in this matter for an order correcting a clerical error in the judgment "by changing the first registration number on the second line of page 2 from 109,566 to 109,596" and my brother Thurlow made an order that the judgment be amended by striking out the reference therein to trade mark Registration No. 109,566. This order has not been taken out by the solicitors for the plaintiff and the Registrar has not completed it as contemplated by paragraph 2 of Rule 172.

The present application is for an order correcting the judgment by "inserting, on the second line of the first paragraph on page 2 of the said judgment, the number 109,596".

Counsel for the plaintiff undertook, at my request, to prepare and file a memorandum of authorities. This he has now done and I wish to express my appreciation for a very well prepared and useful review of the relevant authorities.

The explanation for the delay in the application to correct the judgment apparently arises from the fact that the judgment was not presented to the Trade Mark Office to implement the expungement order until comparatively recently. When this was done, it was obvious that the order for the expungement of Registration No. 109,566 was the result of a mistake. My brother Thurlow recognized, when the matter came before him, that the judgment was obviously founded in error in so far as it ordered expungement of Registration No. 109,566 and accordingly deleted the reference thereto from the judgment.

The question as to whether the proceedings can be corrected so as to provide for the expungement of Registration No. 109,596 is more difficult.

There are four matters that cause me concern, namely,

(*a*) the owner of Registration No. 109,596 is "Bonekamp Corporation" of one address, while the defendant in this action is described as "Bonekamp Corporation Ltd." of another address;

(*b*) the registration number in the pleadings, in the Consent on which the judgment is based and in the judgment is 109,566 and not 109,596, which is the correct number for the trade mark "Underbergsche";

(*c*) the Consent upon which I am now asked to make the correcting order is not signed by the solicitors who were acting for the defendant at least as late as May 1, 1962, the date of the examination for discovery, there is no evidence on file that such solicitors have ceased to act for the defendant, there is no evidence of any solicitor having advised the defendant in connection with the Consent, and the defendant has not appeared, by its proper officers before the Court personally;

(*d*) the Consent upon which I am being asked to make the correcting order has not[1] been executed by the defendant corporation in the normal manner by the affixing of the corporate seal witnessed by the President and Secretary or other officers duly authorized by a resolution of the directors, evidence of which has been filed in the form of a copy of such resolution certified by the Secretary over the company seal.

[1] By inadvertence the word *not* was omitted from the judgment of JACKETT P as originally filed in the Court records—ED

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My recollection is that counsel indicated to me that the defendant had ceased to be represented by solicitors some time before the consent judgment was delivered. Presumably, evidence of this can be placed on the Court file. If this is done, I am prepared to adopt, for the purpose of this application, the practice that was being followed when the consent judgment was delivered, of acting on a Consent signed by the consenting party although, for the future at least, under Rule 175B of our Rules, as amended recently, this will not be an acceptable practice.

So far as the defendant's execution of the Consent filed on June 28 last is concerned, this is not acceptable and it will be necessary to have the Consent properly executed.

So far as the description of the defendant and the registration number are concerned, I am satisfied by a reading of the pleadings and other material referred to above that there has been obvious error in the pleadings and the Consent filed on October 16, 1963, which has led to an error in the judgment delivered by this Court. It is perfectly clear that the intention throughout is to refer to the registration in the name of "Bonekamp Corporation" of "Underbergsche" being Registration No. 109,596 and not Registration No. 109,566, which is a registration completely unrelated to the parties or pleading in this action.

After considering Mr. Kokonis' review of the authorities, which are

Paper Machinery Ltd. v. J. O. Ross Engineering Corp., [1934] S.C.R. 186,

Prevost v. Bedard, (1915) 51 S.C.R. 629,

In re Blackwell, (1886) W.N. 97,

Preston Banking Co. v. William Allsup & Sons, [1895] 1 Ch. 141 (C.A.),

MacCarthy v. Agard, [1933] 2 K.B. 417 (C.A.),

Thynne v. Thynne, [1955] P. 272 (C.A.),

Fawell v. Andrew, (1917) 10 Sask. L.R. 320 (en banc),

Hatton v Harris, [1892] A.C. 547,

McDougald v. Mullins, (1897) 30 N.S.R. 313,

Pearlman (Veneers) S.A. (Pty.) Ltd. v. Bartels, [1954] 3 All E.R. 659 (C.A.),

Re Wright, [1949] O.W.N. 113,

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Lewis v. Chatham Gas Co., (1918) 42 O.L.R., 102 at 103-4, at 115,

Ainsworth v. Wilding, [1896] 1 Ch. 673,

Huddersfield Banking Co. Ltd. v. Henry Lister & Co., Ltd., [1895] 2 Ch. 273 (C.A.)

I am satisfied that these errors have resulted in an error in the judgment in expressing the manifest intention of the Court and I am therefore satisfied that the necessary correcting action can be taken.

Upon the filing of evidence that the defendant is not represented by a solicitor and a properly executed Consent, I am prepared to make an order directing that the pleadings and the judgment be amended by substituting "Bonekamp Corporation" for "Bonekamp Corporation Ltd." in the style of cause and by substituting No. 109,596 for No. 109,566 wherever the latter number appears therein.

Windsor 1966

Oct. 4

Oct. 4

BETWEEN:

MARY BILSON ..... APPELLANT;

AND

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

AND BETWEEN:

JOHN BILSON ..... APPELLANT;

AND

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

Income tax—Partnership—Computation of income of partners—Motel business—Sale of motel—Recaptured capital cost allowance—Income of which year—Whether partnership dissolved.

Appellants, who were husband and wife, operated a hotel in Windsor, Ontario, until 1951 when they sold it. In 1953 they purchased a motel which they sold on February 7th 1958. During these years they also owned a duplex and an apartment building. From the mode of dealing of appellants the Court found that they were partners at will in the hotel, motel, duplex and apartment business.

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Appellants' fiscal year for the motel business ended on January 31st. The sale of the motel on February 7th 1958 resulted in a recapture of capital cost allowance, and appellants were each assessed to income tax on one-half of that sum for the 1958 taxation year. Appellants filed notices of objection in which they purported to elect under s 15(2) of the *Income Tax Act* that they be assessed on the said amounts in the 1959 taxation year.

Held, allowing their appeals, in the absence of a notice of intention to dissolve the partnership or of circumstances leading to the inference that it was dissolved appellants' partnership continued and accordingly the sum received on the sale of the motel on February 7th 1958 was assessable in the 1959 taxation year.

[*Crawshay v. Maule,* 1 Swanst 495 at 508, referred to]

APPEALS from income tax assessments.

A. B. Weingarden for appellants.

D. G. H. Bowman for respondent.

GIBSON J.:—Both these appeals concern the taxation year 1958. In both appeals there have been minutes of partial settlement between the parties filed, and the only issue for decision is whether the appellants should be taxed in the 1959 taxation year instead of the 1958 taxation year on certain net income received from the operation of a business then owned by them called the Royal Motel, Windsor, during the period February 1 to February 7, 1958. Specifically what is involved in the dispute as to the net income figure, is an assessment for recapture of part of the capital cost allowance heretofore deducted in respect to the building and equipment of the Royal Motel.

The appellants are husband and wife and it is admitted by the parties and amply proved by the evidence that they have been partners for years. Up until 1951 they operated the Arlington Hotel in Windsor, at which time they sold it. Then in 1953 they purchased the Royal Motel, about which we are mainly concerned in this appeal. They then sold the Royal Motel on February 7, 1958. They also during the material period owned a duplex on Victoria Avenue in Windsor and also the Marwood Apartments, Windsor.

The fiscal year of the business of the Royal Motel ended January 31. The income tax returns of the appellants for the year 1958 and prior thereto were filed on this basis.

The appellants having sold the Royal Motel on February 7, 1958, included in their income for the 1958 taxation year the income less allowable deductions for the period February 1 to February 7, 1958, and thereby included income for a longer period than twelve months. This was done on the advice of their accountants.

As a result of the assessment made by the respondent against the appellants wherein certain recapture of capital cost allowance in respect to the Royal Motel was added to their 1958 income, the appellants filed a notice of objection and in it purported to make an election under section 15(2) of the Act (as it then read).

The appellants in these appeals take two positions: Firstly, predicated on the partnership terminating February 7, 1958, they say they did in fact make an election under section 15(2) so as to permit them the relief afforded by that section which in this case would shift, so to speak, the recaptured capital cost allowance or a certain portion of the recaptured capital cost allowance in respect of the Royal Motel from their income for the 1958 taxation year to the 1959 taxation year; or, secondly, and alternatively, that the partnership was still in existence in 1958 and at all other material times and that since the fiscal period of the business of the Royal Motel had not been changed that the income for the period February 1 to February 7, 1958, less allowable deductions (which would include capital cost allowance) in respect of the Royal Motel should be included in their income for the 1959 taxation year and not 1958.

I am of opinion that at all material times the appellants were partners. The evidence of the formation of the partnership was given. *Inter alia*, it is obvious from the mode of dealing adopted by the appellants that they were partners in the Arlington Hotel, the Royal Motel, the duplex and the apartment business. They jointly borrowed the money from the Royal Bank to finance the Royal Motel business. They used one bank account for all these businesses, and had no other bank account, and all receipts and payments were deposited into and made from such account.

I think it is clear that the appellants were in a partnership at will.

To determine such a partnership there must be notice of intention to do so or it must be inferred from all the

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circumstances that such a partnership was dissolved. Neither situation obtains in this case, and as a result I am of opinion that the partnership at no time was dissolved and exists to-day.

These various assets such as the Arlington Hotel, the Royal Motel, the duplex and the apartment are and were merely part of the stock-in-trade of such partnership.

In Lindley on Partnership[1], there is quoted in part the judgment of Lord Eldon in *Crawshay v. Maule*[2] which is apt in this matter, and I quote:

> Without doubt, in the absence of express there may be an implied contract as to the duration of a partnership, but I must contradict all authority if I say that whenever there is a partnership, the purchase of a leasehold interest of longer or shorter duration, is a circumstance from which it is to be inferred that the partnership shall continue as long as the lease. On that argument the Court, holding that a lease for seven years is proof of partnership for seven years, and a lease of fourteen of a partnership for fourteen years, must hold that if the partners purchase a fee simple, there shall be a partnership for ever (sic). It has been repeatedly decided that interests in land purchased for the purpose of carrying on trade are no more than stock in trade.

In the result therefore, I am of opinion that the partnership between the appellants continued in 1958 and 1959 and was not dissolved at any material time, and therefore the income of the appellants which is in issue in this matter received during the period February 1 to February 7, 1958, less all allowable deductions, should be taxed in the taxation year 1959.

The appeal is therefore allowed.

It is not necessary to consider the first position submitted by the appellants. But this is the only position taken by the appellants in the pleadings. The alternative position which is the basis of the decision on this appeal was not raised in the pleadings, nor was this position defined as an issue in any pre-trial order of this Court. As a consequence, no costs are allowed to the appellants.

[1] 12th Edition, page 160.

[2] 1 Swanst 495 at 508.

BETWEEN:

HENRY J. FREUD ....APPELLANT;

Windsor
1966
Oct. 5

AND

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

Income tax—Loss sustained by individual in promoting car marketing scheme—Loan to corporation formed for promotion of scheme—Failure of scheme—Loss of money loaned—Whether deductible in computing net income—Income Tax Act, s 3—"Source" of income—Meaning.

Appellant, a Detroit attorney residing in Windsor, conceived the idea of developing a market for a small personal sports car and of interesting a manufacturer in its production. In furtherance of this scheme, in 1958 he and two other men promoted a corporation in Michigan (later taking in additional stockholders) which produced prototypes of the car, but attempts to sell the idea to various manufacturers proved unsuccessful. In 1930 appellant loaned $13,840 to the corporation which it used to pay for labour, materials and the cost of driving a prototype of the sports car to New York in an effort to interest a New York manufacturer in its production, but the project came to nought and the corporation accordingly went out of business without realizable assets In his income tax return for 1960 appellant sought to deduct the $13,840 which he loaned to the corporation from his other income for 1960.

Held, allowing his appeal, had appellant's scheme been successful the profit he made would be income from a source within the meaning of the word "source" in the opening words of s. 3 of the *Income Tax Act,* and the money spent by him in 1960 was spent for the purpose of obtaining income from that source; and accordingly the loss he thereby sustained was deductible by him in computing his 1960 income because it is net income only that is taxable.

[*George H Steer v. M N R.* [1965] 2 Ex. C R 458, and *Wood v. M N R.* (unreported) referred to.]

APPEAL from income tax assessment.

Keith Laird, Q.C. for appellant.

A. Garon for respondent.

GIBSON J.:—The issue in this appeal is whether the sum of $13,840.47 advanced by the appellant to a United States company known as Detroit-National Automobile Company is deductible from the appellant's income for the taxation year 1960.

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The appellant for the years 1958 to 1960, which are the material years in this matter, was a resident of Windsor, Ontario, and he practised law in Detroit, Michigan.

In 1958, in conjunction with one Meredith Kettlewell of Orchard Lake, Michigan, a tool and die maker who sold certain components to the "Big Three" automobile manufacturers, he conceived the idea that there was a market for a small personal sports car. This idea in subsequent years and to-day has proved to be a sound one as is evidenced by the success of the Chevrolet Corvette Sting Ray, the Ford Mustang, and this year the Chevrolet Camaro, and the Mercury Cougar. The idea was to market a limited number of these small personal sports car in the belief that purchasers in the market wished to have a motor vehicle unique and distinct from their neighbours. The scheme of marketing the idea was to interest manufacturers, other than the "Big Three" motor car manufacturers, to produce these small personal sports cars without going to the expense of making the metal dies which all motor car manufacturers such as the "Big Three" incur and which runs into millions of dollars. The kind of manufacturer that the appellant had in mind in interesting in manufacturing such a sports car was Seagraves Corporation, whose head office is in New York City, and plant in Columbus, Ohio, a long time manufacturer of fire engines.

The appellant and Kettlewell and a retired mechanical engineer by the name of Charles S. Porritt in 1958 first embarked on this project and a prototype of their sports car was made in that year.

The moneys put up in carrying on this project by the appellant and Mr. Kettlewell at this time were advanced to a corporation which was incorporated in Michigan under the name of Floridian Motors Corporation.

Then when the appellant and Mr. Kettlewell became convinced that much more substantial sums of money were necessary to advance their project they caused this company to have its name changed to Detroit-National Automobile Company and to have increased its share capital. Then certain shares were sold to other third parties and some greater sums of money were obtained in order to permit this company to further advance this project.

Further prototypes of this small sports car were made and contacts were had with various corporations in an attempt to sell the idea to one of them.

It was never the intention of the appellant and his associates to get into the manufacturing business. Instead the idea was to sell the concept to a third party corporation, which latter was to do the actual manufacturing.

Up until 1960 no success was met in selling this idea to any manufacturer and in the year 1960 all of the other shareholders declined to put up any further moneys.

Up to that time the moneys put up by the appellant had been exchanged by Detroit-National Automobile Company for shares in that company.

In 1960, however, the appellant advanced moneys by cheques from his own bank account in the sum of $13,-840.47. Some of these were put through the bank account of the Detroit-National Automobile Company, some of these were issued directly to certain labour employed by that company, and some directly to material men who supplied the materials to this company, and the balance was spent directly by the appellant in taking him, a prototype model of the company's sports car, and the driver to New York City to display and to attempt to sell to the Seagrave Corporation this concept of a sports car.

The prototype which was taken to New York was drivable. It had a continental motor. And for some months in 1960, the Seagrave Corporation expressed interest in it, but finally did not make any offer to buy the concept and project of Detroit-National Automobile Company. The appellant at this hearing said that in retrospect he now realizes that what was required was more than a prototype model which in essence was hand made without engineering plans. What was necessary, he said, was the complete engineering design and plans for such a sports car so that any potential purchaser of the concept would be able immediately to go into manufacturing production.

Having failed to sell the concept to Seagraves Corporation, the appellant ceased to advance any further moneys and the Detroit-National Automobile Company went out of business in 1960, and there was no salvage value in any of its assets.

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The issue on this appeal is whether these moneys in the sum of $13,840.47 paid out by the appellant to Detroit-National Automobile Company or on its behalf in 1960, can be utilized as a deduction from his other income in that year, for the purpose of computing his taxable income.

The appellant claims that these moneys paid out in 1960 were an outlay for the purpose of earning income from a "business", and the respondent contends that such moneys paid out are not deductible because they do not qualify under section 12(1)(*a*), or alternatively that they are advances of capital within the meaning of section 12(1)(*b*) of the Act.

As the evidence discloses and which is not disputed, the appellant did not at any time intend that Detroit-National Automobile Company would produce this small personal sports car the concept of which the appellant and Mr. Kettlewell had. Instead they intended to sell the idea and obtain the gain through such sale.

In my view, if the appellant had been successful and realized a profit therefrom, this gain clearly would be income from a source outside the sources specified in section 3 but within the meaning of "sources" in the opening words of the section. In other words, it would not have been a windfall gain and so not a capital gain.

In my view also, the moneys paid out in 1960 by the appellant were moneys spent by him for the purpose of obtaining an income from a source within the meaning of the opening words of section 3 of the Act.

The appellant therefore in computing his income for the taxation year 1960 was entitled to deduct the loss from such potential source because it is his net income only in this sense that is taxable. (cf. *George H. Steer v. M.N.R.*[1]; and *Wood v. M.N.R.*[2])

The appeal is therefore allowed with costs.

[1] [1965] 2 Ex C.R. 458 [2] (September 7, 1966, Unreported).

BETWEEN:

MONTREAL TRUST COMPANY, Executors under the Will of CHESLEY ARTHUR CROSBIE ..... APPELLANT;

AND

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

Montreal 1966
Sept. 30
Ottawa Oct. 11

Estate tax—Company controlled by deceased—Gift or benefit conferred on blood relative within three years of death—Grant of option to buy shares at less than actual value—Option given for legitimate business reasons—Estate Tax Act, 1958, c 29, s. 3(1)(c) and (g)—"Gift", "partial consideration", meaning of—Estate Tax Act, s. 3(6)(b)—Construction of statute—Intent of Parliament

In November 1961 the directors of a company controlled by CC, granted AC, an employee of the company and a blood relative of CC, in view of his past services and as an incentive for his future services, i.e. wholly for legitimate business reasons, an option to buy 18,500 shares of the company during the years 1961, 1962 and 1963, as long as he remained an employee of the company, at 10¢ a share, their actual value being $4 94 a share. In exercise of the option AC bought 6,167 shares in December 1961, 6,167 shares in March 1962 and 6,166 shares in January 1963. CC died on December 26th 1962 and his estate was assessed to estate tax in respect of the grant of the option or alternatively of the shares issued to AC in December 1961 and March 1962 as being a gift or a disposition of property for partial consideration made within three years prior to CC's death (secs. 3(1)(*c*) and (*g*) of the *Estate Tax Act*).

Held, the estate's appeal must be allowed.

1 A gratuitous payment by an employer to an employee as remuneration for services, past or future, though made without consideration as that word is used in the common law of contracts is nevertheless made for a business reason i e, for a "cause", and such a payment does not fall within the ordinary meaning of the word "gift" as employed in s 3(1)(*c*) of the *Estate Tax Act*.

2 For the like reason a benefit conferred by an employer on an employee by transferring property to him for less than its value is not a disposition "for partial consideration" within the meaning of s. 3(1)(*g*) if it is done as remuneration for services Having regard to the French version of s 3(1)(*g*) wherein the phrase in the English version "for partial consideration" is "pour une cause ou considération partielle", the word "consideration" in the English version is used not in the common law sense as payment supported exclusively by business considerations but as payment partially supported by such motives as love and affection, family duty or philanthropy.

Semble. The grant of an option to AC to buy shares as long as he remained an employee of the company created no contract between

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the company and AC and there was therefore not a disposition of property within the meaning of s. 3 of the *Estate Tax Act* until the option was exercised.

Semble. Section 3(6)(*b*) of the *Estate Tax Act* does not apply to a disposition made by a company controlled by a deceased to a person unless it was made to that person as a "person connected with the deceased by blood relationship, marriage or adoption", and therefore does not apply to a payment *bona fide* made to an employee for services merely because the employee is so connected with the deceased.

APPEAL from assessment under the *Estate Tax Act.*

Maurice A. Regnier and *Stanley H. Hartt* for appellants.

D. G. H. Bowman for respondent.

JACKETT P.:—This is an appeal by the Estate of Chesley Arthur Crosbie of the City of St. John's, Newfoundland, who died on December 26, 1962, from an assessment under the *Estate Tax Act,* chapter 29 of the Statutes of Canada, 1958, as amended. The sole reason for the appeal is the inclusion by the respondent, in the computation of the aggregate net value of property passing on the death of the deceased, of the sum of $109,150 as being the value of a gift deemed to have been made by the deceased within three years prior to his death to Andrew C. Crosbie, or, alternatively, as being the amount of a benefit deemed to have been conferred by the deceased within three years prior to his death upon Andrew C. Crosbie by a disposition of property for partial consideration.

It is common ground that, at all times material to this appeal prior to his death, Newfoundland Engineering and Construction Limited (hereinafter referred to as "the company") was a corporation "controlled" by the deceased within the meaning of the word "controlled" as used in paragraph (*b*) of subsection (6) of section 3 of the *Estate Tax Act.*

On November 30, 1961, the company had an employee, Wallace Pennell, who had been a full-time employee of the company for seven years, and one Andrew C. Crosbie, who had been a director of the company since September, 1958 and secretary-treasurer of the company since June, 1959.

It is common ground that Andrew C. Crosbie, who was paid a salary as secretary-treasurer, was "connected with

the deceased by blood relationship" within the meaning of those words as used in paragraph (*b*) of subsection (6) of section 3 aforesaid, and that Wallace Pennell was not so connected with the deceased. On that day, that is November 30, 1961, the directors of the company adopted two resolutions reading as follows:

The Chairman advised the meeting that in view of the long and faithful service of Mr. Wallace Pennell to the Company and as a further incentive to him to continue to render such service to the Company, Mr. Pennell should be granted an option to purchase eighteen thousand five hundred (18,500) shares without par value of the capital stock of Newfoundland Engineering and Construction Company Limited for the price of ten cents (10¢) per share which option should extend for a period of one month from the date of this meeting. On motion duly made and seconded, Mr. Pennell refraining from voting, it was unanimously resolved that Mr Wallace Pennell, Vice-President and General Manager of the Company, be granted an option effective for one month from the date of this resolution to purchase from the Company eighteen thousand five hundred (18,500) shares without par value of the capital stock of the Company for the price of ten cents (10¢) per share in recognition of his services to the Company.

The Chairman advised the meeting that in view of the valuable and faithful service of Mr Andrew Crosbie to the Company, in view of his present service and the prospect of his continued valuable service to the Company and as a further incentive to him to continue to render such service to the Company, Mr. Crosbie should be granted an option to purchase eighteen thousand five hundred (18,500) shares without par value of the capital stock of the Company for the price of ten cents (10¢) per share, which option should only be exercisable by him as long as he remains an employee of the Company and which option should be exercisable by him during the year 1961 for sixty-one hundred and sixty-seven (6167) shares, exercisable by him during the year 1962 for sixty-one hundred and sixty-seven (6167) shares and exercisable by him during the year 1963 for sixty-one hundred and sixty-six (6166) shares of the Company Upon motion duly made and seconded, Mr. Andrew Crosbie refraining from voting, it was resolved that Mr. Andrew Crosbie, Secretary-Treasurer of the Company, be granted an option effective only so long as he continues to be an employee of the Company to purchase from the Company during the year 1961 sixty-one hundred and sixty-seven (6167) shares without par value of the capital stock of the Company for the price of ten cents (10¢) per share, during the year 1962 sixty-one hundred and sixty-seven (6167) shares without par value of the capital stock of the company for the price of ten cents (10¢) per share, and during the year 1963 sixty-one hundred and sixty-six (6166) shares without par value of the capital stock of the Company for the price of ten cents (10¢) per share in recognition of his past and present service to the Company.

In December 1961, Pennell exercised the "option" so granted to him and 18,500 fully paid shares were issued to him by the company upon payment by him to the company of ten cents per share.

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In December 1961, and March 1962, respectively, Andrew C. Crosbie exercised the "option" so granted to him in respect of 6,167 shares on each occasion, and, on each occasion, 6,167 fully paid shares were issued to him by the company upon payment by him to the company of ten cents per share.

As already indicated, the deceased died on December 26, 1962.

In January 1963, Andrew C. Crosbie again exercised the "option" that had been granted to him by the company in November 1961, and 6,166 shares were issued to him by the company upon payment by him to the company of ten cents per share.

At all times material to this appeal, the shares so issued to Pennell and Andrew C. Crosbie had a fair market value of $4 94 per share.

The parties to the appeal have expressly agreed that the aforesaid "options" were "granted" for "legitimate business reasons".

The parties have also agreed, although it is probably not relevant to the determination of this appeal, that Pennell and Andrew C. Crosbie paid income tax under section 85A of the *Income Tax Act* on the benefits that accrued to them from the exercise of the aforesaid options, which income tax was not payable unless the benefit was received "in respect of, in the course of or by virtue of the employment" as employees of the company. (See subsection (7) of section 85A.)

It is common ground that the assumption as to the value of the shares upon which the Minister based the assessment appealed against was excessive and that, assuming that the appellants are otherwise unsuccessful, the appeal is to be allowed with costs to the respondent and the assessment is to be referred back to the Minister for reassessment on the basis that the aggregate net value of property passing on the death of the deceased be reduced by $19,600 from the amount upon which the assessment was based.

The relevant provisions in the *Estate Tax Act* read as follows:

3 (1) There shall be included in computing the aggregate net value of the property passing on the death of a person the value of all property, wherever situated, passing on the death of such person, including, without restricting the generality of the foregoing,

. . .

(*c*) property disposed of by the deceased under a disposition operating or purporting to operate as an immediate gift *inter vivos*, whether by transfer, delivery, declaration of trust or otherwise, made within three years prior to his death;

. . .

(*g*) property disposed of by the deceased under any disposition made within three years prior to his death for partial consideration in money or money's worth paid or agreed to be paid to him, to the extent that the value of such property as of the date of such disposition exceeds the amount of the consideration so paid or agreed to be paid;

(6) For the purpose of this Act,

(*b*) a disposition made by a corporation controlled by the deceased to or for the benefit of any person connected with the deceased by blood relationship, marriage or adoption shall be deemed to be a disposition made by the deceased to or for the benefit of that person, and, in relation to any such disposition, any act or thing done or effected by that corporation shall be deemed to have been done or effected in all respects as though that corporation were the deceased;

.

4 (1) Notwithstanding section 3, there shall not be included in computing the aggregate net value of the property passing on the death of a person the value of any such property acquired pursuant to a *bona fide* purchase made from the deceased for a consideration in money or money's worth paid or agreed to be paid to the deceased for his own use or benefit, unless such purchase was made otherwise than for full consideration in money or money's worth paid or agreed to be paid as hereinbefore described, in which case there shall be included in computing the aggregate net value of the property passing on the death of the deceased in respect of the property so acquired only the amount by which the value of the property so acquired computed as of the date of its acquisition exceeds the amount of the consideration actually so paid or agreed to be paid.

58. (1) In this Act,

. . .

(*e*) "disposition" includes any arrangement or ordering in the nature of a disposition, whether by one transaction or a number of transactions, effected for the purpose or in any other manner whatever;

As I appreciate the position of the parties to this appeal, there is no dispute as to the basic facts although there may be some question as to what inferences should be drawn from them. Nothing, therefore, turns on an onus of proof. What has to be decided is a question of law as to whether the assessment can be supported in whole or in part by the provisions of the taxing statute.

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The respondent's position as to that, as I understand it, may be stated as follows:

(1) In the first place, he says that the grant of the "option" by the company to Andrew C. Crosbie in November, 1961, was a "disposition" made by a "corporation controlled by the deceased" to a "person connected with the deceased by blood relationship" and must therefore be "deemed" by virtue of section 3(6)(*b*) to be "a disposition made by the deceased to...that person"; and, that being so, the option is "property disposed of by the deceased" under a "disposition operating...as an immediate gift *inter vivos* . . . made within three years prior to his death" and so must be included in computing the aggregate net value of the property passing on his death by virtue of section 3(1)(*c*).

(2) Alternatively, he says that, if the grant of the "option" was not such a disposition, the issue of the shares by the company to Andrew C. Crosbie in December, 1961, and March, 1962, was a "disposition" made by "a corporation controlled by the deceased" to "a person connected with the deceased by blood relationship" and must therefore be "deemed", by virtue of section 3(6)(*b*), to be "a disposition made by the deceased to...that person"; and, that being so, the shares are "property disposed of by the deceased" under a "disposition made within three years prior to his death for partial consideration in money or money's worth paid or agreed to be paid to him" and so must be included in computing the aggregate net value of the property passing on his death, by virtue of section 3(1)(*g*), "to the extent that the value of such property as of the date of such disposition exceeds the amount of the consideration so paid or agreed to be paid".

There are at least two submissions made by the appellant against the respondent's position upon which I do not propose to express any opinion and which, therefore, I will merely endeavour to indicate at this point. The first of these is that the *creation* of a right or property falls outside the word "disposition" and therefore neither the grant of an option nor the issue by a company of shares can be regarded as a disposition of property. The second is that,

even if the issue of the shares can be regarded as a disposition by the company of shares to Andrew C. Crosbie for a partial consideration, the partial consideration cannot be regarded as having been "paid to him" ("him" being the deceased) within section 3(1)(*g*) inasmuch as the concluding words of section 3(6)(*b*) expressly deem any act or thing *done or effected by the company* to have been done or effected as though the company were the deceased (but does not contain any provision which deems anything paid *to* the company to have been paid to the deceased).

Another position taken by the appellant upon which I do not have to express any concluded opinion, having regard to the grounds upon which I have decided to dispose of the appeal, is that the so-called grant of an "option" was no disposition of property because it created no legal right in Andrew C. Crosbie, being no more than an offer to Crosbie to issue shares to him on certain terms. The respondent took the position that there was an implied contract—implied in the sense that it was not expressed—whereby, in consideration of Crosbie continuing to work after the resolution was passed in November, 1961, the company bound itself to issue the shares in accordance with the terms of the resolution if Crosbie elected to exercise the option. If I had to decide this question upon the view I have so far been able to form of the matter, I should have to find that there is no basis for inferring any such contract and that there was therefore no disposition or creation of any rights on property until such time as the option was exercised.

I come to the view of the matter upon which, in my view, the appeal should be decided.

The question that has to be decided is whether a benefit conferred by a company controlled by the deceased, upon Andrew C. Crosbie as an employee of the company "for legitimate business reasons" is to be dealt with for estate tax purposes as property passing on the death of the deceased by reason of the fact that Andrew C. Crosbie happened to be a blood relation of the deceased. There is no suggestion that the transaction was a mere subterfuge for conferring a benefit on Andrew C. Crosbie as a blood relation of the deceased and there is no suggestion that any part of the amount of the benefit is for anything other than the benefit that "legitimate business reasons" dictated that it was in the commercial interest of the company that it

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should confer on this employee. This aspect of the case is underlined by the otherwise irrelevant fact that a similar arrangement was made for a fellow employee on very similar terms at the same time.

One further point needs to be developed in considering the neat point that has to be decided on this appeal. In my view, what was done here falls into a not uncommon category of business transactions, namely, payments made in the ordinary course of business without legal liability. A business is operated to make a profit. No disbursement is a proper business disbursement unless it is made directly or indirectly to attain that end. Generally speaking, business payments are made pursuant to contracts whereby the business man receives a *quid pro quo* for that payment—e.g., contracts for services, purchase contracts, construction contracts, etc. Nevertheless, good business can dictate, depending on the circumstances, disbursements over and above the amounts legally owing for what the business man has received or is to receive. A special payment to a good contractor in unforeseen difficulties so that he will be available for future work, is one example. Bonuses to employees over and above any requirement of the contracts of employment, so as to maintain their goodwill and keep employee morale high is another. Still another is the very type of benefit conferred on senior executives that we find in this appeal. That it is a very common type of benefit conferred on senior executives is evidenced by the special provision made in section 85A of the *Income Tax Act* for their income tax treatment.

Two aspects of the facts call for special attention when it is claimed that the benefit should be treated as part of the deceased's estate for estate tax purposes, viz.:

(*a*) the benefit was conferred on Andrew C. Crosbie as an employee of the company and not as a blood relation of the deceased, and

(*b*) while the benefit was completely gratuitous in the sense that it was not conferred pursuant to a legal obligation as payment for something already received or pursuant to a contract for something to be received, it was nevertheless an ordinary business transaction and had none of the characteristics of what is commonly thought of as a gift *inter vivos*.

Counsel for the respondent submits that neither of these aspects of the matter is of any significance. He would say, I believe, that the statute necessarily contains arbitrary provisions designed to bring into the tax net transactions that might otherwise be employed to avoid the incidence of estate tax and that such provisions are to be applied quite literally to transactions that are not avoidance transactions—probably because of the difficulty involved in establishing that any particular transaction has a tax avoidance character.

I accept the proposition that provisions such as section 3(1)(*c*) and (*g*) and 3(6)(*b*), by their very nature, must be applied according to their terms, regardless of whether their application to particular circumstances may go further than, in the opinion of the Court, is required to carry out the scheme of the statute. I am of opinion, however, that in determining the effect of such a provision, as in the case of determining the effect of any other provision in a statute, it must be weighed having regard to the place it occupies in the scheme of the statute.

Three further questions arise, viz:

(*a*) whether section 3(6)(*b*) applies to a payment by a company controlled by the deceased to an employee in respect of past and future services if that employee happens to be a blood relative of the deceased, and

(*b*) whether a payment made gratuitously by an employer to an employee is a disposition operating or purporting to operate as a "gift" within section 3(1)(*c*) even though such payment was remuneration for services and was motivated exclusively by legitimate business reasons, and

(*c*) whether a transaction whereby a deceased conferred a benefit on an employee by conferring property rights on him for a nominal payment is a disposition "for partial consideration in money or money's worth" within section 3(1)(*g*) even though the benefit is conferred as remuneration for services and was motivated exclusively by legitimate business reasons.

As far as I know there is no authority to guide the Court in deciding any of these questions.

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In view of my conclusion with reference to the second and third of these questions, it is unnecessary for me to reach a concluded opinion with regard to the interpretation of section 3(6)(*b*). Having said that, I may say that I am inclined to the view that that paragraph does not apply to a disposition made by the controlled corporation to a person unless it was made to that person as a "person connected with the deceased by blood relationship, marriage or adoption", and that it does not therefore apply to a payment made by the company to an employee for services merely because that employee happened to be so connected with the deceased. This is not to say that a payment or benefit would not fall within that provision if the employer-employee relationship between the controlled company and the blood relation were being used as a means of making to the blood relation a gift consisting in whole or in part of the amount of the payment or benefit.

The questions that I have formulated with regard to paragraphs (*c*) and (*g*) of section 3(1) may, in my view, be discussed together. The respondent's position, as I understood it, was that there is a gift within paragraph (*c*) if there is no "consideration" in the sense of the consideration required as a condition to the validity of a contract made otherwise than under seal at common law regardless of whether the disposition was made in the ordinary course of business. Similarly, the respondent's position was that a disposition was made for "partial consideration" within paragraph (*g*) if, on the evidence, the value of the "consideration" in the aforesaid sense was less than the value of the property disposed of even if the disposition was the subject of an arm's length contract. I am of opinion that these paragraphs must be read as companion provisions. If a gratuitous (i.e., unenforceable) payment by a business man to an employee as remuneration for services is a "gift" within the meaning of that word in paragraph (*c*), then a transaction whereby a business man, in lieu of simply making such a payment, confers a benefit on an employee by charging him a nominal price for shares is, for the purposes of paragraph (*g*), a disposition "for partial consideration". Conversely, if a gratuitous payment by a business man to an employee as remuneration for services is not a "gift" within the meaning of that word in paragraph (*c*), then a transaction whereby a business man, in lieu of simply mak-

ing such a payment, confers a benefit on an employee by charging him a nominal price for shares is not, for the purposes of paragraph (*g*), a disposition "for partial consideration".

It is beyond controversy that gratuitous payments to employees having regard to their services, past and future, are nevertheless, for business and income tax purposes, payments as remuneration for services; and are taxable in the hands of the employee and are deductible in computing the employer's profit from his business. While such payments may fall within the concept of a "gift" for the purposes of certain principles of common law—e.g., that a contract to make a gift is unenforceable—with much hesitation, I have reached the conclusion that they are not gifts within the meaning of the word "gift" as used in section 3(1)(*c*) of the *Estate Tax Act*.

While there is no "consideration" for such a gratuitous payment in the sense in which the word "consideration" is used by the common law of contracts, there is, from the point of view of the employer, a business reason—that is a "cause"—for making the payment. Having regard to the scheme of section 3, I cannot conclude that Parliament intended, by paragraph (*c*) of section 3(1), to bring within the concept of "property ... passing on the death" of the deceased all payments made by the deceased in the ordinary course of business during the three years prior to his death that did not happen to have been made pursuant to legally enforceable obligations. Such payments are not, in my view, "gifts" within the ordinary use of that word and are not, therefore, gifts within section 3(1)(*c*) of the *Estate Tax Act*. Compare *Finch v. Commissioner of Stamp Duties*[1].

I am reinforced in my view of section 3(1)(*c*) when I come to consider section 3(1)(*g*). Section 3(1)(*g*) applies to dispositions made "for partial consideration". While my first reaction was that this was an adoption by Parliament of the common law concept of "consideration", I find on referring to the French version that the corresponding phrase is "pour une cause ou considération partielle" which, to me, indicates that what we are talking about is a payment that is not supported exclusively by business considerations but is partially supported by such motives as love

[1] [1929] A.C. 427.

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and affection, family duty or philanthropy. Compare *Attorney-General v. Boden*[1], *Attorney-General v. Earl of Sandwich*[2], *In re Baroness Bateman*[3] and *Gorkin et al. v. Minister of National Revenue*[4].

For the above reasons, the appeal is allowed with costs to the appellant and the assessment is referred back to the respondent for reassessment on the basis that the aggregate net value of property passing on the death of the deceased is $109,150 less than that on which the assessment appealed from was based.

I should add that, while the issues upon which I have decided the appeal as I have formulated them differ somewhat from the issues formulated in the "Agreed Statement of Facts" that was filed as Exhibit 1, the issues as I have formulated them were accepted by counsel for both parties as having been raised by the appeal and submissions were made on both sides with regard thereto.

[1] [1912] 1 K.B. 539
[2] [1922] 2 K.B. 500
[3] [1925] 2 K.B. 429
[4] [1962] S.C.R. 363

BETWEEN:

Ottawa 1966 Oct 11 / Oct 17

HERMAN E. GAMACHE .....PETITIONER;

AND

D. R. JONES and J. A. MAHEUX .....RESPONDENTS.

Practice and Procedure—Mandamus—Demotion of pilot by Quebec Pilotage Authority—Demand for reinstatement—Refusal of—Mandamus procedure in Quebec—Whether applicable in Exchequer Court—Exchequer Court Rules 2(b), 6(3).

Gamache, a licensed class A pilot in the Quebec Pilotage District, was demoted to class B by the Quebec Pilotage Authority purporting to act under s. 24(5) of the Quebec Pilotage District general by-laws, P.C. 1930-756. Following refusal of his demand for reinstatement he applied to the Exchequer Court for a writ of *mandamus* ordering respondents, the Superintendent of Pilotage and the local Supervisor of Pilots, to reinstate him on the ground that the decision to demote him was made without the petitioner having been called or heard. Exchequer Court Rule 2(*b*) provides that in the absence of specific provision in a federal statute or the rules of the court the procedure shall be determined by the court by analogy to the procedure for similar proceedings in the courts of that province to which the subject matter most particularly relates. The procedure followed by petitioner was strictly in accordance with the provisions of sections 834, 835 and 844(3) of the Quebec Code of Civil Procedure relating to *mandamus*.

Held, while it would appear that the application would be granted if the matter were governed by the Quebec procedure the proceedings in the

Exchequer Court should in accordance with Exchequer Court Rule 6(3) have been initiated by statement of claim, there being nothing about the remedy of *mandamus* that made the question for decision unsuitable for adjudication by the normal procedure by statement of claim, statement of defence, discovery, etc. *Queen v. Leong Ba Chai* [1954] S.C.R. 10; *Exchequer Court Act*, s. 29(*c*), referred to.

APPLICATION for *mandamus*.

Raynald Langlois for Petitioner.

NOËL J.:—An application was made to this Court by Herman E. Gamache on Tuesday, October 11, 1966, requesting (1) the issuance of an order permitting the petitioner, a licensed pilot, residing and domiciled in Quebec City, P.Q. to issue a Writ of Mandamus against the respondents, D. R. Jones and J.-A. Maheux, respectively, Superintendent of Pilotage and local Supervisor of Pilots for the Quebec Pilotage District and ordering them to file an appearance in this action within ten days of the service upon them of said Writ and that in default of their so doing, the said action may proceed and judgment may be given in their absence; (2) that respondents be ordered to reclassify petitioner as a Grade "A" Pilot for the Quebec Pilotage District and grant him every right and privilege attending such grade; and (3) that costs be assessed against respondents whatever the issue of the cause.

The statutory provision which gives jurisdiction to this Court in relation to the subject matter of the application is section 29 of the *Exchequer Court Act*, R.S.C. 1952, chapter 98 which reads in part as follows:

> 29. The Exchequer Court has and possesses concurrent original jurisdiction in Canada
>
> . . .
>
> (*c*) in all cases in which demand is made or relief sought against any officer of the Crown for anything done or omitted to be done in the performance of his duty as such officer; . . .

Before considering what is the appropriate procedure in this Court, it will be helpful to consider the remedy known as Mandamus as it has been developed in the province of Quebec as well as in jurisdictions governed by the common law. In such jurisdictions Mandamus is a procedure by which, in a proper case, a court may issue an order commanding a person to perform a duty which is not of a purely private nature and, more particularly, as is alleged in the present case, when a public officer omits, neglects or

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refuses to perform a duty belonging to his office, or an act which by law he is bound to perform (cf. article 844(3) of the *Code of Civil Procedure, Quebec*).

It is clear, I believe, that a Mandamus will not lie to the Crown or a servant of the Crown. There is, however, a distinction to be made between a case when a servant of the Crown is acting as a servant of the Crown and a case where a servant of the Crown, be he a minister or any other employee, has been designated to fulfil a particularly statutory duty affecting the rights of subjects. In the latter type of case, unless the power exercised is purely discretionary (and even in such a case if the discretion should have been, but was not, exercised judicially a Mandamus may still issue; compare *Board of Education of Etobicoke v. Highbury Developments, Ltd.*,[1]) a Mandamus may issue in a proper case. This was the basis of the decision in *Queen v. Leong Ba Chai*[2] where Taschereau J., (as he then was) said:

> It has been held several times that when a duty has to be performed by the Crown, the Courts cannot claim any power to command the Crown. (*The Queen v. Lord's Commissioners of the Treasury*, (1872) 7 Q.B. 387 at 394; *Short & Mellor*, The Practice of the Crown Office, 2nd ed., 1908, p. 202). This is not the case in the present instance. Other considerations would have to be taken into account if the Immigration Officer were a servant of the Crown acting in his capacity of servant and liable to answer only to the Crown (*The Queen v. Secretary of State*, (1891) 2 Q.B. 326 at 338) but the Immigration Officer has been designated by Statute to fulfil a particular act. He is charged with a public duty which runs in favour of the respondent in whom it created a civil right (*The Minister of Finance v The King*, [1935] S.C.R. 278 at 285). If he refuses to act and discharge that duty he is amenable to the ordinary process of the courts.

It was considered that the functions of the immigration officer in that case were judicial or *quasi judicial* and that it was his duty to consider whether the applicant for admission conformed to the standards laid down in the regulations.

In *Security Export Company v. Hetherington*[3] Duff J., as he then was, quoted a passage from the judgment of Brett L.J. (Lord Esher) in the Court of Queen's Bench in *Regina v. Local Government Bond*[4] which reads as follows:

> Whenever the Legislature entrusts to any body of persons other than the Superior Courts, the power of imposing an obligation on individuals,

[1] [1958] S.C.R. 196.
[2] [1954] S.C.R. 10.
[3] [1923] S.C.R. 539 at 550.
[4] 10 Q.B.D. 309.

the Courts ought to exercise as widely as they can the power of controlling those bodies of persons, if they admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament.

It is, therefore, necessary to look at each statute, by-law or regulation imposing a duty and determine whether, on the one hand, the Minister or servant of the Crown is exercising a purely administrative function or discretion or forming a policy judgment or whether, on the other hand, he is bound by certain statutory or legal limits and requirements or pre-existing standards set up by statute. In the latter type of case, where he is subjected to such standards or where his authority is specifically limited, he may be subject to Mandamus and becomes a *"persona designata"* performing statutorily imposed duties rather than a servant of the Crown.

The substantive right of the person aggrieved by the refusal of such a *persona designata* to comply with his legal duty after he has been required, by an appropriate demand to do so, is to invoke the process of a court of competent jurisdiction to force him to do his duty. Mandamus is the procedure developed in the province of Quebec and common law courts whereby the person so aggrieved may obtain the implementation of such substantive right.

Under section 29(*c*) of the *Exchequer Court Act*, this Court has jurisdiction to implement a substantive right. The problem I have to deal with is what is the appropriate procedure in this Court to implement that substantive right.

The procedure followed by the petitioner in requesting the issuance of a Writ of Mandamus here is that in force in the province of Quebec, under articles 834 and 835, and 844, subparagraph (3) of the new Quebec *Code of Civil Procedure*. Under the above articles all extraordinary recourses including Writ of Mandamus can only be exercised with the previous authorization of a judge of the Superior Court obtained upon a motion setting forth the facts justifying the recourse, the allegations of which must be supported by an affidavit. Service is then made by means of a Writ on which must appear, over the signature of the prothonotary the name of the judge who authorized it. The above motion must then be annexed to the Writ to take the place of a declaration and the procedure then follows the ordinary rules, but the suit must be heard and decided by

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preference. Under article 836 of the *Code of Procedure* "a judgment which grants the demand must be served on all parties in the case; failure to comply with the order therein contained, constitutes a contempt of court".

Under rule 2 of the *General Rules and Orders* of this Court, as amended, when any matter arises in any proceedings before this Court which is not otherwise provided for by any provision in any Act of the Parliament of Canada or by the rules of this Court, the practice and procedure shall be determined by the Court for the particular matter by analogy:

(*a*) to the other *General Rules and Orders* of the Court, or

(*b*) to the practice and procedure in force for similar proceedings in the courts of that province to which the subject matter of the proceedings most particularly relates whichever is, in the opinion of the court, most appropriate in the circumstances.

The procedure contemplated by this latter paragraph, paragraph (*b*) is the procedure adopted by the applicant in making this application; and this might well have been one which could have been adopted by the Court in the present matter providing, of course, the Court were of the view that the applicant falls within the conditions precedent to the granting of the application.

Rule 2 only applies, however, when any matter arises "which is not otherwise provided for . . . by any general rule . . . of the Court" and rule 6, paragraph 3, of the Rules of this Court provides that "any...proceedings in this Court, unless otherwise specially provided for, may be instituted by filing a Statement of Claim, which...shall conform to the rules of pleading herein prescribed". If there were something about the very nature of the remedy granted in other courts by the procedure known as Mandamus that made it unsuitable for adjudication by the simple procedure of Statement of Claim, Statement of Defence, discovery and hearing provided for by the general rules of this Court, I might have concluded that rule 6 did not cover the matter and that resort must be had to rule 2. On balance I have concluded that there is no such inherent unsuitability and that persons seeking such a remedy may proceed, without any preliminary step, to file and serve a Statement of

Claim. The procedure and practices of the court are sufficiently simple and flexible to enable the parties to seek and obtain any special orders required by the nature of the particular case in order to ensure that the matter proceeds with sufficient speed and within such bounds as may be necessary to ensure that justice is done without undue delay and that public interest is protected[1]. If experience in this or any other case appears to demonstrate that special procedure is required for this type of case, amendments to the Court's General Rules will, of course, be considered.

In the present instance the authority under which the petitioner was demoted from Class "A" pilot to Class "B" pilot is subsection (5) of section 24 of the general by-laws of the Quebec Pilotage District, P.C. 1960-756, passed pursuant to section 329 of the *Canada Shipping Act* which reads as follows:

> 24. ...
>
> (5) Every grade A pilot who, in the opinion of the authority, is incompetent or unsuitable may be reclassified as grade B pilot by the authority.

The allegations of the petition show that the above decision was arrived at without the petitioner having been called or heard and it may well be that the above decision was not arrived at judicially. It also appears on a superficial consideration that such a decision is not made under a discretionary or policy authority, but must be reached after a proper appreciation of the facts upon which a decision as to the petitioner's incompetence or unsuitability is based. In arriving at such a decision the Pilotage Authority may well have acted outside its jurisdiction if it, for example, considered extraneous matters (compare *Smith and Rhuland v. The Queen*[2]).

The question will also arise as to whether a clear demand has been made for the fulfilment of the duty in question.

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[1] Rule 155C—Directions as to Conduct of Action

The Court may, upon the application of any party or of its own motion, after giving every party a reasonable opportunity to be heard with regard thereto, at any stage of an action, prior to its having been set down for trial or to an order having been made fixing a date and place for the trial thereof, give directions as to the future course of the action, which directions shall, subject to being varied or revoked by subsequent order of the Court, govern the conduct of the action notwithstanding any provision in these Rules to the contrary.

[2] [1953] S.C.R. 95

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Such a demand appears to have been made by the petitioner's solicitor when he wrote to one of the respondents, D. R. Jones, on August 15, 1966, on behalf of the petitioner. The letter of the superintendent dated September 8, 1966, appears also to be a clear refusal to reinstate the petitioner and the present application appears to be to obtain what he alleges he is entitled to and what the respondents have refused to give him.

It would appear, therefore, that if this matter were governed by the procedure in the new *Code of Civil Procedure for Quebec*, the application would be granted. In view of my conclusion, however, as to the procedure that governs in this Court, no order is necessary. The applicant may proceed by way of Statement of Claim under the *General Rules and Orders* of this Court and the action, if so instituted, will proceed under the rules in the same way as any other action in the Court, subject to any special order that may be sought and granted having regard to the special nature of the relief sought.

Toronto 1966 Oct. 4-7

Ottawa Nov. 8

BETWEEN:

COLEMAN C. ABRAHAMS ..... APPELLANT;

AND

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

(No. 1)

Income tax—Sale of business as going concern—Valuation placed on accounts receivable—Binding effect of on Minister—Contract not validly ratified by purchasing company—Income Tax Act, ss. 17(2), 85D.

Parties—Evidence—Agreement as to facts—Admission of fact made under misapprehension—Duty of court to regard true facts disclosed by evidence

Appellant, who was in charge of the sales organization of a book selling company, was remunerated by a commission on sales from which certain charges were deducted and the resultant balance was payable to him six months after the end of each quarter. In late 1960 or early 1961 appellant discussed with officials and lawyers of his employer the possibility of selling to a company wholly owned by appellant effective April 1st 1961 (*a*) the property of his "business" as a sales agent,

(*b*) an office building project, (*c*) his home, and (*d*) his car, but the details were not worked out. A draft agreement was put forward in August 1961 but it was not until October 4th 1961 that an agreement dated April 1st 1961 was executed by appellant and a director of the purchasing company purporting to act in its behalf. The agreement then executed differed materially from the earlier draft agreement The executed agreement listed among the assets, at a valuation of $5,000, accounts receivable by appellant from his employer amounting to $208,875, being the amount which would have become payable to appellant after April 1st 1961 under his arrangement with his employer subject to liabilities of approximately $195,000 which were assumed by the purchaser. Appellant's employer paid the purchasing company $208,875 on September 30th and October 1st 1961. On March 15th 1962 the agreement executed on October 4th 1961 was approved by resolution of the purchasing company's directors.

Appellant appealed from an income tax assessment for 1961 contending that in computing his income for that year he was entitled to a deduction of $203,875 (i e. the amount of the accounts receivable, $208,875, less the $5,000 at which they were valued in the agreement of October 4th 1961) by virtue of s 85D of the *Income Tax Act* For the purposes of the appeal it was agreed by the parties *inter alia* that if there had not been a sale by appellant to the purchasing company within the meaning of s 85D on or before April 1st 1961 appellant was not entitled to succeed.

Held, dismissing the appeal, appellant and the purchasing company did not enter into a sale contract on or before April 1st 1961. It could not be inferred on a balance of probabilities from the evidence of what occurred before and after April 1st 1961 that a sale had been entered into on or before that date. Not only were the description of the property being sold and its price not settled on April 1st 1961 but there was no corporate act by the purchasing company ratifying the agreement executed on October 4th 1961 until the directors' resolution of 15th March 1962 and therefore no valid sale agreement with respect to the accounts receivable prior to October 4th 1961. There was no evidence that any person engaged in negotiations on behalf of the company before October 4th, 1961 held any office in the company or otherwise had any authority to negotiate on its behalf: a director of a company does not have such implied authority.

Semble. If, as the evidence indicated, appellant was an employee of the book selling company and not, as conceded by respondent, an independent contractor, respondent's admission should be taken to have been made under a misapprehension and the court should have regard to the real facts as shown by the evidence *Sinclair v. Blue Top Brewing Co.* [1947] 4 D L R. 561 referred to. This principle applies *a fortiori* where the revenue is involved.

Semble. While s 85D(2) of the *Income Tax Act* declares that a statement of vendor and purchaser of debts as to the consideration is binding on them as against the Minister, the Minister is not prevented from inquiring into the veracity of the statement, and, in this case, from applying s 17(2) of the *Income Tax Act*, under which appellant's appeal would also fall to be dismissed on the ground that he had received fair market value for the debts. There is no conflict between the provisions of s. 17(2) and s. 85D.

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APPEAL from income tax assessment.

John G. McDonald, Q.C. and *M. L. O'Brien* for appellant.

Sydney L. Robins, Q.C. and *T. Z. Boles* for respondent.

JACKETT P.:—This is an appeal directly to this Court from a re-assessment of the appellant for the 1961 taxation year made on February 24, 1965.

The Notice of Appeal sought relief in respect of an alleged benefit included in the appellant's income for the 1961 taxation year by the assessment appealed from under section 8 of the *Income Tax Act* and also claimed a deduction, in computing the appellant's income for that year, of $203,875.30 by virtue of section 85D of the *Income Tax Act*. At the opening of the hearing, the appellant abandoned its claim for relief in respect of the section 8 benefit. The only relief now sought is therefore the relief under section 85D.

The Notice of Appeal does not comply with the requirement in subsection (3) of section 98 of the *Income Tax Act* that it should contain "a statement of the allegations of fact...which the appellant intends to submit in support of his appeal" in that it does not allege "facts" that would entitle it to any relief under section 85D. On the other hand, the respondent did not move for an order under subsection (2) of section 99 nor did he, by his reply, take the position that the Notice of Appeal did not allege facts entitling the appellant to the relief sought. Instead, the respondent, by his reply, specifically denied the existence of certain facts the existence of which, among others, is essential for the appellant to be entitled to the relief sought.[1] The Notice of Appeal and the reply fail, therefore, to define the issues of fact in the manner contemplated by the statute. This did not, however, become apparent to the Court until after the appellant had closed his case.

[1] This was done in such a way as to seem, impliedly, to admit the existence of the other facts necessary for the appellant to be entitled to the relief sought. If the reply did not have the effect of admitting such facts, it was embarrassing.

The parties have now remedied the matter by agreeing upon the issues to be decided by the Court. To understand these issues, it is necessary to have some knowledge of the facts that are not in dispute. I shall therefore defer setting out the issues so agreed upon until I have reviewed the facts that, as I understand it, are not in dispute.

A company whose name is Encyclopaedia Britannica of Canada, Ltd., a subsidiary of a United States company, Encyclopaedia Britannica Inc., at all relevant times carried on a business of selling books throughout Canada. For this purpose there was a large organization of commission salesmen, supervised by managers of one or more types at different levels of the organization. These salesmen obtained from potential customers signed order forms, which were, in effect, offers to purchase publications of Encyclopaedia Britannica of Canada, Ltd. Each such order was passed by the sales organization to some other branch of the company which investigated the credit rating of the potential customer and, if that was satisfactory, arranged to have the books ordered shipped to the customer. (While, strictly speaking, the sales organization merely obtained the offer to purchase, in the jargon of the business, what they did was referred to as "sales" and "distribution" of the publications. This is a matter of some importance in appreciating some of the evidence.)

From October 1, 1955 until October, 1961 the appellant was in charge of the sales organization for all of Canada. He was extremely effective at recruiting, training and supervising the persons required to carry on the operation effectively and produced results that were very gratifying to Encyclopaedia Britannica of Canada Ltd. He apparently insisted upon being given almost an absolute discretion in running the sales organization and this was accorded to him. So much was this so that, according to much of the evidence, what the sales organization did was regarded by the senior officers of Encyclopaedia Britannica of Canada Ltd. and of the sales organization as being the appellant's business. Nevertheless, the salesmen were employees of the company, the sales organization carried on its activities in

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premises rented by the company and all money, office equipment and other property used by the sales organization belonged to the company. The financial remuneration of the members of the sales organization may be summarized very briefly as follows:

(*a*) when a sales order was accepted, the salesman who obtained it was credited with a commission at a scheduled rate, against this were charged back commissions previously credited to him on sales that had since gone bad, and he received payment of the balance so established on a weekly basis;

(*b*) when a sales order was accepted, the manager, under whom the salesman who obtained it functioned, was credited with a commission at a higher rate than the salesman but there was charged against his account all the commissions credited to his salesmen, all "chargebacks", and all the other costs of the sales organization in his territory; he was then paid the balance to his credit on a periodic basis; (there may in some cases have been district and regional managers but I propose to ignore this complication as not affecting the outcome of the case);

(*c*) when a sales order was accepted, the appellant, who was in over-all control of the organization was credited with a commission which, after 1958, was 45 per cent., and he was debited with all commissions paid to other persons in the sales organization, all "chargebacks", and all other expenses of the sales organization; a balance was struck at the end of each quarter and that balance was payable to him six months after the end of each quarter, during which time it might be reduced by new "chargebacks" arising on sales that had gone bad and, possibly, by "advances" made to him in the meantime.

The scheme envisaged "advances" to members of the organization on the amounts payable to them in the future. The appellant, throughout that period, was paid $500 a week as an advance of remuneration payable to him in the

future and these advances were deducted in determining the amount payable to him at the end of the six months period.

Necessary records were kept by a group known as the "cashiering department", which department also drew cheques on a company bank account in payment of commissions and other expenses. In 1958, the cashiering department was, for the first time, put under the appellant's control. At that time, an imprest account was set up by the company on which the appellant and persons under his control were given power to draw cheques. This account was maintained at a level necessary to cover the expenses of the sales organization.

After the cashiering department was put under the appellant's control, it kept records of the amounts credited and debited to each of the members of the sales organization other than the appellant. The account of amounts credited and debited to the appellant were kept by a branch of the company outside the sales organization. The weekly advances to the appellant of $500 were charged in that account. A separate account was kept by the company of other amounts paid to or for the appellant when he was being given financial help by the company in special circumstances; these amounts were regarded by the company officials as "loans" and not "advances".

Quite apart from his work with Encyclopaedia Britannica of Canada Ltd., the appellant owned all the shares in a company known as Coab Holdings Ltd., which carried on no business. That company owned all the shares in Coab Merchandising Co. Ltd. which did carry on a business. This latter company was incorporated on February 9, 1959.

During the latter part of 1960, the President of Encyclopaedia Britannica of Canada Ltd. and the appellant explored the possibility of the appellant selling his "business" in connection with the "sale" of that company's publications to a company the shares of which would all be owned by the appellant. This project was discussed by the appellant and company officials with lawyers and accountants and a firm decision was taken, as far as these gentlemen

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were concerned, either in late 1960 or early 1961, that the appellant would sell (*a*) the property of that "business", (*b*) a project he had for building an office building, (*c*) his private residence, and (*d*) his automobile, to Coab Merchandising Co. Ltd., *effective April 1, 1961*.[1] It was also decided that that company's name should be changed to Encyclopaedia Britannica Sales Limited. In February, 1961, the accountant who worked under the appellant in the sales organization was instructed to work out the accounting and other details of the proposed sale and details of how the sales organization would operate after such a sale. Steps were also taken to get appraisals of the value of the private residence.

For various reasons, delays occurred in working out the sale arrangements. On July 21, 1961, the name of Coab Merchandising Co. Ltd. was changed to Encyclopaedia Britannica Sales Limited. On August 30, 1961, the solicitor who was drafting the agreement put forward a draft of the

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[1] While the evidence is not as precise as might be wished, I find that the agreement at that time was an agreement reached by the parties indicated by the witness Kleeb in the following passage quoted from his evidence:

> "Q. ...When was it agreed that such transfer should take effect and be effective?
>
> A. It was agreed that such transfer should take effect April 1st, 1961.
>
> HIS LORDSHIP: Agreed by whom?
>
> THE WITNESS: It was agreed by the principals involved, that is, Mr. Abrahams and Encyclopaedia Britannica of Canada Limited and as an employee of Mr. Abrahams I was so instructed and it was the result of many discussions between these parties and Mr. McDonald, myself and probably one or two other people."

Reading the evidence as a whole, I find that when the witness Swinton says that "the agreement was made long before the actual effective date", he is speaking of the agreement by the parties enumerated by Mr. Kleeb (which is not an agreement between the appellant and his wholly-owned company) and that, when he says that, from April 1, 1961, he treated the wholly-owned company "as having been substituted for the independent contractor, Abrahams", he meant to convey that the arrangement was worked out with effect from that date (because the necessary arrangements had not been made until months after that date).

agreement. On October 4, 1961, an agreement was executed which was different in material respects from the draft of August 30, 1961, and which read as follows:

MEMORANDUM OF AGREEMENT made the 1st day of April, 1961

BETWEEN:

COLEMAN C ABRAHAMS, of the Township of Etobicoke in the County of York, in the Province of Ontario, Executive, (hereinafter called the "Vendor")

OF THE FIRST PART

AND

ENCYCLOPAEDIA BRITANNICA SALES LIMITED, (formerly known as Coab Merchandising Company Limited), a company incorporated under the laws of the Province of Ontario, (hereinafter called the "Purchaser")

OF THE SECOND PART

WHEREAS the Purchaser has agreed to buy and the Vendor has agreed to sell, assign, transfer, convey and/or set over unto the Purchaser all the business, undertaking, property and assets relating to the business of sales agent for Encyclopaedia Britannica of Canada Ltd (including the construction. ownership and operation of Britannica House) formerly carried on by the Vendor in the City of Toronto and throughout Canada as the same are shown in the financial statement as at April 1, 1961 which is annexed hereto as Schedule "A", and made a part hereof,

NOW THEREFORE THIS AGREEMENT WITNESSETH THAT:

1 The Vendor hereby sells, assigns, transfers, conveys and sets over unto the Purchaser all the business, undertaking, property and assets of the said business of the Vendor carried on in Canada as at March 31, 1961 as distributor of Encyclopaedia Britannica Publications issued for sale by Encyclopaedia Britannica of Canada Limited, together with all of the assets, rights and interests of the Vendor in and to the building and building project known as Britannica House and located on Bloor Street West in the City of Toronto, at or for the aggregate price or sum of $471,627 46 representing the sum of the constituent purchase prices of the assets described in Schedule "A"

2. The aforesaid purchase price of $471,627 46 shall be payable by the Purchaser by the assumption of liabilities in the sum of $156,688 73 and by delivery to the Vendor of a promissory note payable upon demand in the sum of $314,938 73.

3. The Purchaser covenants and agrees to pay the sum of not less than $210,000 00 on or before the 30th day of September, 1961 in partial payment of the unpaid balance of the purchase price secured by the promissory note hereinbefore described

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4. The Vendor covenants and agrees to save the Purchaser harmless of and from all debts, claims or liabilities not disclosed in Schedule "A" hereto that may hereafter arise in respect of the conduct of the business of the Vendor the subject of this sale and purchase prior to the first day of April, 1961.

5. The Vendor covenants and agrees to execute and deliver all such further instruments of conveyance, deeds, bills of sale and other documents required to assure to the Purchaser title to the assets of the business of the Vendor the subject of this agreement of sale and purchase.

6. This agreement shall be binding upon the Vendor, his heirs, executors, administrators and assigns, and upon the Purchaser, and its successors and assigns.

IN WITNESS WHEREOF this agreement has been executed and delivered by the parties hereto as of the day first above written.

SIGNED, SEALED AND DELIVERED

in the presence of
(signed)
R. M. KLEEB

(signed) Coleman C. Abrahams

Coleman C. Abrahams (seal)

(signed)
R. M. KLEEB

ENCYCLOPAEDIA BRITANNICA SALES LIMITED

(signed) Kurt R. Swinton

SCHEDULE "A" TO MEMORANDUM OF AGREEMENT DATED 1ST DAY OF APRIL, 1961 BETWEEN COLEMAN C. ABRAHAMS AND ENCYCLOPAEDIA BRITANNICA SALES LIMITED

ASSETS PURCHASED		
Britannica House—Cash	$ 24,838.33	
Construction in Progress	74,458.55	
		$ 99,296.88
Accounts receivable from Encyclopaedia Britannica of Canada Ltd. (value $208,875.30)	5,000.00	
Land $ 75,000.00		
Buildings 150,000.00		
Furniture and Fixtures 135,000 00		
	$ 360,000.00	
Automobile	7,330.58	
		372,330.58
		$ 471,627.46
LIABILITIES ASSUMED		
Mortgage payable	42,000.00	
Rainy Day Savings Fund—Payable	65,391.85	
Due E. H. Houghton	49,296.88	
		$ 156,688.73
Amount due to Coleman C. Abrahams		$ 314,938.73

ENCYCLOPAEDIA BRITANNICA SALES LIMITED

Financial Statement showing Assets and Liabilities referred to in Agreement dated 1st day of April, 1961 between Coleman C. Abrahams and Encyclopaedia Britannica Sales Limited

ASSETS

CURRENT		
Cash on hand and in bank		$ 24,838.33
Accounts receivable		5,000.00
		$ 29,838.33
FIXED		
Land	$ 75,000.00	
Buildings	150,000 00	
Furniture and Fixtures	135,000.00	
Automobile	7,330.58	
Construction in progress	74,458.55	
		$ 441,789.13
		$ 471,627.46

LIABILITIES

CURRENT		
Mortgage payable (see note 1)		$ 12,000 00
LONG TERM		
Mortgage payable (see note 1)	$ 30,000 00	
Rainy Day Savings Fund	65,391.85	
Due E. H. Houghton	49,296.88	
		$ 144,688 73
OTHER		
Due Coleman C. Abrahams per agreement.		$ 314,938.73
		$ 471,627.46

NOTE 1: Total mortgage due $42,000.00, of which $12,000.00 is due and payable within the current fiscal year.

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On March 15, 1962, the Board of Directors of Encyclopaedia Britannica Sales Limited passed a resolution reading as follows:

PURCHASE OF ASSETS

The Chairman presented to the meeting an agreement made the 1st day of April, 1961, between Coleman C Abrahams and the Company providing for the sale to the Company of all the business, undertaking, property and assets related to the business of sales agent for Encyclopaedia Britannica of Canada Ltd (including the construction, ownership and operation of Britannica House) formerly carried on by Coleman C Abrahams in the City of Toronto and throughout Canada as more particularly described in the said agreement, a copy of which appears as Schedule B hereto

The Chairman also stated that pursuant to the terms of the said agreement the Company had paid the sum of $260,000 in the aggregate to the vendor hereunder On motion duly made and seconded and unanimously carried, the following resolution was passed:

BE IT RESOLVED THAT

1 the agreement made the 1st day of April, 1961, between Coleman C. Abrahams and the Company providing for the sale of assets as hereinabove described be and the same is hereby approved

2. the payments made by the Company in the aggregate of $260,000 pursuant to this agreement be and the same are hereby approved, ratified, sanctioned and confirmed

An agreement bearing date April 1, 1961 was entered into between Encyclopaedia Britannica of Canada Ltd. *et al.* and another wholly-owned company of the appellant called Educational Publications Limited, whereby the latter company was granted "the exclusive right, franchise and licence to distribute and sell" certain of the grantor's publications in consideration of paying to the grantor an amount equal to 55 per cent of "net sales". An agreement bearing the same date was entered into between Educational Publications Limited and Encyclopaedia Britannica Sales Limited whereby it assigned that franchise to Encyclopaedia Britannica Sales Limited in consideration of a promise by the latter company to pay the assignor one and one-half per cent. of the sales. Until October 1961, there was no change in the operations of the sales organization under the appellant. Beginning about that time, changes were made to reflect the fact that the commission salesmen and other employees in the organization had become or were becoming employees of Encyclopaedia Britannica Sales Limited.

An analysis of the sale agreement dated April 1, 1961, whereby the appellant sold the "business, undertaking,

property and assets" of his business as distributor of Encyclopaedia Britannica publications shows that the only asset of the business so sold in respect of which any payment was made was "Accounts receivable from Encyclopaedia Britannica of Canada Ltd. (value $208,875.30)" which was included in the agreement as being sold for $5,000. The amount of $208,875.30 is the amount or the total of the amounts that, in accordance with the arrangements that I have already described would have been payable some time or times after April 1, 1961, in respect of amounts that had been credited to his account before that time subject to

(a) any "chargebacks" that might have arisen after April 1, 1961,

(b) a question (raised by the respondent) as to whether certain payments to be made in the future to salesmen under a plan known as the Rainy Day Savings Fund, amounting in all to $65,391.85, were or should have been charged against the appellant, and

(c) a question (raised by the respondent) as to whether a balance of $129,615.25 shown by the "loan" account to be owing by the appellant to Encyclopaedia Britannica of Canada Ltd. should have been charged against the appellant in determining the amount payable by the company to him under the arrangement already described.

On September 30, 1961 and October 1, 1961, the following cheques were issued and delivered:

(a) Encyclopaedia Britannica of Canada Ltd. to Encyclopaedia Britannica Sales Limited $208,875.80,

(b) Encyclopaedia Britannica Sales Limited to the appellant $210,000.

(c) the appellant to Encyclopaedia Britannica of Canada Ltd. $149,615.25.[1]

As indicated above, the sale agreement between the appellant and Encyclopaedia Britannica Sales Limited was executed three or four days after this issuance and delivery of cheques.

[1] This amount is in respect of the $129,615.25 previously referred to as loans made to the appellant by Encyclopaedia Britannica of Canada Ltd. to the appellant prior to April 1, 1961, plus a subsequent loan of $20,000.

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The Rainy Day Savings Fund, to which reference has already been made, was an arrangement that was in force during the period commencing January 1, 1961, under which, for purposes of current payments to salesmen, they were only credited with 90 per cent. of the scheduled commissions and the remaining 10 per cent. was placed to their accounts for payment to them, subject to the deduction of chargebacks arising in the meantime, several months after the determination of their respective employments. The amounts, so payable to salesmen in the future, that had been credited to salesmen on or before March 31, 1961, totalled $65,391.85. This amount was not deducted in determining the amount of the receivable of $208,875.30 that the appellant purported to assign to Encyclopaedia Britannica Sales Limited and was included in the liabilities of the appellant that Encyclopaedia Britannica Sales Limited purported to assume, by the agreement dated April 1, 1961, for the sale to it of the appellant's business.

The above is a sufficient background of the facts that are not in controversy to appreciate the issues upon which the parties have agreed as being the issues, and the only issues, between them in this appeal. These issues have been stated by the parties as follows:

1 Whether there was a sale within the meaning of 85D on or before April 1, 1961 from Abrahams to E.B.S.L.

2 Whether there was a sale at any time of all or substantially all of the business or the property used in carrying on the business.

3. Whether there was at any time a sale of debts that had been or would have been included in computing Abrahams' income tax for 1960 or 1961 and that were still outstanding at the time of sale.

4 Whether E B S L continued the business which Abrahams had carried on prior to April 1, 1961.

5 If the Appellant is found to have satisfied the provisions of 85D, what is the effect of Section 17(2) and Section 23 of the *Income Tax Act*.

6 Assuming Section 85D applies:

(*a*) whether the Rainy Day Savings Fund of approximately $65,000.00 was a debt within 85D and a debt that had been or would have been included in computing Abrahams' income for 1961 or 1960 and was outstanding at the time of the sale;

(*b*) whether the sum of $129,000 should be deducted from the sum of approximately $208,000 to determine the "debts" upon which an election under 85D can be made

7. Whether the Respondent had the right to issue a second assessment after Appeal had been filed in respect of the previous assessment.

Counsel for the respondent agreed that, if the issues stated in the first four paragraphs are decided in the affirmative, the appellant is entitled to succeed subject to his being defeated by the decision of the issue stated in paragraph 5 and subject to the amount of his success being diminished by the decision of the issue stated in paragraph 6. It is common ground that, if any of the issues stated in the first four paragraphs are decided in the negative, the appeal must be dismissed subject to a contention put forward on behalf of the appellant after the agreement on issues that, if the evidence establishes that there was such a sale before September 30, 1961, that sale is of the same effect as though there were a sale on or before April 1, 1961.

The issue stated in paragraph 7 has been disposed of by the reasons for judgment that I am issuing concurrently in a companion appeal and need not be referred to further in relation to this appeal.

I propose now to deal with the first issue, namely,

Whether there was a sale within the meaning of 85D on or before April 1, 1961 from Abrahams to E.B.S L.

"E.B.S.L." here means Encyclopaedia Britannica Sales Limited, "Abrahams" is the appellant and "85D" is section 85D of the *Income Tax Act* as applicable to the 1961 taxation year, which reads as follows:

85D (1) Where a person who has been carrying on a business has, in a taxation year, sold all or substantially all the property used in carrying on the business, including the debts that have been or will be included in computing his income for that year or a previous year and that are still outstanding, to a purchaser who proposes to continue the business which the vendor has been carrying on, if the vendor and the purchaser have executed jointly an election in prescribed form to have this section apply, the following rules are applicable:

(*a*) there may be deducted in computing the vendor's income for the taxation year an amount equal to the difference between the face value of the debts so sold (other than debts in respect of which the vendor has made deductions under paragraph (*f*) of subsection (1) of section 11) and the consideration paid by the purchaser to the vendor for the debts so sold;

(*b*) an amount equal to the difference described in paragraph (*a*) shall be included in computing the purchaser's income for the taxation year;

(*c*) the debts so sold shall be deemed, for the purposes of paragraphs (*e*) and (*f*) of subsection (1) of section 11, to have been included in computing the purchaser's income for the taxation year or a previous year but no deduction may be made by the purchaser under paragraph (*f*) of subsection (1) of section 11 in respect of a debt in respect of which the vendor has previously made a deduction; and

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(*d*) each amount deducted by the vendor in computing income for a previous year under paragraph (*f*) of subsection (1) of section 11 in respect of any of the debts so sold shall be deemed, for the purpose of paragraph (*f*) of section 6, to have been so deducted by the purchaser.

(2) An election executed for the purposes of subsection (1) shall contain a statement by the vendor and the purchaser jointly as to the consideration paid for the debts sold by the vendor to the purchaser and that statement shall, as against the Minister, be binding upon the vendor and the purchaser insofar as it may be relevant in respect of any matter arising under this Act

The general purpose of this section is to change the rules applicable to accounts receivable to which the vendor and purchaser of a business were previously subject. Accounts receivable (for goods sold by a trader) become gross income in the year in which they arise subject, in effect, to a subsequent deduction for such of them as become bad or doubtful in the years in which they become bad or doubtful. Prior to the enactment of section 85D, upon the sale of the assets of a business, including the accounts receivable, as part of the sale of the business as a going concern, there was no allowance for any loss in respect of the sale of the accounts receivable and, of course, there could have been no subsequent occasion for any deduction in respect of any of them becoming bad or doubtful. On the other hand, the purchaser of a business including the accounts receivable was not, prior to that time, required to bring them into the computation of his income from the business and he was not therefore entitled to make any deduction by reason of any of them becoming bad or doubtful. Section 85D makes it possible, if the vendor and purchaser agree, for the vendor to deduct, in computing his income from the business for the year of sale, the amount of his loss upon the sale of the accounts receivable and, in such event, requires the purchaser to take that same amount in as part of his income from the business for that year and then permits the purchaser to make deductions in respect of such of the accounts receivable as become bad or doubtful.

Obviously, in the case of an arm's-length transaction, the provision would seem to be fair from the point of view of not only the vendor and the purchaser, but also from the point of view of the Minister of National Revenue. In the case of a sale to a person with whom the purchaser is not dealing at arm's length, it would seem that any possibility

of the provision being used to avoid tax is defeated by subsection (2) of section 17, which reads as follows:

> (2) Where a taxpayer carrying on business in Canada has sold anything to a person with whom he was not dealing at arm's length at a price less than the fair market value, the fair market value thereof shall, for the purpose of computing the taxpayer's income from the business, be deemed to have been received or to be receivable therefor.

Coming back to the first issue, it raises for determination the mixed question of fact and law as to whether Encyclopaedia Britannica Sales Ltd. entered into a contract with the appellant on or before April 1, 1961, the terms of which are reflected by the written contract between them bearing that date but executed on October 4, 1961.

The appellant does not contend that there is any direct evidence of the two parties having so agreed before that day in the sense that one made an offer to the other that was accepted or in the sense that the terms were written down or otherwise crystallized or enumerated so that both parties could and did manifest an intention of entering into a business agreement on those terms. The appellant does say, however, that a study of what happened in fact during the period preceding and following April 1, 1961, leads to an inference, on a balance of probability, that such an agreement had been entered into on or before that day.

I have not been able to find that the facts lead to any such an inference.

In the first place, vital terms such as the description of the property being sold and the price to be paid therefor were not settled on April 1, 1961. This is apparent from a review of all the evidence. For example, as late as May 30, 1961, as appears from the solicitor's letter of May 31, 1961, the appellant was being advised as to what amount should be put in the agreement as the consideration for the accounts receivable, and, in August, the solicitor submitted a draft of the agreement that differed, so far as material terms are concerned, from the agreement finally executed on October 4, 1961.

In the second place, there is no evidence of any corporate act by Encyclopaedia Britannica Sales Ltd. until the resolution of March 15, 1962, which may be regarded as ratifying the execution of the agreement that was executed on October 4, 1961. There is no evidence that any person who

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was engaged in any of the negotiations before October 4, 1962, held any office in the company or otherwise had any authority to negotiate on behalf of the company.[1] While, as against third parties, the intent of a closely held company is to be judged by the acts of those who are in charge of its affairs and the Court is bound to assume that the owner of all the shares of a company who purports to act on its behalf has taken the necessary steps to give himself the authority he purports to have, when it is a question of establishing, as between such a person and third parties, that he has entered into a contract with a company all of whose shares belong to him, in my view, evidence is required to establish that there has in fact been a formulation and expression of the intent of the company, which is not, after all, a person of flesh and blood having a mind of its own, in one of the modes contemplated by the law, namely, a resolution of the Board of Directors or an act of an officer, servant or agent of the company acting in the course of employment or of the agency. Here, there is no such act established by the evidence (a director being, as such, neither an officer, a servant nor an agent) until March 15, 1962, although it is arguable that the resolution passed then constitutes ratification of the execution of the contract on behalf of the company on October 4, 1961.

This lack of any evidence of any corporate act having effect prior to October 4, 1961, is an insurmountable answer, in my view, to any contention that there was a sale agreement before the $208,875.30 was paid on September 30, 1961 or October 1, 1961, by Encyclopaedia Britannica of Canada Ltd.[2]

It becomes unnecessary, therefore, to reach a final conclusion as to whether there is a balance of probability on all

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[1] The witness Swinton did say that he was a director of "E B S L." (by which he meant Encyclopaedia Britannica Sales Limited) and that he conferred "on behalf of E.B.S.L." with the appellant, many times, in the preparation of the agreement between "E B.S.L" and the appellant. There is no evidence of any authority for him, as an individual director, to negotiate such an agreement and, in my view, it is not authority that would be implied in respect of a director. Furthermore, he does not say that he purported to act for "E B S L" in making an agreement on its behalf with the appellant at some time prior to the execution of the written agreement.

[2] Obviously, once the debt was paid, it could not be the subject of a sale to a third person

the evidence that all the terms of the sale agreement were agreed upon by the individuals concerned at some time between the creation of the draft agreement accompanying the lawyer's letter of August 30, 1961 and the issuance and delivery of cheques which was provided for by a lawyer's letter of August 31, 1961 and carried out on September 30 and October 1, 1961. My view is, however, that the balance of probability is that the various individuals who were advising the appellant and Encyclopaedia Britannica of Canada Ltd. regarded the settlement of all the terms and the creation of the sales agreement between the appellant and his wholly-owned company as mere legal technicalities, the timing of which was of no great significance and proceeded with the more important practical steps in the confident expectation that what they regarded as legal technicalities would be filled in at leisure.[1] I am not convinced, therefore, that the issuance and delivery of the cheques establishes, on a balance of probability, that all the terms of the agreement had already been agreed upon.

Having reached that conclusion, it follows that the appeal must be dismissed.

I do not propose, therefore, to make any finding with regard to the issues in the paragraphs numbered 2, 3 and 4 *supra*. I might make this comment, however, that a discussion of these issues assumes an air of fantasy and unreality when all the evidence[2] points to the conclusion that the appellant directed the operations of the sales organization that I referred to earlier as an employee of the company while the appellant takes the position, and the respondent concedes, that he did so as an independent contractor. In these circumstances, it would seem that this might be a case where the evidence and the admission made by counsel for the Minister cannot stand together, in which event, the admission should be taken to have been made under a

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[1] Compare *Angel v. Hollingworth & Co*, (1958) 37 TC 714, per Vaisey J. at page 723: "In other words, they regarded and treated as an accomplished fact that which was not an accomplished fact but only a well grounded expectation that it would become an accomplished fact, as in due course it did.

[2] I am ignoring evidence by laymen as to the legal state of affairs at different stages as they were only competent to give evidence of the *facts* as they knew them. I have in mind particularly an employment contract executed on October 1, 1955 between the appellant and Encyclopaedia Britannica of Canada Ltd. which, according to the appellant's answers on discovery, was still in force until April 1, 1961.

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misapprehension and it is the duty of the Court to have regard to the real facts as shown by the evidence. See *Sinclair v. Blue Top Brewing Co.*[1] at page 562. If this principle applies in a cause between ordinary persons, it would seem to have even greater application where the revenue is involved.

With reference to the issue in the paragraph numbered 5 *supra*, I content myself with saying that, as it appears to me, subsection (2) of section 85D makes the statement provided for therein binding on the vendor and purchaser (but only "as against the Minister"). It does not make the statement binding on the Minister. Neither the language nor the scheme of the provision supply any reason for preventing the Minister from inquiring into the veracity of the statement. Furthermore, I see no reason why subsection (2) of section 17—but not section 23—does not apply to the facts of this case. The only submission of the appellant in support of the view that subsection (2) of section 17 does not apply was based on the view that there is a conflict between that provision and section 85D. There is, in my view, no such conflict, and therefore no room for application of the rules as to which of two provisions applies where there is a conflict between them. I should therefore have concluded that the appeal must be dismissed upon a decision of the fifth issue even if I had reached a different conclusion on the first one.

With regard to the sixth issue, if I had to decide it, I should decide that the respondent was correct with regard to both amounts.

The loans or advances, in my view, are advances made in accordance with the contract between the appellant and Encyclopaedia Britannica of Canada Ltd. on October 1, 1955, whether they were made on a regular basis as in the case of the $500 per week or were special advances in special circumstances. There is no doubt, in my mind, that, if the appellant had sued for the balance owing to him and had objected to the deduction of any of these amounts, Encyclopaedia Britannica of Canada Ltd. would have successfully contended that they were all deducted in accordance with the governing agreement.

The amounts credited to salesmen under the Rainy Day Savings Fund plan, in my view, were amounts payable by

[1] [1947] 4 D.L.R. 561.

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Encyclopaedia Britannica of Canada Ltd. to its salesmen, who were its employees, just as were all the other amounts of remuneration payable to them. Those amounts were therefore deductible, in accordance with the governing agreement, in determining the balances owing to the appellant. Whether the payment of the balance without deducting such amounts was the result of a mistake or of an arrangement under which the appellant assumed the responsibility of paying the salesmen, it cannot make such an amount a debt that has been or will be included in computing the appellant's remuneration for the services rendered to the company. (The fact that, in the computation that he filed with his return, the appellant showed a gross amount from which he deducted *inter alia* the amount in question does not establish that such amount was included in computing his income for the year—this was merely the calculation by which one determined the balance payable to him as remuneration for the year.)

Either party may apply for judgment in accordance with these reasons and, at that time, I shall be glad to hear submissions as to costs.

BETWEEN:

COLEMAN C. ABRAHAMS .....APPELLANT;

AND

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

Toronto
1966
Oct. 4-7

Ottawa
Nov. 8

(No. 2)

Income tax—Assessment—Re-assessments—Second re-assessment based on assumed correctness of first re-assessment—Whether second re-assessment barred—First re-assessment nullified by second—Re-assessment of total tax due distinguished from additional assessment—Costs of appeal—Whether appellant entitled to—Income Tax Act, s. 46 (4).

On September 6th 1963 appellant was re-assessed to income tax for 1961 and on February 17th 1965 appealed therefrom to this court. On February 24th 1965 appellant was re-assessed a second time for 1961 on the basis that his income was the amount on which the first re-assessment was based plus an additional amount. Appellant appealed

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to this court from the second re-assessment and contended that the Minister had no power to make a second re-assessment while the first re-assessment was *sub judice*.

Held, appellant's contention must be rejected.

1. The Minister's power to re-assess under s. 46(4) of the *Income Tax Act* may be exercised as often as circumstances require regardless of the fact that an appeal has been initiated.
2. The first re-assessment was nullified by the second re-assessment. (It would be different if it were not an assessment of the taxpayer's total tax for the year but merely an assessment of an amount of tax in addition to that already assessed.)
3. When the second re-assessment was made the appeal from the first re-assessment should have been discontinued or an application made to have it quashed.
4. As the second re-assessment was based on a new view of the facts and not upon a discovery of facts previously known to the taxpayer and not to the Minister the Minister must pay the costs of the appeal incurred by appellant prior to setting it down for hearing.

APPEAL from income tax assessment.

John G. McDonald, Q.C. and *M. L. O'Brien* for appellant.

Sydney L. Robins, Q.C. and *T. Z. Boles* for respondent.

JACKETT P.:—This is an appeal to this Court from a re-assessment of the appellant for the 1961 taxation year made on September 6, 1963.

The appellant objected to the re-assessment of September 6, 1963 (hereinafter referred to as the "first re-assessment") on September 21, 1963 and, the respondent having taken no action with reference to the objection, a Notice of Appeal to this Court bearing date February 8, 1965, was filed on February 17, 1965. That is the appeal that is the subject matter of these reasons.

A week later, on February 24, 1965, the respondent issued a further re-assessment (hereinafter referred to as the "second re-assessment"). That re-assessment is the subject of a separate appeal to this Court.

On August 26, 1965, the Minister filed a reply to the Notice of Appeal that had been filed in this Court with regard to the first re-assessment.

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In due course, both appeals were set down for the same general sittings and, by consent, it was ordered that they should be tried together.

The difference between the first re-assessment and the second re-assessment is that, by the second re-assessment, the appellant is assessed on the basis that his income is the amount on which the first re-assessment was based plus an additional amount.

The power to re-assess is found in subsection (4) of section 46 of the *Income Tax Act* as amended by chapter 43 of the Statutes of 1960, which reads as follows:

> 46 (4) The Minister may at any time assess tax, interest or penalties under this Part or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the taxation year, and may
>
> (*a*) at any time, if the taxpayer or person filing the return
>
> (i) has made any misrepresentation or committed any fraud in filing the return or in supplying any information under this Act, or
>
> (ii) has filed with the Minister a waiver in prescribed form within 4 years from the day of mailing of a notice of an original assessment or of a notification that no tax is payable for a taxation year, and
>
> (*b*) within 4 years from the day referred to in subparagraph (ii) of paragraph (*a*), in any other case,
>
> re-assess or make additional assessments, or assess tax, interest or penalties under this Part, as the circumstances require.[1]

No suggestion has been made that either re-assessment was made outside the four-year term referred to in paragraph (*b*) of subsection (4). The only attack made on the validity of either re-assessment is the contention that the second

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[1] Reference has also been made to subsection (3) of section 58 of the Act, which reads as follows:

> (3) Upon receipt of the notice of objection, the Minister shall with all due despatch reconsider the assessment and vacate, confirm or vary the assessment or re-assess and he shall thereupon notify the taxpayer of his action by registered mail

If it could be said that, "Upon receipt of the notice of objection", the respondent had "with all due despatch", re-assessed, it might be that this section would have authorized a re-assessment not authorized by subsection (4) of section 46 On the facts of this case, however, I do not regard subsection (3) of section 58 as relevant.

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re-assessment is invalid because it was made after an appeal had been instituted to this Court from the first re-assessment. The argument is that, the first re-assessment being, on that account, *sub judice,* the Minister had then no power to re-assess. Reference was made to *Irving Brown v. Minister of National Revenue*,[1] but it was agreed that that was a decision on a different question.

I can find no principle of interpretation that restricts the clear effect of subsection (4) of section 46, which expressly authorizes the Minister, within the four-year period defined by paragraph (*b*) to "re-assess" "as the circumstances require". When read with section 31 (1) (*e*) of the *Interpretation Act,* R.S.C. 1952, chapter 158, which provides *inter alia* that, in every Act, unless a contrary intention appears, "if a power is conferred...the power may be exercised...from time to time as occasion requires", I am of opinion that the power conferred by section 46(4) may be exercised from time to time as circumstances may require. If this were not so, the Minister would not be able to make a second or third re-assessment for the purpose of reducing a taxpayer's liability when circumstances reveal that the taxpayer has been over-taxed. Furthermore, the power is the same in the case of a re-assessment made within the four-year period contemplated by paragraph (*b*) of section 46(4) as it is in a case of "fraud" or "waiver" covered by paragraph (*a*) of that subsection and it would seem clear that the scheme of the Act calls for as many re-assessments as the circumstances require in such cases. The fact that an appeal has been initiated should not make any difference in the application of the provision.

Assuming that the second re-assessment is valid, it follows, in my view, that the first re-assessment is displaced and becomes a nullity. The taxpayer cannot be liable on an original assessment as well as on a re-assessment. It would be different if one assessment for a year were followed by an "additional" assessment for that year. Where, however, the "re-assessment" purports to fix the taxpayer's total tax for the year, and not merely an amount of tax in addition

[1] 64 D.T.C. 1221; 35 Tax A.B.C. 197.

to that which has already been assessed, the previous assessment must automatically become null.

I am, therefore, of opinion that, since the second re-assessment was made, there is no relief that the Court could grant on the appeal from the first re-assessment because the assessment appealed from had ceased to exist. There is no assessment, therefore, that the Court could vacate, vary or refer back to the Minister. When the second re-assessment was made, this appeal should have been discontinued[1] or an application should have been made to have it quashed.[2]

This appeal is therefore dismissed, but, having regard to the fact that the second re-assessment appears to have been based on a new view of the facts and not upon a discovery of facts previously known to the taxpayer and not to the respondent, the respondent is ordered to pay such of the appellant's costs of the appeal as were incurred prior to the setting down of the appeal for hearing.

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[1] The appellant could have asked the respondent to agree to pay his costs as a condition to his discontinuing. If the respondent had refused, he could have applied for leave to discontinue on terms that the respondent be ordered to pay his costs of the appeal that had been made abortive by the second re-assessment.

[2] An alternative view is that the appeal should be allowed and the assessment appealed from declared null. I am of the view that the correct view of the statute is that there is no basis for an appeal from an assessment that has become null by virtue of a re-assessment. Certainly such an appeal is unnecessary and it would be an unnecessary expense and expenditure of time and energy if the practice of taking such appeals developed.

Toronto 1966 Nov. 8

BETWEEN:

JOHN KENNETH KINSELLA .....APPELLANT;

AND

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

Income tax—Assessments for five years—Appeals to Tax Appeal Board—Appeals therefrom by taxpayer to Exchequer Court for three years—No appeal by Minister—Whether Minister may subsequently cross-appeal from Board's decisions re other two years—Income Tax Act, ss. 60(2), 99(1a), 99A(1) and (3).

Appellant appealed to the Tax Appeal Board from his income tax assessments for 1955, 1956, 1957, 1958 and 1959, and after judgment was delivered in all five appeals appealed to the Exchequer Court from the Board's decisions in respect of the assessments for 1955, 1956 and 1957. Neither party appealed from the Board's decisions in respect of the assessments for 1958 and 1959 within the time prescribed by s 60(2) of the *Income Tax Act* Respondent subsequently filed replies to appellant's appeals for the years 1955, 1956 and 1957 and therein purported to cross-appeal from the Board's decisions in respect of the assessments for 1958 and 1959. Appellant moved under Exchequer Court rule 114 to strike out these cross-appeals.

Held, the purported cross-appeals were a nullity and must be struck out. Under s. 99(1a) of the *Income Tax Act* there cannot be a cross-appeal from a decision of the Tax Appeal Board in respect of an assessment for a taxation year unless there has been an appeal from the decision of the Board on that assessment.

[Section 99A(1) and (3) of the *Income Tax Act* referred to]

MOTIONS to strike out cross-appeals from decisions of Tax Appeal Board.

David A. Ward for appellant.

N. A. Chalmers for respondent.

GIBSON J.:—Three motions of the appellant are being heard together. They are in respect to the appeal proceedings before this court for the taxation years of the appellant 1955, 1956 and 1957. They are made pursuant to Rule 114 of this court and are applications to strike out the cross-appeals of the respondent, the Minister, contained in each of the appeal proceedings of the appellant referred to.

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The appeal proceedings to this court are from the decision of the Tax Appeal Board dated December 17, 1963 in respect to five separate appeal proceedings taken by the appellant, John Kenneth Kinsella, namely, for the taxation years 1955, 1956, 1957, 1958 and 1959.

The appellant appealed from the said decision of the Tax Appeal Board in respect to his appeals for the taxation years 1955, 1956, and 1957 only. The appellant did not appeal from the decision of the Tax Appeal Board in respect of his appeals for the taxation years 1958 and 1959.

The appeals before this court of the appellant were made within 120 days from the day on which the Registrar of the Tax Appeal Board mailed the said decision of that Board as prescribed by section 60(1) of the *Income Tax Act*.

The respondent did not appeal from the said decision of the Tax Appeal Board for the taxation years of the appellant 1958 and 1959. Instead, long after 120 days from the day on which the Registrar had mailed the decision of the Tax Appeal Board, the respondent purported to cross-appeal in respect to this decision of the Tax Appeal Board concerning the appellant's appeals to the Tax Appeal Board for the years 1958 and 1959, in each of the proceedings of appeal of the appellant for the taxation years 1955, 1956 and 1957. Counsel for the respondent submitted that this was permissible by reason of the provisions of section 99, subsection 1(*a*) of the *Income Tax Act* which reads as follows:

> If the respondent desires to appeal from the decision of the Tax Appeal Board, he may, instead of filing a notice of appeal under section 98, give notice by his reply (notwithstanding that it is filed and served after the expiration of the time for appeal fixed by section 60) by way of cross-appeal of his intention to contend that the decision of the Tax Appeal Board should be varied and set out therein a statement of such further allegations of fact and of such statutory provisions and reasons as he intends to rely on in support of the contention.

I am of the opinion that what the respondent purported to do in this matter is a nullity. Instead there must be an appeal launched from the decision of the Tax Appeal board in respect to an appeal to it from an assessment for a taxation year before there can be a cross-appeal pursuant

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to the enabling provisions of section 99, subsection 1(*a*) of the *Income Tax Act*. The remedial section 99A, subsection (1) of the *Income Tax Act* makes this clear, especially the contradistinction between the words "notices of appeal" and "notice of appeal". It reads as follows:

> Where the Minister or a taxpayer may appeal to the Exchequer Court of Canada with respect to more than one assessment in relation to that taxpayer, the notices of appeal in relation to such appeals may be included in one document and that document shall be deemed to be the notice of appeal with respect to each assessment to which it relates.

This view is further reaffirmed by the wording of section 99A, subsection (3) which reads:

> Where notices of appeal have been included in one document under subsection (1), the replies, notices of cross-appeal and replies to cross-appeals arising from those notices of appeal may, in each case, be included in one document.

In the result therefore, because no appeals were taken from the decision of the Tax Appeal Board in respect to the taxation years of the appellant for the years 1958 and 1959, in my view the purported cross-appeals contained in the proceedings for the appeals in the years 1955, 1956 and 1957 are a nullity. As a consequence, the motions to strike out are allowed. The appellant is entitled to the costs of these motions, but there shall be one set of costs.

Toronto 1966 Nov. 28-29

BETWEEN:

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

AND

FIRESTONE MANAGEMENT LIMITED ..... RESPONDENT.

Income tax—Aquisition of company shares as investment—Conversion of company to public company and issue of shares to public through underwriters—Whether profit made a trading profit.

In late 1960 F and C, each of whom owned a half interest in a sales company, reached a deadlock and in accordance with their pre-incorporation agreement respecting that eventuality F bought all of C's shares in the sales company for $425,000. As part of the arrangement for financing the purchase the shares so bought from C and, in

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addition, F's own shares in the sales company were sold for $850,000 to respondent, a company controlled by F. Early in 1961 respondent, as a result of advice to F in January and with the assistance of experts, converted the sales company to a public company, reorganized its capital structure, made the necessary arrangements with the Securities and Exchange Commission of the U.S.A. and with the authorities of individual States in the U.S.A., and sold half its shares in the sales company for $1,451,400 to a group of United States underwriters who intended to offer them for sale to the U.S. public. Respondent made a net profit of $921,725 in the transaction. It was assessed to income tax on this sum as being income from trading in shares or from a venture in the nature of trade.

Held, affirming the decision of the Tax Appeal Board, the profit in question was not chargeable. The evidence indicated that respondent did not acquire the shares of the sales company with the intention of turning them to account at a profit by offering them for sale to the public, as it subsequently did. Neither did respondent's activities following its acquisition of the shares in the sales company as an investment, *viz* in converting it to a public company, reorganizing its capital structure, employing expert assistance, arranging for necessary registration with United States securities authorities, amount to the carrying on of a business: it merely did what its advisers advised it to do in order to realize most advantageously a portion of an investment which as a matter of good judgment called for some diversification.

[*Moluch v. Minister of National Revenue* distinguished.]

Semble. The operations of a company or of the holder of a large block of shares in a company for the acquisition of new capital by issuing stock or in selling stock it already owns to the public can never, without more, amount to the carrying on of a business.

APPEAL from decision of Tax Appeal Board.

Pierre Genest and *L. R. Olsson* for appellant.

H. Heward Stikeman, Q.C. and *Maurice A. Regnier* for respondent.

JACKETT P.: (Delivered orally from the Bench at Toronto, November 29, 1966)—This is an appeal from a decision of the Tax Appeal Board whereby a re-assessment of the respondent for the 1961 taxation year was vacated.

With certain exceptions, which do not affect the conclusions that I have reached, the facts as found by the Tax Appeal Board are substantially the same as those that have been established by the evidence adduced before me. It is not, therefore, necessary for me to re-state the facts in detail.

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There are, however, two matters that I have to consider that do not appear to have been before the Tax Appeal Board. To state my conclusions with regard thereto, it is sufficient for me to summarize the facts very briefly and in quite general terms.

There are three main persons involved:

(*a*) Joseph H. Firestone (hereinafter called "Firestone"),

(*b*) the respondent company (hereinafter called "the respondent") which was at all material times controlled by Joseph H. Firestone, and

(*c*) Fireco Sales Limited (hereinafter called the "Sales Company"), an Ontario company carrying on business in Canada.

Until 1960, Firestone had a 50 per cent interest in the Sales Company, the other 50 per cent being held by one Covent. The Sales Company had been incorporated pursuant to an agreement between Firestone and Covent under which Covent could require Firestone, in the event of deadlock between them, either to acquire all Covent's shares in the company or to sell to Covent all his shares in the company. In 1960, Covent invoked the clause of the agreement that gave him this right and Firestone elected to acquire Covent's shares at a price of $425,000.

As part of the scheme arranged to finance this acquisition, the shares acquired from Covent and the shares previously owned by Firestone, being substantially all the shares in the Sales Company, were sold to the respondent at a total cost to the respondent of $850,000. This all happened in the last half of 1960.

The next stage in the story is that, during the first part of 1961, the respondent sold one-half of the shares held by it in the Sales Company to a group of underwriters in the United States who acquired them with the intention of re-selling them to the general public in the United States. The respondent received $1,451,400 from the underwriters for the shares so sold to them.

After deducting certain expenses, the respondent had a profit from the purchase and re-sale of one-half of the shares in the Sales Company of $921,725.21. That profit

was assessed by the appellant as income. The respondent appealed. The Tax Appeal Board allowed the appeal and the appellant is now asking this Court to restore the assessment as far as that profit is concerned.

The appellant contends that one of the possibilities that the respondent had in mind in acquiring the shares in the Sales Company was that it might turn them to account by causing the Sales Company to "go public", that is, by doing what it in fact did, namely, causing the Sales Company to be converted from a private company to a public company, suitably revising the capital structure of that company, qualifying the shares for distribution by underwriters in the various states of the United States and then selling some of them to underwriters at a profit. The Tax Appeal Board rejected this contention on the evidence before it and, in so far as the same evidence was before me, I adopt the reasons of the Board. There was, however, a very important difference between the evidence before the Board and the evidence that was before me. Before the Board it was pleaded that Firestone was first made aware of the corporate advantages of offering the shares of the Sales Company to the public "in January 1961". Firestone apparently gave evidence that he had not considered such a possibility until that month. Before me, Firestone gave evidence that he had, in connection with the evidence in this case before the Board and in this Court, completely forgotten, until just before the trial in this Court, an earlier occasion when he, his chief associate and his accountant had visited an investment dealer to discuss in an exploratory way whether the Sales Company was the sort of company that might "go public". He was quite definite, however, that he never seriously considered going public as a possibility for the Sales Company until January 1961. I accept his evidence and I regard it as corroborated by the evidence of the witnesses called by the appellant in connection with the same occasion in so far as that evidence sheds any light on the matter.

On the whole of the evidence, I am satisfied that Firestone's decision to acquire Covent's shares in the Sales Company was motivated exclusively by his desire to be the

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owner of all the shares in the Sales Company so that he might continue to run the affairs of that company in place of the alternative with which he was faced, of selling his shares in the Sales Company to Covent and thus lose his position in and in relation to that company. I am further satisfied that Firestone's intention, which must also be regarded as being the intention of the respondent, in arranging to have all the shares in the Sales Company sold to the respondent, was to enable the carrying out of a convenient scheme of financing the purchase from Covent, which involved the respondent playing the role of an investment company for Firestone.

The appellant's further contention is that, even if the respondent acquired the shares in the Sales Company as an investment, what it did, commencing in January 1961, constituted the carrying on of a business (within the ordinary meaning of that word) and that the profit in question, or, alternatively, the difference between the selling price to the underwriters and the value of the shares when they were dedicated to the business, constituted a profit from the business that must be included in the respondent's income for the 1961 taxation year. The things that the appellant contends so constitute the carrying on of a business are set out in subparagraph (*a*) of paragraph 2A of the Amended Notice of Appeal, which reads as follows:

> Alternatively, the Appellant says that shortly after purchase of the said shares by the Respondent for the sum of $425,000.00, commencing in or about January 1961, the Respondent retained a "finder" to effect a sale of the said shares or part thereof to a syndicate of underwriters in the United States of America, caused Fireco Sales Limited to be re-organized into a public company and to have its shares re-classified and subdivided, caused the said shares to be qualified for sale to the public by registration with the Securities and Exchange Commission of the United States of America and with numerous state authorities of that country, and assisted the underwriters who were to purchase the said shares in their re-sale to the public by furnishing the said underwriters with a list of purchasers of the said shares, all with a view to re-sale of the said shares at a profit. In June, 1961 the said shares were sold by the Respondent to a syndicate of underwriters for the sum of $1,451,400.00 for re-sale by the underwriters to the public.

The appellant relies on the recent unreported decision of my brother Cattanach in *Moluch v. Minister of National Revenue,* in which it was decided that the appellant had

acquired land as a *capital asset* of a farming business and, after he ceased carrying on that business, used that land as the *inventory* of a new business in which the raw land was converted into building lots and made the subject matter of an operation of selling lots to individual builders. I entirely agree with that decision and I also agree with Mr. Justice Cattanach that, in any particular case, "the matter is one of degree depending upon the business-like enterprise and activity displayed". I also agree that an "element of trade" would be introduced if a purchaser were, by himself or his own employees, or by a contractor, through an expenditure of effort and monies, to change the character of the property. Whether such "element of trade" is such as to constitute the particular operations the carrying on of a business remains, as Mr. Justice Cattanach says, a question of degree "depending upon the business-like enterprise and activity displayed".

In this case I cannot find that the respondent embarked on a business. It merely did what its advisers advised it to do in order to realize most advantageously a portion of an investment which, as a matter of good judgment, called for some "diversification". Neither the respondent nor Firestone, who constituted its management, exercised any initiative or active role in the matter. What was done does not really differ in kind from the normal operations of a company that is desirous of raising new capital and decides to go into the market with a new stock issue. I doubt whether such an operation by an issuing company or the holder of a large block of shares, without more, can ever be the carrying on of a business. In any event, I find that it is not the carrying on of a business in the circumstances of this case.

The appeal is dismissed with costs.

Montreal 1966
Dec. 1-2

BETWEEN:

W. D. ARMSTRONG & CO. LTD. ..... APPELLANT;

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE ..... RESPONDENT.

Sales tax—Appeal from Tariff Board—Exemption—Construction of exempting clause—Matrix used in production of rubber stamps—Whether used in production of "printed matter"—Excise Tax Act, Schedule III, Am S of C 1963, c. 17.

The Tariff Board denied appellant an exemption from sales tax on matrices used in producing rubber stamps on the ground that they were not "made for use exclusively in the manufacture or production of printed matter" within the meaning of Schedule III of the *Excise Tax Act*, as added by S of C 1963, c 17. The rubber stamps were produced by a process in which wording was transferred by pressure from a lead slug to a matrix and from the matrix by heat and pressure to an uncured rubber sheet The same process is commonly used in producing newspapers, magazines, books, etc. Appellant appealed.

Held, the Tariff Board did not err in law and the appeal must be dismissed. While matrices used for the production of newspapers, magazines and books are unquestionably used exclusively in the manufacture or production of "printed matter" within the meaning of Schedule III, it was not shown that the Tariff Board incorrectly construed the words "printed matter" in the context in which they were used in Schedule III as applied to matrices used for the production of rubber stamps.

APPEAL from decision of Tariff Board.

Jonathan J. Robinson for appellant.

André Garneau for respondent.

JACKETT P.: (Delivered orally from the Bench at Montreal, December 2, 1966)—This is an appeal, under section 58 of the *Excise Tax Act*, R.S.C. 1952, chapter 100, as amended, from a declaration made by the Tariff Board on October 5, 1966, to the effect that an article, known as a matrix and used in the course of producing the rubber sheet portion of rubber stamps, did not fall within Schedule III to

the Act as it was during a period of approximately three years prior to the amendments thereto affected by chapter 40 of the Statutes of 1966, so as to bring the sales of such articles, during that period, within the exempting provision of section 32 and thus to exempt such sales from the consumption or sales tax imposed by section 30 of the Act. Those sections read in part as follows:

30 (1) There shall be imposed, levied and collected a consumption or sales tax of eight per cent on the sale price of all goods

(*a*) produced or manufactured in Canada

(i) payable, in any case other than a case mentioned in subparagraph (ii), by the producer or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier, and

(ii) payable in a case where the contract for the sale of the goods (including a hire-purchase contract and any other contract under which property in the goods passes upon satisfaction of a condition) provides that the sale price or other consideration shall be paid to the manufacturer or producer by instalments (whether the contract provides that the goods are to be delivered or property in the goods is to pass before or after payment of any or all instalments), by the producer or manufacturer *pro tanto* at the time each of the instalments becomes payable in accordance with the terms of the contract,

. . .

32 (1) The tax imposed by section 30 does not apply to the sale or importation of the articles mentioned in Schedule III

. .

In the appellant's case the Minister also had to invoke section 31, which reads in part as follows:

31. (1) Whenever goods are manufactured or produced in Canada under such circumstances or conditions as render it difficult to determine the value thereof for the consumption or sales tax because

. . . .

(*d*) such goods are for use by the manufacturer or producer and not for sale;

the Minister may determine the value for the tax under this Act and all such transactions shall for the purposes of this Act be regarded as sales.

Pursuant to section 57 of the *Excise Tax Act*, which confers on the Tariff Board jurisdiction where any difference arises or doubt exists, *inter alia*, as to whether any tax

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is payable on any article, to declare that the article is exempt from tax under that Act, by a letter dated May 16, 1966, the solicitors for the appellant wrote to the Tariff Board to challenge a ruling of the Department of National Revenue concerning the application of sales tax to "matrices used in the production of rubber stamps". That letter stated that the appellant's contention was that the matrices are exempt by virtue of the amendment made to the Excise Tax Act by chapter 12 of the Statutes of 1963, by which a paragraph was added to Schedule III reading as follows:

> Typesetting and composition, metal plates, cylinders, matrices, film, art work, designs, photographs, rubber material, plastic, material and paper material, when impressed with or displaying or carrying an image for reproduction by printing, made or imported by or sold to a manufacturer or producer for use exclusively in the manufacture or production of printed matter;

The letter from the appellant's solicitors to the Tariff Board informed the Board that "The department" had taken the position "that these matrices are not being used for printing", while it was the appellant's contention "that the definition of printing includes rubber stamping".

The evidence with reference to the article in question is summarized in the Board's declaration, in a manner the correctness of which has not been challenged, as follows:

> In the process of making rubber stamps the applicant produces lead slugs, containing the wording of the stamps, and several of these are locked up in a chase. A matrix board is placed over the chase and pressure is applied indenting the matrix board with the characters from the lead slugs. A sheet of uncured rubber is then placed over the matrix board and by application of heat and pressure the rubber is forced into the indentations in the matrix board and cured. When this process is completed the individual stamps are cut out of the cured rubber sheet and attached to wooden handles to form the rubber stamps. The lead slugs are remelted and the matrix board is discarded once the stamps are found to create proper impressions.

It might also be mentioned, although this does not appear to be mentioned in the Tariff Board's declaration, that it was established by the evidence before the Board, and it is common ground, that, in a common type of printing process, exactly the same steps of

(*a*) production of lead slugs containing the wording it is desired to print and locking several of them in a chase,

(*b*) application thereto of a matrix board so as to indent the matrix board with the characters from the lead slugs, and

(*c*) application of a sheet of raw rubber to the matrix board in such manner as to force the rubber into the indentations in the matrix board and curing the rubber while in that state,

are used to produce a rubber sheet that is used for the final stage of the printing process. In other words, the same crafts and techniques are used in that process to produce a rubber sheet that is in a state in which it can, when inked, impress the required wording on paper or other material, as are used by the appellant in producing the rubber sheet for rubber stamps.

The Tariff Board's determination of the matter is contained in the following portion of its declaration:

> Counsel for the applicant contended that the matrix carries an image for reproduction by printing and is made by the manufacturer for use exclusively in the manufacture of printed matter. He contended that the cured rubber sheet is "matter" and that it is printed; the process of imprinting the configurations on the matrix into the rubber sheet, he contended, is "printing".
>
> Counsel for the respondent pointed out that the exemption applies to the enumerated goods when they are used exclusively in the manufacture or production of printed matter and he contended that the meaning to be attached to the words "printed matter" is that commonly attributed to such words, that is printed material of the nature of the printed material enumerated in the first four paragraphs under the heading "PRINTING AND EDUCATIONAL". This material is produced by the use of the goods enumerated in the last paragraph under the heading, such things as composition, plates, cylinders, art work, design and so on. He contended that the cured rubber sheet was not "printed matter" within the meaning to be attached to these words in the exempting provision.
>
> Although the applicant did not make the following point counsel for the respondent argued that while the matrix may carry an image for reproduction, the rubber stamp was not used in the production of printed matter and consequently the matrix does not qualify for exemption, i.e., a rubber stamp does not produce "printed matter" within the meaning to be attached to these words in the exempting provision.
>
> The Board declares that the rubber sheet is not "printed matter" within the meaning to be attached to these words in the exempting

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provision. The Board declares also that, in use, a rubber stamp does not produce "printed matter" within the meaning to be attached to these words in the exempting provision.

Accordingly, the application is dismissed.

By order of this Court made on November 22, 1966, leave to appeal was granted on the following question of law:

> Did the Tariff Board err as a matter of law in determining that matrices used in the production of rubber stamps are not made for use exclusively in the manufacture or production of printed matter?

Substantially the same arguments were put forward in this Court as were put before the Board.

To understand the appellant's argument, it is helpful to understand the difficulty encountered in applying this exemption, which clearly applies to the articles made in the course of the printing process to which I have referred, to the articles made to be used in the course of manufacturing rubber stamps, even though such articles are for all practical purposes substantially identical. In examining this question, it is to be borne in mind that it is common ground that the appellant's only difficulty is to bring the articles in question within that part of the paragraph in Schedule III to which reference has already been made that reads, "matrices ... made ... by ... a manufacturer or producer for use exclusively in the manufacture or production of printed matter".

Applying the words that I have just quoted to the printing process to which I have referred, there is no question that first the slugs, second the matrix and third the rubber sheet are used exclusively in the manufacture or production of the pages of the newspaper, magazine, book or other reading material that is the end product of the printing process and that that end product is "printed matter" that has been manufactured or produced by that process. There is, therefore, no question that the exemption applies to the slugs, the matrices and the rubber sheets used in the printing process.

In the case of the appellant's rubber stamps, the exempting provision is not so obviously applicable. As everybody knows, a rubber stamp, more often than not, is applied to

some article to add some words, such as "paid" to an account or "fragile" to a parcel, the addition of which does not have the effect of manufacturing or producing "printed matter" out of something that was not printed matter before such words were applied. (Clearly, rubber stamps might be used to manufacture or produce printed matter but such an occasional use is not sufficient for the appellant's present appeal because it is his purpose to obtain a decision that the exemption applies generally to the matrices made in the course of making rubber stamps.)

The appellant seeks to overcome this difficulty and to bring the matrix used in making a rubber stamp within the exemption provision by bringing the rubber sheet (which is produced in the form of a sheet that may be cut into a number of appropriately shaped pieces that can be affixed to handles so as to become the articles commonly known as rubber stamps) within the expression "printed matter" in Schedule III. Counsel for the appellant frankly recognized that, at first blush, such a rubber sheet, having raised thereon the inverted representation of certain words for printing purposes, was not obviously within the meaning of the words "printed material" as those words are used in common parlance. His contention was, however, that it is the ordinary meaning of the words used, as that meaning is given to us by recognized dictionaries, that must govern. In applying this submission, he relied upon the primary meaning of the word "printing" as meaning impressing, stamping or moulding, and argued that any matter that was impressed, stamped or moulded was "printed matter". Mr. Robinson deserves great credit for the ingenuity, clarity and forcefulness of his presentation, but I cannot agree that the primary meaning of an ordinary English word as set out in the dictionaries is necessarily its "ordinary meaning" in all circumstances. Frequently, English words have more than one sense sometimes overlapping, sometimes quite different and which of those meanings is its ordinary meaning in a particular statutory provision depends entirely on the context in which it is used. I do not propose to endeavour to formulate a definition of "printed matter"

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in the context in which it appears in Schedule III to the *Excise Tax Act*. I content myself with saying that it has not been shown that the Tariff Board erred by attributing to that expression a sense other than the sense in which it was being used in Schedule III and that, as it appears to me, the Board was obviously applying the phrase in its proper sense in the context in which it appears. I might suggest, without stating any concluded view, that, generally speaking, "printed matter" is the final product of a printing process; in other words, that there is no printed material until something has been printed in the sense in which a printer would use that word. Printed matter would not, in this context, include physical objects resulting at some intermediate stage of the printing process.

In conclusion I wish to mention, so as to avoid any misunderstanding as to what is being decided at this time, that the only question raised by this appeal is the applicability of Schedule III to the matrices made and used in the course of making rubber stamps. The question as to whether sales tax is payable on the matrix made and used as part of the process of making a rubber stamp as well as on the rubber stamp itself, even though the matrix has no function except as one of the stages in manufacturing the rubber stamp and even though the matrix does not exist as an independent article of commerce, is a separate question that has not been raised by this appeal.

The appeal is dismissed with costs which, in the circumstances of this case and subject to what the parties have to say, I propose to fix at $300. This amount is over and above the costs of the preliminary motions, which have already been awarded to the respondent.

BETWEEN:

FURNESS, WITHY & COMPANY LIMITED ..... APPELLANT;

AND

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

Montreal 1966

May 16-20, 24-27, 30-31 & June 1-2

Ottawa Aug. 24

Income tax—Income Tax Act, R.S.C. 1952, c. 148, sections 2(2), 4, 10(1)(c), 31(1)—Canada-U.K. tax agreement (1946)—Articles II(1)(i), III, IV, V—Income from business carried on in Canada by non-resident—Operation of ships or aircraft by non-resident persons—Whether income exempt under either section 10(1)(c) of the Act or Article V of the Agreement—French text of the Act—Industrial and commercial profits—Permanent establishment.

The appellant was incorporated in the United Kingdom in 1891 and during the years in question in the appeal had its head office and ten branch offices there and also had six branch offices in Canada. Its business and that of some of its many subsidiaries included the operation of cargo vessels owned or chartered by them. The appellant's own business also included the providing of general agency and stevedoring services for ships owned or chartered by subsidiary and affiliated companies, (all referred to as "inside business") and also general agency services for ships owned or chartered by strangers (referred to as "outside business"). Whenever any such ships were in Canadian waters, such services were arranged for by Canadian branch offices of the appellant. For all these services the appellant was remunerated at agreed rates.

Until the year 1956, the Minister had accepted the appellant's apportionment of its Canadian profits as between "inside business" and "outside business" and had treated only the latter as taxable. However for the years 1957 to 1963 inclusive the Minister took the position that there was no distinction in law between the two classes of business and that the entire profit of the Canadian branches was taxable.

On appeal the appellant took the position that the whole of its Canadian profits was exempt from tax in Canada either under section 10(1)(*c*) of the *Income Tax Act* or under Article V of the Canada-United Kingdom Tax Agreement both of which exempt from taxation the profits derived by non-resident persons from operating ships.

A secondary issue concerned the deductibility, in computing Canadian profits, of a proportion of the appellant's head office administration expenses, for which no deduction had been made.

Held,

1. That neither the Act nor the Agreement exempted from tax the earnings of the appellant from its managing, agency or stevedoring services rendered in Canada to others, whether such others were affiliates or subsidiaries, or strangers and that the profit attributable to Canadian branches in respect thereof was taxable under sections 2(2) and 31(1) of the Act and Articles III and IV of the Agreement, as being attributable to a permanent establishment in Canada.

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2. That since the expression "operated by him" in section 10(1)(c) of the *Income Tax Act* and the expression "from operating" in Article V of the Agreement are used in each case in an income tax context they implied an operation that was productive of the subject matter of the tax, rather than an operation in any other sense and as referred to both in the *Income Tax Act* and in the Agreement, especially in the light of the official French versions thereof, the term implies operation by the owner or charterer rather than by a mere manager, agent or stevedore who carried out duties for the owner or charterer.

3 That any profits imputable to such managing, agency or stevedoring activities in respect of ships owned or chartered by the appellant itself were part of the profits from the operation of such ships and were exempt from tax under the Act or the Agreement and that the re-assessments should be referred back to the Minister to be revised accordingly.

4. That in computing its income from its operations in Canada subject to taxation, the appellant was entitled to deduct that portion of the general head office expenses of its business chargeable to its Canadian operations other than that portion thereof concerned in the operation of ships owned or chartered by the appellant and operated in its own service.

APPEAL from assessments of the Minister of National Revenue.

H. Heward Stikeman, Q.C. and *W. David Angus* for appellant.

M. A. Mogan and *R. A. Wedge* for respondent.

THURLOW J.:—This is an appeal from re-assessments of income tax for each of the years 1957 to 1963 inclusive. The main issue, which is the same in respect of each of the years in question, is whether, or to what extent, amounts which the Minister treated as profits earned by the appellant in Canada are subject to tax having regard to section 10(1)(c)[1] of the *Income Tax Act*[2] and to Article V[3] of

[1] 10(1) There shall not be included in computing the income of a taxpayer for a taxation year

. . .

(c) the income for the year of a non-resident person earned in Canada from the operation of a ship or aircraft owned or operated by him, if the country where that person resided grants substantially similar relief for the year to a person resident in Canada.

[2] R.S.C. 1952, c. 148.

[3] Article V

Notwithstanding the provisions of Articles III and IV, profits which a resident of one of the territories derives from operating ships or aircraft shall be exempt from tax in the other territory.

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the agreement of June 5, 1946 between Canada and the United Kingdom of Great Britain and Northern Ireland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. The appellant's position is that the amounts in question are exempt from Canadian tax either as *income...earned in Canada from the operation of a ship...owned or operated by the* appellant within the meaning of section 10(1)(*c*) of the Act or as profits which it *derives from operating ships* within the meaning of Article V of the agreement, or both. An issue also arises as to certain deductions to which the appellant claims to be entitled in computing its profits from its operation in Canada.

The appellant was incorporated in the United Kingdom in 1891 and has its head office and ten branch offices there. It also has six branch offices in Canada, twelve in the United States and one in Trinidad. For the purposes of this appeal it is admitted that the appellant in the years in question was resident in the United Kingdom and was not resident in Canada. The appellant has either complete or majority control of some thirty-eight subsidiary companies, which are engaged in a variety of business operations, and substantial investments not amounting to majority control in several others which may be conveniently referred to as affiliated companies. During the years in question the appellant and some of the subsidiary and affiliated companies owned and chartered ships which were engaged in carrying goods in various parts of the world including the North and South Atlantic Oceans, the Great Lakes, the Mediterranean Sea and the North and South Pacific Oceans.

In the North Atlantic these ships plied on regularly scheduled voyages between particular ports in the United Kingdom and ports of Eastern Canada and the United States and while in Canadian waters the ships, whether belonging to or chartered by the appellant or subsidiary or affiliated companies, were serviced and their activities were regulated by personnel of the branch offices of the appellant in Canada. The same applied to ships of the appellant and its subsidiary and affiliated companies in Canadian waters on the Pacific coast. The principal branch office of the appellant in Canada was in Montreal where at all material times one of the directors of the appellant, who

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was also a director of several of the subsidiary and affiliated companies engaged in North Atlantic shipping, was resident.

The functions carried out by the appellant's Canadian branch offices for these ships covered a range which included everything both of an administrative and of a trading nature that would otherwise require the attention of the owner or charterer himself while the ship was in these waters, including in some ports the provision of stevedoring services, and in addition included the finding and booking of cargo for the ships and attending and participating in the rate setting and other activities of the Canada-United Kingdom eastbound freight conference of which the companies concerned were members. Most, if not all, of these functions were carried out by the Canadian branch offices without reference either to the appellant's head office or to the subsidiary or affiliated companies.

Besides the appellant itself there were three subsidiary and two affiliated companies whose ships traded in Canadian ports during the years in question. All of these companies were closely related to the appellant either through shareholding by the appellant or by its other subsidiaries or by long standing arrangements between them. The insurance, and in some if not in all cases the fuel requirements of these companies were arranged for on a group or bulk basis by the appellant in the United Kingdom. The appellant also acted as agent for them in United Kingdom ports in which the companies had no branch offices, provided inspection services for all of them and as broker arranged for chartering of ships by them when required. In the case of two of the subsidiary companies the appellant also acted as manager of the companies' affairs and business under management contracts. The picture as developed by the evidence was one of a group of companies of which the appellant, working in concert with each of the other companies, carried out the functions of a branch office in Canada for each of them as well as for itself.

The enterprises of these other companies, however, were entirely their own. In rendering services to ships of these

companies in Canada the appellant did so as their local agent. In each case the bills of lading for the carriage of goods by them were signed by the appellant as agent for the company concerned. Nor were these companies mere shams or alter egos of the appellant or agents or partners of the appellant. On the contrary each was a substantial shipping company with its own board of directors and business undertaking and the situation as I view it was one in which the appellant and the subsidiary or affiliated companies each conducted its own separate enterprise but in so doing cooperated with the other to secure the maximum advantage to both.

In respect of all services (other than stevedoring services) rendered by the appellant's Canadian branch offices to ships of subsidiary or affiliated companies the appellant was remunerated by a commission on the inward and outward freights of the voyage. For stevedoring services the appellant was remunerated in accordance with the terms of a contract between the appellant and the company to whose ship the services were rendered. These charges would be realized from the freights collected by the branch offices for the principals concerned but the balances of the funds representing freights so collected were not forwarded to the principals by the branch offices. Instead an accounting would be made from time to time and the appellant's head office in the United Kingdom would pay the balance due to the subsidiary or affiliated company. Funds would be transferred between the Canadian branches and the head office of the appellant only once or twice a year as occasion or circumstances of the appellant's business might require.

For purposes of administration and accounting the appellant's branch offices were conducted as if they were separate entities. Whether a ship belonged to the appellant itself or to one of the subsidiary or affiliated companies charges against the ship's account would be made for the commissions and stevedoring fees accruing for the services rendered by the Canadian branches to the ship according to prearranged scales and would be included as part of the receipts of the branch offices. The cost to the appellant of

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providing such services, so far as paid for by the branch office, appeared as disbursements in the branch office accounts. On the basis of such receipts less such disbursements and any other applicable expenses of running it the branch office might or might not show a surplus which, if shown, might be wholly or partly profit from its activities. These activities, consisting of the servicing of ships of the appellant and of its subsidiary and affiliated companies were referred to by counsel for the appellant as "inside business".

The Canadian branches of the appellant company also rendered agency services in Canadian ports on a commission basis to ships of other shipping enterprises during the years in question and both earned revenue therefrom and incurred expenses in connection therewith. In these cases accounting for freights collected and payment of balances to principals was effected by the Canadian branches. This was referred to by counsel as "outside business". The terms on which such services were made available were not materially different from those applicable in the case of "inside business".

For the taxation years 1957 to 1963 inclusive, and indeed for many years prior to 1957, the appellant reported as the taxable portion of its income from its business in Canada the total of the profits earned by its six Canadian branches from "outside business", and treated the remainder of its income as exempt from Canadian income tax. For the years prior to 1957, this basis for Canadian taxation was accepted by the Minister but for 1957 and subsequent years the Minister took the position that there was no distinction to be made between "inside business" and "outside business" and that the appellant was liable for tax on the total of the profits shown by the accounts of the Canadian branches as arising from both. He therefore added the amounts shown as profits from all "inside business" by the accounts of the six Canadian branches and assessed tax accordingly. In so doing he included the amounts credited to the branches as commissions for services and fees for stevedoring performed by the branches in servicing ships belonging to or chartered

by the appellant itself and he made no deduction in respect of any portion of the head office expenses of the appellant company. On the appeal to this Court the appellant took the position that the whole of its income was exempt and its counsel in opening claimed judgment to that effect, though he indicated at the same time that the appellant would be content to be assessed on the basis followed by it and by the Minister prior to the 1957 taxation year.

The first and, as I see it, the principal question to be determined in the appeal is that of the extent of the exemptions provided for in section 10(1)(*c*) of the Act and in Article V of the agreement. The section, it may be noted, is not dependent upon any treaty or other arrangement with any particular country but applies to the income of any non-resident provided the country of his residence, whatever country that may be, grants substantially similar relief to a person resident in Canada. It is admitted in the present case that the United Kingdom fell within the proviso in the years in question. The section, moreover, while first enacted in its present form in the 1948 *Income Tax Act*[1] had a forerunner in somewhat similar form as section 4(*m*)[2] of the *Income War Tax Act*. In section 4(*m*) the exemption was granted in respect of earnings of a non-resident "*derived from the operation of a ship or ships registered under the laws of a foreign country*" which granted equivalent exemption to residents of Canada. This had been in effect for some twenty years before the agreement came into force. In the present section 10(1)(*c*) the exemption applies to income *earned in Canada from the operation of a ship or aircraft owned or operated by* the non-resident. Since in the case of a non-resident person it is only income earned in Canada that is subjected to tax under the *Income Tax Act*[3] the effect of the exemption provided by section 10(1)(*c*) is that none of the income of the non-resident from the operation of ships owned or operated by him, wherever earned, is subject to Canadian income tax.

[1] S of C, 1948, c. 52.

[2] Enacted by S. of C., 1926, c. 10, s. 10.

[3] *Vide* sections 2 and 31(1).

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Article V of the agreement, which has the force of law by virtue of chapter 38 of the Statutes of Canada, 1946,[1] has a somewhat different field of operation. It is part of an agreement between two governments and applies only to the taxation of residents of those two countries. In Article III[2] provision is made both for the exemption of the industrial or commercial profits of enterprises of one country from taxation by the other except when the enterprise has a

[1] Sections 2 and 3 read as follows:

2. The Agreement entered into between Canada and the United Kingdom, set out in the Schedule to this Act, is approved and declared to have the force of law in Canada.

3. In the event of any inconsistency between the provisions of this Act or of the said Agreement and the operation of any other law, the provisions of this Act and the Agreement shall, to the extent of such inconsistency, prevail.

[2] . . .

Article III

(1) The industrial or commercial profits of a United Kingdom enterprise shall not be subject to Canadian tax unless the enterprise is engaged in trade or business in Canada through a permanent establishment situated therein. If it is so engaged, tax may be imposed on those profits by Canada but only on so much of them as is attributable to that permanent establishment.

(2) The industrial or commercial profits of a Canadian enterprise shall not be subject to United Kingdom tax unless the enterprise is engaged in trade or business in the United Kingdom through a permanent establishment situated therein If it is so engaged, tax may be imposed on these profits by the United Kingdom, but only on so much of them as is attributable to that permanent establishment: Provided that nothing in this paragraph shall affect any provisions of the law of the United Kingdom regarding the imposition of excess profits tax and national defence contribution in the case of inter-connected companies.

(3) Where an enterprise of one of the territories is engaged in trade or business in the other territory through a permanent establishment situated therein, there shall be attributed to such permanent establishment the industrial or commercial profits which it might be expected to derive if it were an independent enterprise engaged in the same or similar activities under the same or similar conditions and dealing at arm's length with the enterprise of which it is a permanent establishment.

(4) No portion of any profit arising from the sale of goods or merchandise by an enterprise of one of the territories shall be deemed to arise in the other territory by reason of the mere purchase of the goods or merchandise within that other territory.

(5) Where a company which is a resident of one of the territories derives profits or income from sources within the other territory, the Government of that other territory shall not impose any form of taxation on dividends paid by the company to persons not resident in that other territory, or any tax in the nature of an undistributed profits tax on undistributed profits of the company, by reason of the fact that those dividends or undistributed profits represent, in whole or in part, profits or income so derived.

permanent establishment in the other and for the extent of the subject matter to be taxed when the exception applies. Article IV[1] prescribes the extent of the subject matter of permissible taxation where there are related but separate enterprises in both countries. In both articles the test of what may be taxed is the extent of earnings in the particular country. Article V then provides for an exemption which is to apply regardless of where profits are made and which is also to apply notwithstanding the provisions of Articles III and IV which would otherwise permit one of the countries to impose tax on a resident of the other within the limits therein mentioned. The exemption is provided for *profits which a resident of one of the territories derives from operating ships or aircraft.*

It was not suggested by either party to the appeal that there is any difference between the meaning of the expression *from the operation of a ship or aircraft owned or operated by him* in section 10(1)(*c*) and the expression *derives from operating ships or aircraft* in Article V of the agreement. For the purposes of this case the key words are *operated by him* in section 10(1)(*c*) and *from operating ships* in Article V and the principal question at issue appears to me to turn on the meaning to be given to them. Despite the differences in the fields of operation of the two provisions and despite the rule of strict construction[2] of the exemption provided by section 10(1)(*c*) and the principle[3] of broad interpretation applicable to the agree-

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[1] Article IV

Where

(*a*) An enterprise of one of the territories participates directly or indirectly in the management, control or capital of an enterprise of the other territory, or

(*b*) The same persons participate directly or indirectly in the management, control or capital of an enterprise of one of the territories and an enterprise of the other territory, and

(*c*) In either case conditions are made or imposed between the two enterprises, in their commercial or financial relations, which differ from those which would be made between independent enterprises,

then any profits which would but for those conditions have accrued to one of the enterprises but by reason of those conditions have not so accrued may be included in the profits of that enterprise and taxed accordingly.

[2] *Lumbers v. M.N.R.* [1943] Ex C.R. 202 at 211. *M.N.R. v. Sunbeam Corp. (Can.) Ltd* [1961] Ex C.R. 234 at 241

[3] *Vide* Lord Macmillan in *Stag Line Ltd. v. Foscolo, Mango & Co.* [1932] A.C. 328 at 350

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ment the meaning of these particular expressions may therefore be considered together.

The first observation on the construction of these words is that the use of the expression *owned or operated by him* in section 10(1)(*c*) makes it clear that except in the case of an owner the operation contemplated is operation by the taxpayer himself and that, as a matter of the ordinary meaning of the words used, the expression *profits which a resident...derives from operating ships or aircraft* appears to refer only to the operating of ships or aircraft by the resident. In this respect the meaning of the expressions used both in section 10(1)(*c*) and in Article V are thus narrower than that of the statutory provision considered in *Minister of National Revenue v. Hollinger North Shore Exploration Company Limited*[1] and that case is accordingly different from the present case and in my opinion is of no assistance to the appellant.

The second observation is that while the sense or meaning of the verb *operate* and its derivatives may vary with the context and expression in which the words are used neither in section 10(1)(*c*) nor in Article V do they bear two different senses or meanings. Thus if the words are used in the sense of physically directing the working of a ship they might at times refer to direction by an owner or charterer who actively carries out the functions and at other times to direction by a manager or agent for him depending on the extent of his authority and the range of the functions carried out by him. But they could not refer to the owner and to the manager or agent at the same time for *ex hypothesi* in this sense the words refer only to the person physically directing the working of the ship. On the other hand if the references are to operation in the sense of employment by an owner or charterer for the purpose of earning profit therefrom the sort of direction carried out by a manager or agent, regardless of the extent of his authority or the scope of the services which he performs, is not within the meaning since the operation of the ship is not his at all but that of his principal.

The problem then is to determine in which sense the words are used. In the course of argument references were made to a number of dictionaries but I have not been able

[1] [1963] S.C.R. 131.

to find in the meanings there assigned anything that appears to advance the solution of the problem and it appears to me that it is the context and the particular expression in which the words are used rather than the words themselves which determine the particular sense in which they are used. Here the general context in the one case is that of an exempting section in a taxation system and in the other is that of a provision in an international agreement by which the contracting governments agree to grant an exemption from taxation to the extent therein mentioned. Both are thus concerned with income taxation and may be taken to use the words in what, for lack of some better way of expressing it, I shall call an income tax sense, that is to say a sense in which the *operating* referred to can be regarded as productive of the subject matter of the tax rather than in some sense which might fit other contexts.

Briefly, the position taken by the Minister was that neither section 10(1)(*c*) of the Act nor Article V of the agreement exempts the income of a mere agent or stevedore and that it is the carrier and no one else who is exempted by these provisions.

The appellant's position on the other hand, as I understand it, was that regardless of who else might be entitled to exemption under section 10(1)(*c*) and Article V the expressions used therein are apt ones to refer to the profits earned by a person who on behalf of the owner carries out anywhere in the world, all or substantially all, of the functions involved in administering the ship and its trading activities or to one who carries out such functions while in a particular geographical area when the ship is in that area in the course of a voyage. This submission is not unattractive since in ordinary parlance the verb, *operate* would not I think be inept to characterize in a particular sense the activities as a whole of such a manager or agent with respect to the ship and the noun, *operator* would not be inept to characterize the manager or agent in the same sense. The submission moreover appears to me to draw support from the reflection that the revenues earned by employing ships in carrying cargo are their freights and that the revenues of such a manager or agent, (who, at least in cases such as this, has an interest as a member of a team consisting of himself and the owner in the earning of the freights) in a sense represent a portion of the freights

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earned by the efforts of both which would be exempt in the hands of the shipowner if he performed all the functions himself.

I have come to the conclusion, however, that the appellant's submission cannot succeed. In the absence of any expression of judicial opinion on these or similar provisions in effect in other countries, I am of opinion that neither the expression *operated by him* in section 10(1)(*c*) of the Act nor the expression *from operating ships* in Article V of the agreement refers to one whose functions with respect to the ship are merely those of a manager or agent for another or others whether generally or in a particular geographical area, or of a manager or agent and stevedore combined, and that this is the legal position no matter how extensive the authority exercised by him as such manager or agent or the services rendered by him may be.

There are several reasons which lead me to this conclusion. First the situation which leads to taxation in more than one country of the profits of a shipowner or charterer from operating ships or aircraft engaging in international trade,[1] and which both section 10(1)(*c*) and Article V

[1] The problem is described as follows in a note by Arnold D. McNair in the *American Journal of International Law* (1925) Vol 19, page 569:

> Although the operation of the British Income Tax Acts is primarily territorial, tax is leviable upon non-residents who derive income "from any trade profession employment or vocation exercised within" Great Britain and Northern Ireland. During recent years the zeal of the officials of the British Inland Revenue Department induced them to levy tax upon foreign shipowners who both had vessels trading to the United Kingdom and had offices or subsidiary companies or other regular agents in the United Kingdom who booked freight for them in the United Kingdom. The profits (or a portion of them,) deemed to accrue from freights booked in this manner were assessed to income tax, and it was paid. The precise kind of trading to a British port, which exposed a foreign shipowner to British taxation, need not be considered here. Thereupon the United States of America by the Income Tax Law of 1916 followed suit or retaliated by taxing a portion of the profits earned by foreign shipowners on freights booked in the United States, and there was every prospect of the maritime countries of the world drifting into a tax war.
>
> . . .
>
> A shipowner earns profit in respect of the service rendered by him of transporting passengers and cargo from the territory of State A to the territory of State B (We may eliminate for our present purpose the incidental services of feeding passengers and of assisting in the loading and unloading of cargo.) The space in which the services are rendered is divisible as follows: (i) in the port of A and its adjacent maritime belt, (ii) on the high seas, and (iii) in the

appear to me to have been intended to remedy does not appear to me to apply or to call for a remedy so far as such a manager or agent is concerned. Nothing in the nature of the business of such a manager or agent or stevedore requires that it be carried on in more than one country so as to attract tax in both as in the case of the owner or charterer of the ship or aircraft who is engaged in the carriage of goods or passengers in international trade and I regard it as unlikely that either of these provisions was intended to exempt any portion of the earnings of a person as such a manager or agent or stevedore. In short since the nature of the services from which the profits as such of a person so engaged arise is such that the services are rendered or can be rendered in a single country there was never any occasion to provide exemption for such profits and I regard it as unlikely that any such exemption was ever intended.

Next I think it likely that the exemption was meant to apply to the whole of the profit earned by the owner or charterer of a ship who has it engaged in international trading and not merely to such profit as might, when he conducts his own operation in the country of his residence and has an agent abroad, by some difficult method of apportionment, be attributed to the part of a voyage in which he has the ship under his personal direction. This latter might leave the rest of the exemption to apply in favour of an agent who during the rest of the voyage would be regarded as operating the ship but would raise the problem of taxation in two countries all over again with respect to the owner's or charterer's profit from that portion of the voyage. It seems to me that to construe the words *operated by him* in section 10(1)(*c*) or the words *operating ships* in Article V as referring to the person physically directing the activities of the ship as agent for another or others would thus lead to an absurd division of the exemption between the agent and the owner or charterer unless the exemption

port of B and its adjacent maritime belt. Thus a state which adopts the practice of taxation under discussion taxes a foreigner upon the profits earned in respect of services rendered partly in a foreign country and partly on the high seas, and it taxes him either because he has an office or agent in its territory or because his ship comes into one of its ports and so becomes *pro hac vice* amenable to its jurisdiction. The factor of space is relevant upon a consideration of the equity of the double taxation to which profits so earned may be subjected, but it does not, it is submitted, cast any doubt upon the legality of the practice.

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could be said to apply to both agent and owner or charterer at the same time. To hold that the exemption applies to both agent and owner or charterer at the same time, however, as already indicated, appears to me to involve construing the words of the statute and of the agreement in more than one sense, depending on whose taxation is being considered, and I do not think that that could have been intended.

Finally, the French language text, which also states the law in this country, in section 10(1)(*c*) expresses the meaning of *operated by him* by the words "qu'elle met en service" and the corresponding expression "de la mise en service" is used in Article V to represent the meaning of *from operating* in the English language text of Article V. The French expressions so used appear to me to be apt ones to refer to operation by an owner or charterer who puts a ship into service in the trading in which he is engaged and to be quite inept to embrace or refer to one who simply carries out tasks, however extensive, for such an owner or charterer whether generally or in a particular geographical area into which the ship is sent in the course of a voyage.

Accordingly I shall hold that neither section 10(1)(*c*) nor Article V exempts earnings of the appellant from managing or agency or stevedoring services which it renders in Canada to other corporations and since for tax purposes each other corporation must in my opinion be treated as a separate entity[1] there is, as I see it, no distinction to be made for this purpose between such other corporations whether they are subsidiaries or affiliates of the appellant or mere strangers.

The appellant is, however, in my opinion, entitled to exemption under these provisions in respect of the portion of the amounts treated as income by the Minister which arose from entries of charges made by the branches for "agency" and stevedoring services to ships which were owned or chartered by the appellant itself and were operated in its own service. Such amounts, in my opinion, are mere bookkeeping entries but if and to the extent that they represent profits they are in my view profits from the operation of ships owned or operated by the appellant and from operating ships within the meaning of both section

[1] Compare *The Gramaphone and Typewriter Limited v. Stanley* [1908] 2 K.B. 89.

10(1)(*c*) and Article V. Both the "agency" and stevedoring services in respect of which the entries arose were part of the process of operating the ships and the amounts entered in the books in respect of such services do not become any the less exempt by reason of the manner in which the appellant organized the activities of its branches or arranged their bookkeeping and accounting.[1] In this respect and to this extent therefore the appeal succeeds.

The amounts representing receipts from all other companies, however, less the expenditures incurred, appear to me to represent profits earned by or through the appellant's branches in Canada and to be subject to tax under sections 2(2) and 31(1) of the Act as income from a business carried on by the appellant in Canada. The branches through which these profits were earned moreover appear to have been permanent establishments as defined in Article II (1)(i)[2] of the agreement and the profits properly "attributable" to them were thus within the exception to the exemption provided by Article III. With respect to what profits were properly "attributable" to these branches it has not been established either that the appellant did not

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[1] Compare *M.N.R. v. Imperial Oil Limited* [1960] S.C.R. 735 at 748.

[2] Article II

(1) In the present Agreement, unless the context otherwise requires—

. . .

(i) the term "permanent establishment", when used with respect to an enterprise of one of the territories, means a branch or other fixed place of business, but does not include an agency unless the agent has, and habitually exercises, a general authority to negotiate and conclude contracts on behalf of such enterprise or has a stock of merchandise from which he regularly fills orders on its behalf.

An enterprise of one of the territories shall not be deemed to have a permanent establishment in the other territory merely because it carries on business dealings in that other territory through a *bona fide* broker or general commission agent acting in the ordinary course of his business as such.

The fact that an enterprise of one of the territories maintains in the other territory a fixed place of business exclusively for the purchase of goods or merchandise shall not of itself constitute that fixed place of business a permanent establishment of the enterprise.

The fact that a company which is a resident of one of the territories has a subsidiary company which is a resident of the other territory or which is engaged in trade or business in that other territory (whether through a permanent establishment or otherwise) shall not of itself constitute that subsidiary company a permanent establishment of its parent company.

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have "industrial or commercial profits" within the meaning of Article III (1) for the years in question from its enterprise or (subject to what follow with respect to deductions) that the amounts added in the Minister's computation and thus subjected to tax by the assessments were not the portions of such profits "attributable" to the appellant's permanent establishments in Canada within the meaning of Article III (3). The appeal in respect of the inclusion of such amounts in the computation of the taxable income of the appellant therefore fails.

There remains the issue whether the appellant is entitled to a deduction in each of the years in question in respect of a portion of what were referred to as head office administration expenses. On this issue the evidence is not such that one can determine whether the appellant is entitled to any further deduction under Article III (3) of the agreement since the amounts of the "industrial or commercial profits" for the years in question of the appellant's "enterprise" were not established and evidences lacking as to what industrial or commercial profits the appellant's permanent establishments in Canada could have been expected to derive if they had been an independent enterprise engaged in the same or similar activities under the same or similar conditions and dealing at arm's length with the appellant's enterprise. It is thus not established that the portion of the appellant's profits properly attributable to its branches in Canada was less than the amount subjected to tax by the assessments. If, therefore, the issue turned solely on the provisions of the agreement the appellant would fail. But the matter is also governed by section 4 of the Act which defines income for a taxation year from a business as being, subject to the other provisions of Part I of the Act, "*the profit therefrom for the year*" and by section 31(1). For the 1957, 1958 and 1959 taxation years this section provided:

> 31. (1) For the purposes of this Act, a non-resident person's taxable income earned in Canada for a taxation year is
>
> (*a*) the part of his income for the year that may reasonably be attributed to the duties performed by him in Canada or the business carried on by him in Canada,
>
> minus
>
> (*b*) the aggregate of such of the deductions from income permitted for determining taxable income as may reasonably be considered wholly applicable and of such part of any other of the said deductions as may reasonably be considered applicable.

For the remaining years under appeal section 31(1) was worded somewhat differently but as applied to the present problem appears to have meant the same. It read:

> 31. (1) For the purposes of this Act, a non-resident person's taxable income earned in Canada for a taxation year is
>
> (*a*) his income for the year from all duties performed by him in Canada and all businesses carried on by him in Canada,
>
> minus
>
> (*b*) the aggregate of such of the deductions from income permitted for determining taxable income as may reasonably be considered wholly applicable and of such part of any other of the said deductions as may reasonably be considered applicable.

Under this provision the limit of the amount upon which tax is imposed is (subject to the rules for computing income prescribed by the Act) the "profit" from the agency and stevedoring and other business activities carried on by the appellant in Canada. In computing this profit the head office administration expenses that would be deductible in the case of a resident company carrying on its business only in Canada in computing its profit would also appear to me to be deductible on ordinary principles by a non-resident company and where the business of the non-resident company is carried on both in Canada and elsewhere some proportionate part of the general expenses incurred in carrying on the business in more than one country including Canada would ordinarily be attributable to the portion of the business carried on in Canada and be deductible on ordinary principles in computing profit from the business carried on in Canada.

In the present case the appellant in its returns made no claim for any such deductions. This may have been due to the fact that its returns followed a pattern which appears to have been accepted in earlier years by which only income from *outside business* was reported as taxable, but whether or not this is the reason why no claim was made the appellant on this appeal, was I think, entitled to raise and show its right to such deductions. On the evidence I am satisfied that the appellant was entitled to some deduction in each year, particularly since the completion of accounting to subsidiary and affiliated companies and payment over to them of balances of freight collected for them in Canada, which was part of the process of earning the Canadian revenue, was done through the appellant's head office in London, but as I view it the evidence of the

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witness, Harry C. S. Croft, and the information contained in Exhibit A-4 respecting the total of such expenses and the total gross revenues of the appellant for each of the years in question do not afford a sufficient basis for me to reach a conclusion as to the amount of the deductions to which the appellant was entitled. In this situation all that has been established is that the Minister's computation was incorrect in not allowing any deductions and the proper course is I think to refer the matter back to the Minister for reconsideration and re-assessment on the basis that the appellant is entitled to a deduction in each year in respect of that portion of the general head office administration expenses of the appellant's business which is properly chargeable to the appellant's operations in Canada other than that portion thereof which is concerned with the servicing in Canada of ships owned or chartered by the appellant and operated in its own service.

My conclusion is therefore that the appeal should be allowed and that the re-assessments should be referred back to the Minister for reconsideration and re-assessment in accordance with these reasons.

I will hear the parties on the question of costs, as well as on any question on which there may be disagreement as to the form of the judgment, when an application for judgment is made.

Sydney 1966

June 13

Ottawa Sept. 8

BETWEEN:

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

AND

DUNCAN MORRISON ..... RESPONDENT.

Income tax—Income Tax Act, R.S.C. 1952, c 148—Section 6(1)(j)—Amounts dependent upon use of or production from property—Removal of rock from farm—Claim for compensation at so much per ton and general damages settled for lump sum—Whether proceeds taxable.

The respondent, who owned a 200 acre farm bordering on Big Bras d'Or Lake in Nova Scotia, agreed to sell to a contractor at 2½ cents per ton all the rock required from the respondent's farm for the purpose of building a causeway in the lake. Under the contract payments were to be made monthly based on the amount of rock removed. In the construction of the causeway the contractor used rock both from the respondent's farm and from an adjoining property. No account was

kept by anyone of the quantity of rock removed from the respondent's property and none of the payments called for by the contract were made. Instead, in 1959, the first year of the construction, the respondent was paid an advance of $2,500 and in 1960 after the completion of the causeway he accepted a final payment of $14,500 in settlement of his rights under the contract which included his right to payment for rock and to compensation for some minor damages caused to his buildings in the course of removing it.

The Minister assessed income tax in respect of the two amounts on the basis of their being "amounts received in the year (s) (1959 and 1960) that were dependent upon use of or production from property" within the meaning of section 6(1)(*j*) of the *Income Tax Act*. The Tax Appeal Board, however, allowed the respondent's appeal.

On a further appeal by the Minister held dismissing the appeal that while the amounts which the contractor had agreed to pay for rock, if paid, would have been taxable under section 6(1)(*j*) as amounts that were "dependent upon...production from property" the amounts in fact paid were not calculated by reference to the extent of production from the respondent's property but were lump sum amounts paid in satisfaction of claims arising under the contract or otherwise for the price of rock taken and damage to the respondent's buildings and farm. These did not fall within the meaning of section 6(1)(*j*) and as they were not otherwise of an income nature were not subject to income tax.

APPEAL from a decision of the Tax Appeal Board.

M. A. Mogan and *L. Little* for appellant.

J. G. Hackett, Q.C. for respondent.

THURLOW J.:—This is an appeal from a judgment of the Tax Appeal Board[1] which allowed an appeal by the respondent from re-assessments of income tax for the years 1959 and 1960. The issue in the appeal is whether amounts of $2,500 and $14,500 received by the respondent in 1959 and 1960 respectively were taxable as income under section 6(1)(*j*) of the *Income Tax Act*[2] by which it is provided that:

6(1) Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year

. . .

(*j*) amounts received by the taxpayer in the year that were dependent upon use of or production from property whether or not they were instalments of the sale price of the property, but instalments of the sale price of agricultural land shall not be included by virtue of this paragraph;

In the event that the amounts are required to be included a further issue arises as to the respondent's right to deductions in respect of losses alleged to have been incurred in gaining the amounts in question.

[1] 37 Tax A.B.C. 164.

[2] R.S.C. 1952, c. 148.

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The respondent is a bachelor who has earned his living by fishing, woodcutting, raising cattle, growing vegetables and working on the highways. He lives, as did his father and grandfather before him, on a two hundred acre property at New Harris in Victoria County, Nova Scotia near an arm of the sea known as Big Bras d'Or. The land includes about one hundred and fifty acres of woodland and some pasture and brush land and prior to the events to be related it also included about eight acres of cultivated land. His income tax returns showed income from his activities amounting to $2,460 in 1959 and to $2,195.29 in 1960.

In 1957 Provincial Government engineers, with his permission, made test drillings on his property for the purpose of ascertaining whether the rock under the surface was suitable for use in the construction of a causeway and bridge crossing of the Big Bras d'Or to be built near his property. The rock was found to be suitable and in the following year the respondent was approached by a representative of Municipal Spraying and Contracting Company Limited (hereinafter referred to as Municipal) with a proposal for the purchase of rock from his property for the purposes of its contract for the construction of the causeway. In an agreement in writing between the respondent and Municipal dated November 27, 1958, it is stated that the respondent, in consideration of one dollar and of the covenants and agreements thereinafter set forth:

> hereby sells to the purchaser all the rock required by the purchaser from the Vendor's land hereinafter described, for the purpose of the purchaser's contract for the construction of causeway in the Big Bras d'Or Lake, in the vicinity of Seal Island in the said lake.

After describing the respondent's property, the eastern side of which adjoined Sutherland property a portion of which had been or was later acquired by Municipal, the agreement went on to say:

> The Purchaser, its agents, servants and workmen, at all times within the period of two years from the date hereof shall have full and free liberty of entry through, over and upon the said land, for the purpose of digging, taking, removing, and carrying away the said rock, and with full right and liberty to bring, place, keep and maintain trucks, animals, carts and other vehicles, plant and equipment in and upon the said land, and to erect buildings necessary for the Purchaser's operations on the said land; and with full right and liberty to construct a road or roads from the said Sutherland land across the Vendor's said land, and if required, to construct a road or roads from the present highway to, through and over the said Vendor's land, for the operations of the purchaser.

The price to be paid by the Purchaser to the Vendor for the said rock, and including the rights and privileges herein set forth, shall be Two and one-half cents (2½c) per ton of 2,000 pounds, in accordance with Government scale, to be paid monthly within fifteen days after the end of each month; which the Purchaser hereby covenants and agrees to pay to the Vendor.

The Purchaser agrees that it will remove all the rock required by the Purchaser, within two (2) years from the date hereof, and will also remove within the said period all the plant and equipment of the Purchaser, from the said land.

The Purchaser shall take measures to protect, as far as possible, the Vendor's buildings on the said land from damage from the Purchaser's operations, and the Purchaser will repair any damage to such buildings so caused.

The construction of the causeway was begun in 1959 and was completed some eighteen months later in 1960. In the process a large quantity of rock was removed from the respondent's property and from the adjoining Sutherland property, was weighed at a scale set up on government property nearby and was dumped into the water to form the causeway but no record of the portion thereof taken from the respondent's property was kept either by Municipal or by the respondent and none of the monthly payments required by the contract was made. Instead an advance of $2,500 was paid to the respondent in 1959, which is the amount in question in respect of the re-assessment for that year, and in 1960 when the work had been completed instead of calculating the quantity taken and paying for the same on the basis provided by the agreement the purchaser offered and the respondent accepted a further lump sum of $14,500 which is the amount in question in respect of the re-assessment for 1960.

Just what this sum of $14,500 was intended to cover is not clearly stated but I would infer that it, along with the $2,500 advanced earlier, was in settlement of whatever claims the respondent had against Municipal whether real or fancied and whether for rock or for damage to his house or both or for loss occasioned by the removal of the rock. There had been some damage, occasioned by the blasting, to the roof, wall and chimneys of the respondent's dwelling, for which Municipal was responsible under the agreement, and the excavation of the rock had also resulted in the loss of the road to his pasture and woodland, which would be expensive to replace because of the steep and rough terrain,

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the loss of four acres of his cultivated land and the loss of three springs from which he had formerly drawn water for his cattle and for domestic use. The loss of the springs through removal of the rock seems not to have been anticipated and in an effort to remedy this either Municipal or the government (it does not clearly appear which) drilled a well for the respondent. The well, however, later went dry. The respondent himself then installed a pipe from his house to another spring some distance away and Municipal assisted him in this to the extent of $200 towards the cost of the pipe. By piping to this spring the respondent obtained a sufficient, though scanty, supply of water for domestic use but as a result of the drying up of the springs formerly used his cattle raising came to an end. His woodcutting stopped as well because of the loss of the road and because he took no steps to acquire a new one. In addition apart from the loss of the best of the cultivated land he says that his dwelling is no longer protected from the prevailing winds because of the removal of the side of the hill and that the cliff near his house, resulting from the excavation, presents a hazard to children.

The Minister's case for including the amounts of $2,500 and $14,500 in computing the respondent's income is based entirely on section 6(1)(*j*) of the Act. Two alternative grounds for supporting the assessment, that is to say, (1) that the amounts constituted income from a business and (2) that the amounts were received as rent for the use of land, were raised in the notice of appeal but these were abandoned in the course of the argument. The correct approach to the present problem, therefore, as I see it, is that the amounts in question may be subjected to tax if, but only if, they fall clearly within the provisions of section 6(1)(*j*). If they do fall clearly within the scope of that provision they are of course taxable as income whether they are of an income nature or not. The provision itself makes it clear that such may be the result in some cases. But apart from the effect of section 6(1)(*j*) and excepting the case of a sale in the course of a business there appears to me to be nothing about receipts from the sale of rock forming part of a taxpayer's property that would serve to characterize them as being of an income, as opposed to a capital, nature.

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Section 6(1)(*j*) and its predecessor, section 3(1)(*f*) of the *Income War Tax Act*[1], have been considered in a number of cases including *Ross v. M.N.R.*,[2] *M.N.R. v. Waintown Gas and Oil Co. Ltd.*[3], and *M.N.R. v. Lamon.*[4] Section 3(1)(*f*) of the *Income War Tax Act* was enacted after (and as a result of)[5] the decision in *M.N.R. v. Spooner*[6] in which it was held that oil royalties forming part of the consideration for the sale of property were not income even though they were realizable only from oil produced by the purchaser from the property. The subsection provided that income subject to tax should include:

> Rents, royalties, annuities and other like periodical receipts which depend upon the production or use of any real or personal property, notwithstanding that the same are payable on account of the use or sale of any such property.

Section 6(1)(*j*) of the present statute is broader in some respects and possibly narrower in others. It applies to amounts of money and is not confined to such amounts when representing rents, royalties or annuities or periodical receipts of a like nature to rents, royalties or annuities. The only qualifications required of such an amount appear to be that it be one that (1) has been "received" by the taxpayer in the year and (2) was "dependent upon use of or production from property". While the words "rents, royalties, annuities or other like payments of a periodical nature", which by themselves suggest variability according to the extent of time or use or production, are not present in the section the qualification imposed by the words "dependent upon use of or production from property" in my opinion has the effect of limiting the "amounts" referred to to amounts which vary with and are in that sense "dependent" in some way upon the extent of use of or production from property whether according to time or quantity or some other method of measurement.

Turning to the contract between the respondent and Municipal it seems doubtful to me that the payments contemplated by it, if made, would, as argued on behalf of the

[1] R.S.C. 1927, c. 97 as enacted by S. of C. 1934, c. 55, s. 1.

[2] [1950] Ex.C.R. 411. [3] [1952] 2 S.C.R. 377.

[4] [1963] Ex. C.R. 277.

[5] *Vide M.N.R. v. Wamtown Gas and Oil Co. Ltd.* [1952] 2 S.C.R. 377 per Kerwin J., at page 381 and per Locke J., at page 389.

[6] [1933] A.C. 684 affirming [1931] S.C.R. 399.

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Minister, have fallen within the definition of section 6(1)(*j*) as amounts that were dependent upon "use of" the respondent's property, and particularly so if, as submitted, such payments were to be viewed as amounts received that were dependent upon "use of" the land by the respondent himself. I find no support for such a conclusion in either *Russell v. Scott*[1] or *Smethurst v. Davy*[2], which were cited on behalf of the Minister, both of which were decided on particular statutory provisions and are therefore in my opinion of no assistance in resolving the application of section 6(1)(*j*)[3]. On the other hand if the payments had been made I should have had no difficulty in reaching the conclusion that the payments were amounts that were "dependent" upon the number of tons of rock removed from and thus, in my opinion, "upon production from" the respondent's property within the meaning of section 6(1)(*j*)[4].

The amounts contemplated by the contract were, however, never received. Instead what was received in 1959 consisted of an advance of $2,500, which was not related to the quantity of rock taken, and what was received in 1960

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[1] [1948] A.C. 159.

[2] [1957] 37 T.C. 593.

[3] *Russell v. Scott* was a case of sales of sand and the question decided was whether a concern or business of selling the sand fell within the meaning of a particular statutory provision or within another more general provision. The House of Lords held the concern of selling the sand to be an ordinary use of land but apart from the distinguishing fact that the activity of the taxpayer from which the proceeds arose was a concern or business it is also clear that the expressions used with respect to the removal of sand being an ordinary use of land were spoken in relation to concerns in dealing in sand and gravel and not to concerns in dealing in rock as to which there could probably have been no problem since concerns in stone quarrying were specially dealt with in yet another statutory provision. The case is thus not authority that permitting the excavation of rock is a use of land. *Smethurst v. Davy*, as I read it, does not carry the matter any further since in it what was decided was simply that on the authority of *Russell v. Scott* the digging of sand or gravel was a "use of land" and that payments received by a person who gave to another a right to remove gravel from his property fell within a statutory provision which required that "profits or gains arising from payments for any easement over or right to use land" be taken into account in computing the income of the occupier of the land.

[4] *Vide* Cameron J, in *M.N.R. v. Lamon*, [1963] Ex. C.R. 277 at 281-2:

> "In accordance with the terms of the contracts, the amounts to be received by the respondent were dependent upon the number of cubic yards of gravel removed from the premises".

was a final payment of $14,500 making a total sum of $17,000, which was received by way of an accord and satisfaction of the respondent's rights to be paid both the sums payable for rock under the contract and the damage occasioned to his house. The sums so received were thus, as I view the case, not amounts that were "dependent upon use of or production from" the respondent's property but were amounts paid in settlement of unascertained claims which the respondent had against Municipal for rock removed and for damages to his house.

Even if, contrary to the view I take of the evidence, the amounts of $2,500 and $14,500 are regarded as having been paid and received entirely in respect of the rock taken it is in my opinion clear that they were not dependent upon the quantity taken, since this never was ascertained and as I have already indicated dependence upon the extent or quantity of production or use and the application thereto of some rate or standard appears to me to be an essential qualification of amounts which fall to be taxed under section 6(1)(*j*). Moreover, while it might be possible to infer that from the point of view of the contractor the large, though unknown, quantity of rock obtained from the respondent's property was the prime consideration in reaching the figure of $17,000, from the point of view of the respondent I would infer that at that stage the chief elements in respect of which a satisfactory settlement was required were the losses of the accommodations which the property formerly afforded and in particular the losses of the springs, of the road to the pasture and woodland and of half of the cultivated land rather than the unknown quantity of rock in respect of which he was entitled to payment at the rate of 2½ cents per ton but had no way of knowing what that would amount to or whether it would be more or less than the losses which the removal of the rock entailed.

It might of course be said correctly of the amounts that they were received partly, if not entirely, "in lieu of payment of, or in satisfaction of" amounts that were dependent upon production from the respondent's property but while the expression "in lieu of payment of, or in satisfaction of" appears in other clauses of section 6(1), e.g., in 6(1)(*a*) and (*b*), neither that nor any similar expression is

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found in section 6(1)(j) and to read the clause as if such wording were present would in my opinion be unwarranted.[1]

In my opinion therefore the amounts here in question did not fall clearly within the provisions of section 6(1)(*j*) and as no other basis for taxing them has been advanced they cannot properly be included in the computation of the respondent's income.

In view of this conclusion it is unnecessary to consider the question whether the respondent was entitled to deductions in respect of losses which he sustained by reason of the reduction in the usefulness of his property resulting from the excavation of the rock.

The appeal will be dismissed with costs.

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[1] *Vide Partington v. Attorney-General* (1869) L.R. 4 H.L. 100 where Lord Cairns said at page 122:

> "I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because as I understand the principle of all fiscal legislation it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. 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."

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Sept. 22

BETWEEN:

MORRIS FELDSTEIN and STORK CRAFT LTD. ..... PLAINTIFFS;

AND

McFARLANE GENDRON MANUFACTURING CO. LTD. ..... DEFENDANT.

Patent—Patent Act, R.S.C. 1952, c. 203, s. 57(1)—Motion pursuant to Rule 185 of the General Rules and Orders of the Exchequer Court of Canada by way of appeal from a report of the Registrar upon a reference to inquire into and to determine the damages suffered by the plaintiffs—Infringement of patent—Motion not authorized by Rule 185—Motion dismissed.

The plaintiffs brought a motion purporting to be made under Rule 185 of the General Rules and Orders of the Court by way of appeal from a report of the Registrar upon a reference to enquire into and determine the damages suffered by the plaintiffs by reason of infringement of a patent for a mattress support used principally in children's cribs.

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Such supports, which took the place of a metal bed spring in a crib assembly, were ordinarily marketed as part of a packaged assembly including a crib and accessories therefor, though on occasion, such as when ordered as a replacement, the supports were sold separately. The Registrar had expressed the opinion that in respect of sales lost by reason of the defendant's infringement of the patent damages should be assessed on the basis of loss of profit from sales of supports only but he had not proceeded to fix or report the amount of damages when the motion was brought.

Held, That Rule 185 did not apply as it contemplated an appeal from a report assessing the amount of damages recoverable by the plaintiffs and that the motion would therefore be dismissed.

Semble, the damages to which the patentee would be entitled in respect of sales proved to have been lost through infringement of the patent would not necessarily be limited to profit attributable to the patented article by itself but would depend on the extent of interference with the patentee's trade measured by the loss of profit which but for the infringement he would have made in selling the articles in which he traded, i.e., as applied to this case, cribs provided with patented supports.

MOTION pursuant to Rule 185 of the General Rules and Orders of the Exchequer Court.

Russel S. Smart, Q.C. for plaintiffs.

Donald J. Wright for defendant.

THURLOW J.:—This is a motion which was presented as having been brought pursuant to Rule 185 of the General Rules and Orders of the Exchequer Court by way of appeal from a report of the Registrar upon a reference to enquire into and determine the damages suffered by the plaintiffs by reason of the infringement of patent number 642,079.

The patent was granted in June 1962 in respect of an invention described as having been made by Morris Feldstein and which is both entitled and referred to in the claims as a "posture support for bed mattresses". The invention consists of a flat hardboard or fibreboard panel perforated by a pattern of small holes and surrounded by a frame made of wood or some other material having greater rigidity than the panel itself. When made for use in a baby's crib, where it has its principal application, it is fitted with hooks or other means for suspending or holding it in the desired position in the enclosure and when used it takes the place and fulfills the function of a metal bed spring. The support is said to have a number of advantages over such a spring in providing proper spinal support for a

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growing child, in rendering a crib capable of use as a playpen and in being "lighter in weight, sagless, rust-proof, washable, quieter and warmer" as well as incapable of snagging mattresses or bedding.

The plaintiff, Morris Feldstein, is the owner of the patent and he is also the president and manager of the plaintiff, Stork Craft Limited, the *de facto* exclusive licencee[1] under the patent.

Both prior to and since the invention of the posture support Stork Craft Limited has been engaged in the manufacture and sale of children's furniture the principal item being babies' cribs which have accounted for 85 per cent of its production. The company manufactures and markets from 30,000 to 40,000 cribs per year. These cribs were formerly sold as a package which, besides the sides, ends and other parts, included a metal spring purchased by the crib manufacturer from a manufacturer of springs. The posture support, which is manufactured by Stork Craft Limited itself, was introduced in 1957 and it has since then been included in the packages in the place of the metal spring. For several years after introducing the posture support Stork Craft Limited continued to supply cribs with metal springs both to complete orders already on hand and to use up its stock of springs but from 1962 onward all the cribs manufactured by the plaintiff company were provided and marketed with posture supports. On a few occasions, possibly as frequently as twelve times a year, Stork Craft Limited has supplied a posture support by itself to fill the order of a customer requiring it as a replacement either for a damaged support or for a metal spring. On such occasions the support sold for about $3.50 which may be compared with manufacturers' prices of approximately $25.00 for cribs complete with posture supports or springs. There is, however no established trade in posture supports by themselves since they are normally marketed only in conjunction with the other components of a crib and the plaintiff company is not and never has been engaged in a business of supplying posture boards alone. Moreover, on the evidence it seems not unlikely that that company would have been unwilling to supply them to other crib manufacturers except on such terms as would yield a profit approximately equivalent to what the company itself could have made by

[1] What the terms of the licence were is not disclosed.

using to the full its own capacity to manufacture and market cribs. There is evidence that the plaintiff company at the material time had spare manufacturing capacity from which it may, I think, be inferred that it could have supplied a larger part of the market for cribs than it in fact enjoyed.

In the meantime between the time of the introduction of the posture support on the market in 1957 and the grant of the patent in June 1962 three other manufacturers of babies' cribs, including the defendant, began manufacturing and supplying posture supports with their cribs. Two of these manufacturers desisted therefrom on being advised of the grant of the patent but the defendant persisted despite the plaintiffs' warning and after the grant of the patent manufactured and sold in 1962 and 1963 some 16,200 cribs with posture supports which fell within the claims of the patent. The present action was commenced in December 1962 and resulted in a judgment pronounced by consent on October 15, 1964 which declared the patent to be valid and to have been infringed by the defendant "by the manufacture and sale since the date of the patent of children's cribs having mattress supports made in accordance with the said Letters Patent", restrained the defendant from further infringement and directed the Registrar to hold an enquiry "to determine the damages suffered by the plaintiffs by reason of the said infringement".

When the matter came before the Registrar the parties, instead of proceeding in the normal manner, state that they had agreed that the reference should proceed on the basis that "the issue is whether the damages are to be based on the whole combination, including the mattress support, or on the mattress support only" and that if this preliminary issue were decided the parties would probably be able to agree upon the monetary amounts involved. Evidence was then given by the plaintiff, Morris Feldstein, who was called on behalf of the plaintiffs and by George Breading McFarlane, the vice-president of the defendant company, who was called on behalf of the defendant, arguments were presented by counsel for both the plaintiffs and the defendant and at a later date a report was filed by the Registrar. By it he expressed the opinion that the patented article was "not a component part of the crib but just an accessory thereto", and that it followed that the assessment of the

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damages "should be limited to the sale price of the patented article only" and he so recommended. No finding or recommendation was made as to the amount of the damages. The plaintiffs thereupon brought the present motion.

Notwithstanding the absence of any objection thereto on the part of the defendant the motion in my opinion is not authorized by Rule 185. What was referred to the Registrar by the judgment was not an enquiry to determine an abstract principle, (which the Court is ordinarily unwilling to undertake in the absence of some settled result to flow therefrom) or a particular issue but an enquiry to determine the damages suffered by the plaintiffs by reason of the infringement. The parties no doubt hoped that expense might be saved by the course which they adopted but the fact that a motion by way of appeal has been brought while the amount of damages is still unfixed shows the course to have been abortive in its object and in any event it was not the course contemplated by the judgment. To my mind the judgment required the Registrar to hold an enquiry resulting in the fixation of a proposed amount of money to represent the damages in question and until that stage had been reached there could, in my view, be no report of the kind contemplated by Rule 185 upon which to bring a motion by way of appeal. If a question arose upon which the opinion of the Court was required a procedure was available under Rule 183 but the report contemplated by Rule 185 in my opinion is one upon which a motion for judgment for a particular amount of money as recommended by the Registrar might be made if no appeal were taken within the time limited therefor. In consequence, the only order that can go on the present motion is that it be dismissed and the effect of such a disposition, as I see it, is to leave the matter still in the hands of the referee to be dealt with in accordance with the judgment pronounced on October 15, 1964. However, as the principles to be applied in assessing the damages were argued at length on the hearing of the motion it may not be amiss to state what I think the correct application of them is in case what I may say should be of assistance when the matter is again before the referee.

The extent of the remedy by way of damages available for infringement of a patent is defined as follows in Section 57(1) of the *Patent Act*.

57. (1) Any person who infringes a patent is liable to the patentee and to all persons claiming under him for all damages sustained by the patentee or by any such person, by reason of such infringement.

The wording of this section differs from that dealt with in *Colonial Fastener Co. Ltd. et al. v. Lightning Fastener Co. Ltd.*[1] but it appears to me to express the same principle as that which was stated by Kerwin J., (as he then was) in that case when he said at page 41:

> If the damages claimed are not too remote, the wrongdoers must, as in every case of tort, compensate the injured party for such damages as he may have suffered.

The difference between the measure of the damages that may be awarded under this principle and what might alternatively be recovered on an accounting of profits made by the infringement is expressed as follows by Lord Watson in *The United Horse Shoe and Nail Company Limited v. Stewart and Company*[2].

> When a patentee elects to claim the profits made by the unauthorised use of his machinery, it becomes material to ascertain how much of his invention was actually appropriated, in order to determine what proportion of the net profits realized by the infringer was attributable to its use It would be unreasonable to give the patentee profits which were not earned by the use of his invention; but the case is altogether different when the patentee of machinery who does not grant licenses claims damages from an infringing manufacturer who competes with him by selling the same class of goods in the same market. In that case the profit made by the infringer is a matter of no consequence However large his gains he is only liable in nominal damages so long as his illegal sales do not injure the trade of the patentee; and however great his loss, he cannot escape from liability to make full compensation for the injury which his competition may have occasioned.

The question which arises on the assessment of such damages is one of fact and depends on the circumstances of the particular case[3] but in cases where the patentee does not grant licenses at a fixed royalty and is himself engaged

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[1] [1937] S.C.R. 36 at 40-41. See also *Electric Chain Co. of Canada Ltd. v. Art Metal Works Inc.* [1933] S.C.R. 581 at 590.

[2] (1888) 5 R.P.C. 260 at page 266.

[3] In *Meters Ltd. v. Metropolitan Gas Meters Ltd.* (1911) 28 R.P.C. 157 Cozens-Hardy, M. R., expressed the matter thus at page 161:

> Therefore, in a case such as the present, where licences are not granted to anyone who asks for them for a fixed sum, it is a matter which is to be dealt with in the rough—doing the best one can, not attempting or professing to be minutely accurate—having regard to all the circumstances of the case, and saying what upon the whole is the fair thing to be done.

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in manufacturing and marketing the patented article two principles appear to have been applied in resolving it. These are discussed and delineated in the following passages from the speech of Lord Shaw of Dunfermline in *Watson, Laidlaw & Co. Ld. v. Potts, Cassels, and Williamson*[1].

> In my opinion, the case does raise sharply an important question as to the assessment of damages in patent cases, and with that question I proceed to deal. It is probably a mistake in language to treat the methods usually adopted in ascertaining the measure of damages in patent cases as principles They are the practical working rules which have seemed helpful to Judges in arriving at a true estimate of the compensation which ought to be awarded against an infringer to a patentee. In the case of damages in general, there is one principle which does underlie the assessment. It is what may be called that of restoration. The idea is to restore the person who has sustained injury and loss to the condition in which he would have been had he not so sustained it.
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> . . .
>
> In Patent cases the principle of restoration is in all instances to some extent, and in many instances to the entire extent dependent upon the same principle of restoration. The patentee may show that the trade done by the infringer would have been his (the patentee's) trade, and he is entitled in such cases to be restored against the action of the infringer; and he may adopt, in liquidating that principle in money, an alternative course. He may say, "I shall accept the profits which have been made by the infringer in this trade which ought to have been my trade;" or he may take the other head of the alternative and say, "The illicit opposition to, and interference with, my own trade caused me damage. I lost profit which I would have otherwise made in it; I lost business connexion; the development of my business on its natural lines was interrupted by my being driven by these acts of piracy out of sections of my own trade." These and other things may be heads of damage. It is well settled that a patentee may choose his course of measuring his loss either by the profits which the infringer made, or by items of damages such as those referred to, but that in respect of the same matter he cannot have both his own damages and the infringer's profits. In the course, however, of deciding cases, certain expressions have been used by learned Judges, which, according to the contention, are to the effect, or truly mean, that if the patentee chooses the latter course, namely, to reckon up his claim under heads of damage, is limited, so to speak, by the principle of restoration Phrases, for instance, have been used, which it is said imply that the entire measure of his damage is the loss which he has incurred of the trade done in the pirated articles. And then comes in an astute argument, that in all cases where the infringer can establish that the trade in the machines which happened to contain the patented article or part would, under no circumstances, have ever reached the patentee himself, no claim can be admitted. To take an instance such as the present case affords, the Patentee was not in a position to carry on business in a certain part of the world exclusively possessed for commercial purposes by the energies of the infringer and his agents. It is said in such a case:—"Where is the damage which the patentee has incurred? On the other heads of the case he has

[1] (1914) 31 R.P.C. at 117, 118 & 120.

obtained his damages; but on this part, which covers a section of trade which in no circumstances he could have touched, he can have sustained no damage, because he would never have sold his patented articles within that section. The duty of an infringer is covered by the principle of restoration, and the patentee has surely been restored to as good a position as he was in before the infringement, or would have been in but for it, if he has been put into the same financial position as he would have occupied in that region of trade where alone he would have been operating."

It is at this stage of the case, however, my Lords, that a second principle comes into play. It is not exactly the principle of restoration, either directly or expressed through compensation, but it is the principle underlying price or hire. It plainly extends—and I am inclined to think not infrequently extends—to Patent cases. But, indeed, it is not confined to them. For wherever an abstraction or invasion of property has occurred, then, unless such abstraction or invasion were to be sanctioned by law, the law ought to yield a recompense under the category or principle, as I say, either of price or of hire.

. . .

If with regard to the general trade which was done, or would have been done by the Respondents within their ordinary range of trade, damages be assessed, these ought, of course, to enter the account and to stand. But in addition there remains that class of business which the Respondents would not have done; and in such cases it appears to me that the correct and full measure is only reached by adding that a patentee is also entitled, on the principle of price or hire, to a royalty for the unauthorised sale or use of every one of the infringing machines in a market which the infringer, if left to himself, might not have reached. Otherwise, that property which consists in the monopoly of the patented articles granted to the patentee has been invaded, and indeed abstracted, and the law, when appealed to, would be standing by and allowing the invader or abstractor to go free. In such cases a royalty is an excellent key to unlock the difficulty, and I am in entire accord with the principle laid down by Lord *Moulton* in *Meters Ld. v. Metropolitan Gas Meters Ld.* (28 R.P C. 163). Each of the infringements was an actionable wrong, and although it may have been committed in a range of business or of territory which the patentee might not have reached, he is entitled to hire or royalty in respect of each unauthorised use of his property. Otherwise, the remedy might fall unjustly short of the wrong.

In various cases—of which the present is a good example—it is only by this combination of actual damage on the principle of restoration, with, in another section of these operations, the principle of royalty, that a full and adequate response can be made to the cardinal question which remains always to be answered in these infringement suits, the question put by Vice-Chancellor *Page Wood* in *Penn v. Jack* (L.R. 5 Eq. 81), viz.:—"What would have been the condition of the plaintiff if the defendants had acted properly instead of improperly? That condition if it can be ascertained, will, I apprehend, be the proper measure of the plaintiff's loss." To apply the principle: The Appellants did this Java trade improperly. Had they done it properly, they would have done it under royalty. That royalty the Respondents would have obtained.

It will be observed that with respect to sales which the patentee has lost by reason of the infringement the questions as propounded by Lord Shaw are not qualified by any

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expression limiting the measure of damages to the loss of profits attributable to the patented article itself. Where in the normal course of the patentee's trade the patented article is sold by itself this may well be the limit but where the patented article is not ordinarily sold by itself, as in the present instance, the damage may consist, depending on the particular facts established by the evidence, not merely in loss of profit attributable to the article itself but in the extent of interference with the patentee's trade measured by the loss of profit which he would have made, but for the infringement, in selling the articles in which he trades, that is to say, as applied to this case, cribs provided with the patented posture supports. This is I think precisely the sense intended by Kerwin J., (as he then was) when he said in *Colonial Fastener Co. Ltd. et al. v. Lightning Fastener Co. Ltd.*[1] at page 41:

> As to this branch of the defendants' contention, it suffices to remark that when one bears in mind that the object of the patentee's invention was, as expressed in his claims and specifications, to manufacture stringers to be used in fasteners, the plaintiff could not properly be compensated by reference only to the manufacturer's cost and sale price of stringers and without regard to the cost and sale price of the completed article As has been pointed out previously, *the stringers are of importance only in their use in fasteners and what the plaintiff lost was sales of fasteners.* The principle set forth in *Meters Ld. v. Metropolitan Gas Meters Ld* should be applied. There the Court of Appeal had to consider the amount of damages the plaintiff was entitled to where the defendant infringed plaintiff's patents, one of which related to a particular kind of cam and spindle for opening the gas valve in a prepayment gas meter, and the other of which was for a particular kind of crown wheel in a like meter. It had been shewn before the Master and Eve J., to whom an appeal had been taken, that the plaintiff would have sold many more meters but for the defendant's intervention, and it was, therefore, awarded 13s. 4d. for the loss of profit on each of such meters. The Court of Appeal confirmed the judgment and made it clear that they agreed with the Master and with Eve J. that the proper method of assessing the damages was to take the profit on the sale price of the meters and not merely to consider the parts upon which the plaintiff held patents. Adopting this principle, the defendants' contention fails (Italics added).

Accordingly while on the evidence presented I see no good reason to differ with the conclusion reached by the learned Registrar that the patented posture support is an accessory[2] in the sense in which the term was used by Eve

[1] [1937] S.C.R. 36 at 41.

[2] The patented parts of the meters in the *Meters Limited* case, 24 R P.C. 506, 26 R.P.C. 721, 28 R.P C. 157, were, in my opinion, accessories as well in the same sense of the word.

J., in *Clement Talbot Ltd. v. Wilson*[1] it does not appear to me to follow that the damages sustained by the plaintiff company as a result of the infringement are in respect of lost sales limited to the loss of such profits as might be attributed to the manufacture and sale of posture boards by themselves rather than to the loss of profits on sales of cribs supplied with posture boards which the plaintiff company would have made but for the infringement.

In support of the contrary position the defendant relied chiefly on two cases the first of which was the judgment of the Court of Appeal in the *Clement Talbot*[2] case and the other the judgment of the United States Circuit Court of Appeals in *Wallace & Tiernan Co. Inc. v. City of Syracuse et al.*[3] In the *Talbot* case the defendant had bought in France and had later brought to England a car fitted with a carburettor and control devices on which the plaintiff held patents. The plaintiff did not in the course of its trade sell the patented devices but sold only cars and it claimed as its damages for the infringement the profit amounting to 141£ 6s. which it would have made on the sale of a car. The Court of Appeal held that damages of 24£ 12s. 3d, which had been assessed on appeal from the Master as the difference in value between a car with and one without the patented devices were excessive and should not exceed the amount of 16£ 12s. 3d estimated by the Master. In rendering a judgment in which Fletcher Moulton and Farwell L.JJ. concurred, Cozens-Hardy, M.R. said at page 472:

> I think that the amount of damage suffered is the loss of profit which the Plaintiffs have suffered by not selling the accessories in question, and the amount given by the Master more than compensates the Plaintiffs for the loss of profit which they have so sustained.

This statement must I think be read in the light of the fact that no sale of either the car or the patented devices had been made in England and the tort consisted in the defendant having and using the patent devices in England from the time of the importation of the car until he gave them up to the plaintiff pursuant to the order of the Court. For my part I should have thought that the value of the use of the patented devices in the meantime might have afforded

[1] (1909) 26 R P C. 467 at 470. [2] (1909) 26 R.P.C. 467.
[3] (1930) 45 Fed. Rep, 2d, 693.

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a more precise measure of the plaintiff's loss since it was impossible in the circumstance to affirm that but for his infringing act the defendant would have bought either a car or the patented devices from the plaintiff but in any event the case, as I view it, is so different from one in which loss is to be measured by the extent of interference with the patentee's trade by competition provided by an infringer that it appears to me to afford no guidance whatever for a case such as the present. The tort in cases such as the present lies in the making of sales. The sales are tortious because their subject matter includes the patented device. But being package deals the sales are not divisible and since in each case the sale itself constitutes a wrong to the patentee, in my opinion, the patentee is entitled to recover whatever damages have been caused to him thereby. That a case such as the *Clement Talbot*[1] case has no usefulness in resolving a case of this kind is I think also apparent from the fact that when about a year later the case of *Meters Ld. v. Metropolitan Gas Meters Ld.*[2] came before the Court of Appeal, consisting of Cozens-Hardy, M.R. and Fletcher Moulton and Buckley L.JJ., Fletcher Moulton L.J. in the course of argument remarked that the decision in the *Clement Talbot* case turned upon the special facts of that case and none of the three members of the Court so much as mentioned it in his judgment. So far as I am aware the case has not been followed in any English or Canadian case but whatever the implications from it may be I should regard them as having to give way to the opinion of Lord Shaw of Dunfermline in the *Watson, Laidlaw*[3] case and to what I conceive to be the ratio of the judgment of the Supreme Court of Canada in the *Colonial Fastener*[4] case.

The other case, that of *Wallace & Tiernan Co. Inc. v. City of Syracuse et al.*[5] is I think distinguishable from the present case on its facts since there the plaintiff as exclusive licensee under the patent had demanded royalty payments from infringers and in some cases had received payments and when the assessment of damages in the par-

[1] (1909) 26 R.P.C. 467.
[2] (1911) 28 R.P.C. 157 at 160.
[3] (1914) 31 R.P.C. 104.
[4] [1937] S.C.R. 36.
[5] (1930) 45 Fed. Rep. 2d, 693.

ticular case came before the Master it sought to establish that it had granted licences at a fixed royalty. That case as well appears to have turned on its own particular facts among which was the willingness of the plaintiff to license the use of the invention and to my mind it merely serves to emphasize that the extent of damages is in every case a question of fact depending on the circumstances of the particular case.

Accordingly, I do not think that it follows from the mere fact that the posture supports can be called "accessories" that the loss sustained by the plaintiff company in respect of sales lost by reason of the defendant's infringement of the patent is necessarily to be computed by some calculation based solely on the selling price of posture supports alone. In my view the question to be determined by the Registrar remains one of determining what, in all the circumstances established in evidence, is the loss sustained by the plaintiffs by reason of the infringement and this appears to me to be the question to be answered both with respect to the portion of the plaintiffs' loss which is ascribable to lost sales and to the portion thereof which, though the sales would not have been made by the plaintiffs, nevertheless give rise to a right to damages on the basis of what may be estimated as a reasonable royalty for the use made of the invention. In estimating such a royalty both what the trade of a person in the same business as the infringer could stand without being left with nothing for the effort and what the patentee might reasonably demand, assuming he had been willing to permit use of his invention, are proper considerations to be taken into account.

The motion is dismissed without costs.

Toronto 1966
Sept. 7 & 8
Ottawa Sept. 22

BETWEEN:

FLOOR & WALL COVERING DISTRIBUTORS LIMITED and VINA-RUG (CANADA) LIMITED ..... APPELLANTS;

AND

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

Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 39(2), 4(b)—"Associated corporations"—More than one group in position to control corporation—Determination of group in control.

The matter for decision in each of these appeals was whether each of the appellants was associated with a company known as Stradwick's Limited within the meaning of section 39 of the Act. The shareholdings of relevant corporations were as summarized below:

Voting Shares	*Floor & Wall*	*Vina-Rug*	*Stradwick Ltd.*	*Stradwick Industries Ltd.*
Father	nil	nil	12	25,500
Two sons	4,478	12,266	20	nil
Associate	1,121	6,133	8	9,500
Stradwick Ltd. .		5,250		
Others	4,401	16,351		15,000
	10,000	40,000	40	50,000

The respondent submitted that Stradwick's Ltd. was controlled by "the group" composed of the two sons and an associate which group similarly controlled the two appellants, whereas the appellants submitted that Stradwick's Ltd. was controlled by the "related group" comprising father and sons which group, alone, was not in a position to control either of the appellants.

Held, That the determination of what persons constitute a "group" within the meaning of the section is a question of fact; and that each of the two named groups was a "group" that could control Stradwick's Ltd.; and that while it was open to the appellants to seek to establish that the "group" claimed by the respondent was in fact the "group" that controlled the corporation, the appellants did not succeed in doing so.

2. That the Minister's assumption not having been proven wrong, the appeals were dismissed.

APPEALS under the *Income Tax Act.*

P. N. Thorsteinsson for appellants.

L. R. Olsson and *G. V. Anderson* for respondent.

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GIBSON J.:—These appeals were tried together because the same evidence and argument was applicable to each.

The matter for decision in each appeal is whether each of the appellants was associated with a company known as Stradwick's Limited within the meaning of s. 39(2) of the *Income Tax Act*.

Specifically, the determination of which "group of persons" of two possible groups controlled this company within the meaning of s. 39, s-s. 4, para. (*b*) of the Act during the taxation years 1961 and 1962 is the issue in each appeal.

In each case the assessments appealed from were made on the assumption that each of the appellant companies was associated with each other and each was also associated with Stradwick's Limited and Stradwick Industries Limited.

The owners and the number of shares of all the outstanding common shares (and there were no other voting shares issued in any of these companies) at all material times of each appellant company and of these two other companies were as follows:

Floor & Wall Covering Distributors Limited

J. C. Stradwick, Sr.	nil
J. C. Stradwick, Jr.	2,239
W. L. Stradwick	2,239
H. D. McGilvery	1,121
Others	4,401
Total issued shares	10,000

Vina-Rug (Canada) Limited

J. C. Stradwick, Sr.	nil
J. C. Stradwick, Jr.	6,133
W. L. Stradwick	6,133
H. D. McGilvery	6,133
Stradwick's Limited	5,250
Others	16,351
Total issued shares	40,000

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Stradwick's Limited

J. C. Stradwick, Sr.	12
J. C. Stradwick, Jr.	10
W. L. Stradwick	10
H. D. McGilvery	8
Total issued shares	40

Stradwick Industries Limited

J. C. Stradwick, Sr.	25,500
J. C. Stradwick, Jr.	nil
W. L. Stradwick	nil
H. D. McGilvery	9,500
Others	15,000
Total issued shares	50,000

The J. C. Stradwick, Sr. referred to is the father of J. C. Stradwick, Jr. and W. L. Stradwick. H. D. McGilvery is a stranger in the tax sense, and is and has been for many years a business associate of Stradwick Sr. and the sons. The others referred to are strangers in the tax sense.

Considering the business activities of all of these companies together during the relevant period such could be described as the manufacture and sale at both the wholesale and retail levels of floor and wall tile and many allied products used as building materials.

The factual questions to be decided are two, namely: (1) was Stradwick's Limited at the material times controlled by (*a*) the two Stradwick sons and McGilvery, as submitted by the respondent, or (*b*) by Stradwick Sr. and his two sons, as submitted by the appellants; and (2) depending on which group referred to in (1) above is chosen, whether such group is a "group of persons" within the meaning of s. 39(4)(*b*) of the *Income Tax Act*.

As judicially decided in this court in such cases as *Buckerfield's Limited et al. v. The Minister of National Revenue*[1]; *Yardley Plastics of Canada Limited v. The Minister of National Revenue*[2]; and *Aaron's (Prince Albert) Limited et al. v. The Minister of National Revenue*[3]

[1] [1965] 1 Ex. C.R. 299. [2] [1966] C.T.C. 215.
[3] [1966] C.T.C. 330.

"control" in this subsection means the right to control by ownership of voting shares, not *de facto* control. What is done at any time with such right to control is therefore not necessarily material.

In this connection the appellants, as they were entitled to do, following the dictum of Noël J. in *Yardley Plastics of Canada Limited v. The Minister of National Revenue* above cited, sought to establish in evidence that the "group of persons" consisting of Stradwick Sr. and the two sons, as opposed to the group consisting of the Stradwick sons and McGilvery, did in fact control Stradwick's Limited. In my opinion the appellants failed to do so.

In my opinion also, without detailing the indicia which is clear from the evidence, each of these groups of persons are a "group of persons" within the meaning of s. 39(4) para. (*d*) of the Act, in that they had at all material times a sufficient common connection as to be in a position to exercise control of Stradwick's Limited.

In the result therefore, the appellant has not established that the assumption of the respondent is wrong, namely that the "group of persons" consisting of the Stradwick sons and McGilvery at material times controlled Stradwick's Limited within the meaning of s. 39(4)(*b*) of the Act; or that because of this, that this group of persons by this indirect method also controlled Vina-Rug (Canada) Limited.

Whether or not within the meaning of s. 39(4) para. (*d*) of the Act Stradwick Sr. and the Stradwick sons, also during the same material times, controlled Stradwick's Limited, I do not have to decide, but it is clear from the circumstances of this matter that such is the case.

In the result therefore each appellant falls within the provisions of s. 39, s-s. 2 of the Act and is not entitled to get the greater advantage from the lower tax rate provided in s. 39(1)(*a*) of the Act.

The appeals are dismissed with costs.

Montreal 1966 June 6 Ottawa October 19

BETWEEN:

THE READER'S DIGEST ASSOCIATION (CANADA) LTD.—SÉLECTION DU READER'S DIGEST (CANADA) LTÉE ... APPELLANT;

AND

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

Income tax—Income Tax Act, R.S.C. 1952, c. 148—Section 12(1) (a), (b)—Legal expense incurred in challenging validity of tax under Part II (since repealed) of the Excise Tax Act—Whether incurred to earn income.

In this case the appellant has been assessed by the Minister a large amount of tax under Part II of the *Excise Tax Act* (since repealed) and thereafter incurred legal expenses of some $46,616.00 in an unsuccessful effort to prove the tax unconstitutional.

The appellant now sought to deduct the legal expenses as having been incurred for the purpose of gaining or producing income from its business.

Its appeal to the Tax Appeal Board was dismissed on the strength of Exchequer Court's judgment in *Arrco Playing Card Co. (Canada) Ltd. v. M.N.R.*

Held, That recent Judgments "might well go so far as to invalidate the erstwhile tenet that 'an expense incurred once and for all and to secure an enduring benefit' necessarily related to some capital outlay".

2. That, distinguishing the instant appeal from the cases cited by the Minister, the legal expenses "were incurred conformably to the excepting provision of Section 12(1)(*a*), to earn or protect the commercial income of the company".

3. That the appeal be allowed.

APPEAL from a decision of the *Tax Appeal Board.*

Ernest E. Saunders for appellant.

A. J. Campbell, Q.C. and *Paul Boivin, Q.C.* for respondent.

DUMOULIN J.:—This is an appeal from the Tax Appeal Board's decision, dated June 8, 1964, in respect of an income tax assessment for 1960 of the Reader's Digest Association (Canada) Ltd.—Sélection du Reader's Digest (Canada) Ltée, a printing and publishing corporation with

its principal place of business and excutive offices at 215 Redfern Avenue, Westmount, P.Q. Said decision dismissed the company's appeal to the Tax Appeal Board.

The pertinent facts out of which arose the instant suit are concisely stated in the Tax Appeal Board's judgment[1]. I now quote from the notes of Mr. W. O. Davis, Q.C.:

By Section 3 of chapter 37 of the Statutes of Canada (4-5 Elizabeth II), the *Excise Tax Act* was amended by the addition of a new Part II, comprising Sections 8 to 11 and given Royal Assent on August 14, 1956, whereby an excise tax of 20 per cent of the value of the advertising material contained in each copy of a special edition of a non-Canadian periodical published in Canada was imposed by the Parliament of Canada. This tax became effective on January 1, 1957. The effect of this tax was to cause the appellant to pay an excise tax of 20% of its total revenue from the sale of every page of advertising appearing in the aforesaid publications, *Reader's Digest* and *Sélection du Reader's Digest*. It was admitted that the major portion of the appellant's business consisted of the publication of the said two magazines, and that its major source of revenue was the sale of space in these magazines to advertisers. The sale of the magazines to the public was only of secondary importance as a source of revenue

As a result of the imposition of the said excise tax at the beginning of 1957, the appellant was called upon to pay an amount of tax somewhat in excess of $35,000 (exactly $35,225 32) for the month of January of that year. The impact of this tax upon the revenues of the appellant was serious. As a consequence, the appellant consulted its solicitors as to the constitutionality of the tax in question. In April of 1957, the appellant instituted an action against the Attorney-General of Canada, which the appellant has set out in Paragraph 17 of its Notice of Appeal to this Board as follows: (now paragraph 19 of the Notice of Appeal before this Court)

> "17. (19). In April, 1957, Appellant acting upon the advice of its said Attorneys, (Messrs O'Brien, Home, Hall & Nolan) instituted legal action before the Superior Court of the Province of Quebec against the Attorney General of Canada (Case No S C M 417505), praying for judgment declaring that the said Part of the *Excise Tax Act* as enacted by Section 3 of Chapter 37 of the Statutes of Canada 1956 and the Regulations made pursuant thereto, are outside the competence and ultra vires of the Parliament of Canada, and unconstitutional and null and void and non-existent; and that it be declared that Appellant's two said magazines 'The Reader's Digest' and 'Sélection du Reader's Digest' are not periodicals as defined by said Part II of the *Excise Tax Act*; and that Appellant is not liable for the payment of the said tax."

This action was initially dismissed in the Superior Court and subsequently by the Court of Appeal. A further appeal to the Supreme Court of Canada was eventually withdrawn, according to information given me at trial by appellant's counsel.

During the year 1960, appellant's above mentioned attorneys submitted accounts in a sum of $46,616.12 for their

[1] 35 Tax A.B.C. 359, at 360-361.

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professional services in connection with the legal action against the Attorney General of Canada with regard to Part II of the *Excise Tax Act*.

Claiming "the said legal expenses were made and incurred for the purpose of gaining or producing income from appellant's business, and to protect appellant's right to earn revenue from its sales of advertising...", Reader's Digest deducted the amount of $46,616.12 in its income tax return for 1960, "within the meaning of Paragraph (*a*) of Subsection (1) of Section 12 of the *Income Tax Act*", as alleged in paragraph 29 of the Notice of Appeal.

To this the respondent replies, (paragraph 11) "...that the deduction of legal expenses claimed is prohibited by paragraph (*b*) of subsection (1) of Section 12 of the *Income Tax Act* as such expenses were an outlay of capital or payment on account of capital".

The case was argued solely on points of law and these restricted to the solution of one question: whether or not the legal costs incurred for the purposes above were properly deductible. No argument whatsoever was raised against the competence of the Parliament of Canada to impose such a tax, and no attempt made to substantiate a claim that appellant's two magazines "are not periodicals as defined by the said Part II of the *Excise Tax Act*". I may, therefore, take for granted a tacit waiver of these two grounds, noting also a subsequent rescission of this tax.

The apposite legal provisions admittedly are sections 4 and 12(1)(*a*), or alternatively, should the respondent succeed, (1)(*b*) of section 12 of the *Income Tax Act* (1952, R.S.C., c. 148).

Section 4 is as follows:

> 4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

Section 12(1)(*a*) and (*b*) reads:

> 12. (1) In computing income, no deduction shall be made in respect of
>
> (*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or business of the taxpayer,
>
> (*b*) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part.

One fact at least defies contradiction: the appellant's most remunerative yearly source of income consisted of "the revenue (i.e. profit) resulting from sales of advertising space" in the periodical issues of its two magazines, in keeping with the definition of "income" found in section 4. In the same line of thought it would seem hard to deny that a monthly excise levy or tax cut of twenty per cent of such *profit* unavoidably curtailed, in a proportionate ratio, the appellant's *income* for the corresponding taxation year. (Italicized markings not in text.)

Be that as it may, the problem is susceptible of a more formal approach. The actual text of subsection 12(1)(*a*) was written in the Statute Book at the 1948 parliamentary session, and finally substituted, in 1952, for its predecessor, section 6(1)(*a*) of the *Income War Tax Act*, chapter 97, R.S.C. 1927, which provided that:

> 6. (1) In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of
>
> (*a*) disbursements or expenses not *wholly, exclusively and necessarily* laid out or expended for the purpose of earning the income.

Since Parliament may enjoy the presumption of intending to affect, at least, the operative extent of a law, when proceeding to alter its previous wording, the deletion of three stringently restrictive adverbs: *wholly, exclusively and necessarily*, cannot be considered meaningless. As a touchstone of this opinion, one might apprehend a rather pessimistic reaction in financial and economic quarters, had the 1948-52 amendments decreed the former section 6(1)(*a*) in replacement of the present day section 12(1)(*a*). I feel this view is in line with the interpretation applied quite recently (June 28, 1966) by Martland and Hall JJ., in *Premium Iron Ores Limited v. Minister of National Revenue*[1]. Mr. Justice Martland wrote:

> It seems clear that the present wording of para. (*a*), which first appeared in the 1948 *Income Tax Act*, Chapter 52, Statutes of Canada 1948, was intended to broaden the definition of deductible expenses. The *Income War Tax Act* defined "income" as meaning "the annual net profit or gain or gratuity". Under s. 6(1)(*a*), in computing such profit or gain it was only permissible to deduct expenses wholly, exclusively and necessarily expended for the purpose of earning that income. The present *Act* does not contain this definition of "income". It frequently uses the phrase "income for a taxation year", which appears in s. 11(1) dealing with allow-

[1] [1966] S.C.R. 685.

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able deductions The phrase does not appear in s. 12(1)(*a*) which, as now worded, permits the deduction of any expense made for the purpose of producing income from a property or business.

In his exhaustive review of the law and more so of the leading precedents, Mr. Justice Hall takes a similar view, I quote:

It cannot be overlooked that Parliament, in enacting s 12(1)(*a*), did not include the words 'not wholly, exclusively and necessarily laid out or expended' which were in s 6 of the *Income War Tax Act* prior to 1948 and which are found almost verbatim in the English counterpart...except for the word "necessarily". Consequently, the English decisions like *Strong v. Woodifield* and all those founded on *Strong v. Woodifield,* based on the wording of the English rule cannot now be invoked as wholly applicable and indistinguishable in the interpretation of s. 12(1)(*a*) Some significance must be given to the difference in wording noted above, and to the change in wording when the *Income Tax Act* was enacted in 1948. The statement by Abbott J in *B.C. Electric Railway Co. Ltd. v. Minister of National Revenue,* (1958) S.C.R 133 at p. 136:

> The less stringent provisions of the new section should, I think, be borne in mind in considering judicial opinions based upon the former sections

points up the error that may arise from an unquestioned acceptance of such cases as *Smith's Potato Estates* as being completely applicable in Canada after 1948.

Consequently, the Supreme Court of Canada allowed Premium Ores Limited to deduct, as items of expense, amounts of $12,317.36 and $8,514.16 paid for legal expenses during the 1951 and 1952 taxation years, respectively, in the undergoing conditions summarized by the Tax Appeal Board and excerpted by Mr. Justice Martland:

. . . the appellant learned some years after it had begun to sell ore in substantial quantities that the American revenue authorities had designs on its income on the alleged grounds that it had been earned in the United States of America and that the appellant had a permanent establishment there within the meaning of the Tax Convention and Protocol between Canada and the United States of America, signed on or about 4th March, 1942. The suggestion that tax liability obtained in the latter country was both surprising and startling to the appellant and steps were taken promptly to ascertain its legal position. It was a matter of great importance to the appellant as, if liability were to be established, the income relating to past, present and future years would be in jeopardy and, according to the evidence heard, in the event of the American claim proving successful, immense harm would be done to the appellant, financially. On this account, opinions were sought in Canada and the United States of America and great trouble was gone to and expense incurred in the latter country for the purpose of ascertaining all relevant facts and reaching a position in which the claim could be effectively opposed if it were proceeded with in the appropriate American court.

The case at issue, here, gave rise to a battle of authorities, not a few of which were but applications of valid principles to other circumstances, more particularly those cited on respondent's behalf.

It is unnecessary to dissert at length on the well-known precedent of *Minister of National Revenue v. Dominion Natural Gas Company Ltd.*[1] to reach at once the conclusion that legal expenses resulting from the defence to an action brought against the company, whose franchise rights to supply natural gas in certain sectors of the City of Hamilton were attacked by a rival organisation, should unquestionably be attributed to capital.

The taxpayer, so to say, therein acted to safeguard the very essence of its commercial existence. Chief Justice Duff most aptly formulated as follows this rather self-evident fact. *Vide* p. 24 of the official report:

> It satisfies, I think, the criterion laid down by Lord Cave in *British Insulated v. Atherton*. The expenditure was incurred "once and for all" and it was incurred for the purpose and with the effect of procuring for the company "the advantage of an enduring benefit". The settlement of the issue raised by the proceedings attacking the rights of the respondents with the object of excluding them from carrying on their undertaking within the limits of the City of Hamilton was, I think, an enduring benefit within the sense of Lord Cave's language...
>
> The character of the expenditure is for our present purposes, I think, analogous to that of the expenditure in question in *Moore v. Hare*, where promotion expenses incurred by coalmasters in connection with two parliamentary bills giving authority to construct a line to serve the coalfield were held to be capital expenditures.

I would add the former Mr. Justice Rand's reference to *Minister of National Revenue v. Dominion Natural Gas* in the affair of *Minister of National Revenue v. Goldsmith Smelting & Refining Co.*[2]. None could hope for a more concise analysis of the governing norm than that found in these brief words of the eminent jurist:

> The judgment of this Court in *The Minister v. Dominion Natural Gas* is clearly distinguishable *as having been a case of expenses to preserve a capital asset in a capital aspect.*

(Italics not in text.)

Another oft-quoted instance of legal costs, expended with a view to secure a benefit of a capital nature, is that of *Montreal Light, Heat and Power Consolidated v. Minister of National Revenue*[3], wherein the company sought to

[1] [1941] S.C.R. 19 at 24. [2] [1954] S.C.R. 55 at 57.
[3] [1942] S.C.R. 89 at 94.

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deduct, as operating items, fees paid to its lawyers in furtherance of a plan to redeem before due date and reduce the annual outgo for interest and exchange charges bonds in an amount of $15,000,000. These debentures were, of course, so much borrowed capital as declared, with the concurrence of Davis and Kerwin JJ., by Duff C.J. who wrote:

> I have no doubt that the sums borrowed by means of the original issue of debentures were capital, as distinguished from income, or that the sums borrowed by the second issue of debentures for the purpose of retiring the earlier issue were also capital.

The latter decisions, consequent upon legal expenses pertaining to benefits of a capital character, were consistently distinguished by the Highest Tribunal in, among others, *Premium Iron Ores Limited v. M.N.R.* (*supra*); *The Minister of National Revenue v. The Kellogg Company of Canada, Limited*[1]; *Evans v. The Minister of National Revenue*[2]; *Minister of National Revenue v. Goldsmith Bros, and v. L. D. Caulk Company* (tried together)[3]; and *Rolland Paper Co. v. Minister of National Revenue*[4].

In *Kellogg Company of Canada, Ltd.* (I am now, as further down *in re: Evans,* excerpting from Mr. Justice Martland's citations in *Premium Iron Ores Ltd.*):

> . . the question in issue was as to the right of the Kellogg Company to claim as an expense, in determining its taxable income under the *Income War Tax Act,* legal fees incurred by it in successfully defending a suit for an injunction against alleged infringement of registered trade marks by using certain words in connection with the sale of its products. These expenses were held to be deductible under s. 6(1)(*a*) of that *Act,* and not to constitute an outlay or payment on account of capital within s. 6 (1)(*b*). *They fell within the general rule that in the ordinary course legal expenses are simply current expenditures and deductible as such.*

(Italics added.)

In *Evans v. The Minister of National Revenue,* the question in issue was as to the right to deduct, under s. 12(1)(*a*) of the *Income Tax Act* legal expenses incurred by the appellant in connection with an application by the trustee of an estate for advice and directions. What the Court had to determine upon the application was the appellant's right to receive the income from a portion of the estate...The appellant sought to deduct...her legal fees which she paid in that year...(for appeals to the Ontario Court of Appeals and to the Supreme Court of Canada).

This right (to receive income from part of the estate) was held not to be a capital asset, and the expense in question did not fall within s. 12(1)(*b*). Such expense was held to be properly incurred within s 12(1)(*a*) for the purpose of gaining an income to which the appellant was entitled.

[1] [1943] S.C.R. 58 at 61.
[2] [1960] S.C.R. 391.
[3] [1954] S.C.R. 55.
[4] [1960] Ex. C.R. 334.

Next, Mr. Justice Rand, in the jointly tried cases of *Goldsmith* and *Caulk*, (*supra*), spoke thus:

The question here is whether expenses incurred by the respondent company in defending itself against charges of violating the criminal law by combining with others to prevent or lessen unduly competition in the commercial distribution of dental supplies, are deductible in ascertaining taxable income The agreement or arrangement alleged to have been unlawful purported to regulate day to day practices in the conduct of the respondent's business It formed no part of the permanent establishment of the business; it was a scheme to govern operations rather than to create a capital asset; and the payment to defend the usages under it was a beneficial outlay that helped to produce the income. These expenses included legal fees both for appearing before the Commissioner under the *Combines Investigation Act* and at the trial which resulted in acquittal.

. . .

In the *Rolland Paper case* (quotation from Mr. Justice Hall's notes in *Premium Iron Ores, supra*) the deduction challenged was for legal fees of $5,948 27 paid (by appellant) in the taxation year 1955 as its share of the legal costs of an appeal against the judgment of the Supreme Court of Ontario finding Rolland Paper Company and others guilty of illegal trade practices contrary to s 498(1)(*d*) of the *Criminal Code*. The case resembled *Goldsmith* and *Caulk* but differed in that where the Goldsmith Company and the Caulk Company had been acquitted Rolland Paper Company was convicted. Fournier J. followed the *Goldsmith* and *Caulk* decision, holding that the fact of conviction was not material He allowed the deduction. Notice of Appeal to this Court was given by the Minister. The appeal was not proceeded with, Notice of Discontinuance having been filed.

However, at trial, respondent's learned counsel rested his argument more on the decision of this Court in *Arrco Playing Card Co. v. Minister of National Revenue*,[1] than upon any other authority.

The Arrco Company manufactured playing cards at its Toronto factory and, eventually, began importing lithographed sheets of cards from the United States. On each form 27 cards were lithographed, two forms representing 35 per cent of the cost of a finished deck.

Manufacture of the sheets into complete ready-for-sale decks (stated Mr. Justice Kearney) was carried out in the appellant's plant by processes known as punch pressing sanding, gilting, deck and box wrapping.

. . . the rate of duty applicable was seven cents per deck, whether imported in a complete state of manufacture or in the form of sheets which required the aforesaid finishing processes Moreover the duty of seven cents per deck applied, whether the material was of a quality to constitute a high or a low-priced deck

. . . appellant authorized its attorney to obtain, if possible, a rectification thereof and a reduction in the existing duty of seven cents per unit.

[1] [1957] Ex. C.R. 314 at 315 (bottom line), 316, 323.

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This task, successfully prosecuted, meant a saving for fiscal year 1950-51 of $29,734 in customs duties, and similar advantages for the duration, presumably perpetual, of the remedial legislation.

From its 1950-51 income, Arrco Playing Card Co. deducted $11,000, representing fees and disbursements paid during that year to its attorney for professional services "in procuring favourable modifications in the Customs Tariff affecting materials imported by the appellant from the United States". The learned trial Judge, after a thorough and most lucid sifting of all facts adduced, concluded that:

> The expenditure under consideration was, in my opinion, made once and for all to secure a benefit or advantage that was expected to be enjoyed over a lengthy though indefinite future period. The purpose which motivated the expenditure was the appellant's desire to pay less customs duties in the future than in the past. The fact that, in the last analysis, an increase in income should accrue to the appellant does not, I consider, affect the validity of the above-mentioned conclusion.

Mr. Justice Kearney consequently found:

> . . . that the expenditure in question should be regarded as constituting a payment on account of capital, the deduction of which is prohibited under s. 12(1)(*b*).

With reference to the factual elements of both cases, I cannot altogether escape the impression, more readily felt than expressed, that they might differ in some material respects. Nonetheless, I shall abstain from the possibly futile endeavour of singling out any such dissimilarity for the ensuing reason. In *Arrco Playing Card*, the decision appears to be predicated mainly upon an expenditure made "once and for all and to secure an enduring benefit", and not solely for the purpose of gaining or producing income limited to any particular taxation year. On the other hand, the Supreme Court of Canada seems to have ruled out, as a guiding criterion, the limitation to a definite or specific taxation period of the excepting clause in s. 12(1)(*a*), provided, needless to say, that all other qualifying requirements of income producing or *income protecting expenses* are present. To that effect, I must revert anew to, and quote from Justice Martland's and Justice Hall's speeches *in re: Premium Iron Ores Limited v. Minister of National Revenue (cf.* pages 4 and 8 of the typewritten text):

Page 4, Martland J.:

> Clearly these expenses (legal fees in the *Kellogg Company* lawsuit) were not made solely for the purpose *of earning income in the year in*

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THE READER'S DIGEST ASSOCIATION (CANADA) LTD. v. M.N.R.

Dumoulin J.

which they were incurred. They did not result in the earning of income at all. But they were made *with a view to protecting the income earning capacity of the company,* since it must be assumed that the loss of the right to the use of the words in connection with its sales would have indirectly resulted in a reduction of its income, *not only in the year in which they were incurred, but also in future years as well.*

(Italics mine throughout.)

By the same, page 4, now commenting on the *Evans* case:

> Here again, the expense was not one which was made solely for the purpose of earning income *in that year.* . . . Such expense was made in order to protect her right to receive income, *not only in 1955, but in each of the years in which income became available for distribution from the estate.*

Hall J., at page 8:

> The limitation, spelled out in s. 12(1)(*a*), *does not,* in referring to "producing income from the property or business of a taxpayer" *limit the words quoted solely to the taxation year in which the deduction is being claimed. It is a clear indication to me that the income thus referred to may be the income of the taxation year under review or of a succeeding year.*

Statements of like precision and directness are wide-sweeping and might well go so far as to invalidate the erstwhile tenet that "an expense incurred once and for all and to secure an enduring benefit" usually related to some capital outlay.

For the reasons above and, may I repeat, because I entertain no doubt that legal expenses of $46,616.12, hereby sought to be deducted from appellant's 1960 income tax, were incurred conformably to the excepting provision of s. 12(1)(*a*), to earn or protect the commercial income of the company, the appeal is allowed, and the record referred to the Minister for rectification in keeping with the instant judgment. The appellant is entitled to recover its costs after taxation.

ENTRE:

LE MINISTRE DU REVENU NATIONAL . . APPELANT;

ET

JOSEPH MAURAIS . . . . . INTIMÉ.

Impôt sur le revenu—Loi de l'impôt sur le revenu, S.R. du C. 1952, c. 148, articles 27(1)(a), 46(1)(6) et 62(1)(e)—Dons à des œuvres de bienfaisance—Acceptation de reçu justifiant les dons faits par l'intimé—Appel rejeté.

TROIS-RIVIÈRES 1966

25 octobre

L'intimé Maurais a inclus dans son rapport d'impôt pour l'année 1963 un reçu de $850.00 émis par son curé et représentant le montant des dons qu'il aurait faits aux œuvres de bienfaisance de sa paroisse. L'intimé a déduit cette somme de son imposition fiscale. Aucune tenue de livres n'indique cependant que ce contribuable ait fait des dons pour un montant spécifique. Pour cette raison, le Ministre s'est cru justifié de déduire $500 00 du reçu de $850 00 produit comme preuve de dons de charité faits par l'intimé.

Jugé. La cour est d'avis que la loi tient compte de ce que l'exercice de la charité échappe à la rigoureuse exactitude d'une tenue de livres. Les assertions du témoin Maurais, précisant sa coopération constante à l'œuvre de la St-Vincent-de-Paul, et cela à longueur d'année, corroborées par son curé, ne sauraient être mises en doute. La grande générosité de Maurais envers les œuvres de charité dans sa paroisse est notoire

2. La Cour est satisfaite que les exigences de la *Loi de l'impôt sur le revenu* formulées plus particulièrement aux articles 27(1)(*a*), 46(1)(6) et 62 (1)(*e*) ont été suffisamment respectées par l'intimé

3. L'appelant n'a pas réussi à affaiblir la justification du reçu de $850 00.

4. En outre, l'appelant n'a pas établi que ces dons fussent exagérés ou fictifs

5. L'appel est rejeté avec dépens.

APPEL d'une décision de la Commission d'Appel d'Impôt sur le revenu.

Alban Garon et *Pierre Guilbault* pour l'appelant.

Jacques Lacoursière, c.r. pour l'intimé.

DUMOULIN J.:—(*Dictées en Cour le 25 octobre 1966*)—Après avoir entendu les témoignages de l'intimé, Joseph Maurais, et de M. le Curé Arthur Jacob de la paroisse de St-Lazare du Cap de la Madeleine, la Cour est satisfaite que les exigences de la *Loi de l'impôt sur le revenu,* formulées plus particulièrement aux articles 27(1)(*a*), 46(1)(6) et 62(1)(*e*), ont été suffisamment respectées.

Il est possible que le témoignage de Joseph Maurais aurait dû être plus spécifiquement précis s'il se fût agi d'une transaction commerciale mais, en l'occurrence, il s'agit de dons de bienfaisance, de charité, d'assistance matérielle à l'occasion de l'active participation de l'intimé aux œuvres de la Société St-Vincent-de-Paul de la paroisse St-Lazare, Cap de la Madeleine.

D'autre part, la Cour croit comprendre que la loi tient compte de ce que l'exercice de la charité échappe nécessairement à la rigoureuse exactitude d'une tenue de livres. Le témoin Maurais a précisé sa coopération constante à

l'œuvre de la St-Vincent-de-Paul, et cela à longueur d'année, ce qui me permet de dire qu'il semble plus rationnel de croire, durant l'année fiscale 1963, à des contributions de $700 aux œuvres de la Société St-Vincent-de-Paul que de révoquer ses assertions en doute. Ces dons eurent pour objet le paiement de chauffage, de nourriture, de vêtements à des familles nécessiteuses que Maurais visitait environ deux fois chaque mois à la requête des officiers de la société précitée.

Du reste, pareille somme n'excède pas les moyens financiers de l'intimé qui, en 1963, en sa qualité de contremaître à l'emploi de la compagnie International Paper, a touché un salaire de $14,714.24.

Il n'a pas d'autre obligation de famille que celle de subvenir aux besoins de son épouse, ce couple n'ayant point d'enfant.

En outre, M. Maurais est propriétaire d'une résidence qui lui a coûté $18,000, prix entièrement acquitté.

Le second et dernier témoin, M. le Chanoine Arthur Jacob, curé de la paroisse, explique les circonstances qui l'induisirent à donner le récépissé pour des aumônes de $850, sans prétendre avoir lui-même reçu chaque dollar de cette somme.

M. le Chanoine Jacob ajoute que son paroissien, Joseph Maurais, reçoit un témoignage unanime pour sa générosité envers les œuvres de bienfaisance et en cite, entre autres, un cas alors que l'intimé lui remit, sur demande, un don de $224 pour achat de candélabres d'église. Il ne fut pas étonné d'entendre M. Maurais mentionner le chiffre de $850, contribution qui, conclut le curé, n'outrepasse pas les habitudes charitables de l'intimé.

La Cour est d'avis que l'appelant n'a pas réussi à affaiblir la justification du reçu de $850 et n'a pas établi que ces dons fussent exagérés ou fictifs.

PAR CES MOTIFS, l'appel est rejeté et l'intimé aura droit de recouvrer tous ses frais de Cour après qu'ils auront été régulièrement taxés.

Toronto 1965 Oct. 19 Ottawa Oct. 27

BETWEEN:

EXECUTORS OF ESTATE OF FRANCIS HERBERT CRISPO . . . . . APPELLANTS;

AND

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

Estate tax—Sale of business by deceased—Contract by purchaser to employ deceased's widow—Whether device for disposing of estate property—Estate Tax Act, 1958, c. 29, s. 3(1)(l)(ii).

C, a manufacturer's agent in Toronto, imported about 90% of his goods from two United States manufacturers with whom he had established friendly relations, being sole Canadian importer of their wares though without any exclusive rights. In 1958 he sold his business to A. The sales contract provided for the transfer of the business to a company to be incorporated, that C should be employed by the company as a consultant, and that on his death his wife should be employed as consultant for life at $10,000 a year until she reached the age of 70 and then at $5,000 a year. The clause providing for the wife's employment was inserted at A's suggestion because of his view that her continued association with the business would help to retain the two U.S. manufacturers.

Held, the payment of salary by the company to the widow pursuant to the above clause did not fall within the language of s. 3(1)(l)(ii) of the *Estate Tax Act,* S. of C. 1958, c. 29 Such clause was not in terms a covenant to pay her any amount but rather for her employment by the company, and this was the real bargain between C and A, the test being A's motive.

Mr. W. v. Minister of National Revenue [1952] Ex. C.R. 416 referred to.

APPEAL from re-assessment under *Estate Tax Act.*

Hon. R. L. Kellock, Q.C. for appellant.

Pierre Genest and *B. Verchere* for respondent.

JACKETT P:—This is an appeal from a re-assessment under the *Estate Tax Act* chapter 29 of the Statutes of 1958, as amended, in respect of the estate of Francis Herbert Crispo.

The question raised by the appeal is whether the Minister was in error in re-assessing so as to include, in the computation of the "aggregate net value" of the property passing on the deceased's death, certain payments made after his death to his widow by a company that had, some time before his death, acquired the business carried on by

the deceased during most of his business life. The answer to this question depends upon the application to the facts of section 3(1)(*l*) of the Act, which reads in part as follows:

> 3 (1) There shall be included in computing the aggregate net value of the property passing on the death of a person the value of all property, wherever situated, passing on the death of such person, including, without restricting the generality of the foregoing,
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> * * *
>
> (*l*) property disposed of by any person on or after the death of the deceased
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> * * *
>
> (ii) under the terms of any agreement made by the deceased for valuable consideration given by him providing for the disposition of such property on or after his death, whether or not such agreement is or was enforceable according to its terms by the person to whom such property was so disposed of;

The deceased had, since he was a young man, carried on a business as "manufacturer's agent, importer and distributor" under the name of "F. H. Crispo & Company". In the main, the business consisted in importing goods from the United States and selling them in Canada.

Almost all the goods so imported were acquired from either one of two United States manufacturers. About 60 per cent. of them were acquired from a New York man with whom the deceased had had close business and social associations ever since they were young men together in the United States. About 30 per cent. of the goods imported by the deceased were acquired from a Chicago manufacturer with whom the deceased had also become friendly over the years.

While the deceased had been, in fact, the sole importer into Canada of the New York manufacturer's wares and, for some time, the sole importer into Canada of the Chicago manufacturer's wares, there was no agreement in either case that this state of things should continue. Either manufacturer could, at any time, have started selling to other persons desiring to import their wares into Canada.

While his volume of sales was relatively large, the deceased had a very small business organization consisting, in effect, of a small office staff and a couple of salesmen as well as himself. One of the salesmen, Robert David Archer, had, over the years, gradually acquired greater seniority until he had become manager of the business under the deceased. By 1958, Archer was being paid a salary in the neighbourhood of $20,000 per annum.

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In 1958, as a result of medical advice, the deceased decided to sell his business and negotiated an agreement with Archer under which Archer acquired the business on terms that it would be vested in a company to be incorporated and known as "F. H. Crispo Company Limited". The agreement contemplated that, at the time of transfer, the "assets" and "liabilities" would be "equal". Presumably, the deceased was to withdraw assets before the transfer to the extent, if any, that he had more in the business than the liabilities of the business. The deceased covenanted not to compete. The shares of the company were to be issued to Archer or his wife except for 1 common share to be issued to the deceased and $15,000 worth of redeemable preferred, which was to be issued to the deceased and was to be redeemed fifteen days after the transfer of the business.

The agreement also contained provisions for the deceased being associated with the Company. It provided that the deceased "shall be employed by the Company as a consultant and shall also be a director" (paragraph 4) and that "the duties" of the deceased "as consultant to the Company shall be determined only by him" (paragraph 5)[1]. The agreement further provided that the deceased be paid by the Company a salary of $5,000 per annum effective from the transfer of the business (paragraph 5) and certain additional amounts or bonuses depending on the Company's net earnings (paragraph 6). The agreement provided that the deceased "shall be paid the above-mentioned salary so long as he shall live" but that there should be no bonus after his 75th birthday (paragraph 7).

Finally, the agreement provided that, if the deceased were survived by his wife "then she shall be employed by the Company as consultant for the remainder of her life at a fixed salary of $10,000 until the end of the fiscal year of the Company following her 70th birthday and thereafter her fixed salary shall be $5,000 per annum" (paragraph 7).

(The agreement was in due course confirmed and ratified by the Company, which acknowledged that it was bound by its terms.)

The proposed Company was incorporated, the business was transferred to it, the deceased became the holder of a

[1] Whether this clause made the contract a contract of service or a contract for services would seem to be immaterial

single common share, was made a director and functioned as a consultant to the Company, in which capacity he was, of course, very useful. (The deceased also received the $15,000 worth of preferred and it was redeemed. Archer and his wife acquired the balance of the issued shares and became the other two directors.)

After the deceased's death on August 31, 1960, the widow was elected a director of the Company in the place of her husband and the Company commenced paying her the salary mentioned in the agreement. Apart from her duties as a director, any actual services that she performed for the Company were so unsubstantial as to warrant their being classified as nominal. She took an interest in the business and kept in touch with Archer, who chatted with her from time to time in a general way concerning major business problems such as the acquisition of new lines of goods.

From the time of the deceased's death until February 1963, the Company paid his widow the "salary" contemplated by the 1958 agreement. In that month a new agreement was entered into between the widow and the Company. However, in order to avoid confusion, I propose to consider the correctness of the Minister's assessment in respect of the payments during the period ending in February 1963, without referring to what happened in that month.

The Minister's case, according to the submission of counsel for the Minister, is that each payment of salary to the widow is "property disposed of by any person...after the death of the deceased...under the terms of any agreement made by the deceased for valuable consideration given by him providing for the disposition of such property on or after his death" within the meaning of those words in section 3(1)(*l*)(ii) of the *Estate Tax Act*, which I repeat here for convenience.

> 3. (1) There shall be included in computing the aggregate net value of the property passing on the death of a person the value of all property, wherever situated, passing on the death of such person, including, without restricting the generality of the foregoing,
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> * * *
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> (*l*) property disposed of by any person on or after the death of the deceased
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> (ii) under the terms of any agreement made by the deceased for valuable consideration given by him providing for the disposi-

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> tion of such property on or after his death, whether or not such agreement is or was enforceable according to its terms by the person to whom such property was so disposed of;

The Minister contends that each payment of salary by the Company to the widow was "property disposed of" by the Company, that such property was "disposed of" under the "terms" of the 1958 agreement and that the 1958 agreement was made by the deceased for valuable consideration.

The "terms" of the 1958 agreement under which counsel for the Minister attempts to bring the payments consist of that part of paragraph 7 that provides that "she shall be employed by the Company as consultant for the remainder of her life at a fixed salary of $10,000 until...her 70th birthday and thereafter ...$5,000 per annum". This is not in "terms" a covenant for payment of any amount to the widow but for the creation of a relationship between the widow and the Company by an agreement between them under which certain salary payments would be made. Counsel faced up to this difficulty by submitting that the Court must read that part of paragraph 7 of the 1958 agreement as though it in "terms" was a mere covenant by the Company to pay the widow the amounts in question.

This latter submission was really part and parcel of the theme running through the whole argument for the Minister that the true bargain between the deceased and Archer was a sale of the goodwill and assets of the business together with his part time services during his lifetime for the $15,000 payable by the preferred shares device, annual payments to be made to the deceased during his life and annual payments to be made to his widow after his death and that, regardless of what the agreement says, it was no part of the bargain that the widow should become a consultant to the Company either as an employee or as an independent contractor.

Certainly, if it were established that the real bargain was as counsel submitted and that the contents of the written documents, in this respect a least, did not therefore truly represent the real bargain, the Court would have to decide the case having regard to the real bargain and not to the written document.

The feature of the facts that tends to lend support to the Minister's contention is that the widow had no business experience and that it was never contemplated, either in 1958 or later, that she should take any real part in the activities of the business. That the operator of a business would agree to pay such a person as a "consultant" $10,000 per year, on the face of it, seems so improbable as to suggest that, whatever the reason for the payment, it is not a payment for her services. If, therefore, there were no explanation, I should have had to give serious consideration to the question whether, having regard to the circumstances, the real bargain must be found to have been an agreement to make annual payments to the widow as part of the consideration for the transfer of the business to the company in 1958.

However, I am relieved from considering that question because Archer gave evidence, which is uncontradicted and which I accept, that the clause for the employment of the widow after the death of the deceased was inserted on his suggestion[1] because, in effect, he was strongly of the view that the probability of losing the United States supplier relationships (upon which the very existence of the business depended) was substantially diminished as long as the deceased continued to be a part of the Company's organization and, similarly, but probably to a lesser extent, after the death of the deceased, he would feel more secure concerning the retention of his United States suppliers if the widow were part of the organization. It is clear, notwithstanding much talk about consultations with the widow, suggestions by her, etc., that the real reason why, in 1958, Archer wanted an arrangement under which, upon the deceased's death, the widow would become associated with the company in some capacity, was that he thought that the "Crispo" relationship with the New York and Chicago people would have an advantage to the Company. He did not really expect her to perform services and she only performed the most perfunctory sort of services such as attending shareholder and director meetings. He did,

[1] The statement that the clause for the employment of the widow was put in at Archer's suggestion because he thought it desirable from the point of view of retaining the United States relationships was not challenged on cross-examination.

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however, want her associated with the Company. He did, in fact, associate her with the Company and he paid her for that association exactly as contemplated in the 1958 agreement and for the same reason as that which caused him to put the clause about the widow into that agreement.

The sole question of fact that has to be decided is, as I have already indicated, whether the written agreement whereby Archer agreed that the Company would employ the widow as consultant at a salary of $10,000 per annum represented the real bargain made by the deceased and Archer in 1958 or whether the real bargain was a simple contract by Archer that the Company would make annual payments to the widow. While an undertaking to employ the widow at a salary of $10,000 per annum until she attains the age of 70 and thereafter at a salary of $5,000, although she was not expected to perform any service in the ordinary sense, does not seem to be the sort of undertaking that a business man would enter into unless he received some outside consideration therefor, the real test is what motivated Archer in entering into this particular undertaking. Archer's testimony satisfied me that, in his view, in 1958, having regard to the earnings of the business, the extent to which the continuance of the business depended upon the United States relationships and the extent to which the probability of continuing those relationships after the death of the deceased would be improved by having the widow associated with the business, the clause whereby the Company agreed to employ the widow was one that was in the interest of the proposed company. Archer seemed, when he gave evidence, to be of the view that his 1958 opinion had been shown to have been sound because he has had difficulties with the current management of the New York firm that would, in his view, have resulted in loss of the company's relationship with that firm had it not been for the widow's relationship with the family controlling that firm.

In the light of Archer's evidence, therefore, I reject the submission of counsel for the Minister that paragraph 7 of the agreement does not represent a part of the true bargain between the parties. The Company did not, therefore, make the salary payments to the widow under an agreement

between the deceased and the Company. For that reason, section 3(1)(*l*) does not apply to the payments made before February 1963.

The distinction between a payment "under the terms of any agreement" and a payment by virtue of an arrangement or relationship created by an agreement made "under the terms of any agreement" is not mere "hair-splitting" as might at first appear. What paragraph (*l*)(ii) of section 3(1) contemplates is that property disposed of under the terms of an agreement that was made by the deceased for valuable consideration given by the deceased and that provided for that disposition should be included in the "aggregate net value". In other words, where the deceased paid for property in his lifetime, it should be included in his estate for tax purposes even though it was delivered directly to a beneficiary on or after his death. Neither the words of paragraph *l*(ii), nor the apparent justification for its being in the law, extend to treating as part of the estate of the deceased remuneration paid by a third party under a contract of service or a contract for services merely because the deceased had made it a term of an agreement made by him with the third party that the contract of service or the contract for services should be entered into. In such a case, the remuneration is consideration for the service or services to which the third party was entitled from the recipient and it is not, in effect, a gift from the deceased. Similar reasoning would apply to a contract whereby a deceased had obtained an agreement for consideration from his partners to take a member of the deceased's family into the partnership after his death. Compare the facts in *Mr. W. v. Minister of National Revenue*[1]. It cannot be assumed that Parliament intended to sweep into the estate of a deceased all the profits or remuneration received after his death by a person who was an object of his benevolence during the whole of such other person's life merely because the deceased gave some consideration, no matter how small, for such person being employed or taken into partnership when, in terms, the statutory provision applies only to the very thing paid for by the deceased and delivered on or after his death.

[1] [1952] Ex C.R. 416

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If section 3(1)(*l*) does not apply to the payments before the agreement of July 1963, there can be no possible basis for applying that provision to the payments made after that agreement. There is no need, therefore, to review the circumstances giving rise to that agreement or its terms.

The appeal is allowed and the re-assessment is referred back to the Minister for re-assessment on the basis that the payments made by F. H. Crispo Company Limited to the widow of the deceased are not covered by section 3(1)(*l*) of the *Estate Tax Act*. The Minister will pay to the appellants their costs to be taxed.

Montreal 1966 June 7

Ottawa Oct. 28

BETWEEN:

THE ROYAL TRUST COMPANY, JAMES REID SARE, JAMES GEMMILL WILSON, Executors of the Estate of AGNES HENRY WILSON ..... APPELLANTS;

AND

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

Estate tax—Estate Tax Act, R.S.C. 1958, c. 29, ss 3(1)(a), (2)(a), 58(1)(i) —Competency to dispose of property—Meaning of "general power" of appointment—Whether deceased competent to dispose of property bequeathed and settled on her behalf under trusts.

The late James Reid Wilson, who died some 49 years before his daughter Agnes Henry Wilson, left a will under which she had inherited a portion of the residue of his estate.

During her lifetime, only the income therefrom was payable to her and the disposition of the capital upon her death depended on whether she was survived by husband and children As she was in fact survived by issue "which lived to be six months old", as stipulated, the late Agnes Henry Wilson was given the power to dispose of her share of the capital "after her death in such a manner as she might direct by will".

In the Minister's contention, Agnes Henry Wilson had a general power to dispose of this property within the meaning of ss. 3(1)(*a*), (2)(*a*), and 58(1), so that the property therefore formed part of her estate.

The late James Reid Wilson, her deceased father, has also, by a deed of donation, dated the 11th of December, 1912, given a life interest in certain property to his daughter, together with the power to dispose of it by will "in such manner as she might deem advisable". The Minister also construed this property as passing on the death of the deceased.

Held, That sufficient material has been adduced to conclude that the deceased, Mrs. Agnes Henry Sare, "immediately prior to her death" and long before, had "such general power" and authority to appoint and dispose of the property bequeathed and donated to her by her father the late James Reid Wilson, as enabled her to exercise, in a will, this general power, "as she saw fit" in her own right and not in a fiduciary capacity.

2. That this appeal be dismissed.

APPEAL from an assessment of the Minister of National Revenue.

John de M. Marler, Q.C. and *T. O'Connor* for appellant.

Alban Garon for respondent.

DUMOULIN J:— This is an appeal from the respondent's confirmation of a reassessment, on August 25, 1965, levying an Estate Tax in the net amount of $250,390.60, in respect of the Estate of the late Agnes Henry Wilson, in her lifetime of the City of Montreal, wife of Robert George Sare of the same place.

Mrs. Agnes Henry Wilson-Sare (hereinafter called "the deceased") died on January 26, 1963, leaving a Last Will and Testament dated June 15, 1945, executed, in authentic form, before Dakers Cameron and colleague, Notaries (Ex. C).

By said Will, the deceased appointed the appellants and her husband, Robert George Sare, as her Testamentary Executors. Mr. Sare died on September 24, 1965, and has not been replaced as an Executor.

The instant litigation concerns, 1) the property valued, when the deceased died, at $986,593.11, being her share in the estate of her father, the late James Reid Wilson, a wealthy metal merchant of the City of Montreal, and 2) certain other property valued, at date of death, at $113,-054.03, given (*inter vivos*) by Deed of Donation to the Royal Trust Company in trust for the deceased; said Deed executed before J. A. Cameron, Notary, on December 17, 1912.

Paragraph 3 of the Notice of Appeal imparts the material information as follows:

3. The deceased's father, the late James Reid Wilson...who died on 11th May, 1914, left a Last Will and Testament dated 11th December, 1912, executed before John Fair and colleague, Notaries, by which, after

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bequeathing certain particular legacies, he bequeathed the residue of his property to his children, in equal shares, thereby instituting them his universal residuary legatees, adding, however, that the share of each of his daughters should be retained in the hands of his Executors (i.e., his wife, their son, John Wilson, Mr. James M. Robertson and the Royal Trust Company; *cf.* exhibit A, thirteenth clause) during her lifetime and only the revenue thereof paid to her and, with respect to the share of his daughter the deceased, he provided as follows: (The eighth paragraph of the tenth clause, exhibit A)

> The capital of the share of my daughter, AGNES HENRY WILSON (Mrs. R. G. SARE), shall be disposed of after her death in the following manner:—Should she die without issue surviving her, one fourth of her share shall belong to her husband, if living, and the remaining three-fourths shall belong to her brothers and sisters, in equal shares. *Should she die leaving issue surviving her which live to be six months old, the capital of her share shall be disposed of after her death in such manner as she may direct by will,* or should she die intestate it shall belong to her heirs-at-law. The donation to be made by me to THE ROYAL TRUST COMPANY for the benefit of my said daughter, AGNES HENRY WILSON, shall be considered as a payment to my daughter in advance on account of her share in my estate and in the division of my estate the TRUST PROPERTY mentioned in said Deed, or the securities representing the same at the time of my death, shall be considered as of the value of FIFTY THOUSAND DOLLARS.

The fifth clause of the Deed of Donation, for all purposes an appendix to the late James Reid Wilson's Last Will and Testament, provides that:

> *In the event of the said Dame Agnes Henry Wilson* (Mrs. R G. Sare) *surviving said Donor, she shall have the absolute right to dispose of the said Trust Property by her Will in such manner as she may deem advisable,* and, failing so doing, the same shall at her death pass to her heirs-at-law.

(Italicized words throughout these notes not in original text.)

On appellant's behalf, it is contended that the deceased never was competent to dispose of her property mentioned in paragraphs 5 and 8 of the Notice of Appeal, within the meaning of the *Estate Tax Act*, and, also, "that in any event, the deceased was not, immediately prior to her death, competent to dispose of said property".

As could be expected, the respondent takes a categorically opposite view of the matter, assuming that (*cf.* Reply to Notice of Appeal):

> 9. ...
>
> (*a*) Agnes Henry Wilson was, immediately prior to her death, competent to dispose of her share of the capital mentioned in Clause 10 of the Will made by her father, dated December 11, 1912,

(*b*) Agnes Henry Wilson was, immediately prior to her death, competent to dispose of the trust property referred to in Clause 5 of the Deed of Donation made by her father and dated December 17, 1912.

Both parties rest their case on the differing interpretation each attaches to sections 3(1)(*a*), 3(2)(*a*) and 58(1)(*i*) of the *Estate Tax Act*, 1958, 7 Elizabeth II, c. 29, enacting that:

3. (1) There shall be included in computing the aggregate net value of the property passing on the death of a person the value of all property, wherever situated, passing on the death of such person, including, without restricting the generality of the foregoing,

(*a*) All property of which the deceased was, immediately prior to his death, competent to dispose;

. . .

3. (2) For the purposes of this section,

(*a*) a person shall be deemed to have been competent to dispose of any property if he had such an estate or interest therein *or such general power* as would if he were *sui juris*, have enabled him to dispose of that property.

. . .

58. (1) In this Act,

(i) "general power" includes any power or authority *enabling the donee or other holder thereof to appoint, appropriate or dispose of property as he sees fit, whether exercisable by instrument 'inter vivos' or by will or both,* but does not include any power exercisable in a fiduciary capacity under a disposition not made by him, or exercisable as a mortgagee.

Obviously, the undersigned's sole research consists in determining whether or not the means of disposal, bestowed upon the deceased by her father's will and deed of donation, vested Agnes Henry Wilson with that general power of disposition defined in the Act.

Since the deceased survived her father by no less than 49 years and, at her death, left three children, respectively 52, 50 and 48 years old, my investigation narrows down to the appraisal of the latitude or freedom of action extended to Mrs. Agnes Henry Wilson-Sare by such clauses, as in her author's will: "Should she die leaving issue surviving her which live to be six months old, *the capital of her share shall be disposed of after her death in such manner as she may direct by will...*" and in the deed of donation, as: "In the event of the said Dame Agnes Henry Wilson surviving said Donor (her father, James Reid Wilson) *she shall have*

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the absolute right to dispose of the said Trust Property by her Will in such manner as she may deem advisable."

It would seem to me that no feat of imagination is required to read into those plain, unambiguous directives the conference on the donee and heir-to-be of an untrammelled liberty, *a general power*, under the conditions prescribed, of bequeathing such property by will and testament *"as she saw fit"*. And we have just seen that the enabling requirements: survival and living issue, were fully realized.

Yet, I do not intend disposing of the case in this summary fashion, especially after the decision of the Supreme Court, reversing me, *in Re: Montreal Trust Company, et al. v. The Minister of National Revenue*[1], Estate Robert Newmarch Hickson. Furthermore, it might be apposite to attentively peruse prior decisions of the Courts, and also some of the text writers' views of the qualifying conditions inherent in a "general power".

In the case above, Robert Newmarch Hickson's mother, Lady Hickson, predeceased him leaving a will in notarial form, article IX of which expressed the following condition:

> I direct that one-half of the share of my son Robert Newmarch Hickson in the residue of my Estate, less the sum of Forty Thousand Dollars which I have given him some years ago, shall belong to him in absolute ownership, and the other half of his share I give and bequeath the usufruct thereof during his lifetime to my said son Robert Newmarch Hickson and the ownership to the children of my said son, and if he leaves no children, to his heirs, *legal or testamentary*.

Domiciled in the Province of Quebec, Robert N. Hickson died in June, 1960, survived by his widow, but leaving no issue as the marriage had remained childless. He left a will in authentic or notarial form, executed on October 27, 1959, appointing the Montreal Trust and others his executors. With the exception of a few particular legacies, Hickson gave the residue of his property to Dame Orian Hays, his widow. The pertinent clause was drafted in these words:

> And all the rest, residue and remainder of the property real and personal, moveable and immoveable of every sort, nature and description of which I may die possessed or in which I may have any interest, or over which I may have the power of appointment or disposal (including any lapsed legacies) I give and bequeath to my wife, the said Dame Orian Hays Hickson as her absolute property.

[1] [1964] S.C.R. 647 at 648-649-650-651-652.

The legal consequences of those successive testamentary dispositions were, by the Supreme Court's decision, held to be that:

> . . . Robert Newmarch Hickson was the institute of the substitution; that its opening took place at his death, and that had he left children him surviving they would have been the substitutes.

Mr. Justice Cartwright, speaking for the Court, next pursued:

> With respect, I am unable to agree with the learned trial judge that the substitution lapsed. The will of Lady Hickson provided for the possibility of the institute dying without children and in that event, which happened, named as substitutes "his heirs legal or testamentary".
>
> By the residuary clause of his will, quoted above, his widow was constituted the testamentary heir of Robert Newmarch Hickson; the character of the gift to her in this clause is that of a universal legacy... His widow, as substitute, took the fund directly from the grantor, Lady Hickson, and not from the institute her husband.

Accordingly, Robert N. Hickson having constituted his wife universal legatee and, therefore, his testamentary heir, this lady took the fund "not through the exercise of any power given to Robert Newmarch Hickson, but because Lady Hickson has designated as substitute his testamentary heir".

Presently, the circumstances are at complete variance with those above-stated.

There is not, in any of the provisions revealing the testator-donor's intentions, the faintest trace of a substitution, nothing else than, in James Reid Wilson's testament, "*...the capital of her share shall be disposed of, after her death, in such manner as she may direct by will*"; and in the deed of donation, the unlimited grant of "*...the absolute right to dispose of the said Trust Property by her will in such manner as she may deem advisable...*".

Any anticipation, in each of the covenants, of the possibility of Mrs. Agnes Henry Wilson dying intestate, in which event the property would belong to her heirs-at-law, merely is a redundant repetition of the general law, formulated by article 597 of the *Civil Code*.

Although such empowering terms leave but little room for doubting that they were intended to invest the deceased, in the fullest measure, with that general power of disposition required by s. 3(2)(*a*) and defined by s. 58(1)(*i*) of the Act, I will, nevertheless, add to these obvious reasons the comments of two well-known authors.

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I am now quoting from Loffmark's *Estate Taxes*[1]:

> For purposes of the *Estate Tax Act*, a power is general if the donee can make the subject-matter his own or if he is competent to dispose of property "as he sees fit".....It would also appear that the words in section 58(1)(*i*) "as he sees fit", refer to the disposal of the property and not to the form of disposal; so that a power for this purpose, would not be the less a general power because some special reference to the power was required, or because the date at which the appointment was to take effect was fixed by the donor of the power.

We read in Jameson's *Canadian Estate Tax*[2], that:

> A power which is given to a person who may appoint in favour of anyone, including himself, is general. A special power is one in which the donee of the power is limited in the exercise of the power to appoint only in favour of persons in a limited class or group or certain specified individuals.

It should be noted that "General Power", as outlined in s. 58(1)(*i*), makes no specific mention of the donee's or property holder's right of appointing to himself, which, necessarily, could not arise in connection with a testament. The statute decrees that a "general power" includes any authority to dispose of property as the donee or holder sees fit, such power exercisable, as in the instant case, by will.

The aforesaid treatise next goes on to say that:

> In the case of a general power it is considered by the legislature that such a power in the hands of the donee (or holder of property) amounts *to ownership of the property comprised in the power.*

The following lines apply perfectly to the matter at bar:

> *A donor in creating a power may state that the power may be exercised by will or by deed inter vivos, but the exercise of a power by will is none the less general with that limitation, for although the donee is unable to bring the property into his own possession during his lifetime, he has complete power of disposal of it upon his death.* In *Prov. Sec.-Treas. of N.B. v. Schofield,* a testator devised property to his sister for life, and after her death to such person or persons as she should by will appoint. It was held that the sister had a general power of appointment as the objects of the power derived their benefit from the sister and not from the testator, and consequently they were taxable in the sister's estate.

What precedes offers instances of the current application, rather self-evident should I say, of a general power, or, better still, of the literal exercise of s. 58(1)(*i*). The interpretation obtaining extends, however, far beyond these

[1] Loffmark: *Estate Taxes,* 1960, pp. 163-164

[2] Jameson: *Canadian Estate Tax,* 1960, pp. 118, 120, 121.

clear-cut precedents, according to the writer's opinion and authorities referred to in, again, Jameson's *Canadian Estate Tax* (*supra*) (pages 120-121):

> But a power may still be general if the consent of some person is required to the act of exercising it. In *Re Phillips* the donee had a power to appoint trust funds to such persons as he should designate, subject to the consent of the trustees, the appointment to take effect upon his death It was held that the consent of the trustees did not fetter the donee's selection of objects of the power, and it was a general power. But if the consent required relates to the selection of the objects of the power, then it is a special power and not within the terms of the section.
>
> In *Drake v. A.-G.* a case under s 7 of the English *Legacy Duty Act, 1796,* it was held that the exclusion by the donor of certain persons from the benefit of the exercise of an otherwise general power did not prevent the power from being general.

Sufficient material has been adduced, I humbly believe, to conclude that the deceased, Mrs. Agnes Henry Wilson-Sare, "immediately prior to her death" (and long before) had "such general power". And authority to appoint and dispose of the property bequeathed and donated to her by James Reid Wilson, her father, as enabled her to exercise, in a will, this general power "as she saw fit", *in her own right* and not in a fiduciary capacity.

For the reasons above this appeal is dismissed and the respondent entitled to recover all legal costs after taxation.

BETWEEN:

WILKINSON SWORD (CANADA) LIMITED ..... PLAINTIFF;

AND

ARTHUR JUDA, carrying on business as CONTINENTAL WATCH IMPORT CO. ..... DEFENDANT.

Ottawa
1966
Nov. 15
Nov. 22

Trade marks—Judgment ordering expungement of trade mark—Appeal to Supreme Court of Canada—Application for stay of execution—No jurisdiction in Exchequer Court to grant stay—Trade Marks Act, ss. 56, 61—Exchequer Court Act, s. 21.

Judgment was pronounced dismissing this action and ordering that defendant's counterclaim for expungement of the registration of certain trade marks be allowed. Plaintiff commenced appeal proceedings to the Supreme Court of Canada and applied to the Exchequer Court to stay

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execution of its judgment pending the appeal, suggesting that the action to be taken by the Registrar of Trade Marks on the order for expungement be stayed pending disposition of the appeal.

Held: Neither s. 21 of the *Exchequer Court Act* nor s. 56 of the *Trade Marks Act* authorizes the Court to grant the order sought and in the absence of specific statutory authority for such an order the power of the Court to make it is not to be assumed. The expungement of the trade mark was effective from the pronouncement of judgment so ordering and the substance of the order sought by plaintiff was thus to reinstate the registration pending disposition of the appeal. For such a procedure there was no authority.

APPLICATION for stay of execution.

J. A. Devenny for plaintiff.

Kent H. E. Plumley for defendant.

THURLOW J.:—This is an application "for an order staying execution of the judgment of this Honourable Court pronounced in this cause insofar as the said judgment relates to the expungement of the trade mark registrations of the plaintiff referred to in the statement of claim, pending an appeal to the Supreme Court of Canada".

Following the trial of the action and counterclaim before the President of this Court, reasons for judgment were filed on September 1, 1966, stating in the final paragraph:

> My conclusion is, therefore, that the registrations of the trade marks in question are invalid. The defendant may move for judgment in accordance with that finding at some time convenient to all concerned.

Judgment had not however been pronounced when on October 19, 1966, the plaintiff filed in this Court a notice of appeal to the Supreme Court of Canada "from the judgment of the Exchequer Court of Canada pronounced by the Honourable President on the 1st day of September, 1966". I was informed that the other steps necessary to perfect an appeal to the Supreme Court of Canada were also taken including the posting of security in the amount of $500.

Notice of the present motion returnable November 15, 1966, was filed on November 10, 1966.

On November 12, the President pronounced judgment dismissing the action and ordering "that the Defendant's counterclaim for expungement of the registration of Canadian Trade Mark Registrations Nos. N.S. 197/50113 and 136,228 be and the same is hereby allowed." Costs of the action and counterclaim were also awarded to the defendant. Payment of these costs has not been secured.

Sections 60 and 61 of the *Trade Marks Act* provide:

60. An appeal lies to the Supreme Court of Canada from any judgment of the Exchequer Court of Canada in any action or proceeding under this Act irrespective of the amount of money, if any, claimed to be involved.

61. The Registrar of the Exchequer Court of Canada shall file with the Registrar a certified copy of every judgment or order made by the Exchequer Court of Canada or by the Supreme Court of Canada relating to any trade mark on the register.

It was not suggested that the order sought should purport either to alter the judgment as pronounced or to direct the Registrar of this Court to refrain from complying with section 61. As I understand it what was suggested was that the Court make a further order countermanding in part the order already made by directing that proceedings to be taken on it by the Registrar of Trade Marks be stayed pending disposition of the plaintiff's appeal. In support of his contention that the Court has authority to make such an order counsel referred to section 21[1] of the *Exchequer Court Act* and to section 56[2] of the *Trade Marks Act* and he submitted that this Court being a Superior Court of record and having exclusive jurisdiction in all matters pertaining to the register of trade marks has inherent jurisdiction to make the order.

In my opinion, the Court having pronounced judgment in the matter ordering the expungement of the marks in

[1] 21. The Exchequer Court has jurisdiction as well between subject and subject as otherwise,

(*a*) in all cases of conflicting applications for any patent of invention, or for the registration of any copyright, trade mark or industrial design;

(*b*) in all cases in which it is sought to impeach or annul any patent of invention, or to have any entry in any register of copyrights, trade marks or industrial designs made, expunged, varied or rectified; and

(*c*) in all other cases in which a remedy is sought under the authority of any Act of the Parliament of Canada or at common law or in equity, respecting any patent of invention, copyright, trade mark, or industrial design.

[2] 56. (1) The Exchequer Court of Canada has exclusive original 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 is 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.

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question, has exhausted its jurisdiction arising under both section 21 of the *Exchequer Court Act* and section 56 of the *Trade Marks Act* and as there appears to be no specific statutory provision authorizing an order of the kind sought I do not think it is to be assumed that the Court has authority to make it. Jurisdiction to make such an order does not appear to me to arise under paragraph (*a*) of section 21 of the *Exchequer Court Act*, since that paragraph is concerned only with conflicting applications for trade mark registrations, or under paragraph (*b*) since this is not an application for registration of a trade mark or for expungement, variation or rectification of a registration, or under paragraph (*c*) since the relief sought does not appear to be authorized by any Act of the Parliament of Canada or at common law or in equity. Nor does section 56 of the *Trade Marks Act* authorize such an order. The position might have been somewhat different had the application been made before judgment was pronounced as the Court at that stage might conceivably have given consideration to the problem and suspended the operation of its order pending the appeal. That however has not occurred. Instead the order has passed without qualification as to when it is to take effect and as section 61 of the *Trade Marks Act* appears to me to be a purely administrative provision the expungement in my view is and has been effective from the pronouncement of the judgment. The substance of the order sought would thus have to be to reinstate the registration pending disposition of the appeal. There is so far as I am aware no authority for such a procedure. References were made to sections 80-86 of the *Exchequer Court Act*, to Rule 208[1] of the *General Rules and Orders of the Exchequer Court* and to various provisions of the *Supreme Court Act* including in particular section 70 thereof but there does not appear to me to be authority in any of these provisions for the making of the order applied for.

In the course of argument counsel also referred to *Kerley on Trade Marks* eighth edition, from which it appears, at page 208, that the practice in England is to stay the expungement pending appeal but it appears from page 506 that the statutory provisions in England respecting

[1] *Vide: The King v. Consolidated Distilleries Ltd. et al.* [1931] Ex. C.R. 125.

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expungement are not comparable with those in effect here since they contemplate directions in the order itself for service of it on the Comptroller-General. The English practice accordingly in my view affords no support for the application except insofar as it suggests that if authority to order a stay exists the balance usually favours granting the stay. Had I been of the opinion that the Court has authority to make the order asked for I should have thought in the present case that the order should be granted upon the plaintiff giving security for payment of the costs awarded by the judgment of this Court. However as already indicated I am of the opinion that in the circumstances of this case there is no authority for making the order.

The application therefore fails and it will be dismissed with costs.

Toronto 1966

Dec. 8

Dec. 9

BETWEEN:

WILLIAM E. BUTLER ET ALIOS .....APPELLANTS;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Income tax—Deductions—Purchase of accounting and bookkeeping practices—List of clients and clients' records—Whether part of goodwill—Whether "tangible assets"—Capital cost allowances—Income Tax Act, Sch. B, cl. 8.

In 1962 appellants purchased an accounting practice and a bookkeeping practice in Ontario. By the sale agreements $8,001 was allotted to the goodwill of the practices and $16,600 to lists of clients and various records relating to the clients' businesses. Appellants each claimed a deduction with respect to the expenditure of $16,600 in computing their incomes for 1962.

Held, the lists of clients and related records were of value only if appellants kept the clients, i.e. the chief and primary value of the documents arose from their connection with the tangible asset good will and they were therefore not "tangible assets" within the meaning of clause 8 of Schedule B of the *Income Tax Act,* which authorizes the deduction of capital cost allowances in respect of tangible assets.

APPEALS by William E. Butler, C. Bruce Magee, Alan George Bowers and William V. Curran from income tax assessments.

David A. Ward and *Thomas I. A. Allen* for appellants.

L. R. Olsson for respondent.

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GIBSON J.:—On this hearing four appeals are being considered, all relating to the 1962 taxation year of the appellants. The issue is the same in all appeals. Because of this an Order was made at the commencement to try all four appeals on the same common evidence.

Each of the appellants is a partner in James M. Dunwoody & Company. In the taxation year 1962 this partnership bought accounting practice of Morphy, Boyter & Adams of Trenton, Ontario for the sum of $20,000, and the bookkeeping practice of Lola and Frank Corcoran of Long Sault, Ontario for the sum of $5,101. The respective allocation of the purchase moneys in each of the said agreements was as follows, and I quote from the respective formal agreements.

In respect to the Trenton purchase Clause 2 is the relevant clause and reads as follows:

2. The Purchasers shall pay to the Vendors in consideration of the purchase described in Paragraph 1 above as follows:

(*a*) Goodwill	$	8,000.00
(*b*) List of all present and past clients of the said practice, historical records, working papers, financial statements, reports, ledger cards, files and other records pertaining to businesses audited and serviced by the Vendors, which are the property of the Vendors	$	11,500 00
(*c*) Furniture and fixtures	$	500.00
	$	20,000 00

In respect to the Long Sault agreement, the relevant clause therefrom is Clause 4-A which reads as follows:

4. The Purchasers shall pay to the Vendor in consideration of the purchase described in Paragraph 1 above as follows:

(*a*) For the Bookkeeping Practice the amount of $5,101.00 subject to adjustments as set forth in this agreement, for assets acquired as follows:

I	Goodwill	$	1.00
II	List of all present and past clients of the Bookkeeping Practice, historical records, working papers, ledger cards, files and other records pertaining to the services provided as set out on Schedule "A" to this Agreement	$	5,100 00
		$	5,101.00

The issue for decision is what is the proper tax treatment of the total sum of $16,600 made up as may be noted of $11,500 referred to in the so-called Trenton Agreement and $5,100 referred to in the so-called Long Sault Agreement. The issue may be put in this way: Was $16,600 or any part of it paid for the acquisition of (and I use the words employed in the so-called Trenton Agreement) lists of all present and past clients of the said practice, historical records, working papers, financial statements, reports, ledger cards, files and other records pertaining to businesses audited and serviced by the vendors which are the property of the vendors? (Compare the wording in the so-called Long Sault Agreement above detailed which in essence is similar). If any amount was paid for the same, is such an amount deductible as an expense for tax purposes in the taxation year 1962 as, *inter alia,* a once and for all expenditure and one not paid out to purchase an enduring advantage, and also of course an expenditure for the purpose of earning income within the meaning of section 12(1)(*a*) of the *Income Tax Act*? Or, if not, was it, while still an expenditure for the purpose of earning income within the meaning of section 12(1)(*a*) of the Act, a capital outlay within the meaning of section 12(1)(*b*) of the Act? And if it was a capital outlay, were tangible assets acquired in consideration therefor within the meaning and so as to entitle the appellants to capital cost allowance under Clause 8 of Schedule "B" of the Regulations of the *Income Tax Act*?

In my view, the issue may be determined by answering two questions, namely, firstly, what is purchased goodwill? And, secondly, are these lists of present and past clients, working papers, etc., as more particularly categorized and referred to above in the said two Agreements "tangible assets" within the meaning of Clause 8 of Schedule "B" of the *Income Tax Act*?

To answer the first question, in my opinion, it is sufficient for the purposes of this action to mention only a few of the *indicia* of purchased goodwill. Some are as follows: (1) Purchased goodwill cannot be purchased as a separate item of a business, but instead is intimately connected with and inseparable from the other assets and liabilities of the business which is purchased as a going concern. (2) The

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general concept of goodwill has been a growing one and has progressively changed so that it now not only pertains to customer or client relations, to which it was considered confined at one time, but also in its current broader meaning encompasses almost any intangible factor of economic value to an enterprise; and the factors underlying goodwill may be considered to affect either greater total revenues or decreased unit costs. (3) The valuation of goodwill, is not a precise science, so that what is actually paid for purchased goodwill in practice is seldom arrived at by any theoretically sound calculation. Instead, in all cases it is a negotiated comprised amount agreed upon by the vendor and the purchaser. And in paying for purchased goodwill there is never any assurance that the purchaser will get the benefit of the goodwill he paid for or that he will not lose some or all of it after purchase.

The answer to the second question is that the documents referred to in the said Agreements, namely, the lists of all present and past clients of the practice, historical records, working papers, etc., are of value only if the purchaser keeps the client, except for some negligible value if some information might subsequently be requested by and given from these documents to the new accountant of a lost client on a fee basis. The chief and primary value of these documents by reason of this fact arises from their connection with the intangible asset, goodwill, and if any client is lost, to whom these documents relate, the purchased goodwill abates ratably. In such event, such documents have a negligible value as a tangible asset consisting of the worth of the paper on which the records are kept when sold as scrap paper, or the negligible amount that might be received in fees from the problematical referrals referred to above. In other words, the chief or primary value of these documents is extrinsic rather than intrinsic. For all practical purposes, and for the purposes of and in the meaning those words are employed in Clause 8 Schedule "B" of the Regulations to the *Income Tax Act* these said documents are not tangible assets.

It follows, therefore, from the answers to the above two questions, that the whole of the $16,600 referred to above, which was paid by the appellants in the acquisition of these two practices, was expended for the goodwill of them.

It is of interest to note, in connection with this matter, the opinions of two leading accountants, one a Canadian, and the other a citizen of the United States. The first opinion is contained in the Canadian Institute of Chartered Accountants publication, the Canadian Chartered Accountant[1], and is that of Mr. Clem L. King, F.C.A. The article is entitled "Valuation of an Accounting Practice". Certain excerpts from this article are as follows:

In this discussion, the goodwill of an accounting practice is taken to be the value of the "right of access" to the clientele of the practice under valuation. It is the present value of fees expected to be earned by the new owner or owners as a result of the purchase of the practice. "Value" is naturally taken to be the dollar amount agreed to be paid. No comment will be made as to the value of the furniture and equipment, leases, leasehold improvements, and accounts receivable since these can be dealt with separately from goodwill. If they are to be sold, relatively little problem arises in arriving at a mutually satisfactory valuation.

. . .

Goodwill valuations based on net profits usually fall between one and three times average annual net profits.

. . .

The valuation may be computed as a percentage of gross fees.

. . .

Amounts reputed to have been paid in Canada in the last number of years have ranged from under 75% of one year's gross fees to 125% of one year's gross fees paid in one amount or, in a few cases, over a period of years. In the United States, prices paid are reputed to have ranged from 45% to 200% of one year's gross fees. Since full information is not available as to the nature of the practices sold, the circumstances of the sale, and the manner of computing "gross fees", these price ranges can only be regarded as broad generalizations.

The valuation may be computed as a percentage of the gross fees expected to be earned by the purchaser over an agreed upon period of years in serving clients to be retained with the amount to be paid in annual instalments. In this method the annual instalments are reduced by the appropriate percentage of fees not so retained.

. . .

Depending upon the rates and nature of fees and the other pertinent circumstances, goodwill has been reputed to have been valued in Canada at from one to three times average annual net profits, or from 75% to 125% of one year's gross fees.

While the foregoing may be taken as guides in valuing good will, the circumstances of practices vary so widely that each valuation must be regarded as a separate problem. In each instance both purchaser and vendor must consider all circumstances and arrive at a mutually acceptable valuation.

The second opinion is contained in the American Institute of Certified Public Acountants Incorporated[2], Jour-

[1] November 1959 issue.

[2] October, 1965 issue.

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nal of Accountancy. It is entitled "The Purchase, Sale and Merger of Small Practices." The article is written by Mr. Richard C. Rea, C.P.A., managing partner of Rea & Associates, New Philadelphia, Ohio. Certain excerpts from this article are as follows:

> And now we come to the most important consideration: the value of the practice.
>
> . . .
>
> It is generally believed by small practitioners and small firms that their practice is worth one year's gross fees.
>
> Many practitioners have held out too long for one year's gross fees because they believed that is what a practice is worth.
>
> . . .
>
> "Gross fees" is just a good index of the size of a practice, and serves as a convenient basis for establishing the terms of the pay-out.
>
> I discovered that the price ranged from as low as 50 percent of one year's adjusted gross fees to a high of 150 percent.
>
> The length of time for the pay-out ranged from as short as three years to as long as ten years.
>
> In only a few cases was the pay-out fixed at a definite amount per year. Payment of interest on the unpaid balance was rare, and occurred usually where the price was for a fixed amount.
>
> Lump-sum payments were made only in unusual circumstances, generally where the practice was very small, the price was low, and the seller was extremely anxious to dispose of the practice.
>
> Down payments are usually nominal. In those cases where down payments were substantial, my correspondents stated that this was a mistake and they would not do it again. The large down payment, they said, plus the periodic payments for the first year and the additional capital required to finance work in process and receivables, came near to being an intolerable burden.

It is of interest also to note that in the subject cases on this hearing the appellants bought the so-called Long Sault practice for precisely the amount of the previous one year's gross billings of the vendors, namely $5,100, and that in the case of the so-called Trenton practice purchase they paid a little less than the previous one year's gross billings. In doing so, the appellants appear in reaching their decision as to the price they were prepared to pay for the purchased goodwill, to have considered the formula used by others in the accounting profession when purchasing practices, as a sound one, or at least one that results in executed purchases and sales of practices.

The appeals are therefore dismissed with costs.

QUEBEC ADMIRALTY DISTRICT

Montreal 1966 Nov. 25 Dec. 23

BETWEEN:

ROBIN HOOD FLOUR MILLS, LIMITED ..PLAINTIFF;

AND

N. M. PATERSON & SONS LIMITED ....DEFENDANT.

Shipping—Damage to cargo—Second engineer turning on wrong valve—Whether ship owner liable—Water Carriage of Goods Act, R.S.C. 1952, c. 291, Art. IV(2)(a)—Onus of proof.

In November 1962 defendant carried a cargo of wheat for plaintiff from Kingston to Montreal in its ship. Following discharge of part of the cargo in Montreal the ship's second engineer, at the time in charge of the engine-room, was instructed to put 20 to 25 inches of water in the ballast tanks of No. 2 hold to stabilize the vessel. The second engineer turned on the wrong valve with the result that the water entered No. 2 cargo hold and damaged wheat stored there to the value of $8,777. Defendant denied liability in reliance on Art. IV(2)(*a*) of the *Water Carriage of Goods Act* R.S.C. 1952, c. 291. At the trial it was established that the second engineer was engaged at the commencement of the voyage without any inquiry as to his previous experience or record or as to his familiarity with the type of machinery and piping in the ship, which were in some respects peculiar to that ship; and that there was no plan of the engine-room piping system on board.

Held, defendant had failed to establish, as it was required to do, that it had exercised due diligence to make the ship seaworthy for the voyage in that it did not take proper care before engaging the second engineer and did not provide a plan of the engine-room piping system, and it was therefore liable for the plaintiff's loss.

The Makedonia [1962] 1 Ll. L.R. 316 applied.

ACTION for damages.

William Tetley and *Bruce Cleven* for plaintiff.

Trevor H. Bishop for defendant.

SMITH D.J.A.:—The Court, having heard the evidence and the parties by their respective attorneys, having examined the proceedings and exhibits filed and deliberated:

By its action the plaintiff claims the sum of $10,119.56 damages alleged to have been caused to the plaintiff by the failure of the defendant to safely carry, care for and discharge a shipment of 71,614 bushels of grain which the defendant contracted to transport in the vessel M.V. *Farrandoc* from Kingston, Ontario to Montreal, Quebec in accordance with the terms of a Bill of Lading dated November 26th, 1962.

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It is alleged that upon the arrival of the said vessel at Montreal on or about November 28th the said shipment was found to be short and damaged and that as a direct result of the said damage the plaintiff has sustained a loss totalling the sum of $10,119.56.

By its Statement of Defense the defendant alleges that the said Bill of Lading speaks for itself; admits that some grain was wet and damaged on arrival at Montreal, and that the defendant was the owner of the M.V. *Farrandoc*. Otherwise the allegations of the plaintiff's Statement of Claim are denied and, under reserve of the foregoing, the defendant alleges that the M.V. *Farrandoc* received on board at Kingston on or about November 22nd a bulk cargo of 71,614 bushels, number 4 Manitoba Northern Wheat; that the *Farrandoc* left Kingston on or about November 26th, 1962 and proceeded to Montreal.

It is alleged that, while attempting to stabilize the vessel at the plaintiff's dock at Montreal, by filling number 2 bottom tank with ballast water, one of the ship's engineers opened the wrong valve in the engine-room with the results that water flowed into number 2 cargo hold. The defendant alleges that the grain was duly surveyed and found to be in part wet and since part of the shipment could not be unloaded at the plaintiff's dock, due to its condition, it was left on board and later discharged and sold for a net salvage amounting to $984.58.

The defendant, without admission of liability, alleges having previously offered the plaintiff, prior to the service of the action, the said sum of $984.58, in full and final settlement of its claim, and the defendant renews its said tender of $984.58 plus interest and costs, the whole without prejudice to its defense.

The defendant denies liability in respect of the plaintiff's claim and invokes all of the clauses, rights and immunities provided by the Canadian *Water Carriage of Goods Act*, the whole in accordance with the terms of the Bill of Lading, Exhibit P-1, and alleges that there is no lien de doit between the plaintiff and the defendant.

Prior to the commencement of the hearing, the parties, by consent, filed a document dated November 22nd, 1966 entitled AGREEMENT AS TO FACTS and another docu-

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ment dated November 24th, 1966, entitled ADMISSION TO FACTS by which documents the following facts are admitted.

AGREEMENT AS TO FACTS

1. That arrived sound market value of the wetted grain in question at Montreal on November 27, 1962 was $2 05¾ per bushel, for a total of $8,777 29, being 4,266 bushels at $2.05¾ (without taking into consideration the salvage recovered).
2. That the Robin Hood Flour Mills Limited is the proper plaintiff, and the person that suffered the loss in the present claim.
3. That the defendant is the proper defendant, the vessel owner and the carrier in the present claim.
4. That bill of lading, Exhibit P-1, being a copy of the original bill of lading in question, is identical to the original bill of lading which latter need not be produced in court.

ADMISSION TO FACTS

1. That the Second Engineer of the M.V. *Farrandoc* during the time material to this action was a Mr. R. Humble.
2. That during the time material to this action he held a Third Class Combined Engineer's Certificate No. C-421.

The facts, briefly stated, are as follows:

The M.V. *Farrandoc* sailed from Kingston on November 26th and arrived at the Robin Hood Dock, Montreal at 2045 hours November 27th, 1962. She commenced discharging cargo from number 2 hold at 2200 hours. On the following morning, November 28th, at 0700 hours the vessel resumed discharging cargo from number 2 hold but at approximately 0730 hours the presence of water on the forward tank-top number 2 hold was noted, and discharging from that hold was discontinued.

The proof shows that at 0710 hours the First Officer Gignac instructed the Wheelsman Harvey to order the engineers to put 20 to 25 inches of water in the double-bottom tank of number 2 hold. Harvey immediately conveyed these instructions to Second Engineer Humble who, at the time, was in charge of the engine-room. After waiting approximately three minutes Harvey sounded number 2 bottom-tanks to verify that water had entered them but found that they were still dry. He reported this to the Second Engineer and understood that the matter was being attended to. However, about five minutes later when Harvey again sounded the said tanks he found them to be still dry and immediately reported this to the Second Engineer who apparently went to check the situation.

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The explanation for the presence of water in number 2 hold and its absence in the said ballast tanks is that the Second Engineer Humble turned the wrong valve with the result that water, instead of entering the ballast-tanks, went into the coffer-dam located between the engine-room and number 2 hold and from the coffer-dam gained entry to number 2 hold through an open drain.

The defense relied upon is that which is afforded by Article IV, paragraph 2(*a*) of the *Water Carriage of Goods Act*, R.S.C. 1952, c. 291, which provides that:

> 2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,
>
> (*a*) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship.

It is the defendant's submission that the damage complained of was caused or brought about by an error in the management of the ship and therefore is something for which the defendant cannot be held responsible.

It is well established however, that before such a defense becomes available to the shipowners the latter must have established either that the vessel was seaworthy or that it (the shipowners) exercised due diligence to make the ship seaworthy for the voyage and to secure that the ship was properly manned, equipped and supplied. Unless therefore, the defendant has discharged this burden of proof the immunity provided by the said article of the *Water Carriage of Goods Act* does not apply in the defendant's favour.

The question therefore which the Court is required to determine is that of whether the defendant was successful in proving it had exercised due diligence to make a ship seaworthy and to secure that the ship was properly manned, equipped and supplied for the voyage.

On behalf of the plaintiff it was argued that this burden was not discharged and that the vessel was in fact unseaworthy and was not properly manned, equipped and supplied for the said voyage particularly in that (a) it was not established that the Second Engineer Humble was competent or that proper, or any measures, had been taken before engaging him to inquire into his competence, reliability or familiarity with the vessel's engine-room piping and machinery; and (b) no plan of the engine-room piping was

on board the vessel, and no adequate precautions were taken to lock the valve or prevent the entry of water into number 2 hold by way of the coffer-dam or to otherwise guard against an error such as that committed by Second Engineer Humble.

This officer was engaged on the same day the *Farrandoc* sailed from Kingston. Apparently he was engaged solely on the basis of the fact that he held a Second Engineer's certificate. There is no evidence to show that any inquiry was made as to this man's previous experience or record, nor does it appear that he was questioned as to whether or not he was familar with the type of engine-room machinery and piping on board the *Farrandoc*, which it appears were in some respects peculiar to that ship or at least not generally met with.

In the case of the *Makedonia* [1962] 1 Ll. L.R. page 316 it was held that the shipowners had failed to prove that they had exercised due diligence to make the ship seaworthy in that (*inter alia*) they had failed to prove that they had exercised proper care in the appointment of the ship's engineers who were inefficient at the commencement of the voyage, and that shipowners had failed to exercise due diligence to properly man their vessel and that said vessel was unseaworthy in that she was improperly manned and in that the owners had failed to provide a plan of the ballast and fuel system.

Hewson J. at page 337 wrote:

> In my view the least that should be done is to insure a careful inspection of the seaman's-book, to study the history of the applicant and to question him about it and the reasons why he left his former ships...
>
> Such important appointment to such responsible positions called for a proper interviewing and proper inquiry. I am left completely unsatisfied that the necessary steps were taken and the necessary inquiries made to discover the record and competence of the Chief Engineer. If the Chief Engineer and the Second Engineer are found to be inefficient in the sense in which I have used the word it is for the employers to show that they have exercised proper care in their appointment. I am left far from satisfied that they did so.

In the present case the Court is of like opinion concerning the engagement of Second Engineer Humble.

There is moreover the fact that there was no plan of the engine-room piping system on board the *Farrandoc*. Had such a plan been available it is reasonable to suppose that

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Humble would have availed himself of it with the result that he would not have made the error of opening the wrong valve.

At page 338 of the *Makedonia* case the learned Judge wrote:

> No satisfactory evidence has in any event been produced to me whether there was this or any other plan of the piping system placed on board the ship. The defendants have not satisfied me that there was a proper and understandable plan on board, nor again have they satisfied me that, if there had been one, it would have made no difference.

In the present case the Court is of the opinion that there was failure on the part of the defendant to exercise due diligence to make the *Farrandoc* seaworthy for the said voyage in that it did not take the care it should have taken to assure itself of the experience, competence and reliability of the Second Engineer before engaging him and did not equip the vessel with, and make available to ship's personnel, a plan of the engine-room piping system.

The Court finds moreover, that the unseaworthiness of the *Farrandoc* in the respects above-mentioned was a cause of the damage complained of.

The defendant, having failed to establish that it exercised due diligence to make the ship seaworthy for the voyage and to secure that the ship was properly manned, equipped and supplied, must be held responsible for the consequent loss and damage sustained by the plaintiff.

The proof shows that of the total shipment of 71,614 bushels of grain, 67,348 bushels were accepted as sound by the plaintiff. It is admitted that the arrived sound value at Montreal of 4,266 bushels on November 27th, 1960 was $2.05\frac{3}{4}$ per bushel, of a total of $8,777.29, which is the amount of the plaintiff's loss.

CONSIDERING that the plaintiff has established the essential allegations of its action and made good its claim to the extent of $8,777.29;

CONSIDERING that the defendant's offer and tender are insufficient and unfounded;

DOTH DECLARE said offer and tender to be insufficient and DOTH MAINTAIN the plaintiff's action and DOTH CONDEMN the defendant to pay to the plaintiff the said sum of $8,777.29 with interest and costs.

BETWEEN:

BRONZE MEMORIALS LIMITED .....APPELLANT;

AND

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

1967
Vancouver
Jan. 17-19
Feb. 2

Income—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 14(2), 85B(1) and 139(1)(e)—Whether capital gain or income—Purchase of land from affiliated cemetery company—Profit on resale—Alleged oral term in favour of appellant—Conduct of parties inconsistent with the alleged terms—Appeal dismissed.

Having the exclusive right to supply statuary to a group of companies with which it was affiliated, the appellant company was carrying on business connected with cemeteries. By purchasing some land in 1949, the appellant company then sold said land at cost to an affiliated company for use as a cemetery. Owing to grievances raised by the Municipality about such cemetery in the territory of which such use of land was perpetrated, both parties arrived at a mutual agreement as follows: the appellant bought back that part of land at the original sale price because that land could not be used as a cemetery Then in 1958, the appellant resold that land to a subdivision syndicate and made a substantial profit. The profit was taxable as income from an adventure in the nature of trade which was the decision ruled by the Tax Appeal Board, which case was referred to. Hence, this appeal was launched before the Exchequer Court.

The main contention, in supporting this ground, was an alleged oral term, which made the sale to the affiliated company, subject to reconveyance to the appellant of any land that could not be used as a cemetery. The appellant also argued that even if the profit was taxable as income, only but the excess of the proceeds over the fair market value of the land should have been subject to tax.

Held, That the appeal be dismissed on condition that the profit be re-assessed in conformity with section 85B.

2. That within the Court's view, there was no evidence of any oral term which would create a vested equitable interest in the appellant company with the option which could be exercised conditionally if the land in question could not be used as a cemetery.

3. That there was no memorandum in writing to comply with the *Statute of Frauds.*

4. That the lack of any action by the appellant to delete an absolute assignment of the land by the affiliated company to the municipality indicated that there was no such oral term.

5. That nothing was done by the appellant when the land which it eventually sold to the developer was first declared by the affiliated company as "now on the market for open bidding".

6. That the land sold by the appellant, in the Court's view, was not an investment, forasmuch as the land was vacant and yielded no revenue.

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7. That besides, because the appellant did not qualify as a *bona fide* developer and could not hold the land, with the opinion of the Court, that section 14(2) of the Act required in mandatory language that the property be valued at the lower cost.

APPEAL from a decision of the Tax Appeal Board.

W. A. MacDonald for appellant.

M. A. Mogan and *S. Hynes* for respondent.

SHEPPARD D.J.:—This appeal is by Bronze Memorials Limited from the decision of the Tax Appeal Board of the 13th November, 1963, dismissing the appeal by this appellant from a re-assessment by the Minister for the taxation year 1958 whereby he added $138,150.00 as taxable income, being the profit received from the sale of Parcel A in Block 3, District Lot 73, Plan 3060 NWD.

This appellant contends that the alleged increase of taxable income was capital gain or, alternatively, was negligible in amount. The facts are as follows:

Bronze Memorials Limited (called Bronze Co.) is one of a group of four inter-related companies incorporated in British Columbia. Those companies and their objects are:

(1) Forest Lawn Cemetery Company (called Cemetery Co.) incorporated in 1935 with the objects of owning and operating a cemetery, and has owned and operated the Forest Lawn Cemetery in the Corporation of the District of Burnaby (hereinafter called Burnaby), B.C.

(2) Forest Lawn Development Limited (called Development Co.) has the objects of maintaining, operating and developing the cemetery.

(3) Bronze Co., the appellant, deals in memorial tablets and statuary.

(4) Forest Lawn Florists and Nurseries Limited (called Nurseries Co.) supplies flowers used in the cemetery.

The first three are here of particular importance. The Cemetery Co. by statute was prohibited from distributing dividends or profits to its shareholders other than interest on the money subscribed (Section 22, *Cemetery Companies Act*, R.S.B.C. 1948, Cap. 59). The majority of shares in the Cemetery Co. and therefore the control were throughout in the Development Co. The shareholders of the Development Co. and Bronze Co. were the same and therefor those

shareholders elected the directors of all three companies. The operation of the cemetery has been carried on as follows.

By agreement between the Cemetery Co. and the Development Co. the Cemetery Co. was to sell graves and to pay Development Co. 75% of the receipts of the Cemetery Co. for the Development Co. performing certain services, such as maintaining the cemetery and certain other services. By order of the Public Utilities Commission, according to Arnold, the President of Bronze Co., 25% of the receipts of the Cemetery Co. was payable to a trust fund to secure the maintenance of the cemetery in perpetuity.

By agreement of the 27th February, 1939 (Ex. 1) between the Cemetery Co., Development Co. and Bronze Co., the Bronze Co. was given the exclusive right to supply memorials, grave markers, tablets and statuary used in the cemetery, and was to pay the Cemetery Co. and Development Co. for certain services in installing these articles. An estimate of the proposed revenue to be derived from the operation of Parcel A as a cemetery (Ex. 16) indicates that the profits from the proposed operation were intended to go to the Development Co. and to the Bronze Co: there they could be distributed as dividends to the shareholders.

The issue arises out of the sale of 29.36 acres, being Parcel A, Block 3, District Lot 73, Group 1, Plan 3060 NWD (Ex. 6) by Bronze Co. to Wilfrid J. Sung *et al* (Ex. 7). On the 26th October, 1946, Burnaby agreed to sell to Universal Investments Ltd., Block 3, District Lot 73, Group 1, Plan 3060 NWD, consisting of approximately 40 acres, under deferred payments (Recital 1, Ex. 2). On the 20th December, 1946, Universal Investments Ltd. assigned this agreement to the Nurseries Co. (Recital 2, Exhibit 4). On the 1st June, 1949, the Nurseries Co. assigned to Bronze Co. at cost to the Nurseries Co., and on the 13th August, 1951, Bronze Co., assigned to the Cemetery Co. at the original cost to Bronze Co. by the Cemetery Co. paying to Bronze Co. its outlays and assuming the unmatured instalments. The Cemetery Co. obtained from the Minister of Health and Welfare a permit to operate a cemetery on Block 3, but did not apply for or obtain the permission of the Municipality of Burnaby. Nevertheless the Cemetery Co. operated a cemetery on Block 3 by selling nine graves and certain other sites as "pre need".

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In 1952 Burnaby commenced an action against the Cemetery Co. for an injunction to prevent that company using Block 3 for a cemetery, and on the 22nd April, 1953, recovered in the Supreme Court of British Columbia before Coady J. an injunction restraining the use of Block 3 as a cemetery (Ex. 8 & 9), which judgment was affirmed on the 27th September, 1954, by the Court of Appeal (Ex. 10), and on the 4th October, 1955, by the Supreme Court of Canada (Ex. 11 & 12). Thereupon the Cemetery Co. entered into negotiations with Burnaby for the permitted use of Block 3 or some part as a cemetery, and eventually the parties, that is Burnaby and the Cemetery Co., agreed (Ex. 13, Letter A to G):

(*a*) That the Cemetery Co. would convey Parcel A in Block 3 (Ex. 6) to a *bona fide* developer (Ex. 13);

(*b*) That the Cemetery Co. would convey to Burnaby a strip 66 feet wide for Woodsworth Street (Ex. 13 C), and

(*c*) That Burnaby would give permission to the Cemetery Co. to use Parcel B in Block 3 and the adjoining Parcel B, Plan 12495 (Ex. 6) as a cemetery. By minutes of 7th January, 1957 (Ex. 23), of 21st January, 1957 (Ex. 22), of 4th November, 1957 (Ex. 14), of 7th November, 1957 (Ex. 15), the Cemetery Co. agreed to sell to Bronze Co. at cost to the Cemetery Co. (Ex. 14) the land not permitted to be used for a cemetery.

On 11th December, 1957, the directors of Bronze Co. resolved to have Parcel A appraised by three appraisers and to "accept not less than $4,000.00 per acre" (Ex. 18).

On 17th December, 1957, the Cemetery Co. conveyed to Bronze Co. Parcel A in Block 3 for the sum of $30,950.00 (Ex. 5); being the cost of Parcel A to the Cemetery Co. (Ex. 14). The Bronze Co. had Parcel A valued and listed with real estate agents and on the 7th October, 1958, Bronze Co. agreed to sell to Wilfrid J. Sung *et al* said Parcel A for $176,000.00 on deferred payments (Ex. 7) and would thereby receive the sum of $138,150.00 as profit, which the Minister re-assessed as taxable income for the taxation year 1958.

On Notice of Objection that re-assessment was affirmed and an appeal to the Tax Appeal Board was dismissed.

Bronze Co. has now appealed to this Court.

Counsel for Bronze Co. has contended:

I. That the monies received on resale to Sung *et al* are capital and not income;

II. Alternatively, that the taxable income is only the excess of the purchase price payable by Sung *et al* over the fair market value, therefore the taxable income is negligible.

I. The appellant contends that the monies realized from the sale were the receipt of a capital sum and therefore not subject to income tax for the following reasons:

(1) That the shareholders and directors of the companies are substantially the same;

(2) That the agreement of the 27th February, 1939 (Ex. 1) gave to Bronze Co. a monopoly of supplying tablets to the cemetery. Without that monopoly its business would cease. Therefore Parcel A, which was purchased by Bronze Co. and resold to the Cemetery Co. at cost, was intended by the Bronze Co. to extend the life of the Cemetery Co. and thereby extend the duration and sales of Bronze Co.;

(3) That the sale to the Cemetery Co. was subject to an oral term express or implied that if Block 3, or presumably a part thereof, were not to be used as a cemetery, the block or part would be reconveyed to the Bronze Co. at cost to the Cemetery Co., therefore the sale to Bronze Co. in 1957 was pursuant to this term.

The appellant therefore contends that Block 3 and Parcel A therein were throughout capital assets of the Cemetery Co. and of Bronze Co.

That contention should not succeed. There was no such term. Such a term would be of the type found in *London and South Western Railway Company v. Gomm*[1], and would create a vested equitable interest in the Bronze Co. with the option to be exercised conditionally upon Block 3 or a portion not being used as a cemetery. The interest of Bronze Co. was therefore an interest in land and there was no memorandum in writing of that oral term to satisfy the *Statute of Frauds*. The Cemetery Co. did not throughout recognize the term as an enforceable agreement; but on the

[1] (1882) 20 Ch. D. 562.

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contrary, the Cemetery Co. agreed with Burnaby to convey Parcel A to a *bona fide* developer (Ex. 13 E) and informed Burnaby by letter of 1st December, 1956, that "this property is now on the market for open bidding" (Ex. 13 F).

Further, the oral term could only operate as a condition subsequent in defeasance of the assignment from the Bronze Co. to the Cemetery Co., which is inconsistent with the purported absolute sale contained in the assignment (Ex. 5). The Bronze Co. has made out no case for rectification as against the absolute terms of the assignment.

Again, the minute of the Cemetery Co. of the 13th August, 1951 (Ex. 19) and the minute of the Bronze Co. of the 13th August, 1951 (Ex. 20) authorizing the purchase of Block 3 does not contemplate any such term to Bronze Co.

Also, the conduct of the parties is inconsistent with there having been any such term. After the judgment of Coady J., entered the 22nd April, 1952 (Ex. 8), and affirmed by the Court of Appeal on the 27th September, 1954 (Ex. 10), and by the Supreme Court of Canada on the 4th October, 1955 (Ex. 11), the Cemetery Co. was enjoined from using Block 3 as a cemetery. Nevertheless, Bronze Co. made no demand whatsoever under such oral term, and on the other hand, the Cemetery Co. proposed to deal with Block 3 as absolute owner. By letter of the 29th October, 1956, the Cemetery Co. to Burnaby (Ex. 13 A), the Cemetery Co. offered to grant to the Municipality a strip of Block 3, 66 feet in width, for use as a street. By letter of 9th November, 1956 (Ex. 13 B), Burnaby further proposed that a suitable arrangement be entered into respecting the development of Parcel A (being that portion of Block 3 lying north of Woodsworth Street), and by letter of the 17th November, 1956 (Ex. 13 C) the Cemetery Co. acknowledged receipt of the letter of the 9th November without protest or reference to the alleged oral term, and by letter of 22nd November, 1956 (Ex. 13 E) Burnaby wrote the Cemetery Co. that the Municipality insisted that the Cemetery Co. agree to dispose of Parcel A to "a *bona fide* developer for any use permitted by municipal by-laws". Such oral term, had it existed, would have been raised by the Cemetery Co. as requiring the Cemetery Co. to convey Parcel A to the Bronze Co.

On the contrary, by letter of the 1st December, 1956, the Cemetery Co. stated: "This property is now on the market

for open bidding". That letter is quite inconsistent with any oral term in favour of the Bronze Co. By letter of the 27th November, 1956 (Ex. 13 G), Burnaby to the Cemetery Co., the Municipality sets out the terms of settlement including the conveyance to Burnaby of the road allowance for the extension of Woodsworth Street and that the Cemetery Co. dispose of Parcel A.

The negotiations for the sale by the Cemetery Co. to the Bronze Co. were inconsistent with any outstanding oral term in favour of the Bronze Co. By minute of the 7th January, 1957 (Ex. 23), Bronze Co. authorized its general manager to negotiate with the Cemetery Co. for the purchase. By minute of the 21st January, 1957 (Ex. 22) G. A. Arnold reported to the directors of the Cemetery Co. that he was awaiting the approval of "the Corporation of Burnaby on the 16 acres to be cemeterized bordering on our present property (that would be Parcel B in Ex. 6). He suggested that the balance of Block 3, D. L. 73 not cemeterized be sold to Bronze Memorials Limited". It appears therefore that the requirements of Burnaby came first, and subject thereto an interest in Bronze Co. would depend upon such negotiations for sale. That is inconsistent with such oral term.

By minute of the 4th November, 1957 (Ex. 14), the Bronze Co. offered to purchase Parcel A at $30,950.00, that is its proportionate part of the original price to the Cemetery Co. at $40,000.00 for Block 3, and by minute of the 7th November, 1957 (Ex. 15) the Cemetery Co. purported to accept the offer of the Bronze Co. by setting forth in the minute a recital stating that Bronze Co. "would repurchase the uncemeterized portion". This is the first occasion on which a term of purchase has been referred to, which term is inconsistent with the prior dealings by the Cemetery Co. The sale was completed by deed of the 17th December, 1957 (Ex. 5), for $30,950.00, and the deed contains no reference to the recital contained in the minutes (Ex. 15).

The sale price was taxable income in that the purchase was with the intention of Bronze Co. to resell. The Cemetery Co. had agreed that the lot would be sold to a *bona fide* developer (Ex. 13 E), and further, under letter of the 1st December, 1956, the Cemetery Co. stated: "This property is now on the market for open bidding." At the trial

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G. A. Arnold, President of Bronze Co., testified that the Bronze Co. would not qualify as a *bona fide* developer, and therefore could not hold the property. Hence, as Bronze Co. could not hold the parcel its intention in buying must have been to resell.

That intention in buying to resell is borne out by the minute of 11th December, 1957 (Ex. 18), whereby the directors of Bronze Co. resolved "that the management be authorized to proceed and have the company property in Lot A, Block 3, Lot 73, Group 1, comprising approximately 29.36 acres appraised by three independent appraisers and to accept not less than $4,000 per acre", and Bronze Co. resold on the 7th August, 1958, to Sung *et al* (Ex. 7) at the price of $176,000.00 payable on deferred payments, which contained the profit assessed by the Minister. In considering the reason for the sale to Bronze Co. it is not to be overlooked that the Cemetery Co. could not distribute the profit as dividends to its shareholders (Section 22, *Cemetery Companies Act*).

As Bronze Co. purchased Parcel A for the purpose of reselling and at a profit, that profit is taxable income under *Income Tax Act,* Sections 3, 4, 139(1)(*e*).

In the *Minister of National Revenue v. Taylor*[1], Thorson P. said at p. 25:

> In my opinion, it may now be taken as established that the fact that a person has entered into only one transaction of the kind under consideration has no bearing on the question whether it was an adventure in the nature of trade. It is the nature of the transaction, not its singleness or isolation, that is to be determined.

and at p. 30:

> The respondent could not do anything with the lead except sell it and he bought it solely for the purpose of selling it to the Company In my judgment, the words of Lord Carmont in the *Rheinhold* case (*supra*) that "the commodity itself stamps the transaction as a trading transaction" apply with singular force to the respondent's transaction.

and at p. 31:

> I am, therefore, of the opinion that the respondent's transaction was an adventure in the nature of trade within the meaning of section 127(1)(*e*) of *The Income Tax Act* of 1948, and that his profit from it was profit from a business within the meaning of section 3 of the Act and that the Minister was right in including it in the assessment.

[1] [1956-1960] Ex. C.R. 3.

It follows that as Bronze Co. bought Parcel A solely for the purpose of selling, that is a "venture in the nature of trade" within Section 139(1)(*e*), and therefore taxable income within Sections 3 and 4.

Two judgments cited are distinguishable. In *Miller v. Minister of National Revenue*[1], the farm was acquired for use and its increase in value was due to the increase in population. Therefore it was held that the sale at increased value was the realization of a capital asset and it was not taxable income. In *Minister of National Revenue v. Valclair Investment Co. Ltd.*[2], the farm was held to be an investment as bought for revenue purposes, and Kearney J., in referring to *Commissioners of Inland Revenue v. Reinhold*[3] said at p. 473:

> ". . . Lord Dunedin says, in the case I have already cited, at page 423:
>
> '...The fact that a man does not mean to hold an investment may be an item of evidence tending to show whether he is carrying on a trade or concern in the nature of trade in respect of his investments, but *per se* it leads to no conclusion whatever (15 T.C. 360)'
>
> * * *
>
> I draw attention to Lord Dunedin's language being used with reference to "and investment", meaning thereby, as I think, the purchase of something normally used to produce an annual return such as lands, houses, or stocks and shares. The language would, of course, cover the purchase of houses as in the present case, but would not cover a situation in which a purchaser bought a commodity which from its nature can give no annual return. . ."

and at p. 476:

> I think that those cases which concern the sale of commodities, such as toilet paper or the like, which are consumed by use and by their nature not susceptible of producing income are distinguishable from and inapplicable in the instant case, where the farm was not only susceptible of producing income but actually did so at all material times.

and at p. 477:

> Indeed the passive role played by the respondent was the antithesis of what one would expect from a trader under like circumstances.

The purchase of Parcel A by Bronze Co. cannot be an investment because:

(*a*) The land was vacant and produced no revenue.

[1] (1964) 18 D.T.C. 5084. [2] [1964] Ex. C.R. 466.
[3] 34 T.C. 389.

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Sheppard D.J.

(*b*) According to the evidence of Arnold, Bronze Co. did not qualify to hold that parcel under the undertaking given by the Cemetery Co. to Burnaby.

In neither the *Miller* nor in the *Valclair* case was the land purchased by the taxpayer for resale. In the case at Bar the land was purchased by Bronze Co. for resale as indicated by the minutes of 11th December, 1957 (Ex. 18).

II. The appellant has also contended that the taxable income is negligible for the reason that Bronze Co. has the option of having the land valued at its fair value, and upon the evidence of Squarey, a witness of Bronze Co., the fair value at the time of purchase is fixed by the subsequent sale to Sung *et al.* Therefore Bronze Co. contends that as the fair market value equalled the resale price there was no taxable income.

That contention is precluded by Section 14(2) which reads as follows:

> (2) For the purpose of computing income, the property described in an inventory shall be valued at its cost to the taxpayer or its fair market value, whichever is lower, or in such other manner as may be permitted by regulation.

On the facts of this case Regulation 1800 (then in force) could not apply to the value of the single Parcel A here in question, and Section 14(2) required in mandatory language that the property "shall be valued at its cost to the taxpayer" as the "lower" and not at the fair market value. It is not necessary to consider whether this contention is open to the taxpayer under Section 14(1) as then in force and repealed by 1958, Cap. 32, Section 6(1).

In conclusion, the parties have agreed that the Minister may reassess in accordance with Section 85B by reason that the purchase price was payable in deferred instalments and it will be referred back to the Minister to be reassessed accordingly, but subject there to the appeal is dismissed.

1966
Montreal
May 3, 4
May 6

BETWEEN:

METROPOLITAN MOTELS CORPORATION ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .. .. RESPONDENT.

Income tax—Adventure in nature of trade—Purchase of land by company as site for motel—Failure to obtain necessary financing—Sale of property at profit—Intention of company—Income Tax Act, s. 139(1)(e).

In 1958 appellant company, which was controlled by R, acquired from another company controlled by R a parcel of land which the latter company had bought in 1957. The property adjoined a shopping centre in Dorval, Quebec, and it was R's intention that appellant company should construct a motel on the site and rent it to someone who could operate it. In order to finance the transaction appellant company, which had a paid-up capital of only $4,000, required to borrow some $600,000 and approached several lending institutions for that purpose. Despite diligent efforts, however, no lending institution would advance the money unless appellant company could arrange to rent the motel when constructed to an experienced motel operator. Appellant was unable to meet this requirement and therefore decided to sell the property, which it did in 1959 at a profit of $97,000. The Court found that R acquired the property with the intention of building a motel if possible but otherwise to turn the property to account at a profit.

Held, appellant company was chargeable to tax on its profit as being income from a business within the meaning of s. 139(1)(*e*) of the *Income Tax Act*.

Appellant company was incorporated in Quebec in 1958, its stated purposes including carrying on a motel business. The company was controlled by Isaac Rawas, who came to Canada from Italy in 1953 and engaged in speculative home building through Meteor Homes Limited, a company also controlled by him. In 1957 Meteor Homes Limited endeavoured to buy some vacant land adjoining a shopping centre in Dorval with the intention of setting up a revenue-income complex. There was initial disagreement as to the terms of the proposed purchase but after further negotiations and the preparation of several plans Meteor Homes Limited purchased the property on July 26th 1958 for $60,080.63. It sold two small parcels of land for use as gasoline service stations and on October 24th 1958 conveyed the remainder to appellant company for $60,080.63, of which $5,000 was paid in cash, the balance being secured

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by a mortgage. Appellant company's paid-up capital was only $4,000 and in order to construct a motel it required $600,000. With this in view it approached several lending institutions but was unable to meet their requirements for a loan, *viz* a lease or management contract with a chain of hotel or motel operators or a management contract with a first class hotel man, and appellant company accordingly decided to sell the property. The property was sold to Colonial Motels Corporation in June 1959 for $157,062.40. Appellant company was assessed to income tax on the profit made.

APPEAL from decision of Tax Appeal Board.

H. Heward Stikeman, Q.C. for appellant.

Paul M. Ollivier, Q.C. and *Paul Boivin, Q.C.* for respondent.

JACKETT P.:—This is an appeal from a decision of the Tax Appeal Board dismissing appeals from assessments of the appellant under the *Income Tax Act* for the 1959 and 1960 taxation years.

The sole question raised by the appeal is whether a profit made by the appellant on the sale of a parcel of land was properly included by the Minister in the computation of the appellant's income under the Act for the year in which the sale was made as being income from a business within the extended meaning given to that word by paragraph (*e*) of subsection (1) of section 139 of the Act.

The facts of the matter as established by the evidence given in the Tax Appeal Board are fully set out in the reasons for the judgment of the Board. The facts established by the evidence given in this Court are, for all practical purposes, substantially the same as the facts as set out in the Board's reasons for judgment. There are minor differences, to which counsel for the appellant has, very helpfully, drawn my attention.[1] These differences do not, in my view, affect the matter in any material way.

[1] There is only one finding of fact made by the Board of any possible significance for which there is no basis in the evidence before this Court to which I should refer. There is no evidence before me to suggest that the architectural studies and other preliminary work carried on by Mr. Rawas and the appellant were "promotional steps taken to attract a prospective purchaser".

Counsel for the appellant did not suggest that they did. I therefore adopt the Board's narrative of the events without repeating it. I should also say that I am, generally speaking, in agreement with the Board's approach to the determination of the issue raised by the appellant. I have, after giving very careful consideration to the question upon which, in my view, the appeal turns, reached the same conclusion as that reached by the Board. I must, however, state my reason for reaching that conclusion in my own words.

It is common ground that, for purposes of this appeal, the appellant's intentions are those that Isaac Rawas, by whom the appellant was managed and controlled, had for it. It is also common ground that nothing in this appeal turns on the fact that the property in question was originally acquired by Meteor Homes Limited, another company managed and controlled by Mr. Rawas. The appeal must be decided as though the property had been acquired by the appellant when it was acquired by Meteor Homes Limited.

The situation is then, in brief, that, in 1957 the appellant acquired for a price of $60,080.63 a property that was regarded as a good site for a motel, and, in 1959, after unsuccessfully attempting to make the arrangements necessary to build on the site a motel from which it could get a rental income, it resold the property for $157,062.40, thus realizing a profit of $96,981.77.

It is clear on the evidence given before me, and I so find, that, at the time of the acquisition of the property, the appellant had a firm intention, if it could make the necessary arrangements, to build a motel and rent it to some one who could operate it. It also knew at that time, however, that, before it could carry out that intention, it had to formulate a project for a motel in which it could interest an experienced operator of motels to such an extent that it would commit itself, in advance, to rent the motel to be built and that such operator of motels and its commitment had to be sufficiently acceptable to a lending institution for that institution to be prepared to lend an amount in the neighbourhood of $600,000 on first mortgage to finance, in part, the construction of the motel. The appellant tried to get such a commitment from an operator of motels and

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failed. The appellant did not, therefore, build a motel but, instead, was able to negotiate the very profitable sale to which I have already referred.

If the property in question was acquired for the exclusive purpose of building a motel—if that was the sole motivating reason for its acquisition—the profit is a profit from an affair of capital and is not part of the appellant's income. If, on the other hand, the appellant was also motivated in deciding to buy the property by the possibility that, if it could not build a motel, it could in any event sell it at a profit, then a sale made in the course of realizing that possibility is, in my view, the consummation of a venture in the nature of trade and the resulting profit is taxable.

I observed Mr. Rawas as he gave evidence with great care. He told the Court that the land values in the area in question were, at the time the property was acquired, going up and were going to continue to go up. He said that if this project were not a good buy he would not have bought it. He said that, had he been asked at that time what he would do if the motel proposal were frustrated, he would have said, "We'll do something else". He is a very careful and able business man. He is not some inexperienced or reckless person who would embark on a major transaction without considering all the possibilities. Without in any way doubting his honesty or sincerity, I cannot escape the inference that, when he acquired this property, it was with the intention of building a motel, if possible, and, if that were not possible, of otherwise turning the property to account at a profit.

The appeal is dismissed with costs.

Ottawa 1966

June 1, 2

June 2

BETWEEN:

PHILCO CORPORATION ....PLAINTIFF;

AND

R.C.A. VICTOR CORPORATION .....DEFENDANT.

Patents—Conflict proceedings—Decision of Commissioner—Appeal to Exchequer Court—Time fixed by Commissioner for commencing proceedings—Whether power to extend—Patent Act, s. 45(8)—Evidence of usage—Inadmissibility of—Estoppel—Interpretation Act, s. 31(1)(e)—Patent Rule 126.

On April 9th 1965 the Commissioner of Patents made a decision under s 45 of the *Patent Act* on a conflict of patent applications and fixed a period of 3 months for commencing proceedings in the Exchequer Court by way of appeal therefrom. On July 9th he extended the time to October 9th. On October 15th he again extended the time to January 9th. Plaintiff commenced proceedings in the Exchequer Court on January 4th.

Held, on a motion by defendant to dismiss the proceedings for want of jurisdiction, the Commissioner has no power under s. 45(8) to extend the time fixed by him thereunder.

Evidence that Commissioners of Patents have for years construed s. 45(8) as authorizing extensions of time is not admissible for the interpretation of s. 45(8).

Section 31(1)(*e*) of the *Interpretation Act*, that a power conferred by statute may be exercised from time to time, does not authorize an extension of time once fixed by the Commissioner under s. 45(8).

The authority given the Commissioner by Patent Rule 126 to extend times fixed by him does not explicitly authorize extensions of time, fixed pursuant to the provisions of the Act and would be *ultra vires* if it did.

There was no evidence of any misrepresentation by defendant upon which to claim an estoppel and in any event there can be no estoppel against applying a statute.

Even if the Commissioner had power to extend a time fixed by him under s. 45(8) his second extension was out of time.

Institute of Patent Agents v. Lockwood [1894] A.C. 347; *Re Jaffe, Minister of Health v. The King* [1931] A.C. 494; *Parmenter v. The Queen* [1956-60] Ex. C.R. 66, referred to.

MOTION.

David Watson for plaintiff.

Russel S. Smart, Q.C. for defendant.

JACKETT P.:—During the past two days there has been argued before me a motion by the defendant

(*a*) for an order striking out the Statement of Claim on the ground that the Court does not have jurisdiction to entertain an action under section 45 of the *Patent Act* commenced after the expiration of the period fixed by the Commissioner of Patents under subsection (8) of that section,

(*b*) in the alternative, for an order striking out paragraphs 9 and 10 of the Statement of Claim and paragraphs 2 and 3 of the Prayer for Relief on the ground that the

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> Court does not have jurisdiction in an action under section 45 to determine the issues raised by such paragraphs.

The issues raised by this motion are each of such importance that it is not unlikely that there will be an appeal. As there is a public interest in having any proceeding under section 45 determined with all reasonable speed,[1] I propose to make an order dealing with both branches of the motion (although if I am right in the conclusion that I have reached on the first branch, it would be unnecessary to decide the second branch) in the hope that it will eliminate the possibility of the extra delay arising from a second appeal following the first.

I propose at the present time to state my reasons with reference to the question as to whether the Court has jurisdiction after the time fixed by the Commissioner has expired.

Section 45 provides a procedure to resolve the problem that arises when two or more applications for patents are found in the Patent Office either claiming or disclosing the same invention. The first seven subsections outline the procedure to be applied by the Commissioner of Patents resulting, if the conflict is not otherwise resolved, in each applicant filing an affidavit containing specified information on the basis of which the Commissioner decides which of the applicants is the prior inventor "to whom he will allow the claims in conflict". The final stage contemplated by section 45 is a "proceedings" in this Court, which may be commenced by an unsuccessful applicant to have the decision of the Commissioner reviewed. Such proceedings are provided for by subsection (8) of section 45 which provides, in part, that the claims in conflict shall be rejected or allowed in accordance with the Commissioner's decision

> "unless within a time to be fixed by the Commissioner and notified to the several applicants one of them commences proceedings in the Exchequer Court for the determination of their respective rights."

[1] Any delay in section 45 proceedings delays the ultimate grant of a patent and therefore postpones the time when the seventeen year term of the patent expires and thus, the time when the invention falls into the public domain.

In effect, subsection (8) provides for an appeal to this Court from the Commissioner's decision under subsection (7).

In this case, the sequence of events was

(*a*) On April 9, 1965 the Commissioner made his decision under subsection (7) and fixed a period of three months within which proceedings might be brought in this Court,

(*b*) On July 9, 1965, the Commissioner wrote to the plaintiff's solicitors purporting to extend the time so fixed to October 9, 1965;

(*c*) On October 7, 1965, the plaintiff's solicitors wrote to the Commissioner requesting that such period be further extended;

(*d*) On October 15, 1965 the Commissioner wrote to the plaintiff's solicitors purporting to further extend the period so fixed to January 9, 1966;

(*e*) On January 4, 1966, these proceedings were commenced.

The proceedings contemplated under subsection (8) of section 45 are, obviously, quite special. Ordinarily, while a patent application is pending, no person other than the applicant and his advisors and the Commissioner's staff have any knowledge of it. Proceedings concerning the validity of any decision taken by the Commissioner normally cannot be instituted until after an application has been granted or refused. The so-called "conflict" proceedings contemplated by subsection (8) of section 45 clearly exist only by virtue of the statute and to the extent that they fall within the statutory provisions.

Read literally, subsection (8) says that "The claims in conflict shall be rejected or allowed" in accordance with the Commissioner's decision unless "within a time to be fixed by the Commissioner" one of the applicants commences proceedings. Upon the expiration of the time fixed by the Commissioner without proceedings having been commenced in the Court, the statute requires that the claims be rejected or allowed. If that requirement were complied with, it would be too late to ask the Court to review the Commissioner's decision. Clearly, the proceedings in the Court are authorized if, and only if, they are commenced within the

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times fixed. If the subsection had itself fixed a time, say three months, for commencement of proceedings, there would be no question that proceedings commenced after that time would not be within the statute and would be a nullity. I can see no difference in the effect of the provision when Parliament substitutes, for a specified time applicable to all cases, a time to be fixed by the Commissioner for each individual case.

What counsel for the plaintiff says in effect, as I understand it, is that there must be *implied* in the provision a power in the Commissioner to extend the time which he has fixed in accordance with the authority *explicitly vested* in him. He supports this by reference to somewhat similar time-fixing authorities vested in the Commissioner by subsections (2), (4) and (5) of section 45, which, he says, are the sort of times that ought as a matter of convenience and good administration to be capable of being extended. Despite this and many other interesting and ingenious arguments put forward by counsel for the plaintiff in this case, as well as by counsel for the plaintiff in *Texaco Development Corporation v. Schlumberger Ltd.*, in which case the same point is also being considered at this time, I have not been able to construe subsection (8) of section 45 as conferring on the Commissioner not only the power to fix the time for commencement of proceedings in the first instance, but, in addition, a power to extend the time so fixed.

When Parliament has intended that a time fixed for appealing can be extended, it has made express provision therefor. Just as there can be no appeal unless Parliament has expressly provided for one, so there can be no extension of the time for an appeal unless Parliament has provided for such an extension.

I should not have thought that a judge of this Court can extend the "further time" that he has fixed under section 82(3) of the *Exchequer Court Act* an appeal to the Supreme Court of Canada, once he has fixed it; similarly, I am of opinion that the Commissioner cannot extend the time that he has fixed for proceedings in a particular conflict, once he has fixed it.

It remains on the first branch of the first application to deal with certain arguments made by counsel for the plaintiff.

I refer first to evidence that he proffered as being evidence as to the consequences that would flow from the interpretation of the section that I have adopted and of what he described as "long usage". I am of the view that such evidence is inadmissible and I reject it. In the interpretation of a provision such as subsection (8) of section 45, I am of the view that evidence is not admissible as being relevant to the interpretation to be put on the words used. I am prepared to act upon the knowledge which I have as a judge of this Court and the information communicated to me by counsel of long experience in such matters who practice in this Court. I take it for granted that Commissioners of Patents have for many years acted on the view that they have authority to extend periods of time fixed under section 45. I naturally, in the light of this knowledge, have given most anxious consideration to the matter before concluding that there was no authority to extend a time fixed under subsection (8) of section 45. I am not, however, prepared to admit as evidence concerning the meaning of words in a statute such as this, when used as ordinary words in the English language, evidence as to the meaning that has been given to the statute by government officials. If such evidence is admissible, I see no ground for refusing evidence as to the meaning given to it by members of the bar, solicitors, patent attorneys, inventors, or anybody else who has had occasion to purport to act with reference to it. If such evidence is admissible with reference to the interpretation of statutes, in addition to evidence as to the relevant facts, there will be no end to the ability of parties to protract trials when it suits their purposes.

Counsel for the plaintiff also relied on section 31(1)(*e*) of the *Interpretation Act*. It provides, in part,

> 31 (1) In every Act, unless the contrary intention appears,
>
> . . . .
>
> (*e*) if a power is conferred or a duty imposed the power may be exercised and the duty shall be performed from time to time as occasion requires;

This clearly, in my view, authorizes the Commissioner to fix a time under subsection (8) of section 45 each time he makes a decision under subsection (7), that is, each time the circumstances require. Section 31(1)(*e*) does not, in

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my view, authorize the Commissioner to extend a time once he has fixed it. I did not understand any of the cases cited by counsel for the plaintiff to go that far.

Counsel for the plaintiff also relied very heavily, as an alternative to relying simply on an interpretation of subsection (8) of section 45, on Rule 126 of the Rules made by the Governor in Council under section 12(1) of the *Patent Act*. That rule must be read with Rules 125 and 127. They read:

> 125. The Commissioner may fix a time for the taking of any action for which a time is not prescribed by the Act or these rules and an application may be deemed to be abandoned if such action is not taken within the time so fixed.
>
> 126. Except as provided in these rules, if the Commissioner is satisfied by an affidavit setting forth the relevant facts that having regard to all the circumstances any time prescribed by these rules or the 1935 Rules or fixed by the Commissioner for doing any act ought to be extended, the Commissioner may, either before or after the expiration thereof, extend such time.
>
> 127. Where a time prescribed by these rules is extended pursuant to section 126, the extended time shall be deemed for the purposes of these rules to be the time prescribed by these rules, but no extension of time shall affect any action properly taken by the Office before such extension was granted by the Commissioner.

In considering this alternative branch of the plaintiff's argument, it must be assumed that subsection (8) of section 45 authorizes the special conflict proceedings in the Court if, and only if, they are commenced within the time fixed by the Commissioner. Otherwise, no reference need be made to the Rules. On that assumption, I cannot read the Rules made under section 12(1) of the Act, by which the Governor in Council is authorized to

> . . . make, amend or repeal such rules and regulations as may be deemed expedient
>
> (*a*) for carrying into effect the objects of this Act, or for ensuring the due administration thereof by the Commissioner and other officers and employees of the Patent Office;
>
> (*b*) for carrying into effect the terms of any treaty, convention, arrangement or engagement that subsists between Canada and any other country; and
>
> (*c*) in particular, but without restricting the generality of the foregoing, with respect to the following matters
>
> (i) the form and contents of applications for patents,
>
> (ii) the form of the Register of Patents and of the indexes thereto,

(iii) the registration of assignments, transmissions, licences, disclaimers, judgments or other documents relating to any patent, and

(iv) the form and contents of any certificate issued pursuant to the terms of this Act.

as purporting to permit such very special proceedings as these conflict proceedings are to be commenced after the time contemplated by Parliament. Clearly, the Governor in Council could not have made special provision for such proceedings in circumstances or at times not contemplated by subsection (8) of section 45. If he could not do so explicitly, he could not do so by authorizing an extension of time fixed pursuant to the statutes. The words of Rule 126, when read with 125 and 127, do not explicitly contemplate extensions of time fixed pursuant to the provisions of the statute. In my view, they refer rather to times fixed by the Regulations or fixed by the Commissioner under Rule 125. If they did explicitly refer to the time fixed by the Commissioner pursuant to an express requirement of the statute, I should have thought the rule would be *ultra vires*. In any event, I am satisfied that Rule 126 does not authorize extensions of the time fixed under section 45(8). It is also to be noted that the effect of an extension granted pursuant to Rule 126 is defined by Rule 127, which deems the time to have been extended "for the purposes of these rules".

If the rule does not authorize the extension, or if it is *ultra vires*, section 12(2), upon which counsel rested much weight in the light of the decision of the House of Lords in *Institute of Patent Agents v. Lockwood*[1], cannot have any effect on the matter one way or the other. In this connection, reference should be made to the decision in *Re Jaffe, Minister of Health v. The King*[2].

The other argument of counsel for the plaintiff to which I must refer is that based on estoppel. I reject it because

(*a*) there was no evidence of any misrepresentation made by the defendant, and

(*b*) there cannot be an estoppel against applying a statute as opposed to estoppel that prevents reliance upon a fact that calls the statute into operation.[3]

[1] [1894] A.C. 347. [2] [1931] A.C. 494.
[3] [1956-60] Ex. C.R. 66 per Thorson P. at p. 69.

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Finally, I should say, with reference to the first branch of the Motion that, even if I were of the view that the Commissioner had power to extend the time, having regard to the requirement in subsection (8) of section 45 that the claims be rejected or allowed when the time expires without proceedings being commenced, I should have been of the view that the second extension would have been too late.

With reference to the second branch of the Motion, I have made an order today that paragraph 9 of the Statement of Claim be struck out.

In so far as the balance of the Motion is concerned, I have adjourned the matter to Monday, June 13, at 10:30 a.m. At that time, counsel for the plaintiff if he is so advised will be free to make an application to amend his Statement of Claim and when he has done so, the second branch of the Motion will, by consent, be regarded as applicable thereto. After any such amendment has been made, I propose to make an order following the general line of the Practice Note that I issued in *Branchflower v. Akshun Manufacturing Co.*, No. 159052, on April 20 last, striking out such allegations in the Statement of Claim as there then may be as contain allegations that one or more of the claims in conflict are not sufficiently supported by the specification. When that order has been made I propose then, in accordance with the reasons that I have just given, to make an order striking out the Statement of Claim as well.

On the first branch my inclination would be to give the costs to the defendant. On the second branch I suppose costs should follow the event. However, we will leave the question of costs until June 13.

BETWEEN:

TEXACO DEVELOPMENT CORPORATION ..... PLAINTIFF;

Ottawa 1966
June 2, 13
June 24

AND

SCHLUMBERGER LIMITED ..... DEFENDANT.

Patents—Conflict proceedings—Appeal from Commissioner of Patents—Motion to strike out part of statement of claim—Jurisdiction of court—Purpose of proceedings—Construction of Patent Act, s. 45.

Plaintiff commenced proceedings in this court under s. 45(8) of the *Patent Act* following a decision by the Commissioner of Patents awarding two claims in conflict to defendant on the ground that S, defendant's assignor, was the prior inventor. In its statement of claim plaintiff alleged *inter alia* that defendant was not entitled to a patent which included the two claims in question on the grounds that at the time of S's alleged invention it was obvious having regard to common general knowledge in the art, prior publication, and prior knowledge by plaintiff's inventor. Defendant moved to strike out the above allegations in the statement of claim and alternatively to strike out the whole statement of claim as being filed out of time. The court granted the motion on the latter ground for reasons stated in *Philco Corp. v. R.C.A. Victor Corp.*, *ante* p. 450 but also dealt with defendant's alternative application to strike out certain allegations.

Held, the court has no jurisdiction under s. 45(8) to consider the allegations in question and they must be struck out. The object of s. 45 of the *Patent Act* is to permit the ordinary processing of a patent application to be interrupted for the sole purpose of determining which of two applicants is the first inventor and although s. 45(8)(*b*) is widely enough expressed to permit consideration of such questions as subject matter and as to whether there is a statutory bar under s. 28(1)(*b*) to the grant of a patent it must be construed as restricted to cases in which the evidence reveals that none of the applicants is the real inventor.

MOTION to strike out statement of claim.

R. G. Gray, Q.C. for plaintiff.

Russel S. Smart, Q.C. and *Donald A. Hill* for defendant.

JACKETT P.:—This application, which has been argued before me today, is an application to strike out the whole of the Statement of Claim on the ground that the proceedings were not commenced by the plaintiffs within the time prescribed by the Commissioner of Patents under subsection (8) of section 45 of the *Patent Act*. There is a further

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Jackett P.

branch of the application, in the alternative, to strike out certain parts of the Statement of Claim. Hearing of that part of the application has been adjourned to Monday, June 13.

I have indicated that, after I have disposed of the second branch of the application, I propose to make an order striking out the Statement of Claim for the same reasons as those that I have expressed earlier today on a similar application in *Philco Corporation v. Radio Corporation of America,* No. B-835.

It is to be noted that on the facts of this case there was only one extension, which was granted by the Commissioner before the expiration of the period originally fixed by him, and the second ground for my decision to strike out the whole of the Statement of Claim in the *Philco Corporation* case does not therefore exist in this case.

When I come to make the order striking out the Statement of Claim I anticipate that costs on that part of the Motion will follow the event.

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This is further to the Reasons that I delivered orally on June 2, 1966 with reference to the defendant's application bearing date May 2, 1966.

On June 13, 1966, the second branch of the application came on for argument. That branch of the application was an application

1. For an Order striking out paragraphs 8 and 12 of the Amended Statement of Claim herein on the ground that they do not allege any fact relevant to the action but on the contrary are purely argumentative and will accordingly tend to prejudice, embarrass or delay a fair trial of the action; and

2. For an Order striking out paragraphs 9, 10, 11, 13, 14 and 15 on the ground that they are irrelevant to the issue of priority as between the inventors Schwede and Herzog, but on the contrary could only relate to the validity of any patent containing the conflict claims which may be granted to one of the parties hereto, a matter which is outside the jurisdiction of the Court in these proceedings.

The action is under subsection (8) of section 45 of the *Patent Act.* Section 45 reads as follows:

45. (1) Conflict between two or more pending applications exists

(*a*) when each of them contains one or more claims defining substantially the same invention, or

(*b*) when one or more claims of one application describe the invention disclosed in the other application.

(2) When the Commissioner has before him two or more such applications he shall notify each of the applicants of the apparent conflict and transmit to each of them a copy of the conflicting claims, together with a copy of this section; the Commissioner shall give to each applicant the opportunity of inserting the same or similar claims in his application within a specified time.

(3) Where each of two or more of such completed applications contains one or more claims describing as new, and claims an exclusive property or privilege in things or combinations so nearly identical that, in the opinion of the Commissioner, separate patents to different patentees should not be granted, the Commissioner shall forthwith notify each of the applicants to that effect.

(4) Each of the applicants, within a time to be fixed by the Commissioner, shall either avoid the conflict by the amendment or cancellation of the conflicting claim or claims, or, if unable to make such claims owing to knowledge of prior art, may submit to the Commissioner such prior art alleged to anticipate the claims; thereupon each application shall be re-examined with reference to such prior art, and the Commissioner shall decide if the subject matter of such claims is patentable.

(5) Where the subject matter is found to be patentable and the conflicting claims are retained in the applications, the Commissioner shall require each applicant to file in the Patent Office, in a sealed envelope duly endorsed, within a time specified by him, an affidavit of the record of the invention; the affidavit shall declare:

(*a*) the date at which the idea of the invention described in the conflicting claims was conceived;

(*b*) the date upon which the first drawing of the invention was made;

(*c*) the date when and the mode in which the first written or verbal disclosure of the invention was made; and

(*d*) the dates and nature of the successive steps subsequently taken by the inventor to develop and perfect the said invention from time to time up to the date of the filing of the application for patent.

(6) No envelope containing any such affidavit as aforesaid shall be opened, nor shall the affidavit be permitted to be inspected, unless there continues to be a conflict between two or more applicants, in which event all the envelopes shall be opened at the same time by the Commissioner in the presence of the Assistant Commissioner or an examiner as witness thereto, and the date of such opening shall be endorsed upon the affidavits.

(7) The Commissioner, after examining the facts stated in the affidavits, shall determine which of the applicants is the prior inventor to whom

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he will allow the claims in conflict and shall forward to each applicant a copy of his decision; a copy of each affidavit shall be transmitted to the several applicants.

(8) The claims in conflict shall be rejected or allowed accordingly unless within a time to be fixed by the Commissioner and notified to the several applicants one of them commences proceedings in the Exchequer Court for the determination of their respective rights, in which event the Commissioner shall suspend further action on the applications in conflict until in such action it has been determined either

(*a*) that there is in fact no conflict between the claims in question,

(*b*) that none of the applicants is entitled to the issue of a patent containing the claims in conflict as applied for by him,

(*c*) that a patent or patents, including substitute claims approved by the Court, may issue to one or more of the applicants, or

(*d*) that one of the applicants is entitled as against the others to the issue of a patent including the claims in conflict as applied for by him.

(9) The Commissioner shall, upon the request of any of the parties to a proceeding under this section, transmit to the Exchequer Court the papers on file in the Patent Office relating to the applications in conflict.

To understand what was involved in that application, it is essential to have in mind the Statement of Claim, the body of which reads as follows:

1. The plaintiff is a corporation incorporated under the laws of the State of Delaware, one of the United States of America, and having its principal place of business in the City of New York, in the State of New York.

2. The defendant is a corporation incorporated under the laws of Netherlands Antilles, and having its principal office in the City of Houston, in the State of Texas.

3. The plaintiff is the owner of an invention made by Gerhard Herzog entitled "Well Logging" for which an application for patent was filed in the Canadian Patent Office on May 22, 1952, under serial No. 631,472.

4. The plaintiff has been advised by the Commissioner of Patents that its aforesaid application is in conflict with an application serial No. 681,901 assigned to the defendant and naming H. F. Schwede as inventor, such conflict arising by reason of the presence of claims identified as claims C1 and C2 in each of the said applications.

5. The Commissioner of Patents, by an official letter dated June 20, 1963, advised the plaintiff of his determination that H. F. Schwede was the prior inventor of the subject matter of claims C1 and C2.

6. As between Gerhard Herzog and H. F. Schwede, the first inventor of the invention defined in claims C1 and C2 was Gerhard Herzog.

7. For the purpose of this action the plaintiff relies upon July 26, 1951 as the earliest date of invention by Gerhard Herzog of the subject matter

of claims C1 and C2, that being the filing date of his U.S. patent application Serial No. 238,754.

8. Claim C1 is to be construed as if it read as follows:

"Apparatus for well logging comprising means for producing a unidirectional magnetic field in a region of the earth in situ adjacent the well, means for simultaneously producing in the same region an alternating magnetic field having a component of its vector transverse to that of the unidirectional magnetic field, means for producing the alternating magnetic field being tuned to the resonance frequency for nuclei of atoms of a predetermined type, and means for detecting the intensity of the nuclear resonance which results in said region, the apparatus further including means for periodically varying the frequency of the alternating magnetic field."

9. If claim C1 includes within its scope apparatus as defined in claim C1 except that the "region" is inside the apparatus, which the plaintiff denies, the defendant is not entitled to the issue of a patent including such claim for the following reasons:

(*a*) at the time of H. F. Schwede's alleged invention it was obvious having regard for:

(i) the common general knowledge in the art; and

(ii) the following publications:

F. Bloch, Nuclear Induction, Physical Review 70, 460-474, October 1 and 15, 1946;

F. Bloch et al, The Nuclear Induction Experiment, Physical Review 70, 474-485, October 1 and 15, 1946;

Bloembergen et al, Relaxation Effects in Nuclear Magnetic Resonance Absorption, Physical Review 73, 679-712, April 1, 1948;

U S. Patent No. 2,561,489, July 24, 1951, F. Bloch, et al.

(*b*) prior to the time of H. F. Schwede's alleged invention it was known to:

(i) Dr. Felix Bloch whose knowledge was disclosed in F. Bloch, Nuclear Induction, Physical Review 70, 460-474, October 1 and 15, 1946; F. Bloch et al, The Nuclear Induction Experiment, Physical Review 70, 474-485, October 1 and 15, 1946, and in U S. patent application Serial No. 718,092, filed December 23, 1946, which application subsequently matured to U.S. Patent No. 2,561,489 dated July 24, 1951;

(ii) T. M. Shaw whose knowledge was disclosed in U S. patent application Serial No. 171,483 filed June 30, 1950, which application subsequently matured to U.S. Patent No. 2,799,823 dated July 16, 1957;

(*c*) the alleged invention was described in the following printed publications published more than two years before the filing date of the defendant's patent application Serial No. 681,901:

F. Bloch, Nuclear Induction, Physical Review 70, 460-474, October 1 and 15, 1946;

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F. Bloch et al, The Nuclear Induction Experiment, Physical Review 70, 474-485, October 1 and 15, 1946;

U.S. Patent No. 2,561,489, July 24, 1951, F. Bloch et al;

Bloembergen et al, Relaxation Effects in Nuclear Magnetic Resonance Absorption, Physical Review 73, 679-712, April 1, 1948.

10. Claim C1 includes within its scope the apparatus defined in paragraph 8 hereof which apparatus was known by Gerhard Herzog as early as July 26, 1951, which was before it was known by H. F. Schwede, and the defendant is not entitled to the issue of a patent including such claim.

11. In the alternative claim C1 does not define an invention in distinct and explicit terms.

12. Claim C2 is to be construed as if it read as follows:

"In a method of exploring for minerals in the earth, the steps of subjecting nuclei having magnetic properties and being constituents of minerals in situ in the earth to a polarizing magnetic field, simultaneously subjecting said nuclei to an alternating magnetic field at an angle to said constant magnetic field, varying one of two quantities including the amplitude of said polarizing field and the frequency of said alternating field through a range including a value for which Larmor precession of selected nuclei will be sustained, providing a signal representative of said Larmor precession of the nuclei, and obtaining indications of said signal."

13. If claim C2 includes within its scope a method in which the minerals containing the nuclei are not located in situ in the earth, which the plaintiff denies, the defendant is not entitled to the issue of a patent including such claim for the reasons indicated in subparagraphs (*a*), (*b*) and (*c*) of paragraph 9 hereof.

14. Claim C2 includes within its scope the method defined in paragraph 10 hereof which method was known by Gerhard Herzog as early as July 26, 1951 which was before it was known by H. F. Schwede and the defendant is not entitled to the issue of a patent including such claim.

15. In the alternative claim C2 does not define an invention in distinct and explicit terms.

16. THE PLAINTIFF THEREFORE CLAIMS:

(*a*) A declaration that as between Gerhard Herzog and H. F. Schwede the first inventor of the invention defined in claims C1 and C2 was Gerhard Herzog;

(*b*) A declaration that as between the parties hereto the plaintiff is entitled to the issue of a patent including claims C1 and C2;

(*c*) A declaration that as between the parties hereto the plaintiff is entitled to the issue of a patent including the claims defined in paragraphs 8 and 12 hereof;

(*d*) A declaration that the defendant is not entitled to the issue of a patent including claims C1 and C2 or either of them;

(*e*) Such further or other relief as the justice of the case requires;

(*f*) Costs.

At the conclusion of the argument I disposed of the application orally as follows:

An Order will go striking out paragraphs 8 and 12 of the Amended Statement of Claim on the ground that they do not allege facts constituting elements in the Plaintiff's cause of action and are accordingly embarrassing. Paragraph (*c*) of the Prayer which depends on paragraphs 8 and 12 will be struck out as well.

Paragraphs 11 and 15 which allege that the conflict claims "do not define an invention in distinct and explicit terms" will not be struck out.

I find difficulty in dealing with paragraphs 9, 10, 13 and 14. If one goes back to Section 45(7) of the *Patent Act* it is clear that the decision of the Commissioner of Patents is a decision as to which of the applicants is the prior inventor to whom he will allow the claims in conflict. When one proceeds to sub-section (8) where the jurisdiction of the Court in these proceedings is defined, it is clear that the Court must decide first under (*a*) as to whether or not a conflict exists. Then the Court proceeds to deal under (*d*) with the question as to whether one of the applicants is entitled as against the other to the claims in conflict, i.e., which is the first inventor. In the course of this adjudication the Court may conclude that the evidence shows that none of the applicants is an inventor in which event a declaration under (*b*) must be made. While I readily see that if (*b*) is read by itself it is wide enough to permit the questions raised by paragraphs 9, 10, 13 and 14 to be considered by the Court, I nevertheless decide with a great deal of hesitation that the Court has no jurisdiction to consider such questions and that accordingly paragraphs 9, 10, 13 and 14 of the Amended Statement of Claim will also be struck out.

The foregoing relates to the first Order to be made pursuant to the Defendant's Notice of Motion dated May 2, 1966. Following it a second Order will go striking out the whole of the Amended Statement of Claim and dismissing the action with costs in accordance with the reasons I delivered herein on June 2, 1966.

It might be of some assistance, in the event that there is an appeal from my Order striking out paragraphs 9, 10, 13 and 14, if I indicate, very briefly, that, reading section 45 as a whole, it is my view that it provides for an interruption in an ordinary processing of an application for a patent for the sole purpose of deciding which of two applicants is the inventor (sometimes described as the first inventor) of an invention which is claimed by each of two applications pending in the Patent Office. This interruption in the ordinary processing of applications for patents is extraordinary and should, in my view, be restricted to the determination of the conflict which it is designed to resolve. It is for this reason that, while I recognize that the words of paragraph (*b*) of subsection (8) read literally and by themselves are wide enough to include a consideration of such questions as

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whether the particular claim put in conflict by the Commissioner is an "invention" within the appropriate sense of that word and whether there is a statutory bar under paragraph (*b*) of subsection (1) of section 28 of the *Patent Act* to a grant of a patent to him, nevertheless, having regard to the scheme of section 45, it seems clear to me that paragraph (*b*) of subsection (8) thereof is referring only to the case where "none of the applicants is entitled to the issue of a patent containing the claims in conflict as applied for by him" because the evidence has revealed that the real inventor of the invention described in the claims in conflict is some person other than the applicants who are before the Court.

All other objections to the granting of a patent to one of the applicants should be dealt with in the ordinary course of events as they would be dealt with if there had been no conflict proceedings under section 45. To construe subsection (8) of section 45 as permitting such questions to be raised in the conflict proceedings converts those proceedings into a full scale impeachment action resulting in a protracted trial and, in my view, something quite different from the relatively simple proceedings contemplated by subsection (8) of section 45.

Ottawa 1966

June 28

BETWEEN:

THE CARBORUNDUM COMPANY .....PLAINTIFF;

AND

NORTON COMPANY .....DEFENDANT.

Patents—Conflict proceedings—Appeal from decision of Commissioner of Patents—Allegations in pleadings—Motion to strike out—Jurisdiction of Court—Patent Act, s. 45(8)(b) and (d).

The Commissioner of Patents awarded certain conflicting claims in patent applications to defendant on the ground that defendant's inventor was the prior inventor. Plaintiff commenced proceedings in this court to reverse the Commissioner's decision, alleging *inter alia* that defendant was disentitled to a patent containing the conflicting claims on the grounds (1) that the invention containing them had been described in

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a publication and had been in public use and on sale in Canada for more than two years before defendant's application was filed, and (2) that the invention defined by such claims was not useful and neither party was entitled to a patent containing such claims. Defendant moved to strike out these allegations.

Held, the allegations must be struck out.

1. Under s. 45(8)(*d*) of the *Patent Act* the court can decide that plaintiff as first inventor is entitled as against defendant to the conflicting claims whether or not there is some other bar to the grant of a patent to defendant. Hence an allegation of the existence of such a bar is irrelevant and moreover does not impugn the Commissioner's determination that defendant's inventor was first inventor of the conflicting claims.

2. Section 45(8)(*b*) of the *Patent Act* does not permit an attack on the *validity* of the invention defined by a claim in conflict. *Texaco Development Corp. v. Schlumberger Ltd. ante,* p. 459 followed.

Plaintiff company as assignee of William Everett Gould, the inventor, filed an application for a patent in the Canadian Patent Office on January 11th 1961 under serial number 814,519. Defendant filed an application for a patent in the Canadian Patent Office on October 2nd 1962 under serial number 859,243. The Commissioner of Patents notified plaintiff that there was a conflict between the two applications by reason of the presence of a group of claims, *viz* C1 to C14, in both applications and ultimately on January 13th 1965 plaintiff was advised that the Commissioner had determined that defendant's inventor, James H. Perry, was the prior inventor of the subject matter of the said claims. Plaintiff commenced proceedings in the Exchequer Court for a reversal of the Commissioner's determination and its statement of claim contained the following allegations:

7. The invention defined in conflict claims C1 to C14 inclusive was
   (*a*) described in the note of G. Burkhard appearing on page 78 and the note of Robert Fraser therein referred to appearing on pages 77 and 78 of the March 1959 issue of the Journal of the Technical Section of the Canadian Pulp and Paper Association,
   (*b*) in public use in Canada at the mill of Quebec North Shore Paper Company at Baie Comeau, Quebec, and
   (*c*) on sale in Canada by the plaintiff, more than two years before the filing of the defendant's said application serial No. 859,243, in consequence of which the defendant is not entitled to the issue of a patent containing any of the said claims.

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8. Conflict claims C1 to C14 inclusive do not define any alleged invention made by the said James H. Perry before the invention made by the said William Everett Gould who was the true and first inventor of the subject matter of the said conflict claims.

9. If the conflict claims C1 to C14 inclusive, or any of them, do define any alleged invention made by the said James H. Perry before the invention of the said William Everett Gould, then the alleged invention defined by such claims

(a) was described on page 98 of the Pulp and Paper Magazine of Canada, Volume 60, No. 8, of August 1959 and the defendant is thus not entitled to the issue of a patent containing them, and

(b) is not useful and neither party is entitled to the issue of a patent containing them.

APPLICATION to strike out part of statement of claim.

Christopher Robinson, Q.C. and *Roy H. Saffrey* for plaintiff.

E. Foster for defendant.

JACKETT P.:—This is an application to strike out paragraphs 7, 8 and 9 of the plaintiff's Statement of Claim in these proceedings under subsection (8) of section 45 of the *Patent Act*.

By subsection (7) of section 45, which contains the procedure for resolving a conflict between two applications for patents which are pending in the Patent Office at the same time, the Commissioner is required to examine the facts stated in affidavits which the respective applicants are required to file under subsection (5), and to determine "which of the applicants is the prior inventor to whom he will allow the claims in conflict".

Subsection (8) of section 45 provides for proceedings in this Court following upon a decision so made by the Commissioner and reads as follows:

(8) The claims in conflict shall be rejected or allowed accordingly unless within a time to be fixed by the Commissioner and notified to the several applicants one of them commences proceedings in the Exchequer Court for the determination of their respective rights, in which event the Commissioner shall suspend further action on the applications in conflict until in such action it has been determined either

(a) that there is in fact no conflict between the claims in question,

(*b*) that none of the applicants is entitled to the issue of a patent containing the claims in conflict as applied for by him,

* * *

(*d*) that one of the applicants is entitled as against the others to the issue of a patent including the claims in conflict as applied for by him.

During the course of the argument I reached a conclusion, after hearing counsel for both parties, as to the disposition to be made of the application in respect of paragraph 8. That paragraph is struck out with leave to the plaintiff to plead

(a) that James N. Perry did not make the invention defined by the conflict claims, and

(b) that, alternatively, if he did, he did not do so until after William Everett Gould did so.

With reference to paragraphs 7 and 9 of the amended Statement of Claim, counsel for the defendant relied, in support of his application, upon the reasons that I filed on June 24 last in *Texaco Development Corporation v. Schlumberger Ltd.* (*ante* p. 459) for disposing of the application made in that case and bearing date May 2, 1966. In that case, I took the position, although I do not appear to have stated it explicitly, that paragraph (*b*) of subsection (8) of section 45 is not wide enough to confer jurisdiction on the Court to determine that "none of the applicants" is entitled to the issue of a patent containing the conflict claims in a case where

(a) the defendant's inventor is the first inventor of the invention defined by the conflict claim so that none of the other parties is entitled to a patent containing that claim, and

(b) there is some legal bar to the grant of a patent for the invention to the defendant.

In that case I said: "It might be of some assistance in the event that there is an appeal from my Order striking out paragraphs 9, 10, 13 and 14, if I indicate, very briefly, that, reading section 45 as a whole, it is my view that it provides for an interruption in an ordinary processing of an applica-

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tion for a patent for the sole purpose of deciding which of two applicants is the inventor (sometimes described as the first inventor) of an invention which is claimed by each of two applications pending in the Patent Office. This interruption in the ordinary processing of applications for patents is extraordinary and should, in my view, be restricted to the determination of the conflict which it is designed to resolve. It is for this reason that, while I recognize that the words of paragraph (*b*) of subsection (8) read literally and by themselves are wide enough to include a consideration of such questions as whether the particular claim put in conflict by the Commissioner is an 'invention' within the appropriate sense of that word and whether there is a statutory bar under paragraph (*b*) of subsection (1) of section 28 of the *Patent Act* to a grant of a patent to him, nevertheless, having regard to the scheme of section 45, it seems clear to me that paragraph (*b*) of subsection (8) thereof is referring only to the case where 'none of the applicants is entitled to the issue of a patent containing the claims in conflict as applied for by him' because the evidence has revealed that the real inventor of the invention described in the claims in conflict is some person other than the applicants who are before the Court."

Paragraphs 7 and 9(*a*) of the Statement of Claim in this case contain facts upon which the plaintiff seeks to establish that there is a bar to the grant of a patent to the defendant even if the defendant's inventor is the first inventor of the conflict claims. He endeavours to support the pleading of such facts as a basis for a prayer for judgment in his favour under paragraph (*d*) of subsection (8) of section 45.

Notwithstanding the ingenuity of the argument of counsel for the plaintiff, I cannot escape the conclusion that such pleas are irrelevant to a claim for judgment under that paragraph. Paragraph (*d*) of subsection (8) of section 45 confers jurisdiction on the Court to decide that "one of the applicants is entitled *as against the others* to the issue of a patent including the claims in conflict". (The emphasis is mine.)

If the plaintiff alleges and proves that the Commissioner was wrong in not deciding that the plaintiff's inventor was the first inventor, the Court can decide that the plaintiff is entitled as against the defendant to the issue of a patent including the claims in conflict. Such a decision can be made whether or not there is some other bar to the grant of a patent to the defendant. Any allegation of such a bar is therefore irrelevant to the claim for relief based on the contention that the plaintiff's inventor was the first inventor. On the other hand, a plea of some alternative bar to the grant of a patent for the conflict claim to the defendant cannot *by itself* be a sufficient basis for decision that the plaintiff is entitled to a patent containing the claim in conflict as long as the Commissioner's decision that the defendant's inventor was the first inventor of that claim remains intact. Such an alternative attack on the defendant's right to a patent is not, therefore, material to a claim for a decision under paragraph (*d*) of subsection (8) of section 45. It is unnecessary to support a claim based on a contention that the plaintiff's inventor and not the defendant's inventor is the first inventor and it is insufficient to support a decision as long as the finding that the defendant's inventor is the first inventor remains intact. I therefore reject the submission of counsel for the plaintiff in so far as paragraph (*d*) of subsection (8) of section 45 is concerned.

Counsel for the plaintiff made an alternative argument with reference to paragraph (*b*) of subsection (8) in which he drew a distinction between the type of plea that was made in *Texaco Development Corporation v. Schlumberger Ltd.* and the type of plea that is made by paragraphs 7 and 9(*a*) of the amended Statement of Claim in this case.

In *Texaco Development Corporation v. Schlumberger Ltd.*, the pleas that were involved were pleas which, if accepted, would operate to invalidate the applications of both parties. In this case, the pleas that are contained in paragraph 7 and in paragraph 9(*a*) would operate, if successful, to prevent the defendant from being granted a patent pursuant to his application, but would not affect the plaintiff's application for a patent.

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While I recognize the distinction between the two classes of claims, the distinction is not, in my view, relevant to the grounds which caused me to put the interpretation on paragraph (*b*) of subsection (8) of section 45 that I did in *Texaco Development Corporation v. Schlumberger Ltd.* As I indicated in that case, I recognize that, read literally and by themselves, the words of paragraph (*b*) extend to include the grounds that were put forward in that case as well as the grounds that have been put forward in this case. Having regard to the scheme of section 45 as a whole and having regard to the scheme of the *Patent Act* as a whole, as I understand it, I am of the view that paragraph (*b*) must be restricted to the issues that directly or indirectly relate to the resolution of the conflict that gave rise to the conflict proceedings in the first place.

So far as paragraph 9(*b*) of the Statement of Claim is concerned, counsel for the plaintiff endeavoured to make me appreciate a distinction between a lack of usefulness in the "invention", which would be an attack on the validity of the invention, and a lack of usefulness in the invention as defined by the particular claims, which, he submitted, would not be different in kind from an allegation that the claims were not sufficiently distinct and explicit to comply with subsection (2) of section 36 of the *Patent Act*.

I cannot accept it that paragraph 9(*b*) is anything other than what, as it appears to me, it purports to be, namely, an attack on the validity of the *invention* defined by the claim.

Paragraphs 7 and 9 of the amended Statement of Claim are struck out.

Costs are to the defendant in the cause.

BETWEEN:

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

Toronto 1966 Dec. 15-16

AND

BLODWEN EMILY WORSLEY, Administratrix of the Estate of Sidney William Worsley, ... RESPONDENT.

Estate tax—Death benefit payable under group accident insurance policy of employer—Whether subject to estate tax—Whether policy "life insurance"—Contingent right of insured to designate beneficiary—Not equivalent to death benefit—Estate Tax Act, S. of C. 1958, c. 29, ss. 3(1)(a), (4a,) (m)—Insurance Act, R S.O. 1960, c. 190, s. 244.

Deceased's employer voluntarily insured his employees against accident under a group accident insurance policy with an insurance company for the year commencing April 4th 1963. The policy provided for payment of varying amounts for bodily injuries and in case of loss of life for payment to the employee's estate. Deceased died intestate on November 29th 1963 from an aircraft crash without having designated a beneficiary of the death benefit as he was entitled to do under s. 244 of the *Insurance Act*, R.S.O. 1960, c. 190, and the death benefit, *viz* $100,000, was accordingly paid to his estate.

Held, affirming the Tax Appeal Board ([1966] D.T.C. 63), the death benefit was not subject to estate tax.

1. The accident insurance policy was not "life insurance" within the meaning of s. 3(1)(4a) of the *Estate Tax Act*, S. of C. 1958, c. 29 as amended by 1960, c. 29, s. 1. Nor was it "a policy of insurance effected on the life of the deceased" within the meaning of s. 3(1) (*m*) of the *Estate Tax Act*. Both quoted expressions, though enacted at different times, indicate the same general class of insurance coverage and neither embraces death benefits under an accident insurance policy.

2. The death benefit was not "property of which the deceased was competent to dispose immediately prior to his death" within the meaning of s. 3(1)(*a*) of the *Estate Tax Act* as extended by s. 3(2) (*a*) and s. 58 (1)(*i*). Deceased's right under s. 244 of the Ontario *Insurance Act* to designate a beneficiary of the death benefit was a contingent right to dispose of property prior to his death but that right was a different right (and of much less value) from the right of deceased's estate to be paid $100,000 on his death, which deceased could not have disposed of before he died.

Attorney-General v. Robinson [1901] 2 I.R.Q.B. at pp. 89, 90 approved; *Attorney-General v. Quixley* [1929] L.J.K.B. at 315 distinguished.

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MINISTER OF NATIONAL REVENUE v. WORSLEY et al.

APPEAL from Tax Appeal Board.

M. A. Mogan and *T. Z. Boles* for appellant.

N. E. Phipps, Q.C. and *A. O. Hendrie* for respondent.

JACKETT P. (Orally):—This is an appeal from a decision of the Tax Appeal Board allowing the respondent's appeal from an assessment under the *Estate Tax Act*, chapter 29 of the Statutes of Canada 1958, as amended. The sole question raised by the appeal is whether a sum of $100,000 paid to the respondent as Administratrix of the estate of Sidney William Worsley (hereinafter referred to as "the deceased") under a group accident insurance policy, provided by the deceased's employer, should be included in computing the aggregate net value of the property passing on the death of the deceased for the purpose of the *Estate Tax Act*.

For the purposes of the appeal to this Court, the facts were established by a written agreement of counsel filed in advance of the hearing. Attached as an exhibit to that agreement is a copy of the group accident insurance policy in question.

The group accident insurance policy was a contract between the employer and an insurance company. Neither the deceased nor any of his fellow employees who happened to be named in the policy was a party to the contract. The employer decided to obtain the policy because "it might have had a moral obligation to an employee's estate or next of kin if something happened to the employee while travelling". It was no part of the deceased's contract of employment that such insurance should be provided and the deceased neither directly nor indirectly paid any part of the premium, which was paid entirely by the employer.

The policy was, according to its terms, to be in force from April 4, 1963 to April 4, 1964. By the policy, the insurance company agreed to pay, in the event of bodily injury caused to one of the employees named therein "by an accident occurring while this policy is in force", varying amounts determined in a manner set out in the policy. The policy provided that "in the event of loss of life of an insured person" the indemnity was to be payable to the estate of the insured person and that all other indemnities were to be payable to the insured person.

The provision in the policy that "in the event of loss of life of an insured person" the indemnity was payable to his estate must be read with subsection (1) and subsection (3) of section 244 of the *Insurance Act*, R.S.O. 1960, chapter 190, which reads as follows:

> 244. (1) Where insurance money is payable upon death by accident, the insured, or, in the case of group accident insurance, the person insured, may designate in writing a beneficiary to receive the insurance money or part thereof and may alter or revoke in writing any prior designation.
>
> . . .
>
> (3) A beneficiary designated under subsection 1 may upon the death of the person insured enforce for his own benefit the payment of insurance money payable to him and payment to the beneficiary discharges the insurer, but the insurer may set up any defence that it could have set up against the insured, or the person insured in the case of group accident insurance, or the personal representative of either of them.

Counsel for each of the parties took the position in this Court that this section applies to the policy under consideration; that, under this statutory provision, the deceased could have, during his life, designated a beneficiary to receive the death benefit under the policy; and that, if he had done so, such beneficiary would have been entitled, after the death of the deceased, to enforce payment of it. In fact, the deceased did not designate a beneficiary.

The deceased died intestate on or about November 29, 1963, as a result of an aircraft crash, and the sum of $100,000 thereupon became payable to his estate under the policy. The appellant included this amount in computing the aggregate net value of the property passing on the death of the deceased and, as a result, assessed the estate for $5,638.31 estate tax when, otherwise, no estate tax would have been payable.

Before the Tax Appeal Board, the assessment was supported on the ground that the amount of $100,000 was properly included in the computation of the aggregate net value of property passing on the death of the deceased by virtue of the following provisions of the *Estate Tax Act*, as amended by section 1 of chapter 29 of the Statutes of 1960:

> 3. (1) There shall be included in computing the aggregate net value of the property passing on the death of a person the value of all property, wherever situated, passing on the death of such person, including, without restricting the generality of the foregoing,
>
> . . .

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(*k*) any superannuation, pension or death benefit payable or granted

(i) out of or under any fund or plan established for the payment of superannuation, pension or death benefits to recipients,

. . .

on or after the death of the deceased in respect of such death;

(4a) For the purposes of paragraph (*k*) of subsection (1), any amount payable in respect of the death of a person under a policy of insurance (other than a policy of insurance owned as described in paragraph (*m*) of subsection (1)) under which any life insurance was effected on the life of that person in respect of, in the course of or by virtue of his office or employment or former office or employment as an employee of any other person, except any part of that amount that was payable under the policy to that other person, shall be deemed to be a death benefit payable in respect of the death of that person out of or under a fund or plan established for the payment of death benefits to recipients.

The appellant's contention before the Board was that the group accident policy in question was, in so far as it provided for a death benefit, " a policy of insurance . . . under which. . .life insurance was effected on the life of that person . . . by virtue of his. . .employment" and that the $100,000 payable thereunder was therefore deemed, by subsection (4a), for the purposes of paragraph (*k*) of subsection (1), to be "a death benefit payable in respect of the death of that person out of or under a fund or plan established for the payment of death benefits to recipients" so that that amount was, by the introductory words of subsection (1) of section 3 read with paragraph (*k*) thereof, required to be included in computing the aggregate net value of the property passing on the death of the deceased.

It will be seen that this contention is entirely dependent upon the group accident policy in question being a policy of insurance under which "life insurance" was effected on the deceased's life within the meaning of those words in subsection (4a) of section 3 of the *Estate Tax Act*. The Tax Appeal Board held that a contract for a death benefit in an accident insurance policy is not "life insurance". Mr. Fordham delivered reasons for this conclusion with which I agree and no good purpose would be served by re-stating such reasons. I merely add to what he has said that, in my view, in the absence of any contrary indication, it is proper to assume that, when Parliament uses words by which it refers to a class of insurance coverage in a taxing statute, it is using the words in the same sense as it uses those words in legislation enacted by Parliament for the purpose of regulating insurance companies; and that, in my view, it

seems clear that, in the *Foreign Insurance Companies Act*, R.S.C. 1952, chapter 125 (see, for example, section 37), and the *Canadian and British Insurance Companies Act*, R.S.C. 1952, chapter 31 (see, for example, section 81), there is a contrast between "life insurance" and "insurance against death as a result of accident" even where the latter is included in a policy of "life insurance". (Neither statute appears to have any special definition of either class of business.)

In this Court, the appellant put forward two alternative bases as support for the assessment. His first alternative was that the assessment could be supported under paragraph (*m*) of subsection (1) of section 3 of the *Estate Tax Act*. His second alternative was that it could be maintained under paragraph (*a*) of that subsection. Neither of these contentions was put before the Tax Appeal Board.

I shall deal first with the appellant's contention based on paragraph (*m*) of subsection (1) of section 3 of the *Estate Tax Act*.

This contention depended upon reading paragraph (*m*) with subsection (5) of section 3. It is not necessary to quote these provisions as the contention depends entirely upon the submission that the words in paragraph (*m*), "a policy of insurance effected on the life of the deceased", are sufficiently wide to include a death benefit payable under the group accident policy in issue here. The argument, as I understood it, was that, by using the words "life insurance" at the time that subsection (4a) of section 3 was enacted in 1960, Parliament showed that something wider had been intended by the words "policy of insurance effected on the life of the deceased" in paragraph (*m*) when that paragraph was enacted in 1958. In my view, even if the two provisions had been enacted at the same time, such a conclusion, based on a different arrangement of words, would not be justified. Both expressions, in my view, indicate the same general class of insurance coverage and neither is sufficient to embrace death benefits under an accident insurance policy. Parliament and provincial legislatures have recognized that life insurance and accident insurance are quite different categories of insurance coverage. In addition, when, as here, the two different arrangements of

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words are found to have been enacted by Parliament at different times, in my view, there is even less justification for drawing the conclusion that a reference to insurance on a life includes death benefits under an accident policy.[1]

I turn to the appellant's second alternative contention in this Court, which is based on paragraph (*a*) of subsection (1) of section 3. This contention is based upon reading paragraph (*a*) of subsection (1) of section 3 of the *Estate Tax Act* with paragraph (*a*) of subsection (2) of section 3 and paragraph (*i*) of subsection (1) of section 58. These provisions read as follows:

> 3. (1) There shall be included in computing the aggregate net value of the property passing on the death of a person the value of all property, wherever situated, passing on the death of such person, including, without restricting the generality of the foregoing,
>
> (*a*) all property of which the deceased was, immediately prior to his death, competent to dispose;
>
> . . .
>
> (2) For the purposes of this section,
>
> (*a*) a person shall be deemed to have been competent to dispose of any property if he had such an estate or interest therein or such general power as would, if he were *sui juris*, have enabled him to dispose of that property;
>
> . . .
>
> 58. (1) In this Act,
>
> . . .
>
> (*i*) "general power" includes any power or authority enabling the donee or other holder thereof to appoint, appropriate or dispose of property as he sees fit, whether exercisable by instrument *inter vivos* or by will, or both, but does not include any power exercisable in a fiduciary capacity under a disposition not made by him, or exercisable as a mortgagee;
>
> . . .

These provisions apply to support the assessment, if they do support it, as follows:

1. By virtue of section 3(1)(*a*) there is to be included in the relevant computation the value of all property of which the deceased was, immediately prior to his death, competent to dispose.

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[1] There has been judicial recognition that such differences are inevitable where legislation has to be prepared and enacted under pressure to implement budget decisions. Legislative draftsmen, being human, such differences are also inevitable, although likely to be less frequent, even if reasonable time is available for preparation of legislative measures. In my view, nice comparisons of this kind are not a sound basis for legislative interpretation.

2. By virtue of section 3(2)(*a*) a person is deemed to have been competent to dispose of any property if he had such general power[1] as would have enabled him to dispose of the property.

Therefore, reading the two provisions together, the effect, in so far as it is relevant, may be stated as follows:

> There is to be included in the relevant computation the value of all property in respect of which, immediately prior to his death, the deceased had such general power as would have enabled him to dispose of that property.

3. By virtue of section 58(1)(*i*), "general power" includes any power or authority enabling the holder thereof "to appoint, appropriate or dispose of property as he sees fit". (I am omitting irrelevant limitations.)

Therefore, reading the three provisions together, the effect, in so far as it is relevant, may be stated as follows:

> There is to be included in the relevant computation the value of any property in respect of which, immediately prior to his death, the deceased had such a power or authority—that is, a power or authority that would have enabled him to appoint, appropriate or dispose of such property as he saw fit—"as would . . . have enabled him to dispose of that property".

I emphasize the very clear requirement of the three provisions, when read together in this context, that the deceased must have had in respect of the very property the Minister is seeking to tax "immediately prior to his death" a power or authority of the kind defined in section 58(1)(*i*) that "would . . . have enabled him to dispose of that property".

As already indicated, by virtue of section 244 of the *Ontario Insurance Act*, the deceased did have the right, immediately prior to his death, to designate a beneficiary and, if he had done so, the effect would have been that the $100,000 indemnity that became payable after his accidental death would have been payable to the named beneficiary instead of to his estate. This, according to counsel for

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[1] Counsel for the appellant did not rely on the words "estate or interest" in section 3(2)(*a*).

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the appellant, was a power or authority to appoint or dispose of the contingent right to receive $100,000 on the accidental death of the deceased during the policy period. This contingent right to receive the $100,000 death benefit is referred to in paragraph 10 of the Notice of Appeal as "the deceased's interest in the policy of assurance" and as being "property which the deceased was immediately prior to his death competent to dispose".

I accept it that the contingent right to have $100,000 paid to his estate in the event of his accidental death during the period of a little over four months that remained in the policy period was a property right of which the deceased was, immediately prior to his death, competent to dispose. I do not accept it that that is the property the value of which the appellant included in computing the aggregate net value of the property passing on the death of the deceased. What the appellant so included was the $100,000 that became payable to the deceased's estate after his accidental death had in fact occurred during the policy period.

In my view,

(*a*) the deceased's contingent right, immediately prior to his death on November 29, 1963, to have $100,000 paid to his estate in the event of his accidental death before the end of the policy period, and

(*b*) the estate's right to be paid $100,000 (which arose immediately after his accidental death had, in fact, occurred during that period)

are quite different rights. See *Attorney-General v. Robinson*[1] per Palles, C.B. at pages 89 and 90, where he said: "The words 'accruing or arising' are used in contradistinction to 'passing'. They indicate, not the transfer upon death to another of something which the deceased or some other person had before or at the death, but the springing up, upon the death, and the then vesting in another, of property which previously had not been existing in any one. This is an exact description of money secured by a policy of insurance." The contingent right was in existence before his death; the deceased could have disposed of it; and its value as of the time in question would be very

[1] [1901] 2 I.R.Q.B.

difficult to determine, but, in the absence of very special circumstances, it must have been very small. The estate's right to be paid $100,000 was not in existence before the deceased's death; he could not therefore have disposed of it; and its value, when it arose, was $100,000.

I am conscious that, while the facts were quite different in *Attorney-General v. Quixley*,[1] a case on which the appellant relied, it is very difficult to reconcile my conclusion in this case with the reasoning of the Court of Appeal in that case. There is, however, a vital difference between section 3(1)(*a*) of the *Estate Tax Act*, which cannot be applied unless there was property of which the deceased was competent to dispose "immediately *prior* to his death" and the comparable provision under consideration in that case, which refers to property of which the deceased was competent to dispose "at the time of his death". I can understand the reasoning in that case on one view of the meaning of the latter words. I could not reach the result reached in that case by applying the unambiguous words "immediately prior to his death".

The assessment was based, as appears from paragraph 6 of the Notice of Appeal, on the assumption that the sum of $100,000 was a death benefit under paragraph (*k*) of subsection (1) of section 3 of the *Estate Tax Act*. It was "the sum of $100,000 payable by Continental (the insurance company) to the estate of the deceased" after the death of the deceased that the appellant included in the relevant computation when he assessed the estate. The contention based on section 3(1)(*a*) was put forward as an alternative basis for supporting the assessment on the basis that the value of some other property—that is, the contingent right —should have been included in the computation. Even if such an alternative might have been open to the appellant in this Court, it would have been essential to have pleaded and proved the value of the contingent right. (It seems doubtful that any substantial value could have been established for it.)

The appeal is dismissed with costs.

[1] [1929] L.J K.B. 315.

Ottawa 1966

Dec. 12, 13

BETWEEN:

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

AND

STEPHENS-ADAMSON MFG. CO. OF CANADA LIMITED ..... RESPONDENT;

AND

CANADIAN SKF COMPANY LTD., and FISCHER BEARING MFG. LTD. ..... INTERVENANTS.

Customs duty—Appeal from Tariff Board—Classification of imported goods—Whether of class or kind made in Canada—Submission of agreed issue to Board—Whether Board applied tests of competitiveness and of degree—Customs Act, R.S.C. 1952, c. 58, ss. 44(3), 45(am. 1958, c. 26)—Customs Tariff R.S.C. 1952, c. 60, ss. 6(9), 6(10)—Items 427b(2) and 427b(3).

Respondent imported large sizes of a type of ball bearing possessing characteristics *a* and *b*. Only small sizes of this type of ball bearing possessing characteristics *a* and *b* were manufactured in Canada in substantial quantities. Large size bearings of the type in question possessing neither of the characteristics *a* or *b* were made in Canada in substantial quantities. The Deputy Minister classified all ball bearings of the type in question as being a single class or kind made in Canada and dutiable under Customs Tariff Item 427b(3). An appeal was taken to the Tariff Board on an agreed issue, *viz* whether large size ball bearings of the type in question possessing both characteristics *a* and *b* were a different class or kind from large size ball bearings of the same type not having characteristics *a* and *b*. The Board allowed the importer's appeal, deciding that while the characteristic *a* was not significant ball bearings with the characteristic *b* were designed for use under conditions that would render impractical ball bearings not possessing characteristic *b* and accordingly that the former were a different class. The Deputy Minister appealed to this court on the ground that the Board's decision was based on a test of competitiveness. The intervenants attacked the Board's decision as being bad in law on the ground that the point of distinction adopted was one of degree and not of kind.

Held, both attacks failed.

Dominion Engineering Works Ltd. v. A. B. Wing Ltd., et al [1958] S.C.R. 652 distinguished; *Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue,* [1956] 1 D.L.R. (2d) 497 referred to.

APPEAL from Tariff Board.

D. H. Aylen and *S. A. Hynes* for appellant.

John M. Coyne, Q. C. for respondent.

John D. Richard for intervenants.

JACKETT P. (Orally):—This is an appeal from a decision of the Tariff Board under section 44 of the *Customs Act*, R.S.C. 1952, chapter 58, disposing of an appeal by the respondent from three decisions of the appellant classifying certain goods imported by the respondent as being not "of a class or kind not made in Canada" and therefore as falling within Item 427b(3) of the *Customs Tariff* instead of Item 427b(2).

The goods in question are described as single row radial ball bearings with spherical outer races and extended inner races and with outside diameters from 3.75 inches up to 7.5 inches. (The word "race" is used in this context interchangeably with the word "ring"; single row radial ball bearings with spherical outer rings are to be contrasted with single row radial ball bearings with cyclindrical outer rings which are sometimes referred to as "standard" single row radial ball bearings.) The appellant classified the goods in question as falling within Item 427b(3), which reads:

> 427b(3) "Ball and roller bearings, n.o p.; parts thereof"

and not within Item 427b(2), which reads:

> 427b(2) "Ball and roller bearings of a class or kind not made in Canada, n.o.p.; parts thereof"

Item 427b(2) must be read with subsection (10) of section 6 of the *Customs Tariff*, R.S.C. 1952, chapter 60, which reads as follows:

> (10) For the purpose of this Act goods shall not be deemed to be of a class or kind made or produced in Canada unless so made or produced in substantial quantities; and the Governor in Council may provide that such quantities, to be substantial, shall be sufficient to supply a certain percentage of the normal Canadian consumption and may fix such percentages.

The sole issue between the parties is whether the imported goods are "of a class or kind not made in Canada". The Deputy Minister has classified all single row radial ball bearings in a range of size up to 7.5 inches outside diam-

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eter, with certain immaterial exceptions, as a single class or kind for the purpose of Item 427b(2). The respondent in effect claimed that the appropriate classification called for two distinctions, *viz.*:

(a) between single row radial ball bearings, with extended inner race and spherical outer race, and single row radial ball bearings that possessed neither of those two characteristics; and also

(b) between single row radial ball bearings with extended inner race and spherical outer race in sizes up to 3.75 inches O. D. (hereinafter referred to as the "smaller sizes") and the same ball bearings in sizes over 3.75 inches O. D. up to and including 7.5 inches O. D. (hereinafter referred to as the larger sizes).

It is common ground that bearings with extended inner race and spherical outer race in the smaller sizes are made in Canada in substantial quantities and that the same bearings in the larger sizes are not manufactured in Canada. It is also common ground that single row radial ball bearings not possessing the charactristics of an extended inner race and spherical outer race are made in Canada in substantial quantities in the larger sizes.

The parties entered into an agreement as to the facts for the purposes of the appeal to the Tariff Board and, by such agreement, stated the "issue" to be decided by the Board as follows:

> 6. The issue is whether single row radial ball bearings possessing the characteristics of an extended inner race and a spherical outer race in sizes from 3.75" O.D. to 7.5" O.D. for use in pillow blocks, are of a different class or kind from single row radial ball bearings in sizes over 3.75" O.D. to 7.5" O.D. which do not have an extended inner race and a spherical outer race.

While, therefore, the respondent was in effect asking the Board to decide that single row radial ball bearings that

(a) had an extended inner race,

(b) had a spherical outer race, and

(c) were of the larger sizes,

constituted a separate class or kind for the purposes of Item 427b(2), the hearing before the Board was, quite properly, having regard to the issue so agreed upon by the parties, directed toward the question whether, from the

point of view of such a classification, the possession by single row radial ball bearings of an extended inner race and a spherical outer race made them significantly different from single row radial ball bearings that did not have such characteristics.

The Board decided that, as far as the extended inner ring is concerned, this was merely one of a number of different ways of affixing bearings to shafts and found that "a bearing with an extended inner ring is not, for that reason, of a different class or kind than a standard single row radial ball bearing".

"On the other hand", the Board found "that single row radial bearings with spherical outer rings for purposes of alignment are, by design, intended to be used under conditions and in circumstances that would render impractical the use of standard single row radial ball bearings, that is, single row radial ball bearings with cylindrical outer rings".

The Board's decision was, therefore:

> Accordingly, the Board declares that single row radial ball bearings with spherical outer rings are not of the same class or kind as single row radial ball bearings with cylindrical outer rings; accordingly, to this extent, the appeal is allowed.

Before considering the attacks upon the Board's decision, it is necessary to consider what the effect of the decision is. It must be remembered that the appeal was from a classification of goods by the appellant under the *Customs Tariff*. The Board's powers in disposing of an appeal under the *Customs Act* are found in subsection (3) of section 44, which reads as follows:

> (3) On any appeal under subsection (1), the Tariff Board may make such order or finding as the nature of the matter may require, and, without limiting the generality of the foregoing, may declare
>
> (*a*) what rate of duty is applicable to the specific goods or the class of goods with respect to which the appeal was taken,
>
> (*b*) the value for duty of the specific goods or class of goods, or
>
> (*c*) that such goods are exempt from duty,
>
> and an order, finding or declaration of the Tariff Board is final and conclusive subject to further appeal as provided in section 45.

The Board was thereby authorized to make "such order or finding as the nature of the matter may require". Ordinarily, it might be expected that, in a classification appeal, the Board would make an order or finding as to exactly how the goods in question are to be classified, which

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would be another way of deciding "what rate of duty is applicable to the specific goods" or "that such goods are exempt from duty". On the other hand, when the parties agree on a statement of the issue to be decided by the Board, it might well be sufficient for the Board to decide that issue and let the matter go back to the Deputy Minister for him to work out the consequences of that decision.

Reading the decision in this case with the issue agreed upon by the parties, which I repeat at this point,

> 6. The issue is whether single row radial ball bearings possessing the characteristics of an extended inner race and a spherical outer race in sizes from 3.75" O D. to 7.5" O D., for use in pillow blocks, are of a different class or kind from single row radial ball bearings in sizes over 3.75" O.D. to 7.5" O.D. which do not have an extended inner race and a spherical outer race.[1]

It will be seen that the Board has answered the question contained therein in the affirmative. The Board has said that single row radial ball bearings with spherical outer rings are not of the same class or kind as single row radial ball bearings with cylindrical outer rings. It follows that single row radial ball bearings in the larger sizes that have not only spherical outer rings but also extended inner races are of a different class or kind from single row radial ball bearings in the larger sizes that have neither of those two characteristics. This is a case where the larger class does include the smaller.

I am of opinion, therefore, that the Board's decision must be read as answering the issue agreed upon in the affirmative and may also be read, therefore, as classifying the imported goods in question under Item 427b(2). This latter view is subject to the question whether the Board intended to make a finding that single row radial ball bearings of the larger sizes having spherical outer races—as contrasted with single row radial ball bearings of the larger sizes having both spherical outer races and extended inner races—are not made in Canada in substantial quantities.

It may well be that, on the record before the Board, the question as to whether the larger sizes of single row radial ball bearings having spherical outer races are made in

[1] It became clear during the hearing that the words "for use in pillow blocks" were of no special significance.

Canada in substantial quantities is still open,[1] inasmuch as the agreement as to facts did not deal with this question although it did establish that the theoretically narrower class of the larger sizes of single row radial ball bearings having both spherical outer rows and extended inner races are not made in Canada in substantial quantities. If this was the way in which the Board appreciated the matter, it may well have been the Board's intention to refer the matter back to the appellant to deal only with this narrow question.

There is, in my view, some ambiguity as to whether the Board's decision should be regarded as

(a) an order that the goods in question be classified under Item 427b(2), or

(b) a decision that the issue agreed upon by the parties is decided in the affirmative and a reference back to the Deputy Minister to reclassify in the light of the way in which the Board reached that decision.

As there has been no attack on the Board's decision on the ground that the Board could not validly classify the goods in question under Item 427b(2) because there was no evidence upon which the Board could find that single row radial ball bearings of the larger sizes having spherical outer races are not made in Canada in substantial quantities, there is no necessity for me to decide whether the Board's decision amounts to such a classification or whether the other possible meaning should be given to the Board's decision.

I come now to the attacks that have been made upon the Board's decision.

In this connection, it must be borne in mind that the appeal is under section 45 of the *Customs Act* as amended

[1] Paragraph 4 of the Agreement as to Facts establishes that single row radial ball bearings with extended inner race and spherical outer race in sizes from 3.75" O.D. to 7 5" O.D. are not manufactured in Canada. Theoretically it is possible, notwithstanding that admission, that single row radial ball bearings in such sizes having spherical outer race but no extended inner race are made in Canada in substantial quantities. This is the one question that, as it seems to me, can be regarded as open for consideration by the Deputy Minister notwithstanding the Board's decision.

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by chapter 26 of the Statutes of 1958, and that the appeal is therefore an appeal upon a "question of law" only. This Court has not power to grant the appellant relief unless

(a) the Board erred in reaching its decision by applying an erroneous principle of law, or

(b) the Board made a finding of fact that cannot be supported by the evidence.

Counsel for the appellant attacked the Board's decision on the ground that the finding that single row radial ball bearings with spherical outer rings are not therefore of the same class or kind as those with cylindrical outer rings was based on a finding that, "for practical purposes, they are not interchangeable"; that the evidence shows that they are interchangeable technically although use of the cylindrical outer rings is more expensive in certain particular applications and that it is, therefore, a test of competitiveness that the Board is applying; and, that a test of competitiveness is unacceptable in law having regard to the decision of the Supreme Court of Canada in *Dominion Engineering Works Ltd. v. A. B. Wing Ltd., et al.*[1] I reject this submission because, in my view, the basis of the Board's finding is contained in the second last paragraph of the Board's declaration, which reads,

> On the other hand, the Board finds that single row radial ball bearings with spherical outer rings for purposes of alignment are, by design, intended to be used under conditions and in circumstances which would render impractical the use of standard single row radial ball bearings, that is, single row radial ball bearings with cylindrical outer rings.

and is amply supported by the evidence. I also reject it as giving an effect to the *Dominion Engineering* decision which, in my view, that decision will not bear. That decision rejected an attack on a decision of the Board in which the contention was that the Board was wrong in law in not applying a test of competitiveness. The decision does not, in my view, establish that competitiveness cannot be a criterion in the solution of a class or kind problem under the *Customs Tariff*.

The attack by counsel for the intervenants was based upon the decision by the Supreme Court of Canada in

[1] [1958] S.C.R. 652.

Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue[1] where reference was made to subsection (9) of section 6 of the *Customs Tariff*, R. S. C. 1952, chapter 60, which reads:

> (9) For the purposes of this section, goods may be deemed to be of a class or kind not made or produced in Canada where similar goods of Canadian production are not offered for sale to the ordinary agencies of wholesale or retail distribution or are not offered to all purchasers on equal terms under like conditions, having regard to the custom and usage of trade.

Based upon this reference, an ingenious attempt was made to persuade me to conclude that the Board's decision in this case was wrong in law because the point of distinction adopted was one of degree and not of kind. I am of opinion that the Board's finding in this case was, in effect, that the difference in question was such a difference in degree as to become a difference in kind, that that finding was one of fact and that I cannot therefore interfere with it.

[1] [1956] 1 D.L.R. (2d) 497.

BETWEEN:

IMPERIAL OIL LIMITED .....APPELLANT;

AND

SUPERAMERICA STATIONS INC. .....RESPONDENT.

Ottawa
1965
Oct. 12-14
Oct. 21

Trade Marks—Opposition to registration of trade mark "SA" by owner of trade mark "ESSO"—Tests for determining whether confusion caused—Judicial notice—Trade Marks Act, S. of C. 1953, c. 49, ss. 6, 12(1)(d), 37(2).

Appellant opposed registration of the proposed trade mark SA as applied to gasoline and certain other petroleum products on the ground that it was confusing with appellant's registered trade mark ESSO.

Held, affirming the decision of the Registrar of Trade Marks, upon application of the tests laid down in s. 6 of the *Trade Marks Act*, S. of C. 1953, c. 49 and taking judicial notice of well known marketing circumstances there was no confusion between the two marks.

APPEAL from Registrar of Trade Marks.

John C. Osborne, Q.C. and *Rose-Marie Perry* for appellant.

William R. Meredith, Q.C. and *Donald G. Finlayson* for respondent.

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IMPERIAL OIL LTD. v. SUPER-AMERICA STATIONS INC.

JACKETT P.:—This is an appeal under section 55 of the *Trade Marks Act*, chapter 49, of the Statutes of 1953, from a decision of the Registrar of Trade Marks dated February 5, 1965, rejecting, pursuant to section 37 of the Act, the appellant's opposition to an application by the respondent for registration of a proposed trade mark.

On July 11, 1960, the respondent applied for registration of "SA" as a proposed trade mark to be used in association with "gasoline, diesel fuel, light fuel oils, lubricating oils and greases".

The first action concerning the application was taken on September 14, 1960, when the Registrar sent a notice, presumably pursuant to subsection (2) of section 36 of the *Trade Marks Act*, notifying it that the mark "SA" was considered to be confusing with the registered trade mark "Esso" applied to a wide range of wares, which covers all those in association with which the respondent proposed to use "SA". On April 18, 1961, the respondent answered this objection by a letter reading, in part, as follows:

> There are various features relating to the nature of the trade and the wares themselves which might be relied on for purposes of distinguishing the two trade marks, but it is submitted that the short answer is simply that there is no significant resemblance between the two trade marks.
>
> There is no resemblance in appearance; the letter "s" is the only letter which the two marks have in common; "SA" is a short two-letter word, or perhaps more correctly, a symbol, while "ESSO" is a substantial four-letter word.
>
> There is no resemblance in sound; "SA" is pronounced with equal emphasis on each letter as in the case of "TV", while "ESSO" is pronounced with the *first* syllable heavily stressed, as *in* the English word "essence" or the name of the German city "Essen".
>
> There is finally, no resemblance in any idea which may be suggested by the trade marks. "SA" conveys absolutely no idea beyond perhaps the suggestion that it is an abbreviation for some word or words as with "TV". Possibly if a person is familiar with the applicant it might be guessed that "SA" stands for the "Superamerica" part of the applicant's name, but this is the limit of any idea suggested.
>
> "ESSO", on the other hand, suggests, particularly to a French-speaking person some connection with the French word for gasoline. To an English-speaking person some connection with essential oils or flavour essences may be suggested, but there is no similarity to "SA" in this or any of the aspects of possible resemblance which may be suggested.
>
> Furthermore, the owner of the "ESSO" trade mark has no monopoly on the use of the letter "s" in combination with other letters or features, which would have to be the position if "SA" were to be refused registration on "ESSO".

The register discloses that there are endless marks of this nature, examples of which of particular interest are:

"ASPA" for lubricants, No. 106,069 Shell Oil Company

"S" and design, for lubricating oil, No. 190/41821 The Singer Manufacturing Co

In conclusion, it is respectfully submitted that there is so great a dissimilarity between these two marks that these cannot by any stretch of imagination be considered confusing, that there is no question that the trade mark "SA" is registrable over "ESSO", and approval of the application is respectfully requested.

Following receipt of that letter, the Registrar appears to have decided that the respondent's application was one that he was required by subsection (1) of section 36 of the said Act to cause to be advertised.

On September 19, 1961, pursuant to subsection (1) of section 37 of the said Act, the appellant filed, with the Registrar, a statement of opposition to the proposed registration of the trade mark "SA". Such an opposition is governed by subsection (2) of section 37 of the Act, which reads as follows:

37. (2) Such opposition may be based on any of the following grounds:

(*a*) that the application does not comply with the requirements of section 29;

(*b*) that the trade mark is not registrable;

(*c*) that the applicant is not the person entitled to registration; or

(*d*) that the trade mark is not distinctive.

The appellant based its opposition on three of the four possible objections permitted by subsection (2) of section 37. It took the position that

(a) the trade mark "SA" was not registrable,

(b) the respondent was not the person entitled to registration of the trade mark "SA", and

(c) the trade mark "SA" is not distinctive.

The contention that "SA" is not registrable was based upon section 12(1)(*d*) of the Act, which reads as follows:

12. (1) Subject to section 13, a trade mark is registrable if it is not

* * *

(*d*) confusing with a registered trade mark; . . . . .

The relevant statement in the statement of opposition was that "SA" is not registrable "since it is confusing with the

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opponent's registered marks...within the meaning of section 6". The appellant's registered trade marks with which, according to the opposition, "SA" is confusing, are

ESSO

ESSOTEX

ESSOTANE

ESSOMARINE

ESSO-MAR

ESSOLITE

ESSOLEUM

ESSOFLEET

A circular device composed of a large "S" superimposed on "O"

ESSO and grotesque man

(I have not set out the various wares in association with which these trade marks were, at that time, used as they were, in every case, by the time the appeal came on for hearing, at least in part the same as those in association with which the respondent proposes to use "SA".) The contention that the respondent is not the person entitled to registration was based upon section 16(3)(*a*) of the Act, which reads as follows:

> 16. (3) Any applicant who has filed an application in accordance with section 29 for registration of a proposed trade mark that is registrable is entitled, subject to sections 37 and 39, to secure its registration in respect of the wares or services specified in the application, unless at the date of filing of the application it was confusing with
>
> (*a*) a trade mark that had been previously used in Canada or made known in Canada by any other person; . . .

The relevant statement in the opposition is that, at the date of filing of the application, the respondent was not the person entitled to registration by reason of the fact that at the date of the filing of its application "SA" was confusing with the various trade marks of the appellant that I have already enumerated, and that such trade marks had "been previously used in Canada". The third contention, that "SA" is not distinctive, was put forward as an objection to the respondent's application in the light of paragraph (*d*)

of section 37(2) of the Act, which I have already quoted. It must be read with paragraph (*f*) of section 2, which reads as follows:

> (*f*) "distinctive" in relation to a trade mark means a trade mark that actually distinguishes the wares or services in association with which it is used by its owner from the wares or services of others or is adapted so to distinguish them;

The relevant statement in the statement of opposition is that "SA" is not distinctive since it is not adapted to distinguish the wares which the respondent proposed to associate with it from the wares which the appellant associates with the trade marks that I have already enumerated.

On September 21, 1961, the Registrar, pursuant to subsection (5) of section 37 of the Act, sent a copy of the statement of opposition to the respondent and, on December 21, 1961, the respondent filed a counter statement pursuant to subsection (6) of section 37.

Both parties filed with the Registrar affidavit evidence and written arguments and, on January 12, 1965, were given an oral hearing by the Registrar.

On February 9, 1965, the Registrar delivered his decision that the trade marks are not confusing within the meaning of section 6 of the Act. He held that "their concurrent use would not be likely to lead to the inference that the wares associated with such trade marks emanate from the same person". Accordingly, he rejected the appellant's opposition. This appeal is from that decision.

The appellant based its appeal to this Court, in effect, upon the same grounds as those set out in its statement of opposition to the registration. The parties agreed that the appellant has used in Canada, and has been the registered owner, at all material times, of the trade marks referred to in the statement of opposition. The sole issue of fact between the parties is whether the respondent's proposed trade mark "SA" is "confusing" with any, or some, or all, of the trade marks of the appellant set out above within the statutory concept of "confusing" to be found in section 6 of the *Trade Marks Act*.

It is common ground that, if the answer to that question is in the affirmative, the trade mark "SA" is not registrable

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by virtue of section 12(1)(*d*) of the *Trade Marks Act* and that the appellant's opposition should therefore succeed by virtue of section 37(2)(*b*). It is also clear that the appellant bases its alternative submissions that it is entitled to succeed by virtue of section 37(2)(*c*) and section 37(2)(*d*) upon the same contention that the respondent's proposed trade mark is "confusing" with its registered trade marks. Therefore, if the appellant succeeds by virtue of section 37(2)(*b*), there is no need to deal with the alternative submissions and, if the appellant fails to achieve success by virtue of section 37(2)(*b*), it also fails of success in its alternative submissions. In either event, there is no need to deal with any ground of appeal other than that founded upon section 37(2)(*b*) and section 12(1)(*d*).

The sole question that I have to consider, therefore, is whether the proposed trade mark "SA" is confusing with the appellant's trade marks within the meaning of the word "confusing" in section 12(1)(*d*). That question must be decided by applying the provisions of subsections (1) and (2) of section 6, which read as follows:

> 6. (1) For the purposes of this Act a trade mark or trade name is confusing with another trade mark or trade name if the use of such first mentioned trade mark or trade name would cause confusion with such last mentioned trade mark or trade name in the manner and circumstances described in this section.
>
> (2) The use of a trade mark causes confusion with another trade mark if the use of both trade marks in the same area would be likely to lead to the inference that the wares or services associated with such trade marks are manufactured, sold, leased, hired or performed by the same person, whether or not such wares or services are of the same general class.

The first question that has to be decided, with reference to each of the appellant's registered trade marks is, therefore, whether the use of "SA" and such registered trade mark in the same area "would be likely to lead to the inference" that "the wares...associated with such trade marks" are manufactured or sold "by the same person". It is clear from the argument of appellant's counsel that, if the appellant cannot succeed with reference to the trade mark "Esso", it cannot succeed with reference to any of its other registered trade marks. A further question has to be decided, however, as to whether "SA" is "confusing" in the same sense with some or all of the appellant's registered trade marks considered as a "family" or group of trade marks.

I do not propose to review the evidence that the parties put before the Registrar or the evidence that they filed in this Court for the purpose of this appeal. There was, as I understand counsel for the parties, no controversy concerning any fact that was still relied upon by either of them at the end of the argument of the appeal. I should say that, to some extent, I propose to rely on facts, of which no evidence appears in the record, concerning which, in my view, I may take judicial notice.

In determining a question whether trade marks are "confusing" for the purpose of the *Trade Marks Act*, the Court is governed by subsection (5) of section 6 of the Act, which reads as follows:

> 6. (5) In determining whether trade marks or trade names are confusing, the court or the Registrar, as the case may be, shall have regard to all the surrounding circumstances including
>
> (*a*) the inherent distinctiveness of the trade marks or trade names and the extent to which they have become known;
>
> (*b*) the length of time the trade marks or trade names have been in use;
>
> (*c*) the nature of the wares, services or business;
>
> (*d*) the nature of the trade; and
>
> (*e*) the degree of resemblance between the trade marks or trade names in appearance or sound or in the ideas suggested by them.

Neither party referred to any "surrounding circumstances" other than those covered by the enumerated paragraphs of subsection (5). For the purposes of this appeal, I divide these "circumstances" into three classes:

(a) *"the inherent distinctiveness of the trade marks"* (paragraph (*a*)) and *"the degree of resemblance between the trade marks...in appearance or sound or in the ideas suggested by them"* (paragraph (*e*)). Generally speaking, these circumstances must be appraised upon an examination of the trade marks themselves and outside evidence is not likely to be of much value.

(b) *"the extent to which they have become known"* (paragraph (*a*)) and *"the length of time the trade marks have been in use"* (paragraph (*b*)). The evidence establishes that the appellant's trade mark "Esso" is one of the best known trade marks in Canada and that it has been in use for a very long time. The

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respondent's proposed trade mark "SA", being a "proposed" trade mark is virtually unknown in Canada.

(c) *"the nature of the wares, services or business"* (paragraph (*c*)) and *"the nature of the trade"* (paragraph (*d*)). As appears from the respondent's application, the wares are "gasoline, diesel fuel, light fuel oils, lubricating oils and greases". No evidence was given concerning their nature but the Court is aware that they are products one of the most important uses of which is as fuel, etc., for automobiles and other road vehicles. They are also used in water craft, as fuel for stoves and furnaces and for many other purposes. The Court is also aware that, from the point of view of the present problem, the most important method of marketing such products is probably by way of filling station sales to the operators of individual motor vehicles. (Sales to operators of fleets of vehicles and other purchasers of large quantities, while substantial in volume, are not likely to be of any great importance from the point of view of trade mark confusion. Professional purchasing agents can be expected to know the market.) There are, of course, other retail outlets for the sale of such products but, while substantial, these are probably relatively unimportant for present purposes compared to the myriad of filling stations with which the public is confronted almost everywhere. Filling stations, and probably such other outlets, generally speaking, if not exclusively, sell the products of only one oil company. Consequently, the individual motorist chooses the company whose product he is going to buy when he drives into a particular filling station. Furthermore, the Canadian motoring public is, generally speaking, quite knowledgeable concerning the relatively few oil companies whose products are sold in Canada. By means of newspaper, magazine, television, radio, billboard and other advertising, by the "get-up" of their filling stations, by the distribution of credit cards, and by numerous other devices, these companies manage to make themselves, their products and their credit cards well known to the ordinary motorist so that he is

surprisingly knowledgeable concerning such trade marks or trade names as "Shell", "B.A.", "B.P.", "Esso", etc.

As appears from paragraph (*e*) of section 6(5), the degree of resemblance between the appellant's registered trade marks and "SA" must be considered from three points of view, namely,

(a) appearance,

(b) sound,

(c) the ideas suggested by them.

It was not suggested on behalf of the appellant that there is any resemblance in the ideas suggested by "SA" and "Esso" or any of the other of the appellant's trade marks, and I hold that there is none. I have not been able to find any relevant resemblance in the appearance of these trade marks and I hold that there is no such resemblance. That leaves for consideration the question of the degree of resemblance in sound.

In considering the degree of resemblance in sound, I shall restrict myself to a comparison of "SA" with "Esso" and the circular device composed of a large "S" superimposed on "O". I can see no resemblance in sound between "SA" and any of the appellant's other registered trade marks. I shall not refer specifically to the device because what I say about "Esso" will apply substantially to it.

"SA" and "Esso" have a decided similarity in sound[1], particularly when "SA" is pronounced in the French language. I do not overlook the respondent's insistence on the difference between the pronunciation of "Esso", where there is an emphasis on the first syllable, and the pronunciation of "SO", where the two letters are generally pronounced with equal emphasis. This is a subtle distinction, however, to which I do not attach much importance in the comparison of these trade marks. The importance of the similarity in the sound of "SA" and "Esso" is greatest, in my view, in connection with the radio (excluding televi-

[1] Cf. *Aristoc Ld. v. Rysta Ld.*, [1945] A.C. 68, per Viscount Maugham, at pages 85-6.

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sion) advertising of "Esso" where the impact of the message on the mind of the listener who is not too attentive might possibly cause him to react to the attraction of an "SA" filling station instead of an "Esso" filling station.

In considering what weight to attribute to this possibility, in my view, I must reach a conclusion as to whether an ordinary Canadian motorist or other purchaser of the wares in question is "likely" to infer that such wares are manufactured or sold by the same person if they are sold in association with the two different trade marks in the same area.

The likelihood of the ordinary Canadian motorist being led to make such an inference must be considered having regard to the fact that he is exposed not only to ordinary radio advertising, where he hears only the sound of the two letters "S" and "O", but also to extensive television and other pictorial advertising of all kinds, where he becomes familiar with the appearance of the word "Esso" and frequently sees it at the same time that he hears it. The appellant's evidence of its whole advertising programme, as well as the general knowledge of that programme, which is so all pervasive that the Court can, in my view, take judicial knowledge of it, convinces me that the ordinary Canadian motorist is so well acquainted with the trade mark "Esso" as it is written that there is no real likelihood of him thinking of it as "SO" or confusing it with "SA". It would be, I should have thought, an exceptional Canadian motorist, or other customer for the wares in question, who would make that mistake. In reaching this conclusion, I have in mind that, as I have already indicated, the ordinary Canadian customer for such wares is particularly knowledgeable concerning such trade marks.

In my view, the test contained in section 6(2) must be applied from the point of view of the ordinary customer for the wares in question and not the exceptional customer.

Looking at the question that I have to decide, having regard to all the surrounding circumstances contemplated by subsection (5) of section 6, I hold that "SA" is not confusing with any of the registered trade marks of the appellant within the statutory meaning dictated by section 6.

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In reaching this conclusion, I have not overlooked the alternative argument based on the appellant's "family" or class of trade marks. The only class of trade marks that I can perceive is the "Esso" class and I cannot see that "SA" can, in any way, be regarded as "confusing" with that class in the sense of that word as established by section 6.

I have not so far made any reference to the "survey" evidence introduced by the respective parties. As I indicated during the hearing, this evidence does not, in my view, meet the requirements that must be met before such evidence can be accepted as establishing facts relevant to the appeal. Compare *Robert C. Wian, Inc. v. David Mady et al.*[1] per Cattanach J.

The appeal is dismissed with costs.

[1] [1965] 2 Ex C R. 3.

BETWEEN:

BENABY REALTIES LIMITED ..... APPELLANT;

AND

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

Montreal 1964 Nov. 9-10

Ottawa 1965 June 7

(No. 1)

Income tax—Profit from disposition of company's land—Whether taxable —Expropriation of land—Taxability of profit—In what year taxable— Taxpayer's accounts on accrual basis.

When one of a company's motives for acquiring a large quantity of land is its hope and expectation of disposing of it at a profit, a profit made upon a subsequent expropriation of part of the land is taxable. When the company's accounts are kept on an accrual basis the profit made on such expropriation is taxable in the year in which notice of expropriation is given, that being the year in which the debt becomes receivable, even though the compensation is not received until the following year. It is immaterial that s. 24 of the *Expropriation Act*, R.S.C. 1952, c. 106, permits the Crown to abandon part or all of the land expropriated before paying compensation therefor and that the

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Regulations Relating to the Acquisition of Land by Government Departments, P.C. 4253 of October 9th 1952, require Treasury Board authorization when the compensation exceeds $15,000 (as in this case).

Lechter v. M.N.R. [1965] 1 Ex C.R. 413, followed; *C.I.R. v. Newcastle Breweries Ltd* (1925) 12 T.C. 927; *Kennedy v. M.N.R.* [1952] Ex C.R. 258; *Regal Heights Ltd v. M.N.R.* [1960] S.C.R. 902; *Income Tax Act*, R.S.C. 1952, c. 148, 85B(1)(*b*), applied.

APPEAL from Tax Appeal Board.

N. N. Genser, Q.C. and *Sydney Phillips, Q.C.* for appellant.

Paul Boivin, Q.C. for respondent.

NOËL J.:—This is an appeal from a decision of the Tax Appeal Board[1] in respect of the assessment of the appellant under Part I of the *Income Tax Act* for the taxation years 1954 and 1955. The Tax Appeal Board rejected all the appellant's complaints against its assessment for the 1954 taxation year and, while it referred the 1955 assessment back to the Minister for re-assessment in respect of some of the relief claimed by the appellant, the Board rejected the appellant's complaints against its 1955 assessment in other respects. There is no cross-appeal by the respondent.

While other complaints are made against the assessment in the notice of appeal, during the course of the argument in this Court, all grounds of appeal were dropped except those set out in the following portions of the notice of appeal:

FACTS:

. . .

2 THAT on or about the 31st day of March 1953, the Appellant acquired a property bearing civic number 304-310 Craig St. West, for the purpose of producing rental income. In order for the Appellant to gain income from the above mentioned property, it was necessary to refreshen same to induce tenants to lease the premises, the whole at a cost of some $53,842.66 out of which sum, an amount of $25,000.00 was capitalized and the balance was charged by the Appellant to expenses incurred for the purpose of gaining income which the Respondent disallowed to the extent of $25,000.00. The said expenditures were made from time to time during the fiscal year ending April 30th 1954, the whole as appears from a detailed statement hereto attached;

[1] 28 Tax A.B.C. 176.

3. THAT the Appellant is in the business of Real Estate rentals as will be evidenced by its past financial statements together with those up to the present fiscal year;

4. THAT in the later part of the year 1952, the Appellant assessing the economical growth of the City of Montreal, decided that it would be in the best interest of the Appellant to obtain and make investments in land in or near the City of Montreal. Towards this end, on October the 31st 1952, the Appellant purchased Lot Nos. 525-527 in the Parish of St. Laurent. Furthermore, on January the 24th 1954 the Appellant purchased Lot No. 196 in the Parish of St. Laurent;

5. THAT upon said lots so acquired there were farm buildings which the Appellant obtained tenants for in that they were in the business of real estate rentals;

6. THAT the said Appellant realized its investment, at such time and such prices as appear in a schedule hereto attached:

. . .

STATUTORY PROVISIONS & REASONS WHICH THE APPELLANT PRESENTLY SUBMITS:

. . .

2. THAT the repairs of $25,000 00 capitalized by the department are in addition to the improvements of $25,000.00 already capitalized by the Company, the latter being made once and for all and enhancing the value of the building, whereas the former are such repairs as are necessary with each change in tenancy as will be noted in the Appellant's financial statements in the subsequent years. The assessors did arbitrarily permit an amount of approximately $3,842.66 to be charged off as an expense by the Company without stating what items this should be applied in these schedules hereto attached;

3. . . . In any case the Company considers the entire profit on the sale of land as a capital gain. Land was not bought for immediate resale. The Company had considered future development of the land which it held. Furthermore the indemnity received from the Federal Government of land in the amount of $371,260.00 and producing a profit of $263,864 03 according to the Department constitutes in the opinion of the Company a capital gain. In any event the Company is in the business of real estate rentals and all profits on the sale of land constitute a capital gain;

. . .

5. THAT the Appellant Company was not in the business of dealing in real estate and the gain resulting from the sale of lands was a gain made in carrying out a policy of investments;

The grounds of appeal set out in the notice of appeal, upon which the appellant relied in this Court may, therefore, be summarized as follows:

(a) that the respondent wrongfully refused to allow $25,000 of an amount of $53,842.66 expended by the appellant "to refreshen" certain property which had just

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been acquired by the appellant "to induce tenants to lease the premises" as current expenses of earning the income from the property;

(b) that the respondent wrongfully taxed the appellant on profits made from the resale of land that had not been bought "for immediate resale" and from the expropriation of other such property.

In addition, the appellant urged a further ground of appeal, not set out in the notice of appeal, in respect of the profit realized from the expropriation transaction. The appellant urged that, if this profit was taxable at all, it was taxable in the taxation year in which the expropriation took place and not in the taxation year in which it reached an agreement with the expropriating authority as to the amount of the compensation and actually received the amount of the compensation, which is the year in respect of which the respondent has assessed it.

With reference to the sum of $25,000, which the appellant claims should have been allowed to it as a current cost of maintenance and repairs, it became clear during the course of argument that no evidence had been adduced to show how any part of the total amount of $53,842.66 had actually been expended. The only evidence given with reference to these expenditures was that of the company's auditor who did not pretend to have any personal knowledge of the reason for the expenditures and, indeed, gave no evidence upon which I could make any finding as to whether any part of the expenditures were in respect of current maintenance or repairs. A statement of the details making up the expenditures was filed as an exhibit and I have examined this with a view to the possibility of drawing some conclusion from it with regard to the appellant's contention, but I find it quite impossible to draw any conclusion favourable to the appellant based on that statement. The respondent did allow, out of the total amount of $53,842.66, an amount of $3,842.66 as representing current expenses and I cannot find as a fact that any more than this amount represents expenditures having to do with current maintenance or repairs.

With reference to the appellant's appeal against the assessment of the profits which it made from the acquisition and disposition of certain vacant lands, it appears that the appellant, which was incorporated in 1949, did acquire certain revenue producing properties which, for the purposes of this appeal it may be assumed, were acquired for the purpose of obtaining a rental revenue from them and, in addition, in 1953, it started acquiring farm properties near the Côte-de-Liesse Road on Montreal Island, some of which properties were disposed of by it in a manner that is sufficiently indicated by a statement entitled "Reconciliation of Net Profit Re Sale of Land", which is attached to the notice of appeal and which reads as follows:

RECONCILIATION OF NET PROFIT RE SALE OF LAND

Re: Expropriation by the Federal Government—Deed 1106499

Date—Nov. 9/54

Expropriation Price		371,260.00	
Cost of Land Sold—Purchased Oct. 21/52	75,391.60		
Cost of Land Sold—Purchased Oct. 31/52	32,004.37	107,395 97	
Net Profit			263,864 03

½ Time held re lot 525 as per deed 1106499—one year, 1 month & 28 days
½ Time held re lot 527 as per deed 1106499—one year, 2 months & 7 days

Re Sale to Innes Equipment Ltd.—Deed 1109955

Date—Nov. 17/54

Selling Price		50,180 20	
Cost of Land Sold—Purchased Oct 21/52	5,206 23		
Commission-Westmount Realties	2,509 00		
Notarial Fees	25.00	7,740 23	
Net Profit			$42,439.97

Time held as per Deed 1109955—2 years, 27 days
Lot 525

Re Sale to Relative Realty Corp.—Deed 1128590

Date—April 1/55

Selling Price		475,000 00	
Cost of Land Sold—Purchased Jan 28/54	346,908.14		
Commission	9,829 00	356,737 14	
Net Profit			$118,262.86

Time held as per Deed 1128590—1 year, 2 months, 3 days
Lot 196

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Re Sale to Studebaker Corp. of Canada—Deed 1007182

Date—May 7, 1953

Selling Price		67,475.70	
Cost of Land Sold—Purchased Oct. 31/52	11,166.88		
Commission to Morgan Realties Inc.	3,373.78		
Notaries Fees	75.00		
Adjustment of Taxes	24.75	16,640.41	
Net Profit			$52,835.29

Time held as per deed 1007182—6 months & 7 days
Lot 525

Re Sale to Canadian Comstock Co. Ltd.—Deed 1091288

Date—Aug. 18/54

Selling Price		122,500.00	
Cost of Land Sold—Purchased Oct. 21/52	31,833.99		
Commission to Ernest Pitt	4,625.00		
Notarial Fees	79.50		
Notarial Fees	250.00	36,788.49	
Net Profit			$85,711.51

Time held as per deed 1091288—1 year, 9 months, 18 days
Lot 527

Re Sale to William James Langill—Deed 1097138

Date—Sept. 15/54

Selling Price		20,000 00	
Cost of Land Sold—Purchased Oct. 21/52	3,506.47		
Commission	1,000.00		
Notarial Fees	75 00	4,581.47	
Net Profit			$15,418.53

Time held as per Deed 1097138—1 year, 10 mos., & 15 days
Lot 527

As appears from the statement above quoted, the appellant invested very substantial amounts of money in large areas of land which, for all practical purposes, it is admitted by counsel for the appellant, must be regarded as having been vacant land.

The sole issue, as far as these profits are concerned, is whether the lands in question were acquired for the purpose of resale at a profit. The only evidence adduced by the appellant with reference to that question is the evidence of the person who was president of the appellant at the time

of the trial and who, according to his own evidence, had no personal knowledge of what was in the mind of those who were guiding the fortunes of the company at the time that the land was purchased. The relevant part of his evidence reads as follows (p. 97 of transcript):

> A. Well, the policy, from what I can remember, was that we had bought large blocks of land and subsequently, there was some trouble with some zoning restrictions for the airplanes or something like that and we had thought that we would use it for development, we would hold it for investment.
>
> But after the expropriation, such a large chunk was taken away that we finally decided that perhaps we should change our attitude. And at that time, through the foresight of the officers of the company, when the purchase was made, the investment had realized nicely in value and it was decided that since the expropriation took place and they took . . . I don't remember how much land away . . . but it would probably be advisable to sell out and take a profit and that would be that.

In my opinion, this evidence is not sufficient to rebut the obvious inference from all the circumstances that at least one of the motivating reasons for the appellant to acquire the vacant land in question was its hope and expectation that it would be able to dispose of it at a profit.

If that was one of the motivating reasons, profits made upon subsequent disposition of the property are taxable in accordance with *Regal Heights Ltd. v. M.N.R.*[1]. It also follows, as decided in *Byron B. Kennedy v. M.N.R.*[2], that a profit realized upon the expropriation of properties so acquired is taxable. (An appeal to the Supreme Court of Canada from this decision was dismissed without reasons. Cf. p. viii of [1953] 1 S.C.R.).

As indicated earlier, although it is not raised by the notice of appeal, the appellant took the position on the argument in this Court that it ought to succeed with reference to the profit from the expropriation because that profit, if it was taxable, was taxable in the year in which the expropriation took place and not in the year in which it received the compensation. The expropriation took place on January 7, 1954, and the company's fiscal year ending on April 30, 1954, the offer of payment, its acceptance and the authorization to pay took place in the fall of 1954, i.e., during the 1955 fiscal period. The profit from the expro-

[1] [1960] S.C.R. 902. [2] [1952] Ex. C.R. 258.

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priation was then assessed for the 1955 instead of the 1954 taxation year. Having regard to the principle laid down by the House of Lords in *Commissioners of Inland Revenue v. Newcastle Breweries Limited*[1] and section 85B(1)(*b*) of the *Income Tax Act* which sets down that for taxpayers keeping accounts on an accrual basis (which is the case of the present appellant) every amount receivable in respect of property sold or services rendered in the course of the business in the year must be included in computing their income, I am of opinion that, if the issue that the assessment had been made in the wrong year had been properly raised, the appellant would be entitled to succeed with regard thereto.

In *Ben Lechter v. M.N.R.*[2] my brother Dumoulin rendered a decision to the effect that a profit from an expropriation under the *Expropriation Act* (1952 R.S.C. c. 106) for a taxpayer who is on an accrual basis is taxable in the year in which the expropriation took place and not in the year in which the compensation was received on the basis that "the relevant taxation year must coincide with that during which a debt or an obligation to pay legally enforceable originated between respondent and appellant" as a result of section 9 of the *Expropriation Act* whereby the land covered by the notice of expropriation is expressly vested in Her Majesty from the day a plan and description are deposited on record in the Registration office and the expropriated party, because of such deposit and in view of section 23 of the *Expropriation Act,* loses the ownership of the land so expropriated which passes to the Crown, and is then left with a claim to whatever compensation money is agreed upon or is adjudged.

I agree with this decision and in my view there is in principle no difference between the case of *Ben Lechter v. M.N.R.* (*supra*) and the present one as the fact relied upon by counsel for the respondent that here, contrary to the *Lechter case,* the notice of expropriation, the offer of settlement and its acceptance and payment, all took place in the same calendar year although not within the same fiscal year (as the appellant's fiscal year ended on April 30 of each year, the expropriation took place on January 7, 1954 and

[1] (1925) 12 T.C. 927. [2] [1964] C.T.C. 510.

the compensation was received in November 1954) whereas in the *Lechter* case the notice of expropriation took place in one calendar year (January 7, 1954) the offer of settlement and acceptance took place in July of that year and the payment was authorized on February 11, 1955, i.e. in the 1956 fiscal period as the taxpayer's fiscal year ended on January 30 of each year, does not in my view distinguish this case from that of *Lechter,* the main and important fact being that in both cases the taxpayer was not taxed, as it should have been, in the fiscal year in which the expropriation took place (and the debt became receivable) but in the fiscal year in which the compensation or payment was made and received.

I have also considered the "receivability" of the compensation money from the expropriation as the submission of counsel for the respondent appears to be, in regard to both section 24 of the *Expropriation Act* and Order-in-Council No. 4253 and the "Regulations Relating to the Acquisition of Land by Government Departments". Section 24 enables the Crown to abandon the totality or part of the land which was vested in the Crown by the registration of the plan and description of the land at the Registry of Deeds for the county or registration division in which the land is situate before the compensation money has been actually paid by registering a written declaration of abandonment in the same registry office whereby such land then revests in the person from whom it was taken or in those entitled to claim under him.

Order-in-Council No. 4253 and "Regulations Relating to the Acquisition of Land by Government Departments" provide that the authorization of the Treasury Board is required in all cases where compensation for the acquisition of land by the Government exceeds the sum of $15,000 (which of course applies to the present case). I am of the view that the matter of possible abandonment of the land expropriated or of the required authorization of the Treasury Board would not make the amount receivable for the taking of the land by expropriation a claim of such a precarious nature that it could not be included in the year in which the expropriation took place. Indeed, it appears to

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me that notwithstanding section 24 of the *Expropriation Act* or the required authorization of the Treasury Board, registration of the plan and description of the land on January 14, 1954, operated as a compulsory sale of the land and as there is no question but that a compulsory sale is any the less a sale and that, consequently, the owner was, as and from then, entitled to claim compensation for this sale, such compensation money became an unquestionable receivable at that date.

Having reached the conclusion that the appeal should be allowed in respect of the profit from the expropriation if this point had been properly raised, I must now consider whether the appeal should be allowed in respect of that profit notwithstanding that it was not so raised. Section 98(3) of the *Income Tax Act* requires the appellant to "set out" in the notice of appeal "a statement" of *inter alia* the "reasons which the appellant intends to submit in support of his appeal". This particular reason was not included in the notice of appeal. Indeed, it was raised for the first time during the course of final argument by counsel for the appellant. Had the respondent at that time objected to the point being taken by the appellant, I am inclined to the view that I would have put the appellant to a choice of taking leave to amend his notice of appeal under section 99(2) of the *Income Tax Act* upon terms as to costs or of abandoning the point. Counsel for the respondent did not however make such an objection and, indeed, having regard to the manner in which he strove to avoid the decision of Dumoulin J. in the related appeal of *Ben Lechter* which decision had been delivered some five days before the argument in this case, I can only assume that he anticipated that the point would be taken. I therefore order that the appellant be permitted to make an amendment to the notice of appeal raising this point in an appropriate way.

In reaching the above conclusion with regard to the taxability of the profits from the disposition of the vacant lands, I have not taken into account the evidence concerning the transactions in land of the shareholders in the appellant company, which was admitted subject to the appellant's very strong objections and in view of the conclu-

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sion which I have reached without reference to this evidence, it therefore becomes unnecessary for me to rule with regard to its admissibility.

Consequently, upon the appellant amending its notice of appeal pursuant to the leave herein granted, there will be judgment allowing the appeal and referring the assessment back to the Minister for re-assessment by excluding the profit from the expropriation from the appellant's income for the 1955 taxation year and dismissing the appeal in all other respects. In the circumstances, there will be no costs.

Montreal 1966

Aug. 9 Oct. 20

Oct. 21

BETWEEN:

BENABY REALTIES LIMITED .....APPELLANT;

AND

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

(No. 2)

Practice and Procedure—Appeal to Supreme Court—Failure to file notice of appeal in time—Motion for extension of time—Discretion of judge—Exchequer Court Act, R.S.C. 1952, c. 98, s. 82.

Through the inadvertence of a junior solicitor notice of appeal from a judgment of this court was not filed with the Registrar of the Supreme Court of Canada on behalf of the Minister of National Revenue within the time prescribed by s. 82 of the *Exchequer Court Act*, R.S.C. 1952, c. 98, i.e. by October 7th 1965. When counsel for the Minister became aware of the omission in February 1966 no action was taken nor was the solicitor for the other party informed of the omission. The latter had received notice of appeal in due time and there had been an oral understanding between counsel that this appeal would remain in abeyance pending the outcome of an appeal to the Supreme Court of Canada from this court's judgment in *Lechter v. M.N.R.* ([1965] 1 Ex. C.R. 413) which it was thought would determine the issue in this case. The Supreme Court of Canada delivered judgment in the *Lechter* case on June 28th 1966 ([1966] S.C.R. 655) but it did not determine the issue in this case. On July 14th 1966 application was made to extend the time for appeal in this case. The motion came on first on August 9th but was not heard until October 9th in order to accommodate the solicitors for the other party and it then appeared that counsel differed as to the terms of their oral understanding.

Held, but with considerable hesitation, that in all the circumstances the Minister should have the leave sought in view of the dominant fact that the other party was under the impression until this motion was

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launched that its judgment was under appeal and throughout that period the Minister intended to appeal. The difference of opinion between counsel as to the terms of their oral understanding was irrelevant in view of the *rationale* of the Supreme Court's decision in the *Lechter* case.

Gatti v. Shoosmith [1939] 3 A.E.R. 916, discussed.

APPLICATION for extension of time for appeal to the Supreme Court of Canada.

N. N. Genser, Q.C., Sydney Phillips, Q.C. and *Wolfe Friedman* for appellant.

Paul Ollivier, Q.C. for respondent.

JACKETT P. (Orally):—This is an application to me, as a judge of this Court, for an order extending the time within which an appeal may be brought from a judgment allowing this appeal in part that was delivered by my brother Noël on June 7, 1965.

The judgment so delivered is a "final" judgment within the meaning of that expression in section 82 of the *Exchequer Court Act*, R.S.C. 1952, chapter 98, which is the provision regulating such an appeal and which reads in part as follows:

> 82. (1) An appeal to the Supreme Court of Canada lies
>
> (*a*) from a final judgment or a judgment upon a demurrer or point of law raised by the pleadings, and
>
> (*b*) with leave of a judge of the Supreme Court of Canada, from an interlocutory judgment,
>
> pronounced by the Exchequer Court in an action, suit, cause, matter or other judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars.
>
> (2) An appeal under this section shall be brought by serving a notice of appeal on all parties directly affected and by depositing with the Registrar of the Supreme Court of Canada the sum of fifty dollars by way of security for costs; the notice of appeal with evidence of service thereof shall be filed with the Registrar of the Supreme Court of Canada and a copy of the notice shall be filed with the Registrar of the Exchequer Court.
>
> (3) The notice of appeal shall be served and filed and the security shall be deposited within sixty days (in the calculation of which July and August shall be excluded) from the signing or entry or pronouncing of the judgment appealed from or within such further time as a judge of the Exchequer Court, or in the case of an appeal from an interlocutory judgment a judge of the Supreme Court of Canada, may either before or after the expiry of the said sixty days fix or allow.

With section 82, one must read section 85 of the same Act, which is as follows:

> 85. If the appeal is by or on behalf of the Crown no deposit is necessary.

In effect, therefore, an appeal from a final judgment by the Minister of National Revenue, which is an appeal "by or on behalf of the Crown", is "brought" by

(a) serving a notice of appeal on all parties directly affected,

(b) filing the notice of appeal with evidence of service thereof with the Registrar of the Supreme Court of Canada, and

(c) filing a copy of the notice of appeal with the Registrar of this Court,

within sixty days (in the calculation of which July and August are excluded) from the signing or entry or pronouncement of the judgment appealed from.

Whether or not the filing of a copy of the notice of appeal with the Registrar of this Court is an essential part of instituting the appeal, which must occur within the specified period, does not arise in this case. It is common ground that the filing of the notice of appeal with evidence of service thereof with the Registrar of the Supreme Court of Canada is an essential part of instituting such an appeal.

In this case, a decision to appeal was duly taken on behalf of the Minister of National Revenue in time so that

(a) a notice of appeal was served upon the solicitors for Benaby Realties Limited (hereinafter referred to as "Benaby") on June 29, 1965 and

(b) the original of such notice with admission of service endorsed thereon was filed with the Registrar of this Court on July 2, 1965.

There has been, however, no compliance with the requirement of section 82 of the *Exchequer Court Act* that the notice of appeal with evidence of service thereof be filed with the Registrar of the Supreme Court of Canada.

The failure to institute the appeal in accordance with the statutory requirement is attributed to "inadvertence", presumably on the part of the "junior solicitor" who was instructed to "file an Appeal".

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Following July 2, 1965, there was an understanding between counsel for the Minister and counsel for Benaby that the appeal in this case would remain in abeyance pending the outcome of an appeal in *Minister of National Revenue v. Ben Lechter* from a judgment, delivered by my brother Dumoulin on November 5, 1964.[1]

On or before February 23, 1966, counsel for the Minister became aware that the requirements of section 82 for the institution of an appeal from the judgment of my brother Noël had not been carried out. No action was taken at that time as a result of the realization that no appeal had in fact been instituted and no communication was made to Benaby's legal representatives of the change in the basis for the understanding between counsel to which I have referred.

On June 28, 1966, the Supreme Court of Canada delivered judgment in the *Lechter* case. While that judgment allowed the Minister's appeal in part, it was against the contention of the Minister in so far as the appeal related to the ground of appeal which gave rise to the understanding of counsel to which I have referred.

The present application was brought by notice of motion dated and served on July 14, 1966. It came on for hearing in Montreal on August 9, 1966. Following that hearing, there were written submissions and a further hearing on October 20, 1966. However, any delay in disposing of the application following the hearing on August 9, 1966 was for the purpose of accommodating Benaby and is in no way attributable to the Minister.

The situation is, therefore, that

(a) time for appeal within the period fixed by the statute expired on October 7, 1965,

(b) realization that no appeal had been instituted came some time before February 23, 1966,

(c) application for an extension of time for appeal was made on October 9, 1966 by way of a notice served on July 14, 1966.

Some help in considering this application is to be found in a passage from the judgment of Sir Wilfrid Greene, M.R. in

[1] [1965] 1 Ex. C.R. 413.

Gatti v. Shoosmith[1] quoted by the Minister in his written submission.[2] As the Master of Rolls pointed out in that case with regard to the provision that he was applying, the discretion under section 82 is "a perfectly free one". The only question to be decided is whether, upon the facts of this particular case, the discretion should be exercised. I adopt his view that there is no absolute bar to exercising that discretion in the fact that the failure to file within the statutory period was due "to a mistake on the part of a legal adviser". I must say, however, that I do not find here all the circumstances that inclined him to take a lenient view in that case. In that case there was a misunderstanding "which, to anyone who was reading the rule without having the authorities in mind, might very well have arisen" and the period involved was "a very short one, . . . only

[1] [1939] 3 A.E.R. 916 at 919.

[2] The passage reads as follows:

> On consideration of the whole matter, in my opinion under the rule as it now stands, the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, may be a sufficient cause to justify the court in exercising its discretion. I say "may be," because it is not to be thought that it will necessarily be exercised in every set of facts. Under the law as it was conceived to be before the amendment, such a mistake was considered to be in no circumstances a sufficient ground. What I venture to think is the proper rule which this court must follow is: that there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter shall be so treated must depend upon the facts of each individual case. There may be facts in a case which would make it unjust to allow the appellant to succeed upon that argument.
>
> The discretion of the court being, as I conceive it, a perfectly free one, the only question is whether, upon the facts of this particular case, that discretion should be exercised. If ever there was a case in which it should be exercised, I should have thought it was this one. We are not, I think, concerned here with any question at all as to the merits of this case or the probability of success or otherwise. The reason for the appellant's failure to institute his appeal in due time, was a mere misunderstanding, deposed to on affidavit by the managing clerk of the appellant's solicitors—a misunderstanding which, to anyone who was reading the rule without having the authorities in mind, might very well have arisen. The period involved is a very short one, it is only a matter of a few days, and the appellant's solicitors, within time, informed the respondent's solicitors by letter of their client's intention to appeal. That was done within the strict time, and the fact that the notice of appeal was not served within the strict time, was due entirely to this misunderstanding. On the facts of this case, it appears to me that the case is one where the discretion of the court ought to be exercised, and, accordingly, leave will be given.

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a matter of a few days". Here, I cannot imagine that anyone who read section 82 could have been under a misunderstanding (the "inadvertence" must have been a failure to have a properly qualified person take charge of this important matter) and the period involved was four months and not a matter of a few days. The one fact that influenced Sir Wilfrid Greene in reaching his conclusion in that case that we find here is that Benaby was aware of the Minister's intention to appeal well within the time fixed by the statute for appeal.

This brings me to the painful part of my consideration of the matter. As I have already indicated, from shortly after the time that the Minister, and Benaby, thought that the Minister had instituted an appeal, there was an understanding between counsel. Unfortunately, that understanding was not put in writing at the time that it was arranged or at any subsequent time and, therein, I do not think that I am being too harsh in my opinion that both counsel concerned were grievously at fault. It is a fundamental rule of practice that all agreements between opposing sides should, if not made in writing, be confirmed in writing while the matter is fresh in the minds of all concerned. No matter how much goodwill there is on all sides, a verbal agreement between opponents leads almost inevitably to disagreement. This matter exemplifies this simple fact of life very sharply.

The Minister's position is that there was a simple understanding that the Benaby appeal "would remain in abeyance" pending the outcome of the *Lechter* appeal. His hope and full confidence was that the decision of the Supreme Court of Canada in that case would indicate quite clearly to the parties whether the point decided by my brother Noël in this case must be resolved in favour of the Minister or in favour of Benaby, in which event, the parties would settle the matter accordingly. When counsel for the Minister became aware in February, 1966, that there was, in fact, no appeal, he formed the view that this gave rise to no need for action at that time as the parties would, as he fully expected, be in a position to resolve the matter amicably when the Supreme Court of Canada pronounced its judgment in the *Lechter* case. However, when that judgment was delivered, he found that, in his view, while it was

unfavourable to the Minister on the facts of the *Lechter* case, it did not decide the question that arises in the *Benaby* case. As soon as he realized that, he took steps to launch the present application.

Counsel for Benaby, on the other hand, was of the view that the understanding between counsel was not merely that the Minister's appeal in this case "would not be pushed and that it would be held in abeyance" but that "it was further agreed to hold this case in abeyance so that the parties would follow the judgment in the *Lechter* case". His position is that "there was absolutely no question of reviewing the judgment in the *Lechter* case, because both parties agreed that the issues in the *Lechter* case and the *Benaby* case were identical and that judgment in one would be followed in the other".

The members of the profession involved in this understanding of counsel were both before me on the second hearing of this application[1] and I am happy to say that there was a sincere agreement that no lack of good faith was involved and that this unfortunate disagreement arose *bona fide* out of a difference in the basic approach to the making of the verbal agreement without any question of either party having failed in candour or sincerity.

Furthermore, it is common ground that there can be no question of my having to decide as between the parties as to what, if any, meeting of the minds there was between counsel.

To appreciate just how the parties have reached their present state of disagreement, reference should be made as briefly as possible to what was decided by the Supreme Court of Canada in the *Lechter* case and to the problem raised by the judgment from which the Minister seeks to appeal this case.

At the risk of oversimplification, the facts in the *Lechter* case may be stated as follows:

(a) in Lechter's 1954 taxation year, the Crown expropriated real property belonging to him (the effect being that the property vested in the Crown forthwith and

[1] In the future, I propose to be stricter in applying the rule that persons involved in the factual situation on which a particular proceeding has to be decided should not appear as counsel in the proceeding, unless it is, practically speaking, impossible to instruct other counsel.

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he ceased to have any title to it, his rights being replaced by operation of law by his right to compensation);

(b) in Lechter's 1955 taxation year, the department concerned reached an agreement with Lechter as to the amount of the compensation;

(c) in Lechter's 1956 taxation year, Treasury Board approval was given to the compensation agreement and the amount of the compensation was paid to him.

Lechter was assessed on the basis that the compensation was income from a business (within the meaning of that term in the *Income Tax Act*) for his 1956 taxation year. In the Supreme Court of Canada, his position was that it was taxable in the 1954 taxation year when title to the land was transferred or in the 1955 taxation year when the amount was established. The Supreme Court dealt with the matter on the basis of an agreement by counsel for the Crown that if the amount should have been assessed in a year earlier than the 1956 year when it was assessed, it was immaterial for the purposes of the appeal whether that year was 1954 or 1955. That Court directed attention, therefore, exclusively to the question whether the compensation was taxable income in the 1956 taxation year. The Minister's contention in that Court was that no taking of land and no agreement of sale was valid until approval by Treasury Board had been obtained. The Supreme Court decided against this contention and held that, if Treasury Board's authority for the settlement was required, when given, it operated as ratification of the settlement agreement that was made in the 1955 taxation year. The Supreme Court concluded, therefore, that the respondent "operating on an accrued basis, was bound to treat the profit...as having been earned" *prior* to the 1956 taxation year and that it was not therefore taxable *in* that year. The Supreme Court did not therefore have to consider whether this was a case to apply the rule that, when inventory of a trader is expropriated, the compensation has to be brought into the trader's current account in the year in which the property was taken from him and in which, therefore, it disappeared from his books as stock on hand, just as the price for which goods are sold must be brought in in the year in which the

goods are sold regardless of when the price is paid. (Compare *The Commissioners of Inland Revenue v. Newcastle Breweries, Ltd.*[1], *Ken Steeves Sales Ltd. v. Minister of National Revenue*[2] and the cases referred to therein.) In this case, as the facts appear from the judgment from which the Minister desires to appeal, the expropriation was in one year, the settlement and payment of compensation was in a later year and the compensation was assessed in the year of payment rather than in the year of expropriation. It would appear, therefore, that it was not necessary for the Supreme Court of Canada to decide in the *Lechter* case precisely the same question that is raised by the judgment in this case.

My review of what is involved in the appeal has a further relevance to my consideration of the matter in that it leads me to the conclusion that there is an important question of law involved in the appeal that was apparently regarded by the Supreme Court of Canada as being sufficiently debatable for that Court to refrain from deciding it in the *Lechter* case when it was not necessary to do so. While, as Sir Wilfrid Greene pointed out, on an application of this kind, the judge is not concerned with the merits or the probability of success or otherwise, I am of the view that it would have been an important factor to consider if it had seemed apparent that what was involved in this case were completely covered by the *Lechter* judgment.

After carefully covering the various factors that have been urged on me in the light of all the circumstances, which I have reviewed as carefully as I can, I have with considerable hesitation come to the conclusion that I should grant the leave sought. The dominant fact, as it seems to me, is that Benaby has throughout the matter, until July of this year, been under the impression that its judgment was under appeal and throughout that period the Minister has intended to appeal. While I must admit to having been inclined to the view for some time that the Minister's position was dependent on an understanding that was of dubious value, I have ended up by concluding that the difference of opinion as to the understanding is irrelevant to the question whether the Minister should be

[1] (1925) 12 T.C. 927.

[2] [1955] Ex. C.R. 108.

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allowed to file his Notice of Appeal beyond the statutory time. The same situation would have existed if the Minister's legal advisers had done their work correctly as will exist if I now extend the time for filing the Notice of Appeal and they do so within the extended time.

While I have concluded that I should grant the leave sought, I have not concluded that it should be granted without terms. I am prepared to hear the parties as to the terms on which leave should be granted and as to costs.

St. Catharines 1966

Nov. 9-10

Ottawa Dec. 9

BETWEEN:

THE CANADA TRUST COMPANY, surviving Executor of the Estate of Charles Arthur Ansell ..... APPELLANT;

AND

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

Income tax—Income of estate—Trust for charitable organizations—Payment to charitable organizations deferred—Assessment in year of receipt—Income Tax Act, ss. 16(3), 62(1)(e), 63(4), (7), 65(1).

A testator who died in 1957 by his will gave his estate in trust to pay annuities to his sister and nephew from the estate's income (with power to enroach on capital) and on the sister's death to pay half the residue to certain charitable organizations and the income from the other half to the nephew (with power to encroach on corpus) and on the nephew's death to pay the residue of his half to the three charitable organizations. In 1958, 1959 and 1960 the estate received income in excess of the amounts paid to the testator's sister and nephew and it was assessed to tax for these years on the sums so retained. The assessments were affirmed on appeal to the Tax Appeal Board and the executors of the estate then applied for construction of the will to the Supreme Court of Ontario, which held, *inter alia*, that the income retained by the estate vested in the charitable organizations as of the testator's death (subject to defeasance to secure the annuities to the sister and nephew) but was not payable to the charitable organizations until the sister's death (subject to the *Accumulations Act*). The nephew died in 1961 and the sister in 1965.

Held, the estate was correctly assessed for the years 1958, 1959 and 1960.

1. The estate's share of the income was not paid to the charitable organizations in the year of receipt nor did they have the right to enforce payment thereof in that year: hence the amount was not deductible by the estate in computing its income for that year as being "payable" to a beneficiary in such a year within the meaning of

s. 63(4) and (7) of the *Income Tax Act*. Section 16(2) is not to be construed to require that an amount is to be treated as "paid" within the meaning of s. 63(7) when in fact it was not paid.

2. If the estate's share of the income was constructively received by the estate for the charitable organizations and therefore required to be included in computing their income for the year of receipt under s. 65(1) as being a benefit from a trust the estate's liability for tax thereon under s. 63 was not affected since the amount was not "payable" to the charitable organizations in such year within the meaning of s. 63(4) and (7).

3. It was irrelevant in assessing the estate for 1958, 1959 and 1960 that because the executors did not exercise their power under the will to encroach upon accumulations of surplus income for the benefit of the sister and nephew they therefore held the surplus income only for the benefit of the charitable organizations during the years in question: the application of the *Income Tax Act* must be determined by the facts as they exist in the taxation year.

4. The income in question was not exempt from tax under s. 62(1)(*e*) as being income of charitable organizations: they had no right to receive it in the year of receipt by the estate and their right to receive it in future was defeasible. Moreover it would be received as capital, not income.

M.N.R. v. Trusts and Guarantee Co. (Birtwhistle Estate) [1940] A.C. 138; *Burns Estate v. M.N.R.* [1950] C.T.C. 393; *McLeod v. Minister of Customs and Excise* [1926] S.C.R. 457, per Duff J. at 460, considered.

APPEAL from Tax Appeal Board.

J. L. G. Keogh, Q.C. for appellant.

D. G. H. Bowman for respondent.

THURLOW J.:—This is an appeal from a judgment of the Tax Appeal Board dismissing an appeal from assessments of income tax for the years 1958, 1959 and 1960. The assessments in question are based on the provisions of section 63 of the *Income Tax Act* and the issue to be determined is the liability of the appellant under this provision for tax on income of the residue of the estate of Charles Arthur Ansell deceased in excess of amounts paid by the appellant in each year to two life beneficiaries pursuant to the provisions of the deceased's will. In their income tax returns in respect of the estate the executors reported the amounts in question but treated them as "distributable to charities" and therefore not taxable as income of the estate. The Minister, however, regarded the amounts as " 'Taxable Income' in the hands of Executor" and assessed tax thereon accordingly.

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The facts are not in dispute and were put before the Court by an agreed statement. The appellant is the surviving executor of the estate of the deceased, Charles Arthur Ansell, who died on November 7, 1957. His sister, Bertha Mabel Bellingham, the other executor named in his will died on June 18, 1965. Reginald Ansell who is also referred to in the will died on September 28, 1961.

By paragraph III of his will the deceased gave the whole of his estate to his executors, who were also appointed trustees, upon trust to pay his debts and testamentary expenses as well as succession duties and death taxes, to deliver certain articles of personal property to his sister, Bertha Mabel Bellingham, to permit her to use certain real property for her life and

> (f) To set aside and to invest and keep invested from time to time, all the rest, residue and remainder of my estate which shall hereinafter be referred to as "the residue", and to pay to my Sister, Bertha Mabel Bellingham, the sum of Six Hundred Dollars ($600.00) monthly so long as she shall live, utilizing for such purpose, firstly the income from the said residue and so much of the capital of the said residue as from time to time may be necessary for such purpose. Provided that my Trustees may in their sole discretion from time to time and so often as they may deem it necessary and advisable in order to meet any extra-ordinary financial demands arising out of the illness or otherwise respecting the person of my said Sister, or for her proper maintenance and comfort, make payments to my said Sister in addition to the said sum of Six Hundred Dollars ($600.00) monthly out of the residue of my estate in such amount or amounts as they may consider advisable from time to time, and for such purpose and for the purpose of making the monthly payments aforesaid to my said Sister, I will and direct that my Trustees may encroach upon the capital of the residue of my estate from time to time remaining in their hands to obtain such moneys as may be required additional to the income from the said residue. Provided further that my Trustees may in their sole discretion from time to time and so often as they may deem it necessary and advisable, increase such monthly payments of Six Hundred Dollars ($600.00) to such monthly amounts as they in their sole discretion from time to time may consider necessary to correspond with any substantial increase from time to time after my death and during the life of my said Sister in the Consumer Price Indices and/or Cost of Living Indices published from time to time hereafter by or on behalf of the Government of Canada or the Bureau of Statistrics (Statistics) thereof over and above such Indices and Statistics of the Government of Canada as the same existed at the date of this my Will; and for such purpose and for the purpose of making such increased monthly payments if necessary as aforesaid, to my said Sister, I will and direct that my Trustees may encroach upon the capital of the residue of my estate from time to time remaining in their hands to obtain such moneys as may be required additional to the income from the said residue.

By subparagraph III (g) provision was made for payment of $200 monthly to Reginald Ansell during the life of

Bertha Mabel Bellingham and while he should live, with authority similar to that in subparagraph (f) for the trustees to increase the amount and make additional payments.

Subparagraph III (h) then provided

(h) Upon the death of my said Sister or in the event that she predeceases me, to divide all the residue of my estate then remaining in the hands of my Trustees, into the following four unequal parts or percentages and to pay, transfer and deliver such parts or percentages as follows:

(1) Fifty percent (50%) of the residue of my estate then remaining in the hands of my Trustees, to be held by my Trustees and kept invested by them as hereinafter directed in respect to the residue of my estate and to pay the income from such fifty percent (50%) in equal quarterly payments so far as it may be practical so to do to my Nephew, Reginald Ansell, if he survives my said Sister, Bertha Mabel Bellingham, and during the term of his natural life. Upon the death of my said Sister and if my said Nephew survives my said Sister, my Trustees shall also provide my said Nephew during his lifetime with a suitable residence free of rent and of expense to him either at 56 Albert Street, Port Dalhousie, or by purchasing or renting for him elsewhere from time to time, a suitable residence, duplex or apartment for his own use during his lifetime free of rent and expense by him, including the upkeep and maintenance of such residence and the grounds thereof, and in such manner and for such rent and with payment of such expenses as aforesaid as my Trustees in their sole and uncontrolled and absolute discretion may determine from time to time thereafter as being reasonably suitable as such residence for my said Nephew. And I further direct that in the event of my Trustees in their absolute discretion, deeming it advisable after the death of my said Sister, that moneys be advanced to my said Nephew, Reginald Ansell, or on his behalf for the purpose of establishing him in any business selected by him solely or in partnership, then my Trustees may in their sole, absolute and uncontrolled discretion, encroach upon the corpus fo (of) the Fifty percent (50%) part of the residue of my estate to the income from which my said Nephew shall become entitled as aforesaid for the purpose of defraying the whole or such part of the cost of establishing my Nephew in such business as my Trustees in their sole, absolute and uncontrolled discretion shall deem advisable. In the event of my said Nephew predeceasing me or predeceasing my said Sister or upon the death of my said Nephew, I direct that this fifty percent (50%) part shall be divided equally between the charities set out in subclause (2), (3) and (4) hereof for the purpose therein set forth.

(2) Twenty-five percent (25%) of the residue of my estate then remaining in the hands of my Trustees, to be paid, transferred and delivered by them to the Religious Hospitallers of St. Joseph of Hotel Dieu of the Roman Catholic Archdiocese of Toronto in Canada, a corporation having its head office at the Hotel Dieu Hospital at 155 Ontario Street, in the City of St. Catharines, County of Lincoln, to be used by such corporation for the purposes of and at and in connection with the said Hotel Dieu Hospital at St. Catharines. I specifically direct that these moneys shall not be used outside of the County of Lincoln for

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any purpose whatsoever and shall be used only for the purposes of or in connection with the said Hotel Dieu Hospital at the said City of St. Catharines.

(3) Twelve and One-Half Percent (12½%) of the residue of my estate then remaining in the hands of my Trustees, to be paid, transferred and delivered by them to the Salvation Army of Canada, provided specifically that the said moneys so paid to the Salvation Army of Canada, shall be used solely for the relief of the poor and for welfare work within the County of Lincoln. I specifically direct that the moneys shall not be used outside of the County of Lincoln for any purpose whatsoever and I further specifically direct that the said moneys shall not be used for the construction of buildings or the making of other capital expenditures, but shall, as herein directed, be used exclusively for the relief of the poor and for welfare work within the County of Lincoln.

(4) Twelve and One-Half Percent (12½%) of the residue of my estate then remaining in the hands of my Trustees, to be paid, transferred and delivered by them to the Lincoln County Humane Society and it is my desire that the moneys be applied particularly to the investigation and prosecution of cases involving cruelty to animals.

Paragraphs 3 to 7, inclusive, of the agreed statement of facts are as follows:

3. The Respondent admits, for the purposes of this appeal only, that the Lincoln County Humane Society, the Salvation Army of Canada and the Religious Hospitallers of St. Joseph of Hotel Dieu of the Roman Catholic Archdiocese of Toronto in Canada are charitable organizations within the meaning of s. 62(1)(*e*) of the *Income Tax Act*, but objects to the relevancy of such admission.

4. In the taxation years 1958, 1959 and 1960 income was earned on the residue of the estate of the deceased as follows:

1958—$25,059.89, of which $15,769 21 was paid to Bertha Mabel Bellingham and Reginald Ansell and the balance of $9,290 68 was retained by the Estate.

1959—$37,921.24, of which $19,316.07 was paid to Bertha Mabel Bellingham and Reginald Ansell and the balance of $18,605.17 was retained by the Estate.

1960—$39,720.75, of which $19,847.94 was paid to Bertha Mabel Bellingham and Reginald Ansell and the balance of $19,872.81 was retained by the Estate.

5. The estate of the deceased, Charles Arthur Ansell, was at all material times an estate within the meaning of s. 63 of the *Income Tax Act*.

6. The amounts referred to in paragraph 4 hereof were retained by the estate and no portion thereof was paid to the organizations referred to in paragraph 3 hereof in any of the years 1958, 1959 or 1960.

7. Following the dismissal of their appeals to the Tax Appeal Board in respect of the assessments for the 1958, 1959 and 1960 taxation years the executors of the estate of the deceased brought a motion in the Supreme Court of Ontario for the opinion, advice and direction of the Court in respect of certain matters arising in the construction of the said Will

Attached hereto and marked respectively as Exhibits ASF-2 and 3 are a true copy of the Notice of Motion and a true copy of the Judgment of the Honourable Mr. Justice Hughes.

The documents referred to in paragraph 7 show that nine questions were submitted for the opinion of the Court of which eight were answered as follows. The second question was dependent on a negative answer to question 1 and was not answered.

Question (1) Does the surplus income of the estate, (over and above the amounts paid by the Executors in each year to Bertha Mabel Bellingham, the sister of the Testator, and up to his death on September 20, 1961, to Reginald Ansell, the nephew of the Testator) vest in the residuary legatees, (the three charitable organizations named in the Will), as of the date of the death of the Testator, November 7, 1957?

Answer: Yes, and doth order and adjudge the same accordingly.

Question (3) Is the whole of the said surplus income payable to the said residuary legatees upon the date of the death of the Testator's sister, Bertha Mabel Belligham, (subject to *The Accumulations Act*); or is 50% of the surplus income, and 50% of "the residue of my estate" payable upon the date of the death of the Testator's nephew, Reginald Ansell (September 20, 1961) to the said residuary legatees?

Answer: The whole of the surplus income, which falls into residue, is payable to the residuary legatees as accumulated for not more than 21 years after the death of the Testator, upon the death of Bertha Mabel Bellingham. It is clear that the opening words of para. III sub-para. (h) of the Will govern all its provisions; and doth order and adjudge the same accordingly.

Question (4) To whom does the said surplus income (and the income therefrom) in the hands of the Executors belong, before such time of payment of it?

Answer: It vests as part of the residue in the residuary legatees from the date of death of Testator subject to defeasance in whole or in part to secure the annuities as provided for in the Will, and doth order and adjudge the same accordingly.

Question (5) Do clause (h) and its subclauses (1), (2), (3) and (4) of paragraph III of the Will empower the Executors to pay all of the said surplus income, and the income therefrom, to the said residuary legatees; or is there an intestacy as to any part, and if so, what part of the said surplus income and the income therefrom?

Answer: Yes. There is no intestacy as to any part of the surplus income and income therefrom until the expiry of the period of limitation on accumulations as provided by *The Accumulations Act,* and doth order and adjudge the same accordingly.

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Question (6) Are the powers of encroachment given to the Executors to "encroach upon the capital of the residue of my estate from time to time remaining in their hands to obtain such moneys as may be required additional to the income from the said residue" in clauses (f) and (g) of paragraph III of the said Will, limited to encroachment upon the corpus of the residue?

Answer: No, if by "corpus" is meant the original capital fund less the surplus income which may have augmented it since the death of the Testator, and doth order and adjudge the same accordingly.

Question (7) If question 6 is answered in the negative, have the Executors power to so encroach upon the accumulations of surplus income (and the income therefrom) carried forward from year to year?

Answer: Yes, and doth order and adjudge the same accordingly.

Question (8) Are the provisions authorizing the Executors to utilize "firstly the income from the said residue" in clauses (f) and (g) of paragraph III of the said Will, limited to the income of the particular year in question; or can the Executors thereunder encroach on the accumulated surplus of income (and income therefrom) from previous years?

Answer: Yes, but since the surplus income from previous years has become capitalized the distinction suggested in the question does not exist, and doth order and adjudge the same accordingly.

Question (9) Is it the duty of the Executors under the language of this Will to accumulate the whole of the surplus income from each year (with the income therefrom and interest thereon) until the date of the death of the sister of the Testator, Bertha Mabel Bellingham; or until twenty-one years after the date of the death of the Testator (pursuant to *The Accumulations Act*), whichever date comes earlier; and to then pay it to the said residuary legatees?

Answer: Yes, and doth order and adjudge the same accordingly.

Subsections (1), (2), (3), (4), (6) and (7) of section 63 of the *Income Tax Act* read as follows:

63. (1) In this Act, trust or estate means the trustee or the executor, administrator, heir or other legal representative having ownership or control of the trust or estate property.

(2) A trust or estate shall, for the purposes of this Act, and without affecting the liability of the trustee or legal representative for his own income tax, be deemed to be in respect of the trust or estate property an individual; but where there is more than one trust and

(*a*) substantially all of the property of the various trusts has been received from one person, and

(*b*) the various trusts are conditioned so that the income thereof accrues or will ultimately accrue to the same beneficiary, or group or class of beneficiaries,

such of the trustees as the Minister may designate shall, for the purposes of this Act, be deemed to be in respect of all the trusts an individual whose property is the property of all the trusts and whose income is the income of all the trusts.

(3) No deduction may be made under section 26 or paragraph (*ca*) of subsection (1) of section 27 from the income of a trust or estate.

(4) For the purposes of this Part, there may be deducted in computing the income of a trust or estate for a taxation year such part of the amount that would otherwise be its income for the year as was payable in the year to a beneficiary or other person beneficially interested therein or was included in the income of a beneficiary for the year by virtue of subsection (2) of section 65.

(6) Such part of the amount that would be the income of a trust or estate for a taxation year if no deduction were made under subsection (4) or under regulations made under paragraph (*a*) of subsection (1) of section 11 as was payable in the year to a beneficiary or other person beneficially interested therein shall be included in computing the income of the person to whom it so became payable whether or not it was paid to him in that year and shall not be included in computing his income for a subsequent year in which it was paid.

(7) For the purposes of subsections (4), (4*a*) and (6), an amount shall not be considered to have been payable in a taxation year unless it was paid in that year to the person to whom it was payable or he was entitled in that year to enforce payment thereof.

The scheme of these provisions differs from the corresponding provisions of the *Income War Tax Act* under which a number of cases arose including: *McLeod v. Minister of Customs and Excise*[1], *Royal Trust Company v. Minister of National Revenue*[2], *Holden v. Minister of National Revenue*[3], *Minister of National Revenue v. Trusts and Guarantee Co. Ltd. (Birtwhistle Estate)*[4] and *Burns Estate v. Minister of National Revenue*[5]. In that statute section 11(1) provided for taxation of the beneficiary of a trust in respect of "all income accruing to the credit of the taxpayer whether received by him or not during such taxation period". Section 11(2) then provided that "income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests" should be taxable in the hands of the trustee. There were thus two separate charging sections each charging income of a particular description. The importance of this appears from the result of the *Burns Estate* case where income accumulating in the hands of trustees for the benefit of ascertained beneficiaries was held to be not taxable as income of

[1] [1926] S.C.R. 457.
[2] [1931] S.C.R. 485.
[3] [1933] A.C. 526.
[4] [1940] A.C. 138.
[5] [1950] C.T.C. 393.

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the estate. In the present statute the effect of section 63(2) appears to be to bring initially into the computation of the income of the trust and to charge with tax the whole of the income of the trust property (whether it is to be accumulated or not) and the result which would follow from this is then mitigated by section 63(4) and several other provisions under which deductions may be made of certain portions of the income[1] in computing the income in respect of which the trustee is to be taxed. The provisions of section 63 thus appear to be more comprehensive than the corresponding provisions of the *Income War Tax Act* but the general principle of taxing a trustee in respect of income the ultimate right to which remains uncertain during the taxation year seems to be much the same. Under the provisions of the *Income War Tax Act* in the *Royal Trust* and *Holden* cases income was held to be taxable in the hands of the trustee notwithstanding that a beneficiary, whose right thereto though vested was defeasible during the taxation year, was a non-resident and not subject to taxation under the Act.

Thus in the *Royal Trust* case, Anglin, C.J.C. said at page 489:

> Whether the word "trust" means a person or body holding the property, or distributing the trust estate, or means the property itself, or means the trust upon which such property is held, is quite immaterial in view of what is said above.
>
> Those who are at the present time probable beneficiaries of the trust, or some of them, it is true, reside in the United States. But that fact does not prevent this case coming within subsection 6 of section 3 above referred to, nor render exempt from taxation in the hands of trustees income accumulated on a trust for unascertained beneficiaries or beneficiaries having contingent interests. On the contrary, in our opinion, such income accumulating in trust is distinctly a subject of taxation under the subsection referred to, regardless of the residence, if ascertainable, or probable beneficiaries, whose interest is contingent during the taxation period.

This opinion was re-affirmed in the *Holden* case where Lord Tomlin said at page 531:

> Further, their Lordships are satisfied that upon the true construction of the taxing Acts, s. 11, sub-s. 2, fixes the trustee of the accumulating income with liability for the tax, and is a true charging section, and that the position of the section in Part IV under the heading to which reference has been made, does not justify a departure from what in their

[1] *Vide Minister of National Revenue v. Trans Canada Investment Corporation* [1956] S.C.R. 49.

Lordships' view is the natural meaning of the words. It follows from this that the Supreme Court of Canada were, in their Lordships' judgment, correct in treating the place of residence of the testator's children as an irrelevant circumstance.

In the *Birtwhistle Trust* and *Burns Estate* cases claims for exemption of income from taxation in the hands of the trustee on the ground that it was income of a charitable organization failed, in the *Birtwhistle Trust* case on the ground that the beneficiary in question was not a charitable institution within the meaning of the statutory provision exempting the income of such institution and in the *Burns Estate* case on the ground that under the terms of the will the right of the charitable institutions in the money in question was not of an income nature. Thus Lord Greene said at page 397:

> With regard to the argument that the last five added appellants are "charitable institutions" entitled to claim exemption the learned Deputy Judge said: "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."
>
> In the Supreme Court this claim to exemption was held to fail for the same reason although in the opinion of the majority the Lacombe Home and the Salvation Army were religious or charitable institutions. This latter expression of opinion was, however, not necessary to the decision. Their Lordships, while not desiring to throw any doubt on its correctness, prefer to base their decision on the view taken both by the learned Deputy Judge and by all the members of the Supreme Court that the income was not income of any of the five added appellants. The executors are the recipients of the income. It is their duty to accumulate it and ultimately to hand over the accumulation to the Royal Trust Co. That company will receive these accumulations not as income but as a capital fund which will always remain capital in its hands. All that it will disburse, all that the five bodies will receive, will be the income of the capital fund. It is true that the company and the five bodies are entitled to enforce the obligations in respect of the income which the will imposes upon the executors and the five bodies will also be entitled to enforce the obligations in respect of the administration of the accumulated fund and the distribution of its income which are imposed on the company. But this does not make the income received by the executors or the capital fund to be received by the Royal Trust Co. in any sense or at any time the income of those bodies. This being in their Lordships' view a conclusive answer to the whole of the claim based on cl. (e) of s. 4(1) they prefer to express no opinion on the question whether any of the five bodies are institutions within the meaning of that clause.

I turn now to the submissions put forward on behalf of the appellant. In the first four of these the fact that the three organizations referred to in the will, which for convenience I shall refer to as the "charities" were charitable organizations within the meaning of section 62(1)(*e*) is

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irrelevant the submissions being broad enough to apply even if their rights had belonged to any taxpayer.

The first of these was that though the amounts in question were not paid to the charities in the taxation years and were not recoverable by them from the appellant in those years, under section 16(2) of the Act the amounts were deemed to have been paid to the charities in the years. This subsection reads as follows:

> 16. (2) For the purposes of this Part, a payment or transfer in a taxation year of money, rights or things made to the taxpayer or some other person for the benefit of the taxpayer and other persons jointly or a profit made by the taxpayer and other persons jointly in a taxation year shall be deemed to have been received by the taxpayer in the year to the extent of his interest therein notwithstanding that there was no distribution or division thereof in that year.

The appellant's submission was that the payments of income to the executors were, to the extent of the surplus over the amounts required for the life beneficiaries, payments to another person, that is to say, the executors for the benefit of the three charities jointly, that that is the effect of the will as interpreted by the Supreme Court of Ontario and that accordingly each of the three charities is deemed to have received its share in the year of payment to the executors notwithstanding that there was no distribution of such surplus amounts to any of the charities in that year, that the share of each of them therein must therefore be included in computing its income for the year—whether taxable or not—and was deductible under subsection (4) of section 63 in computing the income of the trustee for the taxation year.

I do not read s. 16(2) as having the effect for which the appellant contends. First I do not think it follows that because an amount may be deemed under s. 16(2) to have been "received" by a beneficiary it must also be deemed to have been "paid" to the beneficiary within the meaning of sections 63(4) and (7). Section 16(2) deals with factual situations and is not a section defining statutory expressions. On the other hand the meaning of "payable" in section 63(4) is restricted by section 63(7) to referring to amounts which were "paid" to a beneficiary in the year and to amounts of which the beneficiary was entitled in the year to enforce payment. Here the word "paid" appears to me to refer only to what has been paid in fact since what

has not been paid in fact is dealt with by the reference to amounts of which the beneficiary was entitled in the year to enforce payment. I do not think therefore that section 16(2) can apply to require that an amount be treated as having been "paid" within the meaning of section 63(7) when in fact it was not paid. But be that as it may it appears to me that the whole scope of section 16(2) is indicated by the words "notwithstanding that there was no distribution or division thereof in that year". The amount referred to is to be deemed to have been received by the taxpayer notwithstanding the lack of a payment or distribution of it to him. But that is as far as the subsection goes. It does not say that an amount received by a trustee or other person which for any other reason would not be included in computing the income of the taxpayer beneficiary for the taxation year is to be deemed to have been "received" by the taxpayer. Nor does it say that the amount is deemed to have been "paid" by the trustee to the beneficiary in the taxation year. The subsection is one which extends the general concept of income taxable under the Act[1] and it should be given no more extended a meaning than the words plainly call for. I am of the opinion therefore that an amount which was not only not actually received by the taxpayer in the year but was not recoverable by him in the year because his right to it though vested was still imperfect in that it was still defeasible and which on that account cannot be regarded as his income in the ordinary sense of the term cannot properly be included in the computation of the taxpayer's income for the purposes of Part 1 of the Act merely because of the provision of section 16(2). The argument based on the application of section 16(2) therefore fails.

The second position taken by the appellant was that the surplus income of the estate in each year was a benefit to the charities within the meaning of section 65(1) and should therefore be included in computing the income of

[1] *Vide* Abbott J. in *McArdle Estate v. Minister of National Revenue* [1965] S.C.R. 723 at page 726:

> The general rule under the *Income Tax Act* is that tax is payable on income actually *received* by the taxpayer during a taxation period. There are exceptions to this general rule . . .

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the charities and be deducted in computing the income of the appellant. Section 65 provides:

65. (1) The value of all benefits (other than a distribution or payment of capital) to a taxpayer during a taxation year from or under a trust, estate, contract, arrangement or power of appointment, irrespective of when made or created, shall, subject to subsection (2), be included in computing his income for the year.

(2) Such part of an amount paid by a trust or estate out of income of the trust or estate for the upkeep, maintenance or taxes of or in respect of property that, under the terms of the trust or will, is required to be maintained for the use of a tenant for life or a beneficiary as is reasonable in the circumstances shall be included in computing the income of the tenant for life or other beneficiary from the trust or estate for the taxation year for which it was paid.

In my opinion this submission also fails.

Section 65(1) is a provision of broad application the effect of which appears to me to be to require that a beneficiary bring into the computation of his income all benefits to him arising not only under a trust, but under a contract or arrangement or power of appointment as well, (other than a distribution of the capital of the trust etc.) whether or not from his point of view the benefits receivable by him could be regarded as being of an income as opposed to a capital nature. For example but for this provision a payment of a legacy to be paid out of income of an estate might be regarded as capital in the hands of the beneficiary while the money from which it was paid would have been income in the hands of the trustee. To some extent the provision of this section may overlap that of section 63(6) but their fields of operation are not co-extensive.

It was urged in support of the appellant's submission that under equitable principles of constructive receipt the amounts here in question were constructively received by the trustee for the charities but even accepting that the amounts were received by the trustees for the benefit of beneficiaries who, save for the possible exercise by the trustees of their power of encroachment thereon, were the charities, I do not see how the appellant's position is thereby supported. What is in issue in the present case is the liability of the trustees for tax under section 63 in respect of the surplus income of the estate property. To the issue whether these amounts of surplus income are to be included

in computing the income of the trustee the fact that the same amounts might, under some other provision, be included in computing the income of some person other than the trustee appears to me to be irrelevant except insofar as the statute otherwise provides. Here the statute does make provision in section 63(4) for amounts that might otherwise be included in the income of both trustee and beneficiary by permitting a deduction of amounts from the income of the trustee but while section 63(4) specifically provides that amounts attributed to beneficiaries under section 65(2) may be deducted it says nothing of deducting amounts which are required by section 65(1) to be included in computing the income of beneficiaries beyond what is referred to by the expression "payable in the year" which in turn is restricted by section 63(7) and save for section 63(10), which is inapplicable, there is, so far as I am aware, no other provision of the *Income Tax Act* authorizing a deduction from what is otherwise the income of a trustee under section 63 on the ground that the amount is required by section 65 to be included in computing the income of a beneficiary. This submission, as well, must therefore be rejected.

The third position taken by the appellant was that the charities were "entitled in the year to enforce payment" of the amounts in question within the meaning of that expression in section 63(7) and that the amounts were therefore deductible under section 63(4). The argument was that having a vested interest in the amounts the charities were the legal owners of the money and that at any time in the year they were entitled to enforce the due performance of the trust and for that purpose, if necessary, to restrain the trustee from paying the money to anyone in breach of the trust and that such a right was sufficient to bring the positions of the charities vis-à-vis the amounts in question within the meaning of "entitled in the year to enforce payment thereof" in section 63(7). The precise point was put very neatly by counsel when in reply he said that there is a difference between being "entitled in a year to enforce payment thereof" and being entitled to enforce payment thereof within that year and that if the words "in that

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year" came at the end of section 63(7) he would agree that the words would not fit the present situation.

In my view whatever the rights of the charities were with respect to enforcing the due performance of the trust they did not include a right in the year of the kind required. No doubt a right to prevent payment to anyone else may be indirectly a way of enforcing payment ultimately to the charities but such a meaning seems out of context in a section which refers first to actual payment in the year and then to a right in the year to enforce payment. In any event, however, section 63(7) as I read it is merely restrictive and the expression "entitled in the year to enforce payment" in that subsection does not amplify the ordinary meaning of "payable in the year" in section 63(4). It follows that the submission cannot prevail.

The next point taken was that the Court should hold that the power of the executors to encroach upon the accumulations of surplus income (which, subject to such power of encroachment belonged to the "charities" at all material times) was never exercised in any of the taxation years in question as it was unnecessary for them to do so up to the dates of the deaths of the life beneficiaries, that the trustees therefore held such surplus income in the years in question only for the benefit of and for eventual distribution to the "charities" and that the Court is entitled to deal with this appeal on the basis of these facts even though the deaths occurred after the taxation years in question. In my opinion the relevant time is the taxation year and the application of the *Income Tax Act* in respect of the income in question must be determined by the facts as they existed in that taxation year.[1] There is, in my opinion, no room for taking into account facts which occurred after the end of the taxation period as affecting the application of the statute to the facts as they existed.

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[1] *Vide* Duff J. (as he then was) in *McLeod v. Minister of Customs and Excise* [*1926*] *S.C.R. 457 at 460:*

> The fund, in other words, is to accumulate for the benefit of persons who, *for the relevant period* are not ascertained, and such fund is, within the ordinary meaning of the word, it seems abundantly clear to me, a fund held for the benefit of "unascertained persons". (Italics added).

The remaining submission, the pleading of which was amplified by an amendment for which leave was given in the course of the argument, was that since the amounts in question were monies which belonged to the charities they were exempt from taxation under section 62(1)(*e*). This section provides:

> 62. (1) No tax is payable under this Part upon the taxable income of a person for a period when that person was
>
> . . .
>
> (*e*) a charitable organization, whether or not incorporated, all the resources of which were devoted to charitable activities carried on by the organization itself and no part of the income of which was payable to, or was otherwise available for the personal benefit of, any proprietor, member or shareholder thereof;

As the charities are admittedly charitable organizations within the meaning of this provision the issue is whether the exemption provided by this subsection applies to amounts received by the trustee upon trust for them, subject to the power of encroachment, when the application of section 63 to the trustee in respect of the income of the trust property is being considered.

The issue is similar to issues which were raised in the *Birtwhistle Trust* and *Burns Estate* cases. In the *Birtwhistle Trust* case the taxpayer's submission failed because the beneficiary did not qualify as a charitable institution within the meaning of the exempting provision. In the *Burns Estate* case the submission failed because under the will what the charitable institutions would ultimately be entitled to was not the income in question but the income from a trust fund of which the income in question would constitute a part of the capital. Here that particular feature as well is not present but it appears to me that at the relevant times, that is to say, in the taxation years in question, the right of the charities to the money lacked an essential quality of income of the charities in that the charities did not receive the money in the year, their right to it though vested was a right to receive it only in the future, "upon the death of" the testator's sister, and their right to receive it in the future was subject to defeasance. Their right to receive it was also a right to receive it as

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capital[1] and there is no provision of the Act which would require them to treat the money here in question as income either in a year when, though received by the trustee, it was not receivable by them or in any later year when it became payable by the trustee to them. The right of the charities to the amounts in question in the relevant taxation years accordingly was not such that it could fall within the wording of section 62(1) and be thereby exempted from taxation as being "taxable income" of the charities for those taxation years.

In the result therefore the appeal fails and it will be dismissed with costs.

[1] See the answer of the Supreme Court of Ontario to Question 8, page 8 supra. A point that seems to have been precisely similar to that under consideration appears to have been raised in the *Burns Estate* case but was not decided. Cameron D.J. (as he then was) said, [1946] Ex. C.R. 229 at page 241:

> 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* 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.
>
> * * *

Toronto
1966
Dec. 6-7

BETWEEN:

MORGAN SECURITIES LIMITED .....APPELLANT;

AND

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

Income tax—Business of company promotion—Acquisition of shares in company being promoted—Dividends received in loss years—Sale of shares at loss—Deductibility of loss from trading profit—Income Tax Act, ss. 27(1)(e), 28(1) and (11).

Appellant company (a subsidiary of a stock brokerage company controlled by H, M, and T) was in the business of a bond dealer, underwriter and sharebroker, actively traded in securities on its own account, and engaged in company promotions. In 1955 it participated with H, M, and T in the formation of a private company, Parkton Ltd (controlled by H, M, and T) which acquired 3 transport companies with the object of operating them successfully, converting Parkton Ltd to a public company and selling its stock to the public at a profit. Appellant's part in the transaction was to purchase 2,000 3% cumulative 2nd preference shares in Parkton Ltd for $200,000. Owing to the outbreak of a strike adversely affecting the transport companies the proposed promotion was abandoned and in 1959 appellant sold its shares in Parkton Ltd at a loss of $157,189. Appellant had received dividends from its shares in Parkton Ltd in 1957 and 1958 but its overall operations in those two years (and also in 1960) resulted in losses. Appellant sought to apply the 1959 loss of $157,189 against its income for that year and for 1961.

Held, appellant was entitled under s. 27(1)(*e*) of the *Income Tax Act* to deduct the 1959 loss from its income for 1959 and 1961.

1. The purchase of the shares in 1955 was a transaction in the course of appellant's usual business and not a capital transaction.

2. Inasmuch as appellant could not and in consequence did not deduct from its income the amount of the dividends received from Parkton Ltd in 1957 and 1958 (having had no "income" in those years within the meaning of the *Income Tax Act*) it was not barred by s. 28(11) of the *Income Tax Act* from deducting the loss on the sale of the shares in 1959 from its profits in 1959 and 1961 pursuant to the provisions of s. 27(1)(*e*) of the *Income Tax Act*.

APPEAL from income tax assessment.

R. M. Sedgewick, Q.C. and *R. M. Shoemaker* for appellant.

D. G. H. Bowman for respondent.

GIBSON J.:—In this appeal the quantum of the 1959 and the 1961 taxable income of the appellant is in dispute. The appellant claims that it is entitled to deduct, in computing its 1959 income, a loss of $157,189.97 arising out of the sale for $43,313.33 in that year of 2,000 second preference shares

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in a company by the name of Parkton Limited which had cost it $200,000 approximately three years prior thereto, plus $503.30 legal fees incurred in completing the said sale of the shares. And the appellant further claims that if it is entitled to this deduction in the taxation year 1959, and only in that event, that there will result a balance of business loss in its profit and loss account which it is entitled to use as a deduction in computing its taxable income by reason of the provisions of section 27(1)(*e*) of the *Income Tax Act*[1].

The respondent claims that the said loss of $157,189.97 of the appellant in its taxation year 1959 is a loss of capital within the meaning of section 12(1)(*b*)[2] of the Act, and also that the deduction of this loss in any event is prohibited by section 28(11)[3] of the *Income Tax Act*.

---

[1] 27. (1) . . .

(*e*) business losses sustained in the 5 taxation years immediately preceding and the taxation year immediately following the taxation year, but

(i) an amount in respect of a loss is only deductible to the extent that it exceeds the aggregate of amounts previously deductible in respect of that loss under this Act,

(ii) no amount is deductible in respect of the loss of any year until the deductible losses of previous years have been deducted, and

(iii) no amount is deductible in respect of losses from the income of any year except to the extent of the lesser of

(A) the taxpayer's income for the taxation year from the business in which the loss was sustained and his income for the taxation year from any other business, or

(B) the taxpayer's income for the taxation year minus all deductions permitted by the provisions of this Division other than this paragraph or section 26.

[2] 12. (1) In computing income, no deduction shall be made in respect of

. . .

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

[3] 28. (11) Where a corporation has, in its return of income under this Part for a taxation year, deducted under this section an amount in respect of a dividend, no loss arising from transactions with reference to the share in respect of which the dividend was received shall be allowed to reduce the income of the taxpayer for that or a subsequent taxation year unless it is established by the corporation that

(*a*) the corporation owned the share 365 days or longer before the loss was sustained, and

(*b*) the corporation did not, at the time the dividend was received, own more than 5% of any class of the issued share capital of the corporation from which the dividend was received.

At all material times the business of the appellant, Morgan Securities Limited, was that of bond-dealer, underwriter, and share broker, and for its own account was most active in trading all types of securities and commodity futures, and on numerous occasions did the financial work in the promotion of companies. All of its net receipts from these activities were declared and taxed as income and none as belonging to capital account. At all material times also the appellant, Morgan Securities Limited, was a wholly owned subsidiary of Houston & Company Limited, brokers and underwriters, a member of the Toronto Stock Exchange, or of the individual partners of the predecessor partnership firm, Houston & Company.

The transaction in September 1955, which the appellant entered into as a result of which it expended the said sum of $200,000 and received the said 2,000 second preference shares in Parkton Limited was as follows:

The appellant, Morgan Securities Limited, mainly through the aegis of James Houston, Reginald F. Morgan, and Ralph H. Tetlaw, controlling shareholders of Houston & Company Limited, and partners in the predecessor partnership firm of Houston & Company, caused a private Ontario company to be incorporated under the name of Parkton Limited, and then caused Parkton Limited in September 1955, to buy all the shares of three car transport companies from one Harold Hoare, namely Gillson Automobile Transport Limited, Roadway Carriers Limited, and Automobile Transport Limited for $690,000 which was paid for as follows: firstly, by a note to Harold Hoare for $65,000 and by issuing and delivering 250,000 first preference shares of Parkton Limited to him and by paying him $375,000 in cash. (The $375,000 in cash was raised by Parkton Limited firstly by issuing 3,000 second preference 3 percent cumulative non-voting shares for $100 each, of which 2,000 were purchased by the appellant, Morgan Securities Limited, and 500 by one C. M. Williams and one C. W. E. Scott, neither of whom was in any way financially interested in the appellant company or Houston & Company Limited or the predecessor partnership); secondly, by Parkton Limited issuing 10,000 no par value common shares for one dollar each which was subscribed for and paid by James Houston who acquired 4,000 shares, by

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Ralph H. Tetlaw who acquired 1,000 shares, by Reginald F. Morgan, who acquired 1,000 shares, by G. M. Park who acquired 2,000 shares, by C. M. Williams who acquired 1,000 shares, and by C. W. E. Scott who acquired 1,000 shares; and thirdly, by utilizing for the balance the surplus in Gillson Automobile Transport Limited after moving the necessary sum of money to Parkton Limited by way of inter-company dividend. Thus subject to the note of $65,000 and the $300,000 first preference shares of Parkton Limited held by Harold Hoare, at the date of this acquisition the major shareholders of Houston & Company Limited, or its predecessor partnership, controlled Parkton Limited through the appellant, that is to say James Houston, Ralph H. Tetlaw and Reginald F. Morgan.

The cause for the disposition by the appellant in September 1958, which was during its 1959 taxation year, of the said 2,000 second preference shares for $43,313.33 resulting in said loss of $157,189.97 (which sum includes the said sum of $503.30 of legal fees) was as follows: It was intended after this acquisition to build up a successful earnings history for Parkton Limited through the operation of these three car transport companies acquired by it and through other company acquisitions. Two more companies were in fact acquired for this purpose. It was then proposed that Parkton Limited would be caused to go public, at which time a profit to the promoters and to the appellant was anticipated. This did not happen however. Instead, immediately after this transaction of acquisition by Parkton Limited there was a General Motors strike which commenced around the end of September 1955, and lasted for five months, which seriously affected the earnings of the three car companies so acquired as they in the main hauled cars from the General Motors plant in Canada. There resulted also because of this strike, extensive use of equipment which caused maintenance charges to become high and replacements necessary; and generally during the three year period in which these companies were operated for various other reasons there resulted a poor earning history for Parkton Limited. Finally, in September 1958, the appellant and the three promoters, Messrs. Houston, Tetlaw and Morgan, caused the Parkton Limited shares which the appellant held and the common shares which were held as

indicated to be sold to said Harold Hoare and he became the sole owner of Parkton Limited then and also in turn through Parkton Limited owner of the three car companies and the two companies which Parkton Limited had acquired during the three year period. For the $200,000 which the appellant had paid for the second preference shares in Parkton Limited it received $43,313.33 or $157,189.97 (including the said sum of $503.30 of legal fees) less than it had paid for them.

The questions for decision in this appeal, namely, firstly, was this loss of $157,189.97 a capital loss or an income loss, and secondly, was the deduction of this loss in any event prohibited by section 28(11) of the *Income Tax Act*, may be answered briefly.

As to the first question, I am of opinion that the appellant in acquiring these 2,000 second preference shares of Parkton Limited for $200,000 in September 1955 was engaging in its usual business. It intended to make a profit from this transaction through the way that Parkton Limited was organized. The appellant was in the controlling position to do so in a variety of ways if Parkton Limited was financially successful. And this type of transaction was one of its usual sources of income. The appellant did not make this expenditure to develop a new source of income different and distinct from its usual business. It follows that the expenditure in 1955 was therefore on income account and not on capital account; and therefore the loss in September 1958, which was during the taxation year of 1959 of the appellant, was an income loss and not a capital loss.

As to the second question, I am of opinion that section 28(1)[1] of the *Income Tax Act* cannot be invoked by a

[1] 28. (1) Where a corporation in a taxation year received a dividend from a corporation that

(*a*) was resident in Canada in the year and was not, by virtue of a statutory provision, exempt from tax under this Part for the year,

. . .

(*d*) was a non-resident corporation more than 25% of the issued share capital of which (having full voting rights under all circumstances) belonged to the receiving corporation, or

(*e*) was a foreign business corporation more than 25% of the issued share capital of which (having full voting rights under all circumstances) belonged to the receiving corporation,

an amount equal to the dividend minus any amount deducted under subsection (2) of section 11 in computing the receiving corporation's income may be deducted from the income of that corporation for the year for the purpose of determining its taxable income.

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taxpayer so as to enable him to carry forward a loss, (by reason of the enabling provisions of section 27(1)(*e*) of the Act), which is greater than the business loss of such taxpayer. In other words a taxpayer, from a tax point of view from inter-company dividends under section 28(1) when he suffers a loss, only gets a benefit therefrom when he has a profit in a taxation year. The meaning of the words "income" and "taxable income" in the concluding words of that subsection make this clear. (See also sections 3 and 4 and 139(1)(*x*) of the Act.[1])

The appellant therefore in the taxation years 1957 and 1958 when it received a dividend from Parkton Limited, but still suffered a business loss, was not entitled to the benefit of section 28(1) and therefore section 28(11) is no bar to the appellant to a deduction of this loss of $157,-189.97 arising out of this transaction in its taxation year 1959 with reference to these Parkton Limited second preference shares.

The appeal is therefore allowed with costs and the matter is referred back for reassessment for the 1959 and 1961 taxation years of the appellant, not inconsistent with these reasons.

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[1] 3. The income of a taxpayer for a taxtion year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

139. (1) . . .

(*x*) "loss" means a loss computed by applying the provisions of this Act respecting computation of income from a business *mutatis mutandis* (but not including in the computation a dividend or part of a dividend the amount whereof would be deductible under section 28 in computing taxable income) minus any amount by which a loss operated to reduce the taxpayers income from other sources for purpose of income tax for the year in which it was sustained;.

BETWEEN:

HAROLD DIAMOND, SARAH DIAMOND, ESTELLE DIAMOND .. APPELLANTS;

AND

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

Winnipeg 1966 Oct. 4, 5

Ottawa Oct. 31

Revenue—Income—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 27(1)(e) and 139(1)(e)—Capital gain or income—Investment or speculation—Purchase and joint deals in vacant lands by members of family—Secondary intention of purchaser—Passive and silent roles of partners—Profits on properties taxable—Business loss claimed by one participant or offset—"An undertaking"—"A venture in the nature of trade"—"A business"—Appeal dismissed.

Harold Diamond and his brother-in-law Michael Shnier decided to operate a drive-in theatre on the outskirts of Winnipeg through a family corporation. During the year 1952, they purchased a five-acre strip of land near the theatre. The five-acre parcel of land was sold in five sales between 1953 and 1958.

On the 1st of July, 1953, Harold Diamond and Michael Shnier purchased a 70 acre lot near the theatre and convinced Sarah Diamond to put up the money and the property was registered under her name. It was agreed that Sarah Diamond would provide the funds for the purchase but arrangements were made that Harold Diamond and Michael Shnier were to share in any profits if the property was resold. In 1958, the land was sold and Sarah Diamond, Harold Diamond and Michael Shnier realized a substantial profit.

The three appellants were assessed by the Minister on their shares of the profits made from the two transactions.

The Tax Appeal Board dismissed their appeal. From that decision, the appellants sought to appeal before this Court.

The appellants argued that the profits from both transactions were capital gains because they acquired the two properties, having in mind several investment purposes abandoned, due to lack of financial means and also to the unprofitable operation of the drive-in theatre business. In addition to that situation, Sarah Diamond contended that she was entitled to deduct $15,000.00 for loss suffered by her in 1957.

Held, That the appeals are dismissed.

2. That owing to the profits made by the three appellants, the income received from the sale of the two properties was subject to tax;

3. That the appellants failed to discharge the onus of showing that at least one of the motivating reasons for the acquisition of these lands in 1952 and 1953 was not the hope and expectation that it could be disposed of at a profit;

4. That although Estelle Diamond in the first deal and Sarah Diamond in the second transaction had played a passive and silent role, having left matters in the hands of Harold Diamond and Michael Shnier, they should be in no different a position than Harold Diamond.

5. That in the Court's view, both transactions were a venture in the nature of trade, "a business", whereby all profits were taxable;

6. That the loss claimed by Sarah Diamond was not deductible as a business loss. It was not a business transaction on her part.

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HAROLD DIAMOND, SARAH DIAMOND AND ESTELLE DIAMOND v. MINISTER OF NATIONAL REVENUE

APPEAL from a decision of the Tax Appeal Board.

A. J. Irving for the appellants.

Bruce Verchere for the respondent.

NOËL J.:—This is an appeal from a decision of the Tax Appeal Board[1] dated August 16, 1965, which dismissed Harold Diamond's appeal from the assessments of income tax for the years 1957, 1958 and 1959, Sarah Diamond's appeal for the years 1958 and 1959 and Estelle Diamond's appeal for the years 1955, 1956, 1957 and 1959.

Harold Diamond's appeal, as well as the appeals of both his wife, Estelle Diamond, and his mother, Sarah Diamond, were all heard at the same time and it was agreed by counsel that the evidence herein should apply as well to the two other appellants.

There is no dispute as to the figures involved in these appeals and the main issue in all of them is whether the amounts received by the appellants from the sale of vacant land situated on the outskirts of Winnipeg are capital gains or trading receipts.

Harold Diamond's 1957 assessment, however, is based entirely on the assumption made by the respondent that his spouse earned in 1957 income in excess of one thousand ($1,000) dollars and for that reason he was not in 1959, by virtue of paragraph (*b*) of subsection (2) of section 26 of the *Income Tax Act,* entitled to a deduction of two thousand ($2,000) dollars permitted by paragraph (*a*) of subsection (1) of section 26 but was entitled to a deduction of one thousand ($1,000) dollars pursuant to paragraph (*b*) of subsection (1) of section 26 of the *Income Tax Act.* I should also add here that counsel for the appellants stated at the trial that he abandoned the contention raised in the case of Harold Diamond and his wife, Estelle Diamond, that the money invested by the appellants in common shares, preferred shares and loans of Portage Drive-In Ltd. and Prairie Drive-In Ltd. should be held to be deductible as business losses under section 27(1)(*e*) but did not abandon Sarah Diamond's alternative argument that if it is found that she has engaged in a trading transaction with respect to the McInnes property that the loss she has sustained in the Balstone Farms option of $15,000 be con-

[1] (1965) 39 Tax A.B.C. 133.

sidered as a business loss deductible in accordance with the provisions of section 27(1)(*e*) of the *Income Tax Act*.

During the year 1952, Harold Diamond and one Michael Shnier (sometimes called Max) his brother-in-law, decided to establish two corporations, Portage Drive-In Ltd. and Prairie Drive-In Ltd., to operate drive-in theatres in the Province of Manitoba. Shnier had some interests in a drive-in theatre already in operation in Winnipeg and, therefore, was experienced in that type of business. The two partners, therefore, sought out land on the outskirts of Winnipeg for the above purpose and made several attempts to purchase a portion (15 acres) of a property hereinafter referred to as the McInnes property, situated on highway No. 1, municipality of Assiniboia, some three or four miles west of Winnipeg. They were not successful in purchasing the above land and during the year 1952 they purchased another property slightly west of the McInnes property some six miles (15 to 20 minutes) from the city of Winnipeg. They established thereon a drive-in theatre known as the Circus Drive-In Theatre owned by Portage Drive-In Ltd. in which Harold Diamond and his wife, Estelle Diamond, held a one-half interest and Shnier and his wife held the other; they also, some time later, established and operated another drive-in theatre known also as the Circus Drive-In Theatre owned by Prairie Drive-In Ltd. situated at Portage La Prairie, Manitoba, in which Harold Diamond and his wife, Estelle Diamond, also held a one-half interest and Michael Shnier and his wife held the other half.

During the year 1952, Harold Diamond and Michael Shnier, having been approached by the municipality of Assiniboia, caused their respective wives to acquire, for $1,500, a strip of real property (containing five acres) for which Estelle Diamond paid $750 and Mrs. Shnier paid $750. This land, situated directly across from the Circus Drive-In Theatre of Portage Drive-In Ltd., was registered in the joint names of Estelle Diamond and Mildred Shnier.

Both of these ladies owned one share each of Portage Drive-In Ltd. and Prairie Drive-In Ltd. as well as a number of preferred shares. They did not carry out the negotiations which led to the purchase of the five acres which was carried out by their respective husbands nor did they have anything to do with a number of sales of the lots of this

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parcel of land, Estelle Diamond admitting, however, that she did exactly what her husband told her to do with respect to the purchase as well as to the sales and relied entirely on him in this regard. The above five acre parcel was sold as follows:

(1) 1st July 1953—
Sale of lots 1-8 block 1 plan 1120 to Engelhardt Stelzer for $3,390 00
Profit . . . . . $ 3,021 40

(2) 21st October, 1954
Sale of lots: 6 block 12 plan 1120
1-5 block 12 plan 1120
7-8 block 12 plan 1120
to Henry Schultz and Lloyd Richmond for $11,400 00
Profit $10,902 87

(3) 18th August 1955
Sale of lot 22 block 1 plan 1120 to Henry Schultz for $200 00
Profit . . . . . $ 125 53

(4) 19th May 1957
Sale of lots 1-8 block 11 plan 1120 to Canadian Oil Companies Ltd. for $15,000 00
Profit $13,344 52

(5) 7th May 1958
Sale of lots 1-8 block 22 plan 1120 to Max Yale Diamond for $10,000 00
Share of Profit applicable to Estelle Diamond $ 4,655 60

One half of the profit realized from the sales of the above land only is applicable to Estelle Diamond of which $2,-706.45 was assessed in 1955, $2,582.26 in 1956, $6,672.26 in 1957 and $3,711.05 in 1959.

During the early part of the year 1953, the "McInnes property", which was until then being farmed, became vested in the executors of its recently deceased owner and the executors approached Harold Diamond and offered the whole of the McInnes property (70 acres) at a price considerably less than what they had previously offered for a portion of that property. As a matter of fact, the offer made by Harold Diamond and his partner for 15 acres of the McInnes property in 1952 went as high as $1,000 an acre but the owner then would not part with the land for less than $1,200 an acre. The executors, after his death, offered the whole of the 70 acres for approximately $12,450 and they bought it.

Harold Diamond and Michael Shnier, as well as the two corporations, were at this time without funds and in order to provide for the purchase of this property, the appellant

convinced his mother, Sarah Diamond, to put up the money, which she did. Upon completion of this purchase, the property was transferred from the McInnes estate to Michael Shnier on October 19, 1953, and then registered in the name of Sarah Diamond on November 7, 1953. On October 1, 1954, an agreement was signed between Sarah Diamond, Michael Shnier and Harold Diamond, whereby Sarah Diamond (1) undertook not to sell the McInnes lands before October 1, 1958, without the consent of both Michael Shnier and Harold Diamond; (2) agreed that if before October 1, 1958, Michael Shnier and Harold Diamond brought to her a purchaser for cash of the lands and Michael Shnier and Harold Diamond both authorized her in writing to sell the land to the purchaser she would agree to sell provided the amount of the purchase price was such that after deducting the moneys she paid for the lands together with costs incurred by her and all moneys expended by her for taxes and maintenance of said lands and interest on all moneys paid out by her at 4% from the date of respective payment, it would be sufficient to leave her with a profit of at least $5,000. It was further stipulated in this agreement that "in the event the profit, after deducting income tax that she may have to pay (sic) by reason of said sale of the lands exceeds $5,000 but does not exceed $15,000, she agrees to divide such excess in equal shares" between Michael Shnier, Harold Diamond and herself. Any excess over $15,000 was to be divided equally between the three of them; (3) she agreed that if at any time before she sold the land Michael Shnier and Harold Diamond together would tender to her in cash two-thirds of the moneys paid by her for the purchase of the said lands plus two-thirds of the costs incurred by her in obtaining title to said lands, plus two-thirds of all taxes and other moneys that she had to expend in respect to said lands, plus the interest then she shall transfer to each of Michael Shnier and Harold Diamond an undivided one-third interest in the said lands.

On May 11, 1956, Harold Diamond wrote to Michael Shnier referring to the above agreement and in paragraphs 2 and 3 of this letter stated:

> I further agree to act along with you on your decisions in order to exercise that agreement in our behalf. It is specifically understood that Harold Diamond does not have to abide by a decision of Max Shnier to sell the land unless the total sale price is a minimum of $1,250 per acre.

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It is also understood that whatever profit or loss is made on the sale of this land, both Max Shnier and Harold Diamond will share equally.

On July 7, 1958, Michael Shnier and Harold Diamond wrote to Sarah Diamond, c/o Nitikman & Nusgart, solicitors, referring to the agreement of October 1, 1954 between her and both of them and to the clauses contained in the agreement, advising her that they believed "that Diamond Agencies Ltd. are desirous of purchasing the said land at the price of $1,250 per acre and we do hereby authorize and instruct you to execute in favor of the said Diamond Agencies Ltd., and to deliver to its solicitor, Max Yale Diamond . . . an option to purchase said lands for the price of one thousand two hundred and fifty ($1,250) dollars per acre, the option to be in such form and on such terms as you see fit . . .".

"The option which you are to grant will be from yourself and the two of us, and we will join in the execution of the said option".

On October 9, 1958, Harold Diamond, Michael Shnier and Sarah Diamond wrote to Messrs. Nitikman and Nusgart in connection with the transfer by Sarah Diamond of the McInnes land stating that these solicitors would receive cash in the sum of $29,278.25 "being the balance of the cash payment in respect of the aforesaid transfer" which they would be authorized to disburse by paying to Sarah Diamond the sum of $19,867.06, and after deducting their fees of $1,000 plus disbursements, by dividing the balance remaining into three equal parts, one part to Sarah Diamond, one to Harold Diamond and one to Michael Shnier.

On the same day, October 9, 1958, Sarah Diamond, Michael Shnier and Harold Diamond entered into another agreement whereby, after referring to the agreement of October 1, 1954, the option to Diamond Agencies Ltd. and the sale to the latter of the McInnes land, the parties therein confirm that the said sale is at and for the price and sum of $86,500 payable $30,000 in cash and the balance to be secured by a mortgage from the said Diamond Agencies Ltd. in favour of the appellant, Sarah Diamond and Michael Shnier for $56,500 and interest at 6% per annum.

The parties also agreed therein that out of the cash payment of $30,000, Sarah Diamond shall be paid firstly all monies she paid for the lands with costs incurred by her

and interest, Nitikman and Nusgart shall be paid their legal fees and disbursements and any balance remaining shall be divided equally between the three parties. It is to be noted that the amount of $5,000 to be paid to Sarah Diamond in the previous agreement has now been deleted and she now shares equally with the other two partners.

The agreement contains a further clause 3(*a*) and (*b*) which reads as follows:

> 3. The parties further agree that the monies secured by the real property mortgage shall, when realized, be disbursed and divided as follows:
>
> (*a*) There shall be paid firstly to the Party of the First Part (Sarah Diamond) all monies which the said Party of the First Part shall be required to pay and shall pay by way of income tax payable by her by reason of the sale of the said lands; (sic)
>
> (*b*) the balance of the monies shall be divided equally between the Parties of the First, Second and Third Part.

Harold Diamond's share of the profit from the sale of the McInnes property was $22,295.85 of which $7,718.91 was assessed in 1958 and $14,863.08 in 1959 and Sarah Diamond's share of the profit was $25,551.91 of which $8,-846.17 was assessed in 1958 and $17,033.66 in 1959.

It appears clearly from the above that the McInnes property was purchased on a partnership basis by Harold Diamond, Michael Shnier and Sarah Diamond, with the latter supplying the funds and all eventually dividing equally the profit realized from its sale. It is true that Sarah Diamond seems to have played a passive and silent role in this matter but as she was content to leave the handling of the jointly held property to the other two she should be in no different position than they are. If the true nature of that transaction is a business transaction, any profit derived therefrom by any of them should be held taxable (compare *M.N.R. v. C. H. Lane*[1]).

It also appears that although Estelle did not know why she was purchasing an interest in the 5-acre property, her husband Harold knew and as she relied entirely on him in purchasing the interests as well as in selling the land, the latter's intention and actions also become relevant in determining the nature of the transactions which allowed her, over a period of years, to benefit from the profitable sales of the land.

[1] [1964] C T.C. 81.

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The position taken by the appellants herein is that the profits realized from the sale of the 5-acre parcel as well as the McInnes property are all non-taxable as capital gains; that the 5-acre property acquired by the two wives was to be used to build a motel, a service station and a drive-in restaurant and that the McInnes property acquired by Sarah Diamond in partnership with Harry Diamond and Max Shnier was for the purpose of establishing thereon a pitch and putt golf course, a stock car racing track and, according to Harold Diamond, it was also a good purchase in that it prevented a competitive drive-in theatre from establishing itself on this land which was closer to Winnipeg than their Drive-In theatre. The appellant, Harold Diamond, admits that no specific arrangements had been made to finance these projects and that the two partners were hoping to be able to obtain sufficient funds from the operations of their two drive-in theatres. He stated that in no case did they attempt to sell the land outright but that they were trying to develop Assiniboia to attract people. He further stated that they had no fixed objective but were trying with a lot of ideas. The evidence discloses that the two partners had arranged no financing for the establishment of a restaurant or a motel, had no plan or drawings prepared and were merely toying with the idea that if their drive-in theatre operations were profitable, they could consider such developments. In cross-examination, he was at one stage referred to his evidence before the Tax Appeal Board, p. 109 of the transcript, and agreed that he had then stated that it was in their mind that if they could not use the property "we would have to say that we would have to sell it".

The appellant's explanation as to why they did not go ahead with all these projects but sold the land instead is that when they started their drive-in theatre business they were confident that they could, based on the happy experience of Michael Shnier in the North Main Drive-In operation in which he held an interest prior thereto, anticipate a substantial profit; their estimation was that they would earn between $65,000 to $75,000 annually which was 40% of what the North Main Theatre had been doing and this would have enabled them to realize their projects. The first year of operation, however, turned out to be disappointing in that a loss after depreciation of $488.49 was incurred in 1952 and a small profit of $471.59 was realized after de-

ing and when the partners needed funds, but here again the preciation in 1953. The business then started to deteriorate towards the end of 1953-1954 and declined drastically after 1954. It was operated at a loss until 1956 and then the land and the fixtures were sold to Western Theatres Limited for $82,000 in 1957. Harold Diamond explained this unfortunate turn of events because of the advent of television in 1954, its novelty, people preferring to stay home and watch television rather than going out to see a movie. Their operations were also hampered by the fact that they could only get last run films after every theatre in Winnipeg had shown them.

Harold Diamond and Estelle Diamond later sold their shares in Portage Drive-In Ltd. for $4,000 and in Prairie Drive-In Ltd. for $18,500. The appellant Harold Diamond then entered into a new business, the cold storage business and is still in it.

Now, although the lack of funds may have explained why some of these projects did not materialize, the evidence discloses that a sale made as early as July 1, 1953, i.e., when the two partners should have been confident that their drive-in theatre operations would be successful, could not be explained for this reason and that is the sale made to Engelhardt Stelzer for $3,390. This gentleman was in the restaurant business and approached the two partners with the idea of establishing on the property a drive-in restaurant. Now, although here Harold Diamond claimed that their intention was to set up a restaurant operation themselves, they do not appear to have resisted at all Stelzer's appeal to purchase land for this very purpose. I might also add that after buying the land he did not build a restaurant on it. The only conclusion one can arrive at in this case is that one of the motivations of the two husbands in purchasing the land was to sell it whenever feasible and, of course, this is what they did at a profit of $3,021.40. The sale of the lots to Henry Schultz on October 21, 1954, at a price of $11,400 and at a profit of $10,902.87, as well as the sale to the same purchaser of lot 22, block 1, plan 1120, for $200 at a profit of $125.53 is also significant in that the purchaser, according to his evidence, was approached on a job by Mr. Shnier who offered to sell him the property, This, of course, occurred in 1954, when business was declining and when the partners needed funds but here again the

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conduct of Mr. Shnier is consistent with an intention of a relatively quick resale.

The conduct of the partners with regard to the sale made to Canadian Oil Companies Ltd. of lots 1-8, block 11, plan 1120, for $15,000 at a profit of $13,344.52 on May 19, 1957, although also at a time when they needed funds, does not indicate any real and serious intention to establish a filling gas station on the property. Indeed, their only attempt, according to Harold Diamond, to establish a gas station was when he discussed this possibility with Canadian Oil the year before but did nothing to establish it. They ended once again by selling the lots to Canadian Oil for the site and here again the only conclusion one can arrive at from such conduct is that if the two partners intended to build a gasoline station on this land, they surely must have also had an alternative of selling to build if they could not go ahead with their plan. The balance of the 5-acre parcel was disposed of on May 7, 1958, to Max Yale Diamond for $10,000. It therefore appears that the totality of this 5-acre parcel was disposed of from 1953 to 1958 with none of the various projects intended by the partners realized, nor from the evidence can I see that any of the purchasers of the land used it for any particular development.

In my opinion the above evidence is not sufficient to rebut the obvious inference from all the circumstances that at least one of the motivating reasons for the acquisition of the vacant 5-acre land was the hope and expectation that it would be possible to dispose of it at a profit and, of course, if that was one of the motivating reasons, profits made upon subsequent disposition of the property are taxable in accordance with *Regal Heights v. M.N.R.*[1].

I now come to the purchase and sale of the McInnes 70-acre property purchased in 1953 and sold at a profit of approximately $74,000 in 1958. It appears from the evidence that although the partners did not need this land for their business, it was too good a bargain to resist. They had failed to buy 15 acres for $15,000 in 1952 and they were offered the whole of the 70 acres for $12,500 in 1953. The appellant's plans to use this property are still more nebulous and uncertain than those for the 5-acre parcel. Harold Diamond states he wrote to a company who owned a golf course near Chicago to obtain some information but the

[1] [1960] S.C.R. 902; [1960] C.T.C. 384.

short golf course or driving range never materialized and although he claims he had some conversations with a man interested in setting up a stock car racing track, nothing ever came of that either. A portion of the land was rented one year to a man who operated a driving range who, however, failed to pay any rent. A man was found who leased the land on a share crop basis and the net revenue from this operation totalled, before municipal taxes, $932.54 for the years 1954-1956-1957.

Here again the inference is inescapable from all the circumstances that at least one of the motivating reasons for the acquisition of this land was the hope and expectation that it could be disposed of at a profit. This conclusion is further supported by the agreement between Sarah Diamond, Harold Diamond and Michael Shnier of October 1, 1954, where the intention to sell is confirmed by the measures taken therein to insure a proper distribution of profits in the event of a sale and where Mrs. Sarah Diamond's tax liability in the case of a sale of the land is even provided for.

The appellant, Harold Diamond, embarked on a number of ventures in connection with a housing development and the promotion of a gas company. He also acted for his brother, Larry Diamond, in taking a $5,000 option on the Fink property for the purpose of purchasing this 177 acre property on which his brother, a real estate broker and land developer, intended to set up a housing development for Air Force families. The development did not go through and Larry Diamond lost the $5,000 option money. Harold Diamond's expectation of profit from this venture was that he was to work in the project as a field man and would receive shares in the company to be incorporated.

In my view, neither of these ventures are particularly relevant or helpful in determining the main issue in these appeals which depends rather upon the proper analysis of the transactions which gave rise to these appeals.

They do indicate, however, the business ability and enterprise of Harold Diamond, one of the appellants, who, although confined to a wheel chair, has entered into a number of enterprises one of which, however, ended in a loss of a deposit of $15,000 advanced by his mother, Sarah Diamond, and for which she is claiming a deduction under section 27(1)(*e*) of the *Income Tax Act*. In 1956 he indeed caused a deposit to be made of $15,000 for the purchase of

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Balstone Farms situated behind the drive-in theatre, at a time when he was acting for The Great Plains Gas Company. The land was to be used for a housing and industrial development and was expected to create a market for the company's gas. This money had been obtained from his mother, Sarah Diamond, in whose name the option was registered. She, however, stated that she had expected no profit from this deal which would go all to her son Harold and hoped only for the return of her money. The money, however, was lost when the financial company withdrew its backing and the option was dropped. Sarah Diamond now claims this $15,000 as a loss to offset the profits made in the sale of the McInnes property in the event these profits are held to be taxable. She states that "if (she) has engaged in an act of business with respect to the McInnes property, that the Balstone Farms option should be similarly construed as an act of business and the loss incurred in the sum of $15,000 is therefore a business loss for the taxation year 1957 and deductible in accordance with the provisions of section 27(1)(*e*) of the *Income Tax Act*.

I would gladly comply with her request if the above loss could be considered as a business loss. However, in view of the evidence adduced by her and confirmed by Harold Diamond, that is not possible. Indeed, it appears that the amount of $15,000 was simply turned over to Harold Diamond by Sarah Diamond upon his request as an accommodation. She loaned him this money and expects to get it back and never hoped to participate in the profits had the option been accepted and the property purchased. The sole beneficiary would have been Harold Diamond and Sarah Diamond's alternative argument must, therefore, be denied.

Having regard to the evidence adduced in this case as a whole it appears clearly to me that one of the motivating reasons which caused them to acquire these lands in 1952 and 1953 was a hope and expectation that they could resell them at a profit. In any event, I am not convinced by the evidence that the appellants have discharged the onus of showing that such was not one of their motivating reasons.

It therefore follows that the appellants' appeals fail and are dismissed with costs. The respondent, however, will be entitled to the cost of one appeal only as these appeals were heard together on the same evidence.

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