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Exchequer Court of Canada

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73675—5

JUDGES

OF THE

EXCHEQUER COURT OF CANADA

During the period of these Reports:

PRESIDENT:

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

PUISNE JUDGES:

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

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

THE HONOURABLE ALPHONSE FOURNIER
(Appointed June 12, 1953)

THE HONOURABLE LOUIS McC. RITCHIE
(Appointed April 21, 1955)

THE HONOURABLE JACQUES DUMOULIN
(Appointed December 1, 1955)

THE HONOURABLE ARTHUR LOUIS THURLOW
(Appointed August 29, 1956)

DISTRICT JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

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

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

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

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

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

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

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

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

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

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

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

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

73675—5½

The Honourable Louis McC. Ritchie resigned from the bench of the Exchequer Court of Canada during the current year

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CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

BRITISH COLUMBIA ADMIRALTY DISTRICT

1955

Sept. 6 & 7

Sept. 14

BETWEEN:

MIDDLEPOINT LOGGING COMPANY LIMITED ..... } PLAINTIFF,

AND

I. D. LLOYD, carrying on business under the firm name and style of LLOYD'S TOWING COMPANY, and the said LLOYD'S TOWING COMPANY, and HARRY MUDGE } DEFENDANTS.

Shipping—Action for breach of contract—The Canada Shipping Act, R.S.C. 1952, c. 29, s. 657—Defendant not entitled to limitation of liability.

In an action for damages for breach of contract for the failure of defendant to carry safely plaintiff's goods the Court found that defendant was wholly to blame for the loss sustained by plaintiff.

Held: That defendant was not entitled to limitation of liability under the Canada Shipping Act since he had not proved that the occurrence giving rise to the loss was without his fault or privity.

ACTION for damages for breach of contract.

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

C. C. I. Merritt for the plaintiff.

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MIDDLEPOINT LOGGING CO. LTD. v. I. D. LLOYD et al.

Smith D.J.A.

B. W. F. McLoughlin for defendants I. D. Lloyd and Lloyd's Towing Company.

J. S. Maguire and *J. Leighton* for defendant Harry Mudge.

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

SIDNEY SMITH D.J.A. now (September 14, 1955) delivered the following judgment:

This is a claim for damages for breach of contract. The damages were allegedly sustained by the plaintiff in consequence of a failure on defendants' part to carry safely the plaintiff's Lorain shovel, Model SP-254, from Comox to Halfmoon Bay, a distance of 50 miles across the Strait of Georgia, British Columbia.

The shovel had been loaded on a small barge *L.T.C.O.* (length 51½ feet, breadth 18 feet, of 43 tons gross) owned by defendant I. D. Lloyd, trading under the firm name of the defendant company, and who now may be referred to simply as Lloyd. The barge was of the landing craft type, and was being towed by the tug *Janicella,* also owned by Lloyd. In charge of both was the defendant Mudge—a young man 22 years of age and uncertificated. He was alone. Lloyd had handed the whole undertaking over to this lad and bothered no more about it.

It would seem tug and barge left Comox during the evening of 8th March 1954, but put back on account of weather conditions. They departed again next morning about eleven o'clock. Mudge said there was then only a light wind and calm sea, and that these ideal conditions prevailed during the voyage. I would be inclined to doubt this. His pleadings say the wind was "north west 4". This indicates a moderate wind of some 15 miles per hour. When he was off the north end of Texada Island, about 15 miles from Comox, he noticed the after end of the barge becoming lower in the water. He accordingly ran for near-by Blubber Bay and had just reached there about half an hour later when the barge overturned to starboard and spilled her load. Salvage operations were later carried out and the shovel retrieved, overhauled and repaired. All these expenses are included in the plaintiff's claim.

On the evidence I find that the disaster was caused by an influx of water into the barge due to the craft's being inadequate for this voyage with the load she carried. That is the view of Captain Stacey, an experienced ship-master and surveyor whose testimony I accept. It may be noted that her freeboard aft at the commencement of the passage was no more than four to five inches. It is significant too that Lloyd failed to appreciate the weight to be carried. He stated that he "understood" it to be 17 tons. He so informed Mudge. It was nearly 23 tons. Overloading may have contributed to the disaster. I find the barge unseaworthy. *City of Alberni* (1).

I felt rather sorry for Mudge. He impressed me as a likeable, well-meaning lad, and I think plaintiff's counsel said as much. In the box he was plainly nervous and out of his depth; hesitated and faltered over his answers; at times seemed to guess at them to break the waiting silence. He is not to blame for this. He had some former experience with this barge but did not claim to be a seaman. During the years he had done occasional jobs for Lloyd of a like but minor nature. On this occasion he was engaged to tow the barge to Halfmoon Bay and back for an hourly wage of one dollar and a half—a labourer's hire. The condition of the barge was no concern of his. I am satisfied he did his best, but his testimony cannot be regarded as wholly reliable. I refer in particular to what he said about the sounding of the tanks.

The submission made for Lloyd was that the plaintiff was responsible for the loading, that it was improperly performed, that during the voyage the shovel slipped aft along the deck of the barge forcing the stern under water, and thus causing all the trouble. With full appreciation of the able presentation of his case by Mr. McLoughlin, I am unable to give effect to any of these contentions. There was considerable evidence as to the manner of loading and securing. I find the plaintiff had no responsibility for this, other than for the mechanical operation of the shovel. The rest was carried out under the supervision of Mudge.

Defendant Lloyd claims limitation of liability under Section 657 of the Canada Shipping Act. In my view he has not met the conditions necessary for such a finding. He has

(1) (1947) 63 B.C.R. 262.

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Smith D.J.A.

not discharged the onus of proving that the occurrence was without his fault or privity, *City of Alberni* (*supra*) at page 273. He appears to entertain curious notions of his obligations as an owner whose barge is used for the carriage of others' goods. He seems to think that without notice of any defect nothing need be done. The barge had capsized in June 1952 and had been duly repaired. Since then he had made no inspection either personally or by surveyor. The uncontradicted evidence shows that this will not do; that the barge should have been dry-docked for inspection at least once a year.

The action as against defendant Mudge is dismissed with costs; otherwise judgment will go for the Plaintiff with costs; limitation of liability is refused; the learned registrar will assess the damages.

Judgment accordingly.

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Sept. 13

Nov. 21

BETWEEN:

BEN ROSENBLAT ..... APPELLANT;

AND

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

Revenue—Income—Income tax—Option to buy land sold at a profit—Profit not reported in taxpayer's income tax return—Subsequent transactions to buy land—Facts on which assessment is based—Matters arising subsequent to assessment—Whether profit from first transaction taxable—Whether evidence of subsequent transactions admissible—The Income War Tax Act, R.S.C. 1927, c. 97, s. 3(1)—The Income Tax Act, S. of C. 1948, c. 52, ss. 3 and 4—Income from business—Appeal from Income Tax Appeal Board dismissed.

In 1945 appellant, then engaged in the coal and builders' supply business, secured from a municipality for $1,500, an option to purchase a tract of land which he intended to develop into a housing subdivision. He sold the option the same year for $36,000 to a company in which his brother was one of the promoters, receiving $1,500 in cash, the balance being paid to him in 1948 and 1949 in two instalments of $18,000 and $16,500 respectively. Appellant did not report the two latter amounts in his tax returns for those two years. Subsequently through three successive agreements with the same municipality carrying the same covenants and obligations as those contained in the 1945 option, appellant secured further options which he sold in 1949 and 1950 to the same company. In 1952 appellant was re-assessed for the 1948 and

1949 taxation years on the ground that the amounts then received by him as a result of the sale of the 1945 option amounted to annual net profits or gains from a trade or business. An appeal to the Income Tax Appeal Board from the Minister's reassessments was dismissed and appellant now appeals from the Board's decision to this Court.

Held: That to determine whether an assessment or reassessment is justified evidence can be heard in respect to all the facts on which the assessment or reassessment is based and in respect to matters arising subsequent to the assessment or reassessment, provided such matters are relevant. *Nicholson Limited* v. *The Minister of National Revenue* [1945] Ex. C.R. 191 at 201; *Lincolnshire Sugar Co. Ltd.* v. *Smart* [1937] 1 All. E.R. (H. of L.) 413. Here evidence respecting subsequent transactions is admissible in order to establish that the 1945 transaction marked the commencement of a series of similar transactions or of a course of conduct in the nature of a trade or business. The last transaction in respect of which evidence was given was entered into on June 19, 1950 two years before the reassessment made by the Minister on June 25, 1952. The reassessment was made having regard to the information available to the Minister at that date.

2. That appellant's securing the first transaction option and his assigning it to the company at a profit, standing by itself, constituted an adventure in the nature of trade or business and that the second, third and fourth transactions definitely establish a course of conduct indicating a continuance of that trade or business. *Atlantic Sugar Refineries Limited* v. *The Minister of National Revenue* [1949] S.C.R. 706; *Edwards (Inspector of Taxes)* v. *Bairstow and Another* [1955] 3 All E.R. 48 at 53 and 58.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Ritchie at Winnipeg.

A. M. Shinbane, Q.C. for appellant.

W. S. McEwen, Q.C., C. C. Henderson and *A. L. DeWolf* for respondent.

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

RITCHIE J. now (November 21, 1955) delivered the following judgment:

This is an appeal from the decision of the Income Tax Appeal Board (1), dated January 29, 1954, dismissing the appellant's appeal from income tax reassessments for the 1948 and 1949 taxation years.

(1) 10 Tax A. B. C. 41.

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Ritchie J.

By the reassessments the Minister added to the taxable income of the appellant monies received by him in the 1948 and 1949 taxation years in payment of the consideration for which in 1946 he had assigned an option entitling him to purchase lands for subdivision purposes.

The appellant submits that an intention formed by him in 1945 to embark in the business of developing a housing subdivision was frustrated and that the monies in excess of his cost received on the disposal of the asset are a capital gain or non-taxable income.

The Minister submits the profits received by the appellant in 1948 and 1949 as a result of his having sold or assigned his option to buy the land amounted to annual net profits or gains from a trade or business.

Because the course of conduct followed by the appellant is, in my view, relevant to the question of whether his sale or assignment of the option to purchase land was a transaction in the course of carrying on a trade or business I will set out in some detail and in chronological order the transactions and the nature of the transactions which the Minister contends support his submission that the 1948 and 1949 receipts constitute taxable income.

During the year of 1945 the appellant learned of the Dominion Government policy of assisting housing developments through the agency of Central Mortgage and Housing Corporation, thought the scheme looked interesting and so, as a matter of business, secured under date of August 31, 1945, from the Rural Municipality of West Kildonan, hereinafter referred to as "the municipality", an option (Exhibit 1), effective until November 15, 1945, to purchase a tract of land estimated to be of sufficient size to permit subdivision into three hundred building lots. This option agreement is sometimes hereinafter referred to as "the first transaction option".

The appellant in 1945 was in the "coal and builders' supply business" in partnership with his father and had not prior thereto been engaged in the business of buying and selling real estate or building houses.

The terms of the first transaction option were such that acceptance by the appellant would create automatically an

agreement of sale and purchase requiring the appellant to pay the sum of $1,500 in cash and further obligating him to

(*a*) subdivide the land so as to provide building lots at least forty feet in width, streets at least sixty-six feet in width and lanes at least twenty feet in width;

(*b*) construct streets having a sufficient depth of crushed stone to provide an all-weather surface and install cement sidewalks, sewers, water mains and hydrants on all the streets; and

(*c*) completely develop the subdivision by the erection of single family dwellings of four, five and six rooms each, ranging in value from at least $4,800 to at least $6,000 and duplex dwellings having a value of at least $9,000.

The obligation in respect to the erection of houses called for the completion of fifty single family dwellings within one year after the date of entering into an agreement with the Dominion Government and the erection of dwellings on all building lots in the subdivision within four years after that date.

I am satisfied that, at the time of executing the first transaction option, the defendant, as a business man, knew just how onerous were the terms contained in it and how much money was involved in performing the obligations which acceptance of the option would impose upon him.

After execution of the first transaction option, the appellant commenced discussions with Central Mortgage and Housing Corporation and ascertained he could negotiate an agreement covering the erection of fifty houses. The appellant then approached his banker in respect to financing the project, the first phase of which was estimated to cost approximately $480,000, in cash and mortgage liability. The testimony did not indicate how much risk equity capital was required. The appellant says that because his banker indicated little liking for the proposal and pointed to the complications which might develop by reason of material shortages, he began to doubt the wisdom of proceeding alone and approached three or four contractors in an effort to have them become associated with him and share the risk involved in the development of the property. The approaches so made to contractors were unsuccessful.

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According to his own testimony the appellant, following his unsuccessful efforts to interest contractors in becoming associated with him, became convinced the proposition involved too much money for him to finance alone and discussed the situation with his brother Edward Rosenblat who, in association with some other parties, caused to be incorporated a new company, under the name Modern Housing Limited, hereinafter sometimes referred to as "the company", which agreed to pay the appellant the sum of $36,000 in consideration of his assigning to it all his rights under the first transaction option.

Edward Rosenblat, who in 1946 became a partner in the coal and builders' supply business, apparently had little difficulty, despite the prior failure of the appellant, in locating associates willing to assume part of the risk involved in the Kildonan housing development.

The appellant says that after he began to doubt his ability to finance the project alone and realized the necessity of having associates to share the risk, he, under date of November 1, 1945, addressed a letter (Exhibit 2) to the secretary of the municipality requesting an extension of the option until December 31, 1945 and gave as a reason for his request the necessity of having sufficient time to conclude negotiations with the Dominion Government. Exhibit 2 includes a statement to the effect that a further meeting with the federal authorities at Ottawa had been arranged for November 13 and at that meeting it was hoped to arrange a contract for the erection of at least fifty houses. The extension requested was granted on November 6, 1945 (Exhibit 5).

On December 29, 1945 the appellant entered into an agreement with the company where, for a consideration of $36,000, he sold and assigned to the company all his right, title and interest in the first transaction option. Paragraph 5 of the statement of facts contained in the notice of appeal refers to the December 29, 1945 assignment having been in writing but it was not filed as an exhibit at the hearing of this appeal. The $1500 covering the cash part of the purchase price of the land was paid by the company but payment of the balance of the $36,000 payable to the appellant was deferred.

The appellant's solicitor, on December 31, 1945, addressed a letter (Exhibit 3) to the secretary of the municipality, accepting the first transaction option, enclosing a cheque to cover the cash portion of the consideration, advising the proposed agreement with the Dominion Government had been concluded, stating that the housing development would be proceeded with by the company, and enclosing for the approval of the municipality an assignment to the company of the appellant's interest in the lands covered by the option. The terms of the assignment (Exhibit 4) executed by the appellant, the company, and the municipality, as of January 9, 1946, included, *inter alia,* the following:

(*a*) the appellant assigned to the company all his interest in the lands;

(*b*) the company agreed to pay all moneys payable by the appellant under the terms of the option and to do and perform all other acts and things which, under the terms of the option, the appellant was obligated to do and perform;

(*c*) the appellant agreed that neither the execution of the assignment nor the approval of the assignment by the municipality would in any way release the appellant from his obligations under the option; and

(*d*) the municipality consented to the assignment of the appellant's rights to the company.

No payments, other than the $1,500 to cover the cash payable to the municipality, were made by the company on account of the purchase price of the first transaction until the 1948 taxation year, when $18,000 was received by the appellant.

The appellant's income tax return for the 1948 taxation year, certified under date of April 9, 1949, made no reference to the $18,000 he had received from the company on account of the purchase price of the first transaction option. The income tax assessment of the appellant for the 1948 taxation year was substantially on the basis of the return as filed.

On June 25, 1949 the appellant entered into an agreement of sale and purchase with the municipality (Exhibit A), hereinafter referred to as "the second transaction", whereby he agreed to buy seventy-one lots from the municipality for

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a consideration of $1,000 and the performance of covenants and obligations similar to those contained in the first transaction option.

Under date of July 13, 1949 the appellant, the company and the municipality executed an agreement (Exhibit B) in terms similar to Exhibit 4 under which the appellant, for an expressed consideration of $1.00, assigned to the company all his interest in the lands included in the second transaction. Again the appellant covenated that the assignment to the company would not release him from any of the obligations contained in his agreement to purchase the seventy-one lots. No evidence was tendered as to the actual consideration for this assignment. The second transaction agreement of sale was assigned to the company just eighteen days after its execution.

In the 1949 taxation year the appellant received $16,500 from Modern Housing Limited in payment of the balance of the purchase price of the first transaction option.

The income tax return of the appellant for the 1949 taxation year, completed on April 15, 1950, included no reference to the $16,500 received from the company in payment of the balance owing on the assignment of his rights under the first transaction. The income tax assessment of the appellant for the 1949 taxation year was made in due course.

On June 1, 1950 the appellant entered into another agreement with the municipality, hereinafter referred to as the third transaction, under which he agreed to purchase a further sixty-five lots for a consideration of $1,500 and the performance of obligations similar to those contained in the first transaction option.

On June 19, 1950 the appellant entered into a further agreement with the municipality (Exhibit E), hereinafter referred to as the fourth transaction, under which he obtained an option to purchase further lands for a consideration of $1,000 and the performance of obligations similar to those contained in the first transaction option.

The appellant, on June 19, 1950, (Exhibit D), for an expressed consideration of $1 assigned to the company all his interest in the lands included in the third and fourth transactions. No evidence was given as to the actual consideration for this assignment.

The Minister of National Revenue, under date of June 25, 1952, issued reassessments under which he added to the income of the appellant for the 1948 taxation year the $18,000 he had received in that year from the company and to the income of the appellant for the 1950 taxation year added the $16,500 he had received from the company during that taxation year.

Section 3 of the Income War Tax Act, upon which the Minister relied in confirming the assessment in respect to 1948 income, reads as follows:

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

Sections 3 and 4 of the Income Tax Act, upon which the Minister relied in confirming the reassessment for the 1949 taxation year, read as follows:

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

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

The appellant argued the first transaction, standing by itself, was not of a kind as to make taxable any gain resulting therefrom and that evidence of the subsequent transactions was not admissible and further, that even if admissible, such transactions had no probative value and should not be considered in determining the question as to whether a gain resulting from the first transaction is taxable.

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The president of this Court in *Nicholson Limited* v. *The Minister of National Revenue* (1) said at page 201:

> The extent of the Court's jurisdiction under section 66 of the Act is very wide. Subject to the provisions of the Act it has exclusive jurisdiction to hear and determine all questions that may arise in connection with the assessment. It may, therefore, deal with issues of fact as well as questions of law. Nor is its jurisdiction restricted to questions arising subsequent to the assessment; it may deal with all questions, whether they arise before or after the assessment, provided they are connected with it.

In *Lincolnshire Sugar Co. Ltd.* v. *Smart* (2) Lord Macmillan said at page 419:

> It may be a question whether it is legitimate to have regard to the fact that it is now known that the payments are irrevocable and that the contingency of repayment can now never arise. The question might have had to be decided before this was known. There are observations by noble and learned Lords in *Bwllfa & Merthyr Dare Steam Collieries* (1891) *Ltd.* v. *Montypridd Waterworks Co.* [1903] A.C. 426; 11 Digest 129, *186,* to the effect that a court ought not to shut its eyes to the true facts if it subsequently knows them, although these facts could not have been known when the question originally arose, and ought not to resort to guessing when certainty is available. I have sympathy with this view, and with what *Lord Wright* and *Greene,* L.J., have to say on the point.

I entertain no doubt as to the admissibility of evidence respecting subsequent transactions in order to establish that the particular transaction under consideration marked the commencement of a series of similar transactions or of a course of conduct in the nature of a trade or business. The last transaction in respect of which evidence was given was entered into on June 19, 1950 (Exhibit E), two years before the reassessment made by the Minister on June 25, 1952.

The reassessment was made having regard to the information available to the Minister at that date. To determine whether an assessment or a reassessment is justified evidence can be heard in respect to all the facts on which the assessment or reassessment is based and in respect to matters arising subsequent to the assessment or reassessment, provided such matters are relevant.

In *Atlantic Sugar Refineries Limited* v. *The Minister of National Revenue* (3) Kerwin J., as he then was, quoted, at

(1) [1945] Ex. C.R. 191 at 201. (2) [1937] (H. of L.) 1 All E.R. 413.

(3) [1949] S.C.R. 706.

page 708, from the judgment of Duff J., as he then was, in *Anderson Logging Co.* v. *The King* (1) the following two paragraphs:

It is common ground that a company, if a trading company and making profit, is assessable to income tax for that profit. The principle is correctly stated in the Scottish case quoted, *California Copper Syndicate* v. *Harris*, 6 F., 894; (1904) 5 T.C. 159. It is quite a well settled principle in dealing with questions of income tax that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of schedule D of the Income Tax Act of 1842 assessable to income tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business;

What is the line which separates the two classes of cases may be difficult to define and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realizing a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

The rule quoted from *California Copper Syndicate* v. *Harris* (2), seems particularly appropriate to the circumstances pertaining to the case presently presented for consideration.

A recent House of Lords decision also having particular application to the instant case is *Edwards* (*Inspector of Taxes*) v. *Bairstow and Another* (3), in which Lord Radcliffe said at page 58:

If I apply what I regard as the accepted test to the facts found in the present case, I am bound to say, with all respect to the judgments under appeal, that I can see only one true and reasonable conclusion. The profit from the set of operations that comprised the purchase and sales of the spinning plant was the profit of an adventure in the nature of trade. What other word is apt to describe the operations? Here are two gentlemen who put their money, or the money of one of them, into buying a lot of machinery. They have no intention of using it as machinery, so they do not buy it to hold as an income-producing asset. They do not buy it to consume or for the pleasure of enjoyment. On the contrary, they have no intention of holding their purchase at all. They are planning to sell the machinery even before they have bought it. And, in due course, they do sell it, in five separate lots, as events turned out. And, as they hoped and expected, they make a net profit on the deal, after charging all expenses such as repairs and replacements, commissions, wages, travelling and entertainment and incidentals, which do, in fact, represent the cost of organising the venture and carrying it through.

The contention that the first transaction standing by itself was not taxable is answered by a judgment of my brother Cameron in this Court and by another paragraph of

(1) [1925] S.C.R. 45. (2) 6 F. 894 (1904) 5 T.C. 159.
(3) [1955] 3 All E.R. 48.

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Lord Radcliffe's judgment in the *Edwards* v. *Bairstow* case (*supra*). In *McDonough* v. *The Minister of National Revenue* (1) Cameron J. said at page 312:

> But the mere fact that a transaction is an isolated one does not exclude it from the category of trading or business transactions of such a nature as to attract income tax to the profit therefrom.

At page 58 of his judgment in *Edwards* v. *Bairstow* (*supra*) Lord Radcliffe also said:

> There remains the fact which was avowedly the original ground of the commissioners' decision—"this was an isolated case". But, as we know, that circumstance does not prevent a transaction which bears the badges of trade from being in truth an adventure in the nature of trade. The true question in such cases is whether the operations constitute an adventure of that kind, not whether they by themselves, or they in conjunction with other operations, constitute the operator a person who carries on a trade. Dealing is, I think, essentially a trading adventure, and the respondents' operations were nothing but a deal or deals in plant and machinery.

Counsel for the appellant stressed the House of Lords judgment in *Jones* v. *Leeming* (2). That judgment was rendered "having regard to the finding of the Commissioners that the transaction was not a concern in the nature of trade". Both in the Court of Appeal (3) and in the House of Lords (*supra*) that finding of fact was accepted without review. In the Court of Appeal the Master of the Rolls intimated that had that Court not been bound by that finding of fact, the decision might have been otherwise. At page 292 he said:

> Now Rowlatt J., and I think this Court, might perhaps have taken the course of saying that having regard to what he had called attention to in this case, the particular facts, "of organizing the speculation, of maturing the property," and the diligence in discovering a second property to add to the first, "and the disposing of the property," there ought to be and there must be a finding that it was an adventure in the nature of trade; but Rowlatt J. refrained from so doing, and I think he was right, for however strongly one may feel as to the facts, the facts are for the Commissioners. It would make an inroad upon their sphere if one were to say in a case such as the present that there could be only one conclusion. The Commissioners are far better judges of these commercial transactions than the Courts, and although their attention has been drawn to what happened, they have in their final case negatived anything in the nature of an adventure or trade.

While in the instant case the facts are to be found by the Court I think it worthwhile to refer once more to *Edwards* (*Inspector of Taxes*) v. *Bairstow and Another* (*supra*) because in that case the Commissioners of Inland Revenue

(1) [1949] Ex. C.R. 300. (2) [1930] A.C. 415.
(3) [1930] 1 K.B. 279.

had held the transaction upon which was based the income tax assessment complained of "was not an adventure in the nature of trade", but the House of Lords, after considering *Jones* v. *Leeming* and other cases, set aside the finding of the Commissioners and allowed the appeal of the Inspector of Taxes. Viscount Simonds said at page 53:

> . . . The primary facts as they are sometimes called do not, in my opinion, justify the inference or conclusion which the commissioners have drawn; not only do they not justify it but they lead irresistibly to the opposite inference or conclusion. It is, therefore, a case in which, whether it be said of the commissioners that their finding is perverse or that they have misdirected themselves in law by a misunderstanding of the statutory language or otherwise, their determination cannot stand. I venture to put the matter thus strongly because I do not find in the careful and indeed exhaustive statements of facts any item which points to the transaction not being an adventure in the nature of trade. Everything pointed the other way. When I asked learned counsel on what, in his submission, the commissioners could have reasonably founded their decision, he could do no more than refer to the contentions which I have already mentioned. But these, on examination, seemed to help him not at all. For, if it is a characteristic of an adventure in the nature of trade that there should be an "organisation", I find that characteristic present here in the association of the two respondents and their subsequent operations. I find "activities which led to the maturing of the asset to be sold" and the search for opportunities for its sale, and, conspicuously, I find that the nature of the asset lent itself to commercial transactions. And by that I mean what I think Rowlatt, J. meant in *Leeming* v. *Jones* [1930] 1 K.B. 279; 99 L.J.K.B. 17; 141 L.T. 472; that a complete spinning plant is an asset which, unlike stocks or share, by itself produces no income and, unlike a picture, does not serve to adorn the drawing room of its owner. It is a commercial asset and nothing else.

It is difficult to reconcile the appellant's submission that his 1945 intention to engage in the business of subdividing land and the sale of houses erected thereon was frustrated because of his inability to finance the undertaking with the assignment, at a profit of $34,500, of the first transaction option to a company of which his brother was one of the promoters and the provision in the assignment approved by the municipality that he would not be released from any of his obligations to the municipality. The appellant, as a business man, knew just how onerous were his obligations under the option both when he executed it and when he agreed to continue to be bound thereunder notwithstanding its assignment to the company.

If the appellant did completely withdraw from his original scheme of housing development on December 29, 1945 then, when he assigned to the company his interest in

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the lands which were the subject of the first transaction option, he entered into a new, for him, type of business of dealing in options to purchase and agreements to purchase land.

The appellant's course of conduct in respect to the second, third and fourth transactions positively establish that he had embarked on a business scheme of acquiring options on and agreements to purchase land suitable for subdivision and turning over such lands to a development company, presumably at a profit.

I find that the appellant's securing the first transaction option and his assigning it to the company at a profit, standing by itself, constituted an adventure in the nature of trade or business and that the second, third and fourth transactions definitely establish a course of conduct indicating a continuance of that trade or business.

The appeal will be dismissed with costs.

Judgment accordingly.

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Sept. 16

Nov. 21

BETWEEN:

JOE ZAROWNEY .....CLAIMANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Seizure—Forfeiture—Motor vehicle used for the purpose of transporting unlawfully manufactured spirits—Information filed in Court for condemnation of thing seized—Claim to property seized—Notice by owner of thing seized—Conditions upon which judge may grant order to protect claimant's interest in the thing seized—The Excise Act, R.S.C. 1952, c. 99, as amended, ss. 114(1) and (2), 115(1), 163(3) and 164(1) and (2)—Claim to property seized dismissed.

Claimant's truck driven by his son was seized after some jugs of unlawfully manufactured spirits were found in it. Following the seizure claimant gave a notice to the Department of National Revenue, Customs and Excise, that he was the owner of the truck and that he requested its return to him. The matter was referred to this Court on behalf of her Majesty by the Deputy Attorney General of Canada by way of information praying for the condemnation of the truck. Claimant then filed a statement of claim seeking the dismissal of the action and the return of his truck. At the conclusion of the trial claimant sought an extension of the time within which an

application may be made under s. 164 of the Excise Act, R.S.C. 1952, c. 99, for an order declaring his interest in the truck be not affected by such seizure.

Held: That the limitation of thirty days within which an application may be made under s. 164 of the Excise Act is statutory. There being no statutory provision permitting the limitation of time to be enlarged the Court has no jurisdiction to grant the order sought by claimant.

2. That section 114 and 115 of the Excise Act, under which the claimant chose to proceed, confers on the Court no discretionary power, such as that conferred by section 164. The Court must release or condemn the truck "as the case requires".

3. That the words of s. 163(3) of the Excise Act are unequivocal. The fact that the use of the truck for the purpose of transporting unlawfully manufactured spirits was without the consent or knowledge of the owner or of the driver of the truck cannot affect the application or effect of that section of the statute. Condemnation is mandatory. There is no room for doubt as to the meaning of the words, "all vehicles that have been used for the purpose of transporting the spirits so manufactured shall be forfeited to the Crown". *The King* v. *Krakowec* [1932] S.C.R. 134; *Mayberry* v. *The King* [1950] Ex. C.R. 402 referred to and followed.

INFORMATION exhibited by the Deputy Attorney General of Canada to have condemned as forfeited to the Crown a motor vehicle seized under the provisions of s. 163(3) of the Excise Act.

The action was tried before the Honourable Mr. Justice Ritchie at Regina.

W. B. Carss for claimant.

Edward Bayda and *P. M. Troop* for respondent.

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

RITCHIE J. now (November 21, 1955) delivered the following judgment:

This is a proceeding *in rem* commenced by an information exhibited on behalf of Her Majesty by the Deputy Attorney General of Canada claiming to have condemned as forfeited to the Crown a 1954 Ford one-ton truck, serial number FCE83BHR17627, model number F350, seized by Royal Canadian Mounted Police officers on November 12, 1954.

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The seizure was made under section 163(3) of the Excise Act, chapter 99, R.S. 1952 as amended by section 6 of chapter 319, R.S. 1952. The relevant parts of section 163 read as follows:

163. (1) Everyone, whether the owner thereof or not, who, without lawful excuse, the proof whereof shall be upon the person accused, sells or offers for sale or purchases or has in his possession any spirits

(*a*) unlawfully manufactured,

is guilty of an indictable offence.

(3) All spirits referred to in subsection (1) wheresoever they are found, and all horses and vehicles, vessels and other appliances that have been or are being used for the purpose of transporting the spirits so manufactured, imported, removed, disposed of, diverted, or in or upon which the same are found, shall be forfeited to the Crown, and may be seized and detained by any officer and be dealt with accordingly.

One Joe Zarowney, a farmer residing at Poplar Bluff in the Province of Saskatchewan, has filed a statement of claim seeking the dismissal of the information and the return of the truck to him.

While the evidence established that the truck had been licensed in the name of Carl Zarowney in order to facilitate his obtaining delivery at the factory and driving it to Saskatchewan I am satisfied that Joe Zarowney, subject to the lien of an unpaid conditional sale agreement, was the real owner of the truck. Carl Zarowney is a son of Joe Zarowney.

At the trial the claimant admitted that at the time of the seizure three one-gallon jugs of unlawfully manufactured spirits were found in the truck.

The relevant parts of section 114 of the Excise Act, pursuant to which the claimant has filed his statement of claim, are subsections (1) and (2), which read as follows:

114. (1) So soon as an information has been filed in any court for the condemnation of any goods or thing seized under this Act, notice thereof shall be posted up in the office of the registrar, clerk or prothonotary of the court, and also in the office of the collector or chief officer in the excise division wherein the goods have been seized or thing has been seized as aforesaid.

(2) Where the owner or person claiming the goods or thing presents a claim to the same and gives security and complies with all the requirements in this Act in that behalf, the said court, at its sitting next after the said notice has been so posted during one month may hear and determine any claim that has been duly made and filed in the meantime, and release or condemn such goods or thing, as the case requires; otherwise the same shall, after the expiration of such month, be deemed to be condemned as aforesaid, and may be sold without any formal condemnation thereof.

On November 12, 1954, the day on which the truck was seized, Joe Zarowney instructed his son Carl to take the truck to Benito and obtain a quantity of electric light bulbs, groceries and other supplies for use at a gathering in celebration of the marriage of one of the other children of Joe Zarowney. Both father and son testified at the trial that Carl Zarowney had not been instructed to procure any intoxicating liquor. Carl Zarowney was emphatic and unshaken in his testimony that he had no liquor in his possession at any time that day and had no knowledge that liquor was on the truck until told by Kluk immediately before the seizure.

While in Benito making his purchases, Carl Zarowney met his cousin Fred Kluk and agreed to drive him to the Zarowney home so that he would be there for the wedding celebration. The two had lunch at the Kluk home, which was on the route between Benito and the Zarowney residence. During lunch Carl Zarowney noticed Fred Kluk leave the house for a short while but thought nothing of it. After lunch Carl Zarowney and Fred Kluk proceeded on their way. At a point on the road Kluk noticed a Royal Canadian Mounted Police patrol car parked so as to observe oncoming traffic. On noticing the patrol car, Kluk immediately told Carl Zarowney to stop as he (Kluk) had unlawfully manufactured liquor in the truck. As soon as the truck came to a stop Fred Kluk seized jugs from the open box body of the truck and attempted to dispose of them. Kluk's attempt to dispose of the jugs attracted the attention of the officers in the patrol car who closed in on the truck. Kluk ran for the woods. The R.C.M.P. officers caught Kluk, found illicit spirits in the truck and promptly informed Carl Zarowney the truck was seized and forfeited to Her Majesty. Carl Zarowney did not join in the attempt to get rid of the illicit spirits but remained at the steering wheel until one of the officers told him to get out of the truck.

Following the seizure, the claimant's solicitor, on December 6, 1954, addressed to the Department of Justice a letter (Exhibit B) advising that Joe Zarowney was the owner of the truck, asking that it be released, and requesting that in any event the letter be considered as a claim to the truck on behalf of Joe Zarowney. The claim so made is acknowledged by paragraph 3 of the information filed herein.

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On December 14, 1954 (Exhibit C) the Assistant Deputy Minister of Justice acknowledged the letter written by the claimant's solicitor under date of December 6, 1954 and advised it had been referred to the Department of National Revenue.

Under date of February 14, 1955 the claimant's solicitor addressed a letter (Exhibit D) to the Department of National Revenue reviewing the circumstances leading to the seizure and asking that the truck be released.

The Deputy Minister of National Revenue on March 2, 1955 (Exhibit E) acknowledged the February 14, 1955 letter from the claimant's solicitor, advised

(*a*) that on the basis of the evidence before the Department there was no authority under the Excise Act whereby the truck could be released;

(*b*) that special consideration as an act of executive clemency could hardly be expected in view of the attempt of Carl Zarowney and Kluk to destroy the evidence and their refusal to give any information as to the source of the alcohol;

(*c*) that in view of the claim under section 115 the Department would be obliged to refer the matter to the Department of Justice with a request that it be brought before the Exchequer Court and a judgment of forfeiture sought; and

(*d*) that substantial costs would be awarded against the claimant if the judgment was unfavourable to him and so to allow further time for consideration no reference to the Department of Justice would be made until April 2, 1955. At the trial the Crown presented no evidence that Carl Zarowney had attempted to destroy the illicit spirits or refused to give any information as to the source from which the alcohol was obtained.

The only relevant part of section 115 of the Excise Act, under which the claimant first gave notice that the truck was his, is subsection (1) and reads as follows:

115. (1) All vehicles, vessels, goods and other things seized as forfeited under this Act or any other Act relating to excise, or to trade or navigation, shall be deemed and taken to be condemned, and may be dealt with accordingly, unless the person from whom they were seized, or the owner thereof, within one month from the day of seizure, gives notice in writing to the seizing officer, or to the collector in the excise division in which such goods were seized, that he claims or intends to claim the same.

Joe Zarowney impressed me as an honest, hard-working person. That Joe Zarowney has some standing in the community in which he resides is evidenced by his having held the office of Reeve for a period of four years. The evidence of Joe Zarowney and Carl Zarowney was not contradicted.

At the conclusion of the trial the claimant sought an order extending the time in which he was entitled to proceed under section 164 of the Excise Act, which provides that whenever any vehicle has been seized as forfeited anyone (other than the person accused of an offence resulting in such seizure or person in whose possession such vehicle was seized) who claims an interest in such vehicle may, within thirty days after such seizure, apply to any judge of any Superior Court of any province or to a judge of the Exchequer Court for an order declaring his interest. If the judge is satisfied that the claimant

(*a*) is innocent of any complicity in the offence resulting in such seizure or of any collusion with the offender in relation thereto; and

(*b*) exercised all reasonable care in respect of the person permitted to obtain the possession of such vehicle to satisfy himself that they were not likely to be used contrary to the provisions of the Act

he may order that the claimant's interest be not affected by such seizure. The limitation of thirty days within which an application may be made under section 164 is statutory. There is no statutory provision permitting the section 164 limitation of time to be enlarged. I therefore have no jurisdiction to grant the order the claimant now seeks.

Were I dealing with an application under section 164 of the Excise Act I would have no hesitation in ordering that the claimant's interest be not affected by the seizure. The situation is different, however, when considering a claim under sections 114 and 115 under which the claimant has chosen to proceed. The statutory enactment must be adhered to. Sections 114 and 115 confer on the Court no discretionary power such as is contained in section 164. I must release or condemn the truck "as the case requires".

The words of section 163(3) of the Excise Act are unequivocal. The fact that the use of the truck for the purpose of transporting unlawfully manufactured spirits was without the consent or knowledge of the owner or of

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the driver of the truck cannot affect the application or effect of section 163(3) of the statute. Condemnation is mandatory. There is no room for doubt as to the meaning of the words, "all vehicles that have been used for the purpose of transporting the spirits so manufactured shall be forfeited to the Crown."

An extract from the judgment of Rinfret J., as he then was, in *The King* v. *Krakowec* (1) at page 141 is particularly appropriate to the circumstances of this case. When the Krakowec judgment was delivered no provision such as contained in the present section 164 was included in the Excise Act. There was, however, a section similar to the present section 163(3). The extract from the judgment is lengthy but so appropriate that I will quote it in full.

> The section, it will be noticed, sets out no qualification as to ownership of the "horses and vehicles, vessels and other appliances which have been or are being used." On the contrary, it says that all such horses, vehicles, etc., "shall be forfeited to the Crown, and shall be dealt with accordingly." Upon the bare words of the enactment it must, therefore, follow that any vehicle used for the purpose of removing spirits unlawfully manufactured or imported is subject to the forfeiture therein prescribed, unless something be found in the context or in the general scope of the Act to justify a departure from the well known rule that the intention of the legislature must be determined from the words it has selected to express it. Here we find nothing of the kind in the context or in the subject-matter of the statute. The learned trial judge observed that, when dealing with penalties, the expression "whether the owner thereof or not" is used in the section, while it is not there when the section comes to deal with the forfeiture. But the explanation is that it was necessary, in order to avoid doubt, to insert the expression in the one case, while it was not in the other. In the first part of the section, mere possession is the mischief aimed at by the legislature. Now, possession may be possession by the owner, or it may be possession in the name of or for another; and it was, of course, essential, in the premises, to specify that "possession" alone would be sufficient to incur the penalty, "whether" the person found in "possession" of the spirits was "the owner thereof or not." It was not so, however, in that part of the section dealing with the forfeiture of vehicles, and the other appliances mentioned. It may be a question whether, the legislature having once said that the penalty was incurred by the mere possessor, whether owner or not, the expression does not *ipso facto* extend to the whole section without the necessity of its being repeated. It is sufficient to say that, in the provision respecting forfeiture, the object in view is the connection between the vehicles and the spirits unlawfully manufactured or imported. The point is that the vehicles "have been used or are being used for the purpose of removing the same"; and it is immaterial to whom the vehicles belong. In the words of Sedgwick J., in *The Ship "Frederick Gerring Jr."* v. *The Queen*, (1897) 27 Can. S.C.R. 271, at 285,

(1) [1932] S.C.R. 134.

> In the enforcement of fiscal law, of statutes passed for the protection of the revenue or of public property, such provisions are as necessary as they are universal, and neither ignorance of law, nor, as a general rule, ignorance of fact, will prevent a forfeiture when the proceeding is against the thing offending, whether it be the smuggled goods or the purloined fish, or the vehicle or vessel, the instrument or abettor of the offence.

That the proceeding is, under the *Excise Act,* "a proceeding against the thing," that is, in the nature of a proceeding *in rem,* is apparent throughout the Act (Secs. 79, 83, 121, 124, 125, 131, etc.), but is nowhere more evident than in sec. 125, under which all vehicles, vessels, goods and other things seized as forfeited *** shall be deemed and taken to be condemned and may be dealt with accordingly, *unless the person from whom they were seized, or the owner thereof,* *** gives notice that he claims or intends to claim the same.

As will be noticed, the automatic condemnation is against the thing seized. Moreover, the right to object is given both to the owner and "the person from whom (it was) seized"—a right quite incompatible, if forfeiture resulted only in cases where the owner was also the offender.

We agree that, when the meaning of a statute is doubtful or ambiguous, the courts should not, unless otherwise compelled to do so, give it that interpretation which might lead to unjust consequences; but even penal statutes must not be construed so as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation would comprehend (*Dyke* v. *Elliott; The "Gauntlett",* (1872) L.R. 4 P.C. 184, at 191); and it is surely not for the judge so to mould a statute as to make it agree with his own conception of justice (Craies on Statute Law, 3rd ed., pp. 86, 444). Adverting to the particular case before us, it is not assuming too much to say that it must have been known to the legislature, when it passed the *Excise Act,* that a great many drivers of motor vehicles are not the owners thereof, but possess and operate them subject to conditional sale agreements, and if sec. 181 was meant to apply only to vehicles driven by the owners thereof, it is obvious with what ease the provision respecting forfeiture could be evaded.

Whether such a thing exists as what is referred to by Lord Cairns (in *Partington* v. *Attorney-General,* (1869) L.R. 4 H.L. 100, at 122) as the "equitable construction" of a statute, we cannot see that this is a case for its application, and we find no reason why we should not simply adhere to the words of the enactment.

It is not for the court to say if, in some cases,—such as, for example, when the vehicle utilized was stolen from its owner—the forfeiture may effect a hardship. Such cases are specially provided for in subs. 2 of sec. 133 of the *Excise Act.* The power to deal with them is thereby expressly vested in the Governor in Council, thus leaving full play to the operation of sec. 91 of the *Consolidated Revenue and Audit Act* (c. 178 of R.S.C., 1927), for the remission of forfeitures. We are unable to agree with the decision in *Le Roi* v. *Messervier,* (1928) Q.R. 34 R.L. n.s. 436, already referred to, that the discretionary power is also vested in the court under sec. 124 of the Act. In our view, that section means nothing more than this:

After the vehicles, vessels, goods and other things have been seized as forfeited under sec. 181, the person from whom they were seized, or the owner thereof, may prevent the automatic condemnation of the said vehicles, etc., by giving notice as provided for in sec. 125 "that he claims

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or intends to claim the same"; whereupon, an information for the condemnation of the vehicles, etc., having been filed (as was done in this case), the court may hear and determine the claim made by the person from whom they were seized or from the owner, and the court may release or condemn the vehicles, etc., as the case requires, i.e., according as they come or not under the provisions of the Act. The court thereunder is vested with no discretion, it must decide according to law.

As my brother Cameron did under somewhat similar circumstances in *Mayberry* v. *The King* (1), I must apply the words of the statute and order the condemnation of the truck.

There will be judgment declaring condemnation of the truck as forfeited to the Crown. The costs of the application must be borne by the claimant.

The claimant also claimed compensation for loss of use of his truck. That claim will be dismissed but without costs.

While the condemnation may be a great hardship to the claimant, the way is open to him to apply for consideration under section 22 of the Financial Administration Act, chapter 116, R.S. 1952.

Judgment accordingly.

1955

June 27

Nov. 24

BETWEEN:

JOHN POLLOCK .....SUPPLIANT,

AND

HER MAJESTY THE QUEEN .....RESPONDENT,

AND

ATTORNEY-GENERAL OF NEWFOUNDLAND .....} INTERVENER.

Crown—Petition of right—Terms of Union of Newfoundland with Canada, 13 Geo. VI, c. 1, s. 39(1)(2)(3)—Civil Service Act, 1926, Newfoundland —Pension right assured by Terms of Union.

Suppliant an employee of the Newfoundland Railway, a public work of and owned by Newfoundland, prior to the union of Newfoundland with Canada, became an employe of the Canadian National Railways after the union. In 1953 he retired from the service of the Canadian

(1) [1950] Ex. C.R. 402.

National Railways on a life pension. He now asks a declaration of the Court that "the Government of Canada do provide a pension for the said suppliant without loss of pension rights acquired by reason of his service in Newfoundland" and that his pension be increased accordingly.

The Newfoundland Railway became the property of Canada on April 1, 1949 and clause 39(1) of the Terms of Union provide that "Employees of the Government of Newfoundland in the services taken over by Canada . . . will be offered employment in these services or in similar Canadian services . . . but without reduction in salary or loss of pension rights acquired by reason of service in Newfoundland".

Suppliant submits that he was entitled to exactly the same pension from the Canadian National Railways as he would have been entitled to receive from Newfoundland had the whole of his services up to retirement been with the Newfoundland Railway.

Held: That the only pension right acquired by suppliant by reason of his service in Newfoundland and which he was entitled to retain by reason of clause 39(1) of the Terms of Union was the right to a pension based on the provisions of the Civil Service Act, 1926, of Newfoundland, and computed on the basis of the last three years of his service in Newfoundland prior to union. That is the right which by clause 39(1) of the Terms of Union may not be lessened.

PETITION OF RIGHT asking for a declaration that suppliant's pension be increased.

The action was tried before the Honourable Mr. Justice Cameron at St. John's.

R. S. Furlong, Q.C. and *F. J. Ryan* for suppliant.

K. E. Eaton for respondent.

J. B. McEvoy, Q.C. and *W. R. Smallwood* for intervener.

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

CAMERON J. now (November 24, 1955) delivered the following judgment:

The nature of the relief sought in this Petition of Right is shown in the Prayer of the Petition as amended at the trial, which is as follows:

Your suppliant therefore humbly prays for a declaration that the Government of Canada do provide a pension for the said suppliant without loss of pension rights acquired by reason of his service in Newfoundland and that the amount of the said pension shall be $293 per month from the 30th day of April, 1953.

I am informed that this is a test case. The claim is based on clause 39(1) of the Terms of Union of Newfoundland with Canada, which terms form the schedule to chapter 1 of

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the Statutes of Canada (1949) 13 George VI, and by which Act the agreement set out in the schedule was approved. By order of the President of this Court dated September 2, 1954, the Attorney-General of Newfoundland was permitted to intervene in the proceedings.

The facts are not in dispute. On April 30, 1953, the suppliant retired from the service of the Canadian National Railways and was granted a life pension of $220.00 per month. On April 1, 1949, Newfoundland became a province of Canada. Immediately prior to that date the suppliant had been employed as Superintendent of Marine Engineers of the Newfoundland Railway, which railway was one of the public works of and was owned by Newfoundland; by clauses 31 and 33 of the Terms of Union, that railway and many other public works of Newfoundland became the property of Canada on April 1, 1949. Pursuant to the provisions of clause 39 (*infra*), the suppliant was offered employment in the services of the Canadian National Railways, which offer he accepted, remaining in its service from April 1, 1949, to the date of his retirement.

Clause 39 of the Terms of Union is as follows:

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39. (1) Employees of the Government of Newfoundland in the services taken over by Canada pursuant to these Terms will be offered employment in these services or in similar Canadian services under the terms and conditions from time to time governing employment in those services, but without reduction in salary or loss of pension rights acquired by reason of service in Newfoundland.

(2) Canada will provide the pensions for such employees so that the employees will not be prejudiced, and the Government of the Province of Newfoundland will reimburse Canada for the pensions for, or at its option make to Canada contributions in respect of, the service of these employees with the Government of Newfoundland prior to the date of Union, but these payments or contributions will be such that the burden on the Government of the Province of Newfoundland in respect of pension rights acquired by reason of service in Newfoundland will not be increased by reason of the transfer.

(3) Pensions of employees of the Government of Newfoundland who were retired on pension before the service concerned is taken over by Canada will remain the responsibility of the Province of Newfoundland.

The suppliant relies on the concluding phrase of subsection (1) of that clause. There is no dispute, however, as to salary matters. Just prior to the date of Union, he was in receipt of a monthly salary of $340.00 from the Newfoundland Railway; on April 1, 1949, when he entered the

services of the Canadian National Railways, his salary was immediately increased to $400.00; on December 1, 1950, it was increased to $440.00; and on September 1, 1952, to $484.00, remaining at that figure until his retirement. The complaint relates solely to matters of pension. It is said that the pension of $220.00 per month awarded him by the Canadian National Railways results in "a loss of pension rights acquired by reason of service in Newfoundland", contrary to the provisions of clause 39(1). It is submitted that the pension right which he had acquired by reason of service in Newfoundland was the right, upon retirement (and taking into consideration the total number of years of employment in railway service), to a pension of two-thirds of the average salary for the three years preceding retirement; that such average monthly salary was $440.00, and that therefore his monthly pension should have been $293.00 instead of $220.00 actually awarded to him. In effect, counsel for the suppliant submitted—and in this he was supported by counsel for the intervener—that the suppliant was entitled to exactly the same pension from the Canadian National Railways as he would have been entitled to receive from Newfoundland had the whole of his services up to retirement been with the Newfoundland Railway.

It should be stated here that I have not been furnished with any particulars as to the manner in which the pension of $220.00 awarded to the suppliant was made up. It is established, however, that pensions paid by the Canadian National Railways to its employees are to a substantial extent based on contributions made to the pension fund by the employees. It is also admitted that the suppliant, during his employment with that railway, did not make any contribution to its superannuation or pension fund.

Reserving all his rights to object to the admissibility thereof, counsel for the respondent at the request of counsel for the suppliant, permitted the filing of certain Orders in Council passed subsequent to the date of Union; these indicate that some efforts were made to bring about some adjustments in the rate of pensions payable to former employees of the Newfoundland Railway who entered the service of the Canadian National Railways. One of these seems to provide that for such employees who made no contribution to the Canadian National Railways Pension

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Fund, an allowance of $15 per year of service in such railway would be paid in addition to the pension which the employee would have been entitled to receive from Newfoundland had he retired on March 31, 1949. I do not think however, that these Orders in Council in this case can in any way affect the suppliant's claim as he does not rest his case on any of their provisions. The Petition of Right and the Particulars filed make it perfectly clear that the claim is for a pension of two-thirds of his average monthly salary during his last three years of employment and that the statutory authority under which he claims to have acquired pension rights prior to Union is the Civil Service Act, chapter 12, Statutes of Newfoundland, 1926, and Amendments, the pension provisions of which, he submits, were applied to employees of the Newfoundland Railway by Order-in-Commission.

It becomes necessary, therefore, to first ascertain what pension rights the suppliant had by reason of service in Newfoundland. He entered the service of the railway in 1909, the railway at that time being owned and operated by the Reid-Newfoundland Company. In 1923 the Government of Newfoundland took over all of the assets of that company, including the railway. There is no evidence to suggest that while the railway was operated by the Reid-Newfoundland Company, the suppliant was entitled to any superannuation or pension at the expense of that company. It is also shown that until January 1, 1935, there was no provision by Newfoundland for the payment of pensions to employees of its railway. On September 25, 1934, at a meeting of the Commission of Government, the following Minute (Exhibit 1) was passed:

> P.U.35—On recommendation of the Commissioner for Public Utilities it was agreed to apply from January 1st next, to employees of the Newfoundland Railway, pension and superannuation arrangements analogous to those applied to Civil Servants.

The reference therein to superannuation for civil servants related to the Civil Service Act of 1926. By section 15 thereof it was provided that the Act did not apply to certain groups, including employees of the Newfoundland Government Railway.

Again, on November 14, 1947, an Order of the Governor-in-Commission (Exhibit 2) provided:

It was agreed that the computation of pensions of employees of the Newfoundland Railway should continue to be on the basis under which civil servants received pensions in 1934.

Under the Civil Service Act, 1926, it was provided that:

8. The superannuation allowance hereinbefore mentioned shall be calculated—

(*a*) Upon the average yearly salary, and emoluments legally enjoyed. *at the expense of the Colony,* during the last three years of the service in respect of which an allowance is permitted hereunder;

(*b*) At the rate of two and one-quarter per centum of such average salary and emoluments, for each year of service, for a period not longer than thirty years in any instance;

(*c*) In computing the number of years of service, if the actual period of service includes a fraction of a year, the fraction, if equal to or greater than one-half, shall be counted as a full year's service; if less than one-half it shall not be counted in the service;

The superannuation thereby provided was entirely non-contributory. By section 6(1) thereof, payment of superannuation was limited to those civil servants who had served for ten years or more.

The suppliant submits that these Orders-in-Commission make applicable to employees of the Newfoundland Railway the superannuation provisions of the Civil Service Act, 1926. It is in evidence that up to March 31, 1949, the provisions of that Act relating to pensions were applied to employees of the Newfoundland Railway.

In the Statement of Defence the respondent denied that the suppliant had acquired any pension rights by reason of service in Newfoundland. At the hearing, however, his counsel stated at p. 22:

In any event I think there is no room for argument about what the basis for the suppliant's pension was prior to union. Under the Newfoundland provisions this was a pension based on two-thirds of the average annual salary for the three years preceding entitlement.

And at p. 24:

I think we can state by agreement between counsel that had he retired on March 31, 1949, his pension would have been two-thirds of his average annual salary for the three years immediately preceding. It is alleged in the particulars what his salary was and we can agree on a figure of $320 a month as his average salary. That appeared in the first instance as paragraph 2 of the particulars. I assume two-thirds of that would be what he would have received.

For the purposes of this case I need not stop to consider the question as to whether the suppliant *as of right* was

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entitled to a pension from the Government of Newfoundland had he retired on March 31, 1949. In an unreported judgment of Mr. Justice Higgins of the Supreme Court of Newfoundland, dated November 6, 1939—a copy of which has been filed—it was held that a person to whom the Civil Service Act, 1926, applied, and who was otherwise qualified, had a right to a superannuation allowance of an amount computed in accordance with that Act. He held, however, that as the Act expressly excluded railway employees from its operation, a railwayman had no *right* to pension thereunder. It is sufficient to say that on the evidence and on the admissions made, the suppliant, had he retired on March 31, 1949, would have received a pension based on the provisions of the Civil Service Act, 1926.

If the agreement as to the basis on which the suppliant would have been entitled to pension had he retired on March 31, 1949, be correct, that pension would have amounted to two-thirds of $322 (that amount rather than $320 being stated in the Particulars), or $214.50. It seems to me, however, that if the pension were computed on the basis of the requirements of the Act of 1926 (*supra*)—and I was not referred to any change made in that Act which affected railwaymen—the suppliant would not have been entitled to take into consideration for purposes of pension those years of service with the Reid-Newfoundland Company, by reason of the provisions of section 8(1)(*a*) of that Act. If that be correct, then he would have been entitled to a pension computed at the rate of $2\frac{1}{4}$ per cent of his average salary for the last three years prior to March 31, 1949, multiplied by the number of years' service between 1923 (when the Government of Newfoundland acquired the railway) and 1949. On a monthly basis that would be approximately $58\frac{1}{2}$ per cent of $322, or $188.37.

The precise computation of the quantum of the pension which the suppliant would have been entitled to receive from Newfoundland, had he retired March 31, 1949, would doubtless be of great importance to the province of Newfoundland in computing the payments or contributions which it is required to make to Canada under clause 39(2) of the Terms of Union (*supra*), as well as to the Canadian National Railways in working out the suppliant's pension. But in the view that I have taken of the case, it is here of

relatively minor importance whether such pension be $214.50 or $188.37, since the pension of $220 actually awarded to the suppliant is greater than either of such amounts.

For the purposes of this case it may also be assumed, I think, that had Union not taken place and had the suppliant continued to serve in the Newfoundland Railway, enjoying the same increases in salary as were in fact granted by the Canadian National Railways, he would, upon retirement on April 30, 1953, have been entitled to receive from Newfoundland a pension of $290 per month. On that date he would have served approximately thirty years with the Newfoundland Railway while it was owned and operated by Newfoundland. The question is whether in view of the provisions of clause 39(1) he was entitled to a pension of the same kind upon retirement from the services of the Canadian National Railways under the circumstances above referred to.

Up to this point, in considering what pension rights the suppliant had acquired by reason of service in Newfoundland, I have dealt mainly with the quantum thereof. It now becomes necessary to consider more closely the nature of such rights in the light of the submissions made on behalf of the suppliant on whom lies the onus of establishing his case.

That submission is to this effect. It is said that upon the suppliant entering railway enployment in 1909—or at least by 1935 when the provisions of the Civil Service Act, 1926, relating to pensions, were made applicable to employees of the Newfoundland Railway by Order-in-Commission—he acquired a certain right, namely, the right upon retirement to receive a pension based on the provisions of that Act. That right in its entirety, it is said, was reserved to him by the concluding phrase of clause 39(1) throughout his service with the Canadian National Railways, but with this latter submission I am quite unable to agree. The "pension rights acquired by reason of service in Newfoundland" are admittedly to be found only in the terms of the Civil Service Act, 1926, and it is those rights only which are not to be lessened. As one would expect, that Act said nothing whatever about superannuation for civil servants other than

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that relating to employment by the Government of Newfoundland; it does not purport to confer any superannuation rights in respect of services after the employee has left the service of that Government and has entered the service of some other organization such as in the instant case.

Section 6(1) of that Act authorizes the Governor in Council to "grant an annual superannuation allowance to any member of the Civil Service as defined herein"; that term is defined in section 1(1) and is limited to those "who are employed on full time and exclusively occupied in the service of the Colony". Then by section 8(9), the allowance is calculated "upon the average yearly salary, and emoluments legally enjoyed, at *the expense of the Colony,* during the last three years of the service in respect of which an allowance is permitted hereunder". This submission in substance means that the suppliant had acquired a right to the allowance provided in the Act upon retirement from *railway employment,* and whether or not at that time he was employed by a railway other than that owned by Newfoundland. I find nothing in that Act or elsewhere which confers any such right on the suppliant. In my view, his rights as to superannuation are limited entirely to such rights as he may have acquired while in the service of the Newfoundland Government.

Accordingly, I must reject the submission made on behalf of the suppliant that, upon entering the service of the Canadian National Railways, he was entitled to the same superannuation allowance upon retirement as he would have been entitled to had Union not taken place and had he received from Newfoundland the same advances in salary as were granted him by the Canadian National Railways.

This conclusion, it seems to me, is consistent with the main purpose of clause 39(1) of the Terms of Union which was to ensure that an opportunity would be given to employees of the Newfoundland Government to secure employment in the same or similar services in Canada and under the terms and conditions from time to time governing employment in such services. Other than the maintenance of salary and pension rights acquired while in the service of Newfoundland, there is nothing to suggest that upon entering the Canadian services, such employee would receive preferential treatment beyond that accorded to

other employees who had not previously been in the employment of the Government of Newfoundland. If it could be argued that the right to superannuation on the basis of two-thirds of the average annual salary during the last three years of employment, and after thirty years of service, was carried forward to the period of employment with the Canadian National Railways, it is obvious, I think, that it might also be argued that another "right" provided for in the Civil Service Act, 1926, should also be carried forward. I refer to the fact that the allowance under that Act was entirely non-contributory. Undoubtedly, if such were the case, other employees would be at a disadvantage since as I have stated, the superannuation provided by the Canadian National Railways is to a very substantial degree supported by contributions from its employees.

During the argument, I put a question to counsel for the suppliant. I asked him whether he would support a submission that an employee of the Newfoundland Railway who had served therein for two years prior to union, and had then entered the service of the Canadian National Railways, would be able to say: "Upon retirement at the age of sixty-five I am entitled to a pension based on the provisions of the Civil Service Act, 1926, without making any contribution to the superannuation fund of the Canadian National Railways, since, by reason of my service in the Newfoundland Railway, I have acquired a right to such a pension without contribution". He agreed that such a contention could not be supported, but added that in such a case the employee would be entitled to say: "I have been in that position in Newfoundland for two years and that must be counted. I am entitled to two years non-contributory to any scheme." The important part of that admission is that there is in effect a cut-off date as of the date of Union and that there was no right carried forward, when entering the service of the Canadian National Railways, to insist upon the "right" to a non-contributory pension thereafter. I can see no reason why any of the other provisions of the superannuation sections of the Civil Service Act, 1926, should be carried forward after the date of Union.

What then is the true meaning to be given the words "pension rights acquired by reason of service in Newfoundland"? In the first place I think "Newfoundland" is used

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as the name of one of the contracting parties to the Terms of Union, that is, in contradistinction to the province of Newfoundland which it became on April 1, 1949, after Union. It seems to me, therefore, that it was the intention of the contracting parties, in ensuring that the employees of Newfoundland who accepted employment in Canada would not be prejudiced, to provide a "cut-off" date—namely, the date of Union—at which time the salary of such employees and the quantum of pension rights acquired by reason of service to that date would be determined. If salaries were not to be reduced it would be necessary, of course, to establish what salaries were referred to, and the salaries paid at the date of Union were chosen as the salaries to be maintained. Similarly, as pension rights varied according to the length of service, it was necessary to fix with certainty what pension rights were to be maintained and they were fixed as being those "acquired by reason of service in Newfoundland", that is, as of the date of Union. As I have stated above, none of the provisions of the Civil Service Act, 1926, could be carried forward to the period of employment with the Canadian National Railways after Union. The quantum of superannuation thereunder to which an employee might have been entitled or might have acquired by reason of service up to April 1, 1949 (and based on length of service and on such matters as his average salary during the last three years of employment with the Government of Newfoundland), could be determined with accuracy as of the date of Union; that, in my view, is what was intended to be determined and when so determined was not to be lost to the employee. That precise computation based on a cut-off date as of April 1, 1949, was required to be made in order to carry out the terms of clause 39(2) (*supra*). Under that clause, Canada was to pay all pensions to employees who so entered its services. But the province of Newfoundland was to reimburse Canada for the pensions for (or at its option to make contributions in respect of) the service of such employees with the Government of Newfoundland prior to the date of Union.

I am therefore fully in agreement with the submission of counsel for the respondent that in the case of this suppliant, who undoubtedly had acquired pension rights by reason of having served over ten years as an employee of the Government of Newfoundland, the only pension right acquired by

him by reason of service in Newfoundland and which he was entitled to retain by reason of clause 39(1) of the Terms of Union, was the right to a pension based on the provisions of the Civil Service Act, 1926, and computed on the basis of the last three years of his service in Newfoundland prior to union. That is the "right" which by clause 39(1) may not be lessened.

As I have stated above, the pension actually awarded was $220 per month, which amount is in excess of the figure seemingly agreed upon by counsel for both parties as that which the suppliant would have been entitled to had he retired on March 31, 1949, and of the lower figure as I have computed it to be in accordance with the strict terms of the Civil Service Act, 1926. There is therefore no *loss* of that right which I have referred to above. No attempt was made by the suppliant to establish that the difference between either of the latter two amounts and the amount of $220 actually awarded was less than the amount of any additional pension to which the suppliant may have become entitled by reason of his four years' service with the Canadian National Railways on a non-contributory basis. I am unable to find, therefore, that the amount actually awarded is any less than that to which the suppliant is entitled.

The fact is that he was entitled to make contributions to the Canadian National Railways Pension Fund had he so desired, and had he done so his pension would undoubtedly have been larger. If by reason of the provisions of any Order in Council passed subsequent to the date of Union he is entitled to any supplementary payments by reason of service with the Canadian National Railways, I am confident that they will be provided if, in fact, they have not already been included in the pension awarded.

I desire to state that the conclusions at which I have arrived are based entirely on the facts of this case. In particular, I make no finding as to whether an employee who had served less than ten years with the Government of Newfoundland prior to Union has or has not acquired any pension rights by reason of that service, as it is unnecessary to consider that point.

In view of my conclusions, it is unnecessary to consider the other defences raised by the respondent. Included therein was the submission that the suppliant had no status to bring this action as only the contracting parties to the

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Terms of Union could insist on its terms being carried out; another submission was that this Court had no jurisdiction under the Exchequer Court Act, or otherwise, to entertain Petition of Right of this character. I felt it desirable to determine the issue on the merits and for that reason have assumed, but without deciding, that the Court had jurisdiction and that the suppliant was entitled to invoke on his own behalf the provisions of the Terms of Union.

There will therefore be a declaration that the suppliant is not entitled to any of the relief sought in the Petition of Right which will, accordingly, be dismissed. The respondent is entitled to taxed costs. There will be no order as to the costs of the intervener.

Judgment accordingly.

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Oct. 18 & 19
Nov. 28

BETWEEN:

THE ESTATE OF THE LATE WILSON WORKMAN BUTLER ..... } APPELLANT,

AND

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

Revenue—Income—Income earned during life of taxpayer but received after his death—The Income War Tax Act, R.S.C. 1927, c. 97, as amended, s. 11(4)(b)—Amount held in escrow and paid in year following taxation year—Payment not "received" when, in fact, withheld —Appeal from Income Tax Appeal Board allowed in part.

In 1944 one B, appointed the American ancillary executor of the appellant estate, brought an action before the New York courts on behalf of the Canadian executrix of the appellant estate, Mrs. Butler, against an American corporation for unpaid salary due to her husband, who until his death in 1937 was for a number of years an officer and director of the company, and for compensation for services he rendered to the latter in that capacity in preparing and pressing certain claims of the company before the Mixed Claims Commissions in U.S.A. The action was contested by the company but eventually settled out of court in February, 1948, for an amount of $125,000. Out of that amount Mrs. Butler's American attorneys received $97,855 in March, 1948, and in April, 1948 remitted to her in Canada $50,000. Pursuant to an agreement between the parties the balance of the amount of the settlement was deposited on March 18, 1948, to be held in escrow pending the determination of the estate's federal and state tax liability. No such taxes being payable a first amount of $18,750 was

released from the escrow and paid to the estate's American attorneys on May 4, 1948 and on January 13, 1949 the balance of the amount so withheld was paid to them. The appellant estate was first assessed on the basis of an income of $50,000 for the taxation year 1948 being the amount received in Canada by Mrs. Butler from her American attorneys in that year. However it was later reassessed on the basis of the amount of the settlement i.e. $125,000 less certain costs and expenses. An appeal from the reassessment to the Income Tax Appeal Board was dismissed and from the Board's decision appellant now appeals to this Court.

Held: That on the evidence the whole of the amounts paid under the settlement relate to the salary and services of the late Mr. Butler and were "income earned during the life" of the deceased within the meaning of s. 11(4)(*b*) of the Income War Tax Act.

2. That s. 11(4)(*b*) of the Income War Tax Act relating specifically as it does to "income earned during the life of any person" its words are satisfied whether the income was earned before or after January 1, 1940, when the section came into effect.

3. That on the evidence the claims were advanced by the Butler estate as a *bona fide* claim and settled on that basis. Any evidence relating to the manner in which the action was financed, or evidence in regard to the disposition to be made of the "income earned" *after* it had been received are wholly irrelevant to the question before the Court as to whether or not the moneys paid as the result of the settlement represent "income earned" by the deceased during his lifetime. *Goldman* v. *Minister of National Revenue* [1953] 1 S.C.R. 211 at 214.

4. That on the evidence the two payments received by the American attorneys in 1948 were constructively received by Mrs. Butler on behalf of her husband's estate in that year and the fact that a portion thereof was not remitted to her in Canada until the next year is of no importance.

5. That, however, the amount of $8,395 held in escrow until January, 1949 was not received in 1948 by anyone acting in a fiduciary capacity for the Butler estate. A payment cannot be considered as having been "received" when, in fact, it was withheld. The amount was not at the disposal of the estate and it was not reduced into its possession until 1949. The reassessment therefore should be reduced from $125,000 to $116,605.

APPEAL from a decision of the Income Tax Appeal Board.

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

Edouard Masson, Q.C. for appellant.

Guy Favreau, Q.C. and *Maurice Paquin, Q.C.* for respondent.

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

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CAMERON J. now (November 28, 1955) delivered the following judgment:

This is an appeal from a decision of the Chairman of the Tax Appeal Board dated November 27, 1954 (1), which dismissed an appeal from a reassessment dated October 30, 1952 (as amended in the notification by the Minister dated September 9, 1953), on the estate of Wilson Workman Butler, late of the city of Montreal, for the taxation year 1948. Mr. Butler died on June 18, 1937. In assessing his estate to income tax, the respondent relied and now relies—on the provisions of paragraph (*b*) of subsection (4) of section 11 of the Income War Tax Act which in 1948 read as follows:

> 11.(4(*b*) Income earned during the life of any person shall, when received after the death of such person by his executors, trustees or other like persons acting in a fiduciary capacity, be taxable in the hands of such fiduciary.

Certain basic facts are not in dispute. The late Mr. Butler in his lifetime was president of Canadian Car and Foundry Company Limited for a number of years. That company had a wholly owned subsidiary operating in the United States, namely, Agency of Canadian Car and Foundry Company Limited; in 1917 the latter company was engaged in the manufacture and assembly of munitions of war at its plant at Kingsland in the State of New Jersey. On January 11, 1917, the plant was badly damaged by an explosion and it was alleged by the company officials that such explosion was caused by saboteurs acting on behalf of the German Government.

Thereafter the Agency filed claims for its damages with the Mixed Claims Commission, an agency created to make and distribute awards to parties who had suffered damages by reason of acts of the German Government and its agents, out of funds held in part by the Alien Property Custodian of the United States. The Agency claims were completely unsuccessful up to the time of Mr. Butler's death in 1937. Subsequently, however, the claim was allowed and in 1939 the Agency secured a decision that the Government of Germany was liable for the damages suffered in the explosion and it was awarded some millions of dollars. About 1940 or 1941 the Agency collected a substantial part of the amount so awarded.

(1) 11 Tax A.B.C. 424.

By his last will and testament, Mr. Butler appointed his widow, Mary Jane Butler, Mr. Arnold Wainwright, Q.C., and the Royal Trust Company, as his testamentary executors; they carried out their duties as such executors and were eventually discharged in 1938. The residuary legatees of the Butler estate (including his widow), having heard in 1940 that the claim of the Agency had been allowed and that certain of its officials had received special compensation from the Agency for their services in preparing and pressing its claim before the Mixed Claims Commission, decided to negotiate with the Agency for the purpose of securing a like award in respect of similar services rendered over many years by the late Mr. Butler. Their claims were not allowed by the Agency and it was decided to take action against the Agency in the courts in New York. For the purpose of such contemplated action, the widow, Mary Jane Butler, petitioned the Superior Court of the province of Quebec, Judicial District of Montreal, to be appointed executrix of her husband's estate. By a judgment of Tyndale J., dated August 19, 1943, the petition was granted, the full terms of the order being set out in the decision below. Thereby Mrs. Butler was appointed executrix of her late husband's estate for the purpose of prosecuting a claim against both the Agency and the Canadian company, namely, the Canadian Car and Foundry Company Limited. The action as instituted, however, was against the Agency only.

Inasmuch as the Agency was an American corporation, it was necessary to bring action in the courts of that country and to take the action in the name of an American citizen. Accordingly, upon petition of the widow and executrix, the Surrogate Court of the county of New York appointed one C. Napier Blakeley as ancillary executor of the Butler estate for the purpose of instituting the action against the Agency. In 1944 Blakeley filed an action for $1,168,990.00 against the Agency.

The claim was a lengthy one but for the purpose of this appeal it is sufficient to adopt the summary of the two demands made, as stated by the Chairman of the Board, as follows:

> A. As a result of the destruction of the defendant's (the Agency's) plant and injury to its business, caused by the explosions, the defendant's assets, income and earnings were substantially decreased,

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with the additional result that, for a time, the salary payable to the late Wilson W. Butler was reduced by 50% and, for a further period, was not paid at all. Agreements had been reached between the parties to the effect that the defendant would pay Butler any unpaid salary out of the moneys it would receive as a result of its claim to the *Mixed Claims Commission*. This unpaid salary amounted to $168,990, and although in 1941 the defendant received a large amount of its award, no part of the unpaid salary was paid to the plaintiff or to any of the executors of his estate, and the plaintiff claimed payment of the said sum of $168,990 for unpaid salary.

B. From the time of the destruction of the defendant's plant in 1917, and continuously until his death in 1937, Wilson W. Butler rendered extensive and extraordinary services to the defendant in connection with its aforesaid claim for damages, both before the *Mixed Claims Commission* and otherwise. By reason of the damages, the defendant had not sufficient means to pay for these services which it had however accepted. These services were of the reasonable value of $1,000,000, no part of which was paid, and payment for which was thereby claimed.

The Agency duly filed its answer to the said complaint and denied all the material allegations in the claim and all liability to the plaintiff. As shown by the "Papers on Appeal" (Exhibit A-1), there were many interlocutory motions and appeals. Finally, an out-of-court settlement was agreed upon and on February 28, 1948, an agreement was entered into between the ancillary executor, the widow and sole executrix of the Butler estate, and the Agency. Counsel for the appellant relies to some extent on the terms of this agreement and for that reason I think it desirable to reproduce it in full. It is as follows:

> SETTLEMENT AGREEMENT dated February 28, 1948, between C. Napier Blakeley, Ancillary Executor of the Estate of Wilson Workman Butler, deceased (hereinafter referred to as BLAKELEY), MARY JANE MACKIN BUTLER, sole Executrix of the Estate of Wilson Workman Butler, deceased (hereinafter called MRS. BUTLER) and AGENCY OF CANADIAN CAR & FOUNDRY COMPANY, LIMITED, a corporation organized and existing under the laws of the State of New York (hereinafter referred to as the AGENCY COMPANY),
>
> WHEREAS—
>
> A. Prior to June 18, 1937, and for many years prior thereto, Wilson Workman Butler (hereinafter called BUTLER) was an officer and director of the AGENCY COMPANY and also of CANADIAN CAR & FOUNDRY COMPANY, LIMITED, (hereinafter called the CAR COMPANY), a corporation organized under the laws of the Dominion of Canada and the corporate parent of the AGENCY COMPANY.
>
> B. On October 30, 1939, the Mixed Claims Commission, United States and Germany, entered an award (hereinafter called the Agency Company Award) decreeing that the Government of Germany is obliged to pay to

the Government of the United States on behalf of the AGENCY COMPANY the sum of $5,871,105.20 with interest at the rate of 5% from January 31, 1917.

C. On August 19, 1943, the Superior Court of the Province of Quebec appointed MRS. BUTLER (the widow of BUTLER) sole testamentary executrix under the Last Will and Testament of BUTLER for the purpose of prosecuting or causing to be prosecuted a claim or claims on behalf of BUTLER's estate against the AGENCY COMPANY and against the CAR COMPANY for alleged unpaid salary and for services alleged to have been rendered by BUTLER in connection with the securing of the Agency Company Award.

D. Pursuant to the petition of MRS. BUTLER and BLAKELEY, the Surrogate's Court of New York County on March 16, 1944, issued ancillary letters testamentary to BLAKELEY with the right to prosecute the said claim or claims of BUTLER against the AGENCY COMPANY and not the right to compromise, settle or collect the same.

E. Thereafter an action was instituted in 1944 by BLAKELEY against the AGENCY COMPANY in the Supreme Court of the State of New York, New York County, (hereinafter called the New York Supreme Court action) to recover the sum of $168,990 with interest thereon from January 1, 1941, on account of alleged unpaid salary and services alleged to have been rendered by BUTLER in connection with the recovery of the Agency Company Award.

F. BLAKELEY, MRS. BUTLER and the AGENCY COMPANY have agreed to settle and compromise the New York Supreme Court action and all claims, demands and causes of action (including unliquidated and contingent claims and demands) which the estate of BUTLER has or may have against the AGENCY COMPANY and/or the CAR COMPANY upon the terms and conditions hereinafter set forth:

NOW THEREFORE, THIS AGREEMENT WITNESSETH

FIRST: Upon the delivery to the AGENCY COMPANY of the documents enumerated in clause "SECOND" hereof the AGENCY COMPANY will pay to BLAKELEY, or his attorneys, the sum of $125,000.

SECOND: Simultaneously with such payment, BLAKELEY shall deliver to the AGENCY COMPANY:

(*a*) a certified copy of the order of the Surrogate's Court of New York County authorizing and approving the compromise and settlement in accordance with the terms of this Agreement;

(*b*) a general release executed by BLAKELEY in the form annexed hereto;

(*c*) a general release executed by MRS. BUTLER in the form annexed hereto;

(*d*) a stipulation discontinuing the New York Supreme Court action executed by BLAKELEY's attorneys in the form annexed hereto.

THIRD: The AGENCY COMPANY further covenants and agrees to pay to BLAKELEY, or his attorneys, subject to full performance by BLAKELEY and MRS. BUTLER of all acts and things required by clause "SECOND" hereof, an amount equal to two (2%) per cent of any and all payments which the AGENCY COMPANY may hereafter receive on the Agency Company Award, on account of principal and/or interest due or to become due on the Agency Company Award *excepting* payments

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the AGENCY COMPANY may receive as a result of the transfer of funds by the Attorney General to the Secretary of the Treasury as provided in Public Law 375, 80th Congress, 1st Session, approved August 6, 1947, and provided that the aggregate of the payments to be made pursuant to this clause "THIRD" shall in no event exceed Fifty Thousand ($50,000) Dollars. In the event that BLAKELEY shall be discharged as Ancillary Executor prior to the time any sums pursuant to this clause "THIRD" shall become payable to BLAKELEY, such sums shall be paid to MRS. BUTLER as sole executrix or to her legal successor or successors. Provided, *however*, that the AGENCY COMPANY shall be entitled to deduct and withhold from any payment pursuant to this clause "THIRD" the portion thereof required to be deducted or withheld under applicable revenue laws and regulations then in force.

FOURTH: This Agreement shall be binding upon, and inure to the benefit of, the parties hereto, their legal representatives, successors and assigns.

I think I may assume that the documents which were to be delivered to the Agency by reason of the *second* clause of the agreement were so delivered. It will be noted that the amount then due under the settlement was $125,000.00. Of that amount, $97,855.00 was paid by the Agency to Breed, Abbott and Morgan, the New York attorneys who acted on behalf of the ancillary executor, on March 16, 1948. The balance of $27,145.00 was paid by the Agency to its attorneys, Messrs. Graustein and Kormendi, on March 18, 1948, to be held by them under the terms of its letter of the same date (such terms had been agreed to by the other parties to the settlement). In brief, such terms were that $18,750.00 was to be held until it was ascertained by the estate that the Agency company was not liable to the Commissioner of Internal Revenue for "withholding taxes" in respect of the settlement of $125,000.00, and upon such proof being produced, that amount was to be paid to Messrs. Breed, Abbott and Morgan. The remaining amount of $8,395.00 was to be held on similar terms in connection with any duty that might be payable to the New York State Tax Commission. In the result it was found that no such taxes were payable, but the estate in 1949 voluntarily paid $2,422.24 to the United States Government to secure the required release. On May 4, 1948, Messrs. Graustein and Kormendi sent $18,750.00 to Messrs. Breed, Abbott and Morgan and on January 13, 1949, the balance of $8,395.00 was likewise sent to them.

From her New York attorneys Mrs. Butler received in Canada the sum of $50,000.00 on April 19, 1948; and on

December 12, 1949, she received a further remittance of $42,252.02, together with an exchange premium thereon of $4,225.20, the total receipts actually coming into her hands in both years aggregating $96,477.22.

In the assessment dated October 30, 1952, tax was levied on the basis of an income of $50,000.00 in 1948. That amount, of course, corresponds to the amount that actually came into Mrs. Butler's hands in that year. It was stated to be "Amount received in 1948 from Agency of Canadian Car and Foundry Limited in respect of a claim for services rendered by the deceased during his lifetime". In the Notification of the Minister the respondent, having reconsidered the assessment and having considered the facts and reasons set forth in the Notice of Objection, notified the taxpayer of his intention to reassess the income as follows:

Amount received from Agency of The Canadian Car and Foundry Company Limited	$125,000.00
Less expenses of collection	62,066.81
	63,933.19

And will allow a tax credit under section 8 of the Act of $2,422.44, paid to the Government of the United States of America,

In Exhibit A-2 and the schedule thereto (filed on behalf of the appellant), the gross receipts by Mrs. Butler are shown as $96,477.22. From that amount there are deducted detailed "expenses incurred in Canada" aggregating $33,904.73; and finally the following statement appears:

Net Amount Shared Between Participants in Litigation

Amount received	$ 96,477.22
Amount expended	33,904.73
	62,572.49

It will be noted, therefore, that the amount of income assessed against the appellant for the year 1948 includes amounts actually coming into her hands in 1948 and 1949 as the result of a settlement arrived at with the Agency and that the amount of the assessment—$63,933.19—is somewhat in excess of the "net amount" shown in Exhibit A-2. No evidence was introduced by other parties to account for the discrepancy or to indicate what items of expense were disallowed.

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At the hearing, it was agreed that the evidence given before the Tax Appeal Board would be taken as evidence in this appeal, the Court, however, to rule on the admissibility of any evidence to which objection had been taken below. In addition, certain oral evidence was introduced at the hearing.

Later herein it will be necessary to consider the question as to whether the amounts which actually came into the hands of the widow-executrix in 1949 form part of the taxable income of the estate in 1948. The first point which I shall consider is whether the amounts paid as a result of the settlement were "income earned during the life" of the late Mr. Butler within the meaning of section 11 (4) (*b*) (*supra*). It is submitted by counsel for the appellant that they are not "income earned" or, alternatively, that they are not wholly "income earned".

In so far as the payments relate to the settlement of the claims advanced in the New York courts, there is not the slightest doubt that they were paid in respect of salary claims from the Agency and/or special services rendered by the late Mr. Butler to the Agency. I have carefully perused the claims as found in the appellant's Exhibit A-1 and it is abundantly clear that the entire demand related to salary and services and to nothing else. That fact was admitted by Mr. Masson, counsel for the appellant. There is no doubt whatever that payments made in respect of salary and services rendered fall within the definition of "income" as defined in section 3 of the Income War Tax Act.

Counsel for the appellant, however, attempted to establish that the terms of the settlement and the forms of the releases given show that another claim by the late Mr. Butler against the Agency was taken into consideration and that such claim did not relate to his salary or to services rendered. He referred to clause F of the recital to the settlement (*supra*) and to the form of the general releases to be supplied by both the executrix and the ancillary executor. A copy of the latter release is in the record; it is couched in the terms usual for a general release and fully releases the Agency from all claims and demands which the ancillary executor, as such, had or could have against it.

In support of this contention the appellant introduced Exhibit A-7 consisting of

(*a*) a letter dated October 18, 1955, from M. A. Loughman, vice-president of the Agency, to Mr. A. M. Beatty, a witness called on behalf of the appellant and the stepson of the late Mr. Butler; that letter is of no importance here;

(*b*) a letter and an Assignment and Transfer, which are as follows:

New York, February 9, 1934.

Mr. Amos J. Peaslee,
Peaslee & Brigham,
501, Fifth Avenue,
New York, N.Y.

My dear Amos:—

In connection with your suggestion that some arrangement might be made for a contingent interest to persons willing to finance you to the extent of $5,000, I wish to state that Mr. Butler is willing to procure for you the sum of $5,000 in consideration of the assignment by you out of any amount which may become payable to you by way of compensation and/or fees for services in the Lehigh Valley Railroad Company and/or Agency of Canadian Car & Foundry Company, Limited, Claims—from either or both—a sum equivalent to ten (10%) per cent of the aggregate amount of such compensation and/or fees, but not to exceed the sum of $250,000.

It should be understood that as the amount in question will not be advanced by Mr. Butler personally nor by me nor any of the directors or officials of our Company, the assignment is to be made to "W. W. Butler and/or L. A. Peto in Trust".

Yours very truly,
(signed) L. A. Peto.

I hereby agree to and accept the foregoing.
Amos J. Peaslee

ASSIGNMENT AND TRANSFER

In consideration of payment to me of the sum of $5,000, receipt of which is hereby acknowledged, I hereby assign, transfer and make over to Messrs. "W. W. Butler and/or L. A. Peto in Trust", a sum equivalent to ten (10%) per cent of the aggregate amount which may become payable to me by Agency of Canadian Car & Foundry Company, Limited, and/or the Lehigh Valley Railroad Company by way of compensation and/or fees for services or otherwise in connection with or in relation to the Black Tom and Kingsland Claims now pending before the Mixed Claims Commission —from either or both—but not to exceed in all a total sum of $250,000.

In witness whereof I have hereto set my hand this ninth day of February, 1934.

Amos J. Peaslee.

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It is said that these documents created a claim in favour of Mr. Butler against the Agency, which claim was included in the settlement and was released by the general releases executed by Blakeley and Mrs. Butler; that the whole or part of the sum of $125,000.00 may have been referable to that claim, which, by its nature, was not "income earned" by the deceased during his lifetime. The evidence is that Peaslee was a New York attorney working for the Agency in presenting the sabotage claims before the Mixed Claims Commission. I was invited by Mr. Masson to find that the settlement included the release of a claim of the Butler estate for $250,000.00 against the Agency and arising out of the documents filed as Exhibit A-7.

I must reject completely this ground of appeal as being entirely without foundation. From the documents themselves it is clear that both Butler and Peto were trustees only of any rights thereby transferred to them. It is not shown or suggested by any of the evidence that Butler ever had any personal interest in the subject matter of the assignment. The letter states specifically that he advanced no money and the oral evidence of Mr. Beatty is that it was paid by the Agency itself out of a special fund. Butler had died long before the award of the Mixed Claims Commission in favour of the Agency and his trusteeship was then at an end. There is no evidence that Peaslee ever became entitled to any amount, either from the Agency or from the other named corporation—the Lehigh Valley Railroad Company. There is nothing to identify the person for whom Butler and Peto were trustees; it may possibly have been the Agency itself. There is no admissible evidence to establish that the assignment was ever served upon the Agency or that it was at any time brought formally to the attention of its officers.

I am quite unable to construe the general releases as relating in any way to any claim arising out of the Peaslee Assignment and Transfer. The only claims advanced in the litigation were for salary and services rendered and it is for the recovery of these claims only that Mrs. Butler was appointed executrix and Blakeley was appointed ancillary executor. By the settlement this claim was specifically settled and the requirement of the general releases in the specified forms was merely adopted *ex abundanti cautela.*

It must be assumed, I think, that if the parties had in mind any such large claim as that which might have arisen out of the Peaslee assignment, a special reference thereto would have been made in all the documents, but they are entirely silent on that matter. If it had been in the contemplation of the parties, a release from Peto, the surviving trustee, would undoubtedly have been required. The onus is on the appellant to establish that the settlement did, in fact, relate in whole or in part to that claim and the attempt to do so has failed completely. I find that the whole of the amounts paid under the settlement relate to the salary and services of the late Mr. Butler.

A further ground of appeal is that section 11 (4) (*b*) is not to be construed retroactively and that if the amounts received are found to have been "income earned" by the deceased, they were so earned prior to his death in 1937 at which date that subsection was not in effect. It is common ground that the subsection was enacted by section 19 of chapter 34, Statutes of 1940, and was made applicable to the 1940 and subsequent taxation years; it remained in force to December 31, 1948, when the new Income Tax Act came into effect. As I understand the matter, the subsection was introduced to bring into charge income earned during the lifetime of a deceased taxpayer but received by his estate after his death. The previous practice had been to regard such income—which would clearly have been taxable income had it been received in the taxpayer's lifetime—as capital. I agree that it would be improper to construe the subsection as relating to income received by an estate prior to January 1, 1940, as that would involve a retroactive construction. The subsection does not in terms limit its effect to income earned after the coming into effect of a subsection, but does relate specifically to "income earned during the life of any person". In my opinion, the words of the subsection are satisfied whether the income was earned before or after January 1, 1940. I must therefore reject this ground of appeal also.

Another ground of appeal was that the payments made by the Agency were not "income earned" but were paid as the consequence of a *pacte de quota litis* (an agreement which counsel for the Crown admitted would be illegal in the province of Quebec). In the course of his evidence

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before the Board, Mr. Beatty stated that certain of the heirs of Mr. Butler's estate had agreed with his widow to share in the financing of the litigation against the Agency; that certain attorneys, both in Canada and the United States, were to be compensated for their services in prosecuting the claim by payment of a percentage of the amount actually recovered; and that the heirs-at-law were to divide the net proceeds between themselves in agreed proportions. It is submitted that such a contract was illegal and that the respondent could not tax as "income earned" any moneys recovered from such an illegal transaction. It was also suggested by counsel for the appellant that there was probably no merit in the claim as advanced; that the action was taken merely for its nuisance value in the hope that something might be recovered. I find nothing whatever in the evidence to support this last contention. In my view the claims were advanced by the Butler estate as a bona fide claim and settled on that basis.

Counsel for the respondent objected to the introduction of any of the evidence of Mr. Beatty as to the alleged illegal agreement to pay for the attorneys' services and to divide the net balance on the basis of a percentage of the amount recovered. I think that objection must be sustained on the ground that such matters are wholly irrelevant to the issue before me. What I am concerned with here is the nature and character of the amount paid in the settlement. What falls to be determined is the question as to whether or not the moneys paid as a result of the settlement represent "income earned" by the late Mr. Butler during his lifetime. In reaching a conclusion on that question it would be wholly irrelevant to take into consideration evidence relating to the manner in which the action was financed, or evidence in regard to the disposition to be made of the "income earned" *after* it had been received.

Reference may be made to the opinion of Kellock J. in *Goldman* v. *Minister of National Revenue* (1), where it is stated:

> The appellant having succeeded in obtaining the remuneration he set out to obtain, and which he has kept for himself, I do not consider that the form by which that result was brought about is important nor that if there be any illegality attaching to the agreement to divide the taxed costs, this can avail the appellant. What the appellant received, he received

(1) [1953] 1 S.C.R. 211 at 214.

as remuneration as he intended. Mr. Stikeman admits that had the offer of the bondholders to approve payment of $8,000 been accepted, the $3,000 which would thereby have found its way to the appellant would have been taxable in the hands of the latter as remuneration. In my view the mere interposition of the certificate of taxation does not change the character of that which the appellant actually received.

Having found that the sum of $125,000.00 paid by the Agency was in fact "income earned" by the late Mr. Butler during his lifetime, I now turn to the question as to what portion thereof was "received" after his death in the taxation year 1948. I have set out above the details of the dates and amounts of the several payments made by the Agency and its attorneys and of the actual receipts coming into the hands of the executrix. On behalf of the appellant it is submitted that in 1948 the executrix received only the remittance from her New York attorneys of $50,000.00 and it is agreed that in that year only that amount came into her personal possession. Then it is said that as the net amount finally available for distribution was $62,572.49 (Exhibit A-2), the balance of the sum of $125,000.00 represented costs and expenses; that such costs and expenses amounted to $62,427.51, a sum in excess of the $50,000.00 received in 1948, and that, therefore, there remained no taxable income for 1948. That submission, however, is not quite in accordance with the facts. The New York attorneys received in March, 1948, the sum of $97,855.00 and remitted $50,000.00 to the executrix, apparently retaining the balance as security for their fees and disbursements. Exhibit A-2 shows that the total expenses paid by the executrix out of the moneys coming into her hands (paid both in 1948 and 1949) aggregated only $33,904.73, so that even if that amount were paid or payable out of the $50,000.00 received, the balance of $16,095.27 would have been taxable income in her hands.

For the respondent it is submitted that the full amount of $125,000.00 (less proper deductions for costs and expenses) consists of taxable income in 1948 and was "received" by the executrix in that year. I shall first consider two payments received by the New York attorneys of the executrix in 1948, namely, $97,855.00 on March 16, 1948, and $18,750.00 on May 4, 1948. The submission is that Blakeley, the ancillary executor, was appointed at the request of the widow-executrix and was merely her

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agent for the purpose of claiming and collecting the compensation due her husband's estate; that his attorneys, Messrs. Breed, Abbott and Morgan, were also her agents or attorneys (or in any event the attorneys and agents of Blakeley) and that the receipt of these moneys by them constituted a receipt of such moneys by her.

The appellant's first submission on this point is that only the testamentary executors had power to receive the payments and that as they had fulfilled their duties and had been discharged, the moneys belonged not to the estate but to its heirs, and that Mrs. Butler, the executrix appointed by the order of Tyndale J., had no power to receive and did not receive the money. I cannot agree with this submission. It is proven that she did, in fact, receive the payment of $50,000.00 and I am satisfied that the order of Tyndale J. was sufficient to confer on her the right to prosecute the claim and to receive the proceeds thereof as executrix. Section 11 (4) (*b*) imposes the tax upon her in her fiduciary capacity as executrix. Then it is said that payments to Blakeley, the ancillary executor, are not payments to the estate and that the payments in any event could not be received until they were in the hands of the executrix in Canada. It was not suggested that the payment to the New York attorneys for Mr. Blakeley did not constitute a receipt by him of such moneys and I am of the opinion that they did.

I decide this point on the established fact that upon payment of these amounts to the New York attorneys, such amounts became the property of the Butler estate and, except as to the proper charges of such attorneys, became subject to the control and direction of either the executrix or the ancillary executor, or both. Blakeley was the nominee of Mrs. Butler and had been selected by her to act on behalf of the estate in the proposed litigation. By the terms of the settlement Mrs. Butler authorized "the payments to be made to either Blakeley or his attorneys". The Agency discharged its obligation in full at the date of the settlement, either by payment direct to the attorneys or by the delivery of the balance to its counsel to be held pending the determination of the estate's tax liability. Under no circumstances could any of the moneys revert to it for its own use. The direction in the "escrow agreement" was to

pay to Messrs. Breed, Abbott and Morgan, as attorneys *for the estate of Wilson Workman Butler,* all the moneys so deposited except such amounts as might be found payable to the Federal and state taxing authorities. Under these circumstances, both payments received by the attorneys in 1948, aggregating $116,605.00, were, in my view, constructively received by Mrs. Butler on behalf of her husband's estate in that year. The fact that a portion thereof was not remitted to her in Canada until the next year is of no importance.

The last payment of $8,395.00 received by Breed, Abbott and Morgan on January 13, 1949, must be considered separately. By the terms of the main settlement agreement, the agreed amount of $125,000.00 was to be paid by the Agency to Blakeley or his attorneys upon the delivery of the documents specified. On the same date, however, a collateral agreement was arrived at between the same parties, as shown by the terms of the letter by the executrix and the ancillary executor to the Agency and agreed to by the Agency. Thereby, it was agreed that the Agency "shall be entitled to withhold from the payment of $125,000.00 required to be made under Clause "FIRST" of the settlement agreement the sum of (*a*) $18,750.00 on account of Federal income taxes, and (*b*) $8,395.00 on account of New York State income taxes, or an aggregate amount of $27,145.00", and that the amounts so withheld should be deposited in escrow with Messrs. Graustein and Kormendi, the Agency attorneys.

As I have mentioned above, the deposit was made to protect the Agency against liability for any "withholding taxes" in respect of the amount paid by the settlement. The collateral agreement provided that to the extent that rulings should be received from the taxing authorities releasing the Agency from such tax, the money should be paid "by Graustein and Kormendi to Messrs. Breed, Abbott and Morgan, *our attorneys*", free of any claim by the Agency. To the extent that such rulings should not be secured, Graustein and Kormendi were instructed to withdraw the moneys and pay them to the Collector of Internal Revenue and/or the New York State Tax Commission. The collateral agreement forms part of Exhibit R-4 as is also the letter from the agency to Graustein and Kormendi

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dated March 18, 1948. With that letter was forwarded the Agency's cheque for $27,145.00 and the letter states:

> You will deposit this sum in a special account in your name and you will hold and dispose of the same as escrow agent subject to the terms of this letter.

The letter substantially conforms to the terms of the collateral agreement. I have not found it necessary to consider that part relating to the sum of $18,750.00 which had been estimated as the amount that might be due to the Commissioner of Internal Revenue inasmuch as that amount was released from the escrow and paid to Breed, Abbott and Morgan on *May 4, 1948.*

The escrow agents were to hold the sum of $8,395.00 until February 15, 1949 (I assume that on or about that date the Agency would be required to pay any withholding taxes for which it might be found liable), unless sooner disposed of as provided therein. Then followed instructions relating to possible taxes due the New York State Tax Commission which are similar to those set out in the collateral agreement, relating thereto. On January 10, 1949, the latter Commission ruled that no tax was payable to it and, in accordance with the terms of the collateral agreement, the whole amount so withheld was paid to Breed, Abbott and Morgan three days later. In the escrow letter it is stated that its terms are irrevocable and may not be changed except upon the written consent of the Agency, Breed, Abbott and Morgan, Mrs. Butler (executrix) and Blakeley (ancillary executor).

It is true, as urged by counsel for the respondent, that by payment of $97,855.00 in cash and the deposit in escrow of the balance of $27,145.00, the Agency had discharged its obligation and paid its debt in full and could under no circumstances recover any part thereof for its own benefit. It is also a fact that the $8,395.00 held in escrow until 1949 would either be paid to the estate attorneys for the estate or be used in settlement of the New York State tax payable by the estate (and for which the Agency would be liable only to withhold the proper amount before making payment). Counsel for the respondent submits that under these circumstances and as the escrow agency was established with the approval of the executrix and the ancillary

executor, the escrow agents were in fact the agents of the estate and that, therefore, this payment also was "received" by the estate in 1948.

I am of the opinion, however, that this payment was not received in 1948 by anyone acting in a fiduciary capacity for the Butler estate. The collateral agreement provided that it should be *withheld* and it was in fact withheld until the following year. I fail to understand how a payment can be considered as having been "received" when, in fact, it was withheld. If the agreement had provided that that sum should be retained until the following year by the Agency for the purpose of clarifying its tax position, and had, in fact, been withheld until then, it could not be said that the payment had been received in 1948 by anyone on behalf of the estate. I do not think that the placing of the amount in the hands of counsel for the Agency, even though agreed to by the other parties, changes the position in any way. In my view, this amount was not at the disposal of the estate and it was not reduced into its possession until 1949. For that reason the reassessment (as stated in the notification of the Minister), on the basis of the amount received from the Agency, should be reduced from $125,000.00 to $116,605.00.

An objection was also taken by Mr. Masson to the form of the assessment. Mrs. Butler died in January, 1950, and by her will her son, Alvah H. Beatty, was appointed the executor of her will. Under the laws of the province of Quebec, the executorship of Mr. Butler's estate did not devolve on Mrs. Butler's death to her executor, Mr. Beatty. The reassessment of October 30, 1952, was directed to "Ex. of Estate of Wilson W. Butler, c/o Mr. Alvah (misspelled as Alvali) M. Beatty, Ex. of the Estate of Mary Jane Butler, c/o Edouard Masson, Q.C., Suite 203, 333 Craig St. W., Montreal, Quebec." It undoubtedly reached the attention of Mr. Beatty as he signed the Notice of Objection dated November, 1952, and participated as a witness not only before this Court, but in the proceedings before the Tax Appeal Board. Mr. Masson's submission is that as there was then no executor of Mr. Butler's estate, its heirs, or those who received the moneys when distributed, should have been assessed.

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I do not think this submission can be supported. When the moneys were received in 1948, Mrs. Butler was alive and then acting as executor for her husband's estate. At that time, as such executrix, she became liable for the payment of income tax in respect of such receipts. As she failed to pay such tax in her lifetime, the obligation to do so did not lapse but falls as a duty upon her executor. In my opinion, the assessment was properly made. It may be noted that section 69(D) of the Income War Tax Act provides that "an assessment shall not be vacated or varied under this Part by reason of any irregularity, informality, omission or error on the part of any person in the observation of any directory provision of this Act". It is also worthy of note that neither in the Notice of Objection nor in the Notices of Appeal was any objection taken to the form of the assessment.

For these reasons the appeal will be allowed to the extent that I have indicated, namely, by reducing the total amount of receipts in 1948 from $125,000.00 to $116,605.00. The assessment will be referred back to the Minister to reassess the appellant in accordance with my finding.

While the appellant to a minor extent succeeded in his appeal, I must keep in mind that by far the greater part of the hearing was taken up with matters in which he has failed completely. I think that under the circumstances I should make no order as to costs.

Judgment accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT

1955
Nov. 3
Nov. 29

BETWEEN:

MARJORIE MANZ LeVAE, LILIAN ANNIE ILOTT and MARION ADELAIDE CROOKS ..... PLAINTIFFS,

AND

THE STEAMSHIP *GIOVANNI AMENDOLA* ..... DEFENDANT.

Shipping—Motion to dismiss action for want of jurisdiction—Action in rem lies for death caused by a ship.

Held: That an action *in rem* will lie for death caused by a ship.

MOTION to dismiss the action for want of jurisdiction.

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

J. Cunningham for the motion.

D. McK. Brown contra.

SMITH D.J.A. now (November 3rd, 1955) delivered the following judgment:

This interlocutory motion (heard by me on the 3rd instant) to dismiss the action for want of jurisdiction raises several unusually interesting and difficult points.

The action is brought by several executrices (widows) of seamen who were drowned through the foundering of a tug following collision with the defendant vessel. It is common ground that they claimed either under the British Columbia Families Compensation Act (which is substantially a copy of the English Fatal Accidents Act—otherwise known as Lord Campbell's Act) or equivalent Dominion legislation though the endorsement on the writ does not expressly say so. Objection was taken as to this but I held the endorsement sufficient.

The Provincial Act gives a right of action against "any *person*" who causes the death of another, if the death causes loss to specified dependents including widows. The neat

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point raised before me is whether that Act has been adequately supplemented by other legislation to give an action to plaintiffs *in rem* against the ship itself. Such is this action. It may be noted that much the same point at common law came before the Court of Appeal in *Haley* v. *Brown Fraser* (1).

Apart from statute, no admiralty action was open for physical injuries or loss of life, but Parliament has at intervals enlarged admiralty jurisdiction, and the question is whether it has gone far enough to support this action. This legislation has been uniform in England and Canada, except for an amendment here in 1948, not paralleled in England.

Section 7 of the Admiralty Court Act (1861) (Imperial) conferred on this Court

> Jurisdiction over any claim for damage done by any ship . . .

At first this section was construed by Courts of first instance as enabling actions *in rem* to be brought under Lord Campbell's Act. But in the *"Vera Cruz"* (No. 2) (2), the Court of Appeal and House of Lords decided that that view was wrong, and that such an action *in rem* would not lie. But there was a striking divergence in the reasons given by the two tribunals. The Court of Appeal held that the loss suffered by the dependents of a person killed by the operation of a ship was "not damage done by a ship". Brett M.R. said (9 P. at page 100)

> The death of the man caused by the negligence of the defendants is only part of the cause of action. There must be actual injury to the person on whose account the action is brought. The real cause of action is in fact pecuniary loss caused to these persons; it is not a cause of action for anything done by a ship, which is only one ingredient in the right of action.

Bowen L.J. said at page 101

> The killing of the deceased *per se* gives no right of action at all, either at law or under Lord Campbell's Act. But if the claim be, as it only can be, for the injuriously affecting the interests of the dead man's family, the injurious affecting of their interests is not done by the ship in the above sense.

And Fry L.J. said at page 102

> It cannot be correctly said that it is an action for damage done (which are the words of the Act) though it is for damage resulting from or arising out of damage done.

(1) (1955) 15 W.W.R. (N.S.) 1. (2) (1884) 9 P. 96; 10 A.C. 59.

The House of Lords gave no countenance to this reasoning, but put their affirmance on quite a different basis. The Lords did not hold that an action under Lord Campbell's Act, when a man was killed by a ship, was not "an action for damage done by a ship"; they held that it was not such an action within the meaning of Section 7 of the 1861 Act which was quite a different matter.

Lord Selborne L.C. began by saying that the effect of the Act was that if the Admiralty Court had jurisdiction it could proceed *in rem*. But he pointed out that Lord Campbell's Act in no way suggested Admiralty jurisdiction

> Every word of that legislation being, as it appears to me, legislation for the general case and not for particular injury by ships, points to a common law action, points to a personal liability and a personal right to recover, and is absolutely at variance with the notion of a proceeding *in rem* (10 A.C. 67).

It may also be noted that earlier on the same page Lord Selborne said "death is essentially the cause of the action". This was quite contrary to the Court of Appeal views.

At page 68 Lord Selborne went on to point out that if an action *in rem* were brought to enforce a claim under Lord Campbell's Act, it would bring in procedure in conflict with that prescribed by that Act. He concluded that as it was not a necessary inference that actions under that Act were intended by Section 7 of the 1861 Act, and anomalies would be caused, Section 7 should be otherwise construed.

Lord Blackburn, referring to an action under Lord Campbell's Act, said at page 71: "This is a personal action; if personal action there can ever be" and he pointed out that the remedy for dependents of a man killed by a ship was to sue the persons at fault, not the ship.

The matter rested at that until The Maritime Conventions Act 1911 (Imperial) Chapter 57, Section 5 which enacted that:

> Any enactment which confers on any Court Admiralty jurisdiction in respect of damage shall have effect as though references to such damage included references to damages for loss of life or personal injury, and accordingly proceedings in respect of such damages may be brought *in rem* or *in personam*.

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The situation is now covered in England by the Judicature Act 1925. Section 22 of this reads

Section 22 (1)—

The High Court shall, in relation to admiralty matters, have the following jurisdiction . . . that is to say,

(*a*) Jurisdiction to hear and determine any of the following questions or claims

(iv) Any claim for damage done by a ship.

Section 22 (2):

The provisions of para. (*a*) of subsection (1) of this section which confer on the High Court admiralty jurisdiction in respect of claims for damage shall be construed as extending to claims for loss of life or personal injuries.

And Section 33 (2) reads:

The Admiralty jurisdiction of the High Court may be exercised either in proceedings *in rem* or in proceedings *in personam*.

These sections add nothing to the language of Section 7 of the 1861 Act taken with Section 5 of the Maritime Conventions Act 1911.

In England no one has attempted to dispute that the effect of the 1911 Act and the 1861 Act (and equally of the above sections of the Judicature Act) has been to enable claims under Lord Campbell's Act for loss of life caused by a ship to be enforced by action *in rem*. All the leading text books on shipping and admiralty law since 1911 stated this as accepted law: see, for example, 1 Hals. (3rd Ed.) 60; Roscoe's Admiralty Prac. (5th Ed.) 66N; Temperley Merchant Shipping Acts (5th Ed.) 164; Marsden on Collisions at Sea (10th Ed.) 318. Actually there are no reported cases where the point was ever expressly decided; but there is no lack of cases in which the right to sue *in rem* has been clearly assumed by the Court: e.g. in *The Caliph* (1); *The Espanoleto* (2); *The Kwasind* (3), the last being a decision of the Court of Appeal made upon an express admission by counsel that the action was proper.

Legislation in Canada was parallel, though with far different results in the Courts, these probably being the cause of a further enactment in 1948, not found necessary in England.

(1) [1912] P. 213. (2) [1920] P. 223.
(3) (1915) 84 L.J.Ad. 102.

Our equivalent of Section 7 of the 1861 English Act first appeared in the Colonial Courts of Admiralty Act 1890 and our equivalent of Section 5 of the 1911 English Act is Section 6 of the Maritime Conventions Act 1914.

But in *S.S. Catala* v. *Dagsland* (1), President Maclean, the learned President of the Exchequer Court, stated that the relevant legislation was not explicit enough to exclude the principle applied in the *Vera Cruz* (*supra*), and that it did not enable any claim under the Families Compensation Act of British Columbia for a death caused by a ship to be enforced by an action *in rem*. It clearly was not brought to the attention of the President that English legal opinion was entirely opposed to his views (though there were no express English decisions). He quoted *The Moliere* (2), and *The Kwasind* (*supra*), as having held that the 1911 Act had made no change. Actually however *The Moliere* dealt with a claim for Workmen's Compensation (independent of negligence) and not with damage (as the President assumed) and in *The Kwasind* as I have said, the Court assumed that the legislation had authorized an action *in rem* under Lord Campbell's Act. The President at page 91 said that *The Kwasind*

> was an instance, I think, where a Judge presiding in the Admiralty Court was exercising his common law jurisdiction.

With respect, that was not so. However I do not presume to criticize the President's general reasoning that the new legislation was not explicit enough to exclude the principle of the *Vera Cruz* case, even if I would be justified as a local judge in refusing to follow him. I shall return to the *Vera Cruz* later.

The Admiralty Act 1934 reproduced the relevant section from the 1890 Act and also brought in Section 22 of the English Judicature Act 1925 verbatim: see Schedule "A" to the 1934 Act. The same is now found in the schedule to the present Admiralty Act.

Following the Act of 1934 Carroll D.J.A. in *Rogers* v. *Baron Carnegie* (3), followed the President's ruling in the *Catala* case and held that the then state of the legislation still did not permit a claim under Lord Campbell's Act to be enforced against a ship by action *in rem*. It is argued

(1) [1928] Ex. C.R. 83. (2) [1925] P. 27.
(3) [1943] Ex. C.R. 163.

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that he would have decided otherwise if he had not felt bound by the President's judgment, but I do not so read his language. He urged that further enabling legislation be passed. Possibly as a result of this suggestion, the following amendment was passed in 1948:

> Where the death of a person has been caused by such wrongful act, neglect or default as if death had not ensued would have entitled the person injured to maintain an action in the Admiralty Court and recover damages in respect thereof, the dependents of the deceased may, notwithstanding his death and although the death was caused under circumstances amounting in law to culpable homicide, maintain an action for damages in the Admiralty Court *against the same defendants* against whom the deceased would have been entitled to maintain an action in the Admiralty Court in respect of such wrongful act, neglect or default if death had not ensued.

This forms Section 726 of the present Canada Shipping Act.

In *Monks* v. *The Arctic Prowler* (1) (Newfoundland) Walsh D.J.A. decided that by this amendment the legislature had finally succeeded in authorizing an action *in rem* by a claimant under Lord Campbell's Act for a death caused by a ship. Defendant's counsel, in an exceptionally lucid and plausible argument, stoutly contended that the decision was wrong, that the new section in substance goes no farther than the old legislation, and that the *Catala* case is still the ruling authority. He also distinguished the case on the ground that Walsh D.J.A. had a common law as well as an Admiralty jurisdiction under Newfoundland law. That being so, I think I am obliged to consider the matter on principle.

At the outset I will deal with the suggestion that the Probate, Divorce and Admiralty Division of the High Court has greater powers than this Court would have because, by virtue of the Judicature Act, it is also a Court of common law as well as an Admiralty Court. That factor seems to me irrelevant. In *Bow McLachlan & Co.* v. *Ship Camosun* (2) at page 608 Lord Gorrell said:

> Admiralty jurisdiction of the High Court does not include any jurisdiction which could not have been exercised by the Admiralty Court before its incorporation into the High Court, or may be conferred by statute giving new Admiralty jurisdiction.

(1) (1953) 32 M.P.R. 220. (2) [1909] A.C. 597.

And in the *Vera Cruz* case (10 A.C. at page 64) Lord Selborne L.C. said:

> This question must be determined exactly in the same manner as if the action had been so brought (i.e. in the Court of Admiralty) and as if the Judicature Acts had never been enacted.

That indicates that the mere fact of the Admiralty division having a common law side does not enable it to handle a common law action as though it were an Admiralty action, e.g. by issuing a writ *in rem* or by arresting property. I therefore cannot agree that the variance between English and Canadian views on the common legislation can be explained by the common law jurisdiction of the Admiralty Divisions.

The defendant contended that "Section 726 of the Canada Shipping Act has not altered the recognized interpretation of common law that the infliction of death itself is not remediable". I cannot accept this. The Families Compensation Act abrogates that principle, at least where there is also loss to the dead man's dependents. And when I read Section 726 I find in it all the essentials of the Families Compensation Act. The effect of Section 726 seems to be that where a man who was killed could have sued for his injuries in the Admiralty Court if he were living, then his dependents can sue in that Court any defendants whom he could have sued. The word "defendants" has I think been chosen to avoid restricting those suable to persons and so as to include ships. If a ship is a suable defendant, that means of course an action *in rem*. So the whole question turns on whether, apart from Section 726, a person injured by a ship could have sued the ship.

Apart from statute there was no Admiralty jurisdiction over physical injuries caused by a ship: *The Moliere* (*supra*) page 31. The books in general treat the right to libel a ship for physical injuries as created by the Maritime Conventions Act 1911 Section 5 and of course they are now covered by the later Acts reproducing that section. But such actions were also brought under the 1861 Act before the 1911 Act was passed, so I go back to Section 7 of the 1861 Act, which gave the Admiralty Court

> Jurisdiction over any claim for damage done by any ship.

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Did that section allow a plaintiff to sue a ship for personal injuries to himself? That seems obscure. In *The Sylph* (1) and *The Beta* (2) plaintiffs were held entitled to sue *in rem* for their injuries caused by a ship, and *The Sylph* was cited with apparent approval by Lord Herschell in *Mersey Docks* v. *Turner* (3). On the other hand, in *Smith* v. *Brown* (4), which actually dealt with an action under Lord Campbell's Act, the Queen's Bench refused to follow *The Beta.* In *The Franconia* (5) which was a case under Lord Campbell's Act in which four judges divided evenly, two approved *The Sylph* and the other two reserved judgment as to whether an injured party could sue *in rem* for his own injuries. In the *Vera Cruz,* Lord Blackburn, after holding that no action *in rem* lay under Lord Campbell's Act, said that he would not apply the same principle to an action to recover for the plaintiff's own injuries, without hearing full argument. In *The Theta* (6) there was very full argument on a plaintiff's right to sue *in rem* for his own injuries and Bruce J. obviously assumed that this right was given under the 1861 Act, though he dismissed the action on other grounds. There were indeed several other cases in which *The Sylph* and *The Beta* were questioned, but in those cases the principle they decided did not really arise.

On the whole I think the weight of authority favours the view that an injured party could sue *in rem* for his injuries. I note that 1 Hals. (1st Ed. 1907) page 71 so states the law, citing only *The Sylph.* It may well be that for me this point is concluded by *The Beta,* which was a Privy Council decision and so probably binding on me, though not on the English courts.

Assuming however that the 1861 Act left doubt whether a person injured by a ship could sue the ship, I cannot agree that the Maritime Conventions Act did nothing to remove those doubts. It deals with

> any enactment which confers on any Court Admiralty jurisdiction in respect of damage

(1) (1867) L.R. 2 A. & E. 24.
(2) (1869) L.R. 2 P.C. 447.
(3) [1893] A.C. 468 at 478.
(4) (1871) 6 Q.B.D. 729.
(5) (1877) 2 P. 163.
(6) [1894] P. 280.

a class which clearly embraced Section 7 of the 1861 Act. The 1861 Act then was to

> have effect as though reference to such damage included references to loss of life or personal injury.

That meant that the Admiralty Court by virtue of the two Acts, was given cognizance of any claim for damage for personal injury. The doubts about the 1861 Act expressed in such cases as *Smith* v. *Brown* were as to whether "damage" included personal injury: the 1911 Act removed that doubt. That Act then went on to say:

> and accordingly proceedings in respect of such damages may be brought *in rem* or *in personam*.

That clearly removed any doubt whether a personally injured plaintiff had to sue *in personam*.

The President in the *Catala* case, as we have seen, declined to hold that the 1911 Act extended also to actions under Lord Campbell's Act. His reasoning was that the *Vera Cruz* case had held that the 1861 Section was not intended to give a dependent a claim for the killing of a man, and that the 1911 Section was not explicit enough to give a new application to the 1861 Section. The President may not have been referred to the *ratio decidendi* of the English case, and so may have overlooked the distinction between the reasons of the Court of Appeal and the House of Lords. The President's decision can best be justified, I think, on the basis that Lord Campbell's Act was essentially inconsistent with an action *in rem*, so that general language contemplating an action *in rem* must be taken to deal with causes of action arising elsewhere than under Lord Campbell's Act. That reasoning would apply to the 1911 Act with as much force as to the 1861 Act though it would not apply to an action by an injured person. If Parliament did intend to override the *Vera Cruz* decision by the 1911 Act, it is certainly surprising that it did not find clearer language to achieve this end.

However, when we come to Section 726 and Section 727 of the Canada Shipping Act, we find that most of the language of Lord Campbell's Act has been reproduced, showing that Parliament had it in mind. Moreover, as I have shown, the test whether the dependents can sue is whether the deceased person, if he had been alive, could have sued. No such test

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is set up in either the 1861 or the 1911 Acts. As I have said, the deceased person, if he had been merely injured, could have sued the ship *in rem;* so I think it is established that the dependents can sue *in rem.* I therefore agree with the conclusion reached by Walsh D.J.A. in *The Arctic Prowler* case.

I am unable to agree that any difficulty is raised by the fact that the Families Compensation Act is provincial legislation, whereas the Court's jurisdiction is governed by Federal Acts. Section 726 of the Shipping Act reproduces the essence of the Provincial Act, and I think it was framed as it is to overcome the suggested difficulty which had been raised in former cases. Even apart from that, however, I am far from convinced that the difficulty was real. I see no reason why recognition should not be given in the Exchequer Court to provincial legislation defining substantive law.

It is argued with some plausibility that death by drowning is not within the Families Compensation Act, because it is said that the death itself is the only injury. Presumably what is meant is that the Act contemplates antemortem injuries, such as wounding, which it is implied are wholly missing in a drowning case. I presume the defendant means to ask what injuries the deceased men here could sue for, if they were still alive. I think it is fair to answer such a technical argument in a technical way. A drowning man does not die instantaneously, and no doubt these men had their lungs first partially filled and then entirely filled with water for an appreciable number of moments before life became extinct. For them to have to go through this was a wrong and therefore an injury inflicted on them by the navigation of the ship, which I assume for this motion to have been wrongful. If at the last second these men had been rescued and brought back to life by the use of respirators, I have no doubt that they could have sued for being subjected to their ordeal. If so, that is all that is needed to give their dependents a right

of action. The English case of *Morgan* v. *Scoulding* (1) is somewhat in point though the action there was not under Lord Campbell's Act.

I therefore hold I have jurisdiction and dismiss the motion with costs.

Judgment accordingly.

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BETWEEN:

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LIMITED ..... PLAINTIFF;

1955
Apr. 14
Dec. 6

AND

ELMWOOD HOTEL LIMITED ..... DEFENDANT.

Copyright—Motion to have point of law set down for hearing dismissed—Competence of Court to hear action to collect fees fixed by Copyright Appeal Board—Constitutional law—Rule 149 of Rules of Court—The Copyright Act, R.S.C. 1952, c. 55, s. 20(6), 50(9)—Exchequer Court Act, R.S.C. 1952, c. 98, s. 21(c)—The British North America Act, 1867, s. 91, clause 23.

Held: That the Court has jurisdiction to hear an action brought to recover fees approved and certified by the Copyright Appeal Board, such right being a statutory one conferred on the Court by the Parliament of Canada.

2. That it was within the competence of Parliament under s. 91, clause 23, of the British North America Act, 1867 to vest this Court with jurisdiction to hear and determine such action as the one now before it.

MOTION to have hearing on point of law.

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

D. W. Mundell, Q.C. for plaintiff.

G. F. Henderson, Q.C. for defendant.

FOURNIER J. now (December 6, 1955) delivered the following judgment:

This is a motion of the defendant for an order that the defence of the defendant contained in paragraph 2 of the statement of defence be set down for hearing and disposal of at a date to be fixed.

(1) [1938] 1 K.B. 786.

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Fournier J.

The facts are disputed, but the defence is subject to the objection of the defendant to the jurisdiction of the Court and the constitutionality of section 21 of the Exchequer Court Act and section 20 of the Copyright Act. As no factual dispute is involved in the consideration of the objection raised by the defence as to jurisdiction and constitutionality, it is assumed that the allegations contained in the statement of claim may be assumed as accurate.

The plaintiff, a duly incorporated company, is the owner of performing rights in Canada in a substantial number of musical works. The defendant is the owner and operator of the Elmwood Hotel at 400 Dougall Road, in the Township of Sandwich West, in the County of Essex, Province of Ontario, in which it has provided entertainment of which music forms a part and has performed in public musical works in which the plaintiff owns the performing rights. On September 7, 1947, the defendant applied to the plaintiff for the plaintiff's license to perform all musical works which are the property of plaintiff. By license No. G1863, dated February 20, 1948, the defendant became entitled to perform the said works in public at the Elmwood Hotel after payment of the fees for 1947 and thereafter the fees therefor approved by the Copyright Appeal Board, and the license has at all times material remained in full force and effect.

The fees for the years 1951, 1952, 1953 and 1954 were approved by the Copyright Appeal Board and were set out in the Canada Gazette, as mentioned in the statement of claim. As holder of its license, the defendant was obligated to pay the fees for its license under the appropriate items No. 6 in the tariffs for the above years, which was "a proportion of the total amount paid for all entertainment of which music forms a part, including the amount paid to the orchestra, vocalists and all other entertainers."

At all material times, the plaintiff was entitled after the last day of January in each of the years 1952, 1953, 1954 and 1955 to examine, by duly authorized representative, at any time during business hours, the books and records of accounts of the defendant to such extent as may be necessary to verify all statements rendered by the licensee. The defendant has always declined to render to the

plaintiff full and proper statements of the fees payable by it and has refused and neglected to furnish statements to permit inspection by the plaintiff and to pay fees to which the plaintiff is entitled. Now, substantial sums of money are due by the defendant to the plaintiff for fees for the years 1951, 1952, 1953 and 1954, which have not been accounted for by the defendant. The plaintiff claims that it is entitled to examine the defendant's books to verify the accounts of expenses of the defendant on entertainment of which music forms a part and to recover from the defendant the amount of the license fees it is owing to the plaintiff.

As it was entitled to do by the General Rules and Orders of this Court, the defendant, in its defence, raised certain questions of law. The legal points are in paragraph 2 of the statement of defence, which reads as follows:

2. The Plaintiff's cause of action is for fees or charges alleged to be payable under a certain license referred to in paragraph 6 of the Statement of Claim whereby the Plaintiff alleges that the Defendant became entitled to perform in public in the Elmwood Hotel the musical and dramatico-musical works of which the Plaintiff allegedly owns or controls that part of the copyright therein known as the public performing right, in consideration of the payment of the fees as provided for in the said license. The jurisdiction of this Court is statutory and the relevant statutory provisions are the Exchequer Court Act, R.S.C. 1952, Chapter 98, Section 21, and the Copyright Act, R.S.C. 1952, Chapter 55, Section 20, Subsection (6). The Plaintiff's cause of action does not fall within the provisions of the said statutes and this Court has no jurisdiction to try the issues raised in the Statement of Claim. In the alternative, if the provisions of the said statutes purport to confer upon this Court jurisdiction in the premises then such provisions are ultra vires of the Parliament of Canada by reason of the provisions of the British North America Act (Imp.) 30-31 Victoria, Chapter 3, Section 92, Clause 13, and the amendments thereto.

In support of this application to set down for hearing before trial the points of law raised by the above paragraph of the defence, the defendant invokes Rule 149 of the General Rules and Orders of this court. This rule reads as follows:

149. No demurrer, as a separate pleading, shall be allowed, but any party shall be entitled to raise by his pleading any point of law; and any point so raised shall be disposed of by the Court or a Judge at or after the trial: provided that by consent of the parties, or by order of the Court or a Judge, on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.

The defendant submits that Rule 149 should be invoked where a point raised by the pleadings depends upon legal

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rather than factual consideration and that the point should be one which would result in a disposition of the proceedings before the Court. I agree that the point should be one *which would* result in a final disposition of the case, but that the rule should not be invoked if it is not clearly established that it would have that result. If the hearing and disposition of the points of law raised did not have the effect of disposing of the proceedings so that a trial became unnecessary, the granting of this application would result in delaying the disposal of the action. To justify the setting down of the hearing of the points of law for argument, the applicant must establish a strong probability that they will be decided in a way that will dispose of the proceedings before the Court. At least a *prima facie* case must be made that the defendant will succeed. In the present instance, the setting down of the hearing before the trial was not agreed to by the plaintiff, so the defendant must show the Court that it would be more convenient to have the legal points decided before any evidence is given or any question or issue of fact is tried.

The learned counsel for the defendant argued that the cause of action did not fall within the provisions of the statutes above mentioned. He submitted, if I understood him well, that even if it were taken for granted that the Copyright Appeal Board had the necessary powers to establish a tariff of fees and to approve and certify the statements of fees, charges or royalties of the association or company concerned, and had exercised these powers, the plaintiff did not have the right to recover the fees thus certified and approved from the defendant in the Exchequer Court. His right to recover was a civil right and his recourse was before the provincial Courts. I cannot agree with this submission when the Copyright Act, R.S.C., 1952, chapter 55, deals with the recovery of fees by a "performing right society".

Section 20 (6) reads as follows:

> The Exchequer Court of Canada shall have concurrent jurisdiction with provincial courts to hear and determine all civil actions, suits, or proceedings that may be instituted for violation of any of the provisions of this Act or to enforce the civil remedies provided by this Act.

There is no doubt that this section of the Copyright Act, passed by Parliament, gives the Exchequer Court jurisdiction to try and dispose of this action.

As to the approval of the fees, charges or royalties to be charged by a performing right society, section 50 (9) provides for same and reads:

> The statements of fees, charges or royalties so certified as approved by the Copyright Appeal Board shall be the fees, charges or royalties which the society, association or company concerned may respectively lawfully sue for or collect in respect of the issue or grant by it of licences for the performance of all or any of its works in Canada during the ensuing calendar year in respect of which the statements were filed as aforesaid.

In the *Maple Leaf Broadcasting Company Limited* v. *Composers, Authors and Publishers Association of Canada Limited* (1) the Supreme Court of Canada expressed the view that the Parliament of Canada had the legislative authority to enact laws regulating the licensing of performing rights by associations such as the plaintiff and fixing the amount of fees, charges or royalties and the terms of the licenses. And it was held that "the statements filed by the respondent before the Board and the statements certified by the Board were both statements of 'fees, charges and royalties' within the meaning and contemplation of the Act."

According to this section of the Act, the plaintiff may sue for or collect in respect of the issue or grant by it of licenses, etc. There is no doubt in my mind that the remedy sought by the plaintiff lies in the Exchequer Court of Canada which is given jurisdiction by section 20 (6) of the Act.

The Exchequer Court Act, R.S.C. 1952, chapter 98, also clothes this Court with jurisdiction to hear and determine claims for the recovery of fees for copyright licenses by section 21 (*c*).

The section reads:

> 21. The Exchequer Court has jurisdiction as well between subject and subject as otherwise,
>
> (*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.

(1) [1954] S.C.R. 64 et seq.

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Fournier J.

In my view this section of the Act extends the jurisdiction of the Exchequer Court of Canada to all claims based on copyright to the full limit that Parliament may confer jurisdiction in that Court. Paragraph (c) covers all matters within the legislative authority of Parliament arising from copyright. Legislation on licenses and fees for copyright being within the authority of Parliament, it would follow that the present claim and the plaintiff's right to recover fees approved and certified by the Copyright Appeal Board is a statutory right, and actions respecting these matters therefore are within the jurisdiction of this Court.

So far, it has not been established before me that this Court is not vested with jurisdiction to try and dispose of this claim, nor that the plaintiff's claim does not fall within the ambit of the statutes mentioned in paragraph 2 of the defendant's statement of defence. I am rather of the opinion that the jurisdiction of the Exchequer Court as set out in the Exchequer Court Act extends to the hearing and disposing of matters within the legislative authority of Parliament for recovery of fees on a license granted to use a copyright.

The second point of law propounded by the defendant is that if the provisions of the said statutes purport to confer upon this Court jurisdiction in the premises then such provisions are unconstitutional. I believe that legislation on the subject of copyright is within the competence of Parliament under section 91, clause 23, of the British North America Act, 1867.

> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—
>
> 23. Copyrights.

This being the case, Parliament had the authority to give jurisdiction to this court to try and determine actions such as this.

On this point I would refer the parties to a recent decision of the President of this Court, in the case of *Composers, Authors and Publishers Association of Canada Limited* v. *Sandholm Holdings Limited* (1).

That was an action by the plaintiff to recover in this Court from the defendants unpaid license fees in respect of the issue by it to the defendants of a license to perform in public all or any of the musical works in which it owned the performing rights and, if so, whether it was entitled to any other remedy.

At page 10 of his reasons for judgment the learned President says:

> . . . The fees for a license to perform the musical works in which a performing rights society owns the performing rights are no longer a matter of contract between the society and the user of the music but a matter of statutory fixation by the Copyright Appeal Board. Consequently, we are not here concerned with any question of contract between subject and subject. Thus the assumption on which I based my doubt as to the competence of Parliament is without foundation. The legislation under consideration is clearly legislation on the subject of copyright and, as such, within the competence of Parliament under head 23 of section 91 of the British North America Act.
>
> That being so, it was within the competence of Parliament to vest this Court with jurisdiction to hear and determine such an action as this.

The cause of action in the *Sandholm Holdings Limited* case was, as above stated, for the recovery of unpaid license fees and the claim in the present instance is for fees or charges payable under a certain license to perform musical works the performing rights of which are owned by the plaintiff. In both cases, there was objection based on the jurisdiction of this Court and the competence of Parliament to vest jurisdiction in the Exchequer Court of Canada. The only difference is that in the former case no application was made for a hearing of the points of law before trial, whilst in this action the defendant has moved that an order be issued setting down a date for a hearing before trial.

For the reasons stated, I find that the defendant has failed to show that there was any probability that the proceedings could be finally disposed of by the hearing prayed for in this motion. I have no hesitation in stating that nothing was invoked in the oral argument or the written submission to indicate that the defendant would succeed on

(1) [1955] Ex. C.R. 244.

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the points of law at issue. At all events, the points of law raised in the defence may be more conveniently tried and disposed of at the trial, thus avoiding delay in the final disposition of all the matters involved. Furthermore, I concur in and make mine the remarks of the learned President of this Court in the *Sandholm* case *(supra)* on the same questions of law.

Therefore, there will be judgment that the motion for an order setting down a date for the hearing and disposition of the defence contained in paragraph 2 of the statement of defence is dismissed with costs.

Judgment accordingly.

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Sept. 19

Dec. 7

BETWEEN:

NATIONAL PAVING COMPANY LIMITED ..... APPELLANT,

AND

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

Revenue—Income tax—Payment to appellant not income derived from a business or any other source—Appeal allowed.

Appellant company in 1949 entered into an arrangement with B & M, a United States partnership, whereby appellant was to participate in a United States Army contract, herein called the York contract. Appellant was unable to provide the money agreed upon as its share of the necessary capital to carry out the York contract because of the refusal of the Foreign Exchange Control Board of Canada to permit the export of such money from Canada to the United States. In December 1950 B & M paid to appellant the sum of $225,000 in United States funds in consideration of its relinquishing any claim to any interest or right of profit participation it might have in the York contract. The respondent assessed appellant for income tax on the basis that such payment represented its share of the profits realized on the York contract. Appellant appealed to this Court.

Held: That since appellant's contribution of capital for the York contract depended on approval of the Foreign Exchange Control Board which approval was never obtained, and therefore appellant did not contribute any capital for the York contract nor participate in the management of the York contract or its re-negotiation and the payment to appellant was made before the profits from the York contract

had been fully determined, the payment was not income of the appellant derived from a business or income of appellant derived from any other source.

2. That the payment to appellant was not a transaction which resulted in a benefit being conferred on it by persons with which it was not dealing at arms length.

APPEAL under the Income Tax Act.

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

J. Ross Tolmie for appellant.

Harold W. Riley, Q.C. and *J. G. DeWolf* for respondent.

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

RITCHIE J. now (December 7, 1955) delivered the following judgment:

This is an appeal by National Paving Company Limited, hereinafter referred to as "the appellant company", from an income tax assessment in the amount of $112,012.68 made by the Minister of National Revenue in respect to its 1951 taxation year.

The objection of the appellant company to the assessment is that the Minister included in its taxable income an amount of $239,625, being the proceeds in Canadian funds of a payment of $225,000 in United States funds, received from Messrs. Bowen & McLaughlin, a United States partnership, in respect to a participation right in a United States Army contract for the rebuilding of 1300 tanks at York, Pennsylvania. The tank rebuilding contract hereinafter will be referred to as "the York contract".

The Minister contends the the $239,625 payment represents the appellant's share of the profits realized on the York contract.

The appellant company contends the payment is a capital receipt in consideration of which it relinquished any claim to any interest or right of profit participation it might have in the York contract.

The basic points in issue are, for the most part, questions of fact rather than of law.

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NATIONAL PAVING CO. LTD. v. MINISTER OF NATIONAL REVENUE

Ritchie J.

To understand the transaction forming the basis of the assessment from which this appeal is made it is desirable to have some understanding of the business and personal relationships of Mervin A. Dutton of Calgary, Reginald F. Jennings, of Calgary, John L. McLaughlin of Great Falls, Montana, O. W. McIntyre of Great Falls, and Truman Bowen of Phoenix, Arizona. It also will be helpful to refer to applications which Messrs. Dutton and Jennings and the appellant company made to the Foreign Exchange Control Board for approval of the purchase by Messrs. Dutton and Jennings of shares in the capital stock of the appellant company from Messrs. McLaughlin and McIntyre and the manner of dealing by the appellant company with United States funds it anticipated it might receive from the York contract.

Mr. Dutton is the president, a director and a shareholder of the appellant company.

Mr. Jennings is the secretary, a director and a shareholder of the appellant company.

Mr. McLaughlin is a general contractor, a partner in the firm of Bowen & McLaughlin and a former director and shareholder of the appellant company.

Mr. McIntyre is associated with Mr. McLaughlin in the contracting business and is a former shareholder and director of the appellant company but has no connection with the firm of Bowen & McLaughlin.

Mr. Bowen is a partner in the firm of Bowen & McLaughlin, a partnership having its headquarters in Phoenix, Arizona and in which Messrs. Bowen and McLaughlin are the only partners.

The business association of Messrs. Dutton, Jennings, McLaughlin and McIntyre, which dates back to at least 1947, has been successful and has resulted in close personal friendships developing among them.

So far as the evidence on the hearing of this appeal indicates, the first business dealings of Mr. Bowen with Messrs. Dutton and Jennings commenced in December, 1948 or January, 1949 when Mr. McLaughlin proposed that the York contract be handled as a joint venture on the basis of Bowen & McLaughlin being entitled to a two-thirds participation and the appellant company being entitled to a one-third participation.

Prior to 1947 Messrs. Dutton and Jennings were actively engaged on road construction work in the Province of Alberta and carrying on their principal activity through a company known as Standard Gravel and Surfacing of Canada Limited. Because in 1947 there was a scarcity in Canada of the kind of equipment required by Standard Gravel and Surfacing of Canada Limited for the most efficient handling of their contracts Messrs. Dutton and Jennings approached Mr. McLaughlin, who had the type of equipment they required, and proposed he make available to Standard Gravel and Surfacing of Canada Limited, on a basis satisfactory to him, certain equipment which he controlled. Mr. McLaughlin accepted the proposal on the condition that the equipment which he would cause to be furnished would be operated by a new company in which Messrs. Dutton, Jennings, McLaughlin and McIntyre each would hold one-fourth of the issued shares and which would pay rental for use of the equipment. Messrs. Dutton and Jennings accepted the condition imposed by Mr. McLaughlin and the appellant company was incorporated on April 15, 1947. The appellant company then leased equipment from McLaughlin Inc., one of the companies through which Mr. McLaughlin carried on his contracting activities. On the importation of the equipment into Canada, valuations for duty purposes were set by the Canadian Customs authorities.

Subsequent to incorporation and until December 20, 1950 Messrs. Dutton, Jennings, McLaughlin and McIntyre each held twenty-five of the one hundred outstanding shares of the capital stock of the appellant company.

In 1950 amendments to the Income Tax Act made it possible for the appellant company to elect to be assessed and pay a tax of 15% on an amount equal to its undistributed income on hand at the end of the 1949 taxation year and then make a tax-free distribution among its shareholders of the tax-paid surplus. The auditors of the company drew the Income Tax Act amendments to the attention of the company. Several conferences ensued between the auditors and Messrs. Dutton, Jennings, McLaughlin and McIntyre. Because any distribution of the tax-paid surplus would, under United States laws, be regarded as income in the hands of United States shareholders it was agreed

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that, to facilitate Messrs. Jennings and Dutton taking advantage of the Income Tax Act amendments, the fifty shares in the capital stock of the appellant company then held by Messrs. McLaughlin and McIntyre would be sold to Messrs. Dutton and Jennings for an aggregate consideration of $225,000.

Foreign Exchange Control Board approval of Messrs. Dutton and Jennings' purchasing fifty shares in the capital stock of the appellant company from Messrs. McLaughlin and McIntyre was sought by a letter (Exhibit 16) which counsel for the appellant company addressed to the board on December 22, 1950 and which states the $225,000 aggregate purchase price for one-half of the issued shares was based on an earned surplus of $405,219.56, plus an anticipated but undetermined profit, expected to accrue to the appellant company from the York contract, of at least $100,000, less the 15% tax under section 95A of the Income Tax Act.

Approval of the share purchase transaction was sought and granted by the Foreign Exchange Control Board on the basis that the $225,000 purchase price would be paid in three instalments of $75,000 immediately, $75,000 in 1951 and $75,000 in 1952 and that the payments would be deposited in a Canadian bank and used by Messrs. McLaughlin and McIntyre for participation with the appellant company or with Messrs. Dutton and Jennings in future Canadian contracts. Foreign Exchange Control Board approval was granted on December 22, 1950. The share transfers were completed forthwith. Messrs. McLaughlin and McIntyre then ceased to be directors and shareholders of the appellant company but, either personally or through a company controlled by them, continued to be associated with appellant company in the performance of Canadian contracts.

During the 1947 and 1948 contracting seasons the appellant company used and operated equipment owned by McLaughlin Inc. and for which it was charged rental.

On January 29, 1949 a remittance of $51,393.55, covering accumulated rental, less 15% withholding tax, was made to McLaughlin Inc. Foreign Exchange Control Board approval of this remittance had been obtained.

In 1948, the appellant company having acquired a cash position, it was decided it should purchase the equipment and so avoid payment of further rental. Foreign Exchange Control Board approval was sought and secured for the purchase of the equipment at the price of $145,191.63, which was computed on the basis of the Customs valuation. On April 2, 1949 the purchase price was remitted to McLaughlin Inc.

Under date of November 30, 1948 the firm of Bowen & McLaughlin secured from the Detroit Ordnance District of the United States Army the York contract, Exhibit 3, for the re-manufacture, modification and processing of 1300 tanks on terms estimated to work out on an average at $5,000 for each tank.

Bowen & McLaughlin decided it would be advantageous to have $200,000 capital in addition to the $400,000 they were themselves prepared to invest in the York contract so sought such capital from former associates in the United States. The United States associates approached demanded, as a condition of their making a capital contribution, that they should supply personnel and participate in the management of the contract, which demands were regarded by Bowen & McLaughlin as not acceptable. Bowen & McLaughlin then decided to offer a one-third participation in the York contract to the appellant company on the basis of the participation being limited to the supplying of $200,000 capital and being entitled to a one-third share of the profits. The exclusive management of the contract and the selection of the personnel employed would be left to Bowen & McLaughlin.

On December 27, 1948 Mr. McLaughlin telephoned to Mr. Jennings and offered the appellant company the one-third participation in the York contract on the terms above stated. Mr. Jennings accepted the participation offer, subject to permission for the export of the $200,000 being obtained from the Foreign Exchange Control Board. On the following day, December 28, 1948, Mr. McLaughlin confirmed the telephone conversation by a letter (Exhibit 4) addressed to the appellant company.

Mr. McLaughlin testified that in his telephone conversation with Mr. Jennings he enquired how long it would take

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to secure approval for the export of the $200,000 as Bowen & McLaughlin needed it badly. On Mr. Jennings' replying he thought the money should be available in a week or ten days, Mr. McLaughlin said the appellant company would be considered as participating in the contract and that he would endeavour to borrow the required $200,000 on his own account on a temporary basis. Mr. McLaughlin was successful in borrowing the $200,000 and caused it to be deposited in the York contract account.

Mr. McLaughlin is emphatic in asserting that he did not make an advance of $200,000 to the appellant company to cover its share of the capital required for the York contract and that the advance was a private accommodation on his part for the firm of Bowen & McLaughlin.

On the accounting records of the York contract the $200,000 was credited to Mr. McLaughlin, not to the appellant company.

The books of the appellant company in no way reflect the $200,000 which Mr. McLaughlin borrowed and paid into the revolving fund of the York contract.

Under date of January 7, 1949 Bowen & McLaughlin and the appellant company executed a formal joint venture agreement (Exhibit 2) in respect to the York contract. The joint venture agreement required the appellant company, prior to January 15, 1949, to contribute $200,000 to the joint venture revolving fund and provided that it should be entitled to one-third of the profits derived from the contract.

A supplemental agreement (Exhibit 7), entered into between Bowen & McLaughlin and the appellant company under date of April 15, 1949, makes clear that the appellant company is to make no contribution to the venture other than the financing capital of $200,000 and, as remuneration for such advance of capital, is to receive one-third of the net income after price re-determination by the Re-Negotiation Board of the United States government plus the return of its original capital when payment for the completed work has been received in full. The dating and wording of the supplemental agreement constituted a waiver of the non-compliance by the appellant company with the January 15, 1949 deadline for its capital contribution to the joint venture and for that deadline substituted an open end.

Following the December 27, 1948 telephone conversation the appellant company, through its bankers, made application for Foreign Exchange Control Board approval of the $200,000 investment in the York contract, but the bankers were not successful in obtaining the approval applied for. Messrs. Dutton and Jennings personally and Mr. J. Ross Henderson, the auditor for the appellant company, then assumed the task of securing the necessary approval and during 1949 and 1950 made several trips to Ottawa for interviews with the Foreign Exchange Control Board officials but also without success. Notwithstanding repeated refusals, Messrs. Dutton and Jennings refused to give up hope and until the end of 1950 continued to seek the required approval. No correspondence with the Foreign Exchange Control Board in relation to the application for permission to acquire the interest in the York contract was produced. Apparently the negotiations were verbal. The refusal of the management and auditors of the appellant company to regard as final the non-approval of the application by the Foreign Exchange Control Board was not unusual.

Throughout 1949 and 1950 Messrs. Dutton and Jennings would be in touch from time to time with Mr. McLaughlin in connection with their other business ventures and, whenever the subject of the York contract was mentioned, would assure him that, despite the long delay, they were confident approval for their participation in the York contract eventually would be granted. As Mr. Dutton put it, he was always hoping.

On August 19, 1950 Bowen & McLaughlin addressed a letter (Exhibit 8) to Messrs. Dutton and Jennings, saying, "As per instructions from Mr. Truman Bowen we enclose herewith our cheque #1893 in the amount of $100,000. This amount is being charged to your account." This letter is dated at Phoenix, Arizona and is signed by "Mary L. Baker, Office Manager." On August 28, 1950 the appellant company returned the $100,000 cheque with the request that it "be made payable to the National Paving Co. Limited, who are the signers of the original contract drawn between them and Mr. Bowen and Mr. McLaughlin." The request of the appellant company was complied with and a cheque

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for $100,000 forwarded to it on August 31, 1950. On September 8, 1950, Standard Gravel & Surfacing of Canada Limited wrote to Mr. W. McIntyre as follows:

> Please find enclosed herewith letter and a cheque received from Miss Baker in respect to National Paving Co. Limited. I think this should be held at your office until a further meeting of the directors is held to ascertain disposition of same.

The cheque never was cashed.

There is no clear-cut explanation of why the $100,000 cheque was issued by Bowen & McLaughlin to the appellant company. Apparently on August 28, 1950 both parties to the agreements of January 7 and April 15, 1949 were continuing to expect the appellant company to become a partner in the York contract.

It can be inferred that the appellant company returned the $100,000 cheque because it did not want to put itself in the position of having accepted United States funds on account of profits derived from a participation in a United States contract, approval of which had been refused by the Foreign Exchange Control Board but was still being sought. It also can be inferred that the $100,000 cheque tendered by Bowen & McLaughlin to the appellant company formed the basis of the reference to "an undetermined profit of at least an additional $100,000 accruing to the National Paving as at October 31, 1950 from the York, Pennsylvania deal" contained in the letter (Exhibit 16) which counsel for the appellant company addressed to the Foreign Exchange Control Board on December 22, 1950.

When Mr. Bowen's attention was directed to the $100,000 cheque sent the appellant company he said, "Well, to be honest, I did not know where I was at. I did not know where they were at. So I thought 'Well, by God, I will send a cheque and find out.' So I got the cheque back. I did not know their financial set-up."

While Messrs. Dutton and Jennings were positive the investment of $200,000 in the York contract would result in substantial profits being earned in United States dollars and open the way to participation in United States contracts on a far larger scale than was possible in Canada, the Foreign Exchange Control Board officials were more cautious and regarded the project as a risk venture from which a loss might result instead of a profit.

Because of the board adhering to their original refusal to grant approval of the appellant company exporting $200,000 to the United States or of it borrowing that amount of money in the United States, the appellant company never did provide the $200,000 capital it had undertaken to provide for the York contract.

The actual physical work on the 1,300 tanks covered by the York contract was completed about July, 1950 but shipments still were being made and discussions were being carried on with the Ordnance Department respecting re-negotiation and regarding an extension of the contract. Re-negotiation of the York contract was completed in March, 1951.

Towards the close of 1950, when it had become apparent an extension of the York contract or new tank rebuilding contracts would be forthcoming, Messrs. Bowen and McLaughlin examined the situation arising from their agreement to allow the appellant company a one-third participation in the York contract and the appellant company's failure to fulfil its obligation to furnish $200,000 capital. Mr. McLaughlin testified the firm of Bowen & McLaughlin were in a difficult and embarrassing position because neither the Ordnance Department nor the Army knew of their relationship with the appellant company and in order to negotiate a contract extension it was essential that full disclosure be made of all parties entitled to participation rights. Legal advice sought and obtained from the partnership attorneys was to the effect that Bowen & McLaughlin should have obtained United States Army permission before executing the participation agreement and that the appellant company might have a claim not only to participate in the profits arising from the York contract but in the profits earned from any extensions of that contract or in other contracts arising from it and of a like nature. The attorneys for Bowen & McLaughlin may have had regard to the elimination of the deadline date by which the $200,000 capital was to have been supplied by the appellant company.

Messrs. Bowen and McLaughlin once more discussed the situation, this time having particular regard to the opinion of their attorneys, and made a definite decision to offer the

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appellant company the sum of $225,000 for a complete surrender of any claim to participation rights in the York contract. Payment of $225,000 was regarded as justified because of probable extensions to the York contract. Mr. Bowen testified that the overall gross of the York and subsequent contracts of a like nature approximated $100,000,000.

On December 28, 1950 Mr. McLaughlin met Messrs. Dutton and Jennings at Great Falls, Montana. The situation in respect to the York contract and the inability of the appellant company to fulfil its capital commitment was discussed. On behalf of Bowen & McLaughlin, Mr. McLaughlin offered to pay the appellant company $225,000 in consideration of it surrendering any claim to participate in the York contract. The offer was quickly accepted. Mr. Dutton's testimony was that he was absolutely amazed because the appellant company had not lived up to its obligations and he did not consider it had any rights.

Under date of December 28, 1950 an agreement (Exhibit 19) was executed by the firm of Bowen & McLaughlin and by the appellant company. Under the terms of this agreement the appellant company, in consideration of $225,000, United States dollars, relinquished all its rights under the joint venture agreements of January 7, 1949 (Exhibit 2) and April 15, 1949 (Exhibit 7).

Following the execution of the December 28, 1950 agreement Bowen & McLaughlin immediately deposited $225,000 to the credit of the appellant company in the Great Falls National Bank at Great Falls, Montana, subject, however, to a stipulation that $50,000 would be held by the bank until approved for disbursement by Messrs. Bowen and McLaughlin. The $50,000 was held to protect Bowen & McLaughlin against any contingencies which might "arise in connection with the sale of the contract covered by the $225,000 consideration." The $50,000 was released about March, 1952. The United States government claimed no income tax from the appellant company in respect to the $225,000 payment. No withholding tax was paid by Bowen & McLaughlin.

The only witness called on behalf of the Minister was Jack J. Williams, a special agent for the Internal Revenue Service of the United States Treasury Department. Mr.

Williams testified that on June 23, 1955, accompanied by Mr. Robert D. A. Amos, the chief of the Treasury Intelligence Division, and by Canadian investigators, he, in the course of investigating the affairs of Bowen & McLaughlin, interviewed Mr. McLaughlin regarding the December, 1950 payment of $225,000 to the appellant company. Mr. Williams says Mr. McLaughlin told him the $225,000 payment represented a distribution of the profit on the York contract. Mr. Williams also testified that on the question of the contribution of capital by the appellant company to the New York contract Mr. McLaughlin was a little vague as to how the capital had been contributed but assured him the contribution had been made and suggested he discuss it with Mr. McIntyre, who looked after his financial affairs and would have the answer.

Mr. Williams says Mr. McIntyre, who was interviewed by him and the other investigators on June 27, 1955, confirmed the $225,000 was a distribution to the appellant company of its share of the profits realized from the York contract and told him specifically that the appellant company had contributed the $200,000 capital to the York contract by making payments to Mr. McLaughlin on equipment and thereby making available to Mr. McLaughlin the $200,000 required for the York contract. On cross-examination Mr. Williams was not so specific as to the manner in which the contribution had been made.

Mr. Williams also testified that Mr. McIntyre told him the profit distribution on the York contract was handled as a contract purchase on the books of Bowen & McLaughlin because the appellant company wanted it that way in order to obtain a tax benefit in Canada.

I attach little weight to the evidence of Mr. Williams. Positive statements by Mr. Williams on direct examination became indefinite and vague when subjected to cross-examination.

Regardless of what Mr. McLaughlin may or may not have told Mr. Williams in the course of a United States Treasury investigation into the affairs of Bowen & McLaughlin, we have Mr. McLaughlin's sworn testimony that while, until pretty well into the York contract, he and Mr. Bowen expected the appellant company would become a partner in the venture, they were compelled to

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adopt a different status when they realized the capital commitment of the appellant company could not be fulfilled.

As against Mr. McIntyre's alleged statement to Mr. Williams that the $225,000 payment was a distribution of profits we have Mr. McLaughlin's testimony at page 65 of the transcript:

Q. What is that you say, National Paving were not on the bond?

A. They were not on the bond. They were not to supply any talent to do the work, and they were not named in the contract that we had. We were in a rather embarrassing position. We could not go to the Army and get a change of contract nor any addition. Our submission was already made, we could not change the position at all. We thought we would clear our house and put it in order and pay off our associates and there was no scientific way of declaring what their, what we owed them. It was an arbitrary figure. It was a nuisance value figure. That probably is not the right word. But it was not on the basis of scientific declaration in accordance with the principles of our contract agreement. It was just a figure we picked out of the air, and we cleaned our skirts and we felt that was the honourable thing to do under the circumstances.

Q. Now did you feel that it was also a good thing to clear up any implied promise or implied situation for National Paving Company coming into subsequent contracts with the Ordinance Department?

A. Well, our attorney advised us they could have followed through. Ordinarily in our country it is common practice in the construction industry, or any groups of association, when they receive a contract and there is a continuation of it, it is common practice to have your associates in your first contract persist with the remaining contracts. That is very common. We have been in many instances in our contracts with other people, we have always been included. We wanted to get this thing cleared away as far as these boys were concerned, and that is one of the reasons we made that liberal contribution.

In contradiction of Mr. Williams' testimony as to the manner of contribution of capital by the appellant company we have, at page 60 of the transcript, Mr. McLaughlin's testimony regarding his December 27, 1948 conversation with Mr. Jennings:

. . . I asked him, as I remember it, how long would it take him to get this money to us because we needed it very badly. We were already under way in the performance of our contract. He felt, as I remember, he just picked this time out of the air, a week or ten days at the outset. I agreed with him over the 'phone they would be considered as participants in the contract and that I would see what I could do to secure, to borrow this $200,000 from the bank on my own account on a temporary basis, which I was successful in being able to do, and I so notified Mr. Jennings.

And at page 61:

Q. MR. TOLMIE: While we are on that point, Mr. Henderson testified a few moments ago that that temporary advance by you to Bowen & McLaughlin of $200,000 capital, which you hoped National would be able

to provide, was that ever treated as an advance in Bowen & McLaughlin of the National contribution to the capital of Bowen & McLaughlin?

A. No. It was a private accommodation on my part. Bowen & McLaughlin did not borrow this money. I prevailed on a banker friend of mine to supply us with these funds on a temporary basis.

As against the not precise statements of Mr. Williams on cross-examination, that Mr. McIntyre told him the capital contribution of the appellant company was made by making payments on account of equipment to "either Mr. McLaughlin personally, or McLaughlin Inc. or McLaughlin—", we have the very precise statement of Mr. J. Ross Henderson, a chartered accountant and a member of the accounting firm who in 1950 were the auditors of the appellant company, as to how the equipment transactions were handled. Mr. Henderson's testimony was that the appellant company rented equipment from McLaughlin Inc. in 1947, that the remittance of $51,393.55 made to that company on January 29, 1949 was in payment of accrued rental and the remittance of $145,191.63 on April 2, 1949 was the purchase price of the equipment previously rented. The consideration for each remittance in respect to equipment was earmarked very definitely and was approved by the Foreign Exchange Control Board. The equipment remained in Canada and became an asset owned wholly by the appellant company.

Mr. McIntyre in June 1955 was not a director or shareholder of the appellant company and there is nothing in the evidence on the hearing of the appeal that indicated he has had any connection with it since 1950.

That Mr. McIntyre had no authority to speak for Bowen & McLaughlin is made very clear by Mr. Bowen's testimony at page 83:

Q. MR. TOLMIE: Can you tell us . . .

A. Well, as far as McIntyre was concerned, I want this very straight. He has nothing to do with Bowen & McLaughlin, he never has had, and as far as I am concerned he never will. Now, is that plain?

Q. I was going to ask you that the next question. In your opinion, was Mr. McIntyre involved in the affairs of Bowen & McLaughlin?

A. Definitely he has not been for fifteen years. J. L. and I have been together, but he never has been, never on any deal in any shape or form.

Q. He worked for Mr. McLaughlin, did he?

A. That is right.

Q. But never for Bowen & McLaughlin?

A. Never.

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I am satisfied that whatever answers Messrs. McLaughlin and McIntyre made to the questions addressed to them by Mr. Williams were made having regard primarily to how such answers would affect the United States income tax position of Mr. McLaughlin. Mr. McIntyre was a third party having no direct connection with the appellant company or with the partnership of Bowen & McLaughlin.

On behalf of the Minister it was, in effect, submitted that the appellant company, notwithstanding the refusal of the Foreign Exchange Control Board to approve of it doing so, actually had become a partner in the York contract venture and so was in a position of being entitled to share in the profits and of being liable to contribute to the losses, if any, resulting from the contract.

As I see it the following seven facts negative the submission that the appellant company actually was a partner in the York contract.

1. The parties to both the joint venture agreement of January 7, 1949 and the supplemental agreement of April 15, 1949 agree that the obligation of the appellant company to provide $200,000 capital for the York contract was subject to it being able to obtain the approval of the Foreign Exchange Control Board. Such approval never was granted.
2. The appellant company did not contribute any capital for the York contract and had no part in the management of the contract.
3. The appellant company did not participate in and had no knowledge of the re-negotiation of the York contract.
4. Financial statements relating to the York contract were not made available for perusal on behalf of the appellant company nor by its auditors until after this appeal had been launched.
5. The United States income tax returns of Bowen & McLaughlin do not disclose any interest of the appellant company in the York contract.
6. The $225,000 payment was made to the appellant company prior to re-negotiation of the York contract and so a time when the profits from that contract had not been finally determined.

7. The United States government has not demanded any income tax from the appellant company and Bowen & McLaughlin paid no withholding tax in respect to the $225,000 payment.

I have had regard to section 125 (now section 137) (2) and (3) of the Income Tax Act as applicable to the 1951 taxation year of the respondent and have concluded the payment of $225,000 to the appellant company was not a transaction which resulted in a benefit being conferred on it by persons with which it was not dealing at arms length.

Regardless of any conflict, or seeming conflict, between the verbal evidence adduced at the hearing of the appeal and some of the representations made to the Foreign Exchange Control Board, by or on behalf of the appellant company or by or on behalf of Messrs. Dutton and Jennings, I am convinced the wording of the agreement entered into between Bowen & McLaughlin and the appellant company on December 28, 1950 correctly expresses not only the form but also the substance of the transaction it purports to record.

To find that the payment of $225,000 in United States funds, made to the appellant company by Bowen & McLaughlin, was made in the course of distributing the profits earned on the York contract and represents the share of such profits that the appellant company was entitled to, I must disbelieve the evidence of Messrs. Dutton, Jennings, Bowen and McLaughlin. That I am not prepared to do. Messrs. Dutton, Jennings, Bowen and McLaughlin all are, in my opinion, blunt but truthful. I accept their evidence as to the true nature of the transaction. I am satisfied that if the transaction had been in the nature of a distribution of profits Messrs. Dutton and Jennings would have required the production of financial statements.

That Messrs. Dutton and Jennings believed they had no legally enforceable claim to participate in the York contract does not detract from the bona fides of the agreement they executed on December 28, 1950. Messrs. Bowen & McLaughlin based their offer to pay $225,000 for a surrender of any claim for participation on an opinion

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of counsel that, as Mr. McLaughlin summarized it, the appellant company "could have followed through" and "it would be proper to make a settlement." The door for the appellant company to come in had been kept open for too long. It was good business to close it.

The amount of the settlement may seem large but it is a figure fixed by Messrs. Bowen & McLaughlin to secure a quick settlement and put an end to a worrisome situation. Having regard to the gross amount of approximately $100,000,000 to which continuations of the York contract ultimately ran, the $225,000 figure may not be out of proportion.

The fact that the $225,000 payment approximates one-third of the estimated profit on the York contract in December, 1950 does not make it income. Likewise the fact that the existence of an especially friendly relationship between the parties may have influenced the amount of the payment does not change its character.

The appellant company has satisfied the onus of establishing that the assessment is in error. The payment of $225,000 in United States funds, which was the equivalent of $239,625 in Canadian funds, was not income of the appellant company derived from a business or income of the appellant company derived from any other source.

The appeal will be allowed with costs, to be taxed.

The assessment will be set aside and the matter referred back to the Minister for re-assessment on the basis of the amount of $239,625 not being included in the 1951 taxation year income of the appellant company.

Judgment accordingly.

BETWEEN:

1955
Oct. 11 & 12
Dec. 9

GORDON CHUTTER ..... APPELLANT;

AND

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

Revenue—Income Tax—The Income Tax Act, R.S.C. 1952, c. 148, s. 3, 4, 139(1)(e)—"Business"—Profit or capital gain—Isolated transaction—Profit on isolated transaction subject to income tax—Appeal dismissed.

Appellant purchased four engines and resold them at a profit. Appellant's sole occupation is that of manager of a company manufacturing wire rope. Appellant was assessed for income tax on the profit realized from the sale of the engines and appealed to this Court. He contends that the engines were purchased for re-sale and not for use and that the profit is a capital gain the transaction being an isolated one.

Held: That the purchase of the engines cannot be regarded as an ordinary investment; they were purchased for the purpose of re-sale at a profit and not for the purpose of deriving any income through the leasing or rental of them; the transaction was a deal in machinery and constituted an adventure in the nature of trade or business and the profit is a gain made through an operation of business in the course of carrying out a scheme for profit making and attracted income tax.

APPEAL under the Income Tax Act.

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

Harry R. Bray, Q.C. for appellant.

F. J. Cross for respondent.

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

RITCHIE J. now (December 9, 1955) delivered the following judgment:

This is an appeal from a reassessment made by the Minister of National Revenue on October 6, 1954 in respect to the income of Gordon Chutter of Vancouver for the 1952-1953 taxation years.

The appellant objects to the reassessments because a receipt amounting to $26,917.21, resulting from a sale of machinery, is added to 1952 income and a receipt amounting to $1,468.21 added to 1953 income.

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The appellant, during the taxation years in question and in subsequent years, has had no occupation other than that of managing director of Wright's Canadian Wire Ropes, Limited, a company engaged in the manufacture and sale of wire rope. Apart from the transaction on which is based the assessment appealed from, the appellant has had no dealings in machinery.

On March 30, 1951, the appellant purchased from Dulien Steel Products Inc., a United States corporation carrying on business at Seattle in the State of Washington, four used General Motors diesel engines, each weighing approximately twenty tons and having a horsepower of 1840 each. The aggregate purchase price for the four engines was $20,000.00. The cost in Canadian funds of the four engines landed in Canada was $29,614.58.

On April 19, 1951, the defendant entered into an agreement (Exhibit 1) to sell the four engines to General Machinery Limited of Vancouver for the sum of $65,000.00, payable by instalments, with the deferred payments carrying interest at five per cent. On or about January 31, 1952, the agreement was re-negotiated and the purchase price reduced to $58,000.00.

The appellant first learned of the engines through a Mr. Kaplan, who controls and is the manager of General Machinery Limited. Mr. Kaplan thought a profit could be made through purchasing the engines for re-sale and suggested to the appellant that he either loan him the money to purchase the engines or that they become partners in the transaction. The appellant declined the proposals made by Mr. Kaplan but became interested and about ten days later, accompanied by Mr. Kaplan, inspected the engines at Seattle and agreed to purchase them. The appellant says that he purchased the engines for re-sale and had no intention of using them.

Sections 3, 4 and 139 (1) (*e*) of the Income Tax Act read as follows:

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

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

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 Minister contends that the profit realized from the sale of machinery was income from a business. The appellant denies that he was in the business of buying and selling machinery and says the profit realized was in the nature of a capital gain and so not taxable. Stress also was laid on the fact that the machinery transaction was an isolated one.

Application of the isolated transaction test alone for the purpose of determining whether a profit realized from one purchase and one sale is liable to income tax is neatly dealt with by the President of this Court in *Atlantic Sugar Refineries Limited* v. *Minister of National Revenue* (1) at page 630:

> There remains the contention that the appellant's gain was not taxable income because it was not income from any trade and because its venture was an isolated transaction outside its normal business operations and unconnected therewith. The appellant cannot escape liability merely by showing that its entry into the raw sugar futures market was an isolated transaction. While it is recognized that as a general rule an isolated transaction of purchase and sale outside the course of the taxpayer's ordinary business does not constitute the carrying on of a trade or business so as to render the profit therefrom liable to income tax—*vide Commissioners of Inland Revenue* v. *Livingston et al.* (1926) 11 T.C. 538 at 543, per Lord Sands; *Leeming* v. *Jones,* [1930] 1 K.B. 279; [1930] A.C. 415; it is also established that the fact that a transaction is an isolated one does not exclude it from the category of trading or business transactions of such a nature as to attract income tax to the profit therefrom. There are numerous expressions of opinion to that effect—*vide Californian Copper Syndicate* v. *Harris,* (1904) 5 T.C. 159; *T. Beynon and Co., Limited* v. *Ogg,* (1918) 7 T.C. 125 at 133; *McKinley* v. *H. T. Jenkins and Son, Limited,* (1926) 10 T.C. 372 at 404; *Martin* v. *Lowry,* (1925) 11 T.C. 297 at 308, [1926] 1 K.B. 550 at 554, [1927] A.C. 312; *The Cape Brandy Syndicate* v. *Commissioners of Inland Revenue,* (1920) 12 T.C. 358; *Commissioners of Inland Revenue* v. *Livingston,* (1926) 11 T.C. 538; *Balgownie Land Trust, Ltd.* v. *Commissioners of Inland Revenue,* (1929) 14 T.C. 684 at 691; and *Anderson Logging Co.* v. *The King,* [1925] S.C.R. 45 at 56.
>
> Whether the gain or profit from a particular transaction is an item of taxable income cannot, therefore, be determined solely by whether the transaction was an isolated one or not.

(1) [1948] Ex. C.R. 622.

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And at page 633:

> While it may not be possible to define the line between the class of cases of isolated transactions the profits from which are not assessable to income tax and that of those from which the profits are so assessable more precisely than in the tests referred to, it is clear that the decision cannot be made apart from the facts. The character or nature of the transaction must be viewed in the light of the circumstances under which it was embarked upon and the decision as to the side of the line on which it falls made after careful consideration of its surrounding facts.

The judgment of the President was affirmed by the Supreme Court (1).

The often-made contention that because a profit realized on the purchase and sale of an article is an isolated case it is not subject to taxation also is dealt with in the judgments of my brother Cameron in *McDonough* v. *The Minister of National Revenue* (2) and of Lord Radcliffe in *Edwards* v. *Bairstow* (3).

At page 312 in the *McDonough* v. *The Minister of National Revenue* case *(supra)* Cameron J. said:

> But the mere fact that a transaction is an isolated one does not exclude it from the category of trading or business transactions of such a nature as to attract income tax to the profit therefrom.

At page 58 in the *Edwards and Bairstow* case *(supra)* Lord Radcliffe said:

> There remains the fact which was avowedly the original ground of the commissioners' decision—"this was an isolated case". But, as we know, that circumstance does not prevent a transaction which bears the badges of trade from being in truth an adventure in the nature of trade. The true question in such cases is whether the operations constitute an adventure of that kind, not whether they by themselves, or they in conjunction with other operations, constitute the operator a person who carries on a trade. Dealing is, I think, essentially a trading adventure, and the respondents' operations were nothing but a deal or deals in plant and machinery.

The purchase and re-sale of the four engines by the appellant bear the badges of trade. The purchase cannot be regarded as an ordinary investment. The engines were purchased for the purpose of re-sale at a profit and not with any thought of deriving any income through the leasing or rental of them. The transaction was a deal in machinery.

(1) [1949] S.C.R. 706. (2) [1949] Ex. C.R. 300.
(3) [1955] 3 All E.R. 48.

The circumstances surrounding the purchase and re-sale of the engines fall clearly within the well-known rule enunciated by the Lord Justice Clerk (Macdonald) in *Californian Copper Syndicate* v. *Harris*, (1).

It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax.

What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

The words of Lord Radcliffe at page 58 in the report of *Edwards* v. *Bairstow* (*supra*) also have particular application:

If I apply what I regard as the accepted test to the facts found in the present case, I am bound to say, with all respect to the judgments under appeal, that I can see only one true and reasonable conclusion. The profit from the set of operations that comprised the purchase and sales of the spinning plant was the profit of an adventure in the nature of trade. What other word is apt to describe the operations? Here are two gentlemen who put their money, or the money of one of them, into buying a lot of machinery. They have no intention of using it as machinery, so they do not buy it to hold as an income-producing asset. They do not buy it to consume or for the pleasure of enjoyment. On the contrary, they have no intention of holding their purchase at all. They are planning to sell the machinery even before they have bought it. And, in due course, they do sell it, in five separate lots, as events turned out. And, as they hoped and expected, they make a net profit on the deal, after charging all expenses such as repairs and replacements, commissions, wages, travelling and entertainment and incidentals, which do, in fact, represent the cost of organising the venture and carrying it through.

(1) (1904) 5 T.C. 159.

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I find that the appellant's purchase of the four engines and their re-sale at a profit constituted an adventure in the nature of trade or business and that the profit is a gain made through an operation of business in the course of carrying out a scheme for profit making.

The appeal will be dismissed with costs.

Judgment accordingly.

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Sept. 29 & 30, Oct. 1

Dec. 12

BETWEEN:

RICHARD L. REESE, CHARLES G. RENTON, JOHN LEWIS, WILLIAM J. HARPER, LUTHER A. LARSEN, Executor of the Will of Andrew Liddle, RODERICK LEWIS, PETER MacDONALD, LUTHER A. LARSEN, FLORENCE J. NICHOLAS, HARRY L. BAILEY, HELEN CHRISTINA BEATON, Executrix of the Will of Daniel Beaton, WILLIAM KERR and WILLIAM STOUTENBERG ..... SUPPLIANTS,

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—The Soldier Settlement Act, S. of C. 1919, c. 71 —Land purchased from Soldier Settlement Board—Action for declaration that suppliants entitled to transfer of mineral rights—No order-in-council authorizing transfer—Employee of Crown cannot bind Crown in absence of authority of order-in-council.

Suppliants purchased land from the Soldier Settlement Board and after payment for same received title to the land subject to a reservation of mines and minerals by the board. Title to such lands had been acquired by the board from the Bobtail Band of Indians and the land was known as the Bobtail Reserve. The order-in-council which ordered transfer of the land to the board made no reference to mineral rights being reserved. The letters patent conveying the land to the board contained no reservation other than that of water rights.

A news release issued by the Department of Veterans' Affairs stated that veterans under the Soldier Settlement Act of World War I who had completed or did complete their contracts would be granted mineral rights on their properties in all cases where the Soldier Settlement Board acquired those rights with title to the land.

Subsequent to this certain correspondence had between the suppliants and the solicitor for the board resulted in the suppliants filing with the solicitor completed application forms for the mineral rights and remitting to him a fee which he had stated was required. In no case did this result in mineral rights being conveyed and suppliants now ask a declaration of the Court that such mineral rights be conveyed to them.

Held: That since the board's solicitor had no authority to bind the Crown no contract to transfer mineral rights pertaining to the Bobtail lands resulted from his correspondence with any of the suppliants.

2. That regardless whether the mineral rights in question are vested in the board or some other agency of the Crown or whether any trust in favour of the Indians attaches there must be order-in-council authority for their transfer and since there is no order-in-council authorizing the grant of the mineral rights to any of the suppliants they are not entitled to the relief claimed in their petition of right.

PETITION OF RIGHT asking transfer of mineral rights in certain land to suppliants.

The action was heard before the Honourable Mr. Justice Ritchie at Edmonton.

G. H. Steer, Q.C., A. M. Brownlee and *G. C. A. Steer* for suppliants.

Frank J. Newson, Q.C. and *P. M. Troop* for respondent.

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

RITCHIE J. now (December 12, 1955) delivered the following judgment:

This action was commenced by a petition of right filed on March 23, 1953 by Richard L. Reese and the twelve other above-named suppliants, all of whom are resident in the province of Alberta.

The suppliants, with the exception of Florence J. Nicholas, William Stoutenberg and Helen Christina Beaton, all served in Her Majesty's armed forces during the 1914-1918 World War I and are soldier settlers under the Soldier Settlement Act, originally enacted as chapter 21 of the Statutes of Canada, 1917.

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Florence J. Nicholas, William Stoutenberg and Helen Christina Beaton are respectively the personal representatives of Alphonse Louis Nicholas, Ernest Stoutenberg and Daniel Beaton, all deceased, who also were Soldier Settlement Act settlers. Luther A. Larsen petitions in his own right and also as the personal representative of Andrew Liddle, who was one of the original petitioners but died before the trial.

For brevity, the suppliants, other than Florence J. Nicholas, William Stoutenberg and Helen Christina Beaton, will be referred to collectively as "the soldier settlers", which expression also shall include the deceased settlers Alphonse Louis Nicholas, Ernest Stoutenberg, Daniel Beaton and Andrew Liddle.

Each of the soldier settlers entered into an agreement of sale with the Soldier Settlement Board, hereinafter referred to as "the board", under which, on the terms therein set out, he agreed to purchase, and the board agreed to sell, lands described therein and situate in Alberta. In each instance the lands dealt with were formerly part of what is generally known as the Bobtail Indian Reserve.

The purpose of the action is to obtain for the suppliants title to the mineral rights pertaining to the lands which the soldier settlers have purchased or have agreed to purchase from the board.

Those of the suppliants who have completed payment of the purchase price stipulated by their respective agreements of sale, have had title to the lands transferred to them but, in each case, subject to a reservation of mines and minerals by the board. All such transfers of title other than that to William Kerr have been registered in the appropriate Land Titles Office.

The Soldier Settlement Act, 1917, assented to on August 29, 1917 and hereinafter referred to as "the 1917 Act", was enacted by chapter 21 of the Statutes of Canada, 1917. The 1917 Act provided for the appointment by the Governor-in-Council of a board consisting of three commissioners, to be called "The Soldier Settlement Board." The 1917 Act did not contemplate the board acquiring land for resale to settlers but did provide for the board making loans to settlers so as to enable them, *inter alia,* to acquire lands

for agricultural purposes and for any settler recommended by the board receiving a grant of free entry to not more than 160 acres of Dominion lands reserved for the purposes of the Act.

Section 37 of the regulations, made under the 1917 Act, stipulated that a grant of soldier entry should not convey a right to salt, coal, petroleum, natural gas, gold, silver, copper, iron or other minerals within or under the land covered by such entry.

On February 11, 1919, the Governor-in-Council adopted P.C. 299, which, after reciting that many applications had been made and many others would be made to the Soldier Settlement Board for land for soldier settlement and that Dominion-owned lands available and suitable and within reasonable distance of marketing facilities would not be sufficient to satisfy the applications, authorized the board, for so long as, pursuant to the War Measures Act, 1914, the order might lawfully endure, or until the Parliament of Canada should otherwise provide, to acquire lands suitable for the purposes of soldier settlement and to sell to settlers any lands so acquired.

At the 1919 session of Parliament there was enacted The Soldier Settlement Act, 1919 (Statutes of Canada, 1919, chapter 71), hereinafter referred to as "the 1919 Act" and to which assent was given on July 7, 1919. Provisions of the 1919 Act which are relevant to the matters herein at issue are contained in sections 4(1), 4(3), 10, 16(*a*), 16(*b*), 20, 57 and 64.

4. (1) For the purposes of acquiring, holding, conveying, and transferring, and of agreeing to convey, acquire or transfer any of the property which it is by this Act authorized to acquire, hold, convey, transfer, agree to convey or agree to transfer, but for such purposes only, the Board shall be and be deemed a body corporate, and as such the agent of the Crown in the right of the Dominion of Canada. Any and all property acquired by the Board shall, upon acquirement, vest in the Board as such body corporate; but these provisions shall not in any wise restrict, impair or affect the powers conferred upon the Board, generally, by this Act, nor subject it to the provisions of any enactment of the Dominion or of any province respecting corporations, nor require of it, in the keeping of its records, any segregation of its corporate from its non-corporate acts.

(3) All documents which require execution by the Board in its corporate capacity shall be deemed validly executed if the seal of the Board is affixed, and the name of one of the commissioners is signed, by such commissioner thereto, the whole in the presence of one other person who has subscribed his name as witness; and every document which purports to be impressed with the seal of the Board and to be sealed and signed in

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the presence of a witness by a commissioner on behalf of the Board shall be admissible in evidence in all courts in Canada without proof of such seal or of such sealing or signing.

10. The Board may acquire from His Majesty by purchase, upon terms not inconsistent with those of the release or surrender, any Indian lands which, under the *Indian Act,* have been validly released or surrendered.

16. The Board may sell, or dispose of, and, upon full payment made, may convey, to settlers, any lands granted, conveyed or transferred to or acquired by it, or which it may have power to sell or dispose of, but subject in every case of sale of lands acquired by purchase, whether by agreement or compulsorily, to the following provisions:—

(*a*) Where the parcel to be sold has been separately acquired the sale price shall be the cost of the parcel to the Board;

(*b*) Where the parcel to be sold has been acquired as portion of one or more other parcels the sale price shall be such amount as in the opinion of the Board, bears the same proportion of the cost of the entire parcel or parcels so acquired as the value of the parcel to be sold bears to the value of the parcel or parcels so acquired;

20. Subject to the provisions of section fifteen of this Act as to soldier grants of Dominion lands, the Board shall deal with and dispose of all Dominion lands, Indian lands or school lands granted or otherwise conveyed or transferred to it pursuant to sections six, ten and eleven of this Act as nearly as may be as if such lands were private lands acquired by it by way of purchase, but the sale price of such lands shall be such as is approved by the Governor in Council.

57. From all sales and grants of land made by the Board all mines and minerals shall be and shall be deemed to have been reserved, whether or not the instrument of sale or grant so specifies, and as respects any contract or agreement made by it with respect to land it shall not be deemed to have thereby impliedly covenanted or agreed to grant, sell or convey any mines or minerals whatever.

64. (1) *The Soldier Settlement Act, 1917,* is repealed, but notwithstanding, all officers and employees of the Board are continued in office and employment as if such repeal had not been had, all entries granted and loans made pursuant thereto shall, unless otherwise determined by the Board, remain subject to the terms and conditions on which such entries or loans were granted or made, and the Loan Regulations and Regulations affecting Dominion Lands made and approved under the said Act, shall, respectively, remain operative until lawfully repealed or amended.

(2) All matters instituted or things done under authority of,—

(*a*) *The Soldier Settlement Act, 1917;* or,

(*b*) any regulations made thereunder; or,

(*c*) any order of the Governor in Council;

which might have been instituted or done under authority of this Act (though instituted or done before this Act was passed), shall, at the option of the Board, be deemed to have been instituted or done under authority of this Act, and any thereof which are now pending or in progress shall, at the option of the Board, be deemed to have originated under this Act and may be continued, completed and enforced hereunder.

While the 1919 Act, as carried into chapter 188 of the Revised Statutes of Canada, 1927, does not contain the section 64 wording above referred to, Appendix 1 to the 1927 revision, states at page 34, Volume 5, that section 64 of the 1919 Act had neither been repealed nor consolidated.

The Soldier Settlement Act is not contained in the Revised Statutes of Canada, 1952 but is shown in Appendix 1, at page 14 of Volume 6, as not repealed and not consolidated.

Because the lands which the soldier settlers agreed to purchase and which are involved in this section all are situate in the province of Alberta and all formerly formed part of an Indian reserve generally known as, and hereinafter referred to as, the Bobtail Reserve, reference is necessary to the procedure by which the board acquired title to such lands.

Under date of June 12, 1909, the Chief and Principal Men of the Bobtail Band of Indians, acting for and on behalf of the whole people of the Band in Council assembled, surrendered and conveyed the 31.5 square miles comprising the Bobtail Reserve to His Majesty the King,

in trust to dispose of the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people and upon the following conditions, viz:—

That ten square miles approximately shall be allotted to the Montana Band as a Reserve for the Band immediately South of the Battle River in the Eastern portion of the Reserve.

That the portion of the Reserve north of the Battle River contained in Township 44 in Range 24 and Township 43 in Range 24, West of the 4th Meridian, shall be joined to Samson's Reserve hereafter to form part of the said Reserve.

That the remainder of the Reserve shall be sold.

AND upon the further condition that all moneys received from the sale thereof shall be administered as follows:—

1. The usual percentage shall be deducted for management.

2. Twelve and a half per cent of the estimated value at Eight Dollars per acre shall be distributed share and share alike to ourselves and the members of the following Bands of Indians associated with us in the Hobbema Indian Agency, viz:—Samson's, Ermineskin's, Muddy Bull's, and Montana's, no member of the four last mentioned Bands to receive more than Twelve Dollars, and the sum remaining after such per capita division to be divided equally between us the members of Bobtail's Band.

3. The balance shall be placed to the credit of Samson's and Ermineskin's Bands' trust funds pro rata of our membership in the said Bands upon condition that we are received into full membership with the said Bands to share equally with them in their lands and moneys.

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4. That the interest on that part of the capital of Ermineskin's and Samson's Bands accruing from the sale of the said Reserve shall be paid in cash.

On July 29, 1909 by order-in-council P.C. 1674, the surrender of the Bobtail Reserve was accepted by the Governor-in-Council and authority given for the lands to be disposed of by the Superintendent General of Indian Affairs in the best interests of the Indians concerned, without reference to the Land Regulations of the Department of Indian Affairs, as established by order-in-council of September 15, 1888.

On October 22, 1919, three months after the 1919 Act had been assented to, the Governor-in-Council adopted order-in-council P.C. 2168, which

(*a*) recites the Soldier Settlement Board has made application to the Department of Indian Affairs for the 6619.50 acres of the Bobtail Indian Reservation which had been surrendered for purposes of sale on June 12, 1909 and the surrender of which had been accepted by the Governor-in-Council on July 29, 1909;

(*b*) recites the Superintendent General of Indian Affairs had reported agreement on a valuation of $79,862 for the 6619.50 acres had been determined by the Department and the board and that the provisions of the Indian Act and of the Soldier Settlement Board had been complied with; and

(*c*) orders that the 6619.50 acres of the Bobtail Reserve be transferred to the board.

P.C. 2168 makes no reference to mineral rights being reserved.

Considerable time elapsed before implementation of the P.C. 2168 direction to transfer the Bobtail lands to the board. By letters patent dated and with effect as of December 8, 1920 (Exhibit 5) and bearing the Great Seal of Canada, His Majesty in consideration of $79,862 paid by the board conveyed to it part of the Bobtail Reserve. Registration of the letters patent was not effected until nineteen months after the date as of which they were executed. The letters patent bear three notations, one stating they were received at the Land Titles Office in the city of Edmonton on July 3, 1922, a second stating they were received on July 7, 1923, and a third stating they were duly

entered and registered in the Land Titles Office for the North Alberta Land Registration District at ten o'clock A.M. on July 7, 1923.

The habendum clause contained in the letters is:

> TO HAVE AND TO HOLD for the purposes of the Soldier Settlement Act, 1919, the said lands hereby granted, conveyed and assured, unto the said the Soldier Settlement Board of Canada, it Successors and Assigns, forever, Saving, excepting and reserving, nevertheless, unto Us, Our Successors and Assigns, the free use, passage and enjoyment, of, in, over and upon all navigable waters that shall or may hereafter be found on or under, or be flowing through or upon, the said land hereby conveyed.

The letters patent contain no exception or reservation other than that of the water rights.

The exhibits indicate that at some departmental level, through a misapprehension, the words "and for no other purpose" have been read into the habendum of the letters patent.

Exhibit 51, a letter from the Minister of Veterans' Affairs to the suppliant Peter MacDonald, suggests the inclusion in the letters patent of the words "for the purposes of the Soldier Settlement Act, 1919, and for no other purposes" have the same effect as the inclusion of a specific reservation of the mines and minerals in favour of the Crown in the Right of the Dominion.

Exhibit 64, a letter addressed by the Superintendent, Securities Section of the Department of Veterans' Affairs to the suppliant Charles Renton states, "The Patent issued in the name of the Soldier Settlement Board by the Department of Indian Affairs contained a clause reading 'for the purposes of the Soldier Settlement Act 1919 and for no other purposes'."

The procedure adopted by the board in carrying out the provisions of P.C. 299 and the 1919 Act in respect to selling to soldier settlers land to which it had acquired title was to have each applicant complete a printed form of application for a loan to enable him to purchase the land and then, following approval of the loan application, complete a printed form of agreement for sale of land under which the board would agree to sell the land to the soldier settler and the soldier settler would agree to purchase the land from

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the board at the price and on the terms set out in the agreement. This procedure was followed in the case of each of the thirteen soldier settlers involved herein.

Exhibits A to L inclusive are twelve loan applications made to the board "under the terms of the Soldier Settlement Act, 1917" by Luther A. Larsen Andrew Liddle, Alphonse Louis Nicholas, Harry L. Bailey, Ernest Stoutenberg, Peter MacDonald, Richard L. Reese, Charles Renton, William J. Harper, Roderick Lewis, Daniel Beaton and William Kerr. The applications state the loans are desired for the purpose, *inter alia,* of acquiring for agricultural purposes, lands forming part of the Bobtail Reserve.

All of the twelve above-mentioned loan applications, with the exception of those made by Nicholas, Reese and Roderick Lewis, are dated November 19, 1919, more than four months after the 1919 Act became effective. The Nicholas application is dated December 1, 1919. The Roderick Lewis application is not dated but bears a rubber stamp suggestive of it having been examined by an employee of the board on November 24, 1919. The Reese application, dated May 19, 1919, is the only one which preceded the 1919 Act. The application made by John Lewis was not filed as an exhibit.

A printed form of application for loan was completed by each of the twelve above-named applicants. The reference to the loan applications being made under the 1917 Act is contained in the printed part of the form and, except in the case of Reese, is, in my opinion, a clerical mistake occasioned by use being made of a form prepared in use prior to the 1917 Act being repealed.

After the loan application of each of the thirteen soldier settlers was approved the board entered into an agreement of sale with each of them providing for sale by the board and purchase by the soldier settler of land which formerly had formed part of the Bobtail Reserve. The Reese agreement of sale was not filed as an exhibit so it is not apparent to me whether it, as well as his application for loan, antedated the 1919 Act.

Counsel for the Crown conceded the agreements of sale entered into between the board and all of the soldier settlers

concerned herein, with the exception of Ernest Stoutenberg and John Lewis, contained a paragraph numbered 13 and reading as follows:

13. This agreement of sale is given and received under the provisions of the Order in Council of the 11th of February, 1919, P.C. 299, and all the provisions of the said Order in Council and the Soldier Settlement Act, 1917, and any amendments now made or which may hereafter be made thereto, and of any Soldier Settlement Act of Canada hereafter passed which can or may be applicable hereto, shall apply to and form a part hereof as if actually incorporated and embodied herein and the Board and the Purchaser shall be entitled to the benefits and privileges conferred and subject to the duties and liabilities imposed by the said Order in Council, the Act and amendments thereto, or by any subsequent Act supplanting or supplementing the said Act.

This paragraph for convenience shall sometimes be referred to hereinafter as "paragraph 13".

The agreements for sale executed by Ernest Stoutenberg on May 29, 1920 and by John Lewis on April 24, 1922 in lieu of the wording contained in paragraph 13 of the eleven other agreements have a paragraph numbered 14, reading:

14. This agreement of sale is given and received under the provisions of The Soldier Settlement Act, 1919, and any amendments now made or which may hereafter be made thereto, and of any Soldier Settlement Act of Canada hereafter passed and of any regulations made or which may be made under any Soldier Settlement Act of Canada which can or may be applicable hereto, shall apply to and form a part hereof as if actually incorporated and embodied herein and the Board and the Purchaser shall be entitled to the benefits and privileges conferred and subject to the duties and liabilities imposed by the said Act and amendments thereto, or by any subsequent Act supplanting or supplementing the said Act or by any regulations made under such Act.

As in the case of the forms used for the loan applications, it is my opinion inclusion of paragraph 13 in eleven of the agreements of sale was a clerical mistake occasioned by use being made of a form which had become obsolete.

In late December, 1948 or early January, 1949 the Department of Veterans' Affairs issued News Release No. 321, (Exhibit 43), which was carried in a number of Canadian newspapers. The news release was to the effect that the Honourable Milton F. Gregg, V.C., then Minister of Veterans' Affairs, and the Honourable J. A. MacKinnon, then Minister of Mines and Resources, had announced that veterans settled on the land, under the Soldier Settlement Act of World War I, who had completed or did complete their contracts would be granted mineral rights on their properties in all cases where the Soldier Settlement Board

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acquired those rights with title to the land. The news release stressed that a somewhat lengthy search of title would be involved before the matter of sub-surface rights could be finally determined.

Subsequent to the public announcement by the two Ministers of the Crown that mineral rights were to be conveyed to the soldier settlers, L. S. Cutler, the district solicitor for the board at Edmonton, addressed letters to the soldier settlers in that area who had paid out their loans and to whom transfers of title had been made.

Mr. Cutler's letters advised the soldier settlers that "a recent order-in-council" provided for them obtaining title to such mineral rights as were vested in the Directors of Soldier Settlement and advised that if the soldier settler wished to apply for such mineral rights an enclosed form of application should be completed and a fee of $25 remitted. In some of his letters Mr. Cutler indicated the addressee was entitled to the mineral rights.

Most of the suppliants completed the form of application for mineral rights with which Mr. Cutler furnished them and remitted the $25 fee. In no case, so far as the record herein shows, did the filing of the application form result in mineral rights being conveyed to any soldier settler who had purchased Bobtail lands.

In view of the stress which counsel for the suppliants placed on the correspondence conducted by Mr. Cutler with the soldier settlers or their representatives, I shall deal with it in more detail than is necessary to dispose of the petition.

On behalf of six of the suppliants, MacDonald, Larsen, Nicholas, Bailey, Stoutenberg and John Lewis, it was contended, with special emphasis, by counsel for the suppliants that there could be no doubt the correspondence with Mr. Cutler had resulted in the formation of contracts calling for conveyance of the mineral rights to them.

[The learned judge here refers to the correspondence and continues:]

Nine principal submissions were made on behalf of the suppliants:

1. That the letters patent (Exhibit 5), issued under date of December 8, 1920, conferred on the board title to the mineral rights pertaining to the lands surrendered

by the Bobtail Indians and that such title is absolute and not subject to any trust in favor of the Indians.

2. That there is nothing in the 1917 Act nor in the Order in Council P.C. 299, adopted on February 11, 1919, which precludes the board from purchasing mines and minerals nor from selling mines and minerals.

3. That the 1919 Act contemplates the board acquiring title to mines and minerals as otherwise there would be no reason for including wording such as contained in section 57, which states that from all sales and grants of land made by the board all mines and minerals shall be deemed to have been reserved.

4. That the agreements of sale entered into with eleven of the soldier settlers are expressed to be under the provisions of P.C. 299 and the 1917 Act which contain no provision calling for an exception or reservation of mines and minerals on a sale to a soldier settler so that, under the terms of their agreements of sale, the mineral rights should be transferred to those eleven settlers.

5. That the 1919 Act has no application to the eleven agreements of sale expressly stated to have been entered into pursuant to P.C. 299 and the 1917 Act.

6. That Mr. Cutler's letters to the soldier settlers were offers to convey mineral rights to them and that delivery of the completed application forms and the remittances of the $25 fee by the settlers were, in the cases of Larsen, MacDonald, John Lewis, Nicholas, Bailey and Stoutenberg, acceptances of the offers and so resulted in the creation of binding contracts.

7. That in respect to Ernest Stoutenberg and John Lewis, whose agreements of sale are expressly stated to be under the 1919 Act, the board, under section 16(*b*) of the 1919 Act has authority to convey, and should convey, the mineral rights to them.

8. That the suppliant Kerr, who refused to register his transfer, is entitled under the terms of the agreement of sale and the letter (Exhibit 86) which Mr. Cutler addressed to him on October 13, 1953, to have the mineral rights conveyed to him.

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9. That the references by Mr. Cutler in his letters to the soldier settlers to "a recent order-in- council" which provided that soldier settlers could obtain title to the mineral rights if vested in the Director of Soldier Settlement was proof of the existence of such an order-in-council.

The fact that eleven of the agreements of sale executed by the soldier settlers are expressed to have been given and received under P.C. 299 and that all of the provisions of P.C. 299 and the 1917 Act and any Soldier Settlement Act passed after the date of any such agreement does not preclude the application of the provisions of the 1919 Act to those agreements.

The authority of the board under P.C. 299 to acquire lands for the purpose of re-sale to soldier settlers endured only until such time as "the Parliament of Canada should otherwise provide." Parliament did, on the enactment of the 1919 Act, otherwise provide. The authority conferred on the board by P.C. 299 lapsed on the 1919 Act coming into effect.

Section 64 of the 1919 Act which repealed the 1917 Act did not give the board an option to elect to proceed under the 1917 Act notwithstanding the enactment of the 1919 Act. Section 64 did provide that matters which had been instituted or done by the board prior to the 1919 Act coming into effect, under either the 1917 Act or under any order-in-council could, at the option of the board, be deemed to have been instituted or done under the authority of the 1919 Act, if the 1919 Act contained authority for the instituting or doing of such matters. The board had the right to bring under the 1919 Act matters which had been instituted or done under the 1917 Act or under P.C. 299. After the 1919 Act was effective the board could not elect to do or institute any matter under the 1917 Act or under P.C. 299.

Use by the board in dealing with eleven of the soldier settlers, of an obsolete printed form of agreement of sale containing paragraph 13 did not revive the 1917 Act and P.C. 299.

The agreements of sale executed by all thirteeen soldier settlers are subject to section 57 of the 1919 Act. The board

cannot be deemed to have impliedly covenanted or agreed to grant, sell or convey mines or minerals to any of the suppliants.

I shall deal next with the submission that binding contracts for the transfer of mineral rights arose from the Cutler correspondence.

In *Mercereau* v. *Swim* (1) White J. said at page 523:

> I know of no mode, apart from special statutory authority, by which the Crown can convey land otherwise than by its grant under the Great Seal. By statute in this province, the Minister of Lands and Mines may grant license to cut timber, and may, in some other respects, deal with Crown land, but I know of no authority which would authorize either the Minister, or his Deputy, to alienate property of the Crown, as it is claimed has been done, by the writing of this letter.

The words of White J., though spoken in respect to lands held by the Crown in the right of a province, seem particularly applicable to the submission in respect to the Cutler correspondence.

Another case that has particular application to the Cutler correspondence and other happenings upon which the suppliants found their petition is that of *Fitzpatrick* v. *The King* (2), in which Mulock C.J.O., delivering the unanimous judgment of the court, said at page 340:

> Crown lands can be alienated only with the approval of the Lieutenant-Governor, usually signified by his signing his name to an instrument which later becomes the patent. The decision of the Minister in favour of the issuing of a patent to Crown lands is merely an intimation that he will recommend such issue, but it does not bind the Crown. If, in the meantime, it should appear to the Minister to be in the public interest to withhold his recommendation, it is his duty to do so: thus his decision is a qualified one.
>
> In the present case, after the Minister's decision, the Department realised that a valuable water-power was appurtenant to the lands in question, whereupon the Minister deemed it in the public interest to reserve the water-power.
>
> Whether the Crown was entitled to reserve it after admitting Dempsey and Ferguson as locatees is a question on which it is unnecessary here to express an opinion. All I am here determining is that the decision of the Minister in favour of the issue of the patents was not a final adjudication as to the rights of the applicants against the Crown.

Because Mr. Culter had no authority to bind the Crown no contract to transfer mineral rights pertaining to the Bobtail lands resulted from his correspondence with any of the soldier settlers. Opinions expressed by Mr. Cutler in

(1) 42 N.B.R. 497. (2) 59 O.L.R. 331.

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good faith may have misled the suppliants but did not bind the Crown nor the board, as an agent of the Crown. Mr. Cutler could recommend, not contract. Any assurance by Mr. Cutler was subject to review by higher authority.

The conveyance of the Bobtail lands to the board was expressed to be "for the purposes of the Soldier Settlement Act, 1919." The board, in dealing with the Bobtail lands must have regard to the 1919 Act.

That the vesting of mineral rights in the board was contemplated by Parliament can be inferred from the inclusion in it of section 57, which requires that from all sales and grants of land by the board mineral rights shall be deemed to be reserved whether or not the instrument of grant or sale so expressly specifies. Section 57, however, prohibits the board disposing of any mineral rights vested in it.

Because the 1919 Act makes no provision for transfer of mineral rights by the board any such rights acquired by it remain vested in the board as an agent of the Crown until such time as the Crown otherwise directs. My attention has not been directed to any provision in the law or any order-in-council governing the disposition of mines and minerals vested in the board.

If the minerals still are subject to a trust in favour of the Indians their disposal, under the judgment of the Supreme Court in *St. Ann's Island Shooting and Fishing Limited* v. *The King* (1), can be only as the Governor-in-Council directs.

The manner of disposing of mineral rights, whether vested in the board or other agency of the Crown and whether or not charged with a trust in favour of the Indians, is governed, in the absence of any other provision in the law, by the Public Lands Grants Act, R.S.C. 1952, chapter 224. Section 4(*a*) provides that in the case of public lands for which there is no other provision in the law, the Governor-in-Council may authorize their sale or other disposition.

Because I have reached the conclusion that, regardless of whether the mineral rights are vested in the board or some other agency of the Crown or whether any trust in favour of the Indians attaches, there must be order-in-council

(1) [1950] S.C.R. 211.

authority for their transfer and, notwithstanding that the Registrar of the North Alberta Land Registration District has issued certificates showing as vested in the board the mines and minerals to which the suppliants seek title, I will refrain from any finding as to whether the letters patent of December 20, 1920 vested in the board the mineral rights pertaining to the Bobtail lands or as to whether any trust in favour of the Indians still attaches to those mineral rights.

Mr. Cutler's statement in some of his letters that "a recent order in council provided that soldier settlers under the Soldier Settlement Act of Canada who had repaid their loans could obtain title to such mineral rights as were vested in the Director of Soldier Settlement" cannot be accepted as proof that such an order-in-council was adopted.

The question of proof of an order-in-council having been made was dealt with by the Privy Council in 1919 in *The King* v. *Vancouver Lumber Company* (1). An indenture varying its terms had been endorsed on a lease made pursuant to an amendment to The Dominion Lands Act enacted by chapter 26 of the Statutes of Canada, 1894 and providing that "The Governor in Council may authorize the sale or lease of any lands vested in Her Majesty which are not required for public purposes, and for the sale or lease of which there is no other provision in the law." An order-in-council was necessary to vary the terms of the original lease. Viscount Haldane, delivering the judgment of the Privy Council, said at page 8:

> An indenture containing the amended terms was endorsed on the old indenture. It was under seal like the original document, and it proceeded on the recital that it was deemed advisable to modify the original lease by removing the proviso giving power to determine it by notice in writing, and by adding a provision that "the said lease, at the expiration of the first term of 25 years, and from time to time at the end of each renewal term of 25 years, shall be renewed for a further term or terms of 25 years," at a rental for each renewal term to be determined in case of difference by arbitration.
>
> Sir Frederick Borden as Minister appears to have executed the indenture thus endorsed, and to have affixed to it his seal as Minister of Militia and Defence, and Col. Macdonald witnessed it.
>
> The question is whether there actually was made an Order in Council authorising these new terms which embodied very substantial concessions to the appellants. Their Lordships have quoted the statements of *Mr. Macdonell,* the legal adviser of the appellants, as to what he alleges

(1) (1919) 50 D.L.R. 6.

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to have been said by Sir Frederick Borden and the two officials who took part in the discussions on behalf of the Government of Canada. The deed was duly executed by Sir Frederick Borden. But that is obviously not sufficient in the absence of the Order in Council that was requisite. It is impossible to speculate as to what really happened. He may have executed the deed before any Order in Council had actually been obtained, anticipating wrongly that this would prove to be a mere formality. Was such an Order actually passed? *Mr. Macdonell* says that Sir Frederick Borden told him so, but his statement as to what Sir Frederick Borden and also the other two officials said is obviously not evidence, especially in the absence of proof that they could not be called as witnesses. Now no such proof was offered. So far as appears there is therefore no evidence that the Order in Council was ever made. No doubt there is the fact that the second indenture was duly executed. But although that would afford some ground for presuming that the Minister had authority, it is not conclusive.

However the matter does not rest here. For the Crown important evidence was called to shew that no Order-in-Council was ever made. The Clerk of the Privy Council of Canada, Rudolph Boudreau, was called. He swore that there was no record in the office of such an Order. He was not cross-examined on behalf of the appellants. Again the Secretary of the Department of Militia and Defence, Ernest F. Jarvis, was called for the Crown. He said that any modification of the original Order-in-Council would be based on a recommendation from the Department, and that there was no record of any such recommendation. Upon this point he was not cross-examined. Coupling the evidence so given with the fact that the appellants did not call as witnesses either Sir Frederick Borden or the two officials who are said to have taken part in the transaction, their Lordships are unable to come to any other conclusion than that the appellants have wholly failed to prove that the Order-in-Council in question ever existed. They regard this issue of fact, moreover, as one on which there is a concurrent finding by the two Courts below. There is no other point of substance in the case, and their Lordships only desire to add the observation that the question on which the appeal turns is of such a nature as to render the opinion arrived at by the Courts in Canada an opinion from which they would be reluctant to differ.

Michael W. Cunningham, who since July 1, 1948 has assisted the assistant clerk of the Privy Council in the preparation and recording and general custody of orders-in-council, testified he had searched the Privy Council records and found no order-in-council authorizing a grant of mineral rights to any of the suppliants.

I accept Mr. Cunningham's evidence as proof of the non-adoption of any order-in-council authorizing the grant of mineral rights to any of the suppliants. In the absence of such an order-in-council the suppliants cannot succeed.

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There must be judgment that the suppliants are not entitled to any of the relief sought in their petition.

The respondent is entitled to the costs of the petition, to be taxed.

Judgment accordingly.

BETWEEN:

VANCOUVER TUG BOAT COMPANY LIMITED (*Defendant*) ..... APPELLANT;

AND

PACIFIC LIME COMPANY LIMITED (*Plaintiff*) ..... RESPONDENT.

1955

Oct. 12

Dec. 15

Shipping—Practice—Misnomer in name of plaintiff a mistake in form only —Correction of misnomer does not substitute a new plaintiff and does not deprive defendant of any right—Appeal from District Judge in Admiralty dismissed.

Held: That it is proper practice to allow the correction of a misnomer in the name of a corporate plaintiff and the defendant is not harmed thereby.

APPEAL from the order of the District Judge in Admiralty for the British Columbia Admiralty District.

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

John I. Bird and *W. D. C. Tuck* for appellant (defendant).

G. F. McMaster for respondent (plaintiff).

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

RITCHIE J. now (December 15, 1955) delivered the following judgment:

This is an appeal from an order (1) made on March 28, 1955 by Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, granting the respondent leave to amend the style of cause herein by deleting the word "Coast" from the name of the plaintiff.

(1) [1955] Ex. C.R. 142.

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VANCOUVER TUG BOAT CO. LTD. v. PACIFIC LIME CO. LTD.

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The action was commenced in the British Columbia Admiralty District of this court by a writ of summons issued and filed as of January 27, 1955 in the name of Pacific "Coast" Lime Company Limited as plaintiff against Vancouver Tug Boat Company Limited as defendant. The endorsement on the writ reads:

> *The Plaintiff* is the holder in due course of Bill of Lading No. 1, dated at Blubber Bay, in the Province of British Columbia, the 1st day of February, 1954, for the carriage by sea from Blubber Bay in the Province aforesaid to Seattle, in the State of Washington, one of the states of the United States of America, in a barge of the Defendant 1,050 tons of bulk limestone fines, also known as lime rock, and claims from the Defendant damages for breach of the said contract.

When setting out the style of cause in the statement of claim, which was filed on January 31, 1955, the word "Coast" was included in the name of the plaintiff.

The plaintiff is described in the statement of claim as a shipping company, duly incorporated under the laws of the province of British Columbia, having its registered office at 744 West Hastings Street, Vancouver.

The statement of claim alleges that in purported performance of a contract to carry limestone from Blubber Bay to Seattle the defendant supplied their barge *Straits No. 3* in tow of the Motor vessel *La Garde* and that in consequence of the two vessels being unseaworthy and unfit for the performance of the contract the barge, when off Point No Point in the state of Washington at or about 1.45 o'clock a.m. on February 3, 1954, capsized and the cargo was lost.

Both the writ of summons and the statement of claim were served on the respondent on February 10, 1955. An appearance was entered on behalf of the respondent on February 17, 1955. No statement of defence has been delivered.

On March 16, 1955 the respondent's solicitors gave notice of application for an order granting leave to amend the style of cause by deleting the word "Coast" from the name of the plaintiff as being a misnomer of the respondent. In support of the application to amend, there were read two affidavits of Cecil David Simon sworn March 16, 1955 and March 21, 1955 respectively.

In his first affidavit Mr. Simon, who is associated in the practice of law with the solicitors for the respondent, states that, pursuant to instructions received by him, he caused

the writ of summons to issue herein and that by reason of a clerical error the word "Coast" was included in the name of the plaintiff in both the writ of summons and the statement of claim. Mr. Simon further states he enquired at the office of the Registrar of Companies of British Columbia and was informed there is no company named "Pacific Coast Lime Company Limited".

In his second affidavit Mr. Simon swears that on March 18, 1955 he attended at 744 West Hastings Street in Vancouver and found the Pacific Lime Company Limited listed on the directory in the hallway as having its office in suite 602 at that address and also observed the full name of the company and the words "registered office" on the door of the said suite. Mr. Simon further deposes that on February 21, 1955 he telephoned to the office of the Registrar of Companies at Victoria, B.C. and was informed Pacific Lime Company Limited was on January 27, 1955, and still is, in good standing.

In opposition to the motion there was read the affidavit of William Donald Campbell Tuck, sworn to on March 18, 1955. Mr. Tuck, who is associated in the practice of law with the solicitors for the appellant, in his affidavit states, *inter alia*:

2. THAT this action arises out of a claim for loss of a cargo of lime rock while being carried from Blubber Bay, B.C. to Seattle, Washington, on board a scow in tow of the Tug *M/V LA GARDE* owned by the Defendant.

3. THAT I am informed by Captain Arthur Gallant, Master of the said Tug *LA GARDE* and verily believe, that the said goods were lost as a result of the said Scow capsizing on the 3rd day of February, 1954 and further, that the said goods should and would have been delivered at Seattle, Washington, on the 3rd day of February, 1954, if the said accident had not occurred.

4. THAT I am informed by J. A. Lindsay, Vice President of the Defendant Company and verily believe, that the said goods were carried pursuant to a contract which incorporated the provisions of the Water Carriage of Goods Act, R.S.C. 1936, Cap. 49.

5. That Article III, Rule VI of the Schedule to the said Act provides inter alia, as follows:

> In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

6. THAT the statutory period of one year from the date when the said goods should have been delivered expired on February 3rd, 1955.

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7. THAT I am informed by the Registrar of Companies of the Province of British Columbia and verily believe that as of the date of the commencement of this action, namely, January 27th, 1955, there was not, nor is there now any company in existence in the Province of British Columbia named "Pacific Coast Lime Company Limited".

8. THAT I am advised by Counsel and verily believe that if the Plaintiff's application launched the 16th day of March, 1955, to amend the style of cause herein by substituting or adding a new plaintiff be granted, the Defendant herein will be prejudiced in that it will be deprived of a statutory defence pursuant to Article III, Rule VI of the Schedule to the Water Carriage of Goods Act, R.S.C. 1936, Cap. 49, set forth in paragraph 5 hereof.

The learned Deputy Judge in Admiralty granted the motion, without costs to either party.

In support of the appeal it was submitted:

1. That the writ of summons and statement of claim were a nullity and so incapable of amendment.
2. That the motion made by the respondent was really to substitute a new plaintiff because no such company as Pacific Coast Lime Company Limited was in existence.
3. That if the learned District Judge in Admiralty had authority to deal with the motion he should not have permitted an amendment that deprived the appellant of its defence under the Statute of Limitations.
4. That if the learned District Judge in Admiralty was correct in permitting the amendment he should have ordered the respondent to pay the costs of the application.

Numbers 9 and 73 of The Admiralty General Rules and Orders are

9. The Judge may allow the plaintiff to amend the writ of summons and the indorsements thereon in such manner and on such terms as to the Judge shall seem fit.

73. Any pleading may at any time be amended, either by consent of the parties, or by order of the Judge.

Numerous authorities, none of them directly in point, were cited by counsel.

Clay v. *Oxford* (1) is a case in which the Court of Exchequer decided a writ issued in the name of John Clay as plaintiff after his death could not be amended by substituting the names of his personal representatives.

(1) (1866) L.R. 2 Ex. 54.

In *Hilton* v. *Sutton Steam Laundry* (1) an action had been instituted by a widow as administratrix of the estate of her husband. Letters of administration did not issue until eight months after the writ had been issued. The Court of Appeal refused to permit the action to proceed in the name of the plaintiff personally rather than in a representative capacity. At page 428 Lord Greene, M. R. said:

> It is very well settled that the court does not allow amendments where the effect of doing so would be to deprive a defendant of any defence open to him under a statutory limitation, and that will be the very effect of allowing this amendment if the principles to which I have referred, laid down by this court in *Ingall* v. *Moran*, [1944] 1 K.B. 160; [1944] 1 All E.R. 97; 113 L.J.K.B. 298; 170 L.T. 57, are applicable to the case. There is only one ground of distinction which has been suggested to us as differentiating this case from that. It is pointed out correctly that, in *Ingall* v. *Moran*, [1944] 1 K.B. 160; [1944] 1 All E.R. 97; 113 L.J.K.B. 298; 170 L.T. 57, the only claim involved, and the only claim that could be brought, was a claim by the personal representative of the deceased, because the benefit of the claim, if it was made good, would enure to the benefit of the estate. It is then pointed out that the position here is now different; that there is no difference of substance between a claim under the Fatal Accidents Acts by a personal representative and a claim by a dependant in his or her personal capacity. In either case, it is said, the cause of action is precisely the same, although the statutes enable two different classes of persons to sue; the beneficiaries of the judgment, if obtained would be the same; the estate of the deceased is not concerned in the matter, and the personal representative was only brought in as the person to sue under the original Act as a matter of convenience and not as a matter of substance.
>
> I should not be adverse to discovering any proper distinction which would enable this unfortunate slip to be corrected. Apart from the fact that the solicitors for the respondents in fairness pointed out the difficulty, there appear to be no merits on their side. But the statutory limitation is not concerned with merits. Once the axe falls it falls, and a defendant who is fortunate enough to have acquired the benefit of the statutory limitation is entitled to insist upon his strict rights. He is similarly entitled to insist upon the strict application of the rule that the court will not deprive him of those rights by allowing amendments in pleadings, and so forth. In this case it seems to me that to allow this amendment would be to deprive the respondents of the benefit of sect. 3 of the 1846 Act, by setting the action on its feet again and, in effect validating *ab initio* the original representative writ. The distinction suggested between this case and *Ingall* v. *Moran*, [1944] 1 K.B. 160; [1944] 1 All E.R. 97; 113 L.J.K.B. 298; 170 L.T. 57, is one which, in my opinion, does not produce the result suggested. It is perfectly true that the result is the same whether an action under the Acts is brought by the personal representative or by the dependants. It does not, however, alter the fact that the action, looked at technically, is an action in different capacities, and the capacity in which it is brought must, under R.S.C., Ord. 3, r. 4, be stated in the indorsement on the writ.

(1) [1945] 2 All E.R. 425.

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If that was done in this case, the appellant bound herself to an action in a representative capacity which she did not possess, and, unfortunately, she must take the consequences.

Hudson v. *Fernyhough* (1), a Queen's Bench Division case decided by Lord Coleridge, C.J. and Mathew, J. in 1889, is an instance where the court refused to approve an amendment which in effect took away a legal right which already had accrued to the defendant, but the circumstances were quite different from those which apply to this appeal. The assignee of a debt had brought an action without giving notice of the assignment to the defendant. The plaintiff then applied to add the assignor as a plaintiff. Between the issuing of the writ and the application the Statute of Limitations had barred the remedy. The judgment of Lord Coleridge is short:

> Lord Coleridge, C.J.—As a general rule, the Statute of Limitations is not a plea to be encouraged; but, at the same time, it seems to me that it would be an indefensible practice to take away from a party to a suit a legal right which has already accrued to him by virtue of that statute. In the case that has been cited by the learned counsel for the plaintiff, the matter turned mainly upon a question of costs, for the payment of which the party seeking the amendment was allowed, and both parties were left in precisely the same position after it as they would have been in if no amendment had been rendered necessary by the mistake or slip that had been made. Such cases, however, do not take away a defence that has already accrued, or change the substantial rights of a party to the action. I think, therefore, that this amendment ought not to have been made, and that the defendant's appeal from the learned judge's order should be allowed.

W. Hill & Son v. *Tannerhill* (2) deals with the improper use of a firm name. W. Hill, an individual trading alone and without partners as "W. Hill & Son", issued a writ in the firm name. A rule of court provided that a writ in a firm name could be issued only by two or more persons carrying on business as the firm. The Court of Appeal upheld an order substituting as plaintiff "Walter Hill trading as W. Hill & Son". The order was made after the expiry of the statutory period within which the action could be brought. Scott, L. J. said at page 473:

> Walter Hill had no right to issue a writ in the name of "W. Hill & Son," as if he was issuing a writ in the name of himself and a son whose name he did not give, when, in fact, he had no partner, but traded by himself, for Or. 48A, r. I, does not allow that to be done. A person carrying on business in a firm name by himself may be sued under Or. 48A, r. II, in that name, but that has nothing to do with this case. Mr. Lynskey,

(1) 61 L.T.R. 722. (2) [1944] K.B. 472.

for the defendant, has submitted that, having regard to the rules, the writ as issued in the name of W. Hill & Son ought to have been treated as a nullity and as not disclosing any cause of action because the real plaintiff was not described. At first sight that seemed a good basis for invoking the principle that an amendment in an action will not be allowed after the defendant has become entitled, under any statute of limitations, to a statutory defence to the claim. Mr. Lynskey relied on the well-known decision of this court in *Mabro* v. *Eagle Star, etc., Insurance Co., Ld.*, [1932] 1 K.B. 485, of which the headnote is: "The court will not, under Or. 16, r. 2, allow a person to be added as plaintiff to an action if thereby the defence of the Statute of Limitations would be defeated." Scrutton L.J. said: "The application now before us is that a person named Zok should be added as plaintiff, as being the administrator of his father, who died in March, 1927, that is, two years after the action had been commenced by the Mabros, and who, it is said, was the person interested in the insurance." After referring to Or. 16, r. 2, the lord justice goes on: "In my experience the court has always refused to allow a party or a cause of action to be added where, if it were allowed, the defence of the Statute of Limitations would be defeated. The court has never treated it as just to deprive a defendant of a legal defence." That is a very well-known principle, but it depends on the fact that the amendment turns an action which has become ineffective by reason of the passage of time into an effective action again by the addition of a new plaintiff after the date when the limitation period has elapsed.

And at page 474:

. . . When the writ was issued in the name of "W. Hill & Son" there was an individual person in fact interested in the claim. His description as "W. Hill & Son" was a mistake by a clerk. The question is whether that mistake is more than a mistake in form. In my opinion, it is not. Under Or. 48A, r. I, one person, even if he is carrying on business in a firm name, cannot issue a writ in the firm name, but if a real person does issue the writ in his own name, say, of "W. Hill," the fact that he adds the two additional words "and Son" does not prevent his still being the real plaintiff in the action.

It is not difficult to distinguish the circumstances of this appeal from the line of cases dealing with actions instituted in the name of a dead man, instituted in the name of a personal representative before being properly constituted as such, instituted in a firm name contrary to the provisions of rules of court, or instituted in the name of the wrong plaintiff. Here we have the simple case of an existing corporation instructing that suit be instituted against the appellant for damage occasioned by breach of a contract entered into between it and the appellant. In carrying out its instructions a slip was made in the office of the solicitors for the corporation that had instructed suit be instituted and an extra word was included in its name in setting out the cause of action.

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The respondent asked that the error in its name be corrected, not, as the appellant contends, that a new plaintiff be added or substituted. Correction of such an error does not offend against any of the decisions cited.

The endorsement on the writ of summons mentions a contract entered into between the plaintiff and defendant on February 1, 1954 for the carriage of limestone from Blubber Bay to Seattle. The statement of claim gives the correct address of the plaintiff and refers to the capsizing of the appellant's barge *Straits No. 3* on February 3, 1954 with the resulting loss of a cargo owned by the respondent.

A defendant served with a writ is entitled to know what he is being sued for and by whom. The endorsement on the writ and the contents of the statement of claim gave the appellant no reason for doubt in respect to what it was being sued for or by whom. The appellant was well aware of the existence of the respondent. The appellant was in no way misled by the inclusion of the word "Coast" in the name of the plaintiff set out on the writ of summons and statement of claim served on it on February 10, 1954.

The *Shorter Oxford English Dictionary* defines "misnomer" as "A mistake in naming a person or place." Inclusion of the word "Coast" in the name of the respondent was a misnomer. A mistake in form only. The misnomer in the name of the plaintiff has been corrected.

The error in the respondent's name did not make either the writ of summons or the statement of claim a nullity. Correction of the error did not, as the appellant contends, have the effect of substituting a new plaintiff. The amendment did not deprive the appellant of any right that had accrued to him.

The learned District Judge in Admiralty was correct in granting the application to amend. I am not disposed to interfere with the exercise of his discretion in disposing of the matter of costs on the application to amend.

The appeal will be dismissed with costs, to be taxed.

Judgment accordingly.

1955
Sept. 26
Dec. 8

BETWEEN:

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

AND

JOHN PAWLUK (SR.) ..... RESPONDENT.

Revenue—Income tax—The Income Tax Act, S. of C. 1948, c. 52, s. 3, 4, 127(1)(e)—Taxpayer carrying on a business—Admissibility of evidence of matters arising after taxation year—Appeal from Income Tax Appeal Board allowed.

Respondent sold black loam from his farm at a profit and was assessed for income tax for the year 1951 on the money received as being income from a business. Respondent contends that because of nearby industrial development his farm was rendered unsuitable for use as a farm and that he had taken the only course open to him for disposing of it.

Held: That the sale of the loam from the farm load by load and day by day in 1951 establishes a course of conduct which is conclusive that while respondent acquired the land with the intention of working it for farming purposes or market gardening he in 1951 abandoned his original intention and in that year and since has been engaged in the business of selling black loam.

2. That on income tax appeals evidence may be received in respect to any matters that have occurred up to the time of the actual hearing of the appeal, provided such matters have relevancy to the taxation year to which the assessment or reassessment under appeal applies.

APPEAL from a decision of the Income Tax Appeal Board.

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

D. B. MacKenzie, Q.C. and *F. J. Cross* for appellant.

A. W. Miller, Q.C. for respondent.

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

RITCHIE J. now (December 8, 1955) delivered the following judgment:

This is an appeal by the Minister of National Revenue from the decision of the Income Tax Appeal Board dated August 19, 1954 (1), which allowed an appeal from a

(1) (1954) 11 Tax A.B.C. 184.

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reassessment of income tax made by the Minister on November 4, 1953 in respect to the 1951 taxation year income of John Pawluk of Clover Bar in the province of Alberta.

The respondent, who prior to coming to Canada was a farmer in Poland, has been resident in this country since 1930, at first working as a labourer and as a miner. In 1944 the savings of the respondent were sufficient to enable him to purchase an eighty-eight acre farm at Clover Bar on the outskirts of Edmonton, an area in which there now is considerable industrial development. Later the respondent purchased another farm of one hundred and sixty-one acres situate not far from the eighty-eight acre farm. The respondent carried on farming and market gardening on the two farms and sold his products in Edmonton.

In 1951 the municipality, for the purpose of building a new road, acquired about five acres at one corner of the respondent's eighty-eight acre farm. When the road-making machinery commenced to work on what had been the respondent's land, he obtained permission to use for his own purposes the top soil being removed for the purpose of road construction. The respondent found the demand for top soil for use in Edmonton gardens so good that, after disposing of all the top soil obtained from the road site, he continued and still is continuing to market top soil obtained from other parts of the eighty-eight acre farm. In 1951 sales of top soil, or black earth, grossed $12,743.98. The top soil was sold at $10 per load if delivered in Edmonton or at $5 per load if delivery was taken at the Pawluk farm.

The respondent, in partnership with his wife, Mary Pawluk, and his son, John Pawluk, Jr., under the style Pawluk Enterprises, is doing some market gardening on both farms, is renting apartments to tenants and is disposing of the top soil on the eighty-eight acre farm. The Minister does not recognize Mrs. Pawluk as a partner in Pawluk Enterprises.

The income tax return of the respondent for the 1951 taxation year, filed on June 2, 1952 and certified by him as correct under date of May 20, 1952, included a profit and loss statement of Pawluk Enterprises reading as follows:

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REVENUE

Sales of Black Earth		12,743.98
Sales of Potatoes		928.00
Sale of Oats		78.00
Rental Revenue		4,333.00
		18,082.98

EXPENSES

Salaries and Wages		1,052.46	
Fuel, Oil and Grease		872.90	
Equipment Repairs		514.03	
Apartment Repairs		631.90	
Light, Heat and Power		784.36	
Taxes		1,649.26	
Potato Harvest		545.33	
Seed Grain		260.00	
Hauling		184.50	
Stripping		144.00	
Advertising		120.44	
Accounting		39.53	
Bank Charges and Interest		88.71	
Sundry Apartment Supplies		102.75	
Depletion Allowance on Earth Sold		540.97	
Depreciation			
—Trucks	1,132.50		
—Motor and Moveable Equipment	930.00		
—Buildings	240.68		
—Houses	76.50		
—Apartment	895.38		
—Farm Home	24.38		
—Car	825.00	4,124.44	11,655.58
Net Profit for Year Ended December 31, 1951			6,427.40
Apportioned,—			
John Pawluk Sr.		2,142.47	
Mary Pawluk		2,142.47	
John Pawluk Jr.		2,142.46	6,427.40

Deducting the personal exemption of $1,000 left taxable income of $1,142.47 declared by the respondent.

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The record contains no original assessment of respondent for the 1951 taxation year but does contain a "reassessment" made by the Minister on February 2, 1953 and adding to the declared taxable income of 1,142.47
the respondent's one-third share of $540.97 claimed as depletion allowance on land 180.32

and

the respondent's one-third share of one-fourth the $825 claimed for depreciation of car 68.75

giving

a revised taxable income of $1,391.54
on which tax was levied.

On February 12, 1953, following the reassessment, the respondent filed an amended income tax return for the 1951 taxation year. The amended return was certified by the respondent under date of January 26, 1953, a date prior to the reassessment. The profit and loss statement of Pawluk Enterprises included in the amended return does not contain the $12,743.98 revenue from sales of black earth nor the expense items pertaining to such sales as shown on the original return. Included in the amended return, however, there is a schedule reading:

Realized on Earth Sales	*Year Ended December 31, 1951*	
	REVENUE	
Sales of Black Earth		12,743.98
	EXPENSES	
Salaries and Wages	1,052.46	
Fuel, Oil and Grease	872.90	
Equipment Repairs	514.03	
Stripping	144.00	
Advertising	120.44	2,703.83
Net Income for Year Ended December 31, 1951		10,040.15
Apportioned:		
John Pawluk, Sr.	3,346.71	
Mary Pawluk	3,346.72	
John Pawluk, Jr.	3,346.72	10,040.15

On November 4, 1953 the Minister issued a second reassessment in respect to the respondent's 1951 taxation year. Under the November 4, 1953 reassessment participation of the respondent's wife as a partner in Pawluk Enterprises was disallowed and a capital cost allowance was allowed to the respondent but disallowed to his son.

Counsel for the respondent contended that no consideration should be given to any matters which have arisen since the 1951 taxation year.

The president of this Court in *Nicholson Limited v. The Minister of National Revenue* (1) said at page 201:

> The extent of the Court's jurisdiction under section 66 of the Act is very wide. Subject to the provisions of the Act it has exclusive jurisdiction to hear and determine all questions that may arise in connection with the assessment. It may, therefore, deal with issues of fact as well as questions of law. Nor is its jurisdiction restricted to questions arising subsequent to the assessment; it may deal with all questions, whether they arise before or after the assessment, provided they are connected with it.

In *Lincolnshire Sugar Co. Ltd. v. Smart* (2) Lord Macmillan said at page 419:

> It may be a question whether it is legitimate to have regard to the fact that it is now known that the payments are irrevocable and that the contingency of repayment can now never arise. The question might have had to be decided before this was known. There are observations by noble and learned Lords in *Bwllfa & Merthyr Dare Steam Collieries* (1891) *Ltd.* v. *Montypridd Waterworks Co.* [1903] A.C. 426; 11 Digest 129, *186,* to the effect that a court ought not to shut its eyes to the true facts if it subsequently knows them, although these facts could not have been known when the question originally arose, and ought not to resort to guessing when certainty is available. I have sympathy with this view, and with what LORD WRIGHT and GREENE, L.J., have to say on the point.

It is my view that on income tax appeals evidence may be received in respect to any matters that have occurred up to the time of the actual hearing of the appeal, provided such matters have relevancy to the taxation year to which the assessment, or reassessment, under appeal applies.

(1) [1945] Ex. C.R. 191

(2) [1937] 1 All E.R. (H. of L.) 413.

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That the sales of top soil have been carried into 1955 is evidenced by Exhibit 5, two advertisements carried in the April 22, 1955 issue of the *Edmonton Journal* and reading:

Black Loam

From Clover Bar, superior, clean, rich, black loam. Prompt delivery at $10 per 6 yd. load. Guaranteed free of quack grass. 5 years of service to satisfied customers and Edmonton's major landscapers. Only continuous year round service.

John Pawluk
Ph. 65216

Attention Truckers
Loading black loam from 7 a.m. till dark.
John Pawluk
Ph. 65216

The reference to the five years of service to satisfied customers and Edmonton's major landscapers indicates that the respondent during the 1951 taxation year was engaged in the sale of black loam. The advertisement indicates the course of conduct of the respondent in the 1951 taxation year.

The respondent contends that by reason of odours and air pollution from the surrounding industrial development the eighty-eight acre farm is no longer suitable for farming, that by reason of being undermined by old mining operations the eighty-eight acre farm is not suitable for use as an industrial site and that by selling the top soil, load by load and day by day, he is taking the only course open to him for disposing of his farm—a capital asset acquired for use as a farm but rendered unsuitable for that use by reason of the industrial development.

The Minister, on the other hand, mantains the respondent is engaged in the business of marketing black loam and that the sale of each load of earth constitutes revenue from that business.

Sections 3, 4 and 127 (1) (*e*) of the Income Tax Act, as applicable to the 1951 taxation year, read:

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.

127. (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;

Counsel for both appellant and respondent cited *Californian Copper Syndicate* v. *Harris* (1), a case that I regard as specially applicable to the circumstances with which the Minister was confronted when considering the reassessment made on November 4, 1953. At page 165 the Lord Justice Clerk (Macdonald) said:

It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax.

What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

A recent House of Lords decision that has some application to the instant case is that in *Edwards (Inspector of Taxes) v. Bairstow and Another* (2), where Lord Radcliffe said at page 58:

If I apply what I regard as the accepted test to the facts found in the present case, I am bound to say, with all respect to the judgments under appeal, that I can see only one true and reasonable conclusion. The profit from the set of operations that comprised the purchase and sales of the spinning plant was the profit of an adventure in the nature of trade. What other word is apt to describe the operations? Here are two gentlemen who put their money, or the money of one of them, into buying a lot of machinery. They have no intention of using it as machinery, so they do not buy it to hold as an income-producing asset. They do not buy it to consume or for the pleasure of enjoyment. On the contrary,

(1) (1904) 5 T.C. 159. (2) [1955] 3 All E.R. 48.

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they have no intention of holding their purchase at all. They are planning to sell the machinery even before they have bought. And, in due course, they do sell it, in five separate lots, as events turned out. And, as they hoped and expected, they make a net profit on the deal, after charging all expenses such as repairs and replacements, commissions, wages, travelling and entertainment and incidentals, which do, in fact, represent the cost of organising the venture and carrying it through.

It is not difficult to conclude that the difference between the gross revenue obtained from the sale of black loam and expense of removing and marketing the loam represents a profit from an adventure in the nature of trade. The respondent has little, if any, intention of retaining any of the top soil on the eighty-eight acre farm for the purpose of market gardening. The respondent's marketing of the loam is, and was in 1951, well organized, advertising is used to attract customers, the soil is cleaned, mechanical loaders load the trucks which deliver the soil or to which the soil is delivered, a chartered accountant supervises preparation of the income tax returns.

The only test I consider necessary to apply to the respondent's method of selling the top soil of the eighty-eight acre farm load by load and day by day in 1951 is that of course of conduct. Application of the course of conduct test leads me to the conclusion that while the respondent acquired the eighty-eight acres with the intention of working them for the purposes of farming or market gardening he, in 1951, abandoned his original intention and in that year and since that year has been engaged in the business of selling black loam.

Quite apart from the evidence in respect to sales subsequent to 1951 I have reached the firm conclusion that the respondent in that year was conducting and engaged in the business of selling top soil. The fact that the respondent was selling an asset which each sale brought nearer to exhaustion does not mean the mode of sale did not constitute a business.

The appeal will be allowed with costs, to be taxed, and the reassessment by the Minister restored.

Judgment accordingly.

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

AND

JOHN PAWLUK, JR. ..... RESPONDENT.

MINISTER OF NATIONAL REVENUE v. PAWLUK (JR.)

The appeal was allowed for the reasons stated in *Minister of National Revenue* v. *John Pawluk, Sr. ante* page 119.

1955

Nov. 23

1956

*Jan. 10

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

AND

RONALD GORDON McINTOSH ..... RESPONDENT.

Revenue—Income Tax—Land purchased and resold as building lots—Isolated transaction unrelated to taxpayer's usual business—Capital gain or taxable income—"Adventure in the nature of a trade"—The Income Tax Act, S. of C. 1948, c. 52, ss. 3, 4, 139 (1).

The respondent, a retired grocer, joined with one L in purchasing a parcel of land with the intention of dividing it into lots and building houses thereon. After the purchase and the division the respondent decided not to proceed with the scheme but to sell his share of the lots totalling 55. In 1952 he sold twenty on which he realised a profit of some $12,087. This amount was assessed by the appellant as income under ss. 3, 4 and 139 (1) of *The Income Tax Act*. The respondent, contending the profit was a capital accretion, appealed to the Income Tax Appeal Board and the assessment was set aside.

Held: That although the transaction was an isolated one and not in any way related to the respondent's usual or ordinary business, it was still a venture or speculation and not an investment in the ordinary sense. The sale was a venture of a trade or business and the profit a gain made through an operation of business in the course of carrying on a scheme for profit making and therefore properly taxable.

Atlantic Sugar Refineries Ltd. v. *Minister of National Revenue* [1949] S.C.R. 706, followed.

APPEAL from a decision of The Income Tax Appeal Board (1).

(1) (1955) 12 Tax A.B.C. 183.

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MINISTER OF NATIONAL REVENUE v. McINTOSH

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

K. E. Eaton and *J. D. C. Boland* for the appellant.

Keith Laird, Q.C. for the respondent.

HYNDMAN D.J. now (January 10, 1956) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board (1), in respect to the income of said respondent for the 1952 taxation year, involving ss. 3 and 4 and 139 (1) (*e*) of *The Income Tax Act* which read as follows:

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

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

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 material facts may be stated as follows:—

Respondent, who lives in Sarnia, Ontario had been engaged in the business of grocer and meat merchant. In 1948 he sold his business and was without occupation. Shortly after one Clinton Laidlaw, a friend and related to respondent, who was interested in building for the purpose of sale, suggested to respondent that they purchase a vacant property known as Grandview Park Subdivision which adjoined the City of Sarnia, and was for sale under the *Veterans' Land Act*. The scheme was that the said property might be purchased and a number of houses erected thereon, a condition of the sale being that houses should be built on said land. The proposal was that they should each acquire a 50-50 interest. Of the two men only Laidlaw had had any experience in house building. Respondent hesitated about entering into the venture, but on repeated urging by Laidlaw, finally decided that he would purchase one-third

(1) (1955) 12 Tax A.B.C. 183.

of the lots, namely 55 out of the 165 lots, into which the property had been subdivided, respondent to pay Laidlaw $2,500 and to receive a deed on paying the further sum of $1,872 on or before the 1st of May, 1948. They were to be associated in the building scheme, but later on differences arose between them and Laidlaw offered to repay the respondent the $2,500 and to end their association in all respects. This offer was unacceptable to respondent who insisted on acquiring the lots. Laidlaw having refused to carry out the sale to McIntosh, the latter brought an action for specific performance in the Supreme Court of Ontario which was ultimately settled out of Court. Respondent then paid the balance due Laidlaw, and the lots were conveyed to him. This ended all dealings between the two men.

Respondent having no experience in building, as was the original intention, decided to sell the vacant lots. The cost to the respondent per lot for the 55 lots was about $112.

In 1952 (which is the year in question) respondent sold 20 of the said lots to one Alfred Sauvé for the sum of $14,545.40, being at the rate of $727 per lot or a profit of about $615 per lot, a total of $12,287.60, later adjusted to $12,087.60.

The question for decision is, therefore, whether said profit was capital accretion, or, income subject to tax.

It can be said at once that this was an isolated transaction, not in any way related to the respondent's usual or ordinary business.

It is equally true that when he entered into the arrangement with Laidlaw his intention was to make gain or profit. Also, after acquiring the 55 lots from Laidlaw, he had no intention of using them himself or developing them for revenue purposes.

From his notice of appeal to the Income Tax Appeal Board, dated the 27th of September, 1954, I quote the following:—

> The appellant's venture in purchasing the said lots was a speculation.

It was very strongly argued by Mr. Laird, Q.C., counsel for respondent, that the arrangement with Laidlaw having fallen through, an entirely new situation arose affecting or displacing his original intention.

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Hyndman D.J.

I have given this argument my best consideration, but I cannot escape the conclusion that the original idea, namely, to make gain or profit, continued. It was, as above stated, still a venture or speculation, and not an investment in the ordinary sense.

Having acquired the said property there was no intention in his mind to retain it as an investment, but to dispose of the lots, if and when suitable prices could be obtained.

It was said that the price received by him was one or two hundred dollars less than the real value, and that this fact in some way negatived an intention of entering into a scheme to make a profit on the venture. I am unable to see any force in this argument. In view of all the circumstances, his insistence in obtaining the property could unquestionably only have been with the object of making a gain or profit.

In a recent judgment in this Court, *Chutter* v. *Minister of National Revenue* (1) on December 9, 1955, Ritchie J. exhaustively reviewed or cited the numerous decisions applying to circumstances, in essence, similar or analogous to the salient facts in the case at bar. The contention in most of these cases was that the undertaking or venture was an isolated one, not in the course of the regular or ordinary business of the taxpayer, and consequently a capital gain, and not income subject to tax. This was the defence set up in *Chutter* v. *Minister of National Revenue* (*supra*) and was rejected by Ritchie J. in view of the authorities referred to by him, and held that it was a venture in the nature of a trade or business, and that the profit was a gain made through an operation of business in the course of carrying on a scheme for profit making.

I find it unnecessary to again review all the decisions as set out in said judgment.

Of the decisions mentioned in the judgment of Ritchie J. I think I need only refer to that of the President in *Atlantic Sugar Refineries Limited* v. *The Minister of National Revenue* (2) which was affirmed in the Supreme Court of Canada.

At page 630 the President said:

> There remains the contention that the appellant's gain was not taxable income because it was not income from any trade and because its venture

(1) [1956] Ex. C.R. 89.

(2) [1948] Ex. C.R. 622; [1949] S.C.R. 706.

was an isolated transaction outside its normal business operations and unconnected therewith. The appellant cannot escape liability merely by showing that its entry into the raw sugar futures market was an isolated transaction. While it is recognized that as a general rule an isolated transaction of purchase and sale outside the course of the taxpayer's ordinary business does not constitute the carrying on of a trade or business so as to render the profit therefrom liable to income tax—*vide Commissioners of Inland Revenue* v. *Livingston et al.* (1), per Lord Sands: *Leeming* v. *Jones* (2); it is also established that the fact that a transaction is an isolated one does not exclude it from the category of trading or business transactions of such a nature as to attract income tax to the profit therefrom. There are numerous expressions of opinion to that effect—*vide Californian Copper Syndicate* v. *Harris* (3); *T. Beynon and Co., Limited* v. *Ogg* (4); *McKinlay* v. *H. T. Jenkins and Son, Limited* (5); *Martin* v. *Lowry* (6); *The Cape Brandy Syndicate* v. *Commissioners of Inland Revenue* (7); *Commissioners of Inland Revenue* v. *Livingston* (8); *Balgownie Land Trust, Ltd.* v. *Commissioners of Inland Revenue* (9); and *Anderson Logging Co.* v. *The King* (10). Whether the gain or profit from a particular transaction is an item of taxable income cannot, therefore, be determined solely by whether the transaction was an isolated one or not.

And at page 633:

While it may not be possible to define the line between the class of cases of isolated transactions the profits from which are not assessable to income tax and that of those from which the profits are so assessable more precisely than in the tests referred to, it is clear that the decision cannot be made apart from the facts. The character or nature of the transaction must be viewed in the light of the circumstances under which it was embarked upon and the decision as to the side of the line on which it falls made after careful consideration of its surrounding facts.

I might also refer to the case of *Edwards and Bairstow* (11) in which Lord Radcliffe said:

There remains the fact which was avowedly the original ground of the commissioner's decision—"this was an isolated case". But, as we know, that circumstance does not prevent a transaction which bears the badges of trade from being in truth an adventure in the nature of trade. The true question in such cases is whether the operations constitute an adventure of that kind, not whether they by themselves, or they in conjunction with other operations, constitute the operator a person who carries on a trade. Dealing is, I think, essentially a trading adventure, and the respondent's operations were nothing but a deal or deals in plant and machinery.

(1) (1926) 11 T.C. 538 at 543.
(2) [1930] 1 K.B. 279; [1930] A.C. 415.
(3) (1904) 5 T.C. 159.
(4) (1918) 7 T.C. 125 at 133.
(5) (1926) 10 T.C. 372 at 404.
(6) (1925) 11 T.C. 297 at 308; [1926] 1 K.B. 550 at 554; [1927] A.C. 312.
(7) (1920) 12 T.C. 358.
(8) (1926) 11 T.C. 538.
(9) (1929) 14 T.C. 684 at 691.
(10) [1925] S.C.R. 45 at 56.
(11) [1955] 3 All E.R. 48.

1956

MINISTER OF NATIONAL REVENUE v. MCINTOSH

Hyndman D.J.

I can quite understand an inclination in such instances to regard the profit as an accretion to capital, and therefore not taxable. However, in view of the authorities, with much deference to the learned member of the Tax Appeal Board, I feel impelled to the conclusion that respondent was properly taxed, and that the decision of the Tax Appeal Board must be reversed and appeal allowed.

It was admitted by counsel for respondent that if the appeal is allowed the amount claimed by the Minister is correct.

The appeal of the Minister herein will therefore be allowed, the decision of the Income Tax Appeal Board set aside, and the assessment made by the Minister allowed. The appellant is entitled to costs taxed.

Judgment accordingly.

1955
Nov. 20
1956
Jan. 17

HAROLD GRIFFITH ..... APPELLANT;

AND

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

Revenue—Income Tax—Deductions—Claim by doctor for expenses incurred attending medical society meetings—The Income Tax Act, S. of C. 1948, c. 52, s. 12 (1) (a).

The appellant, a medical doctor specializing in the field of anaesthesia, claimed as a deduction from his taxable income under s. 12 (1) (*a*) of *The Income Tax Act,* 1948 (Can.) c. 52, expenses incurred for transportation, meals and lodgings while attending meetings of medical societies in Canada, the United States and the British Isles.

S. 12 (1) (*a*) provides:

In computing income, no deduction shall be made in respect of

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

Held: That to obtain the deduction allowed under s. 12 (1) (*a*) of the Act the taxpayer must establish that the expense claimed was incurred with the object of actual or immediate profit. The contention here that while there was no immediate profit, the resulting prestige would eventually lead to the taxpayer gaining or producing a profit in the future, was too remote for consideration.

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GRIFFITH v. MINISTER OF NATIONAL REVENUE

APPEAL from a decision of the Income Tax Appeal Board (1).

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

A. L. Fleming, Q.C. and *A. L. Smoke, Q.C.* for the appellant.

K. E. Eaton and *J. D. C. Boland* for the respondent.

HYNDMAN D.J. now (Jan. 17, 1956) delivered the following judgment:

This is an appeal from the Income Tax Appeal Board dated September 30, 1954 (1), in respect of income tax assessment for the taxation year 1951 of the above named appellant.

The section of *The Income Tax Act* involved in this appeal is section 12(1), which reads as follows:

> 12. (1) In computing income, no deduction shall be made in respect of
> (*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer.

In the case at bar, the appellant claims a deduction for expenses incurred by him for transportation, meals, and lodging, in attending various meetings of Medical Societies in Canada, United States and the British Isles.

The appellant is a medical doctor specializing in the field of anaesthesia and is one of the outstanding specialists in that field. He is the chief anaesthetist at the Queen Elizabeth Hospital in Montreal, and a consultant at the Montreal Neurological Institute, the Reddy Memorial Hospital, and the Jewish General Hospital, has been on the teaching staff of McGill University for the last ten years, and is at present chairman of its department of anaesthesia. He also lectures to university students on this subject, has been active in associations of anaesthetists for more than twenty-five years, has attended medical conventions in various parts of the world, and is also an author of articles on this subject.

The facts as found by me differ in no material respect from those set out in the judgment of Mr. Monet, Q.C., chairman of the Tax Appeal Board.

(1) (1954) 11 Tax A.B.C. 323.

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GRIFFITH v. MINISTER OF NATIONAL REVENUE

Hyndman D.J.

From the judgment of Mr. Monet I quote the following:

> The issue before the Board is whether or not the expenses incurred by the appellant in 1951 to attend conventions and Board of Directors' meetings meet the test of having been incurred by him for the purpose of gaining or producing the income from his profession which, under the provisions of section 127(1)(*e*) of the Act, is a *business*.

I have considered very carefully the reasons for judgment of Mr. Monet and I am in complete accord with his conclusions of fact and law; I feel that I can add nothing of value to what he has said.

I might just add, however, that in my view the proper interpretation of the section above mentioned is that, in order to claim exemption, the expenses must have been incurred with the object of actual or immediate gain or profit as a result of the visits in relation to which the expenses were incurred. It is clear that there was no intention, in the mind of the appellant, in attending these meetings, that he should make a direct profit therefrom. The contention is that, while there was no immediate profit, nevertheless his prestige, which would have been maintained or increased by reason of attending these meetings, would eventually lead to gaining or producing profit in the future. It seems to me that such is too remote for consideration.

The case was very ably and exhaustively argued by Mr. Fleming, Q.C., of counsel for appellant, to which I have given my best consideration, but I am bound to conclude that the very able judgment of Mr. Monet is convincing and sound. Consequently, there is no valid ground for allowing the appeal.

The appeal will, therefore, be dismissed with costs taxed.

Judgment accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT 1955 Oct. 12

BETWEEN:

WILLIAM ROBERTSON .....PLAINTIFF;

AND

THE OWNERS OF THE SHIP *MAPLE PRINCE* and OLAF NELSON .....} DEFENDANTS.

Shipping—Costs of application for limitation of liability.
Held: That costs of an application for limitation of liability follow the event.

MOTION for costs.

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

C. C. I. Merritt for plaintiff.

W. D. C. Tuck for defendant.

SIDNEY SMITH D.J.A. now (October 12, 1955) delivered the following judgment:

In this case I found the owners of the defendant ship *Maple Prince* responsible in damages to the plaintiff and upon subsequent argument decided that they were entitled to limit their liability under the provisions of the Canada Shipping Act. The present application concerns the costs of the "limitation" argument.

Section 131 of the Admiralty Rules reads:

In general costs shall follow the event; but the Judge may in any case make such order as to the costs as to him shall seem fit.

The "event" here is that the defendants have succeeded on the issue of limitation of liability. Is there any reason why I should think "fit" to deprive them of costs?

There seem to be no Canadian decisions expressly in point but the plaintiff directs me to this statement in Roscoe's Admiralty Practice, 5th Ed. p. 249:

The costs in actions of limitation of liability are in the discretion of the Court, but it is an invariable rule of practice for the Court to exercise its discretion by condemning the plaintiffs in the costs of the proceedings

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Smith D.J.A.

other than costs incurred by reason of the defendants having raised unreasonably issues on which they have failed, or costs occasioned by a dispute between rival claimants to the fund in Court.

Marsden, Mayers and other text-book writers are to the same effect and are based on the same authorities. The passage refers to subsequent actions brought by ship owners to limit their liability. Here the issue was raised by counterclaim, so that the defendant owners become plaintiffs by counterclaim. *The Sonny Boy* (1).

I reserve the statement for future consideration. Here the circumstances preclude the application of the rule. I said in the concluding words of my judgment on "limitation of liability":

> There is no submission that the owners of the tug contributed to the collision by their "actual fault or privity". Their servants were responsible.

I remain of this opinion. I say nothing about the owners of the barges. They were not parties to the suit. But, even had they been so, and could be carried into this controversy, I think the improper placing of the white light was negligence of the servants, not "fault or privity" of the owners.

Defendants will have the costs of the argument and this application.

Judgment accordingly.

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Jan. 5 & 6

Jan. 23

ONTARIO ADMIRALTY DISTRICT

BETWEEN:

HONEY HARBOUR BOAT WORKS LTD. ..... PLAINTIFF;

AND

GORDON WISHART ..... DEFENDANT.

Shipping—Collision—Improper navigation of defendant's boat cause of collision—Judgment for plaintiff.

Held: That in an action for damage to plaintiff's motor boat by reason of a collision between it and a boat owned and driven by the defendant judgment should go for the plaintiff when such collision was caused by defendant's improper navigation of his boat.

(1) (1945) 61 B.C.R. 309.

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HONEY HARBOUR BOAT WORKS LTD. v. WISHART

ACTION to recover for damage caused plaintiff's motor boat.

The action was tried before the Honourable Mr. Justice Barlow, District Judge in Admiralty for the Ontario Admiralty District, at Toronto.

N. W. Allingham for plaintiff.

R. N. Starr, Q.C. for defendant.

BARLOW D.J.A. now (January 23, 1956) delivered the following judgment:

The plaintiff's claim is for damage to the plaintiff's motor boat sustained by reason of a collision between the water taxi 24-foot motor driven boat owned by the plaintiff and driven by one Lamoureux and a 20-foot motor driven boat owned and driven by the defendant on the 12th day of September, 1952, about 9 p.m. The defendant's boat struck the plaintiff's boat at right angles just back of the driver's seat with sufficient force to crash and stove in the hull of the plaintiff's boat.

There is some conflict of evidence as to where the collision took place. The evidence of the defendant did not impress me. He appeared to be too ready to give such evidence as would assist his cause and appeared to have carefully considered this. The demeanour of the plaintiff's witness Lamoureux impressed me and I accept it.

Lamoureux was on his way back to Honey Harbour from Cognoshene Lake where he had delivered a passenger. The defendant had come from Honey Harbour with a load of plywood, shingles, etc. and was on his way to his cottage. After Lamoureux rounded Cognoshene Point he saw the defendant's boat approaching at first without lights. The defendant's boat was on its own right side of the channel at this time. Later he turned to port and crashed into Lamoureux at right angles.

Even if I accepted the evidence adduced by the defendant I would find that it was the defendant's negligence which caused the collision. The defendant had been proceeding on a course with the land on his starboard. He says he changed his course slightly to his left. He admits that he saw the light of the plaintiff's boat on his right, and that he did nothing to avoid the collision.

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HONEY HARBOUR BOAT WORKS LTD. v. WISHART

Barlow D.J.A.

The rules of the road grant to the vessel on the right the right-of-way and require the other vessel to keep out of its way. The defendant did nothing to avoid the collision. The defendant says that he saw the light on the plaintiff's boat which he should have recognized as being the light on the boat. At this time the defendant, by the exercise of proper caution, could have avoided the accident. The defendant admits that he struck the plaintiff's boat at right angles.

A careful consideration of the evidence leads to only one conclusion, namely, that the defendant's improper navigation of his boat caused the collision.

Pursuant to the evidence adduced I assess the plaintiff's damages at $1,642.04.

The defendant filed a counterclaim, but offered no evidence in support of the alleged damage.

Judgment will go for the plaintiff for $1,642.04 and costs.

Judgment accordingly.

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Mar. 7

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Jan. 20

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

AND

THE DAVIDSON CO-OPERATIVE ASSOCIATION LIMITED ..... RESPONDENT.

Revenue—Income—Co-Operative Association—Patronage dividends paid —Amount of income subject to tax—The Income War Tax Act, R.S.C. 1927, c. 97, ss. 2 (h) (k), 5 (8) (9).

The respondent, a corporation registered under the *Co-Operative Association Act*, R.S.S. 1947, c. 179, was incorporated in 1914 on a share capital basis to purchase and sell commodities upon the co-operative plan. In 1945 it repurchased all shares held by each member except two by crediting him in a Demand Loan account an amount equal to their value. In 1947 it repurchased the remaining shares by depositing an amount equal to their value to each member's credit in a Members' Deposit account. The latter deposits were repayable on a member leaving the district, on his death, by resolution of the directors or, on the dissolution of the Association. The practice of other retailers was followed by the Association in its purchases and sales except that at the end of its fiscal year, after deduction of overhead, the payment of interest on the Demand Loan and Members' Deposit account and

payment of one per cent of total sales to a Patrons' Emergency Fund, the remaining surplus was credited in even percentages to the Members' Deposit account as a patronage dividend calculated on each member's annual purchases. By by-law it was provided a member could make additional deposits to this account payable on demand and that any purchaser could become a member but that no refund be paid him in cash until he had $20 on deposit and that any patronage refund due him be credited his deposit account until that amount was reached.

The Association was assessed under the *Income War Tax Act*, R.S.C. 1927, c. 97 as amended, for the years 1947 and 1948 on amounts shown in its financial statements for each of those years. It appealed the assessment to the Income Tax Appeal Board contending it had no income as it had distributed all its profits in the form of cash or goods in even percentages to its patrons and that the residue held in a surplus fund was the property of all its patrons. The appeal was allowed and the present appeal is from the Board's decision.

Held: 1. That the respondent was a legal entity as distinguished from its members and a taxpayer as defined by s. 2(*h*) and (*k*) of the Act.

2. That it carried on business for its own purposes and the profits it made were subject to income tax. *Minister of National Revenue* v. *Saskatchewan Co-Operative Wheat Producers* [1930] S.C.R. 402.

3. That having pursuant to s. 5(8) deducted the amounts it paid out as patronage dividends it was left with income subject to tax under s. 5(9) and such income was 3 per centum of the capital employed in its business at the beginning of the relevant taxation year less any allowable deductions for interest paid on borrowed moneys, other than moneys borrowed from a bank or credit union, and deductible as an expense in computing income. All other deductions for interest claimed by the respondent were not allowable under the Act. *Jones* v. *South West Lancashire Coal Owners Assn.* [1927] A.C. 827 and *Municipal Mutual Insurance Ltd.* v. *Hill*, 147 L.T.R. 62, distinguished.

APPEAL from a decision of the Income Tax Appeal Board (1).

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

J. L. McDougall, Q.C. and *F. J. Cross* for the appellant.

J. G. Diefenbaker, Q.C. and *M. W. Coxworth* for the respondent.

FOURNIER J. now (January 20, 1956) delivered the following judgment:

This is an appeal from the decision of the Income Tax Appeal Board (1), dated December 29, 1953, which allowed the respondent's appeal from its income tax assessment for its taxation years 1947 and 1948, on the ground that

(1) (1953) 9 Tax A.B.C. 369.

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the respondent was not deriving any profit for itself from its operations but was acting on behalf of its members and had no taxable income.

The question to be determined is whether the respondent had income liable to tax in respect of these taxation years. In the affirmative, was the amount of the tax to be paid by the respondent under the provisions of the *Income War Tax Act*, R.S.C. 1927, c. 97, and amendments thereto, in each of its 1947 and 1948 taxation years, properly determined.

According to its Memorandum of Association the respondent is an association incorporated under the provisions of the Saskatchewan Agricultural Co-operative Associations Act and registered as such on April 14, 1914, and its objects were to produce, purchase or sell livestock, farm products, building and fencing material, fuel, flour, feed and such other commodities as may be shipped in car lots and distributed from a warehouse upon the co-operative plan. The capital stock of the Association was to consist of 500 shares of $10 each.

It is admitted that during its taxation years 1947 and 1948 the respondent was a corporation registered under *The Co-operative Associations Act*, being c. 179 of the Revised Statutes of Saskatchewan, 1940, and amendments thereto. The purpose of associations incorporated under the above-mentioned Act is to establish and operate any co-operative business or enterprise specified in its memorandum of association. The objects of these associations are enumerated in s. 5 of the Act as follows:

(*a*) purchasing, procuring, selling, exchanging, hiring and dealing in goods, wares and merchandise;

(*b*) producing, purchasing and selling livestock and farm products;

(*c*) preparing, adapting, producing, processing and manufacturing goods, wares and merchandise for sale by it to its consumer members and patrons;

(*d*) establishing, maintaining and operating any one or more of the following: a library, a rest room, a club room or a public hall;

(*e*) erecting, purchasing, taking on lease or otherwise acquiring apartment blocks, houses, dwellings and lodgings, and operating the same;

(*f*) rendering to its members and patrons services of any kind whatsoever incidental to its objects.

These associations have ancillary and incidental powers to do all the things conducive to the attainment of the

above objects and their memorandum of association may be amended with the approval of the registrar. They may also pass by-laws not inconsistent with the provisions of the Act or of the standard by-laws. S. 10 of the above statute reads as follows:

> 10. (1) An association may at an annual meeting or a general meeting called for the purpose pass such supplemental bylaws not inconsistent with the provisions of the standard bylaws as may be deemed advisable by the association, and without limiting the generality of the foregoing may, notwithstanding anything in this Act contained, pass supplemental bylaws . . .

These supplemental by-laws may deal with the application of members or patrons dividends, the retention, variation or limitation of dividends, the payment or non-payment of interest on loan capital, etc.

On March 21, 1947, the respondent passed and registered supplemental by-laws providing that the standard by-laws as prepared by the registrar of Co-operatives shall not apply to their association. The by-laws hereinafter referred to and passed on or after the above-mentioned date were passed in accordance with the provisions of the aforesaid section of the Statute.

The respondent association, from its incorporation till October 29, 1943, operated on a share capital basis. But on that date, by By-law No. 23, it purchased all the shares held by each of its members, except two which were retained by the said members. From there on, members could not own more than two shares each. The purchase was made by crediting the shareholders with an amount equivalent to the value of the shares on a demand loan account in the name of the member, on which interest at the rate of 4 per cent was to be paid.

On March 21, 1947, by By-law No. 30, it was provided that the remaining two shares held by each member be re-purchased and an amount equivalent to their value be placed to the member's credit in a deposit account. These deposits were repayable to the member on his leaving the district, on the association being dissolved, on the death of the member or on the association deciding to repay a member his deposit account. The same by-law also provided that "a member shall be a person who obtains his supplies or part thereof through the Association". It further provided that no patronage dividend would be

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payable to a member in cash until he had $20 on deposit in the association and that any patronage refunds due to him would be credited to his account until it reached that amount.

On the same date, By-law No. 32 was passed providing that members could deposit funds with the Association in addition to the $20 deposit, such funds repayable on demand. Interest could be paid on these deposits and has been paid to members since 1947 and for many years has been paid at a rate of 4 per cent per annum.

While operating on a share capital basis, the respondent had at its disposal for its operations, amongst others, the amount paid by the shareholders for the shares. Since its reorganization, it has for its operations the amount of the repurchase price of the shares, credited to the members as a loan deposit and the membership fee deposits. It also has the accumulated sum of the co-operative's surplus fund and the accumulated amount of what it calls the Patrons Emergency Benefit fund. Interest is paid at an annual rate of 4 per cent on the member's loan and membership deposits and on the surplus and emergency benefit funds. The amounts of the deposits and funds are administered by the directors of the respondent Association but no trust was set up for the aforesaid purposes and no special bank account was opened to set aside these deposits or funds but were kept by the respondent and carried in its books. It would appear that the surplus funds and the Emergency Benefit funds, for bookkeeping purposes, were noted in special accounts. Needless to say that, when the need arises, it also borrows monies from the banks to finance its operations. The above facts outlining the basis on which the respondent operates are not in dispute.

The respondent association's objects set forth in its memorandum of association and in the Statute under which it operates are as above described, to wit: "To produce, purchase or sell livestock, farm products, building and fencing materials, fuel, flour, feed and other such commodities upon the co-operative plan".

The evidence, written and oral, establishes that the respondent purchases, as any other retailer, its merchandises from manufacturers or wholesalers. It also purchases from other co-operatives. When the goods are received

the selling price is marked down. Mr. Wilson stated that prices thus marked were about the same as the selling prices of other merchants in the district. This was carefully checked, so that there would be as little discrepancy as possible between the respondent's prices and those of the other tradesmen. In other words, the prices that were put on its goods were the same or practically the same as the local prices so as to keep in line with the price structure in the other stores of the district. It would follow that those prices comprised the respondent's overhead cost, plus the ordinary profit on the goods handled. Then the goods were sold not only to members but to the public at large. The income tax returns show that over 14 per cent of the business was done with the general public. The respondent does business on the same basis as the ordinary businessman, only there is a return to the members at the end of the year. The invoice issued to the customers bears the words "Sold to" and the words "This is an interim charge". At the end of the year, the books and accounts are totalled up and a patronage dividend is credited to the member's account. It may be also paid in cash, but it would seem that the general practice is to credit the member's account for these dividends. If a customer has during the year purchased for $50 or more of goods, an amount is credited to him as part of his membership fee, up to $20, which entitles him to become a member. But before paying the patronage dividends, interest at the rate of 4 per cent per annum is credited to the loan and member's deposits and to the surplus and emergency benefit fund; also one per cent of the total sales is credited to this last fund.

This summary of the situation, in my mind, covers the essential facts on which the respondent based its income tax returns for the years 1947 and 1948 and on which the appellant based its appeal from the decision of the Income Tax Appeal Board. (1)

On or about April 10, 1948, and November 26, 1949, the respondent filed with the appellant its income tax returns for the taxation years 1947 and 1948 in which it reported that it had no income subject to tax in those two

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years because it was a consumer's co-operative, and a non-profit purchasing agency. The appellant, not satisfied that the business carried on by the respondent in its 1947 and 1948 taxation years was that of a purchasing agency, and that there existed any contract between the respondent and its members requiring that the respondent make no income, assessed the respondent under the *Income War Tax Act*, R.S.C. 1927, c. 97, and amendments, for its taxation years 1947 and 1948. Notices of these assessments were sent to the respondent on February 8, 1951.

On April 3, 1951, the respondent sent notices of objection to the appellant from the above assessments, wherein a tax in the sum of $844.79, plus interest of $56.41, was levied in respect of income for the taxation year 1947 and a tax of $909.86, plus penalty $45.49 and interest $63.42, in respect of the income for the taxation year 1948.

On November 6, 1951, the appellant, after having reconsidered the assessments and having considered the facts and reasons of the respondent in the notices of objection, confirmed the assessments as having been made in accordance with the provisions of the Act.

These assessments were appealed to the Income Tax Appeal Board and the appeal was allowed. From this decision, the Minister of National Revenue appeals to this Court.

The appellant contends that the respondent is a duly incorporated co-operative association and is a distinct, separate and legal person as distinguished from its members, in the same way that an ordinary joint stock company is a separate legal entity as distinguished from its individual shareholders. On the other hand, the respondent claims that it owns nothing and that everything it possesses is the property of its members collectively. It is only the agent of the members in the carrying on of the business. The business and the profits derived therefrom belong to the members; therefore, the association as such has no income, and having no income, is not liable to taxation.

To my mind, the respondent was duly incorporated under a provincial statute and the moment the incorporation formalities were fulfilled it became a legal entity. As a legal person, it has objects and powers which may be

found in its memorandum of association and *The Co-operative Associations Act,* R.S.C. 1940, c. 179, and amendments. The request for incorporation states that the Association desires to go into the business of producing, purchasing or selling goods. There is no mention in its application that it intends to do business for a group of shareholders or members or that in organizing the business it would divest itself of its powers or purposes as a corporation or forgo its right to have income or profits. As to the Act itself it states clearly that any five or more persons who desire to associate themselves together as a co-operative association for any purpose permitted by the Act may do so by fulfilling certain formalities. When incorporated, the association is empowered to establish and operate any co-operative business or enterprise specified in its memorandum of association in its own name and not as agent for its members. I have no hesitation in finding that The Davidson Co-operative Association Limited, the respondent in this instance, is a corporation and as such a separate legal entity as distinguished from its individual members.

As a legal person, the respondent is the owner, in its own right, of land, buildings, furniture and equipment, merchandise and other personal property, including Dominion of Canada Bonds, it employs officials and servants, takes depreciation on its plant, pays taxes and other business expenses and makes provision for bad debts in exactly the same manner as any ordinary corporation. It even collects from its patrons and pays over to the Province of Saskatchewan sales tax imposed by the Province. This tax is collected and remitted to the provincial authorities by the vendor in respect of a retail sale made to a purchaser in the Province.

The evidence before the Court is to the effect that the respondent bought goods on its own account from the ordinary sources of supply, paid for these goods, stocked them in its store and put them up for sale, as any other storekeeper, in the usual course of business. These goods were not purchased to fulfil orders previously received. They were sold to members and customers at a marked up price in line with prices available in the other stores of the region. These prices comprised the cost of purchase,

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the overhead expenses and a profit, plus the education tax. I find that everything the respondent did in the carrying on of its business was similar to what is generally done by businessmen or business firms.

According to the evidence of the respondent's manager the only difference in the procedure followed in making a sale in the respondent's place of business was the handing to its patrons and customers an invoice carrying the words "This is an interim charge". A copy of this invoice was not available at the trial, nor is it on file before the Court. In my opinion, these words could not mean that at some time in the future the prices paid for these specific goods would be less than the invoice price. The fact is that, at the end of the year, the accountant totalled up the books and the difference between the total cost of the goods with the overhead expenses, the interest paid on the loan credits, the membership credits, the emergency benefit fund and the surplus fund, plus one per cent of the total sales credited to the Emergency Benefit Fund, and the moneys received, became the respondent's surplus earnings or income. Most of this income was credited to the members' account in proportion to patronage or (which does not appear to have been the practice) paid in cash, but could have been. The patron or customer dividend was calculated on the amount of money paid by the member or customer to the respondent during the year.

It would seem that prior to 1947 no difficulty arose concerning the taxation of the respondent's income. This is easily understood because previous to 1947 the *Income War Tax Act*, under s. 4, s.s. (*p*), provided that the income of co-operative companies and associations was not liable to taxation. S. 4, s.s. (*p*) reads as follows:

4. Income not liable to tax. The following incomes shall not be liable to taxation hereunder:—

(*p*) Co-operative companies and associations. The income of farmers', dairymen's, livestockmen's, fruit growers', poultrymen's, fishermen's and other like co-operative companies and associations, whether with or without share capital, organized and operated on a co-operative basis, which organizations

(*a*) market the products of the members or shareholders of such co-operative organizations under an obligation to pay to them the proceeds from the sales on the basis of quantity and quality, less necessary expenses and reserves;

(*b*) purchase supplies and equipment for the use of such members under an obligation to turn such supplies and equipment over to them at cost, plus necessary expenses and reserves.

Such companies and associations may market the produce of, or purchase supplies and equipment for non-members of the company or association provided the value thereof does not exceed twenty per centum of the value of produce, supplies or equipment marketed or purchased for the members or shareholders.

But in 1946 the Act was amended, the above provision disappeared from the Statute and was replaced by a new subsection (*p*). The new section gave temporary relief only to corporations commencing business on or after the first day of January 1947. The income during the first three taxation years after the commencement of the business of these corporations was not liable to tax.

I do not believe the respondent was entitled to avail itself of this new provision of the Act. The business carried on by the Association was the continuation of a previous business in which a large number of members of the corporation had a substantial interest, either as shareholders or otherwise. To benefit from the relief provided for by this subsection (*p*) the respondent had to establish that it fell within the ambit of its terms.

Clause VII of s.s. (*p*) of s. 4 of the Act reads as follows:

(VII) the business carried on by the corporation is not, in the opinion of the Minister, a continuation of a previous business in which, in the opinion of the Minister, a substantial number of members of the Corporation had a substantial interest, either as shareholders of a corporation carrying on the previous business or otherwise.

It seems to me that the respondent cannot claim the relief provided for in this section. In 1947 it continued the business it was carrying on previously and the patrons and members had a substantial interest in that business, if not as shareholders, as members, if the contention of the respondent that it owns nothing and has no income and that the members collectively are the sole owners of the business is to be taken into account. The amount of the value of the shares repurchased by the association was deposited to the account of the members, and the evidence does not establish that this amount was reimbursed to the members. Therefore, the members' interest in the business would be the same as it was when they were shareholders. Furthermore, the Minister by making the assessment referred to above, clearly indicated that he was of the

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opinion that the respondent's income was liable to tax. Had he thought that the business carried on by the respondent was not a continuation of a previous business, he would not have made the assessment in dispute.

Having found that the respondent was a legal person doing business in its own right on a profit basis and did have an income in the taxation years referred to herein, the next question to be determined is whether its income was liable to tax.

The contention put forward on behalf of the respondent is that the difference between the proceeds of its sales and the cost of the goods, the overhead and the disbursements heretofore described having been distributed to its members, at the end of each year in proportion to patronage, in an aggregate amount equal, or almost equal, to its surplus earnings, it had no income liable to tax. It was also contended that it was never intended that the Association should make any profits and this was done by paying nearly all its earned surplus to the members.

In this last submission it is admitted that the respondent had earned surpluses, though it is claimed that they were not income liable to tax because most of these surpluses were paid over to its members.

In my view, once it has been established that the respondent derived profits from its business, the liability to pay income tax is to be governed by the terms and provisions of the taxation statute, though the intention of the respondent was that no profit should be made out of the operation of its trade or business. Viscount Simon in *Simon's Income Tax*, second edition, volume 2, paragraph 27, states:

> There may be a carrying on of a trade for tax purposes even though there is no intention to make a profit. The question is whether or not a trade is or was being carried on, and once that question is answered in the affirmative there is liability to tax on any resulting profit, irrespective of whether the trading activities were directed to the making of the profit and irrespective of the purpose to which the profit is applied.

What is material to the present issue is not the respondent's intention, but what was the result of its carrying on of a business. If it derived profits from its operation, were those profits liable to tax or exempted from taxation by some provision of the *Income War Tax Act?* To answer this question, different provisions of the Act have to be considered.

In the *Income War Tax Act*, 1927, R.S.C., c. 97, and amendments, in 1947 and 1948 the word "person" is defined in s. 2, s.s. (*h*), which reads thus:

2. (*h*) "Person"—"person" includes any body corporate and politic and any association or other body, and the heirs, executors, administrators and curators or other legal representatives of such person, according to the law of that part of Canada to which the context extends;

* * *

(*k*) *"Taxpayer"*—"taxpayer" includes any "person" whether or not liable to pay tax;

Having decided that the respondent was a body corporate, a legal entity, it follows that it fell within the ambit of the definition of "person" and was a "taxpayer".

S. 3 of the Act, as amended, defines "Taxable income" in the following words:

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

The evidence adduced clearly indicates that the respondent during its taxation years 1947 and 1948 received net profits or gains derived from its business, but it is established that though it was a corporation it was incorporated as a Co-operative Association. As such it could claim the benefits of the provisions of the Act relating to co-operative companies or associations. I expressed the view that it did not meet the conditions laid down in s. 4, s.s. (*p*), and could not claim the relief provided for in that section.

Having so found, it follows that the respondent would be liable for income tax as any other corporation, at the corporate rate, on its income in each of the two taxation years, because its profits in each of these years were in excess of $30,000, were it not for certain provisions of s. 5 of the *Income War Tax Act*.

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Under the heading "Deductions and Exemptions Allowed", s. 5 provides that deductions may be made to the taxpayer's income when payments are made to members or customers within a taxation year, pursuant to allocations in proportion to patronage.

Paragraph 8 of section 5 reads as follows:

8. *Deductions allowable.* There may be deducted from a taxpayer's income as hereinbefore defined, the aggregate of the payments made by him

(*a*) within the taxation year or within twelve months thereafter to his customers of the taxation year, and

(*b*) within the taxation year to his customers of a previous taxation year, the deduction of which from income of a previous taxation year was not permitted under paragraph (*a*) of this subsection

pursuant to allocations in proportion to patronage for the said years; provided that, if the taxpayer has not made allocations in proportion to patronage in respect of all his customers of the taxation year at the same rate, with appropriate differences for different types or classes of goods, products or services, or classes, grades or qualities thereof, the amount that may be deducted from his income under this subsection shall be

(*c*) the aggregate of the payments previously mentioned in this subsection, or

(*d*) an amount equal to the aggregate of

(i) the amount of the income of the taxpayer of the taxation year attributable to business done with members of the taxpayer, and

(ii) the amount of allocations in proportion to patronage to customers of the taxpayer of the taxation year other than members of the taxpayer

whichever is less.

I am convinced that the respondent gave consideration to this subsection of the Act when preparing its balance sheet and income tax return, but seems to have neglected to pay close attention to the following paragraph 9 of section 5 which is correlative to the previous subsection. It reads:

9. *Interest on borrowed moneys.* Notwithstanding anything contained in subsection eight of this section, if the amount that may be deducted thereunder would leave the taxpayer with an income subject to tax under this Act less than an amount determined by deducting from three per centum of the capital employed in the business at the commencement of the taxation year, the interest, if any, paid.

Section 5, subsection 8, read as follows:

5. 8 *Deductions allowable.* There may be deducted from a taxpayer's income as hereinbefore defined, the aggregate of the payments made by him

(*a*) within the taxation year or within twelve months thereafter to his customers of the taxation year, and

(*b*) within the taxation year to his customers of a previous taxation year, the deduction of which from income of a previous taxation year was not permitted under paragraph (*a*) of this subsection.

pursuant to allocations in proportion to patronage . . . in respect of all his customers of the taxation year at the same rate, with appropriate . . . different types or classes of goods, products or services, or classes, grades or qualities thereof, the amount that may be deducted from his income . . . shall be

(*c*) the aggregate of the payments previously mentioned in this subsection or

(*d*) an amount equal to the aggregate of

(i) the amount of the income of the taxpayer of the taxation year attributable to business done with members of the taxpayer, and

(ii) the amount of allocations in proportion to patronage to customers of the taxpayer of the taxation year other than members of the taxpayer

whichever is less.

I am convinced that the respondent gave consideration to this subsection of the Act when preparing its balance sheet and income tax return, but seems to have neglected to pay close attention to the following s.s. 9 of s. 5 which is correlative to the previous subsection. It reads:

5. 9 *Interest on borrowed moneys.* Notwithstanding anything contained in subsection eight of this section, if the amount that may be deducted thereunder would leave the taxpayer with an income tax subject to tax under this Act less than an amount determined by deducting from three per centum of the capital employed in the business at the commencement of the taxation year, the interest, if any, paid during the taxation year by the taxpayer on borrowed moneys (other than moneys borrowed from a bank incorporated under the Bank Act or from a corporation or association incorporated or organized as a credit union as described in paragraph (*q*) of section four of this Act), and . . .

This provision of the Act, in my opinion, is applicable to this litigation, but it seems that the respondent or its officials overlooked it. When the income tax returns were sent to the Department they showed "no income taxable" for the years under discussion. The respondent took the stand that the business operated by it was not one in which it purchased or produced merchandise for its own account, but that it being a consumer co-operative was purchasing agent for its members and customers. Well, I cannot agree with this statement and it does not agree with the facts of the case nor with the law governing taxation on income. On the one hand, the respondent admits being a duly incorporated body with objects, purposes and powers. It is in business as any other corporation or person and conducts

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its affairs in like manner. It has earned surpluses as any other business, and though it calls these surpluses "overages", it does not change the facts. Furthermore, there is no contract between the respondent and its members and customers to the effect that it make no profit or income.

It is a recognized rule in income tax matters that profits from the operation of a trade or business are taxable. This principle was expressed by the Supreme Court of Canada in the case of the *Minister of National Revenue and The Saskatchewan Co-operative Wheat Producers* (1) in the following words:

> The basis of chargeability to income tax is the operation of a trade or business giving rise to a profit.

The respondent in this case undoubtedly carried on a business for its own purposes which certainly made profits which, in my mind, were subject to income tax.

The respondent took advantage of s-s. 8 of s. 5 of the Act in the preparation of its income tax returns of the years in question and deducted the amounts paid out in patronage dividends during these years. The sums thus deducted left it with an income subject to tax under the Act (s. 5 (9)) less than 3 per cent of the capital employed in the business at the commencement of both taxation years. I am satisfied that the capital employed in the business at the beginning of 1947, less a small amount added through an error, was $93,864.93 and 1948, $101,095.07.

As the returns show that the respondent's profits in the years 1947 and 1948 were in excess of $30,000, which is far in excess of 3 per cent of the capital employed, and that the income subject to tax being 3 per cent of the capital employed in the relative taxation years, less any allowable deduction for interest paid during the taxation year by the taxpayer on borrowed moneys other than moneys borrowed from a bank or credit union and deductible as an expense in computing the taxpayer's income as provided in s-s. 9 of s. 5. It is necessary to consider s. 5 (1) (*b*). It reads:

> 5 (1) (*b*) Interest on borrowed capital—Such reasonable rate of interest on borrowed capital used in the business to earn the income as the Minister in his discretion may allow notwithstanding the rate of interest payable by the taxpayer, but to the extent that the interest payable by the taxpayer is in excess of the amount allowed by the Minister

(1) [1930] S.C.R. 402 at 415.

hereunder, it shall not be allowed as a deduction and the rate of interest allowed shall not in any case exceed the rate stipulated for in the bond, debenture, mortgage, note, agreement or other similar document, whether with or without security, by virtue of which the interest is payable;

In my opinion, clause (*b*) above means that the only interest on borrowed capital used in the business which is deductible as an expense is interest on moneys borrowed to earn income. I do not believe that the evidence before the Court is to the effect that the amounts on which interest is being paid in the present instance were used to earn income. The members not withdrawing their patronage dividends or making deposits with the respondent were paid interest on the sums left in their account and the interest on the surplus and emergency benefit funds was automatically credited to the amount of these funds. But, even if these moneys were used to earn income and the rate stipulated in a contract, the only amount deductible as an expense is the amount that the Minister in his discretion may allow. In the present instance, I repeat the respondent failed to establish that the moneys on which interest was paid were used to earn income or that the interest was paid in virtue of a written document or that the Minister allowed the interest to be paid at the rate at which it was paid.

The Minister used his discretion in disallowing the interest paid or part of that interest so that the provisions of s. 5 could be met, that is to say that the income subject to tax would not be less than the amount determined by deducting from 3 per cent of the capital employed in the business at the beginning of the taxation years, the interest paid in accordance with the conditions stated in s. 5 (1) (*b*) above cited.

It is with these facts and the above provisions of the Act in mind that the appellant proceeded to assess the respondent's income. The reports of the respondent's auditors were used as the basis of the assessments. As it appears in the respondent's reply to the Minister's appeal that the dispute between the parties concerns the deductions made by the respondent for interest paid on moneys borrowed from the members' deposits and from the Patrons' Emergency Fund, the payments made to the Patrons' Emergency Benefit Fund, the capital employed by the respondent for its operations and depreciation, I think it useful to consider the items of the 1947 assessment as an illustration.

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The proceeds from the sale of goods by the respondent amounted to $477,632.33 and the cost to produce or purchase these goods was $442,215.92.

Wholesale cost of goods	$386,948.67
Management salaries	7,895.00
Directors' fees	621.40
Audit	250.00
Wages	29,417.98
Fuel, light and power	1,652.00
Taxes, insurance and license	4,557.75
Interest and discount	3,424.43
Telegraph and telephone	602.45
Travel	195.07
Postage, stationery and adv.	1,785.69
Repairs	419.45
Delivery	3,931.71
Unemployment insurance	58.61
Siding rental	150.48
Miscellaneous	305.23
Total	$442,215.92

The amount of profit from the sale of the goods sold was the difference between the proceeds from the sales, amounting to $477,362.35, and the above detailed costs of producing or purchasing and selling the goods sold amounted to $442,215.92, or an amount of $35,146.41. The respondent, in addition to this amount of profit, had income from other sources amounting to $1,884.87. These two amounts make a total income of $37,031.28 before deductions. The deductions which were assessed comprised charitable donations, $140, allowance for bad debts, $1,000, and allowance for depreciation, $2,144.01, making a total of $3,284.01. After these deductions the respondent's net income was $33,747.27.

The capital employed in the respondent's business at the commencement of the taxation year 1947 amounted to $93,864.93, less a small amount added through error, as I have hereinabove mentioned.

The amount determined by deducting from 3 per centum of the capital employed in the respondent's business at the commencement of the said year, and by the interest paid on borrowed moneys and that was deductible as an expense in computing its income under the *Income War Tax Act*, was $2,815.95. On this basis, the respondent's income sub-

ject to tax for its 1947 taxation year was assessed at the sum of $2,815.95 and for its 1948 taxation year at the sum of $3,032.85.

Before arriving at the above findings, I had carefully considered the decisions on the subject of mutual organizations which were referred to by the parties, because the respondent took the stand that it was a consumers' co-operative with no income or profit. It contended that it was an association of the nature of a mutual company and that the principles governing mutual companies with regard to taxation should be applied to its operations and that it could not be held that there was any profit or gain within the ambit of the taxation Act.

In all the decisions considered, it seems to have been established that the contributors or members were also the owners of the surplus or reserve funds set up for protection against future claims or liabilities and that a real mutuality existed because there was absolute identity between the contributory members and the participators.

In support of its contention, it seemed to rely on the principles laid down in the following cases.

Jones v. *South West Lancashire Coal Owners Association* (1). At page 830 Viscount Cave, L.C. said, quoting from Lord Watson in the *Styles* case (2):

> When a number of individuals agree to contribute funds for a common purpose, such as the payment of annuities, or of capital sums, to some or all of them, on the occurrence of events certain or uncertain, and stipulate that their contributions, so far as not required for that purpose, shall be repaid to them, I cannot conceive why they should be regarded as traders, or why contributions returned to them should be regarded as profits. That consideration appears to me to dispose of the present case. In my opinion, a member of the appellant company, when he pays a premium, makes a rateable contribution to a common fund, in which he and his co-partners are jointly interested, and which is divisible among them, at the times and under the conditions specified in their policies. He pays according to an estimate of the amount which will be required for the common benefit; if his contribution proves to be insufficient he must make good the deficiency; if it exceeds what is ultimately found to be requisite, the excess is returned to him. . . .

In *Municipal Mutual Insurance Ltd.* v. *Hills* (3) Lord Warrington at page 65 said:

> Mutual Insurance business is now perfectly well known. It consists essentially in the association of a number of persons who insure each other against certain risks by contributing by way of premiums to a

(1) [1927] A.C. 827 at 830.
(2) [1889] 14 App. Cas. 381 at 394.
(3) (1932) 147 L.T.R. 62.

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common fund to be used, together with further contributions if necessary, for the purpose of indemnifying any member or members who may have suffered injury in consequence of a risk insured against, any surplus being either carried forward or used to reduce future premiums as the members may determine.

In *New York Life Insurance Co.* v. *Styles* (1) at page 412 (in fine) Lord Macnaghten said:

> . . . I do not think that that decision compels your Lordships to hold in a case like the present, where the business is a mutual undertaking pure and simple, that persons who contribute in the first instance more than is wanted, and then get back the difference, are earning gains or profits, and so liable to income tax.

In mutual insurances persons join together to protect themselves and each other against certain risks, each contributing to a fund deemed sufficient to cover the risks insured. This fund is used to pay the losses that occur. The amount remaining in the fund at the expiration of a fixed period is paid over or credited to the account of each contributor on a *pro rata* basis and applied on future contributions. A contract exists between the members by which each member has a right to get back that portion of contribution he made and was not necessary to be used to pay the losses to be compensated under the mutual insurance contract. He is entitled by contract to the return of that part of his contribution which is not required. It is easily understood that in these cases no profit can be made out of the contributions of the members. On the other hand, were the company to do business which was not purely mutual and made profits, even if distributed to its members, they would be subject to income tax. This rule was applied in *The Cornish Mutual Assurance Co.* v. *Inland Revenue Commissioners* (2). At page 286, Viscount Cave said:

> It is true that it only carries on that business with its own members; but, as every person who chooses to effect a policy with the Company *ipso facto* becomes a member, the restriction does not appear to me to prevent the transactions of the Company from being business transactions.

The above decisions, except the last one cited, are certainly distinguishable from the present case inasmuch as the respondent is not bound by a contract with its members to allocate or divide or return all or any part of its surpluses to the individual members. There is no evidence before the Court that there exists any agency contract

(1) (1889) 14 App. Cas. 381. (2) [1926] A.C. 281.

between the respondent and its individual members to act as their purchasing agent. Furthermore, the respondent is not the agent of a number of persons who have joined together to further a common purpose of protection and have contributed to a common fund to that end. It has dealings with the public at large and the evidence shows that a member is a person who obtains his supplies or part thereof through the association, that is to say that any person who makes a purchase from the respondent may/or becomes a member of the association. To my mind, none of the essential elements to constitute a mutual organization exist in the respondent association.

I am of the view that the Davidson Co-operative Association Limited has all the characteristics of an ordinary incorporated company. Its members in meeting assembled elect the directors and control the operations of the company and of its directors by majority vote. The company employs personnel to carry on its operations of producing or purchasing and sellings goods to their members and all comers at prices comparable to the prices charged for similar goods in the local stores. The difference between the cost of the goods, overhead and other expenses and the amount received from the sale of the same goods is called by the witness "overages" but in business, trade and ordinary parlance it is called "profit" or "gain". In my opinion, the surpluses or profits earned in the taxation year fall within the terms of the definition of taxable income of s. 3(1) of the Act.

What becomes of the net profits or income is shown in the respondent's balance sheets and income tax returns and nowhere else. The Minister's assessments are based on these documents.

The association allocates a certain amount for depreciation; appropriates funds to the Patrons Emergency Benefit Fund for the purpose of making grants and deducts a substantial reserve for uncollectable accounts receivable. These operations are held to be similar to those made by any trading company.

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It was held by the Privy Council in the case of *English and Scottish Joint Co-operative Wholesale Society Ltd.* v. *Commissioner of Agricultural Income Tax, Assam* (1):

that certain of the application of net profits which may be made under the rules of the society is in essentials not different from the application of net profits which might be made by any trading company, being allowance for depreciation; appropriation to a special fund for making grants; appropriation to a reserve fund.

In the above case the appellant was liable to income tax.

In the present case, it may also be noted that the respondent has an item of accounts receivable and an item of goods on hand at the end of the years, which show that the relationship between the association and its members was not simply the relationship of principal and agent and that the association carried on a business for gain. The fact that part of the gains was divided amongst its patrons is clearly evidence that it did make a profit. The distribution to its members of these profits, in part or in whole, does not alter the fact that these profits were income subject to tax.

The Minister, not being bound by the income tax returns made by the respondent, proceeded to determine the amount of tax to be paid by the respondent. His authority to do so is contained in s. 47 of the Act, which reads as follows:

47. The Minister shall not be bound by any return or information supplied by or on behalf of a taxpayer, and notwithstanding such return or information, or if no return has been made, the Minister may determine the amount of the tax to be paid by any person.

The Minister having determined the amount of the tax to be paid by the respondent for the taxation years under discussion, his assessments were valid and binding unless an appeal was taken and the Court determined that such were made on an incorrect basis, but the onus of establishing that the assessment was incorrect, either in fact or in law, rested with the respondent herein (appellant before the Income Tax Appeal Board).

This rule is now well known and was clearly expressed in the case of *Johnston* v. *Minister of National Revenue* (2), wherein it was held:

That an assessment for income tax is valid and binding unless an appeal is taken from such assessment and the Court determines that such

(1) [1948] A.C. 405 at 414. (2) [1947] Ex. C.R. 483.

was made on an incorrect basis and where an appellant has failed to show that the assessment was incorrect, either in fact or law, the appeal must be dismissed.

On appeal to the Supreme Court of Canada (1) this decision was affirmed. In that appeal Mr. Justice Rand, speaking for the Court, said at p. 489:

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

This rule applies in all instances, even when the appellant has been successful in an appeal before the Income Tax Appeal Board and the Minister appeals from the Board's decision to the Exchequer Court, the burden is his to show that the assessment was made on an incorrect basis either in fact or in law. In the present case, I have no hesitation in saying that the taxpayer has failed to refute the facts on which the taxation was made and that the assessment was correct in law.

I find that the basic facts on which the assessments were made were correct, except that for the taxation year of 1947, the Minister should have deducted in the calculation of the capital employed the sum of $100 which, through error was added to the amount of the accounts receivable. By allowing the item of $100 it would decrease the amount of capital employed in the business at the commencement of the year to $93,764.93 instead of as computed for the purposes of taxation—$93,864.93, and therefore, the amount of the assessment for the taxation year 1947, instead of being as assessed $2,815.95, should be $2,812.95 with a corresponding adjustment as to the amount of the tax and interest thereon.

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

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For the above reasons, therefore, I would allow the appeal and confirm the Minister's assessments as set forth in the notices of assessment, saving and excepting that the assessment in respect of the year 1947 should be reduced from $2,815.95 to $2,812.95 with a corresponding adjustment as to the amount of interest thereon.

The Crown is entitled to costs, if it insists upon same.

Judgment accordingly.

1955
June 14, 15
1956
Jan. 20

BETWEEN:

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

AND

JOSEPH CYR ..... DEFENDANT.

AND BETWEEN:

JOSEPH CYR ..... SUPPLIANT;

AND

HER MAJESTY THE QUEEN in the right of Canada ..... RESPONDENT.

Crown—Negligence—Motor car collision at street intersection—No proof intersection that of "through" street with "stop" street—Implied duty on driver of one car to obey stop sign and yield right-of-way belonging to other—The Motor Vehicles Act (N.B.) 1934, c. 20, s. 42 A (3) as amended.

Following a collision between a motor car owned by the Crown and driven by its servant and a motor car owned and driven by C, an action in damages for negligence was brought by each party against the other. The collision occurred in the City of Saint John at the intersection of Delhi street with City Road. Delhi street runs north and south and City Road, which forms part of a Provincial Highway, east and west. There was a "stop" sign erected at the southwest corner of the intersection and just around the corner on City Road a "speed limit 25 miles" sign. It was established at the trial that C was proceeding along Delhi street toward the intersection when, because of the downward slope of the street and the icy condition of the pavement he was unable to stop his car, and seeing no approaching traffic, continued on into the intersection. The driver of the Crown vehicle, an R.C.M.P. constable, testified he was proceeding easterly along City Road at a speed of from 25 to 30 m.p.h. and was 15 or 20 feet from the intersection when he saw C's car, that he applied his brakes and attempted to swerve to the right but was unable to avoid the collision. It was contended for C that it had not been proven that City Road was a "through", or Delhi street a "stop" street, or that the stop sign had been erected by the Provincial Highway Department or pursuant to a valid city by-law, and that as C's vehicle was to the right of the Crown's and had entered the intersection first, he had the right-of-way notwithstanding his failure to stop before entering it.

Held: 1. That although it was not established that City Road was a "through" street or Delhi street a "stop" street, traffic signs are placed on highways for safety and guidance and should be observed and relied on. *Gibbons* v. *Fortune* [1935] M.P.R. 355; *Nelson* v. *Dennis* [1930] 3 D.L.R. 215.

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2. That a driver about to enter a through highway from a stop street is required, by s. 42A(3) of the New Brunswick *Motor Vehicles Act*, to yield the right of way to any vehicle approaching on such through highway. C saw the "stop" sign and knew not only that he was required to stop but that City Road was a through street and his negligence was the *causa causans* of the collision.

3. That the speed at which the Crown vehicle was driven did not cause or contribute to the accident and under the circumstances its driver was not negligent. *Walker* v. *Brownlee* [1952] 2 D.L.R. 450 at 460.

ACTION FOR DAMAGES.

The actions were tried together before the Honourable Mr. Justice Cameron at Saint John.

A. W. Whelley, C. F. Whelley and *K. E. Eaton* for the plaintiff and respondent.

K. P. Lawton for the defendant and suppliant.

CAMERON J. now (January 20, 1956) delivered the following judgment:

By consent of counsel, these two matters were heard together. At about 1:30 p.m. on December 5, 1954, a 1953 Royal Canadian Mounted Police Meteor car owned by the Crown and then driven by Constable H. K. Parsons was in collision with a 1947 Chevrolet panel truck owned and then operated by Joseph Cyr, at or near the intersection of City Road and Delhi Street, in the city of Saint John, New Brunswick. In the Information, the Crown seeks to recover the sum of $345.92 for damages caused to the police vehicle, alleging that the collision was caused solely by the negligence of Cyr. In the Petition of Right, Cyr alleges that the collision was caused solely by the negligence of Parsons and claims $720 for damages to his car and for loss of its use.

Certain of the facts are not in dispute. City Road is a main traffic artery running east and west; it carries the traffic on No. 2 Highway—a main provincial road—through the city of Saint John. The travelled portion is 45 feet wide. Delhi Street, which runs north and south, crosses it at right angles and its travelled portion is about 27 feet wide. Snow had fallen and both roads were slushy and slippery as may be seen from the photograph Exhibit 3; some rain was falling at the time, but visibility was reasonably good. A "stop" sign was erected on a post on Delhi Street near the southwest corner of the intersection as may

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be seen in the photograph Exhibit 5. On another post and just around that corner on City Road there was a sign "speed limit 25 miles", as shown on Exhibit 3.

Constable H. K. Parsons is a member of the Royal Canadian Mounted Police stationed at Saint John. He was employed as a driver for six years and in that time had been in only one minor traffic accident when driving his own car. At about 1:15 p.m. on December 5 he received instructions to drive to the scene of an accident. As he entered City Road and observed the condition of the street, he tested the braking power of his brakes and, while he found that on account of road conditions they did not hold as well as they normally would, there was fairly good traction on that much-travelled road. The brakes had been fully checked a few days previously and there is no doubt that they were in excellent condition. The rear snow tires were new and the front tires almost new. As Parsons approached the intersection of City Road and Delhi Street from the west, the road was somewhat upgrade as shown on Exhibit 6. At that time he was travelling on the south side of the road at a speed which he estimated at about 25-30 miles per hour. He knew the road well and knew that Delhi Street was marked with a "Stop" sign. When he was about 15 to 20 feet west of the intersection, he noticed Cyr's panel truck entering from Delhi Street at his right and about to cross into City Road. He observed that it did not stop before entering City Road; he immediately applied his brakes, but, realizing that he could not stop in time to avoid a collision, turned his wheel to the right, hoping to pass behind Cyr's truck. The panel truck, however, was moving at such a slow speed that he did not succeed in avoiding it and the collision followed. He estimated the speed of Cyr's vehicle at not over 10 miles per hour. After the accident, he checked the brakes on Cyr's car and found them in working order; he made no check of its steering wheel. His view of traffic on Delhi Street at his right was blocked to some extent by a rocky bluff shown on Exhibit 7, and also to some extent by a line of motor cars parked at the right side of City Road as shown in Exhibit 3. He observed that Cyr "cut the corner short" as he turned left into City Road in

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front of his vehicle. Parsons was of the opinion that if Cyr had speeded up his car or if he had turned to the right instead of the left, there would have been no collision.

Joseph Cyr lives in Saint John County and was proceeding to work in the city of Saint John in his panel truck which he had acquired by exchange that year. He had a passenger in the vehicle but at the time of the trial he could not be located. His version of the accident is as follows. As he came down Delhi Street, which sloped downwards toward City Road, his vehicle was slipping due to road conditions and he therefore put his motor in second gear. His intention was to stop before entering the intersection and then to turn to the left on City Road, and proceed westerly thereon. He was familiar with the area and knew that there was a stop sign. He knew also that it was a stop street and that he was always required to bring his vehicle to a full stop at all such streets. Due to the snow and ice on the road, he found that he could not stop before reaching City Road. He was "busy trying to stop" but says that while he looked both ways on City Road for approaching traffic, he saw nothing. His view to the west was blocked somewhat by the line of parked cars. Finding that he could not stop, he "stepped on the gas" and "tried to get ahead". He says that about 5 feet of the front of his car was on City Road when he thought he could stop and that about one-half of the length of his car was on City Road when it was struck by the police car. He states that while he tried to get out of its way, he had no opportunity to do so. Earlier he stated that he did not see the police car until his car was struck. In cross-examination he says he could have put his engine in low gear but had not attempted to do so. He also said that when his truck was on City Road, he saw no vehicle approaching from his left and that when he found he could not stop he decided "to cut right across and go up City Road".

Charles Gobang of Saint John was called as a witness by the Crown. He was working on his car which was parked just off City Road about 30 feet from the point of collision. He saw both cars approaching the intersection, the Crown car travelling east on City Road and Cyr's truck travelling north on Delhi Street. He said, "the police car was not

travelling fast", and estimated its speed at not more than 30-35 miles per hour; it was following the line of traffic and on its own side of the road. He saw that its brakes were applied and that the driver swerved to the right in an effort to avoid the collision. He estimated the speed of the Cyr truck at from 10-15 miles per hour; he thought its brakes had been applied as he saw it slipping as it approached and entered the intersection. He observed that when the truck apparently could not be stopped, the driver speeded up and proceeded further into the intersection. He saw the collision and at that time the truck had crossed about one-quarter of the intersection. He was of the opinion that Cyr, as he approached the corner, could have seen traffic on City Road had he looked, and that while Delhi Street slopes somewhat, Cyr could have stopped his vehicle before entering City Road had he been travelling more slowly, notwithstanding road conditions. He saw the truck turn to the left in order to proceed westerly on City Road when it reached the intersection. When struck, it was entirely on the latter street and about at the centre of the road. He first saw the truck when it was about 25 feet south of the corner. This independent witness was close to the scene of the accident, had an excellent view of both vehicles, and I find no reason for rejecting any of his evidence.

Constable H. A. Clow of the Royal Canadian Mounted Police, was called to the scene of the accident at 1:30 p.m. and arrived there about fifteen minutes later for the purpose of taking photographs. Exhibits 1-8 are photographs taken then by him, showing from various angles the position of the vehicles as he found them, the intersection and its approaches. There is no evidence to suggest that either vehicle had been moved after the collision and I can assume, therefore, that the photographs correctly indicate their position after they came to rest. From these photographs it is clear that the left front portion of the police car struck the left door of the truck. Exhibits 5 and 7 indicate that the police car had not, in fact, entered any part of the road intersection when the collision occurred; there is no evidence that it was pushed backwards by reason of the impact.

Staff Sergeant N. G. McKenzie of the Royal Canadian Mounted Police, was also called to the scene of the accident

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for the purpose of making an investigation. He says that Cyr told him that he was unable to stop his truck before entering City Road owing to the slippery condition of the street and that, therefore, he continued to cross the intersection although he knew he should have stopped. The witness also said that Cyr admitted responsibility for the accident, but this is denied by Cyr. The witness also stated that City Road was a main traffic artery and a "through" street and there is no evidence to the contrary.

The witness also took measurements of the two roads and the position of the two vehicles in relation to two poles, one on either side of City Road. His measurements are contained in a sketch (not drawn to scale) prepared by Constable Clow. These measurements indicate that the police car was entirely on the south half of City Road, although at somewhat of an angle; and that the truck, also at an angle, had its front end about the centre of the road. Exhibits 2, 3, 5 and 7 indicate the relative position of the two vehicles on the road.

Mrs. Stella Campbell was called as a witness on behalf of Mr. Cyr. She stated that she saw the accident from a window in Saint John Hospital where she was employed. She saw the Cyr truck approaching the intersection; it was going down slowly and apparently tried to stop at the corner; she thought it slowed down somewhat but did not seem able to stop on account of the icy condition of the road. She said "it was cutting across", and when it was turning to its *right* on City Road, she saw the police car "going quite fast" and then the vehicles collided. While she first saw the police car just before the impact, she thought it was going "about three times as fast as Cyr's vehicle". She said that when Cyr's truck was struck it was about half-way across the intersection and at an angle and that its front wheels were turned to the *right*. The evidence of this witness did not impress me. On her own evidence she had no opportunity to estimate the speed of the police car. She was quite mistaken in her evidence that the Cyr car had turned to the right on entering City Road; she had twice stated that that was so, but later admitted that it had turned to the left.

From the evidence as a whole the following additional facts are clearly established: (*a*) Cyr did not stop his truck

before entering City Road; (*b*) his truck was almost stopped after it had entered a short distance (perhaps 5 feet or more) upon the intersection; (*c*) Cyr deliberately made up his mind when he found he could not quite stop, to carry out his original plan of turning left and proceeding westerly on City Road; in so doing, he speeded up somewhat and "cut the corner" sharply to the left directly in front of the Crown vehicle; (*d*) Cyr's truck entered the intersection when the Crown car was a short distance (perhaps 15 or 20 feet) westerly thereof; (*e*) the collision occurred when both vehicles were on the south half of City Road, the front of the Crown vehicle being close to the westerly boundary of the intersection but not having entered thereon.

I also find as a fact that Cyr did not look for traffic approaching from his left. Had he done so as he neared or entered upon the intersection, he could not have failed to observe the Crown vehicle approaching but a few feet away. I do not believe his statement that he made an effort to get out of its way; he admitted that he did not see it until the moment of impact.

I find also that Parsons at all times was keeping a proper lookout for traffic; that he knew Delhi Street was marked as a "Stop" street, that when he was about 15 or 20 feet from the intersection, he first saw the Cyr truck entering it directly in front of him and that his speed at that time was about 30 miles per hour; that he immediately applied his brakes and turned his wheel to the right in an effort to avoid a collision. I find, also, that the Crown vehicle was in every respect in excellent mechanical condition.

Which driver, under these circumstances, had the right-of-way? Counsel for Cyr submits that it is not proven that City Road was a through street or that the stop sign on Delhi Street was erected either by the Provincial Highways Department or pursuant to any valid by-law of the city of Saint John; and that, as Cyr's vehicle was to the right of the Crown vehicle and entered the intersection first, he had the right-of-way notwithstanding his attempt and failure to stop before entering.

By consent of counsel for both parties, there was filed a certified copy of a by-law of the city of Saint John entitled "A Law to Regulate Street Traffic in the City of Saint

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John", dated May 28, 1937, together with amendments thereto. S. 55(1) of the *Motor Vehicles Act*, Province of New Brunswick, makes provision for such municipal enactments not inconsistent with the provisions of that Act or the *Highway Act*. By s. 55(2) thereof it is provided, "The regulations mentioned in this section shall come into force only when approved by the Governor-in-Council". At the trial, counsel for Cyr took the position that as there was no proof that the regulations contained in the by-law and its amendments had received the approval of the Governor-in-Council, they were of no effect. In supplementary written argument, however, he referred to an Act relating to by-laws of the city of Saint John, being c. 58 of the 1913 Statutes of the province, s. (1) of which provides:

> Notwithstanding anything in the Charter of the City of Saint John, or any Act of Assembly contained, by-laws duly made and ordained by the City of Saint John shall not require allowance or confirmation, nor be subject to disallowance by the Lieutenant-Governor-in-Council.

S. 3 of that Act further provided that a copy of any such by-law of the City of Saint John, certified under the hand of the Common Clerk of the City, should be *prima facie* evidence in every Court of the contents of such by-law. Counsel for Mr. Cyr now submits that while the by-law in question and its amendments are valid and sufficiently proven, there is no evidence that the requirements of such by-law relating to the establishment of stop streets and through streets have been complied with; he says, therefore, that City Road is not proven to have been a "through" street, nor Delhi Street a "Stop" street.

S. 2 of Article XIII of the by-law as amended and as in force at the date of the accident, gave authority to the Director of the Police Department to make regulations designating stop streets, through streets and one-way streets. S. 3 of the Article provided that such regulations should come into force within ten days after the Common Council had approved thereof and after public notice had been given in the daily newspapers. It is the contention of counsel for Cyr that in the absence of proof—and there is none in this case—of the approval of such regulations by the Common Council, or their advertisement, there is nothing to establish that City Road was validly declared to be

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a through street or Delhi Street a stop street; he submits, therefore, that Cyr was not required to stop before entering the intersection.

I was not referred to any case in which such a submission was upheld. On the contrary, there are several reported cases in which it has been held that where a stop sign has been erected, it should be obeyed even though there might be some possible flaw in the by-law authorizing it, or perhaps in the proof that all its prescribed requirements have been complied with. In the case of *Gibbon* v. *Fortune* (1), a decision of the Appeal Division of the Supreme Court of New Brunswick and a case which is similar in many ways to the instant one, the headnote is as follows:

On August 15th, 1953 during daylight hours the appellant's truck was being driven northerly on Carmarthen Street in the City of Saint John and the respondent Fortune was driving his car westerly on Leinster Street, and at the intersection of the two streets the vehicles collided. The learned trial judge found that there was a stop sign on Leinster Street at its intersection with Carmarthen Street, but that the stop sign had no significance in the absence of proof of a by-law authorizing such sign. He held that because both parties failed to keep a proper lookout then they were both negligent. From this judgment the appellant appealed.

Held: A stop sign should be obeyed. Although there was no evidence of a by-law authorizing such a stop sign both parties knew that Leinster Street was a stop street at its intersection with Carmarthen. The appellant had the right to expect that the respondent would yield the right of way. It would be a most unfortunate thing if the drivers of motor vehicles could ignore stop signs in a city because there might be some flaw in the by-law authorizing them. If the sign is placed irregularly, the remedy is to have it removed, but while it remains it should be obeyed. The respondent was entirely to blame. The appeal should be allowed with costs. Cases judicially noted: *Henderson* v. *Dosse,* 46 B.C.R. 401; *Nelson* v. *Dennis,* [1930] 3 D.L.R. 215.

In that case Harrison J., with whose judgment Richards C.J. concurred, said at page 358:

This case becomes important in view of the fact that the learned trial judge held that the stop sign had no bearing on the question of negligence since it was not proved that there was a by-law authorizing such sign. To my mind a stop sign should be obeyed. In this case both Preston, the driver of the plaintiff's truck, and Fortune, driver of the defendant's car, knew that Leinster Street was a stop street at its intersection with Carmarthen. The result of that was that Preston had a right to expect that Fortune would yield him the right-of-way, and Fortune, on the other hand, was bound to see that there was no car near the intersection before he entered it,—in other words that he could cross the intersection safely.

(1) (1955) 35 M.P.R. 355.

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In my opinion it would be a most unfortunate thing if the drivers of motor vehicles could ignore stop signs in a city because there might be some flaw in the by-law authorizing them. If the sign is placed irregularly, the remedy is to have it removed, but while it remains it should be obeyed.

In this case, therefore, I consider the defendant Fortune was entirely to blame. He had no right to enter the intersection when the plaintiff's truck was approaching and distant such a short space that the two cars collided in the middle of the intersection, when the plaintiff's truck was travelling at the most at 20 m.p.h. I agree that on entering an intersection the driver of each vehicle should look both to the right and to the left, but the driver who comes in from a stop-street is in the same position as one who comes in from a private road, in which case the Motor Vehicles Act provides: "He shall yield the right-of-way to all vehicles approaching on such highway."

The effect of the stop sign on Leinster Street was to make Carmarthen Street a through street at that point. Therefore, even if the plaintiff had been negligent—and as stated above I do not consider he was—still the entire responsibility for the accident was that of the defendant Fortune.

In the case of *Nelson* v. *Dennis* (1), a decision of the Court of Appeal of Manitoba, Dennistoun J.A., in his judgment, with which Fullerton and Trueman JJ.A. agreed, said at page 217:

> But it seems to me that if the defendant had seen the plaintiff before the plaintiff's car reached the "Stop" signal he would have assumed, and would have had a right to assume, that the "Stop" signal would be obeyed and the plaintiff's car brought to a standstill.

And at page 218:

> Mr. Deacon urges that the police authorities of the City of Winnipeg have no authority to set up "Stop" signs which override the statutory right of way. That point may arise hereafter and need not be decided now. So long as the stop signals are in position, in my humble judgment, the public have a right to rely on them, and persons who decline to obey them are guilty of actionable negligence if injury is caused by their so doing.

With respect, I agree with the conclusion arrived at in those cases. Traffic signs are placed on our highways for the safety and guidance of motorists and others and in my opinion should be observed and may be relied upon as long as they are in position. In this case, Cyr saw the sign and knew, not only that he was required to stop, but also that City Road was a through street. I agree, also, with the opinion of Harrison J. in *Gibbon's* case that under the provisions of the *Motor Vehicles Act* of New Brunswick, a driver who is about to enter a through street from a stop street is required "to yield the right-of-way to all vehicles

(1) [1930] 3 D.L.R. 215.

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approaching on such highway" (s. 42A (3)). The provisions of the city by-law are to the same effect, although its terms are somewhat broader as will be seen from the definitions of "Stop street" and "Through street" contained in section 1 as follows:

(*g*) The expression "Stop Street" shall mean and include a street or portion of a street, all traffic on which shall come to a full stop at the intersection of a "Stop Street" and a "Through Street" before entering a "Through Street".

(*h*) The expression "Through Street" shall mean and include a street or portion of a street, on which all traffic shall have the right-of-way over traffic entering such "Through Street", from intersecting "Stop Streets".

It follows, therefore, that as the Crown vehicle was driving on a through street and was approaching the intersection, its driver had the statutory right-of-way. It was Cyr's duty, therefore, to stop his truck before entering the intersection and to refrain from entering upon it until Parsons' car had completed its crossing. His failure to do so and his failure to look out for approaching traffic, and his entry upon and deliberate crossing of the intersection under the circumstances, constituted actionable negligence for which he is liable. It is beyond doubt that had he stopped and looked, as he was required to do, he would have seen the Crown car approaching and would not have attempted to cross. His negligence, in my opinion, was the *causa causans* of the collision.

It is submitted, however, that he was unable to stop owing to the slope in the road and the condition of the road surface and that, therefore, the accident was unavoidable. I cannot give effect to this submission. Cyr had travelled a number of miles before reaching the scene of the accident; he was therefore fully acquainted with weather and road conditions. He knew that he would be required to stop before entering City Road. It was his duty to drive with particular care and to have his car under complete control so that under the existing conditions he could bring it to a stop when required to do so. In my opinion, he was travelling at too great a speed under the existing circumstances and in the result found that as he neared the intersection he could not then control his car in time to come to a stop. I am not satisfied that the accident was unavoidable.

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On this point reference may be made to the cases mentioned on pages 28 to 33 of Hall's *Automobile Accident Cases,* 3rd Ed.

The next question is whether Parsons also was negligent. Particulars of his alleged negligence are found in the Statement of Defence to the Petition of Right. I have already found that he had the right-of-way; it is clear also that he had his car under control at all times; that he was keeping a proper lookout for traffic, that his brakes were in good condition, and that he applied them immediately upon seeing that the truck was not stopping before entering the intersection. I find, also, that he attempted to avoid the collision by swerving his car to the right, but was unable to avoid striking the truck which was then speeding up and "cutting the corner" directly in front of him.

It is alleged, also, that his speed was excessive under the circumstances. The evidence is that he was following in the line of traffic; estimates of his speed—and they are estimates only—vary from 25 to 30 miles per hour. Parsons is an experienced driver and his own estimate was from 25 to 30 miles per hour. I was impressed by his manner of giving evidence and as he was in the best position to know his speed, I am prepared to find that his speed did not exceed 30 miles per hour before he applied his brakes on seeing the truck. Under the Provincial Act the maximum rate of speed for other than commercial vehicles is 50 miles per hour. By section 1 of Article IV of the city by-law, it is provided:

> Section 1. No person shall operate a motor vehicle on any street at a greater rate of speed than is reasonable and proper, having regard to the traffic and use of the highway or so as to endanger the life or limb of any person, or the safety of any property. It shall be *prima facie* evidence of a rate of speed greater than is reasonable and proper as aforesaid, if a motor vehicle is operated at a greater rate than twenty-five miles per hour.

As I have stated above, the traffic sign on City Road also stated that 25 miles per hour was the maximum speed on that highway. While a breach of the statute or by-law regarding speed limits may be evidence of negligence, its violation does not impose liability for an accident unless it actually contributed to the happening of such accident. In this case I am satisfied that the speed at which Parsons was travelling did not cause or contribute to the accident in

any way. When it is realized that the Cyr truck came into the intersection when the Crown vehicle was only about 15 or 20 feet from the crossing and that Cyr's truck cut sharply to the left directly in front of Parsons, it is obvious that had Parsons been travelling at 25 miles per hour, the collision would have occurred in almost precisely the same way that it did and that there would have been no greater opportunity on Parsons' part to avoid the truck than there actually was when he was travelling at 30 miles per hour.

I am satisfied on the whole of the evidence that under the circumstances Parsons was not negligent in any manner whatever. On the contrary, I think he operated his vehicle in a careful and prudent manner throughout, was observant of all traffic and was entitled to approach an intersection in the belief that drivers approaching from his right would obey the law and stop before entering City Road. In the emergency created by Cyr, he acted promptly, and the fact that the vehicles collided was not attributable to any fault on his part.

Reference may be made to the summary of the law on this point by Cartwright J. in the Supreme Court of Canada in the case of *Walker* v. *Brownlee* (1), where he says:

> The more difficult question is whether Harmon should be found to be to blame in part. The difficulty arises not so much in stating the applicable principles as in applying them to the particular facts.
>
> The duty of a driver having the statutory right-of-way has been discussed in many cases. In my opinion it is stated briefly and accurately in the following passage in the judgment of Aylesworth J.A., concurred in by Robertson C.J.O., in *Woodward* v. *Harris*, [1951] O.W.N. 221 at p. 223: "Authority is not required in support of the principle that a driver entering an intersection, even although he has the right of way, is bound to act so as to avoid a collision if reasonable care on his part will prevent it. To put it another way: he ought not to exercise his right of way if the circumstances are such that the result of his so doing will be a collision which he reasonably should have foreseen and avoided."
>
> While the judgment of the Court of Appeal in that case was set aside and a new trial ordered [[1952] 1 D.L.R. 82] there is nothing said in the judgments delivered in this Court to throw any doubt on the accuracy of the statement quoted.
>
> In applying this principle it is necessary to bear in mind the statement of Lord Atkinson in *Toronto R. W. Co.* v. *King*, 7 C.R.C. 408 at p. 417, [1908] A.C. 260 at p. 269: "Traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all the other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets."

(1) [1952] 2 D.L.R. 450 at 460.

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While the decision of every motor vehicle collision case must depend on its particular facts, I am of opinion that when A, the driver in the servient position, proceeds through an intersection in complete disregard of his statutory duty to yield the right-of-way and a collision results, if he seeks to cast any portion of the blame upon B, the driver having the right-of-way, A must establish that after B became aware, or by the exercise of reasonable care should have become aware, of A's disregard of the law B had in fact a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself; and I do not think that in such circumstances any doubts should be resolved in favour of A, whose unlawful conduct was *fons et origo mali*.

In the case at bar I agree with what I understand to be the view of the majority of the Court of Appeal that it is not necessary in deciding this case to take into consideration the fact that Hugel Ave. was a through highway. Obviously the fact that it was known to Harmon to have been so designated cannot worsen his position. Leaving this fact aside, an examination of all the evidence brings me to the same conclusion as that reached by Roach J.A., that, even had Harmon been observing the appellant's car, when the time arrived at which he could reasonably have been expected to realize that the appellant was not yielding him the right-of-way it would have been too late for him to do anything effective to prevent the collision.

The cost of repairing the damage occasioned to the Crown vehicle has been proven at $327.89. In the Information, there will be judgment for the Crown against the defendant, Joseph Cyr, for $327.89, together with taxed costs. In the Petition of Right proceedings, there will be a declaration that the suppliant is not entitled to any of the relief sought therein and dismissing the Petition of Right with costs.

In case the matter should go further, I should state my conclusion as to the damages sustained by the Cyr vehicle. It was a 1947 Chevrolet panel truck which Cyr had acquired earlier in 1954 in exchange for a 1941 Pontiac car, the exchange being without other consideration. It was in fair condition only. A witness estimated the sale value before the collision at $600 and the cost of repairs at the same amount. The repairs were not carried out; Cyr had lost his operator's licence and could not afford to have the repairs made and the truck apparently was therefore abandoned. The evidence is insufficient to establish precisely the amount of his damages. I am satisfied, however, that if the repairs contemplated had been made, the truck would have been in somewhat better condition than it was prior to the accident. I think Cyr could have realized something from the sale of

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the truck or parts of the truck had he made any attempt to do so and that he could thereby have minimized his loss. Doing the best I can under the circumstances, I would have fixed his loss at $400.

Judgment accordingly.

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Oct. 6, 7

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Jan. 13

BETWEEN:

C. W. LOGGING COMPANY LIMITED ..APPELLANT;

AND

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

Revenue—Income Tax—Sale by logging operator—Of standing timber—Of freehold limits—Whether proceeds of each sale taxable income—The Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4.

The appellant, carrying on the business of a logging operator, sold in 1950 the standing merchantable timber remaining on a freehold tract of land it had logged in 1936. In 1952 it sold the land itself. The proceeds of each sale were credited to capital surplus and allocated to the purchase of timber limits contiguous to the appellant's other holdings. To the taxable income reported by the appellant for the taxation year 1950 the Minister added the amount received from the sale of the timber, and to that reported by the appellant for the taxation year 1952, the amount received from the sale of the land. The appellant appealed the reassessments to the Income Tax Appeal Board which dismissed both appeals.

Held: 1. That the sale of the residue of a mature timber crop was the sale of a current asset made in the course of the appellant's carrying on the business of dealing with timber either by logging operations conducted by the appellant itself or by the sale of stumpage. The proceeds of that sale were revenue and were properly included in the taxable income of the appellant.

2. That the sale of the freehold was the sale of a capital asset and the proceeds of that sale were not revenue received from the conduct of a trade or business and did not constitute taxable income.

Anderson Logging Co. v. *The King,* [1925] S.C.R. 45, distinguished. *Commissioner of Taxes* v. *Melbourne Trust Ltd.,* [1914] A.C. 1001 at 1010 approving *Californian Copper Syndicate* v. *Harris,* 5 T.C. 159, applied.

APPEAL from a decision of the Income Tax Appeal Board.

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

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C. W. LOGGING CO. LTD. v. MINISTER OF NATIONAL REVENUE

J. A. Baker for the appellant.

G. F. Gregory and *F. J. Cross* for the respondent.

RITCHIE J. now (January 13, 1956) delivered the following judgment:

The appellant has appealed from a decision of the Income Tax Appeal Board dated June 8, 1954, dismissing appeals by it from reassessments made by the Minister of National Revenue in respect to its income from the 1950 and 1952 taxation years. The two appeals were heard together.

The appellant was incorporated on February 6, 1934 under the authority of the *British Columbia Companies Act,* being chapter 11 of the Statutes of British Columbia for 1929, and amending Acts. The registered office on incorporation was Port Alberni, B.C., but on its income tax return for the taxation years in question the appellant shows Qualicum Beach, B.C., as its address.

The objection of the appellant to the reassessment for the 1950 taxation year is because the Minister of National Revenue added to its reported income an amount of $4,233 representing the proceeds from the sale of all merchantable timber over 16″ breast high standing on Block 350, a freehold tract of land owned by it and situate in the vicinity of Nanoose Bay, B.C.

The appellant also objects to the Minister having included in its taxable income for the 1952 taxation year an amount of $6,500, the price at which in that year it sold the land comprising Block 350 to the same purchasers to which in 1950 it had sold all the merchantable timber standing thereon.

To support the reassessments the Minister relies on ss. 3 and 4 of *The Income Tax Act,* which read:

> 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.

The question to be decided is whether the proceeds of the 1950 sale of the standing merchantable timber and of the

1952 sale of the freehold tract of timber land constituted, in the hands of the appellant, income from a business or from a property. To determine questions of this nature in respect to corporations the courts have applied tests of intention, course of conduct, and the nature of the objects set out in the charter of the company. The evidence of the witnesses called by the appellant is comprehensive enough to permit application of all three tests.

Included in the "objects" set out in the memorandum of association of the appellant are:

(a) To carry on business as timber-owners, timber-growers, timber and lumber merchants, wholesale and retail, saw-mill, shingle-mill, pulp-mill, paper-mill, and box-mill proprietors and operators, loggers, lumbermen, warehousemen, wharfingers, ship, scow, barge and raft builders, proprietors, and brokers, general brokers, general merchants and contractors, carriers by land or sea, store-keepers and boarding-house proprietors, water and electric power and gas plant proprietors; to manufacture and deal in articles of all kinds in the manufacture of which timber or wood is used, and to carry on any business which may seem to the Company capable of being conveniently carried on in connection with any of the above, or calculated, directly or indirectly, to render profitable or enhance the value of any of the Company's property or rights for the time being:

(b) To purchase or otherwise acquire, take or give mortgages on, buy, take on lease, licence, or charter, or on any other arrangement, grow, prepare for market, manufacture, build, construct, improve, manage, develop, let out, charter, hire, hypothecate, pledge, charge, import, export, turn to account, sell, and deal in generally, timber, timber lands, licences, or leases, mills, water records and powers and generally any and all real and personal property whatsoever nature or any interest therein.

(c) To carry on the business of merchants, dealers, traders, buyers, sellers, agents, factors, brokers, commission merchants, either retail or wholesale or otherwise, in respect of lumber, timber, logs, poles, posts, ties, whether manufactured or under manufacture, and in all stages and varieties of manufacture.

By agreement of counsel there was read into the record as evidence herein on behalf of the appellant, the testimony given at the hearing before the Income Tax Appeal Board by Francis Henry Parker, Chester Richards Matheson, and Archibald Stewart Kerr.

Mr. Parker, one of the original applicants for incorporation of the appellant and a former joint manager and superintendent of logging operations of the company, died prior to this hearing. Mr. Matheson is a forestry engineer, of some eleven years experience, employed by C. D. Schultz & Company, a firm of consultants in the field of forestry and

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professional engineering. Mr. Kerr is a professional forester who has been employed by the appellant since 1950. *Viva voce* testimony was given by Walter Stanley Moore, the president of the appellant. The respondent called no witnesses.

Since incorporation the operations of the appellant have been confined to Vancouver Island and, with two exceptions, to logging operations. In 1936 a large residential estate was cleared and fenced under contract for a private owner. In 1942 the appellant participated in a contract to clear the site of the Comox airport.

Francis Henry Parker and Parker E. Belyea, the two signatories to its memorandum of association, directed and managed the affairs of the appellant for some ten years following its incorporation.

The three principal areas in which the appellant has carried on logging operations are to the north of Cameron Lake, to the south of Nanoose Bay, and in the Errington area on Englishman River. During the ten years following incorporation of the company Mr. Belyea supervised the Cameron Lake operation, the Nanoose Bay operation was supervised by Mr. Parker, and the Errington operation came under their joint supervision.

The Nanoose Bay operation was on a tract of land purchased in 1936 and known as Block 350. The sale in 1950 of the merchantable timber on Block 350 and the sale in 1952 of the freehold title to Block 350 are the transactions to which the two appeals relate.

In 1943, Mr. Belyea being in ill health and unable to continue his supervision of logging operations in the Cameron Lake area, the appellant, on his recommendation, sold Block 359 which, under his supervision, had been from eighty-five to ninety per cent logged. Block 359 was about fifteen or twenty miles from the Englishman River tract in the Errington area on which logging operations then were being carried on under the supervision of Mr. Parker. Because of the distance separating the two areas and because it was not practical to use a common booming ground, the two areas could not be logged together efficiently.

In September, 1944, largely because of the continuing illness of Mr. Belyea and his consequent inability to continue active supervision of logging operations, all the outstanding shares in the capital stock of the appellant were sold to Moore-Whittington Lumber Co. Ltd.

Following acquisition of the outstanding shares in the capital stock of the appellant by Moore-Whittington Lumber Co. Ltd., Mr. Parker continued his association with the appellant and, until 1947, was employed as Superintendent of Logging Operation.

Walter Stanley Moore, the president and manager of the appellant, and also the president and manager of the saw mill division of Moore-Whittington Lumber Co. Ltd., testified that the latter company had acquired the outstanding shares of the appellant as part of a policy of acquiring timber lands and logging companies so as to ensure a regular supply of logs. Under the Moore-Whittington management the timber holdings of the appellant were materially increased and a more aggressive operation policy adopted.

Mr. Parker testified the price obtained from Moore-Whittington for the shares in the capital stock of the appellant owned by Mr. Belyea and himself was arrived at by estimating the value of the timber holdings and of the equipment owned by the company. In making up the estimate of the value of the timber holdings for the sale to Moore-Whittington no value was assigned to Block 350 which had been logged by the appellant in 1936 and on which there had been no further operation.

In the spring of 1945, shortly after the purchase of the shares in its capital stock by Moore-Whittington, the appellant sold Lot 90 and Blocks 526 and 592 in the Cameron Lake area. The three tracts of timberland sold were contiguous to Block 359 which had been sold in 1943 and were separated from the Errington and Nanoose Bay areas by a river. The appellant regarded it as good business to sell Lot 90 and Blocks 526 and 592 because they were small and, like Block 359, isolated from its other holdings, and had been logged.

Mr. Parker gave evidence regarding the purchase of Block 350 by the appellant in 1934. Evidence in respect to the reasons motivating the sale of the merchantable timber

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on Block 350 and the sale, two years later, of the land comprising Block 350 was given by Messrs. Kerr and Moore.

Mr. Parker, who, as already mentioned, was a joint manager of the company from 1934 until 1944 and its superintendent of logging operations from 1944 until 1947, testified that Block 350 had been purchased by the appellant in 1936 and had been completely logged under his direction in the same year. Mr. Parker was not an employee of the company at the time of the 1950 and 1952 transactions in respect to Block 350.

Mr. Matheson testified that in July 1949 he, as an employee of C. D. Schultz & Co., participated in a cruise of the timber limits owned by the appellant and found Block 350 comprised a total area of approximately 300 acres of which only 127 acres carried merchantable timber having a volume of 721,000 feet, board measure. About 100 acres carried a very nice second growth but, from the point of view of a company like the appellant, no merchantable stand of timber. The Schultz recommendation was to sell the mature timber, because of it being difficult to log by reason of being on rocky bluffs scattered over the entire block, preserve the second growth, and hold the land until such time as the appellant decided on a definite forestry policy.

Mr. Matheson explained that removal of the shade cast by the older trees would facilitate the growth of the younger timber, and estimated fifty or sixty years would elapse before the second growth would be of merchantable size.

Another reason advanced by Mr. Matheson for recommending disposal of the mature growth was that the older trees, because of their height, constituted a potential danger by reason of being subject to lightning strikes and because of their ability to scatter sparks in the event of fire.

Mr. Archibald Stewart Kerr, a forester with twenty-seven years of experience behind him, who entered the employ of the appellant in September 1950, testified that while he had not personally examined Block 350 he was familiar with the area and, after studying the Schultz cruise report, had advised the appellant to sell Block 350 because of its

isolation from the main holdings of the company, because of the difficulty of exercising supervisory control over it, and because of the fire hazard.

Mr. Moore testified the decision to sell the merchantable timber on Block 350 was based on the Schultz cruise report that it aggregated only 700,000 feet on 126 acres of timbered lands, or an average of the "ridiculous quantity" of 6,000 feet per acre against the 30,000 feet per acre required for economical logging, and because he believed it good business to sell isolated holdings and apply the proceeds to the acquisition of other timberlands adjacent to the main holdings of the company.

On January 9, 1950 the merchantable timber over 16" breast high standing, lying and being on Block 350 was sold for $4,500 to Herman and Emil Deering under the terms of a written agreement (Exhibit 8) requiring the purchasers to fell and remove the old growth trees by selective logging methods and to take all proper precautions for the protection of trees less than 16" breast high. Mr. Moore said this covenant was not one usually included in Pacific Coast cutting agreements but was inserted on the recommendation of the company foresters.

About two years after the sale of the cutting rights on the merchantable timber standing on Block 350 in the Nanoose Bay District to Herman and Emil Deering, the same purchasers sought to buy the freehold title to Block 350 and, after further consultations with the company forester, a sale was consummated for the price of $6,500. Mr. Moore said his approval of the sale of the Block 350 again was influenced by the tract being isolated from the other holdings of the company, because it was an impossible block for the company itself to operate and because it was a risky block to watch for fire hazards.

The 1943 sale of Block 359 in the Cameron Lake area, the 1945 sale of Lot 90 and Blocks 526 and 592 in the Cameron Lake area, and the 1952 sale of Block 350 in the Nanoose Bay area have been the only sales of timberlands owned by the company.

Among the exhibits filed were financial statements of the appellant as of July 31, 1944 (Exhibit 7), March 31, 1950 (Exhibit 5), and March 31, 1952 (Exhibit 6). The 1944

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statement contained no operating figures. The values of the company timberlands as shown on each of the three statements is:

1944	*1950*	*1952*
$17,462.50	$399,525.23	$392,141.11

In all three years the timber lands were carried as capital, or fixed, assets. The $4,233 received in 1950 for the sale of the cutting rights on Block 350 was credited to capital surplus. The same disposition was made of the $6,500 received on the sale of the freehold title to Block 350.

Since 1944, when the appellant became a Moore-Whittington subsidiary, the income of the appellant has been almost 100% derived from log sales. In the 1950 fiscal period gross income was $230,276.34 of which log sales accounted for $222,836.98 and miscellaneous income $7,439.36. In 1952 gross revenue was $282,395.02 divided into $258,963.99 log sales and $23,431.03 miscellaneous income. In the three years from 1950 to 1952, inclusive, miscellaneous income comprised:

	1950	*1951*	*1952*
Poles and piling and salvage	$ 1,748.91	$ 2,425.03	$ 2,134.23
Stumpage receipts	5,100.57	2,386.73	19,966.83
Interest on bonds	300.00	300.00	300.00
Interest received	4.14	21.51	65.07
Sales of rock	250.00		
Sales of gravel		95.00	
Commission	2.50	3.00	4.00
Discounts earned	33.24	64.25	69.81
Sundry		60.00	
Rents of yarder and donkey			891.09
	$ 7,439.36	$ 5,355.52	$ 23,431.03

The inclusion of stumpage receipts in the income of the appellant for the years 1950-1952 inclusive seemed to be of special importance but counsel for the appellant and respondent agree the term "stumpage receipts" is a misnomer and that the income shown under this classification actually was derived from the sale of logs cut on timber limits owned by the appellant or on which it held cutting rights.

The objects set out in the memorandum of association of the appellant include expressions such as "to carry on business as timber-owners, timber-growers, timber and lumber

merchants, wholesale and retail," "to carry on any business which may seem to the company capable of being carried on in connection with any of the above, or calculated, directly or indirectly, to render profitable or enhance the value of any of the Company's property," "to turn to account, sell, and deal in generally, timber, timber lands, . . . and generally any and all real and personal property of whatsoever nature or any interest therein," and finally, "to carry on the business of merchants, dealers, traders, buyers, sellers, agents, factors, brokers, commission merchants either retail or wholesale or otherwise in respect of lumber, timber, logs, poles, posts, ties whether manufactured or under manufacture and in all stages and varieties of manufacture."

I am concerned more with what business or businesses the appellant, from a realistic and practical standpoint, actually did carry on or engage in rather than with what business or businesses it, under the terms of its memorandum of association, has authorization to carry on or engage in. Objects and powers included in the charter of a company often go far beyond actual and practical requirements.

The inclusion in its memorandum of association of a power to sell and deal in timberlands is not evidence that the appellant actually was engaged in the business of buying timberlands with a view of selling such lands at a profit. *Sutton Lumber and Trading Co. Ltd.* v. *Minister of National Revenue* (1). In view of the nature of the testimony to which I have referred and the absence of any testimony as to the circumstances under which the objects and powers conferred on the company were included in the memorandum, I am prepared to disregard the wording of the memorandum of association.

The purchase and sale by the appellant of Block 350 are entirely different from the purchase and sale of timberlands considered in *Anderson Logging Co.* v. *The King* (2). In the *Anderson* case no evidence was given as to the nature of the business actually carried on by the company for several years following its incorporation. The evidence given on these appeals has covered all activities of the appellant, including the intention and subsequent course of conduct of the appellant in purchasing Block 350, in

(1) [1953] 2 S.C.R. 77. (2) [1925] S.C.R. 45.

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logging it and finally selling it. It is not necessary to rely on the memorandum of association of the appellant in order to determine the questions in issue herein.

In *Commissioner of Taxes* v. *Melbourne Trust Ltd.* (1) Lord Dunedin, who delivered the judgment of the Judicial Committee, quoted with approval the now well-known rule enunciated in *Californian Copper Syndicate* v. *Harris* (2):

> It is quite a well settled principle in dealing with questions of income tax that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to income tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business.

To classify the acquisition of Block 350 as an investment from which the appellant expected to derive income does not require the use of any imagination. Even though Mr. Parker did not directly state the intention motivating the appellant to purchase Block 350 the surrounding circumstances leave no room for doubt as to what the intention was. The land was acquired in 1936 with the sole intention of making a profit by logging it, converting the standing timber into logs, and that purpose, so far as the purposes of the appellant were concerned, was achieved in the same year. There was no change of intention, as to the use to which the land was to be put. The proceeds of the sale of Block 350 were allocated to the acquisition of other limits more contiguous to the company holdings in the Errington area. The intention of the sale was to effect a change in an investment.

The business carried on by the appellant since its inception has been that of logging. The excursions into the contracting field in 1936 and 1942 were temporary, isolated ventures that have no bearing on these appeals. At no time has the appellant engaged in the business of buying timber limits with a view of selling them at a profit. Any timber limits purchased were purchased with a view of realizing a profit from logging them. Any timber limits sold were sold because the appellant believed that so far as

(1) [1914] A.C. 1001 at 1010.

(2) (1904) 5 T.C. 159; 6 F. 894.

its purposes were concerned the limits had been completely logged and because they were not suitably located for economical operation by the company.

The 1952 sale by the appellant of the freehold land comprising Block 350 was the sale of a capital asset. The proceeds of that sale were not revenue received from the conduct of a trade or business and so did not constitute taxable income.

A distinction must be drawn between the sale, in 1950, of the cutting rights covering the merchantable timber standing on Block 350 and the sale, in 1952, of the freehold title to Block 350. The two transactions are completely different in nature.

Standing timber, like grain or vegetables, is a crop which, in the absence of a specific reservation, changes ownership when the land on which it stands is sold. Standing timber is a crop regardless of whether the owner of the land has adopted and is following any reforestration policy or is allowing nature to take its course and produce new growth. A sale of land which includes the growing crop is, as a rule, the sale of a capital asset. A crop, however, can be harvested by the owner or sold standing to a purchaser with permission to enter on the land and harvest it. A sale of standing crop only, with title to the lands remaining in the vendor, is the sale of property which is akin to stock-in-trade or an inventory of raw material. Such a sale is of a current asset.

The 1950 sale by the appellant for a lump sum of the cutting rights to all the merchantable timber of 16″ in diameter breast high remaining on Block 350 was a sale of the residue of the mature timber crop and was made in the course of carrying on a business of dealing with timber either by logging operations conducted by the appellant itself or by the sale of stumpage. That the standing timber was not such as the appellant cared to log does not change the nature of the transaction. The proceeds of that sale were revenue which should be included in the 1950 taxable income of the appellant.

The appeal in respect to the reassessment for the 1950 taxation year of the appellant will be dismissed, with costs to be taxed.

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The appeal in respect to the reassessment for the 1952 taxation year of the appellant will be allowed, with costs to be taxed, and the assessment referred back to the Minister for revision.

Judgment accordingly.

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Mar. 14, 15, 16, 17

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Feb. 2

BETWEEN:

HARVEY LINDSAY and KATHLEEN LINDSAY ..... } SUPPLIANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Crown — Negligence — Explosives used in demolition exercise — Public attendance permitted — Spectators injured — Crown Liability Act, S. of C. 1952-53, c. 30, s. 1 (a).

The female suppliant while attending a field exercise of a reserve unit of the Royal Canadian Engineers, engaged in the demolition of the steel superstructure of a highway bridge, was injured by a fragment of steel following the detonation of explosives. The public had been permitted to attend the exercise and the spot where injury was suffered was one to which it had been directed by members of the Provost Corps. In an action for damages brought under the *Crown Liability Act*, S. of C. 1952-53, c. 30:

Held: 1. That the officers and men of the unit were at the time servants of the Crown acting within the scope of their duties or employment and the Crown under s. 3 (1) (*a*) of the Act was liable for their acts or omissions to the same extent as a private person of full age and capacity would be;

2. That under the circumstances that existed it was their duty to exercise a degree of diligence and care amounting practically to a guarantee of safety to those who, like the suppliant, were known to be in a position where there was a possibility that injury might result. The evidence established the possibility existed and was known to them and the directing of the public to an area in such close proximity to the demolition and the failure to ensure that warnings to take cover were adequately given and carried out constituted negligence for which the Crown was liable. *Whitby* v. *Brock & Co.* 4 T.L.R. 241; *Holliday* v. *National Telephone Co.* [1899] 2 Q.B. 392, applied;

3. That on the evidence the maxim *volenti non fit injuria* did not apply and, since it was not established the warnings were given in such a way as to be brought to the attention of the suppliant, contributory negligence was not proven;

4. That even if negligence on the part of its servants had not been established, the Crown was still liable under the rule of strict liability as laid down in *Rylands* v. *Fletcher* L.R. 1 Ex. 263; L.R. 3 H.L. 330 applied in *Miles* v. *Forest Rock Granite Co.* 34 T.L.R. 500.

PETITION OF RIGHT to recover from the Crown damages for personal injuries suffered by the female suppliant and special damages by her husband the male suppliant in respect of disbursements made by him for her hospital, medical and other expenses caused by the alleged negligence of servants of the Crown acting within the scope of their duties or employment.

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

Martin Morrissey for the suppliants.

K. E. Eaton and *D. H. Christie* for the respondent.

CAMERON J. now (February 2, 1956) delivered the following judgment:

This is a Petition of Right in which the female suppliant claims damages for personal injuries sustained on May 16, 1953. On that date she was a spectator at a field exercise conducted by the Seventh Field Squadron, a reserve unit of the Royal Canadian Engineers and under the command of Major G. E. Humphries, which exercise included the demolition by explosives of the steel superstructure of the Thorndale bridge over the north branch of the river Thames in the county of Middlesex, province of Ontario. At the time of the explosion she was struck by a fragment of steel and, while there is a formal denial in the statement of defence that the detonation of the explosives caused the fragment of steel to strike her, that ground of defence was not pressed at the trial. On the whole of the evidence it is clear that she was struck by a fragment of steel projected through the air by reason of the detonation of the explosives used by the squadron. Her husband, the first-named suppliant, claims special damages in respect of disbursements made by him for hospital, medical and other expenses on behalf of his wife.

The claim is brought under the provisions of the *Crown Liability Act*, Statutes of Canada 1952-3, c. 30, an Act which received the Royal Assent just two days prior to the

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accident. By that Act, s. 19(1)(*c*) of the *Exchequer Court Act*, R.S.C. 1927, c. 34, was repealed. S. 3(1) of the new Act was as follows:

> 3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable
>
> (*a*) in respect of a tort committed by a servant of the Crown, or
>
> (*b*) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.

Then by section 4(2) it is provided:

> (2) No proceedings lie against the Crown by virtue of paragraph (*a*) of subsection (1) of section 3 in respect of any act or omission of a servant of the Crown unless the Act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or his personal representative.

Counsel for the Crown submitted that the facts and circumstances of this case were such as to exclude them from the terms of s. 3(1)(*a*) and that, while they might have brought the suppliants within the provisions of s-s. (1)(*b*), that subsection could not assist them as it was not brought into force until November 15, 1954. (See s. 5(1) of the Act.) I have carefully considered this submission and have reached the conclusion that, whatever be the scope of the provisions of s-s. (1)(*b*), they need not here be considered inasmuch as the acts and omissions on which the suppliants rely, if proven, constitute a tort committed by one or more servants of the Crown and are, therefore, within the terms of s-s. (1)(*a*).

The respondent admits that the bridge was demolished and destroyed with explosives by the Seventh Field Squadron and that such demolition was carried out as a demolition exercise under the supervision and direction of officers and personnel of Her Majesty's forces. It is established by the evidence that the demolition was carried out under the direction of Major Humphries who was assisted by the officers and men of his unit and by certain other officers and men of other units, including those from the Provost Corps. I find, therefore, that Major Humphries and those assisting him were at the time servants of Her Majesty and then acting within the scope of their duties or employment.

The suppliants alleged that Major Humphries and the military personnel under his command were negligent in

that (*a*) the detonation of explosives was negligently performed in that it permitted a fragment of steel to fly to the area to which members of the public (including the female suppliant) had been directed; (*b*) the area to which they had been so directed was improperly located and negligently chosen; and (*c*) all proper precautions for the safety of the public were not taken. The suppliants also plead the maxim *res ipsa loquitur*.

The respondent, however, denies all liability, alleging (*a*) that all reasonable care and precautions were taken for the safety of persons and property; (*b*) that persons, including the female suppliant, in the area of the explosion were there voluntarily with knowledge of the danger and accepted the risk attributable thereto; it is submitted that the maxim *volenti non fit injuria* applies. Alternatively, it is alleged that if any officer or servant of the Crown was negligent, the female suppliant was guilty of contributory negligence and that the damages should therefore be apportioned.

The county of Middlesex had decided to replace the old Thorndale bridge by a more modern structure and a contract for the new bridge and the removal of the old bridge had been made with Mowbray & Co. Major Humphries, who was then in command of the Seventh Field Squadron, had knowledge of this contract and thought that it would be good experience for his officers and men to take charge of the demolition of the old bridge as a practice exercise. Authority to do so was secured from the county of Middlesex, the contractor and the military authorities.

The demolition of the steel superstructure of the bridge was planned for Saturday, May 16. Span one was demolished by the squadron in the morning, apparently without members of the public being present.

Mrs. Lindsay, who resides in London, had seen a copy of the London *Free Press* dated May 13, in which there appeared a news item headed, "Old Thorndale Bridge to Go on Saturday". Two paragraphs thereof were as follows:

> Under the command of Maj. G. E. Humphries, the old four-span steel structure will be demolished early in the afternoon, and the piers and abutments will get the same treatment the following Saturday. About 100 pounds of army plastic explosive will be used to blow the four spans, while about 1,000 pounds will be used to blow the abutments and piers.

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Areas from where the public can watch the exercise are available, Maj. Humphries said. Work on the demolition will start early Saturday morning, and the main blast will be about 3.00 p.m. The bridge is just west of Thorndale village on the Thorndale sideroad.

Major Humphries had seen that article and agrees that it fairly represented the purport of what he had said to the reporter; that, while he had not specifically said anything about "the public", it was part of the plan to permit the public to view the exercises, and that areas from which the public could watch them were available. It is apparent that he fully expected members of the public to be present as there was a meeting with the commander of the Provost Corps "who was to regulate the public". Members of that Corps were actually present for that purpose.

Mrs. Lindsay and her husband thought it would be of interest to their twelve-year-old son to view the demolition. They drove with him and two of his friends to the vicinity of the bridge, parked the car some distance therefrom, and after viewing the bridge were directed by the members of the Provost Corps to move southerly along the east bank of the river on property owned by the Upper Thames River Conservation Authority. She says the instructions were, "Stand south of the shack; everyone move down south of the shack". The shack referred to is a small construction shack marked on the plan Exhibit A. It is a small frame building about 8 feet by 10 feet, about 8 feet high, and situated about 380 feet south of the centre of the bridge.

Obeying these instructions, Mrs. Lindsay moved to the south and took up a position south of the shack about where the initials "K.L." appear on Exhibit A. She was standing there when the easterly two spans were demolished by one explosion; no one was injured by that blast. Then there was an interval of about fifteen minutes before the second explosion, designed to demolish the most westerly span, took place. In the meantime, the spectators were moving about somewhat and Mrs. Lindsay, while conversing with others, had moved about twenty feet further to the south. While standing there, the second explosion occurred and it was then that she received her injuries. Another spectator, Mr. W. R. Brown, was also injured by a flying fragment of steel, his claim for damages being also before me. It is clear from the evidence of Major Humphries that both

Mrs. Lindsay and Mr. Brown were part of a group of public spectators and that they and all members of the group were in the general area where they had been directed by the Provost Corps. The number of public spectators was variously estimated at from 75 to 300, but I think it safe to assume that there were 150 at least. Major Humphries also stated that he considered that the area where they were standing when struck "was a safe place for them to be".

In view of the provisions of the *Crown Liability Act,* it seems to me that under circumstances such as these the Crown is liable for damages for the acts or omissions of its servants, such as members of the Armed Forces, to the same extent as a private person of full age and capacity would be. What then is the duty of care required in the use of dangerous goods such as explosives when members of the public in large numbers are known to be present?

Counsel for the suppliant submits that the rule of *res ipsa loquitur* applies and that, having proven the accident, he is not required to prove anything more than that it devolved upon the respondent to establish that the accident arose through no negligence of the Crown's servants. In this case, however, specific acts of negligence were alleged and, in my opinion, proven, so that the maxim is of little importance. I find it unnecessary; therefore, to decide the point.

The degree of care which a person is bound to use in regard to others is relative and in deciding whether a given act is, or is not, negligent, the particular facts and circumstances of the case must be considered. The following principles are stated in Halsbury's Laws of England, 2nd Ed., Vol. 23:

827. Where there are special circumstances which increase the risk attendant on some act or operation not usually dangerous, or where the act or operation is, from its nature, likely to cause injury to others unless special precautions are taken, the degree of care required is proportionately high. From the failure to use those precautions, which skill, foresight, and experience suggest as being necessary in such circumstances, negligence will be inferred. . . .

Consummate caution, too, is required from those handling dangerous weapons, such as loaded guns, or from those dealing with dangerous articles, such as gas or explosives.

883. The possession or use of articles which are dangerous by nature, such as fireworks, firearms, or dangerous chemicals and explosives, imposes

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on the person possessing or using them the duty to take the highest possible degree of care. The mere fact that an accident results from the possession or use of such articles, where with proper care it should not so result, is *prima facie* evidence of negligence. . . .

884. The employment of dangerous or defective machinery or implements, or the conduct of dangerous operations, also imposes a duty to take the most scrupulous care, and failure to do so will render the person by whom they are employed or conducted liable to an employee or to any injured person who has a right to be where he was when he suffered an injury.

In *Pollock on Torts*, 15th Ed., the principle is stated thus at page 386:

The risk incident to dealing with fire, firearms, explosive or highly inflammable matters, corrosive or otherwise dangerous or noxious fluids, and (it is apprehended) poisons ,is accounted by the common law among those which subject the actor to strict responsibility. Sometimes the term "consummate care" is used to describe the amount of caution required, but it is doubtful whether even this be strong enough. At least, we do not know of any English case of this kind (not falling under some recognised head of exception) where unsuccessful diligence on the defendant's part was held to exonerate him.

It becomes necessary, therefore, to ascertain what care was exercised by Major Humphries and those under his command. He was in command of the Seventh Field Squadron and at the time of the demolition of the bridge was in overall command of that unit and of other service units then participating, including the Regimental Headquarters of the First Field Engineers and a detachment from No. 1 Provost Corps Company (Militia) to a total of about 35 or 40, of whom 25 per cent were officers. About a week earlier a meeting was held with the commanding officer of the Provost Unit "who was to regulate the public". A method was worked out by which the roads approaching the bridge should be controlled, areas where the public was not to be allowed were pointed out "and a certain safe distance was set up closer than which the public were not supposed to go during the demolition". It was decided to place members of the public at a point on the easterly bank of the river, southerly of a point about 400 feet south of the centre of the bridge. At this point there was a portion of a fence running east and west; it was to be used as a marker and no one was to be allowed to go forward of that point; the small contractor's shack was near that point. It was considered that if the public remained south of the marker, they would be safe. It was to that area that the

suppliants and the other members of the public, including many children, were directed by the officers and men. I am satisfied from the evidence that at the time of the demolition all members of the public were to the south of that marker.

The planning of the field exercise was done by or under the supervision of Major Humphries, a consulting engineer. He took his training in mechanical engineering in England and later had experience in construction and mining work in Canada. He was in the Armed Forces from 1940 to 1945 and his engineering training then included demolition work. In France his work included the construction and demolition of bridges. Since joining the Militia in 1946, he has had training in demolition work and eight demolition exercises for various authorities, only one of which included the demolition of steelwork of a bridge. He said it was not normal for steel to be demolished in civilian practice with explosives.

In preparation for the demolition, a plan, Exhibit D, was prepared. It shows the four bridge spans, the amount of explosives to be used on each, and the manner of applying the explosives to the bridge members. On three occasions the personnel of the squadron were briefed in the exercise to be carried out. It was decided to use plastic high explosives, 43 pounds of which in 16 charges would be used on the west span. It was considered that the debris from the explosion should be directed downwards into the water and to the north where there was a swamp and little likelihood of damage being occasioned to persons or property. For that purpose no explosives would be placed on the north or on the underside of the steel members, but rather on the top and south sides. The dots on the span Exhibit D show where the charges were to be placed. The explosives with paper wrapping were to be tied on with cordage and tape and were to be initiated by a detonating fuse. Sand bags were to be draped over the charges to minimize the concussion, to provide a tamping effect and to increase the efficiency of the blasts.

Major Humphries said that the channelling of the debris in the above way had been used in most of the cases in which he had been engaged in demolishing steel bridges;

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that it was found necessary as a rule to prevent the debris from travelling in one direction. In his experience he had never found that debris came back in exactly the opposite direction to which it was intended. He said, "There is an angle of debris, say, which would be approximately 200 degrees from the centre line of the bridge over which considerable debris could be expected, and the amount from there backwards decreases in much the same manner as the discharge from a shotgun or anything like that. There is one point that should have zero or a minimum of debris with any charge if the charges are placed directionally."

Major Humphries said that after the charges were placed he personally inspected about 80 per cent. of them and found them in good order and properly placed according to plan. One of his officers who had charge of placing them reported that all were in order. In preparation for the firing of the charges, Major Humphries took up his position behind a tree about 100 feet north of the construction shack. After taking steps to ensure that there was no one in the area north of the bridge, instructions were given to arm the charges. He then "shouted loudly for people to take cover and get down and some others of my officers and people among the spectators carried the warning through". That was about 30 seconds before orders to fire were given. He was then facing south towards the spectators and in a position to see whether or not they were in the assigned area and had obeyed his warnings. He said, however, that after the first morning he was occupied with the business of getting the blasts fired and was not able to pay too close attention to what the spectators were doing.

He said that his reason for selecting the area near the shack as the place which the spectators could use was that there were a number of trees in that area; that if they were there they could be controlled with the forces available; and that the area was at a high level, somewhat above that of the bridge. He considered that there were enough trees to the south of the shack and running along the bank of the river to provide cover for all spectators present on that day. From his cross-examination it is clear that while Major Humphries may have considered the area to the south of the shack to be a safe place for spectators, he did not consider it to be entirely safe. He was asked to explain

the reason for his order before each explosion that the spectators were to take cover, and said: "because in any explosion or demolition it is normal for people to take cover. There never is a 100 per cent. guarantee of safety. Explosives are explosives and cover is one of the major factors. One of the facts in taking that action was that there was cover there and my reason for warning them was to see that the cover was used to as good advantage as possible."

By "taking cover" he meant getting down on the ground in a place where they were sheltered from the direct line of the bridge, getting behind a tree or timber, or any shack that was there. His order to take cover was "an additional assurance which he felt in duty bound to carry out because something might fly in their direction where they were standing and they could get hurt."

As a check on the efficacy of the directional blast, Major Humphries said that after the centre span was demolished in the morning, men had been sent into the water to search for steel fragments and none had been found more than a few feet south of the bridge.

In the afternoon, certain photographers and engineer personnel who were engaged in carrying out the demolitions, were stationed on the east bank in advance of Major Humphries' position. He explained that they had been provided with sand bag protection as they were closer to the bridge and in an area where it was very likely that debris would fly. When referred to the *Royal Engineers' Supplementary Pocketbook 4 on Demolitions* (which he recognized as one authority on the subject), he agreed with the statement therein that in using cutting charges on steel, 1,000 yards was considered as the proper safety distance for personnel during training, unless splinter-proof covering was available for spectators; he pointed out, however, that that was the safety distance when there was no attempt, as here, to channel the debris in one direction by placing the charges in the way I have outlined. He was unable to give any explanation or to suggest any reason why the steel fragments in this case did, in fact, reach the "safety" area where the spectators were gathered.

I cannot doubt that under circumstances such as here existed, it was the duty of those in charge of the demolition

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to exercise a degree of diligence and care amounting practically to a guarantee of safety to those who, like the suppliants, were known to be in a position where there was a possibility that injury might result by the shattering of the steel superstructure. That such a possibility existed and was known to Major Humphries and his officers is established by the evidence. It was for that reason that some attempts were made to give warning to the spectators to "lie down" or "take cover". Some of the Army personnel who gave evidence for the Crown and who were in the spectators' area, said that they themselves did lie down or take cover in one way or another, no doubt because they had been instructed to do so, or considered it a proper safety measure under the circumstances. The evidence makes it quite clear that even where steps are taken to channel the effects of the blast away from the given area, such precaution is not in every case completely successful and, "explosives being explosives", an element of uncertainty and risk still remains. That being so, I think it was negligent on the part of those in charge to select an area to which the public were directed which was in such close proximity to the demolition that injuries might possibly result. The need of practical militia training in demolitions —at least in times of peace—cannot over-ride the plain duty to take exceptional care to see that no member of the public is subjected to risk of injury by reason of such operations. If they cannot be conducted in a public place without such risk, they should not be undertaken there at all.

It is suggested by Major Humphries that from the point of view of public relations, it was desirable that the public should have an opportunity of observing the work carried on by the Reserve Forces. That may well be so, although I doubt whether such a policy extends to an exercise involving such risks as here existed. If it is desired to have the public present, they must be kept out of all possible danger.

Counsel for the Crown stresses the fact that warnings were given to "take cover" and to "lie down" before the first and second explosions. Many witnesses on the point were called by both parties, all of whom, I think, endeavoured to tell the true facts as they recalled them. I find it unnecessary to review their evidence in detail. I am satisfied that Major Humphries, from his forward

position, did call out "take cover" or "lie down" or words to that effect; that instructions were given to members of the Provost Corps to go among the spectators and give similar warnings, and that to a limited extent they did so. There is evidence, however, by the suppliants in this case, and by Mr. Brown, the suppliant in the other case, as well as by others (which I accept), that they heard no such warnings given by any one and saw no one—except perhaps the forward members of the Forces—lie down or take cover. Some warnings were undoubtedly given, but they did not reach either of the suppliants or Mr. Brown, as well as others, although there was nothing to prevent their hearing them had they been given in their vicinity. I think it reasonable to suppose that the personnel required to give warnings were either too few in number to warn all the spectators, or too casual in their manner of carrying out their orders. I am satisfied, also, that there was insufficient and inadequate coverage in the assigned area for all the spectators. There were some trees—or shrubs as some of the witnesses called them—of small size and relatively few in number; there was but little coverage behind the shack and little or no ground cover of any sort.

The evidence also establishes beyond question that although warnings were given, it was known to the personnel of the Forces engaged that a great many spectators did not get down or take cover. It may well be the fact that the men in the Forces had no authority to compel any one to obey the warnings; but knowing as they did that they were not obeyed and that the demolition program involved an element of risk, they should and could have communicated the fact to the commanding officer. He himself, in fact, had every opportunity of observing that the warnings he had given were not carried out; he says that if he had looked he could and would have been that such was the fact. Under such circumstances it was his duty to ensure that the warnings were not only given adequately, but that they were carried into effect before firing the charges. He could have delayed the explosion until he knew that the warnings were obeyed and, if they were not obeyed, he could and should have cancelled the exercise entirely. His failure to do so and the failure of his men to report that these warnings were not carried out constituted

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negligence for which the Crown is liable; such conduct falls far short of the consummate caution required of those dealing with inherently dangerous goods such as explosives.

In *Whitby* v. *Brock & Co.* (1), the plaintiffs had gone to the Crystal Palace where a display of fireworks under the direction of the defendants was to take place. They had passed the entrance and were proceeding in the direction of the fireworks when Mrs. Whitby was struck on the leg by a firework, sustaining personal injuries and damage to her clothing. The jury found that the defendant had been negligent in not exercising proper precautions and in admitting the defendants to the Penge gate after dark. The trial Judge, however, gave judgment for the defendant and the plaintiffs' appeal therefrom was allowed. The report of that case states:

> The Master of the Rolls (Lord Esher) said that the defendants were letting off these fireworks for their own benefit in the Crystal Palace grounds. They knew that people would come to see them. They knew that fireworks were a dangerous article. Therefore, there was a duty to manage with care their dealings with the fireworks. They let off the fireworks and struck the plaintiff, who had a perfect right to come into the grounds. The mere fact that the fireworks struck the plaintiff was sufficient *primâ facie* evidence of negligence, because fireworks did not ordinarily strike the spectators and bystanders. It was entirely a question for the jury, and not for the Judge, whether the plaintiffs took any risk on themselves. There was no evidence that the plaintiffs had taken on themselves any such risk. The verdict of the jury was justifiable and must be restored.
>
> Lord Justice Fry agreed that there was *primâ facie* evidence of negligence on the part of the defendants which had not been rebutted by any evidence on their part.
>
> Lord Justice Lopes said that he adhered to what he had said in *Parry* v. *Smith* (4 C.P.D. 325), that under such circumstances the defendants were bound to use care. The fact that Mrs. Whitby was struck was evidence of negligence, and the defendants had called no evidence to rebut that negligence.

In *Holliday* v. *National Telephone Co.* (2), the plaintiff, a passer-by on a highway, was injured when a defective lamp, used by a plumber engaged on the highway in the process of connecting pipe joints, exploded. The Earl of Halsbury L.C., said at page 398:

> There is a further ground for holding that the plaintiff is entitled to succeed. There was here an interference with a public highway, which would have been unlawful but for the fact that it was authorized by the proper authority. The telephone company so authorized to interfere with the public highway are, in my opinion, bound, whether they do the work

(1) (1888) 4 T.L.R. 241.

(2) [1899] 2 Q.B. 392.

themselves or by a contractor, to take care that the public lawfully using the highway are protected against any act of negligence by a person acting for them in the execution of the works. . . . Therefore, works were being executed in proximity to a highway, in which in the ordinary course of things an explosion might take place. It appears to me that the telephone company, by whose authority alone these works were done, were, whether the works were done by the company's servants or by a contractor, under an obligation to the public to take care that persons passing along the highway were not injured by the negligent performance of the work.

In the same case, Smith L.J. said at page 400:

. . . it is the duty of a person who is causing such works to be executed to see that they are properly carried out so as not to occasion any damage to persons passing by on the highway.

Counsel for the Crown, however, submits that the female suppliant voluntarily assumed the risk of injury and that, therefore, notwithstanding the negligence of its servants, the claim must fail under the maxim *volenti non fit injuria*. It may be assumed, I think, that the female suppliant had some knowledge that the detonation of explosives could be a dangerous operation unless proper precautions were taken. That was brought to her attention, also, by the fact that she and the other spectators were directed to move away from the immediate area of the bridge. Such knowledge, however, is insufficient; if this defence is to succeed, it must also be shown that she fully appreciated the danger and voluntarily accepted the risk (Halsbury's Laws of England, 2nd Ed., Vol. 23, p. 716).

I am quite satisfied that when she was in the so-called "safe area"—and it was there that she was struck—she had no appreciation whatever that she was incurring any risk. Such risk was not apparent to her for she had no knowledge of how far or in what direction steel fragments might be projected by the blast. Moreover, she was not made aware of the possible danger by any adequate warning. It is manifest that under the circumstances she relied—and was quite entitled to do so—on the skill, care and special knowledge of those in charge of the operations. When with others she was directed to the "safe area", she was entitled to assume that it was in fact a safe area. If other spectators in the area to her knowledge had been injured by the first explosion, then, had she decided to run the risk involved in observing the second explosion, a different conclusion might be reached on this point, but such was not the fact. In my opinion, the maxim is not here applicable.

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It is submitted, also, that the female suppliant's contributory negligence contributed to her damages and that, therefore, the damages should be apportioned; it is said that she exercised less than a reasonable degree of care for her own safety under the circumstances. This submission is based on the fact that she did not obey the warnings to "lie down" or "take cover" or that, if she did not hear the warnings, she was careless and inattentive and, in any event, for her own safety she should have realized that there was some danger and should have taken steps to secure her own safety by going further to the south or by lying down and taking cover.

I have already found that the warnings were not given in such a way as to be brought to her attention. I am satisfied, also, that this was due to the inefficient and incomplete way in which the warnings were given and not to any inattention or heedlessness on her part. She is an alert and intelligent woman and I unhesitatingly accept her statement that she neither heard the warning nor saw any other of the spectators close to her, either lie down or take cover. Moreover, I am satisfied that when she carried out the only order that came to her attention—namely, to go south of the shack—she, like any other reasonable person, would assume that that area was a safe place, chosen as such by those in charge and that nothing further needed to be done on her part to avoid danger and ensure her safety. I am quite unable to find that in remaining standing in that area —and that is the only negligence alleged against her—she acted other than a reasonable person would do. In my opinion, the defendant has not proven any contributory negligence on the part of Mrs. Lindsay.

Moreover, I think the suppliants are entitled to succeed on another ground even if I am wrong in my conclusions that they have affirmatively established negligence on the part of the Crown's servants, for which the Crown is liable. I agree with counsel for the suppliants that the rule of absolute liability—or, as it is now more frequently called, the rule of strict liability—as laid down in the famous case

of *Rylands* v. *Fletcher* (1), is here applicable. In that case Blackburn J., in delivering the judgment of the Exchequer Chamber, said at page 279:

We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape.

In *Salmond on Torts*, 11 Ed., the author refers to that rule on page 614, as follows:

The rule known as that in *Rylands* v. *Fletcher* is one of the most important cases of absolute or strict liability recognised by our law—one of the chief instances in which a man acts at his peril and is responsible for accidental harm, independently of the existence of either wrongful intent or negligence. The rule may be formulated thus:—

The occupier of land who brings and keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape, and is liable for all the direct consequences of its escape, even if he has been guilty of no negligence.

In *Clerk & Lindsell on Torts*, 11 Ed., the authors, after quoting the above passage of Blackburn J., said at page 616:

This is the liability of an insurer; it is therefore unnecessary for a plaintiff to prove negligence, and it is no defence for a defendant to prove that he has taken all possible precautions to prevent damage.

1052. The principle of *Rylands* v. *Fletcher* has been aptly termed "the wild beast theory". It applies to "anything likely to do mischief if it escapes," and accordingly the thing must, like a wild beast or accumulated water, have the power of escape. This power of escape must be inherent, and the principle therefore applies to things "essentially dangerous in themselves" which are likely to escape and cause damage. It is impossible, as the authorities stand, to define these things more precisely. The principle, however, has been applied to water (including sewage), fire, gas, explosives, electricity, poison, dangerous animals, . . .

In reference to liability under the rule, the authors state at page 619 ff.:

In *Rylands* v. *Fletcher* water from the defendant's reservoir flowed into the plaintiff's mine, and the judgments accordingly deal with things brought or collected on land. The principle of the decision, however, is not "confined to the invasion of a right of property in soil", and is not limited to persons who keep or accumulate dangerous things on their own land. The person liable is the owner or controller of the dangerous thing. If he brings or collects it on land, he is liable although he is not the owner or occupier of the land, but has merely a licence to use or enter upon it. If he brings it on the highway and it escapes and causes damage he is similarly liable. . . .

(1) (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330.

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1057. The duty under the rule of absolute liability is owed to the world at large. The person responsible is liable "'For any mischief thereby occasioned,' that is to say, not mischief necessarily occasioned to the owner of the adjoining land, but any mischief thereby occasioned". It has accordingly been held that a water company authorised by statute to carry water under the surface of the highway is liable for water from a broken main which damaged the cables of an electricity supply company also under the highway, and that a gas company, whose mains were under the street, was liable for an escape of gas which caused an explosion in an hotel. A railway company has been held liable for damage to stacks in a field caused by the emission of sparks from a railway engine, and so has the owner of a traction engine driven along the highway for damage similarly caused.

The question was raised in *Read* v. *J. Lyons & Co. Ltd.* [1947] A.C. 156, whether damages for personal injuries can be recovered under the rule in *Rylands* v. *Fletcher*. Until this case, no doubt had ever been expressed that they were recoverable. The Court of Appeal awarded such damages without question in *Miles* v. *Forest Rock Granite Co.* [1918] 34 T.L.R. 500, and in *Hale* v. *Jennings Bros.* [1938] 1 All E.R. 579, and in *Shiffman* v. *Order of St. John* [1936] 1 All E.R. 557. Atkinson J. awarded them on the ground of negligence and also, as an alternative ground of his decision, would have been prepared to award them under *Rylands* v. *Fletcher*. Damages for personal injuries are recoverable both in negligence and in nuisance and for breach of an absolute duty imposed by statute, and no principle has yet been put forward which would limit the damages recoverable to damage to property and not include damages to the person. There is no liability, however, unless the dangerous thing "escapes" from the land on which it is brought. Accordingly, when a worker in a munition factory was injured by the explosion of a shell in the factory, it was held that she could not recover.

1058. The principle of *Rylands* v. *Fletcher* may accordingly be stated to be: A person who owns or controls anything inherently dangerous, which is likely to do damage if it escapes from his land, does so at his peril and is liable for all the consequences of its escape, without any proof of negligence on his part, even if he did not know it to be dangerous.

It is of particular interest to refer to the above cited case of *Miles* v. *Forest Rock Granite Co.* (1), a decision of the Court of Appeal where the rule was applied and in which the facts are similar in many ways to those of the instant case. The headnote is as follows:

The duty of the owner of a quarry who brings explosives on to his premises and explodes them there is to keep all the results of the explosion on his own land, and if they escape from his land and cause damage he is liable whether he has been guilty of negligence or not.

(1) (1918) 34 T.L.R. 500.

There the defendant operated a quarry a short distance from a public highway; the plaintiff while proceeding on the highway to his work at another quarry, and after he had passed a flagstaff on which a warning red flag was hoisted, and a flagman posted to give warning that blasting was in progress, was injured by a piece of stone which had been flung a distance of four or five hundred yards by a blasting operation in the defendant's quarry. In summarising the opinion of the Master of the Rolls (Swinfen Eady), the report states:

It was contended that the verdict was against the weight of the evidence. In his opinion the learned Judge had put the case very fairly before the jury, if anything, too strongly in favour of the defendants. The way in which the case was tried was that it was put to the jury as a case of negligence and the learned Judge told the jury that unless the plaintiff proved that the defendants had been guilty of negligence he was out of court. That mode of putting the case was far too favourable to the defendants. This was a case in which the defendants had brought on their premises a quantity of explosives for their business and fired considerable charges. The charge used in this particular case did not appear to have been excessive, but it must have been considerable in view of its effect, which was to propel stones or a stone a distance of about a quarter of a mile. The duty of the defendants on bringing this foreign and dangerous material on the ground and exploding it there was to keep all the results of the explosion on their own lands, and it escaped from their own lands at their peril. The doctrine of *Fletcher* v. *Rylands* (L.R., 1 Exch., 265) applied to the present case. . . .

* * *

The case was like that of the escape of a dangerous and mischievous animal. In *Cox* v. *Burbidge* (13 C.B., N.S., 430) Mr. Justice Williams said:—

> If I am the owner of an animal in which by law the right of property can exist I am bound to take care that it does not stray into the land of my neighbour; and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial.

Fletcher v. *Rylands* (*supra*) was affirmed by the House of Lords (L.R., 3 H.L., 330), and it was pointed out in that case that there was no default or negligence on the part of the defendants whatever. So if the case had been put at the trial, as it might have been put, independently of any question of negligence the plaintiff must have succeeded. The case was not so put, but was based on the negligence of the defendants, while the defendants denied their negligence and also set up the defence of contributory negligence.

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His Lordship came to the conclusion that the case had been fairly put to the jury and that it was impossible to say that there was no evidence of negligence or that the verdict was against the weight of the evidence, or that the jury could not as reasonable men arrive at the conclusion at which they did. The appeal therefore failed and must be dismissed.

Lord Justice Scrutton and Lord Justice Duke gave judgment to the same effect.

Reference may also be made to *Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co.* (1) and to *National Telephone Co.* v. *Baker* (2).

At page 622 of the same text the exceptions to the principle of absolute liability are stated to be: (1) the act of God; (2) the act or default of the plaintiff; (3) the consent of the plaintiff; (4) the independent act of a third party; and (5) statutory authority. Exceptions (1), (4) and (5) are not here applicable and, as I have already found, the defendant has failed to bring the suppliants within exceptions (2) and (3).

Applying the above principles to the facts of this case, it will be seen that the officers and men of the squadron, admittedly servants of the Crown, for their own purposes brought explosives upon the property of the county of Middlesex, where they had a license to go, for the purpose of carrying out an operation which they knew to be dangerous, namely, the demolition by explosives of the steel superstructure; that they had knowledge of the presence of a large group of spectators on another adjacent property where such spectators (including the suppliant) had every right to be; that in the course of carrying out such dangerous operation they permitted the escape of fragments of steel from the property under their control to such other area, thereby causing damage to the suppliant. The defendant is therefore liable under the rule of strict liability laid down in *Rylands* v. *Fletcher*.

I turn now to the question of damages. Mrs. Lindsay is about forty-nine years of age, married, with two children both at home. When struck by the steel fragment she fell down, but was immediately assisted by two nurses who were present and who applied bandages. She was driven

(1) [1921] 2 A.C. 465 at 476. (2) [1893] 2 Ch. 186.

in a car to St. Joseph's Hospital in London where she was given a sedative to relieve the pain. Later that afternoon she was examined by Dr. Murray Simpson, a surgeon of London. He found two penetrating wounds on the inner aspect of her left thigh, a little below halfway between the groin and the knee. The first wound was on the anterior aspect of the thigh, about three inches in length, and appeared to be the point of entry of the fragment of steel; the other wound, about two and one-half inches long, was on the posterior inner aspect of the thigh and was apparently the point of exist of the particle of steel. Between the two was a track through which the steel had passed, torn muscles and injured veins in that region. No bones were damaged. After the haemorrhaging was stopped, anaesthesia was applied, the deeper haemorrhages stopped, the wounds cleaned out, muscle layers were repaired, drains were installed, and the skin repaired. She remained in hospital until June 2 of that year, receiving routine post-operative treatment for a potentially infectious wound. During most of that time she was confined to bed, but was moving about a little just prior to her discharge. Dr. Simpson said that when she left the hospital she could walk in a fashion, but not well; that she had a great amount of pain and some inflammation along the big vein of the inner side of her leg.

She remained under the care of Dr. Simpson until February 1955. He says that she had made a good recovery from the muscle injury but not from the vein injury. She has a recurrent phlebitis involving the vein below the injury; this causes a certain amount of swelling in the lower leg, some backaches, and severely limits her ability to walk very far without pain. The two scars still remain. He said she now has a chronic phlebitic condition which flares up from time to time, that her veinous condition is deteriorating and that she is likely to develop varicose veins. He did not think that her condition would improve further and that in five years she would be able to do much less than she is now doing. In his opinion the particular type of phlebitis was of a recurring nature and would not improve.

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Dr. D. W. B. Johnstone, a consulting surgeon of London, examined Mrs. Lindsay on behalf of the respondent in August 1954 and in February 1955. In his opinion, she was suffering from mild phlebitis, resulting in swelling of the leg. Her condition was the same on both occasions and she complained of pain in the left thigh and swelling of the left leg and foot. He agreed that her condition would interfere with her housework and that her condition would be made worse if she were required to be on her feet for long periods of time and by going up and down stairs, and that scrubbing floors and the like would be very difficult. In his opinion, her condition had reached the maximum and would neither deteriorate nor improve. He found a deformity of the left leg and agreed with Dr. Simpson that if she had inflammation in other parts of her body, her condition might be aggravated. He agreed, also, that after normal exertion at housework, and after standing for periods of time, the leg would be painful.

Mrs. Lindsay said that she suffered considerable pain after the surgery when her wounds were dressed in the hospital, that she found difficulty in sleeping at nights there, and was given sedatives. When she returned home, she spent most of the first week in bed and was unable to resume her housekeeping duties for about two months, during which period she required the services of a housekeeper, her activities being confined to a few simple chores. For about a month she suffered quite severely when her weight was placed on the left leg. Even now when she walks her leg becomes tired and she experiences pain. She still requires the services of a housekeeper one day each week to perform the heavier household tasks such as polishing floors and ironing; the rest of the household duties she is now able to perform herself. Any lengthy exertion, such as prolonged standing or walking, fatigues her. Prior to the accident she skated, danced and hiked a little, but as any of these activities now result in a swelling of her leg, she can no longer participate in them. After discharge from the hospital, she was attended by Dr. Simpson at frequent intervals, but now attends at his office about once

each month for an examination as to her phlebitic condition. No further treatment is now being received. She is able to drive her car for short distances without tiring. She says her condition has shown no improvement since December 1953. She was not cross-examined as to her injuries or disabilities.

From this evidence it is clear that Mrs. Lindsay suffered a considerable degree of pain while in hospital and will continue to do so from the recurrent attacks of phlebitis. It is also clear that the phlebitic condition is of a permanent nature which will not improve and is likely to become worse and that she has been permanently deprived of the opportunity of engaging in her normal recreational activities. She will always be unable to perform certain of the heavier household duties such as ironing, scrubbing and waxing floors, and the like, and for those services will require to employ help at regular intervals. For general damages, which include pain and suffering, permanent partial disability, possible expenses which she may hereafter incur, and all other damages which she has suffered, I shall award her the sum of $8,000. To her husband, Harvey Lindsay, there will be awarded special damages for his disbursements for hospital, medical accounts and the like, which have been agreed upon at $1,084. There will therefore be judgment declaring that the suppliant, Kathleen Lindsay, is entitled to recover from the respondent the sum of $8,000 and that the suppliant Harvey Lindsay is entitled to recover from the respondent the sum of $1,084. The suppliants are also entitled to their costs after taxation.

Judgment accordingly.

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Feb. 2

BROWN v. THE QUEEN

Cameron J.

BETWEEN:

WILLIAM ROY BROWN .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Mayer Lerner, Q.C., R. W. D. Lewis, Q.C. and *M. A. Bitz* for the suppliant.

K. E. Eaton and *D. H. Christie* for the respondent.

There was judgment in this action declaring that the suppliant is entitled to recover damages from the respondent for the reasons stated in *Lindsay* v. *The Queen ante* p. 186.

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BETWEEN:

CANADA SAFEWAY LIMITED .....APPELLANT;

AND

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

Revenue—Income tax—Deductions—"Interest on borrowed capital used in the business to earn income"—Onus on taxpayer to prove income earned taxable or, if both taxable and non-taxable income earned apportionment of borrowed capital used to earn each—Income War Tax Act, R.S.C. 1927, c. 97, as amended, ss. 5(1)(b), 6(5)—Income Tax Act, S. of C. 1948, c. 52, ss. 11(1)(c), 12(1)(c).

The appellant and M company were incorporated in Canada as wholly-owned subsidiaries of a United States Corporation. The appellant to carry on a retail chain grocery business and M company a wholesale grocery and warehousing business to supply the requirements of the appellant. In 1947 the appellant issued debentures in the sum of three million dollars and preferred stock in the sum of two million and turned the entire proceeds so raised over to the parent company receiving from it all the outstanding stock of M company. No change was made in the operations of the two subsidiaries but thereafter the net profits of M company were paid to the appellant. In filing its income tax returns for the years 1947, 1948 and 1949 the appellant claimed as a deduction the interest paid by it on the debenture issue in each of these years as deductions authorized by the *Income War Tax Act* and the *Income Tax Act* as money paid on borrowed capital to earn income. The deductions were disallowed by the Minister and appeals from his decisions to the Income Tax Appeal Board were dismissed.

Held: That as the parent company was the sole owner of the appellant's capital stock there was no reason to believe that it would to its own detriment dispose of M company to outsiders and no evidence was adduced to establish such action was contemplated nor that the purchase by the appellant was the reason for the expansion of the latter's business.

2. That following the purchase the net profits of M company became the property of the appellant and the latter in claiming exemption from its taxable income had to establish that every condition required by the exempting section had been complied with. *Lumbers* v. *Minister of National Revenue* [1943] Ex. C.R. 202; *Robert Addie & Sons' Collieries* v. *Commissioner of Inland Revenue* [1924] S.C. 231.

3. That on the evidence no portion of the borrowed monies was applied to the appellant's business and therefore the interest paid on the debentures was not paid on borrowed capital actually used by it in its business to earn taxable income as defined by s. 5(1)(*b*) of the *Income War Tax Act*. *Strong* v. *Woodifield* [1906] A.C. 448.

4. That as to the contention that the expenses were incurred to earn both taxable and non-taxable income and that the Minister, under s. 6(5) of the *Income War Tax Act* and s. 12(1)(c) of the *Income Tax Act*,

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had power to apportion the expenses, the onus resting on the appellant to prove the necessary facts was not met. *Dezura* v. *Minister of National Revenue* [1948] Ex. C.R. 10; *Johnston* v. *Minister of National Revenue* [1948] S.C.R. 486; [1947] Ex. C.R. 483.

APPEALS from decisions of the Income Tax Appeal Board.

The appeals were heard before the Honourable Mr. Justice Fournier at Vancouver.

J. A. MacAulay, Q.C. and *D. C. McGavin* for appellant.

S. A. Gregory and *J. D. C. Boland* for respondent.

FOURNIER J. now (March 5, 1956) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board, dated April 4, 1953, dismissing the appellant's appeal from the income tax assessments levied against it for the taxation years 1947, 1948 and 1949, whereby it was sought to hold it liable to tax on the interest of debentures issued in 1947, for application towards the purchase price of the outstanding capital stock of MacDonald's Consolidated Ltd., and for other purposes.

It was agreed by the parties and ordered by the Court that the evidence and the argument in one cause would apply to the three appeals.

The appellant company and MacDonald's Consolidated Ltd., in 1947, before the transactions hereinafter dealt with took place, were wholly owned subsidiaries of Safeway Stores, Incorporated, a United States corporation. The appellant carried on a retail chain grocery business in the provinces of British Columbia, Alberta, Saskatchewan and Ontario, and MacDonald's Consolidated Ltd. had been set up to buy and distribute groceries, produce and similar commodities and make warehousing facilities available to Safeway Stores Ltd.

During the period from 1938 through 1945, the parent company had substantially increased its investment in Canada in Safeway Stores Ltd. and MacDonald's Consolidated Ltd. by permitting these companies to retain their earnings and by investing new monies. At the close of the year 1945, its investment in these subsidiaries was several million dollars out of balance with similar operations in the

United States. What took place, from 1945 to 1947, is not clearly established, but the evidence is to the effect that Safeway Stores Ltd. in 1947 became Canada Safeway Ltd., the appellant in these appeals. Under this new corporate name it issued debentures for the sum of three million dollars and preferred stock for two million dollars, for which it received five million dollars. Out of the proceeds of these issues of debentures and preferred stock, three and a half million dollars was paid over to the parent company as purchase price of the outstanding capital stock of MacDonald's Consolidated Ltd. The balance of a million and a half was set up in the books as due to Safeway Stores Inc. This last amount was later transferred to the United States.

Through these transactions, MacDonald's Consolidated Ltd. became a wholly owned subsidiary of the appellant and the appellant remained a wholly owned subsidiary of the parent company, Safeway Stores Inc. From there on it appears that the appellant and its subsidiary continued to operate on the same basis as formerly. The subsidiary continued to be the appellant's warehousing and procurement agent, except that it reported the result of its operations to the appellant, instead of reporting to Safeway Stores Inc. It would make wholesale bulk purchases of groceries, fruits and vegetables which it sold to the appellant at cost price, plus overhead expenses and a small profit, and it sold to other retailers at a higher price. As to warehousing facilities, the appellant paid for the space needed to store the goods purchased until delivery was requested. The independent retailers availed themselves of the same facilities on the same conditions. These conditions prevailed after MacDonald's became a subsidiary of the appellant, except that as the appellant expanded its business it required more warehousing space and purchased more goods. Consequently, the subsidiary had fewer warehousing facilities and goods to offer to outsiders. The evidence, written and oral, in my view does not show that this expansion of the appellant's business was due to its purchase of MacDonald's Consolidated Ltd.

In its income tax returns for 1947, 1948 and 1949, the appellant claimed as a deduction from its income the sums of $44,876.72, $97,500 and $97,500 respectively, as being

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interest at 3¼ per cent per annum paid on its debentures. These deductions were not allowed by the Minister of National Revenue, who added the amounts to the taxable income of the appellant and assessed them accordingly. The appellant appealed to the Income Tax Appeal Board from these assessments and the Minister's decisions. The Income Tax Appeal Board, after hearing, dismissed the appeals. From this decision, the appellant now appeals to this Court.

The appellant bases its right to deduct the debenture interest from its income for the years 1947 and 1948 upon s. 5(1)(*b*) and upon the last sentence of s. 6(5) of the *Income War Tax Act*, c. 97, R.S.C. 1927, and its amendments. These sections provide as follows:

5. (1) "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—

(*b*) Such reasonable rate of interest on borrowed capital used in the business to earn the income as the Minister in his discretion may allow notwithstanding the rate of interest payable by the taxpayer, but to the extent that the interest payable by the taxpayer is in excess of the amount allowed by the Minister hereunder, it shall not be allowed as a deduction and the rate of interest allowed shall not in any case exceed the rate stipulated for in the bond, debenture, mortgage, note, agreement or other similar document, whether with or without security, by virtue of which the interest is payable.

and

6. (5) Expenses incurred by a corporation to earn non-taxable income shall not be allowed as a deduction in computing the income to be assessed. *Where general expenses are incurred to earn both taxable and non-taxable income the Minister shall have power to apportion the said expenses.*

In confirming these assessments, the Minister did not dispute the rate of interest paid as stipulated in the debentures; he contended that monies obtained through the issuance of debentures were borrowed capital when used to earn income, but that the proceeds of the sale of the debentures, in the present cases, were not borrowed capital within the meaning of s. 5(1)(*b*) because they were not used in the appellant's business to earn taxable income. Consequently, the interest paid on the debentures was not a disbursement or expense wholly, exclusively and necessarily laid out or expended for the purpose of earning taxable income, but was an expense incurred to earn non-taxable income. According to the provisions of s. 6(1)(*a*) of the Act such disbursements or expenses are not deductible in computing the amount of the profits or gains to be assessed.

The appellant submitted that, had the parent company sold the shares of MacDonald's Consolidated Ltd. to a third party, it would have been deprived of its warehousing facilities, and it would have lost the benefit of having a procuring agency. It had been led to believe that the above eventuality could happen, because some years previous the parent company had disposed of similar facilities in the Province of Ontario with the result that the appellant's business operations had been adversely affected. By purchasing the capital stock of MacDonald's Consolidated it obtained or retained the warehousing facilities and the right to have MacDonald's procure for it at a very low cost. Being the owner of the above facilities and benefits, the appellant submits that it earned additional income in the years in question. So the prime object of the purchase was to make additional profits, or in other words "additional taxable income." The purchase price, in part, came from the proceeds of the sale of debentures, so the interest paid on the debentures was interest paid on borrowed money used to earn income and was deductible in computing its income.

I think I should first consider the appellant's contention that it was justified in believing that it would lose its warehousing facilities and purchasing benefits. The parent company was the owner of all the capital stock of both subsidiaries. As a matter of fact, it could have disposed of the stock of MacDonald's to outsiders, but in my view it is inconceivable that it would have made such a deal, because it would have been detrimental to its own interest. It had sold certain assets of MacDonald's previously and the result had injured the appellant's operations. Would it have continued to divest itself of assets that were productive of income, if other means were at its disposal to correct a situation that did not appeal to it in the carrying on of its business or financial activities? I cannot bring myself to believe that it would have taken the step feared by the appellant. At all events, no competent witness was heard at the trial to establish, as a fact, that the parent company had contemplated or decided on making such a transaction.

I agree with the appellant's contention that by purchasing the capital stock of MacDonald's it retained its warehousing and purchasing facilities, but I do not believe it had to do so, because the parent company did not dispose

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of its interest in MacDonald's to outsiders. If it had sold out to third parties, it would have lost control of its subsidiary, which was a useful complement to its other subsidiary, the appellant. Being the sole owner of the appellant's capital stock, it would have had to replace the facilities disposed of. There was, to my mind, no real, logical or good reason to disturb the organisation of its subsidiaries, except one, with which I will deal later. What took place, as will appear, is good evidence that the parent company, had it sold MacDonald's to outsiders, would have received the price of the stock, but would have lost control of an important subsidiary. If it sold to the appellant, it received the cash and kept control. If this is logical and in accordance with the facts, the appellant was not justified in its fear that it would be deprived of its facilities.

Now, the question to be determined is whether the proceeds of the sale of the debentures issued were borrowed monies used to earn taxable income or used to meet expenses incurred in earning non-taxable income as provided for by section 4(*n*) of the Act, which reads as follows:

> 4. The following incomes shall not be liable to taxation hereunder:
> (*n*) Dividends paid to an incorporated company by a company incorporated in Canada the profits of which have been taxed under this Act or to which paragraph (*w*) of this section applies, except as hereinafter provided by sections nineteen, twenty-two A and thirty-two A;

As the reasons for judgment herein given will apply to the three taxation years in question, I wish to state that ss. 11(1)(*c*) and 12(1)(*c*) of the *Income Tax Act,* Statutes of Canada 1948, c. 52, are applicable to the taxation year 1949. The only difference between 11(1)(*c*) and 5(1)(*b*) is in the wording. Section 11(1)(*c*) adds the following words: "other than property the income from which would be exempt." It is generally admitted that both sections have the same meaning, and there is no doubt that ss. 12(1)(*c*) and 6(5) are to the same effect.

The appellant raised capital by borrowing money on the issue of debentures bearing interest at the rate of 3¼ per cent per annum. The total proceeds of this loan and of the sale of preferred stock were paid over to the parent company. In return for this outlay, the appellant became the owner of the outstanding stock of MacDonald Consolidated Ltd. So it may reasonably be assumed that all the capital

raised by the loan went into the purchase of the stock of another company. This company continued to operate as formerly and made or did not make profits. If it made gains or profits, they were taxable income. After payment of income taxes, the residue of the gains or profits became the property of the appellant and part of its own income, but not taxable income and not liable to tax in its hands.

It was argued at length that from the standpoint of earning power of the appellant, MacDonald's was a very important factor. In fact, if the appellant were to maintain or increase its earnings, it was an essential factor because MacDonald's acted as its procurement and warehousing agents. I cannot agree with this argument, if I take into consideration all the circumstances. MacDonald's was its purchasing and warehousing agent before the acquisition of its outstanding capital stock and there is no evidence to indicate that it was to be sold to a third party or that its purchase by the appellant was the reason for the expansion of its business.

There is no doubt in my mind that the borrowed capital was used to purchase the stock of another company. Can it be said that it was used in the appellant's business to earn income, is the question to be answered. The appellant claims a deduction from what is its taxable income. To do so, it invokes an exempting provision of the Act. It is a well established principle that "taxation is the rule and exemption the exception" and that the exempting provisions must be construed strictly.

In the case of *Lumbers* v. *Minister of National Revenue* (1), Honourable J. T. Thorson, President of this Court, expressed the rule with reference to the exempting provisions of the *Income War Tax Act* as follows:

> . . . in respect of what would otherwise be taxable income in his hands a taxpayer cannot succeed in claiming an exemption from income tax unless his claim comes clearly within the provisions of some exempting section of the *Income War Tax Act:* he must show that every constituent element necessary to the exemption is present in his case and that every condition required by the exempting section has been complied with.

I believe that the correct interpretation to be given to s. 5(1)(*b*) of the *Income War Tax Act* and s. 11(1)(*c*) of the *Income Tax Act* is that the borrowed capital must be

(1) [1943] Ex. C.R. 202.

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used in the business. Following the above rule this should be construed literally and would bar extending the meaning of the sections to include disbursements or expenses not wholly, *exclusively* and *necessarily* laid out or expended for the purpose of earning the income. I italicized the words "exclusively" and "necessarily" because I think they are essential elements to the deduction of interest on borrowed capital. The appellant carries on a retail chain grocery business. Borrowed capital used to buy a wholesale and warehousing business, to my mind, is not a disbursement or expense wholly, exclusively and necessarily laid out or expended for the purpose of earning the income of a retail chain grocery business.

I explained why I did not think that the appellant was compelled to purchase MacDonald's or that it had to borrow capital to retain its facilities. The proceeds of its borrowings and of the sale of its preferred stock all went to the parent company. The relationship between this company and the appellant could hardly indicate that it would seriously injure the appellant's business and by the same token lose income on its own investment by disposing of its interests in MacDonald's to third parties.

Be that as it may, I will refer to the case of *Robert Addie & Sons' Collieries* v. *Commissioners of Inland Revenue* (1), where the Lord President stated at page 235:

> What is "money wholly and exclusively laid out for the purposes of the trade" is a question which must be determined upon the principles of ordinary commercial trading. It is necessary, accordingly, to attend to the true nature of the expenditure, and to ask oneself the question, Is it a part of the Company's working expenses; is it expenditure laid out as part of the process of profit earning?

What was the true nature of the expenditure in this instance? It appears that the appellant borrowed capital on which it obligated itself to pay interest, turned over all the proceeds to its parent company, and in return became vested with the ownership of MacDonald's, a subsidiary of the parent company. No portion of the borrowed capital was retained by the appellant to invest in the expansion of its own business. By this transaction, the parent company kept control of the appellant company, which in turn gained control of the wholesale and warehousing firm. I have tried

(1) [1924] S.C. 231.

to convince myself, but without success, that this expenditure was necessary to the earning of the appellant's income or that part of the borrowed capital became a portion of its working expenses. In the final result nothing was changed in the operations of the business of the appellant or MacDonald's.

Lord Davey, in *Strong & Co. Ltd.* v. *Woodifield* (1), stated that:

> It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits.

This principle was later approved and followed in *Tata* v. *Income Tax Commissioner* (2). Lord MacMillan, in delivering the judgment, stated:

> Adopting this test, their Lordships are of opinion that the deduction claimed by the appellants is inadmissible as not being expenditure incurred solely for the purpose of earning the profits or gains of the business carried on by the appellants.

The evidence being to the effect that no portion of the borrowed money was applied to the appellant's business, I am of the opinion that the interest paid on the debentures was not on borrowed capital which was actually used in the business and that it is not the creation of the obligation but the amount the appellant put into its business to earn income which justifies, in computing its profits or gains, the deduction of interest paid on borrowed capital.

I also find that the word "income" in s. 5(1)(*b*) means taxable income as defined by s. 3 of the Act. This taxable income, if it clearly falls within the ambit of some provision of the Act, allowing an exemption or deduction, may become non-taxable. The exemption claimed by the appellant is based on the deduction allowed by s. 5(1)(*b*) and the last sentence of s. 6(5). If the amount or part thereof, claimed as a deduction, does not meet with every condition required by these sections, no deduction can be allowed. This would be the case in the present appeal where the borrowed money was used to earn non-taxable income.

(1) [1906] A.C. 448.
(2) [1937] A.C. 685.

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In the case of *Baymond Corporation Ltd.* v. *Minister of National Revenue* (1), at page 16 the President of this Court expressed the view that:

> The expression "used in the business to earn the income" contained in section 5(*b*) of the *Income War Tax Act* shows in clear and explicit terms that the right of a taxpayer to deduct from what would otherwise be his taxable income interest on borrowed capital is not to be measured by the extent of his obligations in respect thereof but is restricted to only such borrowed capital as has actually been used in his business to earn the income. It is not the obligation incurred through the borrowing but the asset in the form of money or other property received from it and actually put into the business to earn the income that is the measure of the taxpayer's right, . . .

To succeed in its last contention that the expenses were incurred to earn both taxable and non-taxable income and the Minister had the power to apportion the said expenses, the appellant had to establish what part or portion of the proceeds of the sale of debentures had been used to earn taxable income and what portion served to earn non-taxable income. The onus of proving the facts necessary to entitle it to the deduction claimed rested with the appellant. It had to show that it had complied with the conditions required to avail itself of the provisions of the section.

It has been held in the case of *Dezura* v. *The Minister of National Revenue* (2) "that the onus of proof of error in the amount of determination rests on the appellant."

In *Johnston* v. *Minister of National Revenue* (3) it was held:

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

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

> . . . the proceeding is an appeal from the taxation; and since the taxation is on the basis of certain facts and certain provisions of law either those facts or the application of the law is challenged. Every such fact found or assumed by the assessor or the Minister must then be accepted as it was dealt with by these persons unless questioned by the appellant. If the taxpayer here intended to contest the fact that he supported his wife within the meaning of the Rules mentioned he should have raised that issue in his pleading, and the burden would have rested on him as on any appellant

(1) [1945] Ex. C.R. 11.
(2) [1948] Ex. C.R. 10.
(3) [1947] Ex. C.R. 483; [1948] S.C.R. 486.

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

These decisions establish that an assessment carries with it a presumption of validity and legality and the onus of showing that it is erroneous in fact or in law is on the taxpayer who appeals against it. In my opinion, the appellant failed to establish that the assessments were wrong in fact and in law and that the Minister's conclusions were not warranted.

For these reasons, I have arrived at the conclusion that the Minister's assessments of the appellant's income in the taxation years 1947, 1948 and 1949 were made according to the established facts of the case and to the provisions of the *Income War Tax Act* and the *Income Tax Act*.

The appeals are dismissed with costs.

Judgment accordingly.

QUEBEC ADMIRALTY DISTRICT

1955

June 8

1956

Jan. 20

BETWEEN:

DEEP SEA TANKERS LIMITED .....PLAINTIFF;

AND

SHELL OIL COMPANY .....ADDED PLAINTIFF;

AND

THE SHIP *TRICAPE* and HER OWNERS, TRITON STEAMSHIP COMPANY LTD. ..... } DEFENDANTS.

Shipping—Collision—Motion to have name of party stricken from record —Motion dismissed.

Held: That where, after a collision between two vessels, the solicitors acting for the owners of one of the colliding vessels give to the owners of the other vessel an undertaking to appear in any proceedings which may be instituted, the former when an action *in rem* is instituted against their vessel, become defendants in the suit from its inception without it being actually necessary to specifically name them as such.

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DEEP SEA TANKERS LTD. *et al.* *v.* THE SHIP *Tricape*

MOTION to strike out the name of an added defendant.

The motion was heard before the Honourable Mr. Justice Arthur I. Smith, District Judge in Admiralty for the Quebec Admiralty District, at Montreal.

C. Russell McKenzie, Q.C. for the motion.

Jean Brisset, Q.C. contra.

SMITH D.J.A. now (January 20, 1956) delivered the following judgment:

WHEREAS in the course of the proceedings leading to the hearing on the Reference in this case, the plaintiff added the name of Triton Steamship Company Limited, owners of the *Tricape;*

WHEREAS the defendants moved to have the name of Triton Steamship Company Limited stricken from the record on the ground that these defendants had been added without the permission of the Court and illegally and because such an addition represented an attempt to unlawfully graft an action *in personam* onto an action *in rem;*

WHEREAS this motion was referred to the hearing on the Reference and now must be dealt with;

CONSIDERING that prior to the institution of the present action, and in order to avoid the arrest of the *Tricape,* counsel for the defendant vessel gave an undertaking in the following terms:

Montreal, 30th March, 1948.

Deep Sea Tankers Limited,
c/o Beauregard, Laurance & Brisset,
240 St. James Street West,
Montreal, Que.

Dear Sirs,

Re: S.S. Tricape and S.S. Paloma Hills—Collision March 1948

In consideration of your not arresting the S.S. *Tricape* owned by Triton Steamship Company Limited, on their behalf we agree as follows:—

1. To accept service of any legal proceedings you may institute in the Province of Quebec against the S.S. *Tricape* or her owners, for damages occasioned by the above collision;

2. To have an Appearance entered in the said proceedings on behalf of the owners of the S.S. *Tricape;*

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3. Upon demand, and whether or not the S.S. *Tricape* shall have been lost, to furnish bail in the said proceedings, by means of a bail bond in the usual form executed by a surety company authorized to furnish such bonds in the Courts of the Province of Quebec, in an amount not exceeding the amount of the damages sustained by the *Paloma Hills,* plus interest and costs, such amount not to exceed in any event the sum of $50,000; the amount of such bond to be without prejudice to the amount of any final judgment in excess thereof.

This undertaking will remain in full force and effect for a period of two years from the date of the collision.

Yours very truly,
MONTGOMERY, McMICHAEL, COMMON, HOWARD, FORSYTH & KER
Per: C. Russell McKenzie

CONSIDERING that, having regard to this engagement and on the authority of the holding in the case of the *Dictator* (1), I find that the owners of the *Tricape,* even though not named in the Writ of Summons, were defendants in the present litigation from its inception and that it was actually unnecessary to specifically name them as such;

CONSIDERING that the defendants' motion to strike is unfounded;

DOTH DISMISS same with costs.

Order accordingly.

QUEBEC ADMIRALTY DISTRICT

1955

Dec. 19, 20

1956

Jan. 20

BETWEEN:

DEEP SEA TANKERS LIMITED and SHELL OIL COMPANY .... PLAINTIFFS;

AND

THE SHIP *TRICAPE* and HER OWNERS, TRITON STEAMSHIP COMPANY LTD. ..... DEFENDANTS.

Shipping—Reference—Collision—Charterparty—No recovery for damages claimed for loss of use of vessel—Costs.

Plaintiffs seek to recover damages for loss of the use of a vessel owned by one plaintiff and chartered by the other plaintiff due to detention necessary for repairs following a collision with defendant ship.

(1) [1892] P. 64.

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Held: That where the owners of a vessel are entitled to receive owners' hire in full throughout the period of detention of a ship due to damage caused by a collision and there is nothing in the Charterparty requiring them to repay or reimburse all or any part of this hire to the charterer neither the owners nor the charterer have the right to recover damages for loss of use of the vessel during the time required to make repairs necessitated by the collision.

REPORT of Referee.

The reference was heard before The Honourable Mr. Justice Arthur I. Smith, District Judge in Admiralty for the Quebec Admiralty District, at Montreal.

Jean Brisset, Q.C. for plaintiffs.

C. Russell McKenzie, Q.C. for defendants.

SMITH D.J.A. now (January 20, 1956) delivered the following judgment:

This matter comes before me following a reference to the Registrar for the assessment of damages due to the plaintiff, Deep Sea Tankers Limited, arising out of a collision between *Paloma Hills,* owned by them, and the defendants' ship *Tricape,* which occurred off the coast of Venezuela on the 21st day of March 1948.

By decree issued by this Court on the 27th day of March, 1951, the *Tricape* was held solely to blame for the said collision.

Subsequent to the issue of the said decree Shell Oil Company, Charterer of the *Paloma Hills,* was added as plaintiff. The owners and alternatively the charterer, seek to recover the same damages in respect of loss allegedly sustained by reason of the detention of the *Paloma Hills.* They claim these damages in virtue of Paragraph 5 of the Charterparty under which the *Paloma Hills* was being operated at the time of the collision. This paragraph, which is quoted hereinafter, purports to oblige the owners to credit the Charterer with monies received by the owners from third parties by way of compensation for the loss of use of the said vessel.

The claim of Deep Sea Tankers for the cost of repairing the *Paloma Hills* is not disputed. In fact, the defendants have deposited in Court an amount which they calculate to be sufficient to pay the said claim in full.

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Smith D.J.A.

On the other hand, defendants strenuously contest the right of either the owners of the *Paloma Hills,* or her Charterer, Shell Oil Company, to recover the damages claimed or any damages in respect of the alleged detention or loss of use of the said vessel on the ground that (a) insofar as the owners are concerned, there was no such loss or damage since they received from the Charterer owners' hire in full throughout the entire period of the detention; and (b) insofar as the Charterer is concerned no right of action lies against the defendant vessel.

It is proposed to deal first with the claim advanced on behalf of the Charterer, Shell Oil Company, and, in view of the conclusion which I reach concerning the principal objection raised against this claim, it will be unnecessary to deal with the various subsidiary grounds of defence advanced on behalf of the defendants.

The Charterparty under which the plaintiff, Shell Oil Company, was operating the *Paloma Hills* was a time-charter which contained an express exclusion of any demise of the vessel to the Charterer and which left possession and control of the *Paloma Hills* in the hands of the owners. Such being the case, any right which the Charterer had in respect of the loss of use of the said vessel, and certainly any arising under Paragraph 5 of the said Charterparty was merely contractual and one in respect of which the Charterer had no right of action against the wrongdoing vessel.

The foregoing proposition is amply supported by the jurisprudence and was not seriously disputed by Counsel for the plaintiff, nor was I referred to any authority to a contrary effect.

The Merida (1), Mr. Justice Hill, at page 91:

> This being so, it seems to me that as the French Government were neither the owners of the ship, nor in possession of her, all that can be said for the French Government is that they had the use of the ship under a contract and therefore damages to the French Government arise only because, under the terms of the contract they continued liable to make certain payments to the owners while getting no benefit from the ship during the period of detention. In these circumstances the French Government had no cause of action arising out of the negligence of the *Merida*. That means this: that if there is to be any recovery at all it can only be a recovery by the owners.

(1) (1921) 9 Ll.L.L.R. 90

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It may be that after the owners recover they will have to account for some of their recovery, as between themselves and the French Government, but whether they do so or not is irrelevant to the wrongdoers. The sustainable claim must be a claim by the owners in their own right.

This judgment was confirmed in Appeal (1). (In the *Merida* case there was no dispute concerning the damages actually sustained by the owners).

Elliott Steam Tug Company Limited v. *The Shipping Controller* (2):

> The Charterer in collision cases does not recover profits, not because the loss of profits during repairs is not the direct consequence of the wrong, but because the common law, rightly or wrongly, does not recognize him as able to sue for such an injury to his merely contractual rights.

And at page 141:

> The Charterer then has no common law right against the person who deprives him of the opportunity of earning profits by his contractual rights, by taking away the ship in respect of which he had a contract.

In the present case the Charterer is not claiming for loss of profits, or for damages caused to it by the loss of use of the *Paloma Hills*. On the contrary, no proof of such loss or damage was made and the Charterer's claim, if any, derives from Paragraph 5 of the Charterparty. While under this provision, the Charterer would have the right to claim from the owners credit for such monies as the owners might have recovered from third parties as compensation for the loss of use of their vessel, the Charterer had no right of action against the defendants as wrongdoers and it is unnecessary to add that if the Charterer had no such right the owners, acting as Trustees or otherwise for the Charterer, had none.

See also *Remorquage A Helice* v. *Bennetts* (3); *Simpson* v. *Thomson* (4).

The real contest on the present proceedings therefore relates to the right of the owners of the *Paloma Hills* to recover damages which they allege they have sustained by reason of the loss of use of the said vessel during the time required to effect repairs to her.

This right is strongly contested on the simple ground that the owners of the said vessel have sustained no such loss, or damage, since they were paid by the Charterer the full owners' hire stipulated in the Charterparty, throughout the entire period of detention.

(1) 9 Ll.L.L.R. 464.
(2) [1922] 1 K.B. 127 at 140.
(3) [1911] 1 K.B. 243.
(4) (1877) 3 Asp. N.S. 567.

On the other hand, owners, relying upon the special terms of the said Charterparty and particularly upon Paragraph 5 thereof, claim the right to recover damages allegedly sustained as a result of the loss of use of their vessel.

Paragraph 5 of the Charterparty reads as follows:—

If any vessel shall be laid up or delayed for any period on account of circumstances beyond the control of Owner and its agents, or if any vessel shall be requisitioned, captured or interned for any period, the Charterer shall nevertheless continue to be liable to Owner for Owner's hire as defined in Paragraph 3B hereof during such period. Out of and to the extent of the sums received by Owner as hire, compensation, indemnity, damages or otherwise from any government, agency, insurer or other Third Party in respect of any events mentioned in this paragraph, Owner shall reimburse Charterer for all sums paid in any manner by Charterer, as Owner's hire hereunder for such period and any balance then remaining shall be applied by Owner as promptly as possible to the prepayment or retirement of indebtedness secured by any then existing mortgage on such vessel and if there be no such indebtedness so secured, to the prepayment or retirement of any other then existing indebtedness of Owner incurred in connection with such vessel or vessels.

It is noteworthy that under this clause the Charterer is obligated to pay full hire throughout the total period of detention and that the owners are entitled to retain said hire unconditionally, but are obligated to credit the Charterer with such monies, if any, as owners they may receive from third parties by way of compensation for loss of use.

Counsel for plaintiff relied upon the holding in the *Mergus* case (1).

However, a careful examination of the judgment rendered in that instance satisfies me that it is clearly distinguishable from the present case and that it does not support the claim made by the owners for damages for detention.

In the *Mergus* case the owners succeeded in recovering damages for loss of use because it was held that under the terms of the Charterparty the obligation of the Charterers to pay hire ceased from the moment detention began. In such circumstances, the owners had lost, or been deprived of hire during the period of detention, and this loss they were held entitled to recover from the offending vessel.

Not so in the present case. On the contrary, the owners here were entitled to receive, and in fact did receive, owners'

(1) (1947-48) 81 Ll.L.L.R. 91.

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hire in full throughout the period of detention and there is nothing in the Charterparty which required them to repay or reimburse all, or any part, of this hire to the Charterer. It is true that there is a stipulation that if owners receive from third parties compensation for detention of the vessel they will be obliged to credit Charterer with such monies. This, however, has nothing to do with the owners' hire due under the Charterparty which the owners have received and are entitled to retain in full. The distinction between the present case and that of the *Mergus* is emphasized by reference to the following remarks of Mr. Justice Wilmer, in the *Mergus* case, page 95:

> It is conceded on the one side that if the owners of the *Kul* properly repaid these sums to the Charterers, then there is nothing to prevent them from recovering said items from the wrongdoers. Equally, it is conceded on the other side, that if the owners of the *Kul* were wrong in repaying these sums to the Charterers, they cannot by making such a wrong and unnecessary payment put themselves in a position to render the wrongdoers liable.
>
> The question, therefore, is whether under the charterparty, as amended (if it is amended) by the addendum, the owners of the *Kul* were liable to repay these sums to the Charterers in the events which happened.

And at page 96:

> It seems to me that I must ask myself this question: In the events which happened, would the owners of the *Kul* have a good claim against the owners of the *Mergus*, as the wrongdoers, if the charterers' liability for hire ceased at the commencement of the period of detention? It seems to me that I can only answer that question in one way. If the charterers' liability had ceased, quite clearly the owners would have a good claim for loss of hire against the wrongdoers . . . If that is the case then it seems to me to follow upon the plain meaning of the words that the charterers are under this addendum clause relieved from liability. That being so, it seems to me to follow that when the owners repaid to the charterers the sums in respect of these three items which had been paid by the charterers in the first instance they were paying what they were legally liable to pay under that clause. If that is right, it seems to me to follow that having properly paid those amounts they are entitled to recover them from the owners of the wrongdoing vessel.

I reach the conclusion therefore that neither the owners, nor the Charterer, have the right to recover the damages claimed for loss of use of the *Paloma Hills* during the time required to make the repairs necessitated by the collision. The objection that in the result the offending vessel will

escape liability in respect of part of the damages consequent upon its wrongdoing cannot avail and in this connection the following remarks of Bankes, L.J., who rendered the judgment in the Court of Appeals in the case of the *Merida* (*supra*) appear to be apposite:

> A second point is taken by Mr. Leck. He says that these wrongdoers ought not to be allowed to get off so lightly, and that looking at the matter as between the owners of the vessel and the wrongdoers merely, the wrongdoers ought to pay to the full for the damage sustained by their wrongdoing; and, he says, for a reason I do not quite follow, from this point of view the owners stand in a better position than the French Government, and although the French Government cannot recover any damages, and although, so far as the wrongdoers are concerned, they, the owners, have received from the wrongdoers the whole loss they have sustained, nevertheless, they, the owners, are entitled to say to the wrongdoers "you must pay something more". I confess I cannot follow the argument. It seems to me that if the damages are not recoverable by the French Government because the French Government have no right which alone would entitle them to recover them, it does not lie in the mouth of the owners to say they are in a better position.

Reference should be made to the allegations contained in plaintiff's Statement of Claim on the Reference to the effect that Deep Sea Tankers is a wholly-owned subsidiary of the Charterer, Shell Oil Company. In my humble opinion both these allegations, and such proof thereof and in respect of the relationship said to exist between the two companies and their *modus operandi,* as was allowed under reserve of defendants' objection are entirely irrelevant and must be disregarded.

Deep Sea Tankers and Shell Oil Company are two separately incorporated companies each being a legal entity with a personality separate and distinct from that of the other and the Charterparty entered into by them must be construed and given effect to in the same way as if the owners and Charterer were two natural persons.

Salomon v. *Salomon* (1) Lord Halsbury:

> . . . It seems to me impossible to dispute that once the Company is legally incorporated, it must be treated like any other independent person with its rights and liabilities appropriate to itself and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discovering what these rights and liabilities are.

As above stated, the amount claimed in respect of the damage to the *Paloma Hills* is not disputed and the defendants have already deposited the sum of $20,000 on account

(1) [1897] A.C. 22.

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of this claim and at the hearing contented themselves with merely putting plaintiffs to the proof of the various items of damage claimed.

In my opinion the claim in respect of temporary and permanent repairs to the *Paloma Hills* made necessary by the said collision, totalling the sum of $19,243.77, and set out in detail in the Statement B annexed to the plaintiffs' Statement of Claim on the Reference has been supported by satisfactory proof and should be accepted.

I accordingly report that the damages which the plaintiffs are entitled to recover in virtue of the decree issued herein on the 27th of March, 1951, are assessed at the said sum of $19,243.77, plus interest at the rate of 5% per annum calculated in respect of the various items which make up the sum of $17,192.22 shown in Statement B from the dates upon which said items respectively were paid and on the sum of $2,051.55 from July 1, 1948.

Having regard to the fact that the defendants insisted upon the production of formal proof in respect of the various items comprising plaintiffs' Statement of Claim, and considering, on the other hand, that the proceedings taken by plaintiff to add Shell Oil Company as a plaintiff for the purposes of the Reference are unfounded and useless, the cost of the Reference will be borne equally by the plaintiffs and the defendants.

Judgment accordingly.

1955

Mar. 26

1956

Feb. 7

BETWEEN:

THE SHIP *TRADE WIND* .....APPELLANT;

AND

DAVID McNAIR & COMPANY LIMITED ..... } RESPONDENT.

Shipping—Damage to cargo—Measure of damages.

Held: That the amount of damages recoverable for delivery of a cargo in a damaged condition is the difference between the cargo's arrived sound wholesale market value and its arrived damaged wholesale market value.

Decision of Sidney Smith, D.J.A. [1954] Ex. C.R. 450 affirmed.

APPEAL from the judgment of the District Court in Admiralty for the British Columbia Admiralty District.

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

V. R. Hill and *J. R. Cunningham* for the appellant.

C. C. I. Merritt for the respondent.

FOURNIER J. now (February 7, 1956) delivered the following judgment:

This is an appeal from the judgment of the District Judge in Admiralty for the British Columbia Admiralty District (1), dated June 30, 1954, by which he allowed the plaintiff's claim for damages arising out of the fact that the defendant wrongfully and in breach of contract did not deliver at its destination a shipment of mandarin oranges in good order or condition, but delivered part thereof damaged, whereby the plaintiff sustained a loss.

The facts are simple and are herein summarized. The ship *Trade Wind* is the property of Pacific Far East Line, Inc., of San Francisco, California, U.S.A. The defendant contracted with the plaintiff, for reward, to carry on board its ship from Japan to Vancouver and Victoria in the province of British Columbia, Canada, a certain quantity of mandarin oranges. The oranges were duly delivered to the ship in Japan in good order and condition and were to be delivered to the plaintiff in like good order and condition at the ports of Vancouver and Victoria, B.C. When the ship *Trade Wind* arrived in Vancouver, it was obvious that damage had been done to the oranges as a consequence of overheating. The plaintiff brought action against the defendant to recover damages.

The defendant in its proceedings and at the trial admitted that the plaintiff was the holder in due course of the bills of lading covering the shipment and was the owner of the cargo. It also admitted that it was bound by contract to deliver the oranges in good condition and that by reason of its fault and negligence part of the shipment was delivered in a damaged condition. The defendant agreed that the plaintiff had done its best to minimize and restrict the

(1) [1954] Ex. C.R. 450.

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damage to the shipment. In other words, the defendant admitted being liable for damages caused and offered plaintiff some compensation for the loss sustained.

At the trial the sole dispute between the parties was the question of the quantum of the damages and the rule to be followed in determining the amount of the said damages. The learned trial judge held that the measure of the damages in this case was the difference between the sound, wholesale, market value of the shipment and the damaged, wholesale, market value at the date and place of the breach of the contract. He then pronounced in favour of the plaintiff's claim and condemned the ship *Trade Wind* and its bail in the amount to be found due to the plaintiff, plus costs, stating that the above rule should be the test in assessing the damages. The defendant (appellant herein) appealed from the judgment to this Court.

The only question to be determined in the present appeal is the quantum of the damages and the rule as to the measure of damages in a case of this kind.

The appellant submits that the determination of the damages to be awarded in this instance should have been based on the principle of *restitutio in integrum,* which is quoted in Vol. 10 of Halsbury's *Laws of England,* 2nd. Ed., at page 82 in the following words:

> The great underlying principle by which the Courts are guided in awarding damages is *restitutio in integrum.* By this is meant that the law will endeavour, so far as money can do it, to place the injured person in the same situation as if the contract had been performed, or in the position he occupied before the occurrence of the tort which adversely affects him.

On the other hand, the respondent contends that the amount of the damages to which it is entitled for the loss sustained should be the difference between the sound, wholesale, market value of the shipment and the damaged, wholesale, market value at the date and place of delivery and that any further dealings it may have had with the shipment were irrelevant to the question of the quantum of damages.

In reply to this, the appellant argued that the above rule would apply in a case when the goods were lost or not delivered but not when they were delivered in a damaged condition. If this principle were applied in the present

case, the basis of the measurement of damages would be the wholesale market value instead of the cost, expenses and commission. Thus, the claimant herein, being an importing agent rather than a wholesaler, would be in a better position than that in which he would have been had the event giving rise to the action not occurred.

Before making findings, I think it would be useful to refer to the authorities and decisions dealing with these contentions. In the case of goods lost or not delivered, the rule as to the measure of damages applicable is well defined in *Scrutton on Charterparties,* 15th edition, article 168, page 432, under the heading "Damages for Failure to carry safely". I quote:

> Where goods are not delivered by the vessel contracting to carry them, the damages will, in the absence of special circumstances in the contract, be the market value of the goods when they should have arrived, less the sums which the cargo-owner must have paid to get them, such as freight.

And when the goods have been damaged the rule is:

> Similarly, if goods are delivered but in a damaged condition, the damages, in the absence of special circumstances in the contract, will be the difference between the market value the goods would have had on arrival, if undamaged, and their value in the damaged condition.

In *The Measure of Damages in Maritime Collisions* by E. S. Roscoe, 2nd edition, at pages 112-113 the same rule is expressed in the following terms:

> . . . the object of [assessment of damages recoverable from a wrongdoer when goods are lost or damaged by a collision] is to place the owner of the goods as nearly as may be in the same position as if the collision had not occurred, and therefore the measure of damages "is the difference between the position of a plaintiff if the goods had been safely delivered, and his position if the goods are lost;

Though the authors deal with damages caused by maritime collisions, the principle is the same when the loss or damage is the result of negligence or of tort. The claimant, according to Roscoe, is entitled to recover from the wrongdoer the "market value when the goods ought to have arrived" or, if there is no market value because there is no market price at the place of arrival, then the "real value" must be ascertained as a matter of fact by the Court and the result must be arrived at by an estimate, taking the cost of the goods to the shipper and adding to that the estimated profit he would make at the port of destination. It seems

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to me to be generally accepted that the rule is the same regarding the measure of damages in the case of lost or damaged goods.

To agree with the appellant's contention that the respondent, not being a wholesaler, was entitled to be indemnified only to the extent of placing it in the same financial position it would have enjoyed if the goods had been delivered in first-class condition would be accepting the principle that the measure of the damage could or would depend on circumstances peculiar to the respondent. It would also be setting aside the appellant's admission that the respondent was the owner and consignee of the goods. It would imply that the respondent, though the owner of the goods, was restrained from disposing of its goods on its natural and normal markets. After making the above admission, the appellant, to my mind, cannot deprive the respondent of his right to receive compensation for his loss on the same basis as another owner, wholesaler or not. It is difficult to understand that, being the owner, he would not be entitled to the market value of his goods, but that his damages would be assessed on circumstances peculiar to him or on his dealings with third parties.

In the *Rodocanachi* v. *Milburn* case (1), where the action arose out of the loss of the cargo as the result of negligence, Lord Esher, after laying down the rule as to the assessment of damages being the difference between the position of a plaintiff if the goods had been safely delivered and his position if the goods were lost, then proceeded to explain what that difference was. If the goods were received, he could sell them and get the value of the goods upon their arrival at the port of discharge less what he would have to pay in order to obtain them. The market value or the real value is to be taken independently of any circumstances peculiar to the plaintiff. He then stated at page 77:

> It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance an intermediate contract entered into with a third party for the purchase or sale of the goods. It is admitted in this case that, if the plaintiffs had sold the goods for more than the market value before their arrival, they could not recover on the basis of that price, but would be confined to the market price, because the circumstance that they had so sold the goods at a higher price would be an

(1) (1886) 18 Q.B.D. 67.

accidental circumstance as between themselves and the shipowners; but it is said that, as they have sold for a price less than the market price, the market price is not to govern but the contract price. I think, that if the law were so, it would be very unjust.

The principles laid down in the above case have been approved and followed in other cases and dealt with at length, especially in the case of *Williams Brothers* v. *Ed. T. Agius, Limited* (1), in which Lord Haldane at page 520 stated:

> In that case it was held that in estimating the damages for non-delivery of goods under a contract the market value at the date of the breach was the decisive element. In the judgment delivered by Lord Esher he laid down that the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, . . . if the plaintiff had sold the goods before the breach for more than the market price at that date, he could not recover on that footing, and that it would therefore be unjust if the market price did not govern when he had sold for less.

Just to complete my authorities, I would like to refer to the case of *Nabob Foods Limited* v. *The Cape Corso* (2).

This was an action by the holder of a bill of lading against a shipowner for damage to a shipment of black pepper in course of a voyage from Liverpool to Vancouver, B.C. The learned judge in that instance held that the rule of assessment of the damages was the difference between the arrived sound market value and the arrived damaged market value and that a provision of a bill of lading lessening the liability of a carrier for loss or damage to goods was void as contravening R. 8 of Article III of the Schedule of the *English Carriage of Goods by Sea Act, 1924.* This decision was given by Honourable Sydney Smith J. who was also the trial judge in the present case.

I believe the evidence and the admissions made by the appellant justify me in finding that the respondent was holder in due course of the bills of lading and owner of the shipment of oranges and had the right to dispose of same. The cargo being delivered in damaged condition, the respondent had the right and duty to take all necessary measures to minimize the damage. It did so by going to the expense of having the damaged goods reconditioned and repacked and put up for sale. The sales of the reconditioned goods were made on their normal wholesale market,

(1) [1914] A.C. 510.

(2) [1954] Ex. C.R. 335, 340.

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that is to say at Vancouver and Victoria, B.C. There was a market price at these two places for the sale of the oranges in good condition. The damaged oranges, after being reconditioned, were sold at lower prices and others were a complete loss. The respondent then claimed as damages for the loss sustained the difference between the proceeds of the sale of the oranges, plus all necessary disbursements involved in making the goods saleable, and the market price of similar undamaged oranges on their normal wholesale market.

I cannot agree with the propositions put forward by the counsel for the appellant in this appeal, and I believe the stand taken by counsel for the respondent was sound in fact and in law.

There is no doubt in my mind that the learned trial judge was right in deciding that the plaintiff was entitled to recover from the defendant, as the amount of his damages, the difference between the sound, wholesale, market value of the cargo and the damaged, wholesale market value at the place and date of the breach. I, therefore, make mine this finding.

The appeal is dismissed with costs.

Judgment accordingly.

1955

April 20

1956

Feb. 14

BETWEEN:

MAXINE FOOTWEAR COMPANY LIMITED and J. ERIC MORIN .. } APPELLANTS;

AND

CANADIAN GOVERNMENT MERCHANT MARINE LIMITED .... } RESPONDENT.

Shipping—Destruction of cargo by fire—Bill of lading subject to The Water Carriage of Goods Act, 1936, S. of C., c. 49—Negligence in management of ship in port—No proof fire caused by "actual fault or privity of carrier"—The Water Carriage of Goods Act, 1936, S. of C., c. 49, article IV, r. 2(a), (b).

The appellant's goods were shipped from Montreal to Kingston, Jamaica under a through bill of lading which provided it should have effect subject to *The Water Carriage of Goods Act, 1936* (Can.). The Act by Article IV r. 2 provides that "neither the carrier nor the ship shall

be responsible for loss or damage resulting from, (*a*) act, neglect or default of the master . . . or servant of the carrier in the navigation or management of the ship; (*b*) fire unless caused by the actual fault or privity of the carrier." The contract of carriage was delivered to the appellant at Montreal by the Canadian National Railways, the agent of the respondent, and the goods, after carriage by rail to Halifax, were loaded aboard the respondent's ship. Subsequently, and before the vessel sailed, the ship's captain gave orders that certain frozen pipe lines be thawed out and in the carrying out of the order the ship was set afire and the appellant's goods destroyed.

Held: That the respondent, the carrier, by its acceptance of the goods owed the appellant a duty to carry them to their destination or, in the event of loss due to its negligence, to answer for such loss unless relieved by some provision of the law.

2. That the ship from a cargo point of view was seaworthy and since the negligent acts which gave rise to the fire were acts done in the management of the ship the respondent was entitled to the benefit of the exemption provided by article IV, r. 2(*a*).

3. That the loss was the direct result of the fire and the respondent was also entitled to the immunity provided by article IV r. 2(*b*) unless the fire was caused by its actual fault or privity as to which the onus of disproof rested on it. The negligence which caused the fire was that of the employees of the respondent but since neither the fact that the pipes in question were frozen nor the means to be used to clear them were communicated to any one who represented the carrier or who had power to act on its behalf, it could not be said that the actions of those responsible for the fire (and to whom alone negligence was attributable), were the very actions of the respondent or of its directing mind. Moreover since the operation which caused the fire was unknown to it, it could not be found that the fire was caused by its privity and having satisfied the onus cast upon it, it was entitled to the immunity provided by r. 2(*b*).

Judgment of Smith D.J.A. [1952] Ex. C.R. 569, affirmed.

APPEAL from the judgment of Smith, Deputy Judge in Admiralty for the Quebec Admiralty District.

The appeal was heard by the Honourable Mr. Justice Cameron at Montreal.

C. Russell McKenzie, Q.C., for the appellant.

Lucien Beauregard, Q.C., for the respondent.

CAMERON J. now (February 14, 1956) delivered the following judgment:

This is an appeal by Maxine Footwear Co., Ltd., from the judgment of Mr. Justice A. I. Smith, Deputy Judge in Admiralty for the Quebec Admiralty District, dated June 3, 1952 (1), which dismissed the appellants' claim for

(1) [1952] Ex. C.R. 569.

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damages. The trial came on before Mr. Justice Cannon, but owing to his illness and subsequent demise, the parties agreed to refer the matter for decision to Mr. Justice Smith. The other named appellant, J. Eric Morin, was joined as a co-plaintiff in the original proceedings in his capacity as consignee under the terms of the Bill of Lading later to be referred to, and stated in the pleadings that he had no interest in the Bill of Lading or in the goods and, in any event, assigned his interest therein to his co-plaintiff and asked for judgment in their favour. It appears that he has now no further interest in these proceedings. Any reference hereinafter to "the appellant" will be understood as meaning the corporate appellant.

The appellant's damages resulted from the loss of its goods entrusted to the respondent for transportation from Montreal to Kingston, Jamaica. The goods were shipped by rail from Montreal to Halifax to be there carried by water to Kingston by Canadian National Steamships, the contract of carriage consisting of a through Bill of Lading delivered to the appellant at Montreal by Canadian National Railways, the agent of the respondent. It may be noted here that in its statement of defence the respondent alleged that any recourse which the appellant might have as a result of the loss of its goods should have been directed against His late Majesty the King, represented by the Minister of Transport as owner of the vessel, and that there was no *lien de droit* between the parties hereto. By the judgment under appeal, that plea was stated to be unfounded and that finding is now accepted. It is expressly provided in the Bill of Lading (Exhibit P-1) that it should have effect subject to the provisions of *The Water Carriage of Goods Act, 1936* (hereinafter to be referred to as "the Act").

The M/V *Maurienne,* operated by the respondent, arrived at the port of Halifax on January 31, 1942. On the following Tuesday, loading of the vessel's No. 3 hold (in which the appellant's cargo was placed) was commenced and the loading of the vessel was completed at about 8 p.m. on the evening of Friday the 6th, it being the intention to sail the following morning. On Friday morning it was found that certain water tanks on deck were leaking and that some of the pipe lines on deck were frozen. Employees

of Purdy Brothers were instructed to weld the tanks and thaw out the pipes and these operations were carried out on Friday morning and Friday evening, the work being completed at about 9 p.m.

Amongst the pipes which were frozen were three scuppers discharging respectively from the bath, toilet and the galley sink, and instructions were given by the Captain to the Fourth Mate to have them thawed out. In order to free these pipes which discharged through the starboard side of the vessel adjoining No. 3 hold and some 8 or 10 feet below deck level, one or more of the employees of Purdy Brothers, working on a scaffold suspended over the side, used an acetylene torch to melt the ice accumulated near or in the openings of the said pipes. This work was carried out between 3 and 4 o'clock on Friday afternoon, and, while all had not then been cleared, all were found to be free early in the evening.

At about 11.30 p.m. the smell of smoke was detected and it was found that there was fire in or close to No. 3 hold, near the place where the acetylene torch had been used in the afternoon. In spite of efforts to extinguish the fire it spread, and by 5.30 a.m. it had reached such proportions that the Captain ordered the opening of the seacocks. The vessel soon sank with almost complete loss of its cargo.

There is clear proof that the respondent agreed to carry the appellant's cargo and that it accepted and had the same under its control. It therefore owed the appellant the duty of transporting and delivering the cargo to Kingston and if the cargo were lost or destroyed due to its negligence or by its failure to discharge its obligations under the contract of carriage, it must answer for such loss unless relieved of liability by some provision in law. Non-delivery of the goods is admitted.

The learned trial Judge found that while direct and positive proof of the cause of the fire was lacking, the facts proven gave rise to a presumption that it had its origin in the heat generated by the acetylene torch which was used in removing the ice from the scupper pipes and which in some way was communicated to the cork insulation in the ship's wall adjoining the scupper pipes. The vessel had originally been a fruit carrier and was insulated throughout with ten inches of granulated cork inside the ship's shell;

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all of the scupper pipes passed through this insulation. There is evidence that the workman operating the acetylene torch placed its flame into the scupper pipes for excessively long periods and the presumption is that in so doing, the cork smouldered and eventually burst into flame, spreading to the wooden sheathing in the cargo holds and thence to the cargo itself. The evidence strongly supports the finding of the trial Judge on this point and it is now accepted by both parties as the most reasonable and probable cause of the fire.

Before me, counsel for the respondent specifically admitted that the fire "was due to the fault of an employee who had been there to thaw out the ice which was blocking the openings of a discharge line or pipe". It might be stated here that there is no evidence that Hemeon—the welder from Purdy Brothers who actually operated the acetylene torch—was told anything about the cork insulation. His work was under the direct supervision of the Fourth Officer who—as well as the other ship's officers—had knowledge of the cork insulation near which the thawing-out operation was conducted. I think that in view of the special risk involved, it was negligence on the part of the Fourth Officer not to adequately supervise the operation and also in his failure to make an inspection to ascertain whether the cork insulation had, in fact, been ignited. Both the Fourth Officer and Hemeon were *employees* of the carrier and it was the negligence of one of these—or of both—that caused the fire. The Captain and Chief Engineer also had knowledge of the operation being carried out and of the proximity of the cork insulation thereto; it may also have been their duty to see that the operation was carried out in safety, but again, both are *employees* of the carrier.

For the purposes of this case it is sufficient to state that the evidence fully warrants the presumption that the fire was caused by the negligence of the *employees* of the carrier. The question to be determined is whether such negligence engages the liability of the respondent.

The first submission of counsel for the appellant is that the trial Judge erred in not finding the ship unseaworthy. He relies on the provisions of Rule 1 of Article III of the Schedule to the Act which is as follows:

> 1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to,
>
> (*a*) make the ship seaworthy;
>
> (*b*) properly man, equip, and supply the ship;
>
> (*c*) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

It is to be observed that the burden of proving unseaworthiness lies on him who alleges it.

The submission on this point falls into three categories. First it is said that the mere presence of ice in the scupper pipes made the ship itself unseaworthy. There is no evidence to support such a finding; none of the experts called on the point were of that opinion. The positive evidence was that it would merely result in some temporary inconvenience caused by the inability to use the facilities to which the scupper pipes were connected and that in the ordinary course of things the ice would disappear shortly after the vessel had commenced its voyage.

The second submission is that the presence of ice in the scupper pipes made the vessel unseaworthy from a cargo point of view—that it lacked cargoworthiness. Seaworthiness, of course, includes cargoworthiness. The suggestion on this point is that as the scupper pipes passed through or over the holds, there was a possibility that the presence of ice therein might at some stage result in a fracture of the pipes and the flow of the water therefrom into the holds would cause damage to the cargo. Mr. Campbell, a witness for the respondent and who has had very lengthy experience in such matters, said that he had never known of a fracture in a scupper pipe caused by ice. That witness and Messrs. Carswell & Tait were all of the opinion that such a condition did not render the vessel unseaworthy from a cargo point of view. Mr. McKean, a witness for the appellant, was of the same opinion so long as the scupper pipes were not fractured. Mr. Fletcher, an expert witness called on behalf of the appellant, however, was of the opinion that the vessel was unseaworthy from a cargo point of view by reason of the ice in the scupper pipes.

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In support of this submission, counsel for the appellant cited *Spencer Kellogg & Sons, Inc.* v. *Great Lakes Transit Corporation* (1), a decision of the District Court of Michigan. In that case the vessel had a frozen *water line* in her cargo hold when the hatches were closed prior to the sailing. While on its voyage the water line broke due to freezing, permitting the contents of the water tank to drain into and damage the cargo. It was held that the vessel was unseaworthy "before and at the beginning of the voyage" for the carriage of a grain cargo because she had a frozen water line in her cargo hold when the hatches were closed and battened. The present case on the facts is readily distinguishable from the *Kellogg* case. There it was a water line leading from a tank that ran through the holds and the line was not insulated; the water line broke. In the instant case the pipes were merely scupper pipes draining a limited amount of water from the lavatory, bath and galley sink, and all were insulated and did not break.

The weight of the evidence on this point supports the finding of the learned trial Judge that the vessel from a cargo point of view was not unseaworthy and his finding should not be disturbed. It may be noted, also, that there was evidence on behalf of the respondent that even if the scupper pipes were broken by ice, only a small amount of water would be released, and, under normal precautions, it would not affect the cargo in any way.

The final submission on this point is that in the negligent use and application of the acetylene torch, the respondent failed before and at the beginning of the voyage to exercise due diligence to make the vessel seaworthy, and the holds and all other parts of the vessel in which goods were carried, fit and safe for their reception, carriage and preservation, as required by Rule 1 of Article III (*supra*), and is not, therefore, entitled to the immunity provided in Rule 1 of Article IV which is as follows:

> 1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

(1) (1940) 32 Federal Supplement 520.

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

It is submitted that the respondent had not proven the exercise of due diligence in making the holds safe inasmuch as the negligence in operating and supervising the thawing-out operation, it is said, negatives diligence.

In view of my conclusion that the learned trial Judge was right in holding that the ship was not unseaworthy nor the holds unfit or unsafe, it would seem to follow that the question of due diligence does not arise—*The Touraine* (1). These findings establish that the respondent had fully complied with the responsibilities put upon it by the relevant parts of Rule 1 of Article III. A finding of seaworthiness implies that due diligence has been used.

Moreover, it seems to me that the negligence which occasioned the fire did not arise in the carrying out of the obligations under Rule 1 of Article III, to make the ship seaworthy and its holds safe and fit. These obligations had been fully carried out before the thawing-out operations began. In my opinion, the fire arose because of negligence by members of the crew or employees of the carrier in the management of the ship and the respondent is therefore entitled to the benefit of Rule 2(*a*) of Article IV, which is as follows:

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,

(*a*) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;

The meaning and effect of this subsection was considered by the Supreme Court of Canada in the recent case of *Kalamazoo Paper Co. et al.* v. *C.P.R.* (2). All the leading cases in which the meaning of the phrase "management of the ship" was considered, were cited and may usefully be referred to.

In *The Glenochil* (3), the facts were that while the vessel was loading and unloading cargo at London, it was found necessary to fill some of the water-ballast tanks in order to stiffen the ship. In doing so, water escaped from the broken pipes causing damage to the cargo. The trial Judge had

(1) [1928] P. 58 at 68. (2) [1950] S.C.R. 356.
(3) [1896] P. 10.

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found that if the pipes had been examined, their broken condition would have been discovered and that the failure to make such an examination was negligence "in the management of the ship" and that, therefore, the owner was not liable. His judgment was affirmed upon appeal. Sir Francis Jeune, President, said in part at page 14:

> It is sufficient for us to say that it is negligence consisting in a mismanagement of part of the appliances of the ship, and mismanagement which arose because it was intended to do something for the benefit of the ship, namely, to stiffen her, the necessity for stiffening arising because part of her cargo had been taken out of her. In that operation of stiffening there was a mismanagement of a pipe and the result was that water was let in and damaged the cargo.

And at page 15:

> The Act prevents exemptions in the case of direct want of care in respect of the cargo, and secondly, the exemption permitted is in respect of a fault primarily connected with the navigation or the management of the vessel and not with the cargo.

In the same case Gorell Barnes J. said at page 19:

> Where the act done in the management of the ship is one which is necessarily done in the proper handling of the vessel, though in the particular case the handling is not properly done, but is done for the safety of the ship herself, and is not primarily done at all in connection with the cargo, that must be a matter which falls within the words "management of the said vessel".

Reference may also be made to *The Rodney* (1). In that case, while the vessel was at sea, a pipe to carry off water became clogged and was cleared in such a negligent manner as to make a hole in it and permit water to damage the cargo. This was held to be negligent conduct in the management of the ship and therefore, under Article IV, Rule 2(*a*), the owners did not incur liability for the damaged cargo. Sir Francis Jeune said at page 117:

> The acts need not be done merely for the safety of the vessel or for her maintenance in a seaworthy condition. If you extend them to keeping the vessel in her proper condition, then the act in this case is an act done in the management of the vessel, and falls within the principle of *The Glenochil.*

In the same case, Gorell Barnes J. said at page 117:

> I think that the words "faults or errors in the management of the vessel" include improper handling of the ship, as a ship, which affects the safety of the cargo.

(1) [1900] P. 112.

In the *Kalamazoo* case Estey J., after referring to the above cases and to *The Ferro* (1), and the *SS. Germanic* (2), said at page 370:

> The foregoing authorities make it clear that the management of a ship is not restricted to acts done in relation to the ship while she is sailing. They rather indicate that the line is drawn where the conduct is, in the language of both Gorell Barnes J. and Mr. Justice Holmes, primarily in relation to the management of a ship as distinguished from acts in relation to the cargo.

And at page 380, Locke J., speaking also for Taschereau J., said:

> Adopting the language of Gorell Barnes J. in *The Rodney,* there was here improper handling of the ship as a ship which affected the safety of the cargo and this was fault or error in management. The learned trial Judge has said that the neglect was essentially a failure in a matter that vitally affected the management of the ship, a conclusion with which I respectfully agree.

In the instant case, the steps taken to thaw out the ice were undertaken to return to use the facilities or appliances of a portion of the ship, namely, the galley and washroom, and to keep those parts of the vessel in proper condition; they were not done primarily in connection with the cargo. In my opinion, therefore, these acts fall within the principle of *The Glenochil.*

Does that principle apply only when the vessel is at sea or does it extend to the time when she is in harbour? The question is discussed in *Carver* at page 117. As I have noted, Estey J. in the *Kalamazoo Paper* case, said that it was clear that the management of a ship is not restricted to acts done in relation to the ship while she is sailing.

Its applicability has also been considered under s. 3 of the *Harter Act* which provided that if the owner of a vessel exercised due diligence to make her seaworthy, he would not be liable "for damage or loss resulting from faults or errors in navigation or in the management" of the vessel.

In *The Glenochil* (*supra*), damage occurred in the cargo in filling the ballast tanks during the discharge of cargo at its destination. It was held to be covered by the section. Gorell Barnes J. stated at page 19: "Exemption extends from the time the cargo was taken on board to the discharge." In *McFadden* v. *Blue Star Line* (3), injury to

(1) [1893] P. 38. (2) (1905) 196 U.S. 589.
(3) [1905] 1 K.B. 697.

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goods caused by the imperfect closing of a sluice door during loading, but after the goods had been shipped, was held to be covered by s. 3. Again, in *SS. Lord* v. *Newsum* (1), it was held that the word "management" can be applied to a ship both while she is in harbour and while she is in motion. In that case Bailhache J. said at page 849:

> The word "management" may well be applied to a ship while she is in harbour and also while she is in motion and the two words taken together denote something done in the user or control of the ship while in harbour or on her voyage. Things done of that nature come within the term "navigation or management". . . .

In *Temperley's Carriage of Goods by Sea Act,* 1924, Third Edition, the author states at page 47:

> Article II provides that "the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities and *entitled to the rights and immunities* hereinafter set forth."
>
> Thus, *prima facie,* the period during which the exceptions in Article IV Rule 2 operate, is the whole period from the beginning of the loading to the end of the discharge. There is no room for any argument based on the idea that the exceptions only operate during the voyage itself or while the ship is beyond the control of the carrier himself.

And at page 48 the author states:

> It is submitted, therefore, that the exception above quoted, contained in Article IV Rule 2(*a*), of acts, neglects and defaults of the master, etc., in the navigation or in the management of the ship should be read as an exemption of the shipowner from liability for any *use or failure to use or any active misuse of the ship and the tackle and machinery on board her, which the owner in pursuance of his* obligation contained in Article III, Rule 1, has *supplied,* and in the manipulation of which the peculiar skill of the seaman in its broadest sense has its scope. In other words, the scheme of the Rules seems to be that the carrier must take all proper steps to provide a proper ship, with proper appliances and a proper crew; but that for what the crew do with the ship and her appliances, and whether they use them in the manner which true seamanship in its broadest sense demands, the carrier is not to be responsible.

Applying these authorities to the present case, I have reached the conclusion that the negligent acts of the respondent's employees, which gave rise to the fire, were acts done in the management of the ship and that the respondent is entitled to the benefit of the exemption provided in Rule 2(*a*) of Article IV.

(1) [1920] 1 K.B. 846.

The trial Judge found that as the cargo was lost because of the fire—and not because of unseaworthiness—the respondent was entitled to succeed under Rule 2(*b*) of Article IV, which is as follows:

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,

(*b*) fire, unless caused by the actual fault or privity of the carrier;

That the immunity provided by that rule is not absolute was pointed out in *Dominion Glass Co., Ltd.* v. *Ship Anglo Indian* (1). There it was held that certain concentrates were a dangerous cargo which rendered the ship unseaworthy and that the loss of the shipper's goods was directly attributable to such unseaworthiness, and not to the fire which resulted when the concentrates heated and the vessel caught fire. In that case Kerwin J. (now C.J.C.), speaking for the majority of the Court, said at page 421:

My conclusion is that considering the purpose of the Act, if the direct cause of a loss is the unseaworthiness of the ship, even though fire was the proximate cause, the loss is not one arising or resulting from fire within the meaning of Article IV, clause 2(*b*) even though it is proven that the unseaworthiness was caused without the actual fault or privity of the carrier. That still leaves the clause free to operate where a loss is the direct result of fire only.

In the present case, the appellant has failed to prove unseaworthiness. Further, it is established, I think, that the loss is the direct result of fire only. In considering whether the breach complained of is *caused* by an excepted peril, the immediate, the direct, or dominant cause, and not the remote cause is looked to—*Scrutton,* page 227. The respondent is therefore entitled to the immunity provided by Rule 2(*b*) of Article IV unless the fire was caused by its actual fault or privity. The onus of disproving "actual fault or privity" is on the shipowner—*Scrutton,* page 511, note (*r*). The words "actual fault" would seem to negative that liability which arises solely under the rule of *"respondeat superior"*. In *Lennard's Carrying Co., Ltd.* v. *Asiatic Petroleum Co., Ltd.* (2), the House of Lords considered the meaning of the phrase "actual fault or privity" in s. 502 of the *Merchant Shipping Act, 1894.* The headnote is as follows:

By s. 502 of the Merchant Shipping Act, 1894, the owner of a British sea-going ship shall not be liable to make good to any extent whatever

(1) [1944] S.C.R. 409. (2) [1915] A.C. 705.

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"any loss or damage happening without his actual fault or privity" where any goods or merchandise taken in or put on board his ship are lost or damaged by reason of fire on board the ship.

A cargo of benzine on board ship was lost by a fire caused by the unseaworthiness of the ship in respect of the defective condition of her boilers. The shipowners were a limited company and the managing owners were another limited company. The managing director of the latter company was the registered managing owner and took the active part in the management of the ship on behalf of the owners. He knew or had the means of knowing of the defective condition of the boilers, but he gave no special instructions to the captain or the chief engineer regarding their supervision and took no steps to prevent the ship putting to sea with her boilers in an unseaworthy condition:—

Held, that the owners had failed to discharge the onus which lay upon them of proving that the loss happened without their actual fault or privity.

In that case Viscount Haldane L.C. said at page 713:

Now, my Lords, did what happened take place without the actual fault or privity of the owners of the ship who were the appellants? My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company. My Lords, whatever is not known about Mr. Lennard's position, this is known for certain, Mr. Lennard took the active part in the management of this ship on behalf of the owners, and Mr. Lennard, as I have said, was registered as the person designated for this purpose in the ship's register. Mr. Lennard therefore was the natural person to come on behalf of the owners and give full evidence not only about the events of which I have spoken, and which related to the seaworthiness of the ship, but about his own position and as to whether or not he was the life and soul of the company. For if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself within the meaning of s. 502. It has not been contended at the Bar, and it could not have been successfully contended, that s. 502 is so worded as to exempt a corporation altogether which happens to be the owner of a ship, merely because it happens to be a corporation. It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself. It is not enough that the fault should be the fault of a servant in order to exonerate the owner; the fault must also

be one which is not the fault of the owner, or a fault to which the owner is privy; and I take the view that when anybody sets up that section to excuse himself from the normal consequences of the maxim respondeat superior the burden lies upon him to do so.

In the instant case the carrier was the respondent corporation, its trade name being The Canadian National Steamships. It has a board of directors, the head office, I think, being in Montreal. Its representative at Halifax in 1942 was Mr. J. W. Campbell, called as a witness by the respondent. He had been assistant superintendent engineer from 1929. It was part of his duty to go on board the respondent's vessels as they arrived in Halifax to overlook and inspect the vessels and secure reports from the ships' officers and to undertake any repairs that might be necessary for the conditioning of the ships. He examined the *Maurienne* on arrival and found her in generally good condition except for a few minor repairs. He found her in good seaworthy condition and the holds and all other parts of the vessel in which goods were stored fit and safe for their reception and preservation. He was on the vessel at least once each day after her arrival in Halifax up to and including the day of the fire. He was not advised by any one that the scupper pipes were frozen and had no knowledge that such was the case or that they were being thawed out with an acetylene torch. There is no evidence as to who employed Purdy Brothers but it was not Campbell; presumably, it was one of the ship's officers who made the arrangements. In any event, it was one of the ship's officers who instructed the employees of Purdy Brothers to thaw out the scupper pipes.

I think it is clear that in order to deprive the carrier of the benefit of the exception, the fault or privity must be in respect of that which causes the loss or damage in question (*Scrutton*, page 511, note (*r*)). The fault or negligence which caused the fire was that of the workman who used the acetylene torch and of the ship's officers, all of whom, as I have said, were employees or servants of the respondent corporation. The evidence is that it is customary to thaw out scupper pipes by the use of a torch, but the fault here was in applying the torch for excessively long periods and in an area close to granulated cork. The clearing of the pipes was considered to be a purely routine matter and

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neither the fact that the pipes were frozen nor that an acetylene torch was to be used to clear them was communicated to anyone who represented the carrier or who had power to act on its behalf. While *Lennard's* case (*supra*) had to do with s. 502 of the *Shipping Act, 1894,* the wording of that section is so similar to that of Rule 2(*b*) of Article IV, that the opinion of Viscount Haldane, which I have quoted, is applicable to this case. It cannot be said, I think, that the actions of those responsible for the fire and to whom alone negligence is attributed, were the very actions of the owner or of its directing mind. Moreover, since the operation which caused the fire was unknown to the respondent corporation, it cannot be found that the fire was caused by the privity of the carrier. In my opinion, the respondent has satisfied the onus cast upon it to establish that the fire was caused without its actual fault or privity and it is therefore entitled to the exception from liability provided for in Rule 2(*b*) of Article IV.

In view of these findings, it is unnecessary to consider the question raised by the respondent in its statement of defence, namely, that if liable to the appellant, it is entitled to limit its liability.

For these reasons, the appeal fails and will be dismissed with costs.

Judgment accordingly.

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Oct. 11

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Feb. 22

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

AND

GENERAL SUPPLY COMPANY OF CANADA LIMITED ..... RESPONDENT.

Revenue—Customs Duty—Appeal on question of law from Tariff Board's decision—Meaning of "accessory" when applied to angledozer used with internal combustion tractor—The Customs Tariff Act, R.S.C. 1952, c. 60, Schedule A, tariff items 427a, 409m(1).

The respondent imported two angledozers, the one on June 10, 1952, the other on January 6, 1953. Each consisted of a steel blade and two connecting arms, the latter being used to attach the blade to the main

component, namely the tractor. The lifting and tilting mechanism which control the operations of the blade formed a permanent part of the tractor itself. The Customs appraiser classified the angledozers under Schedule A, tariff item 427*a* to the *Customs Tariff Act*, R.S.C. 1952, c. 60, as machinery of a class or kind not made in Canada and the classification on review by the appellant at the request of the respondent was confirmed. The respondent appealed to the Tariff Board and it held that the angledozers were "accessories" for internal combustion tractors and therefore classifiable under Tariff item 409(*m*)(1) of the Act, and allowed the appeal. The sole question for determination in the present appeal is whether the Tariff Board erred as a matter of law in its decision.

Held: That there was material before the Board which indicated that in some parts of the trade angledozers were considered to be "accessories" and it was for it to determine whether that evidence should be accepted rather than that which would lead to a contrary conclusion. It was also for the Board to determine whether on the evidence the relationship of the angledozer to the tractor was that of a subsidiary adjunct and therefore an accessory to the tractor within the dictionary definition of "accessory" and since it was not established that the Board in reaching its conclusions acted unreasonably or erred as a matter of law its decision must be upheld.

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

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

K. E. Eaton and *R. W. McKimm* for the appellant.

Gordon F. Henderson, Q.C. for the respondent.

CAMERON J. now (February 22, 1956) delivered the following judgment:

This is an appeal from a declaration of the Tariff Board dated March 7, 1955, brought under the provisions of s. 45 of the *Customs Act*, R.S.C. 1952, c. 58. It relates to two separate importations by the respondent, one entered at Montreal, P.Q., on June 10, 1952, and the other at Thetford Mines, P.Q., on January 6, 1953. The Entry For Home Consumption forms are respectively Exhibits D-2 and D-3. Each entry included an internal combustion traction engine, and certain attachments (the attachments being particularized in Exhibits D-3 and D-4). No question arises as to these engines and attachments which were admitted "free" under Tariff Item 409*m*(1), which then read as follows:

409*m*(1). Internal combustion tractors (not to include highway truck-tractors) and accessories therefor; parts of all the foregoing . . .

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Each entry, however, included also an "angledozer" and it is in connection with this part of the entries that the difficulty has arisen. The appraiser classified the angledozers under Tariff Item 427*a*, which was as follows:

427*a*. All machinery composed wholly or in part of iron or steel, n.o.p., of a class or kind not made in Canada, complete parts of the foregoing . . .

The appellant herein was requested by the respondent to review the appraiser's classification and on July 27, 1954, he made his finding that the angledozers had been properly classified as "machinery of a class or kind not made in Canada, under Tariff Item 427*a* at 7½ per cent *ad valorem*, Most-Favoured-Nation Tariff rate."

From that decision an appeal was taken to the Tariff Board. The appeal of the respondent herein was allowed, the majority of the Board (the chairman—Mr. H. B. McKinnon—and Mr. W. W. Buchanan) being of the opinion that the angledozer was properly described as an accessory to the tractor and therefore properly classifiable under Tariff Item 409*m*(1). The vice-chairman of the Board—Mr. F. J. Leduc—dissented and would have dismissed the appeal, being of the opinion that the angledozer was a machine in its own right and therefore classifiable under Tariff Item 427*a*.

Leave to appeal from the Board was granted by Fournier J. on June 27, 1955, on the following question of law:

Did the Tariff Board err as a matter of law in deciding that two Angledozers imported under Montreal Customs Entry No. E-28831 dated June 10, 1952, and Thetford Mines Customs Entry No. 2076 dated January 6, 1953, respectively, were accessories for internal combustion tractors and therefore classifiable under Tariff Item 409*m*(1) of the Customs Tariff?

The sole question for determination, therefore, is whether the Board erred in law in deciding that angledozers were "accessories" within the meaning to be attributed to that word in Tariff Item 409*m*(1). It is agreed that if they erred in law on that point, the goods imported were properly classifiable under Tariff Item 427*a*.

Each of the angledozers imported was manufactured by Letourneau Inc., of Texas, U.S.A. It consisted of a steel blade and connecting arms, the latter being used to attach the blade to the main component—namely, the tractor (or, as it is called by the manufacturer, a "Tournadozer"). The

evidence establishes that each of the angledozers in issue is equipment usable only as an attachment on the size and model of the tractor for which it was designed, namely, the Tournadozer which was imported at the same time. It is common ground that when the Tournadozer and angledozer are assembled, the entirety is used as an earth-moving machine. In the case of the goods imported, the lifting and tilting mechanisms which control the operations of the blade, form a permanent part of the Tournadozer itself. Mr. A. J. Fenwick, the secretary-treasurer of Northern Machine Works Ltd., of Bathurst, N.B.—a firm which manufactures angledozers (sometimes called bullgraders) for sale to International Harvester Company, said that the angledozers made by his company consisted of the blade, connecting arms, and the lifting mechanism as well.

In considering an appeal to this Court from a declaration of the Tariff Board, it is always necessary to keep in mind the distinction between the duties cast on the Board in deciding which item of the tariff is applicable to the goods imported, and those placed on this Court when hearing an appeal from such a declaration. The distinction was noted by the President of this Court in *Deputy Minister of National Revenue for Customs and Excise* v. *Parke Davis & Co. Ltd.* (1). The appeal to this Court being on a question of law only, the issue is not whether the angledozers imported were "accessories" for internal combustion tractors, but whether the Board erred as a matter of law in deciding that they were. As stated in the *Parke Davis* case, "If there was material before the Board from which it could reasonably decide as it did, this Court should not interfere with its decision even if it might have reached a different conclusion if the matter had been originally before it."

The declaration of the majority of the Board is as follows:

> The question at issue in this Appeal is the meaning to be given to the word "accessories" as that word is used in tariff item 409*m*.
>
> It was made abundantly clear from oral evidence and from illustrative exhibits filed during the hearing that the word "accessories" is not commonly used, by persons familiar with the marketing of tractors, to describe such optional ancillary equipment as may be mounted on or attached to tractors. One witness, W. E. Jolley, Secretary of International Harvester

(1) [1954] Ex. C.R. 1 at 20.

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Co., giving expert evidence for the Crown, when asked "Are there any tractor accessories?" replied "Not in our terminology". (Transcript, page 58).

It was suggested by counsel for the Crown that the word "accessories" when used in connection with tractors was more or less synonymous with the word "attachments"; Mr. Eaton: "Yes, for the purposes of 409*m* I think that, on the basis of the evidence, including the exhibits and what the witnesses have said, probably 'attachments' and 'accessories' in the tractor business amount to the same thing, 'attachment' being more commonly used."

In the illustrative exhibits filed at the hearing, such ancillary equipment as the angledozers under appeal is described as "accessories" or "attachments". (Vide Exhibits D.7, A.4 and A.6.)

Counsel for the Crown argued, and in this argument he was supported by his witnesses, that each of the angledozers at issue, being arms and a blade, is machinery in itself; this being the case, it was somewhat unrealistic, he argued, to regard an angledozer as merely an accessory to another machine. It is difficult to see much force in this contention. Whether or not one thing can be described as an accessory of another depends on the relationship of the two, rather than on what each is, in itself.

Clearly, each of the angledozers at issue is a piece of ancillary equipment usable only as an attachment on the size and model of tractor for which it was designed. Its relationship with the tractor is plainly that of a subsidiary adjunct, and as such each of the angle-dozers at issue would properly be described as an accessory to the tractor.

Accordingly, the Appeal is allowed.

Counsel for the Crown submits that the conclusions stated in paragraph 2 are findings of fact binding on this Court and that they amount to a finding that, in the trade, angledozers are not considered as "accessories" to tractors; that finding by the Board he submits does not warrant the Board's conclusion that the angledozers are within Tariff Item 409*m*(1). I am unable to agree that such is the case. It will be noted particularly that the statement that the word "accessories" is not *commonly* used is the use by persons familiar with the *marketing* of tractors. In that statement, the majority of the Board were clearly relying on the evidence of Mr. Jolley, secretary of the International Harvester Co., which firm does not manufacture angledozers but purchases them from Canadian and American manufacturers and sells them to its retailers. His opinion was that in his trade "accessories" to tractors were quite unknown.

That opinion was not shared by the other Crown witness, Mr. Fenwick. In his view "accessories to tractors" would be "things added to the machine, not needed to actually

operate the machine but provided for the ease and comfort of the operator, such as headlights on the tractor, or speedometer, or the canopy on the top." He did not consider the angledozer to be an accessory but rather a complete machine in itself, the same as a bullgrader or a snowplow, for fitment or attachment to a crawler or wheel tractor. He would have considered the angledozer as an "attachment" rather than an "accessory." Mr. Fenwick stated quite frankly that he was giving his opinion "on behalf of an allied tractor equipment manufacturer."

Mr. Fenwick's distinction between tractor attachments and tractor accessories corresponds with the definitions of lift truck attachments and lift truck accessories found on page 2 of Exhibit D-8, an illustrated booklet of the Hyster Co. in which it is stated:

> Industrial truck attachments are those mechanical devices, tools or special work rigs which are attached to a standard truck to do special or specific jobs and which increase the uses, productivity and efficiency of the unit. (The Hyster Load-Crab, scoops, booms, rams, etc., are examples of lift truck attachments.)
>
> Accessories, for the purpose of this catalog, are defined as those items which may be purchased which would increase the ease, safety, comfort or efficiency of operation under certain conditions but are not considered as standard equipment or a regular part of the standard truck. (Lights, horns, special lug tires, cabs, etc., are considered accessories.)

It is the same distinction between attachments and accessories which counsel for the Crown submits should have been applied to tractors by the Board.

The evidence above referred to is of such a nature that, if accepted in preference to other evidence, the Board might reasonably have reached a conclusion that angledozers were either *not* accessories or were, in fact, attachments.

There was also evidence referred to in the majority declaration of the Board that in the trade angledozers are referred to under the heading of "accessories or attachments", the terms apparently being used synonymously. More particularly, there was evidence in illustrated material filed that in the trade angledozers—as well as other similar pieces of equipment to be used with tractors—were described as accessories. In Exhibit A-7, an advertisement put out by the Baker Lull Corp. of Minneapolis (the appellant company being its Canadian distributor), and relating to a special form of tractor called a "Shoveloader", it is stated on pages 2 and 4:

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Available accessories such as lift forks, solid tires, narrow bucket, crane hooks and special catalytic equipment increase Shoveloader's versatility still further.

Accessories

36" Lift Forks, Solid Tires for Rear and Front Wheels, Narrow Bucket and Crane Hook Available at Extra Cost . . .

Again, in Exhibit A-8—the advertisement of Galion Iron Works, illustrations of a scarifier, a snow plow and wing, and an all-steel cab appear under the heading "Accessories" in relation to a motor grader. In Exhibit A-9, an advertisement relating to tractor shovels, the bulldozer blades, fork lift, snow plows and snow bucket are all included as accessories. In Exhibit A-15, Towmotor Standard Accessories include a great variety of attachments for performing special types of moving and lifting goods.

In addition to the evidence the Board was referred to a number of standard dictionaries defining accessories:

The Oxford English Dictionary

1. An accessory thing; something contributing in a subordinate degree to a general result or effect; an adjunct, or accompaniment;

Webster New International Dictionary

2. Any article or device that adds to the convenience or effectiveness of something else but is not essential, as a speedometer on an automotive vehicle.

Webster's Dictionary of Synonyms

Appendage, appurtenance, accessory, adjunct agree in designating something regarded as additional, and at the same time as subsidiary, to another object . . .

Accessory is applied usually to that which is dispensable yet contributes to the appearance, usefulness, comfort, convenience, or the like of the principal thing; as, automobile accessories; costume accessories.

It is clear, therefore, that there was material before the Board which indicated that in some parts of the trade at least angledozers were considered to be "accessories" to tractors. It was a matter for the Board to determine whether that evidence should be accepted rather than that which would lead to a contrary conclusion. It was also for the Board to determine whether on the evidence the relationship of the angledozer to the tractor was that of a subsidiary adjunct and therefore an accessory to the tractor within the dictionary definition of "accessory". I am unable to find that the majority of the Board in reaching their conclusions acted unreasonably or erred as a matter of law

in deciding that the angledozers in issue were accessories for internal combustion tractors and therefore classifiable under Tariff Item 409*m*(1) of the Customs Tariff.

The answer to the question submitted is therefore "No". It follows that the appeal herein must be dismissed with costs.

Judgment accordingly.

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BETWEEN:

THE CLEVELAND-CLIFFS STEAMSHIP COMPANY and THE CLEVELAND-CLIFFS IRON COMPANY } SUPPLIANTS;

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Jan. 25, 26 & 27

Apr. 17

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Crown Liability Act, 1 & 2 Eliz. II, c. 30, s. 3(1)(a)—Exchequer Court Act, R.S.C. 1952, c. 98, s. 18(1)(b), (c)—Crown not liable for damages resulting to ship grounded in channel—No duty on part of any officer of Crown to see that channel is safe for navigation.

Suppliant Cleveland-Cliffs Iron Company seeks to recover from respondent damages suffered by the ship *Grand Island,* chartered to suppliant, allegedly caused by the negligence of respondent due to respondent's failure to indicate accurately the depth of water on a chart and in the *Great Lakes Pilot,* both of which are publications of the Canadian Hydrographic Service, in consequence of which the ship became grounded when approaching Little Current in the Province of Ontario.

Held: That the grounding of the ship was due to faulty navigation as it was outside the channel at the time of the grounding; that the ship should have depended on the range line and not on boundary buoys in navigating in such a narrow channel, and under the circumstances existing prior to approaching the channel and considering the size of the ship proper navigation would have been to stop dead and seriously consider how best to proceed instead of going even dead slow.

2. That there is no liability on the part of respondent since there was no officer of the Crown in any way in control of the channel or whose duty it was to see that the channel was safe for navigation.

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PETITION OF RIGHT.

The action was tried before the Honourable Mr. Justice Hyndman, Deputy Judge of the Court, at Toronto.

Francis Gerity and *P. B. C. Pepper* for the suppliants.

Peter Wright, Q.C. and *J. J. Mahoney* for the respondent.

HYNDMAN D.J. now (April 17, 1956) delivered the following judgment:

This petition is on behalf of the above suppliants, both having their principal place of business in the city of Cleveland in the State of Ohio, United States of America.

At the outset of the trial it was stated that the action concerns only the above Cleveland-Cliffs Iron Company, it having paid the damages claimed herein by the Cleveland-Cliffs Steamship Company, the latter not being concerned further with the action.

The allegations are as follows: The petitioners are incorporated under the laws of the States of Delaware and Ohio, United States of America. The steamship company is the owner of the steamship *Grand Island,* a ship of some 489 feet in length and 52 feet beam, the said steamship being registered at the port of Wilmington, State of Delaware aforesaid. The Cleveland-Cliffs Iron Company (hereinafter called the iron company) on or about the first day of January, 1951, entered into a charter party with the said Cleveland-Cliffs Steamship Company (hereinafter called the steamship company) for a term of five years, the provisions of the said charter party, amongst other things, providing that the charterer is to have full and complete control over the said steamship and to operate it and to make operating repairs and, in general, to exercise complete control over the said steamship during the term of the said charter party.

On or about the 6th of August, 1953, the said steamship departed from the port of Lorain, State of Ohio, at about 12:09 in the afternoon, bound from thence to the port of Little Current in the province of Ontario, laden with coal. The steamship was at all relevant times fully manned and in all respects seaworthy and fit for the voyage to be undertaken, and navigated by a competent master and officers, servants of the said iron company.

On the 7th of August in the said year 1953, the steamship, approaching the port of Little Current at about 2:58 in the afternoon of the said day, reduced speed just prior to entering the buoyed channel leading to the said port. The said steamship was proceeding from open water so as to enter the said port by means of the so-called "East-Entrance Channel". The said channel is shown on chart No. 2294, a publication of the Canadian Hydrographic Service, and more particularly described at page 282 of the *Great Lakes Pilot*, Volume 2, 7th Edition, issued by the said Service. It is alleged that on the 7th of August the steamship was steering the usual course to pass safely into the port of Little Current by means of the said channel, and that about 3:22 in the afternoon of the said day it became grounded and fast whilst in the fairway of the said channel and between the first and second set of buoys leading in from the open water and being approximately abreast of Gibbons Point. The master of the ship caused soundings to be taken which, it is alleged, gave a less depth of water than that indicated on the chart and publication referred to above, and caused the spot to be marked with a buoy. The ship was later freed from the ground with the assistance of the tug of one J. H. Dixon and proceeded to port in Little Current.

After discharging her cargo the ship sailed to Superior, U.S.A., and took on a cargo of iron ore. She then proceeded to Cleveland. On the voyage a leak was noticed in the starboard bow. After discharging this latter cargo she went into drydock, when it was discovered that certain plates were damaged. Repairs had to be made, costing $30,961.83, which was paid by the iron company.

It is claimed as a result of the said grounding the suppliants have suffered damages by reason of repairs having to be made to the said ship, amounting to the said sum of $30,961.83, United States currency.

It was admitted by counsel for the defendant that, if a liability exists, the said sum of $30,961.83 is correct.

It is claimed that the maintenance, inspection, and markings of the said channel leading to the port of Little Current are under the control of Her Majesty's Ministers of Public Works and Transport respectively, and in the discharge of these statutory duties, officers and servants of Her

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Majesty are charged with said maintenance, inspection and markings of the said channel, and further that the said Minister of Transport and officers and servants acting under him are charged with the duty of issuing notices of any danger of which mariners should be warned in respect to the information hereinbefore referred to, and that in the year 1952 officers and servants of Her Majesty issued and caused to be published *Great Lakes Pilot* (Volume 2, Lake Huron and Georgian Bay, 7th Edition, 1951), which said pilot directory at page 282, lines 23 and 24, indicated at least a depth of 20 feet in the East-Entrance Channel; chart No. 2294, issued and published by officers and servants of Her Majesty, corrected edition, indicates a limiting depth of 20 feet of the said channel leading to the port of Little Current and off Gibbons Point; and that those in charge of navigation of the said steamship were by official publications and charts invited to approach the port of Little Current, utilizing for that purpose the said channel in the belief that this approach to the said port could be safely navigated by a vessel drawing less than 20 feet of water, and that the said grounding and damage occurred by reason of the negligence of officers and servants of Her Majesty, acting within the scope of their duties and employment, and under the control and supervision of Her Majesty's Ministers.

The names and titles of such officers are not in evidence, although suppliant by inquiry failed to elicit them.

The claim is that the said officers and servants of Her Majesty were negligent in that they failed to inspect and maintain said channel in a like order and condition as advertised and published and that they suffered a less depth of water to exist at all relevant times in the said channel than the depth of water advertised to navigators as aforesaid and, alternatively, they permitted an obstruction to be occasioned and continued in the said channel, thereby creating a less depth of water than that advertised, and that they failed to issue another notice to mariners that the said channel had less depth than that advertised or of an obstruction being occasioned and continued in the said channel. It is, therefore, claimed that, having failed in their duty above mentioned, the navigators, acting upon

the said invitation, would be misled into approaching the said port of Little Current in the belief that they could do so safely in vessels drawing less than 20 feet of water.

The petitioners plead the provisions of the Crown Liability Act, 1 and 2 Elizabeth II, chapter 30, Statutes of Canada, specifically 3(1)(*a*), and also plead the provisions of the Exchequer Court Act, chapter 98, Revised Statutes of Canada 1952, and specifically section 18(1)(*b*), and that the said channel is a public work in the meaning of that Act.

There is no doubt, in my opinion, but that this channel was a public work into which the said ship had every right to navigate.

The said channel is 165 feet wide from the western to the eastern limit thereof. On Oak Island to the northward, there are range lights or light houses indicating the centre line of the channel. There are also buoys on the east side in the neighbourhood of Gibbons Point. I am satisfied the evidence discloses that these buoys were not exactly on the east limit of the channel, but I am also satisfied on the evidence of Mr. F. C. G. Smith, Chief Hydrographer in charge of hydrographic surveys, who was a naval officer with the British Admiralty and, I consider, experienced in navigation practices, that it is not safe to rely on buoys for the reason that, owing to the movement of water, they are apt to be changed from place to place and that, in this particular instance, the only safe course to adopt was to navigate on the range line. I agree with this for the reason that the channel was only 165 yards in width and that, owing to the presence off Gibbons Point, of a dredge occupying a considerable portion of the left half of the channel, there would necessarily be some risk with a ship such as this, being 489 feet long and 52 feet beam, and under the circumstances to navigate on the left or east half of the channel would require the utmost care and skill, the draught of the ship being 19½ feet.

I am satisfied that in 1951, when the soundings were taken in and about the channel (Exhibit B), from the evidence of Raymond Paul Rowe, a Bachelor of Engineering, graduate of McGill University, who took the soundings, that the soundings on the said chart at that time were 18·9 to 20 feet in the channel at or near the locus in question, and adjoining the channel. There is no definite or

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satisfactory evidence that an obstruction existed in the right half of the said channel beyond the claim that the steamer went aground at this point. No investigation seems to have been made to establish whether or not any rocks or silt existed there.

After the grounding of the ship, the witness Kenneth Lowrie, holder of a master's certificate and a first class pilot's licence, and who had been sailing for about nineteen years, and who had sailed in and out of the port of Little Current probably twenty-five times, took soundings, and I quote the following from his testimony:

MR. GERITY: Q. Well then will you look at this, which is Exhibit 14, Mr. Lowrie, and read off those soundings which you took and where they were with relation to the structure of the vessel?

A. On the starboard bow about abreast of the pilot house, of the lower pilot house, I got 18 feet. About 24 feet aft of that was 18·6; another 24 feet 18·6.

And up to the middle of the ship—amidship which is about No. 7 hatch was 19 feet.

From there on around the ship on the starboard side and around the stern I got 21 to 22 feet 6 inches.

At the port side it was 22·5—22 and 22·6.

The rest of the way until I got right to the bow and right at the stem was 20 feet; and right over the stem here 19 feet, as I recall.

HIS LORDSHIP: The port side would be the left side of the ship?

MR. GERITY: This is the ship, my lord. (Indicating).

MR. GERITY: Q. What was the greatest depth you could find?

A. 22 feet 6 inches.

Q. Whereabouts was that?

A. That was along the port side—around about aft there and around it. (Indicating).

Q. And where was the least depth found?

A. On the starboard of the pilot house.

Q. And what was that?

A. 18 feet.

Q. Now Mr. Lowrie following the duty you did to take the soundings, did you report to the Master?

A. I did.

Q. And what did you then do, following that?

A. Well following that I sent one man around to take soundings of the ship to be sure we were not taking water.

On the chart of soundings dated November 20, 1951, in the channel, directly opposite Gibbons Point, and where the ship went aground, at the very bow of the ship, the soundings are 18·9 feet, 19·9, 2·17, 2·13, 19·3, 21·8, 20·8, 19·8. Immediately to the east side of the channel at the bow of the ship the soundings were 14·5, 17·7, 19·5, 14·9, 14·5, 14·9, 14·8, and other soundings are about 15 feet, running along to the south.

The evidence is that, while the said soundings were those existing in 1951, in 1953 at the time of the occurrence complained of, the level of the water had risen by 3½ feet, the result being that the soundings in the channel as shown on the 1951 plan should be increased by 3½ feet. If the sounding abreast of the pilot house was 18, and about 24 feet aft of the pilot house was 18·6 and a further 24 feet aft of that, 18·6 feet, all on the starboard side, according to the evidence of Mr. Smith, taking into consideration the increased depth of water since 1951 it would reasonably follow that the ship was off the centre line and the east limit of the channel and finished on the bank on the east side and, therefore, outside the channel. To my mind, this seems the only logical conclusion to be drawn from the soundings both in the channel and to the right of it. As said above, a ship 489 feet long and 52 feet beam, in order to navigate in the limited area of the east side of the channel, would require the utmost care in proceeding, and the presence in the western side of the channel of the dredge above mentioned necessitated that the ship should keep to the right-hand side of the centre or range line.

I have given the evidence and circumstances surrounding the case my best consideration and, without in any way impugning the honesty of the several witnesses for the suppliants, I am nevertheless convinced that they were mistaken as to the location of the ship when it grounded. The narrow limits of the channel rendered it very easy to make a mistake, and called for the utmost care in navigation of the ship, especially in view of the fact that the space between the centre line and the eastern limit was only 82½ feet, in which portion of the channel the ship was being navigated. I am greatly impressed with the fact that in 1951 soundings in the channel showed 20 feet but in 1953 the general level of the water was 3½ feet higher and, therefore, the depth of the water in the channel opposite Gibbons Point was at least 22 feet. The soundings taken by the mate, as stated in his evidence, lead to the conclusion that the ship must have been outside the channel. The presence of the dredge off Gibbons Point to my mind is largely responsible for the unfortunate grounding of the suppliants' ship. A good deal was said as to the distances between the dredge and the ship and the ship and the buoys, but in my

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opinion there was much room for inaccuracy. I am of the view that the only safe method of navigation in such a narrow channel was to depend on the range line and not on boundary buoys, as said above, which obviously must be more or less subject to change of position. It seems to me that, under the circumstances existing prior to his approaching Gibbons point, considering the size of the ship, the proper procedure was to stop dead and seriously consider how best to continue, instead of going even dead slow.

Assuming, however, that the ship was in the channel as alleged, the further question arises as to liability of the Crown.

As said above, there is no evidence in my opinion of any particular officer or servant of the Crown being in control or supervision of the channel who could be charged with negligence in failing to sweep the channel and remove any possible obstructions.

The claim, if any, arises under section 18(*c*) of the Exchequer Court Act, which is as follows:

(*c*) Every claim against the Crown arising out of any death or injury to person or property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

In *The King* v. *Anthony* (1) at page 571 Rand J. said:

I think it must be taken that what paragraph (*c*) does is to create a liability against the Crown through negligence under the rule of *respondeat superior,* and not to impose duties on the Crown in favour of subjects: *The King* v. *Dubois,* [1935] S.C.R. 378, at 394 and 398; *Salmo Investments Ltd.* v. *The King,* [1940] S.C.R. 263, at 272 and 273. It is a vicarious liability based upon a tortious act of negligence committed by a servant while acting within the scope of his employment; and its condition is that the servant shall have drawn upon himself a personal liability to the third person.

In *The King* v. *Hochelaga Shipping and Towing Company Limited* (2), at page 170 Davis J. said:

I agree with the view taken by the learned trial judge on the evidence, that is, that in the restoration and changes made in the jetty, there was negligence on the part of the officers or servants of the Crown while acting within the scope of their duties or employment upon the public work.

It was there found on the facts that certain officers of the Crown were charged with the duty, the work was under the control of one T. J. Locke, resident district engineer of

(1) [1945-46] S.C.R. 569. (2) [1940] S.C.R. 153.

the Department of Public Works at Halifax, and the supervision of Duncan H. MacDonald, his assistant district engineer. The above case is, therefore, distinguishable from the present one in that certain officers named were in control of the public work, and were negligent in their duties, whereas in the present case no officer has been named who was in any way in control of the channel, or whose duty it was to see that the channel was safe for navigation.

In *The Hamburg American Packet Company* v. *The King* (1), the headnote is as follows:

There is no law in Canada under which the Crown is liable in damages for the mere non-repair of a public work, or for failure to use in its repair money voted by Parliament for the purposes of such public work.

2. In such case whether the repair should be made or the money expended is within the discretion of the Governor in Council or of the Minister of the Crown under whose charge the work is; and for the exercise of that discretion he and they are responsible to Parliament alone, and such discretion cannot be reviewed by the courts.

Semble:—Although the channel of a river may be considered a public work under the management, charge and direction of the Minister of Public Works during the time that he is engaged in improving the navigation of such channel under the authority of section 7 of *The Public Works Act* (R.S.C. c. 36), it does not follow that once the Minister has expended public money for such purpose the Crown is for all time bound to keep such channel clear and safe for navigation, or that for any failure to do so it must answer in damages.

Although the last-mentioned case was decided as far back as 1901, and various acts have since been amended, I am nevertheless of the opinion that the principle remains the same, and no fundamental change in the statute, as bearing on the point in question, has taken place.

In *Ginn* v. *The King* (2), at page 211 the President said:

To succeed in their claims the suppliants must prove not only that the injuries suffered by the suppliant resulted from the negligence of an officer or servant of the Crown but also that such negligence occurred while the officer or servant was acting within the scope of his duties or employment. The onus of proof of these matters lies on the suppliants. The onus is not a light one.

For the above reasons, I find that the claim has not been established against the Crown, and, therefore, the action must be dismissed with costs.

Judgment accordingly.

(1) (1901) 7 Can. Ex. C.R. 150.

(2) [1950] Ex. C.R. 208.

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Mar. 28
& 29
Mar. 29

BETWEEN:

JOHN LLOYD McGUIRE .....APPELLANT,

AND

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

Revenue—Income—Income tax—Income Tax Act, R.S.C. 1952, c. 148—Income or capital gain—Real estate bought for farm sold as town lots—Owner not carrying on business—No liability for tax.

Appellant in 1940 purchased a farm for a home intending to live on it and at time of hearing of the appeal herein was living on it. In 1949 he subdivided part of it into 52 lots of which 20 lots were sold in the years 1949, 1950, 1951 and 1952. Appellant was assessed for income tax on the profits from the sale of these lots which assessment was affirmed by the Income Tax Appeal Board from whose ruling appellant now appeals to this Court.

Held: That the decision of the Income Tax Appeal Board must be reversed as appellant did not purchase the land as a venture or for speculation and there is no distinction between selling the land as a whole or in parts.

2. That defendant was not carrying on a business, but was selling his own property in a way that was not speculative.

3. That the money received from the sale of the lots was not income but a capital gain and not subject to income tax.

APPEAL from the Income Tax Appeal Board.

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

Carl H. Morawetz for the appellant.

E. D. Hickey and *T. Z. Boles* for the respondent.

HYNDMAN, D.J., orally, now (March 29, 1956) delivered the following judgment:

I could write a long judgment in this case but I don't think it necessary to do so.

Now, nobody has greater respect for my friend Mr. Fisher than I have. I have known him a long time and his ability. He is a very able lawyer and I usually agree with him in most of his decisions. But in this case I am afraid I cannot. Shortly, the facts are these: Mr. McGuire honestly and sincerely purchased this piece of land with the object of living on it. I believe him when he says that having been

born on a farm and having lived on a farm for part of his life he always had a hankering to get back to the land. I think that was what was in his mind and I am satisfied to accept his statement to that effect. After looking around at various farms he came across this particular land and decided he would like to buy it and did buy it for $5,000 and eventually paid for it in full, $5,000.

That, according to the evidence of the real estate man here seemed to be a reasonable deal, that is, the land was worth $5,000 or $6,000 although it was a run down farm and he was surprised that McGuire had bought it. However, he did buy it and I think he was sincere when he testified he thought he could establish himself and stay put there. He did operate the farm to the best of his ability and the best of his financial circumstances. He was more or less up against it financially but he did do some farming there and although he lost money he kept on purchasing more machinery. His wife and family lived with him on the farm and his wife did some work too, and it would seem to any person that he intended to make that his home and with no thought of speculation, or selling it at a profit, at that time and anyway I would think that under the circumstances being six or seven miles from the centre of Hamilton, surrounded by nothing but farms, that it would be mighty poor speculation if he intended to sell it in lots and I don't think any sensible man would have that in his mind, buying a farm out there at that time. Things have very much changed since and some people want to live out in the country.

Now I am coming to the point that is vital in this case. He owned that land but he found that it couldn't pay as a farm, but he still did not want to leave it. He had an offer from somebody to purchase a lot on the upper part of the farm but he found that he was unable to give title because of the Planning Act. The Planning Act requires that a plan of subdivision must be filed with and approved by the Board before he could register the plan and therefore sell the land. So I think he was quite sincere when he said it was due to this advice he got from the municipal people that he went ahead and put on a plan of subdivision—52 lots, I think.

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Now he did sell this lot, the first purchaser was anxious to buy, and later on sold a few more—eight in 1949, two in 1950, seven in 1951 and three in 1952 according to the evidence. There were sold 20 lots out of the 52 in four years.

Now there cannot be, I think, any question about the right of a man to sell his own property if he wants to. It may make quite a difference as far as income tax is concerned as to whether or not when he purchased his land he intended to sell it as soon as he could and make a profit. In all those cases I think the law is pretty clear that any profits made must be regarded as taxable but in this case I am satisfied that there was no such intention in McGuire's mind when he purchased the property. He just bought it for a home and held it from 1940 until he put on this subdivision which was nine years later. He still lives there.

Now, as I said before, there is no question but that a man has the right to sell his property and if it was not purchased as a venture or for speculation I don't think he is liable for income tax on any profit he might make. So that as far as I am concerned I don't see any distinction between selling the land as a whole or selling half of it or selling a quarter of it or selling 50 parts of it. It was his land to sell and he felt that was the best way to dispose of some of it and that is what he did.

I have not seen any case such as I was expecting to have cited to me similar to this which would have a bearing on the incident of selling a whole property or parts of a property where selling part of it like this, a subdivision, would make any difference unless it was a business in the regular business sense.

As far as I can see in this case if he was carrying on a business it was mighty poor business if he could sell only that many lots in four years and I don't think it could properly be looked upon as a business. I think it was merely a case of a man having this property and willing to sell part of it, the fact of putting up these signs advertising lots for sale I don't think having any bearing on the question of the law in the matter.

Surely the fact that a man wants to sell his own property does not constitute a business. I can't see that. If he went around the country trying to find customers and made a regular business of it that in the ordinary sense of the word

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there might be a question then, or if he was selling other people's property as well as his own that might have a bearing on the case but as far as the evidence is concerned he was selling his own property and nothing more, which I think he had a perfect right to do.

I hesitate to differ with Mr. Fisher who is an authority on these matters but in this case I cannot agree with him. In the end if there is any appeal it may be evident he was right and I am wrong but as I see it now I am of the opinion that this is a pure case of a man selling his own property which he had acquired in a way which was not speculative and there can be no objection in law to selling it and I don't think it makes any difference whether he sold the whole property as a whole or as a half or in 50 pieces.

I am of the opinion that this appeal should be allowed and the assessment set aside and that this was not taxable property but purely a capital gain and not subject to taxation. That is my present feeling and I do not see any sense of prolonging the matter.

I would allow the appeal, set aside the judgment of the Income Tax Appeal Board, and find that the appellant is not subject to tax in connection with the disposal of this land—and costs to be taxed.

Judgment accordingly.

BETWEEN:

HER MAJESTY THE QUEEN on the Information of the Deputy Attorney General of Canada ..... PLAINTIFF;

1956

Jan. 23

Apr. 18

AND

REXAIR OF CANADA LIMITED ..... DEFENDANT

Revenue—Excise tax—Sales tax—Excise Tax Act, R.S.C. 1952, c. 100, ss. 2(1)(ii), 23(1), 30(1)(i)—Goods manufactured solely for defendant by another corporation—"Manufacturer or producer"—Defendant liable for tax.

Defendant company entered into an agreement with a company herein called Radio for the manufacture and deliverance by Radio solely to defendant of electrical appliances made in accordance with drawings

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and specifications furnished by defendant and under patent rights owned by defendant's parent company. The price paid for such appliances was fixed by the agreement subject to variations under certain circumstances. Plaintiff contends that defendant is a manufacturer or producer of such appliances and seeks to recover excise and sales tax thereon.

Held: That the appliances in question were being manufactured on behalf of defendant and for no other purpose and defendant is liable for the excise and sales tax claimed by plaintiff.

INFORMATION exhibited by the Deputy Attorney General of Canada.

The action was tried before the Honourable Mr. Justice Hyndman, Deputy Judge of the Court, at Toronto.

K. E. Eaton for the plaintiff.

P. B. C. Pepper for the defendant.

HYNDMAN, D.J. now (April 18, 1956) delivered the following judgment:

This is an information of Frederick Percy Varcoe, one of Her Majesty's counsel, and Her Majesty's Deputy Attorney General, on behalf of Her Majesty.

The total claim is for $9,672.02, claimed to be due and owing by virtue of the provisions of s-s. (1) of section 80 of the Excise Tax Act (numbered as s-s. (1) of section 23 of the said Act, being chapter 100 of the Revised Statutes of Canada); and s-s. (1) of section 86 of the said Act (numbered as s-s. (1) of section 30 of the said Act, chapter 100 of the said Revised Statutes).

The amount claimed for excise tax is $1,096.58, and for sales tax, $8,675.40.

It was admitted at the time that in the event of liability on the part of the defendant the amount claimed is correct in addition to any interest, penalties and license fees.

It is alleged that the defendant is the manufacturer or producer of electrical appliances adapted to household or apartment use, namely vacuum cleaners and attachments therefor sold under the trade name Model C Rexair Conditioner and Humidifier and delivery by it of such electrical appliances is liable for excise and sales taxes under the provisions of the Excise Tax Act.

It is alleged that during the period from February 1, 1951 to November 30, 1953 the defendant sold and delivered

8,224 of said electrical appliances which had been manufactured or produced by it in Canada, particulars of the sales of which and the excise and sales tax payable in respect of such sales are as follows:

	Units Sold	*Sale Price*	*Sales Tax*	*Excise Tax*
Feb. 1 to Apr. 10, 1951 ..	634	48,152.30	3,131.85	5,872.24
Apr. 11, 1951 to Apr. 8, 1952	3,177	259,371.15	19,212.69	48,031.68
Apr. 9, 1952 to Nov. 30, 1953	4,413	361,585.35	28,926.82	43,390.26
	8,224	$669,108.80	$ 51,271.36	$ 97,294.18

It is claimed that by reason of the sale and delivery of the said 8,224 electrical appliances the defendant became liable for excise taxes totalling $97,294.18 under the provisions of the said Excise Tax Act, and also liable for sales tax in the amount of $51,271.36 under the provisions of the said Act.

In respect of the total amount of excise tax payable, the sum of $96,197.60 has been paid, leaving a balance owing of $1,096.58.

In respect of the total amount of sales tax payable the sum of $42,595.92 has been paid, leaving a balance owing of $8,675.44.

The defendant has neglected and refused to pay the said balance of its liability, although demand was duly made for payment thereof, the refusal being based on the ground that Canadian Radio Manufacturing Corporation Limited, and not Rexair, the defendant herein, was the manufacturer and producer of the said goods.

Plaintiff also claims the sum of $16 for license fees, and interest, and penalties, provided for in said Act.

The fact is that Canadian Radio Manufacturing Corporation Limited (hereinafter called Radio) was the actual manufacturer of the goods in question under agreement with Rexair.

The issue is as to whether or not, under the facts and circumstances of the case, Rexair of Canada Limited (hereinafter called Rexair), and not Radio, must be regarded as the manufacturer or producer, within the meaning of the Excise Tax Act.

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The legislation in question is section 2(*a*)(ii), which reads as follows:

(*a*) "manufacturer or producer" includes

(ii) any person, firm or corporation that owns, holds, claims, or uses any patent, proprietary, sales or other right to goods being manufactured, whether by them, in their name, or for or on their behalf by others, whether such person, firm or corporation sells, distributes, consigns, or otherwise disposes of the goods or not,

Section 23 is as follows:

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

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

(*b*) in Schedule II, at the rate set opposite to each item in the said Schedule.

Section 30(1)(i):

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,

The material facts of the case are as follows. An American company called Rexair Inc., of Toledo in the State of Ohio, held patents for the manufacture of Model C Rexair conditioners and humidifiers complete with standard attachments. Subsequently, another American company, Martin-Parry Inc. of Toledo, acquired all the interests of the first-mentioned company, and later on incorporated a subsidiary in Ontario, called Rexair of Canada Limited, a purely selling organization, whose head office is 13 Adelaide Street East, Toronto, Ontario. The president of Martin-Parry Inc. was also the president of Rexair in Canada.

On the 10th of July, 1950, an agreement was entered into between Rexair of Canada Limited and Radio, in which it was provided that Radio would manufacture for Rexair and deliver to it, f.o.b. Radio's plant, 10,000 Model C Rexair conditioners and humidifiers complete with standard attachments, individually cartonized and enclosed, two

each, in master cartons, at the agreed unit prices of $40.18 for each of the first 3,000 units and $39.36 for each of the balance of 7,000 units, all in accordance with Rexair's drawings and parts lists 920-1 and 920-4, to be furnished without costs to Radio. Clause 1(*a*) states:

> The foregoing unit prices are based on RADIO'S ability to obtain in Canada the required motors at SEVEN and 20/100 ($7.20) DOLLARS each f.o.b. Kitchener, Ont., and to import from the United States the following components at the price per thousand (1,000) indicated below, payable in United States Dollars at Toledo, Ohio, f.o.b. Martin-Parry Corporation Plant at Toledo, Ohio,—

A long list of the components and prices follows in the agreement.

Clause (*b*) reads:

> Any increase or decrease in the cost to RADIO for any or all of the foregoing items shall be reflected in the unit price as to the units to which such costs apply.

Clause (*c*):

> No change in material or design, and no substitution, shall be made in any of the goods manufactured hereunder without prior written approval by REXAIR and mutual agreement of the parties hereto as to any price change, upward or downward, involved therein. In the event of such substitution or change in material or design, payment shall be made by REXAIR to RADIO for any parts thereby made obsolete, at RADIO'S cost thereof.

Clause (*f*):

> REXAIR shall pay the sales tax accruing by reason of the manufacture of goods produced under this agreement, and any other taxes hereafter accruing on account thereof, beyond the sales tax now in force.

Clause 7(*a*):

> The parties hereto mutually agree that REXAIR shall hold RADIO harmless of any and all claims, actions, suits or proceedings for infringement or alleged infringement of any patent in carrying out this contract, and to indemnify RADIO against payment of royalties which may be payable in connection with any such patent; and for all damages, losses and expenses, including legal expense which RADIO may or shall suffer or incur in connection with any such claim, action, suit or proceeding, provided that RADIO shall advise REXAIR of the pendency of any such claims or the institution of any such suit or other proceeding herein contemplated within ten (10) days, and permit REXAIR at its cost and in the name and behalf of RADIO and itself, to defend or adjust any such claim or claims.

Paragraph 8:

> REXAIR is hereby given the right to maintain its inspector in RADIO'S Plant either continuously or from time to time, as REXAIR deems advisable, at its own cost and expense; RADIO shall furnish reasonable facilities for such inspector to conveniently discharge his duties.

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The inspector's authority shall include approval and rejection of parts and/or completed machines which do not conform to REXAIR'S drawings and standard of finish and the test specifications for Canadian manufacture, a copy of which is attached hereto, made a part hereof, and marked Exhibit "B", or the approval of Canadian Standards Association.

Paragraph 9:

If, upon delivery of ten thousand (10,000) completed units herein contracted for, REXAIR and RADIO shall not have reached an agreement for subsequent manufacture by RADIO, REXAIR shall purchase from RADIO f.o.b. RADIO'S Plant whatever quantity of excess parts RADIO shall then have on hand up to a maximum of 500 of each item manufactured by RADIO and 1,000 of each item purchased by RADIO, and which shall pass inspection, at cost of production or procurement, plus five per cent (5%) upon exhibition of costs therefor.

The question to be determined, therefore, is, although Rexair is not an actual manufacturer, but merely a selling organization, whether under the provisions of section 2(*a*)(ii), above quoted, it nevertheless is to be regarded as the manufacturer or producer, or, if Radio only should be regarded as the manufacturer or producer.

The patents in question were the property of Martin-Parry, and not that of the defendant. But there is no doubt in my mind there was an understanding that Radio could use them without any danger of being charged with infringement, Rexair being a subsidiary of the proprietor of the patents.

It was argued that Radio, in whose corporation neither Rexair nor Martin-Parry had any interest, financial or otherwise, was in fact and law the manufacturer or producer, and selling the production in the ordinary way, the price having been fixed by agreement. But such price was subject to variations depending upon certain circumstances affecting the costs of necessary parts and tools. It was not, in my opinion, a straight sale at a firm price in the ordinary course of business.

The opening paragraph of the agreement, to my mind, has much significance. It says, "Radio agrees to manufacture for Rexair and to deliver to it f.o.b. Radio's plant" a certain number of Model C Rexair conditioners, etc., etc. A strict interpretation of these words indicates Radio was acting on behalf of Rexair. The production was entirely and only for the defendant company, and not subject to sale to any other person.

If I am correct in this interpretation of the said agreement, it seems to me one cannot escape the conclusion, examining the said agreement as a whole, that the units in question were being manufactured on behalf of Rexair, and for no other purpose.

In the case of *The King* v. *Ruben Shore* (1), the facts were that Shore, a merchandise distributor, entered into a contract with English and Metcalf of Toronto, known as Leyden Machine and Tool Company, to purchase from the said company twenty-five thousand toy electric irons at the price of forty-seven cents per unit. It was also stipulated that the said company should not in any manner whatsoever either directly or indirectly, through themselves or through any agent, manufacture a similar article of merchandise as mentioned in the agreement, for a period of two years after the completion of the said contract. It was claimed that the defendant, and not Leyden Machine Company, should be regarded as the producer or the manufacturer of the goods sold by him, and consequently liable for the sales tax.

Cameron J. at page 228 said:

> There can be no doubt, I think, that the defendant was the "manufacturer or producer" of the goods within the meaning of section 2(*c*)(ii) of the Act . . .

which is similar to the section above quoted. He goes on to say:

> It is clear from the contract and the evidence that English and Metcalf were manufacturing the toys for the defendant only. The dies to be used in their manufacture were made by English and Metcalf upon the instructions and at the expense of the defendant and they are still the defendant's property. English and Metcalf could not sell the toys to anyone but the defendant, and for a period of two years from the completion of the contract could not manufacture a similar article. At first the toys were painted but later, on the instructions of the defendant, were plated. On several occasions the prices to be paid therefor by the defendant to English and Metcalf were substantially increased beyond the price agreed upon in the contract, due to the fact that the agreed price turned out to be insufficient to meet the costs of English and Metcalf. The defendant held a sales or other right to the goods being manufactured on his behalf by English and Metcalf and therefore, in my opinion, was the manufacturer or producer of such goods.

In my view, the instant case is fundamentally similar to, if not stronger in favour of the plaintiff than the *Shore* decision, and, that being so, following the said decision,

(1) [1949] Ex. C.R. 225.

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which I feel bound to do, the conclusion must be that Rexair is liable for the excise and sales tax as claimed, together with any penalties or license fees provided for in the Excise Tax Act.

There will, therefore, be judgment in favour of Her Majesty for the amount claimed as above mentioned, together with interest, penalties, and license fees provided for in the Excise Tax Act, chapter 100, R.S.C. 1952 as amended, and cost of the action to be taxed.

If any dispute arises as to the amount of interest, penalties or license fees, the matter may be spoken to.

Judgment accordingly.

BETWEEN:

1956

Apr. 3

Apr. 9

ROHM & HAAS COMPANY OF CANADA LIMITED ..... PLAINTIFF;

AND

THE SHERWIN-WILLIAMS COMPANY OF CANADA LIMITED and JOCK FRASER ..... DEFENDANTS.

Practice—Patent—Rules 139 and 143 General Rules and Orders of Exchequer Court—Application for further and better affidavits on production—Refusal to direct determination of question of law before trial.

In an action for infringement of a patent which is denied by defendants who also allege plaintiff's patent to be invalid plaintiff moved for an order directing defendants to file further and better affidavits on production and that defendants be required to produce certain documents for which privilege had been claimed. Defendants submitted that the motion is premature and that before directing production the Court should order that an issue be first determined on a question of law, namely, whether or not certain allegations in the Particulars of Breaches would, if established, constitute infringement.

Held: That as none of the acts of defendants specified in the Particulars of Breaches are admitted by the defendants no question of law should be submitted for determination since it would still be open to the defendants to contend at the trial that the facts were otherwise than as stated in the Particulars.

2. That the issue suggested by counsel for the defendants cannot be satisfactorily determined without evidence as to all of the facts, including, possibly, many or all the facts set out in the documents, the production of which is now said to be premature.

3. That all the issues including that of the validity of plaintiff's patent should be tried together.

MOTION for further and better affidavits on production.

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

D. Watson for the motion.

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

CAMERON J. now (April 9, 1956) delivered the following judgment:

The plaintiff in these proceedings is the owner of Canadian Letters Patent dated October 6, 1953, for an invention relating to a fungicidal agent entitled "Polyvalent Metal Salts of Alkylene Bisdithiocarbamic Acids". It is alleged that the defendants have infringed the plaintiff's rights under the said patent as set out in the Particulars of Breaches. The defendants deny infringement and allege that the claims of the patent relied on by the plaintiff are invalid for the reasons set forth in the Particulars of Objection.

Pursuant to Rule 139 of the General Rules and Orders of this Court, each defendant has filed an affidavit on production of documents. In each case objection is taken to the production of certain documents set out in the Second Part of the First Schedule to the affidavit on the ground that "the said documents are privileged". The privilege is claimed by the corporate defendant in respect of the following documents:

1. Correspondence between the Defendant, The Sherwin-Williams Co. of Canada Limited, and its Solicitors and Patent Attorneys respecting matters at issue in the present action.
2. Inter-departmental correspondence of The Sherwin-Williams Co. of Canada Limited.
3. Correspondence between The Sherwin-Williams Co. of Canada Limited and one of its suppliers.
4. Purchase Orders from The Sherwin-Williams Co. of Canada Limited to one of its suppliers.
5. Invoices of sales between the Defendant, The Sherwin-Williams Co. of Canada Limited, and its customers.

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Those for which privilege is claimed by the individual defendant are as follows:

(*a*) Correspondence between the Defendant, Jock Fraser, and The Sherwin-Williams Company of Canada Limited.

(*b*) Correspondence between the Defendant, Jock Fraser, and his Solicitors.

(*c*) Telegrams to the Defendant, Jock Fraser, from his agent, J. Arsenault.

(*d*) Invoices of sales by the Defendant, Jock Fraser, to his customers since October 6, 1953.

Counsel for the plaintiff now moves for an order that the defendants file further and better affidavits on production and that the defendants be required to produce all those documents for which privilege has been claimed, except those relating to correspondence between the defendants and their respective solicitors.

Counsel for the defendants opposes the motion, mainly on the ground that the motion is premature. His main submission is based on Rule 143, which is as follows:

> If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court or a Judge, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the action, or that for any other reason it is desirable that any issue or question in dispute should be determined before deciding upon the right to the discovery or inspection, may order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

The submission is that the Court, before directing the production of such documents, should order that an issue be first determined on a question of law, namely, whether or not certain allegations in the Particulars of Breaches would, if established, constitute infringement. In order to appreciate this submission, it becomes necessary to set out in some detail the Particulars of Breaches. In para. 1 it is alleged that the corporate defendant sold a fungicide under the trade name of Thiogreen, comprising a new chemical compound included in the plaintiff's patent. Para. 2 alleges that the defendant sold Thiogreen comprising one of the constituents of the plaintiff's new chemical compounds with instructions to combine it with another chemical under conditions which would produce the plaintiff's patented compound. In para. 3 it is alleged that the two constituent elements of the plaintiff's patented chemical compound were sold together by the corporate defendant, accompanied by similar instructions. Paragraphs 4

and 5 are similar to paragraphs 2 and 3 except that they relate to another of the plaintiff's new chemical compounds protected in its patent. Paragraphs 6 and 7 contain similar allegations as to the distribution and sale by the individual defendant as those in paragraphs 1 to 5. Para. 8 alleges that this defendant has also made and used two of the plaintiff's patented chemical compounds. Finally, para. 9 alleges that the acts recited in paragraphs 1 to 8 constitute a joint and several infringement by the defendants of the plaintiff's patent.

It is clear, therefore, that the plaintiff's claim is based on two separate allegations of infringement. The first is said to be a direct infringement of one or other of its patented compounds which it is alleged was sold by the corporate defendant and were distributed or sold and in some cases made or used by the individual defendant.

The second allegation relates to the sale, distribution or use by the defendants of one or both of the constituent elements of the plaintiff's compounds, together with instructions as to the manner in which the plaintiff's compounds should be produced either by adding the necessary additional ingredient or by combining the two ingredients so sold or distributed. It is submitted on behalf of the defendants that this is a case in which the Court should exercise the power conferred on it by Rule 143 and order that an issue be first determined on a question of law, namely, whether or not these sales, together with the accompanying directions, would, if established, constitute infringement; and that in the meantime the Court should reserve the question as to the discovery or inspection of the documents for which privilege is claimed.

In support of this submission, counsel for the defendants referred to the following cases: *Fennessy* v. *Clark* (1); *Carver* v. *Pinto Leite* (2); *Dunlop* v. *Mosley* (3). Reference was also made to 12 Halsbury (Third Edition) 22; Fox on Canadian Patent Law and Practice (Third Edition), page 715; and to Terrell on Patents (Seventh Edition),

(1) (1887) 37 Ch. Div. 184. (2) (1871) 7 Ch. Appeals 90.
(3) (1904) 21 R.P.C. 274.

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ROHM & HAAS CO. OF CANADA LTD. v. SHERWIN-WILLIAMS CO. OF CANADA LTD. et al.

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page 160 ff. Counsel for the plaintiff referred me to *Benno Jaffe et al* v. *Richardson* (1); *Dunlop* v. *Mosley* (*supra*); *Copeland-Chatterson Co.* v. *Hatton* (2); *Innes* v. *Short* (3); and to *Codling* v. *John Mowlen & Co. Ltd.* (4).

After examining these cases, and those referred to in the 1956 Annual Practice, under similar rules in Order 31 of the Rules of the Supreme Court, I have come to the conclusion that this is not a case in which the Court should direct an issue under Rule 143. There may be patent cases in which the pleadings raise a single issue of law such as the validity of the patent or infringement in which it would be proper to first direct an issue to determine the question of law, all essential facts being admitted; in such a case the production of documents relating solely to the question of damages might not be required until the question of liability was first determined, particularly if such documents would disclose trade secrets to a competitor, in which case the production at the earlier stage might be considered oppressive.

This, however, is not such a case. None of the acts of the defendants specified in Particulars of Breaches are admitted by the defendants. Unless and until such acts are admitted, it would be idle to submit a question of law for determination for it would still be open to the defendants to contend at the main trial that the facts were otherwise than as stated in the Particulars. It is now the settled practice of this Court not to grant an application for the hearing and determination, prior to the trial, of a question of law apart from the facts, other than in exceptional cases; otherwise, a multiplicity of appeals and excessive costs would follow. On this point reference may be made to the judgment of Kennedy L.J. in *Codling* v. *Mowlen* (*supra*), where at page 1063 he said:

> I come to this conclusion with some regret that time has been taken up both in this Court and in the Court below upon a point which may have very little purpose so far as the ultimate rights of the parties are concerned. It is one more instance of the difficulty of trying to eliminate from a case everything except the law. It shews what extraordinary care should be taken before this is attempted. There are very few cases which

(1) (1893) 10 R.P.C. 136.
(2) (1906) 10 Can. Ex. C.R. 224.
(3) (1898) 15 R.P.C. 449.
(4) [1914] K.B.D. 1063.

do not depend upon the facts. To admit statements in pleadings may, in certain cases, be both advisable and a saving of expense. But it is very rare that it is possible, with success as regards saving expense to the parties, to have the issues so settled.

In my opinion, the issue suggested by counsel for the defendants cannot be satisfactorily determined without evidence as to all the facts, including, possibly, many or all the facts set out in the documents, the production of which is now said to be premature. To determine that issue, it is necessary to know the precise relationship between the two defendants. Similarly, the issues raised in the pleadings involve the question of what was bought, sold, distributed or used by the defendants, from whom the purchases were made, and, to some extent, to whom they were sold.

The question of infringement involves such further matters as the instructions accompanying the sales made by the defendants and the nature of the chemical reaction upon combining the compounds mentioned.

Moreover, it is clear that any decision made on the issue suggested would not be determinative of the plaintiff's claim. There would still remain the other issue of infringement referred to in para. 1 of the Particulars of Breaches, and the question of the validity of the plaintiff's patent. The result would be unnecessary delay and expense. I am of the opinion that in this case all the issues should be tried together.

The relevancy of the documents in question to the issues raised is admitted. I therefore grant the orders requested in the Notice of Motion, subject to the following limitations:

(*a*) The corporate defendant will not be required to produce its interdepartmental correspondence dated after the inception of the plaintiff's action, if such correspondence was for the purpose of preparation for trial of this action;

(*b*) As the invoices of the defendants' sales to their customers are not before me, I have no knowledge as to their number or contents. The order for their production, therefore, will be subject to any further application to be made on behalf of the defendants within three weeks of this date that one or more of them should not be produced on the

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ground that they contain information not relevant to the issues to be determined at the trial, or are otherwise privileged.

The costs of the Motion will be to the plaintiff in the cause.

Order accordingly.

BETWEEN:

1956

Feb. 20

Mar. 12

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

AND

MONTREAL SHIPPING COMPANY LIMITED and BLUE PETER STEAMSHIPS COMPANY LIMITED ..... DEFENDANTS.

Shipping—Loss of cargo—Contract to transport, discharge and deliver cargo above high water mark—Liability for loss suffered in landing operations.

By a written offer and an amendment thereto made to the King in the right of Canada the defendants, the Blue Peter Steamships Co. Ltd. as contractor and the Montreal Steamships Co. Ltd., as guarantor, agreed for a total payment of $125,000 (the sum to include freight, stevedoring, loading and discharging including the use of any special loading or unloading gear and barges and all other costs and expenses) to transport and deliver aviation gasoline and other cargo to points on Hudson Bay and the Eastern Arctic including the delivery and discharge of 8,000 drums of gasoline "above high water mark at road leading to airstrip at Coral Harbour". Acceptance of the offer and the amendment thereto was authorized by Orders in Council. Pursuant to the undertaking the defendants' schooner arrived at Coral Harbour late in September 1947 at the end of the navigation season. As no docking facilities were available the schooner's captain requested the use of four barges, the property of the Crown, and the aid of a party of Eskimos to bring the cargo ashore. Through the intermediary of the local representative of the Department of Trade and Commerce, the request was granted. Toward the close of the unloading operations, due to rough weather and the leaky condition of one of the barges, two of them capsized and 290 drums of gasoline were lost. After payment to defendants of the agreed sum in an action brought by the Crown to recover the loss the defendants pleaded that their undertaking was to deliver the cargo at ship's side but not otherwise to discharge it and that any loss occurred after the cargo had been

delivered in accordance with the contract as understood and interpreted by the parties; that the landing of the cargo was performed by the agents of the plaintiff acting in performance of their duties while under its direction and control; that the barges were kept and operated by the plaintiff for the purpose of bringing cargo ashore and that the loss was caused by the negligence of the plaintiff's agents.

Held: That the general rule that a shipowner's liability is discharged by delivery of cargo at ship's side is susceptible of being varied or extended by pertinent stipulations in the contract or charterparty and the contracting parties are at liberty to stipulate any special terms and conditions they please as to the manner of discharging the cargo. Here the contractor undertook not only to "deliver" in the legal sense of the word but if necessary to provide and pay for the use of any special crew, gear and barges. The captain, the legal representative of the defendants in the performance of the contract, was in charge and control of the unloading job and the plaintiff was entitled to recover from the defendants the amount of the loss.

ACTION for loss of cargo.

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

Jean Tellier, Q.C. for the plaintiff.

Leon Lalande, Q.C. for the defendants.

DUMOULIN J. now (March 12, 1956) delivered the following judgment:

In this information, the Deputy Attorney General of Canada, on behalf of Her Majesty the Queen, seeks to recover from defendants, jointly and severally, a sum of $10,173.49 (as per amendment), for contractual damages suffered.

On June 16, 1947, Montreal Shipping Co., Ltd., acting also for the co-defendant, Blue Peter Steamships Ltd., offered the Department of Trade and Commerce to transport a miscellaneous cargo, comprising *inter alia* 8,000 full drums of gasoline, between Halifax, N.S., and points on Hudson Bay and the Eastern Arctic, the remotest being Coral Harbour on Southampton Island. This offer was duly accepted on July 15, 1947 after authorization by Order in Council P.C. 2588 (not produced but undenied by defendants). In pursuance of Order in Council P.C. 2836, of July 18, 1947, the contract was amended so that the defendant Blue Peter Steamships Co. Ltd., became the contractor, the performance of the contract being guaranteed by Montreal Shipping Co. A lump sum of $125,000

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constituted the freight that His late Majesty agreed to pay the contractor. Shipping was to commence during July, 1947, complete delivery to follow as soon as possible thereafter in the same year. For reasons undivulged, the schooner *City of New York,* operated and controlled by defendants, cast anchor off Coral Harbour only on September 24, 1947, as the navigation season in those sub-Arctic seas was drawing to a close.

No docking facilities whatever exist at Coral Harbour so that unloading operations, from ship's side to shore, necessitate the use of lighters or scows. Captain L. Kenedy, master of M.V. *City of New York,* undermanned with a crew of eight men, and having no auxiliary transports at his disposal, requested the enlistment of an Eskimo unloading party and the help of four barges belonging to the Department of Trade and Commerce. Amongst other items, the freightage for Coral Harbour included 8,000 drums of gasoline destined for the R.C.A.F. base, some six miles inland. The requisite assistance, namely natives and scows, being procured through the intermediary of an employee of Trade and Commerce, C. W. Kitson, landing operations began on September 25, ending on the 30th of that month. On September 28 and 30, as detailed below, two barges capsized, with an ensuing loss of 303 drums of fuel. Plaintiff consequently seeks indemnification for:— (*a*) 12,470 gallons of gasoline, the amended and agreed value of which is: $3,329.49; (*b*) 290 drums admittedly worth: $2,320 at $8 per unit; (*c*) $104 paid to the Eskimos for salvage of 13 drums, uncontested; (*d*) freight paid to defendants for 68 undelivered tons of gasoline: $4,420, categorically denied in fact and law. It is hardly necessary to point out that the former admissions are restricted to the arithmetical accuracy of the figures and market value of the merchandise and prices listed.

The lump freight price was paid to contractors in three instalments of respectively $60,000 on or about September 11, 1947; $50,000 in October of the same year; and $15,000 on April 17, 1948. It was only on February 14, 1949, that a claim for $10,834.40 was sent to Montreal Shipping Co. on behalf of the Royal Canadian Air Force (Exhibit C). In a letter dated May 10, 1949, filed as Exhibit 2, the contractors repudiated all liability.

Essentially, the moot point centers upon the interpretation of the contract, Exhibit 1, as setting forth the reciprocal obligations of the parties thereto and their extent.

According to the information, the instrument of June 16, 1947, and its subsequent amendment, dated July 5, clearly obliged the ship owners to "deliver and discharge above the high water mark on the road leading to the air strip at Coral Harbour" 8,000 full drums of gasoline. Defendants counter that the offer and acceptance speak for themselves and deny all allegations of plaintiff's paragraph 1 which would not "conform strictly to the said offer and acceptance". The implication flowing from defendants' stand is, in effect, that their contractual undertaking was to deliver the cargo at ship's side but not to otherwise discharge it. Hence, their contention "that any loss suffered by the plaintiff occurred after the cargo had been delivered . . . in accordance with the contract as understood and interpreted by the parties . . ." (statement of defence, paragraph 11). Hence, also, their other statement (paragraph 10) "that the landing of cargo from the M.V. *City of New York* at Coral Harbour was performed by agents . . . of the Plaintiff acting in the performance of their duties as such and that the Eskimos and others engaged in transporting the cargo . . . to the landing stage were hired by and were entirely under the direction and control of the said agents . . ."

Defendants further allege (paragraph 6) that the four barges previously mentioned were "kept and operated by the Plaintiff at Coral Harbour for the purpose of bringing cargo ashore, there being no dock or wharf facilities there and that it was well understood by the parties to the said contract that without such facilities cargo could not be landed at Coral Harbour . . ."

Finally, defendants contend that the loss suffered by plaintiff was caused by the negligence and lack of care of her agents in failing to properly navigate the delivery barges or in using one with too much bilge water in her or, again, in failing to tow a loaded barge before a breeze had time to turn into a gale.

The plaintiff's attitude in reply to the statement of defence may be summarized in paragraph 4, where it is said that "the unloading of the cargo to shore was the responsibility of the defendant and that whoever took part in the

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said unloading did so at the exclusive request and under the direction, control and responsibility of the master of the ship, in the name and under the sole authority of the defendant, for the purposes and in the interest of the latter."

The issue being joined on this statement of facts, three points remain to be elucidated: (*a*) the meaning and portent of the contract as amended; (*b*) the responsibility accruing from the use of lighters at Coral Harbour and the hire of an Eskimo unloading party; (*c*) did the payment by plaintiff of the freight price before any formal claim was presented to defendants constitute an acknowledgment of the satisfactory execution of the contract?

(*a*) The third paragraph on page 2 of the acceptance of tender, which has been alternately termed "the contract" and is tantamount to a charterparty, Exhibit 1, reads:

> Cargo discharged at the following points shall be placed as follows:— . . . above high water mark at road leading to air strip at Coral Harbour . . .

On page 2, paragraph 3, of the amendment dated July 5 we also find the undergoing paragraph, which affords no difficulty of interpretation, at least to my mind:

> His Majesty agrees to pay the contractor for the above services the total lump sum of $125,000, the said sum to include freight, stevedoring, loading and discharging, including the use of any special loading and unloading gear and barges, port charges, piloting, special crew and all other costs and expenses; . . .

I fail to see, in the presence of such plain and easily understood expressions as "cargo discharged above the high water mark at road leading to air strip" and "the total lump sum will include . . . loading and discharging, including the use of any special loading and unloading gear and barges, . . . special crew", how any other conclusion might be reached but that the contractors did in fact undertake, not merely to deliver in the legal sense of the word, but also to discharge the cargo and, if necessary, to provide and pay for the use of any special crew, gear, and barges. Surely experienced mariners, as the defendants are presumed to be, inquired or were told about conditions obtaining at Coral Harbour before affixing their signature to the contract, and the result of this inquiry is clearly shown in the special obligations assumed by the contractors.

(*b*) It has been said that the ship concerned in the present case, viz. M.V. *City of New York*, had a very scanty crew of only eight hands. Mr. C. W. Kitson, who on September 24, 1947 represented the Department of Trade and Commerce at Coral Harbour, testified at trial that Captain L. Kenedy, realizing the shortage of his personnel and the lateness of the season, asked for the use of the government barges, and also for some additional man power in order to speed up unloading.

Mr. Kitson swears that what he undertook to do was done only at the urging of Captain Kenedy, without assuming any obligation, and never giving to understand that the Department of Trade and Commerce would in any way be responsible. Moreover, Kitson cautioned Kenedy against using one of the four barges that leaked rather badly. Mr. Kitson, with the assistance of the Hudson Bay post agent, obtained native help, an improvised crew of Eskimos, but never presumed giving any directions or controlling in any manner the landing operations. As a matter of fact, on the two fateful days, September 28 and 30, this witness was not at Coral Harbour.

On the two last mentioned days, to quote from a copy of the log filed as Exhibit 3, unfortunate incidents occurred, occasioning the loss of about 303 full drums of gasoline. The first mishap, namely that of September 28, according to Captain Kenedy's entry in his journal, was attributable to the fact

> . . . that the barge had a lot of bilge water in her and she would take a big list to her heavier side and the drums slid off. After a launch took her in tow she got beam to and slid half her cargo overboard.

The entry for September 30 reads:

> Loaded 100 on leaky scow, 200 on each of others . . . The last one was leaking bad and they left it here for the nite. During the nite she half filled, listed on her side and lost all her load but one drum.

Yet, whatever the causes of these incidents, they can have no bearing on this decision if Captain Kenedy, as the legal representative of defendants and in the performance of the contract, remained in charge of and kept full control over the unloading job. Here again the plain words of the contract entrust contractors with this obligation.

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Captain Kenedy, it may be interesting to note, was not heard at trial, at the start of which an application was made to have him examined later if found necessary, but this demand was waived as the case ended.

(*c*) The president of Montreal Shipping Co. Ltd., Mr. Knowles, at the time general manager, admitted in court that the two first instalments of $60,000 and $50,000 requisitioned on September 11 and October 7, 1947, did not include any deliveries made at Coral Harbour. The last payment on or about April 17, 1948, applied not only to the Coral Harbour part of the contract but also to the entire composite movement that included five ships. I am unable to agree with defendants' statement that these payments, in the absence of formal acknowledgment, should be construed as a waiver of plaintiff's claim. The complicated and interlocking machinery of government accountancy must be borne in mind, and I think that the necessary allowances should be extended in the present contingency.

I mentioned above that a formal claim was filed on February 14, 1949 with defendants (Exhibit 3), who in their reply dated May 10, 1949 (Exhibit D) did not even allude to the payment of the freight price as constituting an acknowledgment.

At trial it was admitted that $3,329.49 represented the true value of 12,470 gallons of gasoline lost; that $2,320 compensated for 290 empty drums of gasoline at $8 apiece; and also that a sum of $104 had been paid to the Eskimos for the salvage of thirteen drums after the departure of M.V. *City of New York*.

Wing Commander Arthur Tinkler, R.C.A.F., then at Coral Harbour, checked the loss shortly after October 30 and stated at trial that it amounted to 290 drums of gasoline.

The last and largest amount sought by plaintiff is no less than $4,420, which would be equivalent to the transportation costs of 68 undelivered tons of gasoline. The present contract was made for a lump freight price, without any itemization being given for the footage or cubic rate of any of the miscellaneous items comprising the cargo. I asked the learned counsel for plaintiff about the method used in computing this claim. He explained that this sum was

arrived at by dividing the total freight price of $125,000 by the quantity of gasoline drums to be delivered at Coral Harbour, 8,000, subsequently multiplying the quotient by 290, thirteen drums having been salvaged. Arithmetically, this may be true but affords me very little ground for accepting such a figure as the correct transportation rate for 290 drums of gasoline in a lump price contract, with no specific tariff or charge for any chattel carried.

After due consideration, it seems hard to deny that the shipping of 68 tons of gasoline contained in three hundred drums should entail some pecuniary appreciation, notwithstanding Mr. Knowles' testimony to the contrary. The difficulty lies in the fact that no definite basis of calculation appears in the evidence. With some reluctance, I am of opinion that, should I apportion the loss sustained by the Crown on that score at five hundred and eighty dollars ($580), or two dollars per drum, I would still remain within reasonable bounds. Should either party be dissatisfied with this finding, each will be at liberty, within a period of 60 days, to ask for and obtain a reference before the Registrar of this Court.

The learned counsel for defendants, in his argument, contended that the general rule governing the discharge of cargoes could not be superseded by the contract under examination, and he referred the Court especially to Carver's *Carriage of Goods by Sea,* 9th Edition (1952) at page 703, and to Halsbury's *Laws of England,* Volume XXX, No. 683. These quotations must be supplemented by a more extensive perusal of those authors. Halsbury and Carver are at one in holding that the discharge of cargoes is regulated by maritime rules or by the custom of the port only in the absence of contract or charterparty expressing the intentions of the parties.

I quote Halsbury, Volume XXX, pages 532-533, No. 684:

> 684. The position of the parties may be materially modified by the terms of their contract, or by the custom of the port of discharge . . . On the other hand, the shipowner's duty may not cease at the ship's side; he may be required to place the goods in the lighter alongside the ship or to deliver them on to the quay without any assistance from the consignee. Where the goods have to be delivered on to the quay, the shipowner must

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provide, at his own expense, any lighters that may be necessary; he may also be bound to stack the goods, and is not necessarily discharged by delivering them on to the nearest available part of the quay.

Halsbury, *op. cit.*, pages 365 and 366, No. 542, goes on to say:

> SUB-SECT. 4.—*The Construction of Charterparties.*
>
> (*i.*) *General Principles of Construction.*
>
> 542. A charterparty, like any other mercantile document, is to be construed so as to give effect, as far as possible, to the intention of the parties as expressed in the written contract. The rules of construction to be applied are the same as for any other written instrument, and may be shortly stated as follows, namely:—
>
> (1) The words used are to be understood in their plain, ordinary, and popular meaning, unless the context shows that the parties, for the purposes of their contract, intended to place a different meaning upon them, or unless, by the usage of some particular trade, business, or port, they have to such an extent acquired a secondary or technical meaning that it is clearly the meaning intended by the parties.

Carver at page 703, under the heading "Shipowner Generally Discharged by Delivery at Ship's Side", has this to say:

> Generally speaking, the shipowner's obligation is performed by a delivery at the ship's side, or, at most, on a quay. And if the consignee sends lighters for the goods, a delivery into the lighters, to his agents or servants, as a rule terminates the shipowner's responsibility. But his responsibility may be extended by custom.

Such a liability, I venture to think, is also susceptible of being varied or extended by pertinent stipulations in the contract or charterparty. In order to obtain a fair knowledge of Carver's opinion in the matter, it is necessary to read the entire chapter entitled "Mode of Discharge", comprising pages 700 to 703. It will be seen this authority corroborates Halsbury in holding that the contracting parties are at liberty to stipulate any special terms and conditions they please, as to the manner of discharging the cargo.

The contract entered into in the present case manifestly evidences the common intentions of both parties and, therefore, is in full accord with the doctrine advanced by Halsbury and Carver.

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For the preceding reasons, I decide that plaintiff is entitled to recover from defendants, jointly and severally:

(*a*) the price of 12,470 gallons of gasoline, valued at 26·7 cents per gallon	$3,329.49
(*b*) the value of 290 drums at $8 apiece	2,320.00
(*c*) $104 paid to the Eskimos for the salvage of thirteen drums	104.00
(*d*) costs of transportation, 60 tons of undelivered gasoline, paid by defendants and assessed at $2 per drum, 290 drums	580.00
	$6,333.49

Defendants jointly and severally will, therefore, pay to the plaintiff the sum of $6,333.49 with costs to be taxed in the usual way, the right of both parties to a reference before the Registrar of the Court regarding item (*d*) duly reserved during 60 days.

Judgment accordingly.

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Oct. 13

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Mar. 6

BETWEEN:

ACCESSORIES MACHINERY LIMITED APPELLANT;

AND

DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE and CANADIAN ELECTRICAL MANUFACTURERS' ASSOCIATION ..... RESPONDENTS.

Revenue—Customs and Excise—Electric motor imported as replacement for electric shovel—Whether dutiable under tariff item 445g: "electric motors and complete parts thereof, n.o.p." or item 427a: "All machinery composed wholly or in part of iron or steel, n.o.p., and complete parts thereof"—Customs Tariff Act, R.S.C. 1952, c. 60, Schedule "A", Tariff items 427a, 445g—Customs Act, R.S.C. 1952, c. 58, ss. 44, 45.

The appellant imported from the United States a motor as a replacement to be installed in an electric shovel. The appraiser classified the motor under tariff item 445*g*: "Electric motors and complete parts thereof, n.o.p.". The appellant contending it was classifiable under tariff item 427*a*: "All machinery composed wholly or in part of iron or steel, n.o.p. and complete parts thereof", requested a review by the Deputy Minister who upheld the appraiser. The Tariff Board unanimously dismissed an appeal to it and the present appeal, by leave granted under s. 45 of the *Customs Act*, is on the question of

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law: "Did the Tariff Board err as a matter of law in deciding that a part, namely a 125 h.p. open ball bearing vertical shaft motor for P & H Model 1,500 5-cubic yard electric shovel is dutiable under Tariff item 445*g* rather than Tariff Item 427*a*?"

It was agreed on appeal that the motor was imported for the purpose of installing it as a replacement motor in an electric shovel and that the electric shovel (in which the imported motor was to be installed) as a complete unit would have been classifiable under item 427*a* and the appellant conceded that if the phrase "not otherwise provided for" did not appear in item 445*g* it would have been properly classifiable under that item but it contended that while the imported article was an electric motor, item 445*g* refers only to motors "not otherwise provided for" and that the motor as part of an electric shovel was otherwise provided for, namely as part of an electric shovel, and therefore within the ambit of "complete parts of the foregoing" in item 427*a* and that the Tariff Board has misinterpreted the meaning of the phrase by giving it an unwarranted and limiting effect.

Held: That the appeal being on a question of law only, the issue was not whether the motor was properly classifiable under Item 445*g* but whether the Board erred as a matter of law in deciding that it was. *Deputy Minister of National Revenue for Customs and Excise* v. *Parke Davis & Co.* [1954] Ex. C.R. 1 at 20.

2. That there was material before the Board from which it could reasonably decide, and it was within its powers to decide as it did, that as Parliament had seen fit to establish an *eo nomine* classification for electric motors it must have intended to classify such articles in a special category separate and apart from the general and residuary items of machinery or parts thereof in tariff item 427*a*.

APPEAL under the *Customs Act* from a decision of the Tariff Board. The Canadian Electrical Manufacturers' Association at the hearing of the appeal was added as a party respondent.

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

G. F. Henderson, Q.C. for the appellant.

K. E. Eaton for the Deputy Minister of National Revenue.

F. R. Hume, Q.C. for Canadian Electrical Manufacturers' Association.

CAMERON J. now (March 6, 1956) delivered the following judgment:

This is an appeal from a declaration of the Tariff Board, brought under the provisions of s. 45 of the *Customs Act*, R.S.C. 1952, c. 58. It relates to an importation by the appellant of a 125 h.p. open ball bearing vertical shaft

motor for P & H Model 1500, 5-cubic yard Electric Shovel, imported from Milwaukee, U.S.A., under Montreal Customs Entry No. 121526-C on February 3, 1954.

The appraiser classified the motor under Tariff Item 445*g* which reads as follows:

> Electric motors, and complete parts thereof, n.o.p. . . .

The appellant, being of the opinion that the motor should have been classified under Tariff Item 427*a*, requested the Deputy Minister to review the appraiser's classification. That item is as follows:

> 427*a*. All machinery composed wholly or in part of iron or steel, n.o.p., of a class or kind not made in Canada; complete parts of the foregoing.

* * *

The Deputy Minister on August 10, 1954, made his finding as follows:

> The electric motor, is, in my opinion, more specifically provided for in Tariff Item 445*g* than as "complete parts" under Tariff Item 427*a*, and the departmental ruling is hereby confirmed.

From that decision an appeal was taken to the Tariff Board. By its declaration of March 1, 1955, the Board unanimously dismissed the appeal. Leave to appeal to this Court was granted by Fournier J. on June 27, 1955, on the following question of law:

> Did the Tariff Board err as a matter of law in deciding that a part, namely, a 125 h.p. open ball bearing vertical shaft motor, for P & H Model 1500 5-cubic yard Electric Shovel, imported under Montreal Customs Entry No. 121526-C, February 3, 1954, is dutiable under tariff item 445*g*, rather than tariff item 427*a*?

At the hearing of this appeal, I added the Canadian Electrical Manufacturers' Association as a party respondent. That association was represented at the hearing before the Tariff Board but due to an inadvertence was not added as a party in the Notice of Appeal. It is entitled by virtue of s-ss. (1) and (2) of s. 45 of the *Customs Act* to appear on this appeal, and with the consent of its counsel and all parties, it was made a party respondent.

It is not in dispute that the motor in issue was imported for the purpose of installing it as a replacement motor in an electric shovel. It is agreed also that the electric shovel (in which the imported motor was to be installed) as a complete unit would have been classifiable under Item 427*a*.

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The contention of the appellant is that while the imported article is an electric motor, Item 445*g* refers only to motors "not otherwise provided for"; that the motor as part of an electric shovel is otherwise provided for, namely, as a part of an electric shovel, and therefore within the ambit of "complete parts of the foregoing" in Item 427*a*.

The decision of the Board is stated as follows:

> It is the opinion of the Board that the contention of the appellant as to the influence of the "n.o.p." in item 427*a* is correct: The "not otherwise provided for" does *not* apply to that portion of the item which follows the semicolon and which reads: "complete parts of the foregoing." Further, it is our opinion that a "part" (incontrovertibly recognizable as such) of or for a machine, which machine itself is classifiable under item 427*a*, would qualify for the benefits of the item whether or not such part is of a class or kind not made in Canada.
>
> Electric motors are in their very nature generally intended to be incorporated in or attached to machinery or equipment. They would, therefore, unless elsewhere provided for, be considered to be parts for such machinery.
>
> However, since the legislators have provided for electric motors, *eo nomine*, in tariff item 445*g*, we must conclude that this classification is intended to override any "basket" provision such as "parts" in tariff item 427*a*; otherwise, tariff item 445*g* is virtually ineffective. As regards the "n.o.p." provision in tariff item 445*g*, that must be deemed to exclude from that item such electric motors as are elsewhere provided for as *motors*. It is conceivable that there might come into being an electric motor of such unique shape or design as to make it, for tariff purposes, more specifically a *part* of a particular machine than an electric motor. n.o.p., but exceptional instances of this nature do not, in our opinion, override the general proposition above: that item 445*g* covers all electric motors not elsewhere specifically provided for *as motors*.
>
> Accordingly, the Appeal is dismissed.

It is conceded by the appellant that if the phrase "not otherwise provided for" did not appear in Item 445*g*, the imported motor would have been properly classifiable under that item. The submission, however, is that the Board misinterpreted the meaning of the phrase by giving it an unwarranted and limiting effect. The submission is based on the wording used in the decision, namely, "as regards the 'n.o.p.' provision in Item 445*g*, that must be deemed to exclude from that item such electric motors as are elsewhere provided for *as motors*. . . . That Item 445*g* covers all electric motors not elsewhere specifically provided for *as motors*." It is argued that by their decision they have interpreted Item 445*g* as if it read: "Electric motors, and complete parts thereof, not otherwise provided for *as*

motors." The addition of the words "as motors" is said to be unwarranted and erroneous. It is also said that the declaration of the Board has the effect of eliminating the phrase "n.o.p." entirely from Item 445*g*.

The declaration of the Board in this case follows that made by it on July 6, 1953 (A-269) on a reference by the Deputy Minister under s. 51 of the former *Customs Act*. It appears from that declaration that prior thereto it had been the rather general practice of the Customs authorities for duty purposes to segregate electric motors (other than built-in motors) entering Canada as components of (or in connection with) machines and machinery. The opinion of the majority of the Board in that case was that such machines as constituted single physical units are dutiable as entireties without segregation of the motor component, whether such motor was "built-in" or "attached." All the members of the Board were in agreement with the final clause of that opinion, namely:

> This is not, of course, to suggest that motors imported separately for repair or replacement for such machines would be dutiable other than under the tariff item appropriate to the motor, as such.

The declaration of the Board in the instant case follows logically from that expressed in the last clause which I have just quoted.

What then did the Board mean when it stated that in interpreting the provisions of Item 445*g*, the "n.o.p." must be deemed "to exclude from that item such electric motors as are elsewhere provided for *as motors*". Did it mean that the "n.o.p." provision in that item would be effective only in cases in which other tariff items used the specific words "electric motors", as suggested by counsel for the appellant? If that were so, I would be inclined to agree with him that its use of the words "as motors" would result in drastically limiting the effects of the phrase "not otherwise provided for". It was stated in argument that other than in Item 445*g*, the specific words "electric motors" appear in but one tariff item.

In my opinion, however, that is not the proper meaning to attribute to the Board's use of "as motors". The Board, with a full knowledge of the details of the Customs Tariff, would not have been likely to reach any such conclusion. It seems to me that when one considers the nature of the

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problem before the Board, the evidence adduced, the arguments submitted to them, and their declaration as a whole, that they meant something quite different than the interpretation above suggested.

The issue before the Board was, as stated at the outset of its declaration, to be, "Is the replacement motor imported for installation in an electric shovel, a part of the shovel, or an electric motor 'n.o.p.'?" In answering that question, the Board was required to consider the provisions of both Tariff Items 445*g* and 427*a*. As the imported article was an electric motor and as an *eo nomine* classification was provided for "electric motors" in Item 445*g*, it was logical for them to conclude that the imported article, *prima facie* at least, would be properly classifiable under that item. The next step to be taken was to determine the effect of the addition thereto of "n.o.p." and to determine whether elsewhere in the tariff electric motors were otherwise provided for. That involved, in this case, a direct reference only to Item 427*a*.

In considering the provisions of Item 427*a* and as noted above, the Board came to the conclusion that the "n.o.p." therein did not apply to "complete parts of the foregoing" and "that a 'part' (incontrovertibly recognizable as such) of or for a machine, which machine itself is classifiable under Item 427*a*, would qualify for the benefits of the item whether or not such part is of a class or kind not made in Canada." Had their conclusion been otherwise on this point, it is clear that the imported electric motor would have been classifiable only under Item 445*g* as electric motors are named therein and are manufactured in Canada.

The Board was also aware that in its declaration dated July 6, 1953 (A-269), it had stated in its majority decision that such machines as constitute single physical units are dutiable as entities without segregation of the motor component. It knew, therefore, that had the imported electric motor been imported with and as a part of the electric shovel, the entire entity would have been classifiable under Item 427*a*.

Evidence was submitted to the Board that electric motors are in their very nature generally intended to be incorporated in or attached to machinery or equipment. The

Board found that to be the fact and so stated in its declaration. Notwithstanding the argument of counsel for the appellant that that is not always the case, I am not at liberty in this appeal to disturb any findings of fact made by the Board. It was that finding of fact which led to its conclusion that a declaration that the electric motor was classifiable as a "part" of machinery under Item 427*a* would have made Item 445*g* virtually ineffective.

The Board also considered the nature of the tariff items in question. It will be noted that in Item 445*g* electric motors are classified *eo nomine;* the term is clear and quite unambiguous. Moreover, it is not subject to any qualifications such as "of a class or kind not made in Canada". It covers all electric motors of every sort and kind "n.o.p.". On the other hand, Item 427*a* is a "basket" or residual item intended to bring within its reach all machinery composed wholly or in part of iron or steel not otherwise provided for. The Customs Tariff includes a great number of pieces of machinery referred to *eo nomine* or by reference to their "end-use", but quite obviously it would be impossible to specify with particularity each individual item of machinery by name or by end-use. It was therefore necessary to use this type of "basket" item (and also Item 427) so as to include all machines not elsewhere provided for.

It is clear from the Board's decision that in solving this problem it came to the conclusion that Parliament in setting up a tariff item for "electric motors"—which are machines in themselves—dealt with them in a specific way by giving them an *eo nomine* classification, thereby removing them from the more general and unspecific designation of "all machinery . . . n.o.p., and complete parts of the foregoing".

Weighing the specificity of the words "electric motors" in Item 445*g* against the very general nature of the words "all machinery . . . and complete parts of the foregoing" found in Item 427*a*, the Board concluded that the *eo nomine* classification in the former was intended to override a "basket" or "catch-all" provision such as "all machinery . . . and 'parts'." In my opinion the Board, in interpreting the effect to be given to "n.o.p." in Item 445*g*, came to the conclusion that "electric motors" would not by reason of

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the "n.o.p." be excluded from the specific classification of "electric motors" unless in other items of the tariff such words were used as would clearly indicate that electric motors—that is, machinery providing motion—were included therein. That, of course, could be done by the use of the specific words "electric motors" as in Item 409*q*(2); or by such words as "including motive power" as in Item 410*a*(ii). In the Board's opinion there was nothing in the words "parts of the foregoing" in Item 427*a* which in any way pointed directly to "electric motors"; the word "parts" was therefore inadequate to destroy or overcome the *eo nomine* classification that Parliament had seen fit to confer on "electric motors". That interpretation of the Board's use of "as motors" accorded with the submissions made by counsel for the Minister before it, and reading the declaration as a whole, I think that is what they intended.

Counsel for the appellant, however, submits that if the Board's declaration be interpreted in that manner, the result would be that in certain "end use" items where neither "electric motors", "motive power", nor words of similar import are used—but in which it is clear that *all* the specified machinery is to be put to the named "end use" —electric motors will be excluded. He referred to the case of *General Supply Company of Canada* v. *Deputy Minister of National Revenue, Customs and Excise* (1), in which I decided that the "n.o.p." in the item there referred to was apt to exclude therefrom not only an *eo nomine* classification, but also "end use" items as well. If the declaration in the instant case was intended to exclude all "end use" items, I would be inclined to think that the Board had placed too limited a meaning on "n.o.p." in Item 445*g*. I do not think it necessary, however, to consider that point as it was not directly before the Board and need not be determined in this case. The expression "end use" item is not defined in the Act but as I understand it, it refers to certain tariff items in which special treatment is given to imported goods because of the industry or activity in which they will be used—such as logging, farming and the like. Item 427*a* is not an "end use" item in the sense that I understand that expression; it is rather a "catch-all" or

(1) [1954] Ex. C.R. 340 at 347.

"basket" item, there being no reference therein to the ultimate use to which the "machinery" will be put.

After considering with great care the argument submitted by Mr. Henderson, counsel for the appellant, I am unable to reach the conclusion that the Board was in error in deciding as it did, namely, that the electric motor imported should be classified as dutiable under Tariff Item 445*g*.

In considering an appeal to this Court from a declaration of the Tariff Board, it is always necessary to keep in mind the distinction between the duties cast on the Board in deciding which item of the tariff is applicable to the goods imported, and those placed on this Court when hearing an appeal from such a declaration. The distinction was noted by the President of this Court in *Deputy Minister of National Revenue for Customs and Excise* v. *Parke Davis & Co. Ltd.* (1). The appeal to this Court being on a question of law only, the issue is not whether the imported motor was properly classifiable under item 445*g*, but whether the Board erred as a matter of law in deciding that it was. As stated in the *Parke Davis* case, "If there was material before the Board from which it could reasonably decide as it did, this Court should not interfere with its decision even if it might have reached a different conclusion if the matter had been originally before it."

In my opinion there was material before the Board from which it could reasonably have decided as it did. It attributed special weight to the fact that Parliament had seen fit to establish an *eo nomine* classification for "electric motors" and reached the conclusion that Parliament must therefore have intended to classify such articles in a special category, separate and apart from the general and residuary items of machinery or parts therefor in Item 427*a*. In a somewhat difficult problem, the Board was endeavouring to ascertain from the words used in the Customs Tariff what was the true intent of the items, as they were required to do by s. 2(2) of the *Customs Act*, R.S.C. 1952, c. 58, which is as follows:

2(2). All the expressions and provisions of this Act, or of any law relating to the Customs, shall receive such fair and liberal construction and interpretation as will best ensure the protection of the revenue and the attainment of the purpose for which this Act or such law was made, according to its true intent, meaning and spirit.

(1) [1954] Ex. C.R. 1 at 20.

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It seems to me that it was within their powers to determine on the material before them that the attainment of the purpose for which a special tariff item relating to electric motors was established and the protection of the revenue would be best ensured by deciding as they did. To interpret the limiting provisions of the "n.o.p." in Item 445*g*, as I think they have done, has the result of retaining the effectiveness of that item instead of rendering it "virtually ineffective" as the Board stated would have been the case had it decided otherwise. Its interpretation of the "n.o.p." in that item does not result in eliminating it from the item itself, as suggested by counsel for the appellant, but allows it to be effective in cases where, in other items, it is clear that electric motors are intended to be included. Examples of the former may be found in Item 409*q*(2)—"Electric motors incorporated in or attached to . . . agricultural implements or agricultural machinery"—and in Item 410*a*(ii)—"Trucks or tractors, self-propelled, mounted on wheels or endless tracks, including *motive power* . . ."

A further argument was submitted to the Board by counsel for the Minister, namely, that the electric motor which was imported was by itself "Machinery, composed wholly or in part of iron or steel;" and since electric motors were provided for *eo nomine* in Item 445*g*, the presence of the "n.o.p." provisions in Item 427*a* excluded the motor from the latter item. The Board did not refer to that submission in its declaration and I do not know, therefore, what weight, if any, it placed thereon. A similar argument was submitted to me on the appeal.

There is perhaps much to be said in favour of that submission. Electric motors are undoubtedly "machinery composed wholly or in part of iron or steel" and are manufactured in Canada. The Board might perhaps have reached the same conclusion on the basis of that submission, but in view of my finding on the main point in dispute, I do not find it necessary to consider it or the other submissions made by counsel for the Minister.

For these reasons my answer to the question of law submitted is "No". The appeal therefore fails and will be dismissed.

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There remains only the question of costs. In accordance with the principles established by the President of this Court in *The Goodyear Tire and Rubber Co. of Canada Ltd., et al.* v. *The T. Eaton Co. Ltd., et al.* (1), the appellant will be required to pay only one set of costs, namely, those of the Deputy Minister, counsel for whom had the main conduct of the case against the appellant. The other respondent will pay its own costs.

Judgment accordingly.

1953

Sept. 30
Oct. 1-2, 5-7

1955

Dec. 30

BETWEEN:

O'CEDAR OF CANADA LIMITED .....PLAINTIFF;

AND

MALLORY HARDWARE PRODUCTS LIMITED .....} DEFENDANT.

Patents—The Patent Act, 1935, S. of C. 1935, c. 32, ss. 35, 47—Invention to be defined in claim—Anticipation—Statutory presumption of validity—Onus of showing lack of inventive ingenuity on person attacking patent—Test of correctness of specification—Permissible to look to specification and drawings to determine meaning of word "obtuse" in claim 6—Evidence of happenings in another country cannot affect validity of claims in Canadian patent—Construction of re-issued patent.

The plaintiff sued for infringement of its patent for improvements in a mop of the self-wringing type. The validity of the patent was attacked for anticipation and lack of subject matter on the ground that the invention as claimed was broader than as described and was merely a workshop improvement over the prior art, and infringement was denied.

Held: That the fact that there is a correct and full description of the invention and its operation or use in the specification will not avail the patentee unless the invention so described is defined in one of the claims for it is only the invention as claimed that falls to be considered.

2. That the invention as defined in claim 6 was not anticipated.

3. That in view of the statutory presumption in favour of the validity of a patent the onus of showing that the invention covered by it was merely an obvious workshop improvement lies on the person attacking the patent.

4. That the simplicity of a device is not proof that it was obvious and that inventive ingenuity was not required to produce it.

(1) [1955] Ex. C.R. 229 at 240.

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5. That where there has been a substantial and useful advance over the prior art the Court should not give effect to an attack on the validity of the patent covering it on the ground that the advance was an obvious workshop improvement unless it is clearly so. In view of the statutory presumption in favour of the patent the Court should not make the onus of showing its invalidity an easy one to discharge.

6. That the combination which the inventors finally worked out was the result of careful analysis of the prior art and thoughtful study and experimentation. It enabled them to produce a more efficient mop than any mop previously in existence. The combination involved a substantial exercise of inventive ingenuity and was not an obvious workshop improvement.

7. That it is essential that the Court should be fair to the inventors. There may be faults of expression in a patent specification but they do not necessarily affect the validity of the patent for a patent specification is not an exercise of composition to be judged by the canons of grammar or rhetoric. The specification is addressed to persons skilled in the art and the test of the correctness of the specification, including the claims with which it ends, is whether such persons, having the common knowledge of the art, would know without doubt exactly what the invention as defined in the claim is. It should be construed fairly.

8. That it is permissible to look to the specification and the drawings for the purpose of construing the meaning to be assigned to the word "obtuse" as used in claim 6 and to determine the degree of obtuseness of the angle referred to in the claim.

9. That, in any event, the degree of obtuseness of the angle is defined in the claim itself.

10. That claim 6 is not broader than the invention described in the specification and that it and claim 5 are valid.

11. That evidence of a patent application made after the date of the patent in suit but prior to the date of the re-issue of the patent is not admissible.

12. That what happened in another country under a different system of law cannot affect the validity or invalidity of the claims in a Canadian patent, and evidence of an application for a United States patent and a declaration of interference by the United States Patent Office is inadmissible.

13. That when a patent has been re-issued on a petition for re-issue the Court should look at the re-issued patent only in the light of its disclosures and claims without regard to how any changes came to be made in it as the result of the petition for re-issue.

14. That the defendant's mop was an infringement of the plaintiff's right to the invention defined in claim 6.

ACTION for infringement of patent.

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

H. G. Fox, Q.C. for plaintiff.

Christopher Robinson, Q.C. and *R. H. Saffrey* for defendant.

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

THE PRESIDENT now (December 30, 1955) delivered the following judgment:

This is an action for infringement of the plaintiff's rights under Letters Patent No. 477,364, dated September 25, 1951, and issued to it as the assignee of Nathaniel B. Greenleaf and Leonard C. Webster, the co-inventors of the invention covered by it. The patent was a re-issue of Patent No. 459,142, dated August 23, 1949.

The invention relates to improvements in mops, particularly of the self-wringing type. The specification sets out its principal object as follows:

the principal object of the invention is to provide a mop of simplified and extremely economical construction which will enable the wringing of the mopping element or sponge to be more expeditiously and efficiently accomplished than with previous mop constructions to effectively flush the dirt out of the mopping element rather than force it deeper into the mopping element as occurs in present self-wringing mops.

and further objects as follows:

A further important object is to eliminate the expensive double-hinge arrangement of the wringing element previously required.

A further object of importance is to provide a mop in which the mopping element can be quickly secured to the head of the mop and will be positively retained against accidental dislodgement or it can be readily removed and replaced with a minimum of effort.

Another object is to provide a mop which will be extremely convenient to use and which will not scratch or mar the furniture or other woodwork during use.

A still further object contemplated is to provide a mop of the type referred to which will eliminate scuffing of the floor by the mop head even when the handle is inclined at a small angle to the flooring when mopping under furniture or other objects.

The principal feature of the invention is set out in what counsel for the plaintiff called the consistory clause as follows:

The principal feature of the invention consists in providing a specially curved presser or squeezing plate secured by a single hinge to the rear of the mop head and shaping the mopping element carried by the mop head to incline rearwardly whereby the mopping element and presser plate when swung to the wringing position are in co-operative relation to provide a positive squeezing of the mopping element in a direction from back to front upon further movement of the presser plate to flush the dirt accumulating under normal mopping at the forward edge of the mopping element back out the front thereof.

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Other features of the invention are then described as follows:

A further important feature is to shape the mopping element to increase the volume of material at the forward edge where it is most susceptible to wear to increase its life.

Another feature is to provide a positive wringing action which, while effectively removing water and dirt from the mopping element, will not tear or damage the material thereof.

Another feature consists in providing a positive interlock between the mopping element and the mop head.

A further feature consists in forming the mopping element to overlap the mop head to provide a cushioning bumper surface around the mop head and reinforcing the forward edge of the mopping element to prevent this portion from yielding under sharp impact to expose the hard surfaces of the mop head.

A still further feature of importance consists in providing a hinge structure for the presser plate in which the hinge thereof is arranged *above* the mop head and clear of the flooring when the mop is used under furniture or other obstacles with the handle inclined at a small angle to the flooring.

The figures in the drawings accompanying the specification are described in detail but it will be sufficient to give a brief description of the principal parts of the mop and the manner in which they are arranged. The mop is a wet mop most commonly used for cleaning floors and is a back presser mop, as distinguished from the front presser mops that were on the market. Apart from the handle there are three principal parts, the mop head plate, the mopping element or sponge and the presser plate which is the wringing element. The mop head plate, which I shall call the head plate, is a flat rectangular metal plate to the top of which there is secured at its centre a screw socket to receive a wooden handle, the socket and handle extending upwardly at approximately a right angle to the plane of the plate. The mopping element or sponge is of a highly absorbent material, preferably cellulose. It is in the form of a quadrangular block with its upper surface slabbed or bevelled rearwardly and its front and rear surfaces at right angles to the bottom. The block is thus thinner at the back than at the front. The sponge is attached to a fabric with a suitable heat-resistant adhesive, such as cellulose acetate, and the sponge with its adhering fabric is attached to the underside of the head plate by screws in such a way that it can easily be removed when it is worn out and a new sponge put in its place. The sponge with its adhering fabric extends

beyond the edges of the head plate along its entire perimeter thus acting as a cushion when the mop is pushed against furniture or any other wood substance. The presser plate, which forms the wringing element of the mop, is of arcuate or angular formation and is a metal grid with spaced openings and re-inforcing ribs. The manner in which it is connected with the head plate so that it can perform the wringing function intended for it may be described briefly. In the first place, it is hinged to the head plate at the back. This is why the mop is called a back presser mop. A rolled extension of the edge near the head plate forms hinged barrels which interleave with hinge barrels formed by a rolled extension of the back edge of the head plate. These interlocking barrels receive the hinge pintle and so form the hinge which connects the presser plate with the head plate. It is also to be noted that the hinge thus formed is above the head plate. There is an important part of the presser plate which is described as the pivot connecting portion. This is formed by bending or curving the edge of the presser plate near the hinge downward so that the sponge pressing portion of the presser plate is above the hinge. The bent down edge is the pivot connecting portion. The angle formed by the pivot connecting portion and the sponge pressing portion is an obtuse angle that is approximately a right angle. The edge of the presser plate farthest from the hinge is also bent or curved downward to form a lip. There is a handle to the presser plate. When the presser plate is not in use it is kept in place behind the handle of the mop by means of a spring at the hinge.

The manner in which the plaintiff's mop, which is known in the trade as the Chan Mop, operates may be briefly described. When the sponge is wet it becomes very soft and pliable. As the operator pushes the mop forward the bottom of the front face of the sponge tends to fold under so that when the mop is raised from the floor to be wrung the water and dirt gathered up during the mopping is largely at the bottom of the front face of the sponge that has been folded under and on the bottom. When the mop is ready to be wrung to get rid of the water and the dirt accumulated during the mopping the presser plate is swung from its

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position behind the handle of the mop into wringing position. As pressure is applied to the handle of the presser plate the thin back edge of the sponge is first compressed and then under continued pressure the squeezing action continues progressively towards the front edge and flushes the accumulated dirt out the front face of the sponge. Then, as the specification puts it:

> Due to the inclined position of the mopping element and the curvature of the presser plate as the squeezing action continues still further the pressure applied will approach a substantially uniform value throughout the mopping element, and in the finalized position assumed by the presser plate the mopping element will be thoroughly and substantially uniformly wrung and substantially all of the dirt will be flushed therefrom.

Before I attempt to consider the validity of the plaintiff's patent I should set out the state of the prior art. I shall refer to the various kinds of mops mentioned in the evidence and the disadvantages to which each was said to be subject. My enumeration is not necessarily in order of importance or time of invention or production. I shall refer first to the so-called Miracle Mop. This was the only presser mop in use in Canada prior to the plaintiff's invention but there was a similar mop in use in the United States known as the Lux Mop. The Miracle Mop was a front presser mop, that is to say, the presser plate was hinged to the head plate at the front so that the wringing action was from the front of the sponge to the back. It had several disadvantages. It was complicated in design, awkward to use because of its double hinge action and expensive to produce. Moreover, the presser plate, being at the front of the handle when not in use, tended to hit and scratch furniture when the mop was pushed under it. It was also said that when the mop was used under furniture the back of the head plate tended to scratch the floor. There were also serious disadvantages due to the front to back wringing action. As the presser plate was brought over to compress the sponge it came into contact with its front face just below the point of contact of the sponge with the head plate and pulled the front down thereby putting a strain on the bonding between it and the fabric to which it adhered. But this was not the most serious disadvantage of the front presser mop. In the mopping action the bottom of the front face of the sponge folded under and the greatest accumulation of dirt was on the bottom of the

sponge near its front face and on the front face near its bottom. As the presser plate was brought into action it impinged, as already stated, on the front face of the sponge and then on the bottom and tended to force the accumulated dirt back into the interstices of the sponge so that it was left there with danger of rot and decomposition of the cellulose. Moreover, the continued pressure of the presser plate tended to cause part of the sponge to extend beyond the area of pressure which left it not subject to pressure. Moreover, the wringing action was not uniform or complete.

The next mop construction was that shown by United States Patent No. 2,196,837, dated April 9, 1940, issued to L. P. Rader. Here part of the sponge was enclosed in a holder and the balance was between two plates extending downward one of which was called a backing plate and the other a presser plate. When the presser plate was brought into action it squeezed that part of the sponge that lay between the two plates. There was no evidence that this mop even came into use. The construction disclosed in the patent showed serious defects. The wringing action would be very inefficient. The only part of the sponge that would be subject to pressure would be that between the backing plate and the presser plate. The part within the holder and the part extending beyond the plates would remain saturated with water which would cause the sponge to rot. There would be no flushing of accumulated dirt out the front of the sponge and by reason of the fact that only about 25 per cent of the sponge content extended beyond the plates the backing plate would scratch the floor. If a mop were made according to the patent it would be useless in practice.

These were the only constructions of which Mr. Webster had any knowledge when he returned to the plaintiff's employ after the war but there were other mops to which Mr. Greenleaf referred. One of these was the Dufold Mop. In this the head plate was in two sections with the cellulose sponge attached to both and the pressure was exerted vertically downward. It was not possible to get a wringing action that would flush the accumulated dirt out. On the contrary, when the downward vertical pressure to wring the

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sponge was exerted it had the effect of folding the back section on the front one with the sponge between them. It was not possible to bring the sections into parallel relationship with one another and consequently the sponge could not be squeezed effectively. Moreover, the bringing of the two sections of the presser plate together caused the sponge to fold together with the result that the squeezing action, instead of flushing the accumulated dirt out of the sponge, had the effect of trapping it between its folds.

Mr. Greenleaf also referred to German Patent No. 611,571, dated March 30, 1935, issued to Theodor Sendler. The mop covered by this patent was a back presser mop in that the presser plate was hinged to the back of the head plate, but the hinge was below the head plate so that it would tend to scrape the floor. Moreover, the angle between the head plate and the presser plate, which was almost flat, was acute so that when the presser plate was swung into action it would not be possible to subject the whole sponge to uniform and complete wringing. Moreover, the action of the presser plate would force the sponge forward so that the front part of it would extend beyond the head plate and would not be compressed. In the result the Sendler mop would not produce an effective flushing and wringing action. There was the further disadvantage that it was complicated in design and difficult and costly to produce.

Finally, reference was made to United Kingdom Patent No. 411,314, dated June 7, 1934, issued to H. Blume. The drawings show that the presser plate moved down on the sponge in a vertical plane and in squeezing the sponge trapped the accumulated dirt. Moreover, much of the sponge would be left uncompressed. In addition, the construction was complicated.

Thus it was clear that the prior art did not show any mop that gave a complete flushing and wringing action and the known mops had the defects that I have mentioned. The evidence discloses that the inventors, first Mr. Greenleaf and then Mr. Webster as well, deliberately set themselves the task of devising a mop that would give a complete flushing and wringing action and, at the same time, be free from the defects of the known mops. Mr. Greenleaf first showed an interest in the subject in 1937 when he looked at

certain patents. The construction disclosed by them showed certain faults. Rubber sponges were used, the hinging connections were complicated and difficult, the hinges scratched furniture, the action of the presser plate distorted the sponge, the flushing action was inefficient and the wringing of the sponge was incomplete. In 1939 the study of the subject was suspended until after the end of the war and not renewed until 1947. Up to that time, as I understand the evidence, the only specific decision made was to discard the use of a rubber sponge and settle upon a cellulose one because of its greater compressibility and absorptive capacity. In 1947, when Mr. Webster had returned to the plaintiff's employ, the study of the subject was renewed. This became intensive in 1948. Some 166 patents were examined and the faults and defects of all known mops were ascertained. The inventors then sought to devise a mop that would flush the accumulated dirt out the front face of the mop, effect a complete wringing of the sponge without rupturing or tearing it, function without scratching furniture or the floor and be simple in design and inexpensive to make. This was the problem to which they set themselves. Models of mops were made from time to time as experiments were made. The evidence is that the experiments were completed about September 15, 1948, and the application for patent made on December 30, 1948. The patent was issued on August 23, 1949, a petition for re-issue was made on September 23, 1951, and the patent was re-issued on September 25, 1951. Manufacture of the mop was started in February, 1949, and it was first put on the market in April, 1949.

I shall now set out what the inventors did to solve the problem before them without attempting to enumerate their steps in the order of their occurrence. They hinged the presser plate at the back of the presser plate in order to have a back to front pressing action so that the reservoir of water in the sponge would be able to flush the dirt accumulated by the sponge during the mopping operation out the front face of the sponge instead of being forced back into it as in the case of the front presser mops such as the Miracle Mop or being trapped inside it as in the case of the vertical pressure Dufold Mop. Then because of the high

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compressibility of the cellulose sponge they hinged the presser plate above the head plate so that when the mop was being pushed forward the presser plate would not scratch the floor. The adoption of the cellulose sponge with the capillary action of water in it made complete wringing of it essential. Even if only 5 or 10 per cent of the water was left in the sponge it would tend to mildew and rot. Consequently, the wringing action must be such that it would not only flush the accumulated dirt out the front face of the sponge but would also wring it so that it would be as dry as possible. To accomplish this complete wringing the inventors did three things. In the first place, they bent the edge of the presser plate that was near the hinge downward, the bent down part being called the pivot connecting portion, so-called because it connected the hinge with the sponge-pressing portion of the presser plate. The angle between the pivot connecting portion and sponge pressing portion was obtuse but approximately a right angle. They also bevelled the sponge block rearwardly so that it was thinner at the back than at the front. And, finally, they bent the front edge of the presser plate downward to form a lip. The combined effect of providing the pivot connecting portion and bevelling the sponge was that as the progressive flushing of accumulated dirt out the front face of the sponge continued as the presser plate was swung into action the sponge pressing portion of the presser plate finally became practically parallel with the head plate and it was possible to subject all the content of the sponge between the head plate and the sponge pressing portion of the presser plate to uniform and complete compression without rupturing it or pulling it away from its adhesion to the head plate. This uniform and complete compression of the sponge was not possible either with a front to back presser or even with a back to front presser where the angle between the presser plate and the head plate was acute. Nor would the wringing be as efficient if the sponge block was not bevelled. The provision of the lip was an additional contribution to complete wringing. As the back to front pressing action proceeded the pressure on the sponge tended to cause the front of it to extend slightly beyond the two plates so that the extended part escaped the final full pressure. The purpose of the lip was to gather

in this extended part and contain it within the area of uniform and complete compression. Finally, by having the sponge and its adhering fabric extend slightly beyond the edges of the head plate the inventors provided a cushion or buffer when the mop was pushed against furniture or other wooden surfaces.

The invention as disclosed by the specification is a combination of elements and an arrangement of parts to accomplish certain results. I have already described the several elements in it, namely, the head plate, the handle secured to it, the bevelled sponge and the presser plate, the last named consisting of the pivot connecting portion, the sponge pressing portion and the lip, with the angle between the pivot connecting portion and the sponge pressing portion being obtuse but approximately a right angle and the presser plate being hinged at the back of the head plate and above it. The invention is a combination of these elements with the parts arranged to produce the following results: firstly, a progressive flushing of the sponge from back to front by means of the presser plate being positioned at the back of the head plate so that the reservoir of water in the sponge is used to flush the accumulated dirt out its front face; secondly, a complete wringing action by means of the hinge between the presser plate and the head plate being positioned above the head plate and the pivot connecting portion being positioned so that the initial point of contact between the presser plate and the sponge is at its back bottom corner and the presser plate being disposed so that in the final wringing position it will be substantially parallel with the head plate and the provision of a lip at the front edge of the presser plate to gather in the sponge and subject all of it to wringing; thirdly, the prevention of rupture of the sponge by bevelling it to the back so that as the presser plate is swung into position there will not be a large volume of sponge at the back to be forced out of position; fourthly, the prevention of scratching the floor or furniture by positioning the hinge above the head plate; and, fifthly, a reduction in the cost of manufacture by reason of simplification of construction.

The utility of the invention is not open to dispute. The inventors had before them the objective of devising a mop that would give a perfect flushing and wringing action.

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Whether such a result has been achieved or not need not be decided but the fact is that the plaintiff's mop did give a more effective flushing and wringing than any other mop had done and was substantially free from the defects to which other mops were subject. This is established by the evidence of Mr. Greenleaf and Mr. Webster and was admitted by Mr. F. W. Mallory, the defendant's secretary-treasurer, on his examination for discovery. He agreed that the features of the plaintiff's mop combined to make an efficient mop, more efficient than anything he had seen before.

Here I should refer to the fact that there is no attack on the sufficiency of the disclosures in the specification. The invention has been correctly and fully described, as required by s. 35 of *The Patent Act, 1935*, and that is also true of its operation and use as contemplated by the inventors. The specification is addressed to persons skilled in the art. In my opinion, such persons could not have any doubt about the invention that was disclosed in the specification. It was the one described by counsel for the plaintiff as I have sought to set it out.

But, of course, it will not avail the plaintiff that the inventors made the invention so described or that there was a correct and full description of it and its operation or use in the specification, unless it is defined in one of the claims for it is only the invention as claimed that falls to be considered. It may well happen that an inventor has made a useful invention but loses the benefit of his contribution to the public by reason of the fact that he has not properly described his invention or has not validly claimed it. There is an outstanding illustration of this fact in the case of *Minerals Separation North American Corporation* v. *Noranda Mines, Ltd.* (1). Consequently, it is necessary to consider the claims. The claims in suit are claims 1 to 6 inclusive, 8 and 9 which read as follows:

1. A mop including a handle and a head, a compressible mopping element releasably secured to said head, and a presser plate hinged at the rear of said head and normally held above and in angular relation to said mopping element and swingable to compress said mopping element progressively from back to front to flush said mopping element towards the front.

(1) [1947] Ex. C.R. 306; [1950] S.C.R. 36; (1952) 69 R.P.C. 81.

2. A device as claimed in claim 1 in which the hinge of said presser plate is arranged above the mop head.

3. In a mop including a handle and a head secured to said handle and presenting a front edge forward of said handle in relation to direction of mop advance under normal mopping action, and a rear edge at opposite side of said handle, a compressible sponge block releasably secured to said head and presenting at the front of said head a dirt accumulating face of substantial depth and at the rear of said head a rear face, and having a bottom working face presenting at the rear an edge displaced below said head, a presser element pivoted adjacent the rear edge of said head to swing about an axis fixed relative said head and above said bottom working face and at right angles to said handle said presser element having a pivot connecting portion and a sponge pressing portion in angular relation to said pivot connecting portion and spaced thereby from said axis a distance less than the thickness of said sponge at the rear face, and an operating handle for said presser element to swing said element against the undersurface of said sponge to compress said sponge against said head with said sponge pressing portion first contacting said sponge at said rearward edge below said head and displacing said latter edge forwardly and progressively compressing said sponge from rear to front while leaving the front face of said sponge substantially unobstructed to flush dirt accumulations out said front face.

4. In a mop including a handle and a head secured to said handle and presenting a front portion forward of said handle in relation to direction of mop advance under normal mopping action, and a rear portion at opposite side of said handle, a compressible sponge block releasably secured to said head and presenting at the front of said head a front dirt accumulating face and at the rear of said head a rear face, and having a bottom working face presenting at the rear an edge displaced below said head, a presser element pivoted at the rear of said head adjacent the head thereof to swing initially rearwardly of said handle about an axis fixed relative said head and above said bottom working face and at right angles to said handle against the undersurface of said sponge to compress said sponge against said head while leaving the forward face of said sponge substantially unobstructed, and means maintaining said presser element in an upright mopping position adjacent said handle, said presser element being bent to provide an obtuse angle rearwardly of said handle when in said upright mopping position adjacent the pivot axis and at a distance therefrom less than the thickness of said sponge at the rear face whereby upon swinging said presser element rearwardly said sponge is engaged initially at the rear lower edge below said head and compressed progressively from back to front to force water stored in reservoir in said sponge out said substantially unobstructed forward face.

5. A device as claimed in claim 4 in which said presser element has a right angularly turned forward edge, to engage said front sponge face following initial compression of the rear of said block to maintain said block from excessive forward displacement.

6. In a mop including a handle and a head, a compressible sponge block bevelled rearwardly to have a thickness at the rear less than the thickness at the front releasably secured to said head, a presser element pivoted at the rear of said head adjacent the edge thereof to swing initially rearwardly about an axis fixed relative said head against the undersurface of said sponge to compress said sponge against said head while leaving the forward face of said sponge substantially unobstructed,

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means maintaining said presser element in an upright mopping position against said handle, and an operating handle for said presser element, said presser element being bent to provide an obtuse angle rearwardly of said mop handle when in said upright mopping position adjacent the pivot axis and at a distance therefrom less than the thickness of said sponge at the rear whereby upon swinging said presser element rearwardly said sponge is engaged initially at the rear lower corner and compressed progressively from back to front to force water stored in reservoir in said sponge out substantially unobstructed forward face.

8. A mop including a handle and a head secured to said handle and presenting a front portion forward of said handle in relation to direction of mop advance under normal mopping action and a rear portion at opposite side of said handle, a sponge block releasably secured to said head at the underside thereof and having a front and rear in respect to said head and a bottom working face presenting at the rear an edge displaced below said head, a presser plate having a pivotal connection at the rear of said head to swing about an axis fixed relative said head and above said bottom working face and substantially at right angles to said handle, and means to maintain said presser plate in a mopping position above and in angular relation to said block, the relative disposition of said pivotal connection and presser plate positioning said plate upon swinging movement from said mopping position to first engage only the rearward lower block edge below said head, and to thereafter compress said block in a direction forwardly and against the underside of said head progressively from rear to front of said head and including the front of said block to flush said block towards the front.

9. A mop including a handle and a head secured to said handle and presenting a front portion forward of said handle in relation to direction of mop advance under normal mopping action and a rear portion at opposite side of said handle, a sponge block releasably secured to said head at the underside thereof and having a front and rear in respect to said head and a bottom working face presenting at the rear an edge displaced below said head, said block having a maximum vertical dimension at the front, a presser plate having a pivotal connection at the rear of said head to swing about an axis fixed relative said head and above said bottom working face and substantially at right angles to said handle, and means to maintain said presser plate in a mopping position above and in angular relation to said block, the relative disposition of said pivotal connection and presser plate positioning said plate upon swinging movement from said mopping position to first engage only the rearward lower block edge below said head, and to thereafter compress said block in a direction forwardly and against the underside of said head progressively from rear to front of said head and including the front of said block to flush said block towards the front.

On the argument it became clear that claim 6 is the important one. This is the claim on which counsel for the plaintiff primarily relied. If it should fall it would seem unlikely that the validity of the other claims could be established. On the other hand, if it stands the patent is valid and it will not be necessary to consider, in this case at any rate, the validity of the other claims, even if some of them may also be valid.

Two attacks on the patent were made by counsel for the defendant. It was submitted that it was invalid for anticipation and for lack of subject matter. I shall deal first with the defence of anticipation. In support of it counsel relied entirely on the Sendler patent. It is, therefore, the only prior publication that need be considered. If it was not anticipatory of the plaintiff's invention the defence of anticipation fails.

It is admitted, of course, that several elements in the combination constituting the invention were old. For example, the use of cellulose sponge was not new, nor was the bevelling of the sponge. And there was the back to front presser plate in the Sendler patent. But the question for consideration is not whether the elements were new but whether the combination of elements with its arrangement of parts was novel or was anticipated by the Sendler patent.

The requirements that must be met before an invention should be held to have been anticipated by a prior patent or other publication have been discussed in many cases. In *The King* v. *Uhlemann Optical Co.* (1) I summarized the effect of the leading decisions on the subject and made the following statement:

> The information as to the alleged invention given by the prior publication must, for the purposes of practical utility, be equal to that given by the subsequent patent. Whatever is essential to the invention or necessary or material for its practical working and real utility must be found substantially in the prior publication. It is not enough to prove that an apparatus described in it could have been used to produce a particular result. There must be clear directions so to use it. Nor is it sufficient to show that it contained suggestions which, taken with other suggestions, might be shown to foreshadow the invention or important steps in it. There must be more than the nucleus of an idea which, in the light of subsequent experience, could be looked on as the beginning of a new development. The whole invention must be shown to have been published with all the directions necessary to instruct the public how to put it into practice. It must be so presented to the public that no subsequent person could claim it as his own.

And, at page 158, I made particular reference to the statement of Lord Dunedin in *Pope Appliance Corporation* v. *Spanish River Pulp and Paper Mills Ld.* (2), when he put the test as follows:

> Would a man who was grappling with the problem solved by the Patent attacked, and having no knowledge of that patent, if he had had the alleged anticipation in his hand have said, "That gives me what I wish"?

(1) [1950] Ex. C.R. 142 at 157. (2) (1929) 46 R.P.C. 23 at 52.

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and later, at page 56:

> Does the man attacking the problem find what he wants as a solution in the prior so-called anticipations?

It is to be assumed, of course, that the man to whom Lord Dunedin referred was a person skilled in the art to which the alleged anticipating patent related and had the common general knowledge of that art. The test is whether the said patent gave such a man what he wished and whether he could find in it a solution of the problem with which he was grappling.

If the test to which I have referred is applied to the question whether the Sendler patent was an anticipation of the invention covered by the patent in suit, as defined in claim 6, it is obvious that it was not. The claim does not read on Sendler and could not have been included in the Sendler patent. It could not have given the person grappling with the problem what he wished and he could not have found a solution of his problem in it. Even if the bevelling of the sponge was old and the idea of the back to front presser was disclosed by the Sendler patent the idea of combining the bevelled sponge with a back to front presser was new. And if there should be any doubt of that the idea of adding to this combination the provision of the pivot connecting portion and positioning the hinge above the head plate was certainly new. I am assuming, of course, that claim 6 covers the combination I have referred to. On that assumption I find very important differences between the Sendler invention and the invention defined in claim 6. In the first place, the latter is simpler in construction. This, by itself, would be sufficient to distinguish it. Moreover, the Sendler patent did not have a bevelled sponge or a pivot connecting portion. And the arrangement of the elements was different. For example, the hinge in the Sendler patent was below the head plate, the presser plate was straight and the angle between the head plate and the presser plate was acute so that it was not possible to bring the two plates into parallelism and accomplish the progressive and complete wringing achieved by the plaintiff's invention. The differences were so great that it could not reasonably be said that claim 6 had been anticipated by

the Sendler patent. Indeed, counsel for the defendant did not attempt to do so. He agreed that the Sendler patent could not be regarded as anticipatory of claim 6. His contention of anticipation was confined to other claims. For example, he submitted that Sendler read expressly on claims 1 and 8, that Sendler was also anticipatory of claim 9 in that the only difference between it and Sendler was the use of the bevelled sponge and that, consequently, Sendler gave a person skilled in the art what he wished since such person would know about the bevelled sponge. The contention, therefore, was that since claim 9 was merely a combination of Sendler plus the known bevelled sponge Sendler was really anticipatory of it. In view of the conclusion to which I have come regarding the validity of claim 6 I need not deal with the important question involved in the contention relating to the anticipation of claim 9 by Sendler nor discuss the difference between common general knowledge and public knowledge beyond making the observation that there was no evidence that the use of a bevelled sponge was part of the common general knowledge of the art. Nor need I deal with counsel's comments with regard to claims 2, 3 and 4. I shall refer to claim 5 later. Under the circumstances, I find that the invention covered by claim 6 was not anticipated by the Sendler patent and that the defence of invalidity for anticipation fails.

The attack on the patent on the ground that it is invalid for lack of subject matter was, in a sense, a twofold one. It was contended, for example, that claim 6 does not include all the elements of the combination disclosed in the specification and does not, therefore, accomplish the results sought by the inventors with the result that it is broader than their invention and bad on that account. Then it was urged that even if claim 6 is co-terminous with the invention, that is to say, that it does define the invention disclosed by the specification it is invalid for lack of subject matter in that if there was an advance over the prior art it was an obvious workshop improvement and did not involve the exercise of any inventive ingenuity. I shall deal with the charge of lack of inventiveness first.

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Counsel for the plaintiff contended that the prior art did not show the progressive back to front flushing action accomplished by the invention, that the problem of complete wringing was not solved until the inventors solved it, that there was less risk of scratching the floor and furniture in the case of the plaintiff's mop than with any prior mop and less likelihood of rupturing the sponge and that economy of manufacturing had been achieved. He submitted that a combination that produced these advantages over what was previously known indicated an exercise of inventive ingenuity sufficient to support the patent.

I had occasion in *The King* v. *Uhlemann Optical Co.* (1), to consider whether an advance made in the art there under discussion was an obvious workshop improvement or involved the exercise of inventive ingenuity. At page 161, I made the following statement:

> There is a presumption of validity in favor of the patent by reason of its issue and the onus of proving that it is invalid for lack of invention is on the person attacking it, . . . The onus is not an easy one to discharge. No one has really succeeded in defining, apart from the statutory definition, the difference between an advance that is obvious as a workshop improvement and one that involves inventive ingenuity. One of the difficulties is that there is no objective standard of invention. What one person might regard as inventive another would consider as obvious.

While it is true that thus far no one has been able to lay down a precise rule for distinguishing between a patentable advance in an art and an obvious workshop improvement and the determination may be a subjective one in view of the lack of an objective standard the Court is not left wholly dependent on a subjective approach. The statutory presumption of validity of the patent in favour of the patentee and his assigns cannot be too strongly stressed. S. 47 of *The Patent Act, 1935,* S. of C. 1935, c. 32, provides:

> 47. Every patent granted under this Act shall be issued under the signature of the Commissioner and seal of the Patent Office. The patent shall bear on its face the date on which it is granted and issued and it shall theerafter be *prima facie* valid and avail the grantee and his legal representatives for the term mentioned therein, . . .

This statutory presumption of validity is of considerable importance to the Court. Instead of having to determine that the invention covered by the patent in suit does not

(1) [1950] Ex. C.R. 142.

involve the exercise of inventive ingenuity, which is presumed until the contrary is shown, its task is the simpler one of deciding whether the person attacking the patent has succeeded in showing that the invention covered by it was merely an obvious workshop improvement.

Consequently, there is help to be found in decisions indicating what should not be considered as a negation of inventive ingenuity. As examples of what I have in mind I refer to decisions to the effect that the simplicity of a device is not proof that it was obvious and that inventive ingenuity was not required to produce it. This negation of a common attack on the validity of a patent is found in many cases. An early leading statement was made in *Vickers, Sons & Co. Ltd.* v. *Siddell* (1), where Lord Herschell said, at page 304:

> If the apparatus be valuable by reason of its simplicity, there is a danger of being misled by that very simplicity into the belief that no invention was needed to produce it. But experience has shown that not a few inventions, some of which have revolutionized the industries of this country, have been of so simple a character that when once they were made known it was difficult to understand how the idea had been so long in presenting itself, or not to believe that they must have been obvious to every one.

And there was the statement of Lord Davey in *Patent Exploitation, Ld.* v. *Siemens Brothers & Co., Ld.* (2):

> It may be that the invention is a small one, but slight differences in these cases sometimes produce large results.

A similar opinion was expressed in *Giusti Patents and Engineering Works, Ltd.* v. *Rees* (3), where it was held that a patent for an invention, however simple, if it was not obvious and not a mere workshop improvement on a well-known tool, should be supported. In *Pope Appliance Corporation* v. *Spanish River Pulp and Paper Mills Ld.* (4), Viscount Dunedin put the matter positively when he said, at page 55:

> It must also be considered that there may be invention in what, after all, is only simplification.

And in *Electrolier Manufacturing Co. Ltd.* v. *Dominion Manufacturers Ltd.* (5), Rinfret J., as he then was, said of the device there in question, at page 441:

> Though simple, his device cannot be said to have been obvious.

(1) (1890) 7 R.P.C. 292.
(2) (1904) 21 R.P.C. 541 at 549.
(3) (1923) 40 R.P.C. 206.
(4) (1929) 46 R.P.C. 23.
(5) [1934] S.C.R. 436.

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In *The Rheostatic Co. Ltd.* v. *Robert McLaren & Co., Ltd.* (1), The Lord Justice Clerk (Aitchison) said, at page 117:

> Again the simplicity of the device does not exclude invention; on the contrary inventive ingenuity may, and often does, consist in finding a simple and, when discovered, the apparently obvious solution of the problem.

I might also in this connection refer to the statement of Lord Russell of Killowen in *Non-Drip Measure Co. Ld.* v. *Stranger's Ld., et al.* (2):

> Whether there has or has not been an inventive step in constructing a device for giving effect to an idea which when given effect to seems a simple idea which ought to or might have occurred to anyone, is often matter of dispute. More especially is this the case when many integers of the new device are already known. Nothing is easier than to say, after the event, that the thing was obvious and involved no invention.

And Lord MacMillan's statement in the same case, at page 143:

> It might be said *ex post facto* of many useful and meritorious inventions that they are obvious. So they are, after they have been invented.

Thus it seems to me that when there has been a substantial and useful advance over the prior art the Court should not give effect to an attack on the validity of the patent covering it on the ground that the advance was an obvious workshop improvement unless it is clearly so. In view of the statutory presumption in favour of the validity of the patent the Court should not make the onus of showing its invalidity an easy one to discharge.

Apart from the presumption of validity to which I have referred there is confirmation of what I have said in the frequently repeated statement that a mere scintilla of inventiveness is sufficient to support a patent.

In the present case I have no hesitation in expressing the opinion that the plaintiff's mop showed an advance over the prior art that was not an obvious workshop improvement. On the contrary, the combination which the inventors finally worked out was the result of careful analysis of the prior art and thoughtful study and experimentation. It enabled them to produce a more efficient mop than any mop previously in existence. In my opinion, the combination involved a substantial exercise of inventive ingenuity.

(1) (1936) 53 R.P.C. 109. (2) (1943) 60 R.P.C. 135 at 142

Certainly, the defendant has failed to show that the advance made by it was an obvious workshop improvement. In my opinion, the defence of invalidity for lack of inventiveness plainly fails.

In view of this finding I need not deal with the evidence of commercial success adduced on behalf of the plaintiff beyond saying that, in my opinion, it does not contribute anything to my finding. The circumstances under which I found commercial success as evidence of invention in the *Uhlemann* case (*supra*) and in *The King* v. *American Optical Co.* (1), do not exist in the present case.

I shall now consider the contention that claim 6 defined an invention that is broader than the one described in the specification. This, in my opinion, is the most important question in the present case and it is not free from difficulty. It was agreed that claim 6 is the narrowest of the claims. Counsel for the plaintiff pointed out that it makes no reference to the lip on the front of the presser plate, claim 5 being the only one that does so. That is true. Two other complaints were made. The first was that claim 2 is the only claim that requires the hinge between the head plate and the presser plate to be above the head plate, that there is no similar requirement in claim 6 and that, consequently, it is not limited to the hinge being above the head plate but extends to the positioning of it below the head plate. In this connection reference was made to the statement of Mr. Webster that effective wringing of the sponge would not be possible if the hinge was below the head plate and the evidence that in such event the mop would scratch the floor. Therefore, it was submitted, claim 6 covers something that will not accomplish one of the purposes sought by the inventors, namely, effective wringing of the mop, and will defeat another purpose, namely, the avoidance of scratching the floor. The other charge was that in claim 6 the obtuse angle there referred to is not limited to an angle that is approximately a right angle and that, consequently, it extends to any obtuse angle, that is to say, any angle over 90 and under 180 degrees, and that if a very obtuse angle is used the presser plate will not first impinge on the back

(1) [1950] Ex. C.R. 344 at 367.

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bottom corner of the sponge and it will not be possible to bring the presser plate into parallelism with the head plate to accomplish the uniform and thorough wringing of the sponge that the inventors sought, and were able, to accomplish. Put briefly, the argument was that since claim 6 does not include the lip, does not require the hinge to be above the head plate and does not limit the obtuse angle to substantially or approximately a right angle it defines a combination with an arrangement of parts that accomplishes only two of the results accomplished by the inventors as disclosed in the specification and fails to accomplish others, namely, the uniform and complete wringing of the sponge and the avoidance of scratching the floor. Consequently, it was submitted, the invention defined in claim 6 is broader than the one described in the specification and invalid on that account.

Before I deal with these complaints I should refer briefly to certain cardinal principles of construction of claims in a patent. During the course of the argument I commented adversely on the language or, more precisely, the jargon in which the claims were expressed. There was, it seems to me, a difference between the language of the disclosures of the specification and the jargon of the claims. But while I made this adverse comment, it is essential that the Court should be fair to the inventors. As I said in the *Minerals Separation* case (*supra*) there may be faults of expression in a patent specification but they do not necessarily affect the validity of the patent for a patent specification is not an exercise of composition to be judged by the canons of grammar or rhetoric. The specification is addressed to persons skilled in the art and the test of the correctness of the specification, including the claims with which it ends, is whether such persons, having the common knowledge of the art, would know without doubt exactly what the invention, as defined in the claims, is. As I said in the *Mineral Separations* case (*supra*) the proper attitude of the Court in construing a specification was well described by Sir George Jessel, M.R. in *Hinks & Son* v. *Safety Lighting Co.* (1), when he said that it should be construed "fairly, with a judicial anxiety to support a really useful invention if it

(1) [1876] Ch. D. 607 at 612.

can be supported on a reasonable construction of the patent." The need for fair construction was stated by Lord Parmoor in the House of Lords in *Natural Colour Kinematograph Co. Ltd.* v. *Bioschemes Ld.* (*re G. A. Smith's Patent*) (1). The Supreme Court of Canada has shown the same attitude. In *French's Complex Ore Reduction Co.* v. *Electrolytic Zinc Process Co.* (2), Rinfret J., as he then was, approved Sir George Jessel's statement and said that the "specification should not be construed astutely". And in *Baldwin International Radio of Canada Ltd.* v. *Western Electric Co. Inc. et al.* (3), Rinfret J. said that the respondents were entitled to have the claims interpreted "by a mind willing to understand, not by a mind desirous of misunderstanding". And in *Western Electric Co.* v. *Baldwin International Radio of Canada* (4), Duff C.J. pointed out that where the Courts have been satisfied that there was a meritorious invention they have resorted to the maximum *ut res magis valeat quam pereat,* and said:

> And, where the language of the specification, upon a reasonable view of it, can be read as to afford the inventor protection for that which he has actually in good faith invented, the Court, as a rule, will endeavour to give effect to that construction.

It is in the light of these admonitions that I approach the questions under review.

There are, I think, valid answers to the criticisms of claim 6. I shall deal first with the position of the hinge. It would, of course, have been much simpler if the draftsman had expressly stated, as he did in claim 2, that "the hinge of said presser plate is arranged above the mop head", but I am of the view that claim 6 puts a limitation on the position of the hinge in such a way as to exclude a hinge positioned below the head plate. In his written argument counsel for the plaintiff submitted that there are factors in the claim itself that limit the location of the hinge to a position substantially in line with the head plate or above it and exclude a position below it. These factors, expressed in the jargon of the claim, are as follows:

> 1. Presser element pivoted at the rear of said head *adjacent the edge thereof.*

(1) [1915] R.P.C. 256.
(2) [1930] S.C.R. 462 at 470.
(3) [1934] S.C.R. 94 at 106.
(4) [1934] S.C.R. 570 at 574.

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2. Means maintaining said presser element in an upright mopping position against said handle.

3. Said presser element being bent to provide an obtuse angle rearwardly of said mop handle when in said upright mopping position *adjacent the pivot axis.*

4. And at a distance therefrom less than the thickness of said sponge at the rear.

And it was submitted that if the hinge position was below the head plate the presser plate could not be brought up against the mop handle unless either the hinge position is moved rearwardly of the head plate away from a point *adjacent the rear edge,* contrary to the limitation of the claim, or the presser plate is deformed or bent backwards around the back edge of the head plate, in which case the distance of the angle from the hinge would be greater than the thickness of the sponge at the rear. But by having the obtuse angle *adjacent the pivot axis* and the distance between this angle and the hinge less than the thickness of the sponge at the rear and by having the position of the angle with the presser plate in an upright non-wringing position rearwardly of the mop handle and the presser plate against the mop handle it becomes clear that the positioning of the hinge *adjacent the rear edge* means positioning it above the head plate or at least substantially in line with it. Thus, when the position of the hinge is at a point with relation to the head plate such as to allow the presser plate with an obtuse angle *adjacent the pivot axis* (at a distance therefrom less than the thickness of the sponge at the rear) to swing against the mop handle without being obstructed by the head plate and with the position of the obtuse angle being rearwardly of the mop handle then the hinge is positioned *adjacent the rear edge* of the head plate as defined in the claim. The lack of obstruction of the presser plate by the head plate happens only if the hinge position is above the head plate or substantially in line with it. If the hinge is below the head plate the head plate offers an obstruction that will prevent the presser plate from moving up against the mop handle unless the presser plate is deformed. Thus, the limitations of the claim exclude the positioning of the hinge below the head plate.

The attack on claim 6 on the ground that it does not limit the obtuse angle to an angle that is approximately or substantially a right angle was met by two answers, the first being found in the disclosures of the specification and the drawings and the second in the claim itself. Counsel for the plaintiff submitted that the degree of obtuseness of the angle is defined in the specification and drawings and that the claim should be read accordingly. The specification contains the following statement:

> As shown in Figures 2 and 3, the presser plate is bent or curved adjacent to but spaced from the longitudinal hinged edge *through approximately a right angle* to provide a wide portion 20' for engaging the undersurface 7 of the mopping element when the presser plate is swung from the position of Figure 2 to the position of Figure 3, the forward edge 20' of the plate being bent upwardly to constrain the mopping element when pressing.

And Figures 2 and 3 of the drawings show that the obtuse angle between the pivot connecting portion of the presser plate and the sponge pressing portion is just slightly more than a right angle or, as the specification puts it, "approximately a right angle". Exception to this reading of the claim was taken by counsel for the defendant on the ground that the meaning of the word "obtuse" is clear and that in the case of clear words it is not permissible to read into them matter from the specification. But, in my opinion, it is permissible in the present case to look to the specification and the drawings for the purpose of construing the meaning to be assigned to the word "obtuse" as used in the claim. In my judgment, there is support for this view in *Raleigh Cycle Co. Ld. et al.* v. *H. Miller and Co. Ld.* (1), where the meaning to be assigned to the phrase "which gives a steady light even at low speeds" in one of the claims was considered. There it was held, *inter alia,* that resort might be had to the description in the specification and accompanying drawings to limit what would otherwise have been too broad a claim. And counsel for the plaintiff also relied on *British Thomson-Houston Co. Ld.* v. *Corona Lamp Works* (2), where the meaning of the term "of large diameter or cross section" as applied to the filament of an incandescent lamp was discussed. In the present case I am of the view that it is permissible to look to the specification and the drawings to determine the degree of obtuseness of

(1) (1948) 65 R.P.C. 141.
(2) (1922) 39 R.P.C. 49.

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the angle referred to in the claim. It is, I think, obvious that no one could reasonably assume that the term extended to an obtuse angle of say 179 degrees. It was plainly intended that there should be some limitation of the obtuseness. That being so, the limitation intended by the inventors is found in the extract from the specification and the drawings referred to by counsel. Any person skilled in the art could not fail to read the claim with that limitation. He could not fail to understand that the word obtuse was used in the sense that the angle should be obtuse rather than acute, that is to say, larger than a right angle rather than smaller and, consequently, approximately a right angle.

But even if resort to the specification and the drawings for the purpose of defining the degree of obtuseness of the angle is not admissible it does not greatly matter for, in my opinion, the degree of obtuseness of the angle is defined in the claim itself by the following limitations, namely, firstly, the obtuse angle of the presser plate, that is to say, the angle between the pivot connecting portion and the sponge pressing portion must be located rearwardly of the mop handle when the presser plate is in its upright position; secondly, the obtuse angle must be *adjacent the pivot axis* and at a distance from it of less than the thickness of the sponge in the rear, that is to say, the bevelled sponge; and, thirdly, the obtuse angle, located as stated, must be of such a degree that when the presser plate is swung into position the sponge is engaged initially at its back bottom corner and, in the words of the claim, "compressed progressively from back to front to force water stored in reservoir in said sponge out said substantially unobstructed forward face". Under these circumstances, the obtuseness of the angle can be only slightly more than a right angle. If it is more than "approximately a right angle", as stated in the specification and illustrated in the drawings, it cannot meet the limitations of the claim. Moreover, since the position of the hinge is fixed, as I have found it to be, it follows, of necessity, that if the presser plate is to engage the sponge "initially at the rear lower corner" so that the sponge is "compressed progressively from back to front" the obtuse

angle in question must be an angle of approximately 90 degrees. That being so, the charge that the claim fails to define the obtuse angle as approximately a right angle and that, consequently, it extends to an obtuse angle even up to an angle less than 180 degrees falls. Under the circumstances, I find that claim 6 defines the invention substantially as the one described in the specification less the lip, which is covered by claim 5.

Accordingly, I find that claim 6 is valid. I am also of the view that claim 5 is valid for it differs from claim 6 only in the fact that it does not include the bevelled sponge but does include the lip. I need not go further.

There is one other matter to which I should refer. One of the paragraphs in the defendant's amended particulars of objection reads as follows:

> 1. (*j*) Nathaniel B. Greenleaf and Leonard C. Webster, named as the inventors in said patent No. 477,364, are not the first ones to conceive of the alleged invention claimed in the claims in issue, but Alfred L. LeFebvre was. An application for a Canadian patent disclosing a mop similar to the alleged invention of the said Nathaniel B. Greenleaf and Leonard C. Webster was filed in the Canadian Patent Office on the 4th of April, 1950, under Serial No. 599,415 upon which conflict proceedings should have been declared by the Patent Office, and the subject matter of the said application by LeFebvre was known by LeFebvre before Greenleaf and Webster devised the alleged invention to Patent 477,364.

It should be remembered that the patent in suit was a re-issued patent. The petition for re-issue was made on September 23, 1951, and the patent was re-issued on September 25, 1951. The validity of the re-issue was not challenged. In the course of the trial and subject to the objection of counsel for the plaintiff I allowed the patent application of A. F. LeFebvre, dated April 5, 1950, Serial No. 599,415 to be filed as Exhibit H. But this, of course, does not prove any date of invention by Mr. LeFebvre. Other attempts to prove such date were disallowed by me on the ground that the evidence by which it was sought to prove it was hearsay and inadmissible. The result was that counsel for the defendant admitted that he had not been able to prove prior invention by LeFebvre.

It appears that in the petition for re-issue the disclosures of the original application were untouched but that the claims, except claims 1 and 2, were altered. Counsel for the defendant sought to file Mr. Greenleaf's application for

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his United States patent, No. 2,515,403. It was stated that the petition for re-issue was based upon the proceedings on the United States patent and argued that the applicants for the patent had really brought the United States prosecution into the Canadian one. Objection was taken to this proposed evidence on the ground that what happened in another country under a different system of law could not affect the validity or invalidity of the claims in a Canadian patent. I ruled that the objection was well taken and the proposed evidence inadmissible. Counsel for the defendant also sought to adduce evidence of a declaration of interference by the United States Patent Office between Mr. Greenleaf's United States patent and Mr. LeFebvre's application. I ruled that this was irrelevant. Counsel for the plaintiff contended that there was no evidence that conflict proceedings should have been declared by the Patent Office between the patent in suit and the LeFebvre application and further that no conflict could have been declared since the petition for re-issue was not an application. I agree with this contention. Under the circumstances, I am now of the view that I should have refused to allow the LeFebvre application to be filed as an exhibit. The same is true of the license agreement filed as Exhibit G, excepting article 1, s. 5. But while I now sustain the objection of counsel for the plaintiff, I did not, on the request of counsel for the defendant, go so far as to order the offending evidence and exhibits to be struck from the record. Later, in the course of the argument counsel for the defendant suggested that I should look at the plaintiff's petition for re-issue to see what the patentee said about the invention. I then expressed the opinion that when a patent has been re-issued on a petition for re-issue the Court should look at the re-issued patent only in the light of its disclosures and claims without regard to how any changes came to be made in it as the result of the petition for re-issue.

There remains only the question of infringement. It is clear from observation of the defendant's mop that while there are some structural differences between it and the plaintiff's mop it is strikingly similar. It has similar elements and a similar arrangement of parts. The hinge between the presser plate and the head plate is above the

head plate. There is a pivot connecting portion of the presser plate and the angle between it and the sponge pressing portion is obtuse and slightly greater than a right angle. While the shape of the sponge is not precisely the same as in the plaintiff's mop it is bevelled rearwardly so that it is thinner at the back than at the front. Thus the basic combination that made the plaintiff's invention a novel and inventive one is present in the defendant's mop. It was urged on behalf of the defendant that claim 6 was not infringed because it required that the sponge should be compressed progressively from back to front and the compression effected by the defendant's sponge was not progressive. It was submitted that the compression was first at the back, then on the front and then at the middle and that this was not a progressive compression of the defendant's mop. I was of the view that there was a progressive compression of the sponge, although the progression was not in the same regular manner as in the case of the plaintiff's mop. Another defence was that the compression of the defendant's mop did not extend to the front of the sponge but left a portion of it not completely compressed. I do not consider this difference sufficient to free the defendant. It was also urged that by reason of the manner in which the defendant's presser plate folds the forward edge of the sponge around the front face it could not be said that it was not substantially unobstructed. There are also some structural differences. But while there are these differences they are not sufficient to constitute a basic difference between the defendant's mop and the plaintiff's. On the evidence, I have no hesitation in finding that the defendant's mop was an infringement of the plaintiff's right to the invention defined in claim 6. I need not make any finding regarding claim 5.

There will, therefore, be judgment for the plaintiff for the relief sought by it except as to damages. If the parties are unable to agree on the amount of the damages or the amount of profits, if the plaintiff elects the latter, there will be a reference to the Registrar or a Deputy Registrar and judgment for such amount of damages or profits as

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found in the reference. If there are any difficulties in settling the minutes of judgment the matter may be spoken to. The plaintiff is entitled to costs to be taxed in the usual way.

Judgment accordingly.

1955

Dec. 14, 15, 16, 19

1956

Feb. 17

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June 13

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

EASWEST PRODUCE COMPANY and MACDONALDS CONSOLIDATED LIMITED ..... PLAINTIFFS;

AND

THE SHIP S.S. *NORDNES* and the OWNERS OF THE SHIP S.S. *NORDNES* and UNION STEAMSHIP COMPANY OF NEW ZEALAND LIMITED ..... DEFENDANTS.

Shipping—Damage to cargo—Bills of lading—Australian Sea Carriage of Goods Act, 1924—Cargo not fit for voyage—Onus on defendants discharged—Risk not contemplated by Act—No liability on part of defendants.

In an action for damages brought by the owners of a cargo of onions shipped from Melbourne, Australia to Vancouver, British Columbia, against the steamer, her owners and time-charterers, in which breach of contract contained in the bills of lading and negligence were alleged, the Court found that defendants had discharged the onus to show there was no want of care on the part of the ship and that they had exercised due diligence as required by Article III of the Australian Sea Carriage of Goods Act, 1924.

Held: That the nature of the onions, which were damaged was such, that they could not stand the voyage and they decayed, not because of the ship or of the sea, or of the route, but because they were onions which were not fit to make the voyage in the ordinary way, and this is the kind of risk which the Act does not call on the shipowner to bear.

ACTION for damages to a cargo of onions.

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

A. C. Des Brisay, Q.C. and *J. A. Bourne* for plaintiffs.

Vernon R. Hill for S.S. *Nordnes*.

W. J. Wallace for Union Steamship Company of New Zealand Limited.

SIDNEY SMITH D.J.A. now (June 13, 1956) delivered the following judgment:

This is an action by the owners of cargo against the Norwegian steamer *Nordnes* and against her owners and time-charterers respectively. The action was framed in breach of contract contained in the Bills of Lading and, alternatively, in negligence against all defendants. In addition the statement of claim set up a plea of common carrier against the time-charterer but nothing more was heard of this.

The cargo consisted of two shipments of onions (4,610 bags) under two Bills of Lading for carriage from Melbourne, Australia, to Vancouver, British Columbia via intermediate ports. On discharge the onions were found in bad order. There was some dispute as to the legal ownership of the goods but that is not now important. The Bills of Lading were made subject to the Australian Sea Carriage of Goods Act, 1924, and the rules thereunder, which are similar to the kindred Acts and rules in operation throughout the Commonwealth. They were issued and signed by the time-charterers and stated that the onions were

> shipped in apparent good order and condition by (the shippers) on board the ship *Nordnes* now lying in the Port of Melbourne and bound for Vancouver via intermediate ports—to be delivered—in the like good order and condition at the aforesaid port of Vancouver to (the plaintiffs).

As they were not delivered in like good order the onus rests on the ship (using that term to include one or other or all defendants as the context indicates) to show that there was no want of care on the part of the ship; and to prove that the defendants had exercised "due diligence" as required by Article III of the Act, and moreover that the damage fell within one of the exceptions contained in Article 4, Rule 2; Carver's Carriage by Sea, 9th Ed. p. 69; Scrutton on Charter Parties, 15th Ed. p. 169; *Toronto Elevators Limited* v. *Colonial Steamships Limited* (1). Defendants say the damage was due to "inherent—quality or vice".

(1) [1950] Ex. C.R. 371.

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Smith D.J.A.

There was a good deal of evidence taken on commission both in Australia and Norway and again before me at the trial. It is not without significance that the Bills of Lading are dated June 24, 1948 and that the vessel did not arrive at Melbourne for loading until June 26. Loading of the onions was commenced on the 27th and completed on the 28th. I need not enquire into this further in the present case. The vessel sailed on June 28, 1948 and arrived Vancouver on August 13, 1948, thus taking 47 days on the voyage. The trial occupied five days, viz. December 14 to 19, 1955 and February 17, 1956. Thus over seven years intervened between the discovery of the damage and the trial. As the commission evidence was taken only some months before the trial it is not surprising that the recollection of witnesses was not always reliable.

The testimony at Melbourne showed the onions in good order—that is to say in good surface condition with nothing to create suspicion. As I have said they were not in good order on discharge, but they were not in such bad order as some of the Vancouver testimony indicated. However there is no doubt that they were damp and showed signs of heating. The question is what caused this deterioration? One may draw reasonable inferences from the facts disclosed in the evidence.

The Master of the ship, Captain Hysing-Dahl, was asked the question:

> What may in your opinion be the cause of the onion cargo in spite of all arriving in poor condition?

and replied

> Grounds were onions had probably been stored in Australia from January to June. Long voyage through tropics with long stays at ports in Fiji Islands, totalling 48 days from the time of loading at Melbourne to unloading of onions in Vancouver where arrival was made in the summer.

I think this not far wrong. The Captain might indeed have added that the damage was accelerated by delay at Vancouver in taking steps to mitigate. The time-charterers' submission to the same effect was succinctly put in this way: that the damage was caused "by the inherent defect and vice of the goods shipped when considered with respect

to the season of the year and the nature of the voyage". The ship-owners made the same submission in slightly different form.

I am by no means satisfied that the good surface condition at Australia bespoke good internal condition. The onions are normally inspected and packed into bags prior to export. But the inspection is only held good for four days. If at the end of that period they are still in the packing shed they are re-inspected. In the present case they were in trucks from June 21 to 27 and even then only received a cursory inspection on being loaded. It may well be that germs of deterioration were already at work within them. The shipment was made unusually late in the season.

Plaintiff contends that the voyage was of unusual length —47 days. Assuming, but not deciding this, the ship cannot be held at fault. It is not certain that had she gone direct from Melbourne to Vancouver the out-turn would have been entirely good. As it was 16 days were occupied loading and discharging at the intermediate ports. But all this was the intended voyage and the route contemplated when the Bills of Lading were signed. The parties concerned knew or should have known of the potential risks involved in shipping such a perishable cargo on board a vessel with such a comprehensive itinerary. Nothing was concealed.

Moreover, in January 1952 the plaintiffs moved to amend their statement of claim by adding an allegation that the ship had deviated from the contract voyage by calling and by loading and discharging at Fiji and certain other islands in the South Seas. I held however that this was tantamount to setting up a new cause of action and not open to the plaintiffs after the expiration of the statutory period of limitation.

Plaintiffs' real case as pleaded and sought to be established was (1) bad stowage, (2) lack of ventilation. In my opinion, they made good neither issue. The stowage is

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Smith D.J.A.

described in Exhibit 40, a certificate from an independent surveyor, Captain M. H. Longmore at Melbourne. It may be well to set it out in full.

We, the undersigned, under instructions received from The Union Steamship Company of New Zealand Ltd., attended at No. 18 Victoria Dock, from time to time on June 27th, 28th, on board the above vessel for the purpose of supervising the preparations to receive then stow a shipment of Onions, in bags.

Bags were stowed, seven to eight in height, in the upper decks of Nos. 1, 3, 4 holds from a foundation of clean swept compartments dunnaged to a height of three inches by timbers, crossed and well spaced in order to allow the free passage of air between the bags and the deck below.

In the main, bags were stowed fore and aft, one above the other, with a single layer of 6" x 1" flat dunnage between each height, whilst to further the clear flow of air between and through the stacks, fore and aft trunkways were left open to port and to starboard in those instances where the bags were stowed across the deck, and at intervals to the side of the vessel when the bags occupied the wings, only, of the hold.

Bags did not overstow, nor were they overstowed by other cargo.

Bags and contents appeared dry and sound at time of shipment. Care was taken in handling, and in stowage, and as the shipment occupies a position in the holds which will allow a current of air to continually pass through, we consider it a sound risk—it should, given normal conditions, arrive at destination in good order.

M. H. Longmore,
Marine Surveyors.

Melbourne, 28th June, 1948.

An unconvincing attempt was made to show the stowage had been altered at Fiji. Captain Dahl was questioned. The Master could scarcely be expected to be familiar with stowage of a shipment of cargo under normal conditions unless his direction was specially directed to it. That was not so here. Moreover seven years had elapsed and he had left the ship at Vancouver. I am unable to give much weight to the other evidence urged as supporting this submission.

The testimony indicates that the ventilation was by way of Samson posts and the opening of hatches both under way and in port. The testimony shows this was sufficient and that there was no want of care with respect to it. I am satisfied that all proper attention was paid to this important matter and that if the onions suffered in this respect, it was due to the ordinary calling at the ports in the South Sea Islands and not to inattention to ventilation of the cargo.

I need say little about the unloading at Vancouver. There was undue delay on the part of the consignees in accepting the onions and in taking adequate steps to mitigate damages. But this goes rather to the quantum than anything else and need not be further considered.

On the whole it seems to me that the following concluding passage from the judgment of Lord Sumner in the somewhat similar case of *Bradley and Sons Limited* v. *Federal Steam Navigation Company Limited* (1), is equally applicable here:

> The other way is to say that the "inherent quality" referred to is not said to be an inherent bad quality and that the words are "resulting from" not "solely resulting from." The nature of the apples, which were damaged—whether they were simply weaker than their neighbours or had some idiosyncrasy—was such, that they could not stand the voyage. They decayed, not because of the ship or of the sea, or of the route, but because they were apples which were not fit to make the voyage in an ordinary way. This is the kind of risk which the Act does not call on the shipowner to bear, for he has had nothing really to do with it and it is, in my opinion, well within the words "resulting from . . . inherent . . . quality or vice."

After full consideration of all the evidence my conclusion is that the defendants have discharged the onus and that neither in contract nor in tort does liability attach to them.

The action is dismissed with costs.

Judgment accordingly.

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(1) (1927) 17 Asp. 265 at 270.

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Feb. 7
Feb. 8

BETWEEN:

HER MAJESTY THE QUEEN in the right of the Dominion of Canada (*Plaintiff*) ..... APPELLANT;

AND

The Ship M/V *ISLAND CHALLENGER*, the barge *LORD TEMPLETOWN* and the Ship M/V *SWAN* (*Defendants*) ..... RESPONDENTS.

Shipping—Practice in Admiralty—General Rules and Orders in Admiralty, R. 215—General Rules and Orders. R. 2(1)—Rules of Supreme Court, 1883 of England, O. XIX, Rs. 7, 7B—Particulars not to be ordered when effect would be to hamper plaintiff and prevent full discovery.

The appellant appealed from the decision of Smith D.J.A. of the British Columbia Admiralty District ordering the plaintiff to give particulars of certain allegations in the statement of claim.

Held: That the prime consideration that should govern the exercise of the discretionary power implicit in the rules relating to the ordering of particulars is that justice should be done.

2. That where particulars are not required to enable the defendants to plead they should not be ordered when their effect would be to hamper the plaintiff in the prosecution of his claim and prevent him from obtaining full discovery from the defendants.

3. That where the defendant knows the facts and the plaintiff does not the defendant should give discovery before the plaintiff delivers particulars.

4. That the particulars ordered were neither necessary nor desirable to enable the defendants to plead and the order for them was premature.

APPEAL from decision of Smith D.J.A. of the British Columbia Admiralty District ordering plaintiff to give particulars.

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

K. E. Eaton for appellant.

J. G. Gorman for respondents.

THE PRESIDENT now (February 8, 1956) delivered the following judgment:

This is an appeal from the decision of Sidney Smith D.J.A. of the British Columbia Admiralty District (1), ordering the plaintiff to give certain particulars.

(1) [1955] Ex. C.R. 262.

The action is for damages and loss of revenue suffered and incurred by the plaintiff as the result of the alleged negligence of the employees, servants or agents, or of the persons in charge of the navigation of the defendant vessels. The circumstances from which the claim arises are stated to be that on August 22, 1952, the M/V *Island Challenger* having the barge *Lord Templetown* in tow and being assisted by the M/V *Swan* was proceeding downstream in the Fraser River to pass through the Old Fraser River Bridge spanning the River between the City of New Westminster and the Municipality of Surrey, which bridge is owned by the plaintiff, and while the swing span was open the barge *Lord Templetown* struck the centre protection pier of the bridge causing extensive damage to it and the bridge. The claim is for the cost of repairing the bridge and loss of tolls during the time it was closed for traffic.

Paragraphs 7 and 8 of the statement of claim read as follows:

7. The aforesaid collision between the Barge *Lord Templetown* and the protection pier of the said bridge was occasioned solely by the negligent navigation of the servants or those in charge of the navigation of the said M/V *Island Challenger,* the barge *Lord Templetown* and the M/V *Swan,* particulars of which are as follows:—

(*a*) Using too long a tow line to tow the barge *Lord Templetown* having regard to the area of navigation, the state of the tide, known current and the available channel at the point in question.

(*b*) Failing to have tug or tugs of sufficient power to control the said Barge *Lord Templetown* while passing through the said channel formed between the piers of the bridge.

(*c*) Failing to navigate with caution when in the neighbourhood of the said bridge and piers.

(*d*) Proceeding or attempting to proceed downstream through the said South Channel at too slow a rate of speed or, alternatively, at a rate of speed where control of the said Barge *Lord Templetown* could not be exercised.

(*e*) Failing to have the Barge *Lord Templetown* or the M/V *Island Challenger* or the M/V *Swan* under proper or any control.

(*f*) Increasing speed after danger of collision became apparent.

(*g*) Failure to keep a proper lookout aboard the M/V *Island Challenger,* the barge *Lord Templetown* and aboard the M/V *Swan.*

8. In the alternative, damage was occasioned to the said pier and bridge by the collision of the Barge *Lord Templetown* with the said pier which damage indicates a prima facie case of negligence as such collision would be avoided by ordinary care and skill exhibited by those in charge of the navigation of the M/V *Island Challenger* and/or the Barge *Lord Templetown* and/or the M/V *Swan.*

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Thus it appears that there are specific allegations of negligence as set out in paragraph 7 and a general charge of *res ipsa loquitur* raised by paragraph 8.

Prior to delivering a statement of defence the defendants, the ship M/V *Island Challenger* and the barge *Lord Templetown* demanded further and better particulars of the negligence alleged in paragraph 7 as follows:

As to (*a*) Further and better particulars of the alleged use of too long a towline stating to what extent the towline used was too long, and further and better particulars of the alleged known current, stating the rate, direction and effect of such current and giving full details of the said current alleged to be known by the Defendants.

As to (*b*) Further and better particulars of the alleged failure to have a tug or tugs of sufficient power to control the said Barge *Lord Templetown* stating in what way and to what extent were the said tug or tugs of insufficient power to control the said Barge.

As to (*c*) Further and better particulars of the alleged failure to navigate with caution when in the neighbourhood of the said bridge and piers, stating whereof the failure consisted and in what particular or particulars the defendants or either of them failed to navigate with caution as alleged, distinguishing between the failure of each defendant.

As to (*d*) Further and better particulars of the allegation that the Defendants proceeded or attempted to proceed downstream through the said south channel at too slow a rate of speed, stating how and to what extent the Defendants were proceeding or attempting to proceed at too slow a rate of speed.

In answer to the said demand the plaintiff replied as follows:

1. As to the particulars required by Paragraph 1(*a*) of the Demand herein, the Plaintiff says that the particulars demanded of the alleged use of too long a towline are matters of evidence and not necessary for the purpose of pleading and in any event are within the knowledge of the Defendants The Ship M/V *Island Challenger* and the Barge *Lord Templetown,* and as to the particulars of the current the Plaintiff says that the particulars demanded are matters of evidence and not necessary for the purpose of pleading and in any event are matters of public record and knowledge and within the knowledge of the Defendants The Ship M/V *Island Challenger* and the Barge *Lord Templetown.*

2. As to the particulars required by Paragraph 1(*b*) of the Demand herein, the Plaintiff says that the particulars demanded are matters of evidence and not necessary for the purpose of pleading and cannot be given by the Plaintiff until after Examinations for Discovery.

3. As to the particulars required by Paragraph 1(*c*) of the Demand herein, the Plaintiff says that the Particulars demanded are matters of evidence and not necessary for the purpose of pleading and cannot be given by the Plaintiff until after Examinations for Discovery.

4. As to the particulars required by Paragraph 1(*d*) of the Demand herein, the Plaintiff says that the particulars demanded are matters of evidence and not necessary for the purpose of pleading and the Plaintiff cannot give the said particulars until after Examinations for Discovery.

Thereupon a motion was made before Sidney Smith D.J.A. in Chambers for an order for particulars and on April 25, 1955, the particulars were ordered as demanded. It is from this order that the present appeal is taken.

It is to be noted that the demand for particulars was made only by the first two defendants and not by the defendant the ship M/V *Swan*, and that the particulars ordered were in respect of the allegations in paragraph 7.

There is no specific provision in the General Rules and Orders in Admiralty of this Court for the ordering of particulars but Rule 215 provides:

215. In all cases not provided for by these Rules the general practice for the time being in force in respect to proceedings in the Exchequer Court of Canada shall be followed.

Nor is there any specific provision in the General Rules and Orders of this Court or in any Act of the Parliament of Canada for the ordering of particulars, except in particular cases of which this is not one. Under the circumstances, Rule 2(1) of the General Rules and Orders applies, which reads as follows:

(1) In all suits, actions, matters or other judicial proceedings in the Exchequer Court of Canada, not otherwise provided for by any Act of the Parliament of Canada, or by any general Rule or Order of the Court, the practice and procedure shall:—

(*a*) If the cause of the action arises in any part of Canada, other than the Province of Quebec, conform to and be regulated as near as may be, by the practice and procedure at the time in force in similar suits, actions and matters in Her Majesty's Supreme Court of Judicature in England; and . . .

Thus the applicable rules are to be found in "The Rules of the Supreme Court, 1883" of England of which Order XIX, Rule 7, provides:

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

and Rule 7B provides specifically:

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

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The applicable rules are permissive rather than directory and the prime consideration that should govern the exercise of the discretionary power implicit in them is that justice should be done. This is emphasized in the language of Ferguson J.A. in delivering the majority judgment of the Ontario Court of Appeal in *Fairbairn* v. *Sage* (1) where he said:

> The wording of the Rules is permissive, rather than directory, and the cases seem to me to establish that there is no hard and fast rule as to when, at what time, or in what cases, particulars will be ordered or refused. On my reading of the Rules and the cases, the granting or refusing of particulars lies in the discretion of the Court, and the factors that are to guide the Court in exercising the discretion in reference to granting or refusing an order for particulars, are the circumstances of each case. The endeavour of the Court should be to do justice to all parties in view of those circumstances.

In that case the Court had under consideration an Ontario rule similar to the English rule to which I have referred.

In general, the cases indicate that the object in ordering particulars is twofold: (1) for purposes of pleading, i.e., to enable the opposite party to plead intelligently; (2) for purposes of trial, i.e., to define the issues to be tried, so as to save the expense of calling unnecessary witnesses and to prevent the opposite party from being taken by surprise: *vide* Holmested & Langton's Ontario Judicature Act, Fifth Edition, page 675. In some cases the first purpose is paramount, in others the second.

Here the learned District Judge expressed the opinion that the particulars ordered by him were desirable to enable the defendants to plead.

I am unable to agree. The defendants do not require the particulars demanded by them in order to enable them to plead. They are just as able to admit or deny the allegations in the statement of claim without having the further particulars demanded as they would be if they were furnished.

Where particulars are not required to enable the defendants to plead they should not be ordered when their effect would be to hamper the plaintiff in the prosecution of his claim and prevent him from obtaining full discovery from the defendants: *vide Dixon* v. *Trusts and Guarantee Co.*

(1) (1925) 56 O.L.R. 462 at 471.

(1); *Mexican Northern Power Co.* v. *Pearson Ltd.* (2); *Somers* v. *Kingsbury* (3). This is particularly true where the facts alleged lie within the knowledge of the defendants rather than within that of the plaintiff: *vide Millar* v. *Harper* (4) where Bowen L.J. said, at page 112:

> It is good practice and good sense that where the Defendant knows the facts and the Plaintiffs do not, the Defendant should give discovery before the Plaintiffs deliver particulars.

What I have said applies in the present case. It would be unfair to the plaintiff to require particulars at this stage for it would unjustly restrict the scope of what should be permissible examination for discovery and the refusal of particulars at this stage does not work any injustice against the defendants.

While I appreciate that the ordering of particulars by the learned District Judge was an exercise of discretion by an experienced judge and should not be disturbed without good cause I must, with respect, state that the particulars ordered by him were neither necessary nor desirable to enable the defendants to plead and there are no special reasons why they should be delivered at this stage. Whether the defendants will be entitled to them or any of them at a later date, after full discovery has been had, in order to define the issues for the purposes of the trial is a matter to be determined then. The present order for particulars was premature and the appeal from the decision ordering it must be allowed. The order is set aside and the defendants will have 28 days from the date hereof within which to deliver their statement or statements of defence. The plaintiff is entitled as against the first two defendants to the costs of this appeal and of the proceedings relating to the particulars in the Court below, such costs to be costs in the cause to the plaintiff in any event of the cause.

Order accordingly.

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(1) (1914) 5 O.W.N. 645.
(2) (1914) 5 O.W.N. 648.
(3) (1923) 54 O.L.R. 166 at 169.
(4) (1888) 38 Ch.D. 110.

1954
Sept. 28, 29, 30
Oct. 1, 4
1956
Jan. 13

BETWEEN:

JOHN DAROWANY AND DMYTRO DAROWANY ..... } SUPPLIANTS;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Damages—R.C.A.F. aircraft flown over mink ranch at low altitudes during whelping season, mink kittens destroyed by terrified mothers—N.A.T.O. pilots—Onus of proof on suppliants—Exchequer Court Act, R.S.C. 1952, c. 98, ss. 19(1)(c), 50A—Crown Liability Act, S. of C. 1952-53, c. 30, ss. 3(1)(a), 25(2)—Visiting Forces (North Atlantic Treaty) Act, S. of C. 1951, 2nd Sess., c. 28, s. 16—Canadian Forces Act, S. of C., 1953-54, c. 13, s. 17.

The suppliants, mink ranchers, claimed damages from the Crown for the loss of mink kittens during the whelping seasons of 1951, 1952 and 1953 which they alleged was caused by aircraft from R.C.A.F. station Gimli flying over the ranch at low altitudes thereby terrifying the mother mink causing them to destroy their young. At the trial it was established that the whelping season ran from mid April to the end of May and that aircraft had been flown at the time and in the manner alleged by students undergoing instruction at courses conducted for North Atlantic Treaty Organization (NATO). The pilots comprised nationals of the United Kingdom, France, Belgium, the Netherlands, Norway and Italy as well as Canadian pilots.

Held: That the claims were made under ss. 19(1)(*c*) and 50A of the *Exchequer Court Act* as amended, as to the 1951, 1952 and 1953 flights up to May 14, 1953, and under s. 3(1)(*a*) of the *Crown Liability Act* thereafter.

2. That to support a claim against the Crown under either Act the onus of proof rests on a suppliant to establish not only negligence by an officer or servant of the Crown but that the negligence occurred while such officer or servant was acting within the scope of his duties or employment, that the alleged loss resulted therefrom and that he would be personally liable therefor. *The King* v. *Anthony,* [1946] S.C.R. 569 at 571.

3. That although it was established that there had been low flying at the place and times in question, even if it could be shown the acts complained of constituted negligence and that loss resulted therefrom, an onus rested on the suppliants to prove such acts were done by persons for whose acts the Crown was responsible, namely pilots of the R.C.A.F., and this was not done. The students, who were not Canadians, were not members of the air forces of Her Majesty in right of Canada within the meaning of s. 50A of the *Exchequer Court Act* and its successor and could not in the absence of appropriate legislation be deemed servants of the Crown. They became such only after enactment of s. 16 of *The Visiting Forces (North Atlantic Treaty) Act,* S. of C. 1951, 2nd Sess., c. 28, which did not come into force until September 27, 1953, after the date of the acts complained of. Furthermore when s. 16 of *The Visiting Forces Act* came into force, s. 19(1)(*c*) of the *Exchequer Court Act* had been repealed by

s. 25(2) of *The Crown Liability Act*, S. of C. 1952-53, c. 30 and it was not until *The Canadian Forces Act*, 1954, S. of C. 1953-54, c. 13, was assented to on March 4, 1954, that the Crown by s. 17 thereof became liable for a tort committed by a member of a visiting force.

4. That claims against the Crown under s. 19(1)(*c*) of the *Exchequer Court Act* or s. 3(1)(*a*) of the *Crown Liability Act* are statutory and would not exist apart from the statute by which liability was imposed upon the Crown, and the requirements of the statute by which it was imposed must be strictly met before the liability of the Crown can be engaged, (*The King* v. *Dubois* [1935] S.C.R. 378; *McArthur* v. *The King* [1943] Ex. C.R. 77) and the requirements of the statute must be shown by proof (*The King* v. *Moreau* [1950] S.C.R. 18 at 24; *Ginn et al.* v. *The King* [1950] Ex. C.R. 208 at 216).

PETITION OF RIGHT by suppliants seeking damages from the Crown for damages allegedly caused by negligence of servants of the Crown.

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

L. St. G. Stubbs and *R. St. G. Stubbs* for suppliants.

G. R. Hunter and *D. S. Maxwell* for respondent.

THE PRESIDENT now (January 13, 1956), delivered the following judgment:

In their petition of right the suppliants claim damages in the sum of $25,507 for alleged losses of mink kittens in 1951, 1952 and 1953 as the result of the low flying of Royal Canadian Air Force aircraft over their mink ranch during the whelping season.

The suppliants' mink ranch is on their farm property prescribed as the south-west quarter of section 36 in township 18 and range 1 east of the principal meridian in Manitoba. It is near Dennis Lake, also called Russell Lake, about 5 miles west of Malonton and about 15 miles west of the Village of Gimli. A short distance west of Gimli the Royal Canadian Air Force operates an aircraft base and training station.

The substance of the suppliants' claim is that during the whelping seasons of 1951, 1952 and 1953 aircraft from the Gimli station flew over their ranch and terrified the minks causing some of the mother minks to devour the kittens to which they had given birth. It was alleged that the loss of

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kittens thus caused was the result of negligence on the part of the pilots or other operators of the low-flying aircraft while acting within the scope of their employment.

The claim is made under s. 19(1)(*c*) of the *Exchequer Court Act*, R.S.C. 1927, c. 34, as amended in 1938, which reads as follows:

> 19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—
>
> * * *
>
> (*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment;

and under s. 50A of the said Act, as enacted in 1943 by s. 1, S. of C. 1943-44, c. 25, as amended by s. 7, S. of C. 1951, 2nd Session, c. 7, reading as follows:

> 50A. For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and thirty-eight, a member of the naval, army or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

and also under s. 3(1)(*a*) of the *Crown Liability Act*, S. of C. 1952-53, c. 30, which reads as follows:

> 3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable
>
> (*a*) in respect of a tort committed by a servant of the Crown, or . . .

for the period after May 14, 1953, when this provision came into force.

It is established that in a claim under s. 19(1)(*c*) of the *Exchequer Court Act* the onus of proof that the claim is within the ambit of the section lies on the suppliant. He must establish that every condition of liability prescribed by the section has been met. Thus the suppliants in the present case must prove that some officer or servant of the Crown was guilty of negligence, that such negligence occurred while the officer or servant was acting within the scope of his duties or employment and that the losses of mink kittens of which the suppliants complain resulted from such negligence. If the suppliants fail to discharge the onus of proof that the law casts on them in respect of any of these matters their claim falls.

It is also established that the liability of the Crown under this section is only a vicarious one and that before it can be engaged it must appear that some officer or servant of the Crown would himself have been personally liable if he had been sued: *vide The King* v. *Anthony* (1) where Rand J., delivering the majority judgment of the Supreme Court of Canada, said:

> I think it must be taken that what paragraph (*c*) does is to create a liability against the Crown through negligence under the rule of *respondeat superior,* and not to impose duties on the Crown in favour of subjects: *The King* v. *Dubois* (2); *Salmo Investments Ltd.* v. *The King* (3). It is a vicarious liability based upon a tortious act of negligence committed by a servant while acting within the scope of his employment; and its condition is that the servant shall have drawn upon himself a personal liability to the third person.

Thus if the facts would not support a cause of action against some individual servant or servants of the Crown, there cannot be a valid claim against the Crown.

In my opinion, the law in this respect is the same under s. 3(1)(*a*) of the *Crown Liability Act* as under s. 19(1)(*c*) of the *Exchequer Court Act.* In each case the liability of the Crown is vicarious only and the onus of proof that the conditions of liability fixed by the statute are present rests on the suppliant.

In support of the allegation that there was low flying by planes from the R.C.A.F. station near Gimli during the whelping seasons in 1951, 1952 and 1953 counsel for the suppliants called four of the suppliants' neighbours as witnesses, Peter Monaster, Harry Yecenko, Metro Dmytro Schkolny and Philip Senga. It is not necessary to review their evidence in detail. While a great deal of it was plainly exaggerated and there were several inaccuracies in their statements I am satisfied that in the months of April and May of 1951, 1952 and 1953, as well as in other months of these years, planes from the Gimli station frequently flew at low altitudes near and over the suppliants' mink ranch, that such planes engaged in aerobatics not far from the ranch, coming down low, rising, looping, circling and other manoeuvres and that in the course of their activities they caused noises near and over the suppliants' mink

(1) [1946] S.C.R. 569 at 571. (2) [1935] S.C.R. 378 at 394 and 398.
(3) [1940] S.C.R. 263 at 272 and 273.

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ranch. In addition to single planes flying in the area there were also planes flying in formations which flew at higher altitudes. In addition to the evidence of these neighbours there were the statements of the suppliants themselves that there was low flying over their ranch during the whelping seasons and that it terrified the minks. While I am convinced that the neighbours and the suppliants exaggerated the lowness of the planes I am also satisfied that there was a great deal of plane activity in the area with some low flying with its resulting noise which in the case of Harvard planes was very considerable.

Unfortunately for the suppliants, there is, in my opinion, an insuperable obstacle in their way. Even if it could be shown that the pilots of the low-flying planes were guilty of negligence and that the losses of which the suppliants complain resulted therefrom the suppliants' claim would fail for they did not prove that the pilots of the low flying planes that caused the losses were officers or servants of the Crown. It was disclosed during the trial that the pilots of the planes flying from the R.C.A.F. station near Gimli were students undergoing flying instruction at a school for North Atlantic Treaty Organization (NATO) pilots conducted by the Royal Canadian Air Force at its Gimli station. They came from various countries that were members of the North Atlantic Treaty Organization. Thus there were students from the United Kingdom, France, Belgium, Norway, The Netherlands and Italy as well as from Canada. These students were the nationals of the countries from which they came. Thus, even if the students who were not Canadians were subject to the discipline of the school, they were not members of the air forces of Her Majesty in right of Canada within the meaning of s. 50A of the *Exchequer Court Act* and its successor and could not, therefore, in the absence of appropriate legislation, be deemed to be servants of the Crown. The difficulty involved in this fact was realized by Parliament when it enacted *The Visiting Forces (North Atlantic Treaty) Act,* S. of C. 1951, 2nd Session, c. 28. S. 16 of this Act provided as follows:

> 16. For the purposes of paragraph (c) of subsection one of section nineteen of the *Exchequer Court Act,* negligence in Canada of a member of a visiting force while acting within the scope of his duties or employment shall be deemed to be negligence of an officer or servant of the Crown while acting within the scope of his duties or employment.

The Act referred to was assented to on December 21, 1951, but s. 28 provided:

28. This Act or any portion thereof shall come into force on a day or days to be fixed by Proclamation of the Governor in Council.

S. 16 did not come into force until September 27, 1953: *vide Canada Gazette,* vol. 87, October 10, 1953, at pages 2957 and 2958; so that the suppliants cannot avail themselves of this statutory provision in respect of their claims for losses incurred in 1951, 1952 and 1953. There is the further interesting fact, which is not material to this case, that when s. 16 of *The Visiting Forces Act* came into force by proclamation on September 27, 1953, s. 19(1)(*c*) of the *Exchequer Court Act,* to which it specifically referred, was no longer in existence, it having been repealed by s-s. (2) of s. 25 of the *Crown Liability Act* on May 14, 1953. This Act also provided in advance for the repeal of paragraph (*c*) of s-s. (1) of s. 18 of the *Exchequer Court Act,* R.S.C. 1952, c. 98, upon its coming into force which occurred on September 15, 1953.

Thus there was the anomalous situation that when s. 16 of *The Visiting Forces Act* came into force it referred to a statutory provision that was no longer in existence and it was, therefore, of no effect. This was recognized by Parliament when it enacted the *Canadian Forces Act, 1954,* S. of C. 1953-1954, c. 13. S. 17 of that Act repealed s. 16 of *The Visiting Forces (North Atlantic Treaty) Act* and substituted therefor a section which read in part as follows:

16. For the purposes of subsection (1) of section 3 of the *Crown Liability Act*

(*a*) a tort committed by a member of a visiting force while acting within the scope of his duties or employment shall be deemed to have been committed by a servant of the Crown while acting within the scope of his duties or employment; . . .

* * *

The *Canadian Forces Act, 1954* was assented to on March 4, 1954, so that it was not until that date that the Crown became liable for a tort committed by a member of a visiting force. This state of the law puts the suppliants in a difficult position. If the low flying was negligent and if such negligence was the cause of the suppliants' losses they must, if they are to succeed, prove that the negligent low flying was done by pilots for whose negligence the Crown is

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responsible, that is to say, by pilots who were members of the Royal Canadian Air Force. This they have not done. If the actionable low flying was by pilots who were not members of the Royal Canadian Air Force, as might be the case if there was any actionable low flying at all, the Crown is not responsible for it. It is responsible only for the negligence or torts of its own servants. Nor, in the absence of proof, will the Court assume any actionable low flying on the part of Canadian pilots.

It may appear, at first glance, that this is a narrow ground for disallowing the suppliants' claims but it must be kept in mind that claims against the Crown under s. 19(1)(*c*) of the *Exchequer Court Act* or 3(1)(*a*) of the *Crown Liability Act* are statutory and would not exist apart from the statute by which liability was imposed upon the Crown. Consequently, it has been consistently held, ever since liability was first imposed on the Crown, that the requirements of the statute by which it was imposed must be strictly met in every particular before the liability of the Crown could be engaged. The review of the cases by the Supreme Court of Canada in *The King* v. *Dubois* (1) and by this Court in *McArthur* v. *The King* (2), demonstrates this beyond dispute. And it is also settled that compliance with the requirements of the statute must be shown by proof and that conjecture or surmise cannot take its place: *vide The King* v. *Moreau* (3); *Ginn et al* v. *The King* (4). Thus since the suppliants have not proved that the low flying which they claim was the cause of their losses was done by persons for whose acts the Crown is responsible they have failed to establish one of the conditions of the Crown's liability and have thus failed to discharge the onus which the law casts on them. On this ground alone, their claim must fail.

If I were required to deal with their claim apart from the ground on which I have disallowed it I would find myself in great difficulty by reason of the unsatisfactory nature of the suppliants' evidence and the lack of reliable records. Certainly, the claim as they put it cannot be supported. Their contention was that in 1951 they mated 260 females, that at counting time there were 92 boxes in which

(1) [1935] S.C.R. 378.
(2) [1943] Ex. C.R. 77.
(3) [1950] S.C.R. 18 at 24.
(4) [1950] Ex. C.R. 208 at 216.

they did not find any kittens; that in 1952 they mated 207 females and 58 were found to be without kittens; and that in 1953 they mated 238 females and 74 were without kittens. The statement was made that in each case the absence of kittens was due to the fact that the mothers were thrown into a panic by the noise from the low-flying planes and ate the kittens to which they had given birth. While the suppliants did say that all the females that did not show any kittens when their boxes were opened ate their young I think it would be fair to say that they put their statement forward as an assumption rather than as a positive statement of fact. But there is no foundation for the assumption and there were no reliable records to support it. The figures put forward in their petition were all put together some time in June, 1953, after it had been suggested to them that they should put in a claim against the Crown. Up to that time they had not intended to do so.

The evidence of how they kept track of their mink during the mating and whelping season which began in March and ended in May was sketchy. It was stated that after a female was mated she was put into her own pen and it was marked on her card that she was pregnant when one or other of the suppliants thought that she was. Then when one of them heard a squeaking noise in the nest box the fact of birth of a litter was marked on the card. The box was not opened until about 12 days after the assumed birth of the litter. When the boxes were opened it was found that there were no kittens in the boxes of 92 females in 1951, 58 in 1952 and 74 in 1953. It was on this finding that the assumption was made and the contention put forward that all these females had been thrown into a panic because of the noise from low-flying planes over the ranch and because of such panic had eaten all their young.

These contentions are unwarranted. The statement that all the females referred to had become pregnant and given birth to live litters cannot be accepted. While there is a possibility of an occasional 100 per cent pregnancy in a mink farm it rarely happens and it is most unlikely that it happened on the suppliants' ranch and it certainly did not happen three years in a row.

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And there is also the fact that even if the females had produced live litters there were many possible causes of death of kittens other than the one stated by the suppliants. Indeed, that was recognized by the suppliants for in making their claim they made an allowance for loss from natural causes and reduced their claims for loss of litters due to the noise of low-flying planes accordingly, that is to say, in 1951 from 92 litters to 83, in 1952 from 58 to 50 and in 1953 from 74 to 62. In their claims for lost litters they assumed the same average of kittens per female as in the case of the females that had produced live litters without making any allowances for subsequent deaths.

The percentages of lost litters thus claimed of the total of females mated came to approximately 32 per cent in 1951, 24 per cent in 1952 and 27 per cent in 1953. These percentages of misses are somewhat, but not greatly, higher than those shown by Dr. R. J. Kirk, the superintendent of the Manitoba Fur and Game Station of the Game and Fisheries Branch of the Department of Mines and Natural Resources of Manitoba of misses of 26 per cent in 1950, 28 per cent in 1953 and 14·1 per cent in 1954 or an over all average of 22·8 per cent, as shown by Exhibit C, and also higher than the percentages of misses shown on Exhibit F, which ran from 18·8 per cent to 23·3 per cent.

While it is incumbent on the suppliants to show specifically that they suffered loss as the result of such low flying of planes as amounted to negligence on the part of the fliers of the planes and they were not able to give particulars of such specific losses I am satisfied from their evidence that it would be unfair to find that their complaints were wholly groundless. While their evidence is full of inaccuracies and exaggeration I must say that, in my opinion, their complaints were not wholly devoid of justification. While Dr. Kirk gave his opinion that minks were good mothers and did not consider them predisposed to eat their young on being disturbed I was impressed with his statement that low-flying aircraft in numbers flying over a period of time in a day might possibly be upsetting to female minks during the whelping season and that sustained noise might disturb them. There was also the opinion

of E. J. Washington that mink would be disturbed by low-flying and might possibly destroy their young if the noise of the planes was sustained.

Under the circumstances, I am of the view, after making allowances for exaggeration in the evidence of the suppliants and for lack of records, that some of their losses were in excess of what was normal and did result from negligent low flying of planes from the Gimli Air Station over their ranch. Obviously, the estimation of the amount of the damages so caused is difficult and cannot be made with precision. Perhaps, it would not be unreasonable to take 21 per cent of misses as the normal and attribute the excess over that amount as due to disturbance by the noise of low-flying planes negligently flown by their pilots. In that connection I would not make any allowance for losses in 1951 for in that year there was no indication that could be seen from the air that there was a mink ranch on the suppliants' farm and it would be quite improper to attribute negligent low flying to any pilots in that year. But in 1952 there was some indication of the need for care in the form of a yellow pole and fluorescent red flag on the suppliants' barn and in May of 1953 the barn was painted in checkerboard fashion and there was a yellow pole with a fluorescent red flag on it and also a pole near the road.

In 1952 the suppliants claimed $3,312 damages. If I allowed the excess of 24 per cent over, say, 21 per cent, $500 would be ample. In 1953 the suppliants claimed $16,915 but this was on the basis of 5 kittens per female. This is unwarranted and should be reduced to approximately 4. If for this year I were to allow the excess of 27 per cent over 21 per cent an allowance of $3,000 would be ample. Thus, if I were required to assess the suppliants' damages I would put them at $3,500. This, in my opinion, would be the highest amount which the evidence would warrant.

But for the reason which I have stated the suppliants have failed to establish any claim and the judgment of the Court must be that they are not entitled to any of the relief sought by them and that the respondent is entitled to costs.

Judgment accordingly.

1956
Mar. 27, 28
Aug. 31

HAROLD ERNEST MANNING ..... APPELLANT;

AND

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

Revenue—Income Tax—Trusts—Beneficiary entitled to net revenue from encumbered commercial property for life with power of appointment as to income and corpus—Capital cost allowance retained by trustee to preserve corpus—Whether beneficiary entitled to claim deduction as an exemption—The Income Tax Act, S. of C. 1948, c. 52, as amended, s. 58(4), (5), (6), (6A).

Under a trust agreement involving two parcels of real property, "A" and "B", it was directed that the net income from "A" be divided among the testator's four children share and share alike for their respective lives each with power of appointment as to an undivided one fourth share of the income and corpus; that property "B" be sold and the proceeds used to discharge a mortgage on "A", the surplus if any, to be equally divided among the beneficiaries. Property "A" consisted of a commercial building, "B" a vacant lot. As the revenues from "A" and "B" proved insufficient to pay off a mortgage on "A", a court order was obtained authorizing the trustee to refrain from selling "B", to build thereon a store and apartment building, and to apply the revenues from the two properties to paying off encumbrances. To provide funds for the maintenance of "A" and "B" and pay off the mortgages, the beneficiaries agreed to the trustee setting up a depreciation or capital cost allowance fund into which was paid sums withheld from the revenue derived from "A" and "B". The appellant in computing his income from "A" claimed as a deduction one quarter of the capital cost allowance. The respondent ruled that he was not entitled to the deduction under s. 58 of the 1948 Income Tax Act as under the trust he was entitled to one quarter of the income without reduction of any amount in respect of capital cost allowance. The Income Tax Appeal Board affirmed the disallowance.

Held: That the operation of property "A" was the operation of a business, or at least in the nature of a trade or business, and there was a duty on the trustee to preserve the "corpus" in the interest of the residuary legatees. To assure that, reasonable yearly depreciation was necessary. *Re Estate John Ross Robertson* [1953] 2 S.C.R. 1 at 7. The net revenue was what was left after payment of taxes, interest, licenses and reasonable depreciation, and the four children of the testator were not entitled to claim more than the revenue remaining after deducting the said charges. It followed that the appellant was never entitled to any part of the amount set aside for depreciation. He never did receive it and since it never became his personal income, it was not taxable in his hands.

APPEAL from a decision of the Income Tax Appeal Board.

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

D. W. Mundell, Q.C. for the appellant.

A. L. DeWolf for the respondent.

HYNDMAN, D.J. now (August 31, 1956) delivered the following judgment:

This is an appeal from the judgment of the learned chairman of the Income Tax Appeal Board.

The claim is made by the respondent under s. 58, subsections (4), (5), (6) and (6A), of the 1948 Income Tax Act, which reads as follows:

58(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.

* * *

(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 60.

(5) Such part of the amount that would otherwise be the income of a trust or estate for a taxation year as was payable in the taxation 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.

(6) For the purposes of subsections (4) and (5), 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.

(6A) A beneficiary or other person beneficially interested in a trust or estate who is entitled, either contingently or absolutely, to the property of the trust or estate or some part thereof at some future time, may deduct from the amount that would otherwise be his income from the trust or estate by virtue of subsection (5) such part of the amount that would otherwise be deductible from the income of the trust or estate for the year under regulations made under paragraph (*a*) of subsection (1) of section 11 as the trust or estate may determine; and any amount deductible under this section for a taxation year shall be deducted from the amount that the trust or estate would otherwise be able to deduct under regulations made under the said paragraph (*a*) but shall, for the purpose of section twenty, be deemed to have been allowed to the trust or estate under those regulations in computing its income for the year.

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MANNING v. MINISTER OF NATIONAL REVENUE

Hyndman D.J.

I may say at the outset that in my opinion, if depreciation or capital cost allowance as hereinafter mentioned was improperly claimed by the trustee, in view of the said statutory provisions, appellant was properly chargeable for income tax on his personal income in respect of the amount claimed by the respondent.

The material facts, as I find them, are that the father of the appellant, the late Charles Edward Manning, of the city of Toronto, clergyman, died on the 3rd day of September, 1928, having first made his last will and testament, dated the 20th of February, 1928, the material portions as affecting the issues herein being as follows:

I WILL AND DIRECT that my real estate situate on the north east corner of Bloor Street and Dovercourt Road in the City of Toronto be held in trust and the net income derived therefrom be divided share and share alike among my four children, during their respective lives, without power to dispose of the same in the way of anticipation but with power to appoint or dispose of by will that after his or her decease the share of the income to which such child was entitled shall go and enure to the benefit of such person or persons as are designated by said will, with the further power in like manner to dispose of an undivided one fourth share of the estate or corpus from which said income was derived, in the event of no further disposition then to form part of the residue.

I FURTHER WILL AND DIRECT that the said property shall not be sold nor encumbered beyond that which is in existence at the date of my decease and if the encumbrance thereon during the lifetime of any or either of my said children is reduced or satisfied in whole or in part in any way whatsoever, the said property is not to be further encumbered during the lifetime of any or either of my said children.

I WILL AND DIRECT that my property on the south west corner of Bathurst Street and St. Clair Avenue in the City of Toronto and any other real estate except my Bloor and Dovercourt property be sold as soon after my decease as the market conditions, in the discretion of my executors and trustees would warrant so as to obtain a reasonable price for the same. The property is to be disposed of either by public auction or private sale and upon such terms as to down payment and otherwise as to my executors and trustees may seem meet. I direct that the proceeds of the said sale be applied in reduction or payment of the incumbrance on my said property on the corner of Bloor Street and Dovercourt Road and the balance is to be divided share and share alike among my said four children.

THE rest and residue of my estate I give, devise and bequeath to my beloved wife Florence E. E. Manning for her own use absolutely.

The testator appointed his three children Harold Ernest Manning (the appellant herein), Luella Muriel Manning, and Doris Anita Manning as executors and executrices of his said will. Probate was granted to the above-named son and daughters on the 4th of October, 1928, by the Surrogate Court of the County of York.

The Bloor Street and Dovercourt Road property is hereinafter designated as property A, and the Bathurst Street and St. Clair Avenue property as property B. The present controversy arises in connection with property A only.

Property A, above mentioned, has a substantial building upon it, being three storeys high with a frontage of 94-95 feet on Bloor Street, and a frontage of 160 feet on Dovercourt Road. It was rented to a variety of tenants. The ground floor consisted of shops, and the upper floors were occupied by professional men, and for residential quarters.

At the time of the testator's death, there was a mortgage upon the said property in the amount of about ninety thousand dollars in favour of the National Trust Company Limited, bearing interest at six per cent per annum.

Property B was a vacant, undeveloped lot, except that a small revenue was derived from renting it for signs.

It will be noted that, under the terms of the will, no increase was to be made in the mortgage above-mentioned, the direction being that it should not be sold or encumbered beyond that which was in existence at the date of his decease, and, furthermore, if the encumbrance thereon during the lifetime of any or either of his children was reduced or satisfied in whole or in part, in any way whatsoever, it should not be further encumbered during the lifetime of any of his children.

As to property B, the will provided that the same be sold as soon after his decease as market conditions in the discretion of his executors and trustees would warrant, and that the proceeds of such sale should be applied in reduction or payment of the encumbrance on property A, any balance to be divided, share and share alike, amongst his four children.

At this stage, I might observe that the youngest child was incompetent to manage her affairs, and consequently it was not possible for the beneficiaries in any way to depart from the terms of the trust.

Owing to the depression in the real estate market at the time of the testator's death, and for some time afterwards, the trustees were unable to secure a satisfactory price for property B.

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In 1931 or 1932, Mr. Manning, the appellant, was approached by the general manager of the National Trust Company with the suggestion that they should at once begin paying off the principal of their mortgage. Mr. Manning was able to prevail on Mr. O'Connor of the trust company to refrain from pressing the demand for reduction of the principal, as he says, because he had in mind the possibility of developing property B and, if and when that came about, they would in all likelihood be able to commence paying on the principal, and so two or three years' extension was granted.

In 1936 an opportunity arose to develop property B, but the demands of the National Trust Company had to be taken into consideration.

Owing to the fact of the incompetence of the youngest sister, it was impossible for the remaining beneficiaries to in any way depart from the terms of the will. Consequently an application was made to the Supreme Court of Ontario and an order made by MacFarland J. on the 20th of March, 1936, the material portions of which are as follows:

> It is ordered that the applicant, executors and trustees may refrain from selling property more particularly described in exhibit 3 to the affidavit of H. E. Manning filed herein, and may cause buildings to be erected thereon in accordance with the plans and specifications referred to in said affidavit and may rent and continue to rent the said buildings.
>
> And it is further ordered that said executors, etc., may borrow on a security of the first mortgage on the said property at such rate of interest as they or he may arrange the sum of $65,000 or such lesser sum as the said executors, etc. may determine and may be arranged.
>
> And it is further ordered that the said executors, etc. may from time to time apply such amounts out of the income to be derived from the said property and buildings in reduction and payment of the encumbrances referred to in the said last will and testament as they may see fit to apply after paying to the committee of the estate of the said Grace Elaine Manning money sufficient for the maintenance, etc.

Having obtained this order, the question arose as to how they should meet the demands of the National Trust Company in respect of reducing the principal of their mortgage. It was concluded that there would be available non-taxable revenues from property A, representing depreciation allowance, as also non-taxable revenue from parcel B development. Mr. Manning, in his evidence, testified that he had always claimed, and was allowed, depreciation on parcel A up to the year 1951, when it was disallowed by the Income

Tax Department, and the amount of $404.81 being one fourth of such depreciation was assessable to his individual income, from which this appeal arises.

In view of the condition of affairs, that is the now two mortgages, it was found that they would likely need at least six thousand dollars a year with which to reduce the principal of the mortgages.

Although there is nothing by way of agreement in writing up to 1951 between the three children, *sui juris*, and the National Trust Company, acting for the youngest sister, the evidence is that, after many meetings and conferences among them, it was decided and agreed that the amount allowed for depreciation on both buildings, and if necessary a portion of the net revenue, be applied on the said mortgages, and, as a matter of fact, over all those years following 1936, and up to and including 1951, no part of the depreciation on the buildings was paid to them.

It is contended that these amounts for depreciation were not only not paid to the beneficiaries but, furthermore, that if necessary by agreement they disclaimed the same, the reason being that it was absolutely necessary, for the preservation of the properties as against the mortgages, that such payments to them should not be made or demanded. If this contention is sound, there would be no liability on the part of the appellant to be charged with income tax on his share of such depreciation.

I cannot see that an agreement to give up part of a right to certain revenues—in this case, depreciation from an estate—(assuming in this case they were in law entitled to receive it, which I do not think they ever were), operates as a repudiation of the legacy, especially when it is not in any way prejudicial to other interested persons.

See Halsbury's Laws of England, second edition, volume 34, section 160.

It is clear that none of the said beneficiaries had any reversionary interest in property A. Assuming that they were entitled to the sums claimed as depreciation I am of opinion that they legally could disclaim any right thereto. It is true that there was no written agreement between them, but I am satisfied such disclaimer was in fact verbally

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agreed to and acted upon by them. The fact that they never since 1936 received or demanded payment strengthens the testimony of appellant that such agreement was in fact made.

But apart from what I have said above it seems to me that the crucial point in the case is as to the right of the trustees in administering the estate, to charge depreciation in respect of said property A.

According to the evidence of the appellant, as trustee of the estate he always claimed, and was allowed, depreciation by the Income Tax authorities, and it was only in 1951 that such depreciation was disallowed.

The learned chairman of the Tax Appeal Board held (1) that the operation of property A was not carrying on a business entitling the trustees to make a charge for depreciation.

In view of the fact, as said above, that property A is a large, and in my view a purely commercial building, with rented shops, offices, and living apartments, I am of opinion that the operation of such a property should be regarded as a business, or at least, in the nature of trade or business.

Furthermore it seems to me that there was a duty or obligation on the part of the trustees to maintain or preserve the "corpus" in the interest of the residuary beneficiaries, whoever they may be following the exercise or non-exercise of a power of appointment provided for in the will. In this case such deductions for depreciation were used to reduce the large mortgage on the property. If no such reduction took place the property, when it comes into possession of the residuary beneficiaries, it might possibly be of little value, or possibly lost through foreclosure. In my view it was a proper accounting system used by the trustees in ascertaining what the net revenue of the property was.

The only interest of the four legatees in property A was the receipt by them of the *net revenue* for life. The residuary beneficiaries are the real owners of the property, subject to the life interest of the four children in the net revenue.

(1) (1954) 54 D.T.C. 366.

It seems to me therefore that it is most important that the property should be kept intact for the residuary beneficiaries, and to insure that, reasonable yearly depreciation would be necessary. Otherwise, as stated above, it is possible that, when they come into possession, there may be little value left for them.

As said by Kellock, J. *in re Estate John Ross Robertson* (1):

> . . . The theory of such write-offs is maintenance of capital. If there are no profits until after proper write-offs for depreciation have been made, the fact that ultimate realization produces a surplus over book values, a result dependent on market conditions at the time of sale, does not establish that, after all, there were additional profits.

I am therefore of opinion that *net revenue* in this instance is that which is left after payment of taxes, interest, licenses, if any, insurance and other lawful expenses, and reasonable depreciation. In other words the four children of the deceased testator were not entitled to claim more than the revenue remaining after first deducting the said charges.

If I am correct in this, then it follows that the appellant was never entitled to receive any part of the amount set aside for depreciation. He never did receive it, and in my opinion never was entitled to such. It therefore never became part of his personal income, and consequently not taxable in his hands.

Therefore I would allow the appeal with costs, set aside the said assessment and direct that a further assessment be made, excluding therefrom the said sum of $404.81.

Should any question arise as to the actual amount improperly assessed to appellant then the matter may be spoken to.

Judgment accordingly.

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(1) [1953] 2 S.C.R. 1, 7.

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Mar. 29

Apr. 17

LEO PERRAULT LIMITED (*Defendant*) APPELLANT;

AND

CAPTAIN DAVID TREMBLAY *et al.* (*Plaintiffs*) ..... } RESPONDENTS.

Shipping—Damages for detention—Mitigation—Contract with 3rd party —Lien de droit created by consignee.

The respondents pursuant to a contract entered into with a third party transported two cargos of lumber to Montreal and there made delivery to the appellant. On each occasion the latter when notified of the arrival of the respondents' vessel sent trucks to take delivery but because it did not supply the trucks continuously the unloading was delayed. The respondent sued to recover damages for losses sustained by reason of the unlawful detention of their vessel beyond the normal time required to discharge cargo and were awarded judgment by the trial court.

Held: That although there was no contractual relationship between the parties the fact that the appellant on notice of the vessel's arrival undertook to send its trucks and take delivery, created a *lien de droit* between them and established the manner in which the cargo was to be delivered and the appellant became legally bound to proceed with the unloading without interruption until the vessel was discharged.

2. That the respondents were engaged in the "Coasting Trade in Canada" as defined by s. 2(12), *Canada Shipping Act, 1934,* S. of C. 1936, c. 49, and were not compelled to issue bills of lading under the provisions of articles V and VI of *The Water Carriage of Goods Act, 1936,* S. of C. 1936, c. 49: the mode of discharge was to be determined by the verbal undertaking of the appellant and the respondents could not change the manner in which the unloading was to take place. Carver's, *Carriage of Goods by Sea,* 5 Ed., p. 700; *Syeds* v. *Hay* 4 T.R. 260; *Grey* v. *Butler's Wharf* 3 Com. Ca. 67; *Smailes* v. *Hans Dessen* 12 Com. Ca. 117; 10 Asp. M.C. 319, 95 L.T. 809.

3. That there was a delay, the result of the unlawful act of the appellant in not taking delivery in a reasonable time, but the respondents could have mitigated their loss by requesting permission to unload on the wharf and the trial judge was right in deciding the responsibility for the vessel's detention should be shared and as to the amount of damages the respondents were entitled to recover.

APPEAL from the judgment of the District Judge in Admiralty for the Quebec Admiralty District.

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

Harry Aronovitch for appellant.

André Verge for respondents.

FOURNIER J. now (April 17, 1956) delivered the following judgment:

This is an appeal from the judgment of the District Judge in Admiralty for the Quebec Admiralty District, dated July 3, 1953, by which he allowed the respondents' claim for damages arising out of the fact that the appellant unlawfully detained their vessel the *St-Paul du Nord* for a longer period than normally required for the discharge of cargo.

Here is a summary of the facts. The respondents, owners and operators of the above vessel, entered into an oral contract with a third party, by which they undertook to carry two shipments of lumber from Mont-Louis, Gaspé, to Montreal and deliver same to the appellant. The *St-Paul du Nord* on its first voyage arrived at Montreal on September 25, 1949, at 2.45 p.m. The appellant was notified of the vessel's arrival and the next day the unloading commenced. Discharge was completed on October 4, 1949 at 3.45 p.m. On its second voyage it arrived at Montreal on October 21, 1949 at 11.40 a.m. The appellant was immediately advised of this fact and unloading started at 1.15 p.m. the same day. The unloading was completed on October 28 in the afternoon, and the vessel departed the same day at 6.50 p.m. with a cargo of 200 barrels of oil.

On both occasions, the appellant, shortly after being advised of the vessel's arrival, sent its trucks to receive the shipments. It was established that under normal conditions a cargo of this nature would and should be discharged in about two days. It took seven to eight days to unload the first shipment and five to six days to discharge the second cargo. There is no doubt that, had a sufficient number of trucks been available, the cargo could have been discharged in two or three days. It would seem that the appellant, though it undertook to send its trucks to receive the lumber, failed to do so continuously till the vessel was unloaded. The appellant's employees had received instructions to attend first to the servicing of the company's clientele and, when not busy in doing so, to use the trucks for the discharging of the shipments in question. When the trucks were so diverted to other purposes, the respondents and their employees remained idle and the unloading stopped. The respondents claim that the delay caused them damages and entitled them to recover from the appellant the loss sustained therefrom.

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The respondents' claim is based on the rule that the consignee of goods is bound to remove the goods from the ship's side and to provide the number of men and necessary equipment to fulfil the task and that the discharging operation should be a continuous one.

In support of their proposition, it was established that they had received two shipments of lumber to be delivered to the appellant. They carried the cargoes to their place of destination and notified the appellant of their arrival. The company admitted having sent its trucks to take delivery. It is in evidence that the appellant proceeded slowly with the unloading because its men and trucks were part of the time occupied elsewhere, with the result that there were delays in the operation and the respondents' vessel was detained for longer periods than was necessary.

The appellant submits that it had nothing to do with the transportation or unloading of the shipment. It had a purchase contract with one Laliberté for a certain quantity of lumber to be delivered on the wharf at Montreal. No contract existed between the appellant and the respondents. There were no bills of lading, and the shipper had the obligation of discharging the cargo onto the wharf and notifying the appellant that the lumber had been unloaded on the wharf; that being done, it would be deemed that it had received delivery and then had become responsible for the lumber.

The appellant also contended that it was not legally bound to give any instructions as to unloading because it had purchased the lumber to be delivered on the wharf at Montreal. Furthermore, there could be no claim for damages because no demand or complaint concerning the delay of unloading had been made before the last day of discharging and there was no proof that the respondents had sustained any loss as a result of the delays.

The questions to be determined are: Was there a juridical relationship between the parties? If so, does the evidence show in what manner the delivery of the lumber was to be made by the respondents to the appellant? Were there delays in the unloading? Who was responsible for such delays? Did the delays result in a loss to the respondents, and was the appellant responsible for same?

The fact that a contract existed between the appellant and one Laliberté, concerning the purchase and delivery of the lumber, could not affect or bind the respondents, who were not parties to the contract. Legally, a person cannot be injured by the acts of others to which he is a stranger. Hence the appellant's position was that there was no contractual relationship between the parties and the mode of delivery of the lumber was determined by the contract between Laliberté and the appellant.

I cannot agree with this contention. Though there was no written contract between the appellant and the respondents, the fact that, on being notified of the arrival of the vessel, the appellant undertook to send its trucks to take delivery certainly created a *lien de droit* between the parties and established the manner in which the cargo would be delivered. I am of the view that the appellant, after the notification of arrival and the statement that trucks would be on hand to take delivery, became bound legally to proceed with the unloading of the lumber without interruption till the vessel was discharged.

The fact that there were no bills of lading does not help the appellant's contentions. Nothing in the law obligated the respondents to issue bills of lading. The respondents' vessel was engaged in "Coasting Trade in Canada" as defined by para. 12 of s. 2 of the *Canada Shipping Act 1934*, c. 44 of the Statutes of Canada, and they were not compelled to issue bills of lading under the provisions of articles V and VI of the *Water Carriage of Goods Act, 1936*, 1 Edw. VIII, c. 49 of the Statutes of Canada. There is no doubt that the mode of discharge had to be and was determined by the verbal undertaking of the appellant on the day of arrival of the shipments of lumber.

As to the delays in the process of unloading the cargo, it was admitted that they were the result of the appellant's actions. The trucks were used for other purposes after the commencement of the discharging, though on many occasions the respondent Clement Tremblay complained of this situation and requested that the unloading be proceeded with.

To my mind there was nothing unusual in what took place between the parties regarding the mode of delivery of the lumber. Once the respondents were told by the

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appellant that trucks would be on hand to receive the cargo, the respondents could not very well change the manner in which the unloading was to take place.

Carver's *Carriage of Goods by Sea,* 5th Ed., p. 700, states:

> . . . But if one mode of discharge involves charges upon the consignee which another suitable and convenient mode avoids, the shipowner cannot, contrary to the consignee's demand, insist upon adopting the former. Thus, if the consignee requires, and is ready to take delivery into lighters without the goods first being landed on the wharf at which the vessel is lying, the shipowner will be answerable if he lands them on to the wharf and so makes them liable to wharfage charges.

This rule was followed in the following cases: *Syeds* v. *Hay* (1); *Grey* v. *Butler's Wharf* (2); and *Smailes* v. *Hans Dessen & Co.* (3). If this rule applies to the consignee, I see no reason why it should not apply to the shipowner.

The mode of discharge having been determined and the appellant having sent trucks to take delivery, the operation should have continued without interruption. In the absence of express stipulation to the contrary, the delivery contemplated was a continuous delivery and the consignee was bound to remove the goods and to provide for the equipment and men necessary to cope with the situation. On the other hand, I am of the view that the shipowner, under the circumstances, had a certain duty to take necessary measures to minimize the damage. The respondents not only should have complained of the slowness of the unloading but should have insisted on discharging the lumber on the wharf, because when they did insist on the last day they were instructed to do so.

True, the rules cited by the learned trial judge were based on decisions which concerned claims for demurrage, but the accepted definition found in *Scrutton on Charter Parties,* 15th Ed., p. 339, reads as follows:

> DEMURRAGE, in its strict meaning, is a sum agreed by the charterer to be paid as liquidated damages for delay beyond a stipulated or reasonable time for loading or unloading.

In this case there was no charter party, but there was delay by a consignee in receiving a shipment of lumber in a reasonable time, which is alleged to have caused damages. The delay being the result of the unlawful act of the appel-

(1) (1791) 4 T.R. 260. (2) (1898) 3 Com. Cas. 67.
(3) (1906) 12 Com. Cas. 117.

lant in not taking delivery of the goods, the respondents were not bound to unload on the wharf but could have mitigated the loss sustained by requesting permission to do so. If they prove that they were detained for an unreasonable time and sustained a loss as a consequence, I believe they are entitled to succeed with their claim.

I am satisfied that the appellant did not take delivery of the lumber in a reasonable time or within the normal period necessary to unload the cargo and that it is liable for part of the damages, if any, caused to the respondents on this account.

Now, did the respondents suffer damages and sustain losses? If so, what amount should be granted?

A careful reading of the evidence has convinced me that the learned trial judge was correct in his conclusions that the responsibility of the detention of the vessel should be shouldered by both parties.

As to the damages, there is proof that the delays occurred during the last part of the navigation season on the St. Lawrence River and that the respondents were quite busy during that time. After they had delivered cargoes at Montreal, freight would be taken on there and at other ports for the return voyage. This seems to have taken place after the two trips herein mentioned. It may be readily assumed that, had they not been delayed, they could have taken freight on their way back and could have possibly made another voyage. This seems a logical deduction when one considers the evidence adduced and, to my mind, justifies the learned trial judge's conclusion. This loss, though not established by positive figures, is nevertheless a real one. He was correct in considering this loss with the cost to the respondents of the payment of the crew's salaries and board and their own loss, for which amounts were given.

In my opinion, for the reasons above stated, the learned trial judge was right in deciding that the plaintiffs-respondents were entitled to recover from the defendant-appellant

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as damages the sum of $100 per day for each day during which he found that the vessel had been unlawfully detained as a result of the defendant-appellant's failure to discharge the cargoes.

I, therefore, make mine his finding. The appeal is dismissed with costs.

Judgment accordingly.

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Apr. 16, 17

Aug. 21

BETWEEN:

McMAHON AND BURNS LIMITED .....APPELLANT;

AND

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

Revenue—Income Tax—Company incorporated to buy and sell securities—Debentures bought as investment sold soon after at profit—Capital gain or taxable income—The Income Tax Act, 1948, S. of C. 1948, c. 52, ss. 3, 4, 127(1)(e).

The appellant was incorporated under the Companies Act (B.C.) as a private company to carry on the business of underwriters and investment dealers in government, municipal and industrial securities and that of stock brokers. By its Memorandum of Association it was authorized to purchase either as principal or agent and absolutely as owner to sell the debentures of any public or private corporation. In September 1949 it joined a nation-wide group of investment dealers in disposing to the public at a profit a $17,000,000 issue of Interprovincial Pipe Line Co. convertible debentures due in 1970. At the same time it purchased on the open market, allegedly for its investment account and not for trading or trading account, $91,500 principal amount of the debentures. In 1950 in two separate transactions it sold part of the debentures so purchased at a profit of $54,776.25. The Minister of National Revenue included the amount in the appellant's taxable income for 1951 ruling that the two profitable transactions constituted a part of the appellant's ordinary business operations, or in the alternative constituted a concern in the nature of a trade. The appellant, contending that the transaction represented a capital gain and that the purchase had no relation to any class of profit-making operation but was intended solely as an investment of its idle funds, appealed to the Income Tax Appeal Board and its appeal having been dismissed, now appeals to this Court.

Held: That the appellant's Memorandum of Association provided for the particular species of business exercised by it in the purchase and sale of the debentures in question and the profit ensuing therefrom was

correctly included as an item of taxable income. *Anderson Logging Co. v. The King* [1925] S.C.R. 45 at 56 affirmed by [1926] A.C. 140; *Gairdner Securities Ltd. v. Minister of National Revenue* [1952] Ex. C.R. 448, followed.

APPEAL from a decision of the Income Tax Appeal Board.

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

Hon. J. W. de B. Farris, Q.C. and *D. L. Vaughan* for appellant.

W. M. Carlyle and *F. J. Cross* for respondent.

DUMOULIN J. now (August 21, 1956) delivered the following judgment:

This is an appeal by McMahon and Burns Limited, of Vancouver, B.C., an investment dealer and stock-broker firm, from a decision of the Income Tax Appeal Board, dated August 9, 1954 (1), dismissing appellant's appeal from a previous decision of the Minister of National Revenue regarding its income tax assessment for the taxation year ending on March 31, 1951.

In assessing the appellant, for that particular year, the Minister of National Revenue, respondent, included in the Company's reported income a sum of $54,776.25, being the total net profit realized through two resales of 4% convertible debentures, October 1, 1970, of the Interprovincial Pipe Line Co.

Incorporated on the 26th of September, 1939, as a private company, under the *Companies Act* of British Columbia, McMahon and Burns Limited carried on a successful trade as underwriters and investment dealers in government, municipal and industrial securities. It also could and did act as stock-broker on the usual commission basis. The firm is presently in the process of voluntary liquidation.

In September 1949, in order to partially implement the construction of its oil transmission system, The Interprovincial Pipe Line Co. called upon a nationwide group of investment dealers to dispose amongst the public of a $17,000,000 issue consisting in 4 per cent convertible debentures due October 1, 1970.

(1) 54 D.T.C. 370; 11 T.A.B.C. 140.

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Dumoulin J.

Appellant joined this group of dealers, marketed an allotted share of this issue, subsequently selling it to its customers at a profit.

Apart from these initial and customary dealings, the appellant firm "in view of the soundness and long term earning potentials of the said debentures, and the common shares into which same were entitled to be converted (on the basis of two common shares for each $100 debenture), determined to purchase and acquire on the open market and hold for itself solely as an investment for its funds, up to $100,000 principal amount of said debentures" (Statement of Facts, para. 5).

The appropriate resolution (Ex. 3) was passed on September 19, 1949, to the effect "that the Company purchase for Investment Account, an amount not exceeding One Hundred Thousand Dollars ($100,000.00) Par Value, of Interprovincial Pipe Line Company, 4% Convertible Sinking Fund Debentures, Series 'A', dated October 1, 1949, to mature October 1, 1970, at the market".

Accordingly, from September 19, 1949, and until October 14 of the same year, McMahon and Burns Limited purchased on the open market, allegedly "for its investment account and not for trading or trading account, $91,500 principal amount of the said Debentures."

These purchases, dated October 31, 1949, and the ensuing sales, were entered in the ledger account (Ex. 9), under the caption of: "Investment Account".

On July 31, 1950, the Company, apprehending international complications in the Far East—the Korean war had started—sold $40,500 principal amount of these securities at a profit of $46,038.75.

Another sale of a $5,000-slice was made five months later, December 30, with a profit of $8,737.50, raising the total net gain welling out of these transactions, to the sum of $54,776.25.

The point at issue can be succinctly outlined.

By Notice of Assessment dated December 5, 1952, in respect of appellant's taxation year ending March 31, 1951, the Minister of National Revenue included the above mentioned amount of $54,776.25 in the firm's taxable income, assessing thereon the consequent tax. The respondent feels

justified in so doing because these two profitable transactions "constituted a part of the appellant's ordinary business operations, or in the alternative constituted a concern in the nature of trade". The respondent goes on to say that: "The said transactions were not sufficiently dissimilar to the ordinary dealings of the appellant in its business to warrant treatment different from its other trade transactions". (Reply to Notice of Appeal, para. 6).

Appellant, on the other hand, objects that the profit of $54,776.25 was not a business profit under s. 4 of the 1948 Income Tax Act or income from any of its businesses under s. 3; that it merely was the gathering in of the enhancement in value of a capital asset not subject to tax; and, finally, that the purchase of $91,500 of said debentures had no relation to any class of profit-making operation, nor was it intended as a profit-making scheme but solely as an investment of its idle funds.

Appellant relies upon the 1948 Income Tax Act, ss. 3 and 4; respondent upon the same sections and s. 127(1)(*e*), R.S.C. 11-12 Geo. VI, c. 52.

The testimonial evidence adduced on the company's behalf was practically a repetition of the position taken in its written pleadings.

Mr. John McMahon, president of the brokerage firm in 1949, after outlining the company's financial structure, stated that, during the period September 19 and October 14 of that year, it bought on the open market a block of 915 one hundred dollars Pipe Line bonds for its own "investment purposes".

He then went on to say that a margin of not less than ten per cent plus hypothecation of the particular specialties were required by the bank to guarantee the necessary moneys, i.e. $45,000, advanced to McMahon and Burns. To the extent of this loan, at least, it would appear that appellant was surely not investing any idle funds at the moment.

The Pipe Line debentures were bought for appellant by the company trader, Mr. George Duval Sherwood, conformably to instructions received from Mr. J. McMahon to keep these securities as an "investment".

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Mr. John Lyon Burns, the only other shareholder in the firm, corroborated his partner's evidence, regarding the motives which induced the company to enter upon this purchase of 915 debentures for a price of $91,500, earmarking such commodities to its particular account "as a very promising investment".

The last witness, a Vancouver chartered accountant, Mr. Donald William Smallbone, attended, at all material times, to the firm's accounting and auditing.

The Pipe Line debentures, says the accountant, were listed in a general ledger account sheet (Ex. 9), and pledged with the bank, from whom money had been borrowed "outside of and without any relation to the company's other dealings". I hasten to note that this statement is of slight consequence, since a bank may extend separate loans to the one customer for separate but nevertheless ordinary business and profit-seeking ventures.

This Court is once again requested to decide the time-honoured, yet oft-recurring dispute whether the transaction in issue represented the enhancement value of a capital investment or merely profit taking in line with regular trade operations.

Here, the decisive factor should not be the taxpayer's intention, however candid, but the paramount and transcendent interpretation of the pertinent law in this given set of facts.

Before reading the statute, it should be kept in mind that appellant, by Article 3(*a*) of the Memorandum of Association (Ex. 1), is authorized, *inter alia*: "to underwrite, subscribe for, purchase, or otherwise acquire and hold, either as '*principal*' or agent, and 'absolutely as *owner*' or by way of collateral security or otherwise, and to sell, exchange, transfer or otherwise dispose of, or deal in the bonds or debentures . . . or securities of any public or private corporation, government, or municipality, etc.".

It can hardly be denied that the acquisition and disposal of securities as "principal and absolute owner" constitutes one of the main and basic corporate powers conferred upon appellant.

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This, I know, is not the sole standard, since the Supreme Court of Canada, in *Sutton Lumber & Trading Co. Ltd. v. Minister of National Revenue* (1), held:—

> That the question to be decided is not as to what business the company might have carried on under the memorandum, but rather what was in truth the business it did engage in.

Still it is of interest to ascertain that the business it effectively engaged in was not foreign to the memorandum.

In the same line of reasoning, Mr. Justice Cameron, in *Gairdner Securities Ltd. v. Minister of National Revenue* (2), in considering whether the transaction there in question constituted an investment, said:

> . . . its true nature is to be determined from the taxpayer's whole course of conduct, viewed in the light of all the circumstances. Now on the facts . . . it seems to me impossible to conclude that there was here any investment. . . . On the contrary, I think it was in fact *a speculation essentially of the same character . . . as it* [the appellant] *had previously engaged in* and one which it was specifically empowered to do . . . the appellant was empowered to acquire and hold, and to sell and exchange stocks in other securities as principal (as well as in the capacity of agent), as one of the essential features of its business and as one of the appointed means by which it could carry on business for profit. What was done was . . . exercise of the very powers for which the company was incorporated.

This decision met with the unanimous approval of the Supreme Court (3).

Reverting, in the former case, to the important factor that Gairdner Securities had previously engaged in a *"speculation of the same character"* as the moot one, it should be said that McMahon and Burns Limited, on the same day, viz. September 19, 1949, it began buying Interprovincial Pipe Line debentures for its "Investment Account", also purchased for resale to clients another $50,000 block of these identical securities (*vide*: Mr. John McMahon's evidence).

Buying for Jack or buying for Jill seem pretty well alike, and it would require a subtler mind to single out any real objective distinction in this case, so as to bestow upon each of these twin operations a different "family name". The disposal by appellant of its individual holdings after a lapse of nine and fourteen months is quite consistent with

(1) [1953] 2 S.C.R. 77; C.T.C. 237; 53 D.T.C. 1158.

(2) [1952] Ex. C.R. 448 at 457-58.

(3) [1954] C.T.C. 24.

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the able pursuit of a purely commercial and speculative venture. This may be the proper place for recalling, if necessary, the presumption in favour of the assessment's validity, and so far but slim grounds were afforded me in rebuttal thereof. Finally, it should also be remembered that in *Anderson Logging Co. v. The King* (1) affirmed by the Judicial Committee of the Privy Council (2), Mr. Justice Duff, as he then was, held that:—

> The sole *raison d'être* of a public company is to have a business and to carry it on. If the transaction in question belongs to a class of profit-making operations contemplated by the memorandum of association, *prima facie*, at all events, the profit derived from it is a profit derived from the business of the company.

Considered in its proper light, this decision is not necessarily at variance with the subsequent pronouncement, above cited, in *Sutton Lumber & Trading Co. Ltd. v. Minister of National Revenue.*

Appellant's distinguished counsel referred the Court with particular insistence to the case of *Minister of National Revenue v. British and American Motors Toronto Ltd.* (3).

Here, Mr. Justice Cameron, after an exhaustive sifting of every relevant aspect, material and legal, reached the conclusion that of two transactions, outwardly similar: a disposal of automobiles, the first, comprising a single car, was the disposition of a capital asset and non-assessable; the second, including nine vehicles, constituted a profit-making deal consonant with British and American Motors' regular trade.

I must quote at some length to insure a fair understanding of the reasons which impelled the learned judge to draw the dividing line in this case.

> When it (British and American Motors Ltd.) commenced business in 1944, it acquired the assets of a predecessor company, including one 1942 Chevrolet car. Until that car was sold in 1949 it was always treated as a capital asset and depreciation thereon was claimed and allowed in each year . . . (at p. 178).
>
> The second item of $7,220.81 relates to nine new Chevrolet cars acquired by the respondent in 1948 and assigned to the use of company personnel in that year. In its income tax return for 1948, the respondent showed them as capital assets under the heading "Service cars and trucks", claimed depreciation thereon at the rate of 25 per cent of costs, and that claim was allowed in the assessment. All nine cars were sold in 1949 but no depreciation thereon was claimed for that year . . . (at p. 179).

(1) [1925] S.C.R. 45, 56. (2) [1926] A.C. 140.

(3) [1953] C.T.C. 177; 53 D.T.C. 1113.

The two items in dispute must receive separate consideration. The first item has already been mentioned. That vehicle—a used Chevrolet car—was purchased and paid for in 1944. Thereafter, until sold, it was used in the service of the company by one of the employees engaged in soliciting sales of parts to independent garages throughout Toronto. Throughout it was treated as a capital asset in the category of "Service cars and trucks", and depreciation was claimed and allowed annually. It was acquired for the purpose of being used as a service car and was used for that purpose and no other. When it was practically worn out it was sold to a firm of wreckers and the proceeds were credited to the inventory of used cars. Under these circumstances, it is conceded that normally it would be properly treated as a capital asset . . . (at page 180, 4th paragraph).

It is my opinion (continues Honourable Justice Cameron), that where it is clearly established that a motor vehicle has been bought for use as a capital asset in the necessary service of the taxpayer, has been used in the same manner and to the same extent as a capital asset would normally be used, and has always been treated and recognized as a capital asset, the profit which may arise upon its disposition is a capital profit. I am satisfied upon the evidence that the 1942 Chevrolet car sold by the respondent in 1949 falls within that category . . . (at page 181).

I turn now to the second item, the profit of $7,220.81 made upon the sale of the nine Chevrolet cars. The respondent employed a large staff and for some time there had been a practice of furnishing certain of its key personnel with cars owned by the company . . . All were sold between January 8 and April 9, 1949, and the employees were given new cars to replace the cars sold. On an average the nine cars in question were used by the key personnel for about six months before being sold. The item itself refers to these cars as "Inventory demonstrators". In view of the evidence, I think that term is incorrect for they were not used as demonstrators in the ordinary sense except possibly on very rare occasions. It is established that in 1948 and 1949 the demand for automobiles was much greater than the supply; salesmen were instructed not to "push" sales of cars and demonstrators were not needed. . . . There is abundant evidence to establish that these vehicles in the main were not used exclusively as service cars . . . (at page 182).

The conclusion reads:

It follows, therefore, that the profit realized on the sale of the nine cars was an inventory profit . . . (at page 186).

I need only add that, moreover, as a matter of fact, similitude is hardly tenable between automobiles and debentures, between the two completely different trades implied.

In view of the evidence adduced, oral and written, the relevant law offers no difficulty of interpretation.

Section 127(1)(*e*) and ss. 3 and 4 of chapter 52, R.S.C. 1948, are, respectively, as follows:—

S. 127(1)(e). In this Act . . . "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade. . . .

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S. 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.

S. 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.

It was previously seen that the appellant's Memorandum of Association provides for the particular species of business exercised in the purchase and sale of Pipe Line debentures, and that a profit ensued from the exercising of such business.

The Company may have entertained the mistaken notion that the transaction at bar was a realization of a capital asset, but under the circumstances, notwithstanding appellant's so ably propounded arguments to the contrary, I cannot divorce the intention from the error.

The appellant has failed to show error in the assessment appealed from. Profit from its transactions in the Interprovincial Pipe Line debentures, in respect of its taxation year ending March 31, 1951, amounting to $54,776.25, was correctly included as an item of taxable income. Therefore, the appeal must be dismissed with costs against appellant.

Judgment accordingly.

BETWEEN:

1956

Mar. 26

Aug. 27

THE TORONTO GENERAL TRUSTS CORPORATION, Executor and Trustee of the ESTATE of HENRY HERBERT HILDER ..... APPELLANT;

AND

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

Revenue—Succession Duty—Bequest to brother who predeceases testatrix leaving issue her surviving—Whether bequest part of brother's estate and liable to succession duty—The Wills Act, R.S.O. 1950, c. 426, s. 36(1)—Dominion Succession Duty Act, R.S.C. 1952, c. 89, ss. 2(m), 3(1)(i) and 6(1)(a).

T died in 1949 having by his will directed that the interest on the residue of his estate be paid his widow for life and on her death the residue be distributed among his three sons. Probate of the will had been granted and the duties levied under *The Dominion Succession Duty Act,* R.S.C. 1952, c. 89, paid, when in 1950 T's sister died survived by T's widow and sons. The sister by her will drawn some five months prior to T's death bequeathed him a legacy of some $62,992. In view of this bequest the respondent, the Minister of National Revenue, made a further assessment of T's estate and claimed additional succession duty. The appellant contested the demand contending that T's estate was merely a "conduit pipe", that the real and immediate successors of the sister were the beneficiaries under T's will and that no succession duties were properly chargeable against T's estate which had been closed before his sister's death.

Held: That the bequest, which at Common Law would have lapsed, took effect by virtue of *The Wills Act,* R.S.O. 1952, c. 36, s. 1, as if T's death had happened immediately after his sister's. T was to be presumed alive at the time of his sister's death. The legacy thus became part of T's estate and was properly assessable for succession duties as claimed by the respondent. *In re Scott* [1900] 1 K.B. 372; [1901] 1 K.B. 228 applied.

APPEAL under the Dominion Succession Duty Act.

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

W. E. P. DeRoche, Q.C., and *P. N. Thorsteinsson,* for the appellant.

W. B. Williston, Q.C., and *A. L. DeWolf,* for the respondent.

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HYNDMAN D.J. now (August 27, 1956) delivered the following judgment:

This is an appeal from an assessment for succession duties made by the Minister of National Revenue dated the 27th of August, 1953. The amount of the duty charged is not in dispute. The only question is as to the liability of the estate to pay such duties.

The material facts may be simply stated.

The deceased Henry Herbert Hilder died on the 2nd day of February, 1949, testate, leaving him surviving his widow, Florence Maude Hilder, and three sons, Edwin Albert Hilder, Herbert Wilson Hilder and John William Hilder, all of whom remain alive. Letters Probate of his will were granted to the appellant by the Surrogate Court of the County of Welland on the 13th of April, 1949.

The deceased's will provided for certain specific bequests to his widow, for payment of the income from the residue of the estate to the widow for life, and for distribution of the residue amongst his children after the death of his widow.

In due course the succession duties were levied and paid, and the business of the estate was in due course settled.

Henrietta Hilder, sister of said Henry Herbert Hilder, died on or about the 4th day of September, 1950, having first made her last will and testament dated the 1st day of September, 1948, that is about five months prior to the death of her said brother.

Letters Probate of said will were granted to Thomas J. Darby, the surviving executor named therein, on the 20th day of November, 1950, and all succession duties were duly assessed and paid.

In her will, said Henrietta Hilder provided for the payment of certain legacies, for the transfer of her interest in a furniture business, and one-half of the residue of her estate to her brother, the said Henry Herbert Hilder, and the remaining half of the residue for certain religious and charitable objects.

The amount of the bequest to the said Herbert Henry Hilder was about $62,992.68.

In view of the said bequest to Herbert Henry Hilder, a further assessment was made by the Minister of National Revenue and mailed the 27th of August, 1953, claiming additional succession duties with respect to bequest of said $62,992.68. Notice of Appeal was lodged with the respondent and rejected on the 7th day of July, 1954. Appellant lodged with the respondent a Notice of Dissatisfaction on the 6th day of August, 1954, but on the 11th day of January, 1955, the assessment was confirmed by the Minister—hence this appeal.

Notwithstanding the said Henrietta Hilder was aware of the death of her brother, she made no further will, nor any alteration in the will of 1948.

At common law the said bequest to her brother would lapse. However, s. 36 of c. 426, R.S.O. 1950, enacts:

> 36. (1) Where any person, being a child or other issue or the brother or sister of the testator to whom any real estate or personal estate is devised or bequeathed, for any estate or interest not determinable at or before the death of such person, dies in the life-time of the testator either before or after the making of the will; leaving issue, and any of the issue of such person are living at the time of the death of the testator, such devise or bequest shall not lapse but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will.

In view of the said s. 36(1), it must be presumed that the said Henry Herbert Hilder was alive at the time of death of his said sister, and therefore such bequest would not lapse.

Section 6(1) of c. 89, R.S.C. 1952, of the *Dominion Succession Duty Act* provides:

> Subject to the exemptions mentioned in section 7, there shall be assessed, levied and paid at the rate provided for in the First Schedule duties upon or in respect of the following successions, that is to say,—
>
> (*a*) where the deceased was at the time of his death domiciled in a province of Canada, upon or in respect of the succession to all real or immovable property situated in Canada, and all personal property wheresoever situated;

Section 2(*m*) provides:

> "succession" means every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any deceased person, etc., etc.

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And Section 3(1) provides:

A "succession" shall be deemed to include the following dispositions of property and the beneficiary and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to such property:—

* * *

(i) property of which the person dying was at the time of his death competent to dispose;

The contention of the appellant is in effect, that the estate of the said Henry Herbert Hilder was merely a "conduit pipe", that the real and immediate successors or beneficiaries of Henrietta Hilder were the beneficiaries under the will of Henry Herbert Hilder and that, therefore, no succession duties can properly be chargeable against his estate, which had been closed before the death of his said sister.

The Minister of National Revenue, however, assessed the brother's estate on the ground that the said bequest became part of his estate or assets and therefore would be subject to succession duties, first as against the estate of Henry Herbert Hilder, and subsequently against the beneficiaries of his estate.

After the best consideration I have been able to give the matter, I have come to the conclusion that the contention of the appellant cannot be sustained.

Although Henry Herbert Hilder died before his sister, under the law and interpretation of said s. 36(1) the legacy from his sister devolved upon him. In its ordinary natural meaning it must be assumed that, at the time of Henrietta Hilder's death, her brother although in fact dead was still alive, and consequently became a successor to the property involved.

Many authorities were cited, but I think I need only refer to the reasoning in the case of *In Re Scott* (1), which in my opinion applies equally to the present case.

At page 233 of [1901] 1 K.B., A. L. Smith, M.R., said:—

I do not agree with Mr. Joseph Walton when he says on behalf of the appellants that the Wills Acts, 1837 (similar to s. 36(1) of c. 426, R.S.O. above), has nothing to do with the case in hand, for, in my judgment, it has, and it must be looked at to ascertain what it was that the son at the time of his death was competent to dispose of. For instance, it must be looked at to see whether the son was competent to dispose

(1) [1900] 1 K.B. 372; [1901] 1 K.B. 228.

only of property of which he was possessed at the date of his will, as was the case as to real estate before the Wills Act, or of which he was possessed at the time of his death, which is the case since the passing of the Wills Act. When ascertaining what real estate he was competent to dispose of, and upon which taxation is to take place, surely the Wills Act must be looked at, for it plays a very important part in the investigation. Now s. 24 of the Wills Act enacts that every will shall "take effect" as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will; in other words, by the Wills Act a testator is competent to dispose of all the real and personal estate he possesses at the time of his death, and not only, as before the Wills Act, of the real estate he possessed at the date of his will. This may make a great difference when, for the matter of taxation, it has to be determined, as in this case, what the deceased was competent to dispose of; for this is made the subject of estate duty. Again, to see whether the son took anything under his father's will of which he was competent to dispose, the Wills Act must also be looked at, in order to see whether it has any effect upon what the son was competent to dispose of. And what do we find? We find, by s. 33, that in a case like the present, although the son should die in the lifetime of his father, a bequest of the father to the son shall not lapse, but shall "take effect" as if the son had died immediately after the death of his father, unless the contrary intention should appear by the will. As before stated, if the son in the present case had in fact died immediately after the death of his father, the second estate duty now claimed would clearly have been payable; and, if there had been no Wills Act, the son would have had nothing to dispose of. But the Wills Act enacts that the will of the father shall take effect as if the son had died immediately after his father—*i.e.*, that, in the special circumstances to which the section applies, the son shall be competent to dispose of what is left to him by his father, although he may in fact die before his father. It is obvious that the Wills Act must be resorted to by the appellants to get rid of the lapse which otherwise would have taken place; and the same section of the Act by which the appellants get rid of the lapse enacts that the will of the father shall "take effect" as if the son had died immediately after his father; that is, that the son in this case was competent to dispose of the £80,000 of property, subject to his father revoking his will, which he never did. If the appellants take the benefit of s. 33, which they do, and thus obtain the £80,000 of property, they must take the burden also—*i.e.*, of paying the estate duty chargeable thereon.

And Collins, L.J., at page 234, said:

This case appears to me to present little difficulty when s. 33 of the Wills Act is construed in what seems to me its obvious *primâ facie* meaning, and in accordance with the interpretation which, as I think, it has received through a series of authorities. There is no doubt that, under s. 1, s. 2, sub-s. 1, and s. 2, subs-s. 1(*a*), of the Finance Act, estate duty is payable upon the property in question, if, under the last sub-section, John Scott, junior, was at the time of his death "competent to dispose of it". The property in question could clearly never have been his to dispose of in the events which happened but for the operation of s. 33 of the Wills Act. The property was devised to him by his father, and, as he died in

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Hyndman D.J.

his father's lifetime, the devise would have lapsed, and could not, therefore, have come under any disposition made by him. But it seems to me equally clear that the effect of s. 33 of the Wills Act is to confer upon him a right to dispose of it.

And Stirling, L.J., at page 238, said:

By s. 1 of the Finance Act, 1894, there is imposed in the case of every person dying after August 1, 1894, estate duty "upon the principal value, ascertained", as in the Act mentioned, "of all property, real or personal, which passes on the death of such a person". By s. 2, sub-s. 1, "property passing on the death of the deceased shall be deemed to include", amongst other particulars, "(*a*) property of which the deceased was, at the time of his death, competent to dispose". By s. 22, sub-s. 2(*a*), "a person shall be deemed competent to dispose of property, if he has such an estate or interest therein, or such general powers as would if he were *sui juris*, enable him to dispose of the property".

It is contended on behalf of the Crown that, regard being had to the terms of the Wills Act, s. 33, John Scott, jun., had such a general power as enabled him to dispose of the property devised to him by his father's will, and consequently that this property fell within the terms of s. 2, sub-s. 1(*a*), as being property of which he was at the time of his death competent to dispose. In my opinion this contention is right.

In view of what is said above I must find that the bequest of Henrietta Hilder to her said brother became part of his assets and estate, and properly assessable for succession duties as claimed by the respondent, and therefore this appeal must be dismissed with costs payable out of the estate of said Henry Herbert Hilder, deceased.

Should any question arise as to the amount of the duty the matter may be spoken to.

Judgment accordingly.

1955
Jan. 10, 11
1956
Mar. 7

BETWEEN:

DOMINION ENGINEERING WORKS LIMITED ..... APPELLANT;

AND

A. B. WING LIMITED, CANADIAN ASSOCIATION OF EQUIPMENT DISTRIBUTORS AND THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE RESPONDENTS.

Revenue—Customs and Excise—Two and a half yard dipper capacity power shovels—Customs Tariff, R.S.C. 1952, c. 60, Tariff items 427, 427(a)—Customs Act, R.S.C. 1952, c. 58, s. 2(2)—Meaning of "class or kind not made in Canada"—No presumption of policy to be read into Tariff Items 427, 427(a)—Expression "of a class or kind not made in Canada" in Tariff Item 427(a) not referable solely to "machinery"—Nominal dipper capacity of power shovels a proper criterion of class or kind of power shovels—Appellant to pay only one set of costs.

In October 1953 the respondent, A. B. Wing Limited, imported a Northwest Power Shovel, crawler-mounted, convertible full revolving, Model 80D, of a 2½ cubic yard dipper capacity. It was entered under Tariff Item 427 of the Customs Tariff, R.S.C. 1952, c. 60, and the Deputy Minister confirmed this classification. The respondent appealed to the Tariff Board which reversed the Deputy Minister's decision and held that the power shovel was properly classifiable under Tariff Item 427*a* of the Customs Tariff. The appellant appealed from the declaration of the Tariff Board on a question of law pursuant to leave, the question being whether the Tariff Board erred, as a matter of law, in holding that the power shovel was properly classifiable for tariff purposes under Tariff Item 427*a*.

Held: That there is no presumption that it is the purpose of Tariff Items 427 and 427*a* to protect Canadian manufacturers against the importation of competitive machinery from foreign countries or that the words "of a class or kind not made in Canada" in Tariff Item 427*a* should be construed in such a way as to afford Canadian manufacturers of power shovels the intended protection in cases where, by reason of closeness in sizes, an imported power shovel would compete in the Canadian market or on the job with a domestic one or, on the other hand, that they should be construed in such a way as to give Canadian users of power shovels the fullest possible opportunity of importing power shovels of the desired capacity under the lower rates of Tariff Item 427*a*.

2. That full effect should be given to each of the Tariff Items 427 and 427*a*. Each must be read fairly and without the distortion of an assumption of policy that one is to over-ride the other.

3. That the expression "of a class or kind not made in Canada" in Tariff Item 427*a* is not referable to the expression "all machinery composed wholly or in part of iron or steel" by itself, but to the whole expression that precedes it, including the words "n.o.p.", and that the question for

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determination by the Tariff Board was not whether the imported power shovel was of a class or kind *of machinery* not made in Canada, but whether it was of a class or kind *of power* shovel not made in Canada.

4. That the nominal dipper capacity of power shovels is a proper criterion to apply to the classification of power shovels even where the difference between them is one of neighbouring capacities and that it was within the competence of the Tariff Board to settle where the line of difference of classes or kinds of power shovels according to the difference in their nominal dipper capacities should be drawn.

5. That the Tariff Board's decision to draw the line where it did was a decision of fact with which this Court has no jurisdiction to interfere.

6. That the appellant will be required to pay only one set of costs.

APPEAL on a question of law from a declaration of the Tariff Board.

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

A. Forget, Q.C., for appellant.

J. M. Coyne, for respondent A. B. Wing Limited.

G. F. Henderson, Q.C., for respondent Canadian Association of Equipment Distributors.

W. R. Jackett, Q.C., for respondent Deputy Minister of National Revenue for Customs and Excise.

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

THE PRESIDENT now (March 7, 1956) delivered the following judgment:

This is an appeal on a question of law from the declaration of the Tariff Board in Appeal No. 306, dated May 20, 1954, pursuant to leave to appeal on the following question:

Did the Tariff Board err, as a matter of law, in holding that the crawler-mounted convertible full revolving power shovel imported under Vancouver Entry No. 35748 of 21st September, 1953, is properly classifiable for tariff purposes under Tariff Item 427*a*?

The power shovel in question, described as a Northwest Power Shovel, crawler-mounted, convertible full-revolving, Model 80D, of a 2½ cubic yard dipper capacity, was imported, as stated in the question, by the respondent A. B. Wing Limited, hereinafter simply called the respondent, and entered under Tariff Item 427 of the Customs Tariff, R.S.C. 1952, Chapter 60, with a customs duty of 22½ per cent *ad valorem.* On October 19, 1953, the Deputy Minister of National Revenue for Customs and Excise con-

firmed the classification made by the Vancouver appraiser in conformity with a Departmental Memorandum, Series D No. 51 MCR 152, dated June 3, 1953, reading as follows:

> Pursuant to the provisions of Section Six of the Customs Tariff, Convertible Full Revolving Power Shovels and Cranes with a dipper capacity of from ⅜ cubic yard to 2½ cubic yards, both inclusive, are to be considered as of a class or kind made in Canada. The customary three weeks' notice relative to this ruling does not apply to the sizes ½ cubic yard to 2 cubic yards, both inclusive, as this range has previously been ruled to be of a class or kind made in Canada.

The respondent then appealed to the Tariff Board which reversed the Deputy Minister's decision and held that the power shovel was properly classifiable under Tariff Item 427*a* of the Customs Tariff with a customs duty of 7½ per cent *ad valorem*. It is from this decision that the present appeal on the stated question of law is taken.

It is desirable at the outset to set out the relevant tariff items. Tariff Item 427 reads:

> All machinery composed wholly or in part of iron or steel, n.o.p., and complete parts thereof.

and Tariff Item 427*a* reads:

> All machinery composed wholly or in part of iron and steel, n.o.p., of a class or kind not made in Canada; complete parts of the foregoing.

I should also note that the *ad valorem* rates of 22½ per cent under Tariff Item 427 and 7½ per cent under Tariff Item 427*a*, to which I have referred, do not appear under the tariff items of the Customs Tariff. They result from the adoption of an international agreement commonly referred to as GATT.

It was agreed before the Tariff Board, and the fact is not disputed, that no crawler-mounted, convertible full-revolving power shovel with a 2½ cubic yard dipper capacity such as that of the imported shovel was made in Canada and that the largest dipper capacity of any power shovel made in Canada was a 2 cubic yards. It was also established that in the trade, both in Canada and in the United States, from which latter country the power shovel in question was imported, power shovels are categorized according to the capacity of the dippers with which they are ordinarily equipped and for the use of which they are primarily designed, and this capacity is commonly described as nominal dipper capacity. The capacity of the dipper is measured by the amount of water that it can hold in one

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scoop. But if the operator of a power shovel categorized as a 2½ cubic yard dipper capacity power shovel should wish to use a 2 cubic yard capacity dipper to handle heavy material or a 3 cubic yard capacity dipper to handle light material this does not change the category of the power shovel: it is a 2½ cubic yard nominal dipper capacity power shovel. And similarly, a 2 cubic yard nominal dipper capacity power shovel does not cease to be such by reason of the fact that a 1½ or 2½ cubic yard capacity dipper may be used with it according to whether the material to be handled is heavy or light. There can, I think, be no doubt that in the trade the standard used in the classification of power shovels in their several categories is that of nominal dipper capacity. They are sold and bought according to their nominal dipper capacity. Manufacturers, dealers and users alike have accepted it as the standard of the categories into which power shovels fall.

The reasoning which led the Tariff Board to its declaration that the imported power shovel is of a class or kind not made in Canada and, therefore, classifiable under Tariff Item 427*a* is clearly put. The Board regarded nominal dipper capacity as the proper term by which to describe the capacity of a power shovel and found as a fact that the trade understands and accepts this standard and bases its categories of power shovels on it. Nominal dipper capacity is the measure which the trade adopts for the classification of power shovels into their various categories. The Board then made the following important statement:

> short of the general adoption of a standard of specifications that might well include other criteria, probably the most practical *single* criterion by which power cranes and shovels can be categorized by makers, buyers, and users is that of so-called "nominal dipper capacity".

From this statement, which was not in dispute, the Board proceeded to its final conclusion. Its manner of doing so is best described in its own words. I set out the following paragraphs in its reasons for its declarations.

> In determining "class or kind" distinctions in the machinery field it appears essential to have regard for the over-all capacity or capability of various machines.
>
> .....
>
> The evidence is to the effect that the sizes actually made in Canada are nominally rated as to dipper capacity from ⅜ cubic yard to 2 cubic yards.
>
> The propriety of using capacity as a criterion in determining classification is so obvious as scarcely to require comment. It would, for example

be, unrealistic to regard power shovels rated as to nominal dipper capacity of 2½ cubic yards as a class of machinery made in Canada if, in fact the largest machines made in Canada were of ½ cubic yard dipper capacity.

The problem of classification on the basis of capacity becomes acute when the precise point of separation into the "class made" and the "class not made" has to be determined. The distinction which must be made is more or less arbitrary.

Where the capacities of machines are established in clearly defined sizes, as is the case with convertible full-revolving power cranes or shovels, the least arbitrary and perhaps therefore the best line of demarcation is in accordance with those sizes which are, in fact, made in Canada, as opposed to those sizes which are not.

The Tariff Board declared, accordingly, that the imported power shovel was of a class or kind not made in Canada and the only question in this appeal is whether it was in error, as a matter of law, in so declaring.

The issue is of considerable importance. The Court was informed that there are at least 60 tariff items in the Customs Tariff in which the expression "of a class or kind not made in Canada" appears. It may be said generally that where it does appear in a tariff item an article classifiable under such item may be imported into Canada at a lower rate of duty than if it were classifiable under the tariff item in which the expression does not appear. The proper classification of the article is thus of importance from a revenue viewpoint. It is also of importance to manufacturers and users. The expression is not defined in the Act and there is no statement of the test to be applied in determining whether an imported article is of a class or kind not made in Canada or not. The words are general in character, and necessarily so, for it is obvious that it would not have been possible to prescribe a test of general application. What is an appropriate test in any given case must depend on the circumstances.

Before I refer to the argument in support of the appeal I should note that the Departmental Memorandum to which I referred is devoid of legal authority. There was no legal justification for extending the class or kind of power shovels that were made in Canada, namely, shovels with nominal dipper capacities ranging from ⅜ cubic yard to 2 cubic yards, to include power shovels with a nominal dipper capacity of 2½ cubic yards which in fact were not made in Canada.

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Counsel for the appellant assigned a two-fold error to the Tariff Board, one that it had applied a wrong test and the other that it had failed to apply the right one. I summarize his first submission. He did not dispute the propriety of using nominal dipper capacity as a test in determining whether one power shovel is of a different class or kind from that of another but quarreled with the Board for drawing the line of difference where it did, namely, between a 2 cubic yard nominal dipper capacity power shovel and a 2½ cubic yard nominal dipper capacity one, being the next larger size. The only difference between them was that the latter was heavier. To say that it was of a different class or kind was a misconstruction of the tariff items. It was difficult to draw the line precisely and while it must be drawn somewhere the Board had drawn it at the wrong place. If, for example, it had been drawn between 2 and 6 or between 2 and 4 cubic yard nominal dipper capacities no valid objection could have been taken but to draw it between 2 and 2½ cubic yard nominal dipper capacities was erroneous. While difference in size might determine difference in class or kind it does not necessarily do so and cannot do so in the case of neighbouring sizes. There must be something more than the mere difference of one size. Indeed, the difference must be such that the larger power shovel is in fact of a different class or kind of machinery from that of the next smaller one. Nor was the trade classification of power shovels according to their nominal dipper capacities necessarily the classification that the Board should make. When Parliament intended size to be a determining factor it said so in plain terms, which it had not done in the present case. Consequently, since the 2½ cubic yard nominal dipper capacity power shovel, although not made in Canada, was so close in size to the 2 cubic yard nominal dipper capacity one that was made in Canada the Board was in error in declaring that it was of a class or kind not made in Canada.

Counsel then proceeded with his contention that the Board had been in error in failing to apply the proper test. Here he put forward two arguments, which might be termed minor and major submissions. His minor one was that if there was ambiguity in the meaning of the tariff items the

policy dictated by the Act might be taken into account. In this connection he referred to section 2(2) of the Customs Act, R.S.C. 1952, Chapter 58, which reads as follows:

> 2. (2) All the expressions and provisions of this Act, or of any law relating to the Customs, shall receive such fair and liberal construction and interpretation as will best ensure the protection of the revenue and the attainment of the purpose for which this Act or such law was made, according to its true intent, meaning and spirit.

and his submission was that the construction of the Act must be consonant with its purpose and that since the Board's declaration had the effect of reducing the revenue it defeated the purpose of the Act. In my view, there is no ambiguity of meaning in the tariff items and no merit in this submission.

The major submission was of a different nature. It was contended that one of the obvious prime objects of the Act was the protection of Canadian industry against competing imports, that the tariff items were a device for affording such protection and that where imported machinery competes in the Canadian market or on the job with domestic machinery it cannot properly be said that the imported machinery is of a different class or kind from that of the domestic one. Thus, if purchasers of power shovels would hesitate between importing a $2\frac{1}{2}$ cubic yard nominal dipper capacity power shovel and buying a domestic 2 cubic yard nominal dipper capacity one because of their closeness in size to one another they are competitive and this fact indicates that they cannot be of different classes or kinds. If there is a big difference in size between an imported power shovel and a domestic one they would be of different classes or kinds for in such case they would not compete with one another but the reverse would be true if the sizes are close to one another. If there is competition in the Canadian market between the manufacturers of the two shovels referred to Parliament must have intended that the Canadian manufacturers should be protected against the import of the competing shovel and that the term "class or kind" should be construed so broadly as to afford such protection. Whether there is competition in the Canadian market between an imported power shovel and a domestic one is one of the prime factors to be considered in determining whether the imported shovel is of a class or kind

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not made in Canada or not. The Tariff Board did not mention this important criterion and its failure to apply it was erroneous. Put tersely, the contention was that since the imported power shovel was of the size immediately above that of the largest domestic one experience showed that they did compete with one another and counsel urged that once such competition was shown the Canadian manufacturer was entitled by law to the protection of Tariff Item 427. He then proceeded to review the evidence in order to show that the two shovels were in fact similar in function and characteristics and would compete with one another.

There are several reasons for rejecting these submissions. The contention that the Tariff Board erred in failing to apply the test of whether the imported power shovel was competitive with the largest domestic one in determining whether the former was of a class or kind not made in Canada within the meaning of Tariff Item 427*a* was based on an assumed presumption that it is the purpose of the tariff items in question to protect Canadian manufacturers against the importation of competitive machinery from foreign countries and that the words "of a class or kind not made in Canada" in Tariff Item 427*a* should be construed in such a way as to afford Canadian manufacturers of power shovels the intended protection in cases where, by reason of closeness in sizes, an imported power shovel would compete in the Canadian market or on the job with a domestic one. I say categorically that there is no such presumption. It would be just as logical to contend that since the purpose of Tariff Item 427*a*, so far as it relates to power shovels, is to enable Canadian users of power shovels to import them from foreign countries at the lower rate of the tariff item when they cannot obtain shovels of the desired capacity in Canada and since the words "of a class or kind not made in Canada" appear in Tariff Item 427*a*, and not in Tariff Item 427, there is a clear indication that Parliament intended that the words are to be construed in such a way as to give Canadian users of power shovels the fullest possible opportunity of importing power shovels of the desired capacity under the lower rates of Tariff Item 427*a*. The tariff items are not to be thus construed. As full effect must be given to one item as to the other. Each must be read fairly and without the distortion of an assumption of policy that one

is to over-ride the other. The only policy attributable to Parliament is that which it has expressed in the words of the items.

There is a serious error of construction in counsel's contention that before the imported power shovel can be properly classified under Tariff Item 427*a* it must be shown that the difference between its nominal dipper capacity and that of power shovels of a class or kind made in Canada is so great as to put it into a different class or kind *of machinery* from that of Canadian made power shovels. The expression "of a class or kind not made in Canada" in Tariff Item 427*a* is not referable to the expression "all machinery composed wholly or in part of iron or steel" by itself, but to the whole expression that precedes it, including the words "n.o.p.". The Tariff Items 427 and 427*a* are not concerned with machinery composed wholly or in part of iron or steel generally but only with the categories of such machinery that are not otherwise provided for in the Customs Tariff. Obviously, there are many categories of machinery composed wholly or in part of iron or steel that are classifiable under one or other of the items for the reason that they have not been otherwise provided for. It is plain that power shovels constitute one of these categories. They are machinery and are composed wholly or in part of iron or steel and no other provision has been made for them in the Customs Tariff. Thus, every imported power shovel is classifiable under either Tariff Item 427 or under Tariff Item 427*a*. Consequently, in the present case the question for determination by the Tariff Board was not whether the imported power shovel was of a class or kind *of machinery* not made in Canada but whether it was of a class or kind *of power shovel* not made in Canada. This interpretation of the meaning of the expression "of a class or kind not made in Canada" in Tariff Item 427*a* was adopted by the Tariff Board in its declaration in Appeal No. 272, dated March 18, 1953: *vide Canada Gazette,* Vol. 87, page 882, and I accept it, without hesitation, as a correct interpretation. That being so, the Tariff Board's declaration in the present case was a declaration that the imported power shovel was of a class or kind *of power shovel* not made in Canada. This declaration, in my opinion, of necessity imports two findings, one that it was of a different class or

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kind of power shovel from the class or kind of power shovels made in Canada and the other, a resulting one, that it was of a class or kind of power shovel not made in Canada. While I agree that there is no express finding by the Board of such difference in class or kind it is, in my opinion, plainly implied in its declaration.

Apart from the fact that there is no basis for the assumed presumption implied in counsel's contention there is a practical objection to it. It is desirable that the test of whether an imported power shovel should be classified for customs purposes under Tariff Item 427 or Tariff Item 427*a* should be a precise one, for it is clear that the items are exclusive of one another. There is no twilight zone between them. The test suggested by counsel lacks this quality. How could it be determined with the desired precision whether an imported power shovel is competitive with a domestic one? The question answers itself.

But there is a more serious reason for rejecting the appellant's submission. Its whole case rests on the contention that the nominal dipper capacity of an imported power shovel is a criterion for determining that it is of a different class or kind from that of power shovels made in Canada and therefore of a class or kind not made in Canada only if the difference between its nominal dipper capacity and that of the largest power shovel made in Canada is, in fact, such as to put the imported power shovel into a different class or kind of machinery from that of the domestic one, that there cannot be such a difference in the case of an imported power shovel which is of the next larger size than that of the largest domestic one and that the Board's declaration to the contrary was erroneous as a matter of law. In my opinion, this contention is unsound. In the first place, the Tariff Board did not use the mere size of the imported power shovel as the test of its difference. The criterion which it adopted and applied was that of nominal dipper capacity, meaning thereby the over-all capacity of the power shovel, of which size was only one factor. That being so, and the criterion of nominal dipper capacity being accepted as a proper one, I cannot find any valid reason for finding that the Board's declaration was erroneous.

Counsel's contention is really an indirect attack on the declaration of the Tariff Board in Appeal No. 272, but, in a sense, the Board has itself to thank for the situation that led to it. A brief reference to Appeal No. 272 will be in order. There had been representations to the Deputy Minister of National Revenue for Customs and Excise to the effect that the tariff classification of power cranes and shovels on the basis of nominal dipper capacity or type of mounting was *ultra vires* and illegal and that it should be held by the Department that all power cranes and shovels, regardless of nominal dipper capacity, were of a class or kind made in Canada and he had referred these representations to the Tariff Board for its opinion. It was argued before the Board that all power cranes, all power shovels and all convertible power cranes and shovels of the full-revolving type constitute a single and indivisible class or kind of machinery irrespective of variations in nominal dipper capacity, type or mounting, size, weight or any other criterion. The Board disagreed with this contention. It interpreted, as I have already stated, the words "class or kind" in Tariff Items 427 and 427*a* as meaning, in the case before it, class or kind of power crane or power shovel rather than class or kind of machinery and expressed the opinion that power cranes and power shovels could be classified into classes or kinds according to their type of mounting or nominal dipper capacity. Thus nominal dipper capacity was approved as a criterion for the classification of power shovels into various classes or kinds for customs tariff purposes. But the Board concluded its reasons for judgment as follows:

> In so declaring the Board does not suggest that nominal dipper capacity is necessarily the only basis on which power cranes and power shovels could or should be classified; nor that the precise classification presently established by the Department is necessarily correct. It is the Board's opinion, however, that the criterion selected by the Department and made the basis of the ruling at issue is a defensible one.

The Department took comfort from this statement and extended its classification of power shovels of a class or kind made in Canada, which had ranged in nominal dipper capacities from $\frac{1}{2}$ cubic yard to 2 cubic yards, to include power shovels of $\frac{3}{8}$ cubic yard nominal dipper capacity at the lower end of the range and power shovels of $2\frac{1}{2}$ cubic yards nominal dipper capacity at the higher end, although

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there were no power shovels of this capacity made in Canada, and put this extended classification into the Departmental Memorandum to which I have referred. It was from this extended classification that the present respondent appealed to the Tariff Board when it was applied to the power shovel which it had imported. Thus the Board, in declaring, as it did in effect, that the Department's extended classification was erroneous, took up the matter of classification of power shovels according to their nominal dipper capacities from where it had left off in Appeal No. 272.

My reason for saying that counsel for the appellant made an indirect attack on the Tariff Board's declaration in Appeal No. 272 is that while he conceded that the nominal dipper capacity of power shovels is a criterion for classifying them into different classes or kind he contended that this criterion was not applicable where the difference in nominal dipper capacities was only as between neighbouring capacities and sought to establish by reference to the evidence that there was no difference in fact between the imported $2\frac{1}{2}$ cubic yard nominal dipper capacity power shovel and the domestic 2 cubic yard nominal dipper capacity one, that they were, therefore, of the same class or kind and that, consequently, the former could not be of a class or kind not made in Canada. He submitted that the Board had not made any finding of fact on the question whether the imported power shovel was different in function and characteristics from the largest domestic one but had automatically adopted the trade's classification without regard to whether the imported shovel and the largest domestic one were, as a matter of fact, different from one another and that this automatic adoption of the trade's classification was erroneous, as a matter of law.

There is no substance in this submission. The Board's declaration follows logically and naturally from its declaration in Appeal No. 272. Its decision that the trade's classification on the basis of nominal dipper capacity is probably the best one to adopt is a further recognition of nominal dipper capacity as a criterion of classification. It is not suggested, and could not validly be contended, that classification on this basis is erroneous, as a matter of law. It was settled by the declaration in Appeal No. 272 that nominal dipper capacity is a proper criterion to apply in the classi-

fication of power shovels. Once it is conceded, as it must be, that this is a proper test for their classification how could it be said that the Board's application of the test in the present case was erroneous, as a matter of law? Since the nominal dipper capacity of power shovels is the standard which the trade, both in Canada and the United States, recognizes as the standard for its placement of power shovels in their various categories and this criterion of classification for customs tariff purposes was adopted by the Board in its declaration in Appeal No. 272, from which no appeal was taken, it is obvious that the line of difference of classes or kinds of power shovels must be drawn at some difference in their nominal dipper capacities. That being so, it was within the competence of the Tariff Board to settle where it should be drawn. Its decision to draw it where it did was, in my opinion, plainly a decision of fact with which this Court has no jurisdiction to interfere. Thus, counsel's charge of error is really a charge of error of fact, which, even if well founded, could not succeed.

But to contend that the Tariff Board drew the line of difference of class or kind where it did without regard to the evidence is wholly unreasonable. All of the evidence to which counsel referred was before the Tariff Board. In my opinion, it is inconceivable that it would have accepted the trade's classification of power shovels into different classes or kinds and made its declaration, accordingly, if it had considered, on the evidence before it, that there was, as a matter of fact, no difference in function or characteristics between the imported $2\frac{1}{2}$ cubic yard nominal dipper capacity power shovel, which was not made in Canada, and the class or kind of power shovels that were made in Canada, or even the largest of such domestic power shovels.

In my judgment, there can be no doubt that in the Board's declaration there is implied a finding of fact that the imported power shovel is different in fact from any domestic power shovel. There would, therefore, be no object in following the course suggested by counsel for the appellant that this Court should refer the case back to the Tariff Board for a specific finding whether the imported power shovel is, as a matter of fact, different in function and

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characteristics from the largest domestic one, for it is plain what its finding would be. It could not be different from that which it plainly implied in its declaration.

If there was material before the Tariff Board from which it could reasonably declare that the imported power shovel was of a class or kind not made in Canada its finding should not be disturbed. This view of how the Court should deal with appeals on questions of law from decisions of the Tariff Board has been consistently taken ever since the Court was vested with jurisdiction to entertain such appeals; *vide*, for example, *Deputy Minister of National Revenue for Customs and Excise v. Parke, Davis & Company Limited* (1); *Canadian Lift Truck Company Limited v. Deputy Minister of National Revenue for Customs and Excise* (2). Here there was ample warrant for the Board's declaration. Indeed, in the case of power shovels, it would be difficult to think of a better criterion of difference of class or kind than that of nominal dipper capacity. It is recognized by the trade, manufacturers, dealers and users alike, and I am unable to find any reason for concluding that the Tariff Board was in error in declaring that the imported power shovel was of a different class or kind from that of any power shovel made in Canada, even a 2 cubic yard nominal dipper capacity one, and, therefore, classifiable under Tariff Item 427*a* as being of a class or kind not made in Canada. I have, therefore, no hesitation in answering the question of law in the negative.

There remains only the matter of costs. I had occasion to deal with this subject fully in *The Goodyear Tire and Rubber Company of Canada Limited et al. v. The T. Eaton Co., Limited et al.* (3) and I apply the same principles here. The appellant will be required to pay only one set of costs. These will be payable to the respondent, A. B. Wing Limited. The other respondents will each pay their own costs.

The result is that the appeal herein will be dismissed with costs as stated.

Judgment accordingly.

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(1) [1954] Ex. C.R. 1 at 20. (2) [1954] Ex. C.R. 487 at 498.
(3) [1955] Ex. C.R. 229 at 240.

BETWEEN:

THE HORSE CO-OPERATIVE MARKETING ASSOCIATION, LIMITED } APPELLANT;

1954
Oct. 7
1956
June 1

AND

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

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, s. 3(1) —The Co-Operative Marketing Association Act, R.S.S. 1940, c. 180, ss. 4(1), 13, 7(1)(v), 7(1)(w), 10, 43—Quality of income—Substance and reality of transaction to be considered—Appellant machinery established by members—Appellant agent for members.

The appellant was incorporated under The Co-Operative Marketing Association Act, R.S.S. 1940, c. 180. Its members associated themselves together as an incorporated association on a non-profit co-operative plan for the purpose of disposing of their surplus horses by collective and co-operative action. At first the appellant sold live horses but later it processed horse meat and sold it largely in Belgium. The appellant was not in the ordinary business of buying horses. Its members delivered horses to it as instructed and on such delivery received an initial payment per pound, the balance of the payment being dependent on the year's operations. At the end of the year 1947 the appellant credited its members with two amounts, which it styled equalization allotment and further allotment, the totals of which came to $102,917.84 for the former and $742,665.23 for the latter. In assessing the appellant the Minister added these two amounts to the amount of taxable income reported by it. The appellant objected and appealed to the Income Tax Appeal Board which dismissed its appeal and the appellant appealed against this decision.

Held: That the amount of $102,917.84, described as equalization allotment, represents the total of the equalization allowances which were credited to the members' accounts to ensure that all members who had delivered horses in 1947 would receive the same initial payment per pound for the horses delivered by them in that year as if the initial payment per pound had been uniform throughout the year. It was, in a sense, a deferred balance of initial payment per pound credited to those members who had received less than the highest initial payment per pound set for the delivery of horses in 1947.

2. That the amount of $742,665.23, described as further allotment, is the total of the balances due to the members, after the initial payments had been equalized, apportioned out of the net proceeds of the year's operations on the basis of the live weight of the horses delivered during the year, after the results of the year's operations had been ascertained.

3. That the appellant was required to account fully to its members for the proceeds of the sale of horses delivered to it for marketing or processing and the processed products.

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4. That what the members really did in associating themselves together in the appellant association was to establish it as the means or machinery for accomplishing by co-operative action the purpose which they could not achieve individually, namely, the advantageous disposal of their surplus horses. When they delivered their horses to the appellant they did not sell them to the appellant in the ordinary sense but delivered them to it for marketing or processing by it on their behalf and for them.

5. When the appellant received the horses it did so as agent for the members and was accountable to them for the net proceeds from their marketing or the sale of the processed products. The initial payments to the members were really advances to them on account of the total to which they were severally entitled and the surplus of the appellant's receipts over its expenditures did not belong to the appellant as its profits or gains but belonged to the members in their own individual rights and was held by it on their behalf and for them.

6. That, alternatively, the amounts in dispute would be part of the cost of the horses to the appellant and there would be no remaining surplus to constitute profit or gain to it.

APPEAL from decision of Income Tax Appeal Board.

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

W. B. Francis, Q.C. and *R. H. McClelland* for appellant.

J. L. McDougall, Q.C. and *F. J. Cross* for respondent.

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

THE PRESIDENT now (June 1, 1956) delivered the following judgment:

This is an appeal from the decision of the Income Tax Appeal Board (1), dated April 1, 1954, dismissing the appellant's appeal from its income tax assessment for the year 1947.

In its income tax return for the year ending December 31, 1947, the appellant, which had received horses from its members during the year and also purchased horses from non-members and had processed and sold horse meat, included a report from its auditors containing several statements prepared by them, one of which was called its operating statement. This showed, on the one side, the total value of its production for the year as $5,384,552.41 and, on the other, the manner in which this amount was accounted for. The cost of processing and marketing came to $2,752,151.06, the cost of horses was put at $2,578,509.07,

(1) (1954) 10 T.A.B.C. 311.

and the balance of $53,892.28 was described as non-member earnings. This last named amount with the addition of an item of $342.77 for life insurance premiums making a total of $54,235.05 was the only amount which the appellant reported as taxable income from its horse operations. The item of $2,578,509.07 described in the operating statement as "Cost of Horses" was made up as follows:

Initial Payments to Members	1,543,522.43
Full Payment to non-members	189,403.57
Equalization Allotment—Payable	102,917.84
Further Allotment—Payable	742,665.23
	$2,578,509.07

The two last named amounts, namely, $102,917.84 as equalization allotment and $742,665.23 as further allotment, are the amounts in dispute in this appeal. In assessing the appellant the Minister added these amounts to the amount of taxable income reported by it in its return. It objected to the assessment but the Minister confirmed it. The appellant then appealed to the Income Tax Appeal Board which dismissed its appeal. It is from this decision that the present appeal is brought.

The appellant had credited the amounts in dispute to the members in their several accounts under circumstances that will be explained later and the issue is whether they were properly included in the assessment appealed against as items of profit or gain to the appellant and, therefore, taxable income in its hands.

The issue is an important one and it is essential to its determination that the dealings between the appellant and its members should be viewed in the light of their surrounding circumstances so that the true character of the amounts in dispute may be ascertained.

While the questions involved in these proceedings are not free from difficulty I have reached the conclusion without hesitation that the amounts in question were erroneously included in the assessment appealed against and that the appeal herein should be allowed and the assessment set aside. The reasons for my conclusion follow.

The appellant was incorporated on April 6, 1944, under The Co-operative Marketing Associations Act, R.S.S. 1940, Chapter 180, under the name of The Saskatchewan Horse

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Co-Operative Marketing Association, Limited which name was changed on June 11, 1945, to its present one so that farmers from Alberta as well as from Saskatchewan might become members of it. Section 4(1) of the Act provided as follows:

4. (1) Any ten or more persons resident in Saskatchewan who desire to associate themselves together as an incorporated association for the general purpose of marketing products on the non-profit co-operative plan, either with or without a capital divided into shares, shall in the presence of a witness, sign in duplicate and cause to be filed in the office of the registrar a memorandum of association, printed or typewritten (form A), to which shall be attached an affidavit verifying the signatures.

It was under this provision that the appellant was duly incorporated on the filing of the required Memorandum of Association and Organization Bylaws. The capital stock of the appellant consisted of 500,000 shares of one dollar each. Its head office was at Swift Current.

The main object of the appellant, as stated in the Memorandum of Association, was:

4. (*a*) To undertake and carry on all kinds of business or operations connected with the marketing, collecting, receiving, assembling, taking delivery of, buying, slaughtering, processing, transporting, selling, or otherwise handling or disposing of horses produced or delivered to it by its members or by any other persons eligible for admission as members, or the selling or marketing of the by-products thereof;

and I should also refer to the following incidental object:

4. (1) To do all or any of the above things as principals, agents, contractors, trustees or otherwise, and by or through trustees, agents or otherwise, and either alone or in connection with others;

But while the appellant's main object was stated in these general terms the evidence is, in my opinion, conclusive that it was not a trading corporation in the ordinary sense of that term. It was organized for a particular and temporary purpose and its membership was restricted to persons interested in its accomplishment.

The purpose of the members in associating themselves together as an incorporated association on the non-profit co-operative plan, within the meaning of section 4(1) of the Act, is of prime importance. It was carefully and clearly stated by Dr. L. B. Thomson, the president and former acting secretary of the appellant. He was its chief witness. I was favourably impressed with the manner in

which he gave his evidence and I accept it without hesitation. His evidence established that the purpose of the farmers in south-western Saskatchewan in forming the appellant was to find a market for their surplus horses of which there were about 300,000 in Saskatchewan. There were also from 150,000 to 200,000 in Alberta. It was important to dispose of these horses in order to be able to maintain their stock of cattle if there should be a recurrence of drought conditions, but, of course, the farmers desired to realize as much as possible for the horses that they had produced. The only visible means of achieving their purpose was to form an association for the marketing of their horses on a non-profit co-operative plan under the Act and they acted accordingly. The reality was that they decided to do by collective and co-operative action what they could not do individually and they set up the appellant as the necessary machinery for the accomplishment of their collective purpose.

It was originally intended that the appellant should market live horses and some sales of live horses were negotiated. But it was realized at an early date that the processing and sale of horse meat would be necessary if the surplus horses were to be disposed of. There was only a limited market in the United States for horse meat for use as food in fur ranches and for pets but it developed that there was a substantial demand for horse meat in Belgium and, after discussions with the Canadian Government and with guarantees from the Saskatchewan Government, the appellant decided to meet this demand. It really did so at the request of the Canadian Government which had the contract with Belgium. Accordingly, it built two processing plants, one at Swift Current and the other at Edmonton, and sold large quantities of processed meat for use in Belgium. The processing of the meat involved the use of other commodities than meat but the cost of these was less than 2% of the total cost of the output. The supplying of the demand for horse meat in Belgium was the chief means adopted by the appellant for achieving the purpose for which its members had associated themselves together. It was never intended to establish a permanent horse meat processing industry for the farmers knew that over a period of years their surplus of horses would be eliminated and the

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purpose for which the appellant was formed, namely, to dispose of their surplus horses, would be accomplished. Thus the purpose of the appellant and its members was a particular and temporary one. It was, of course, as Dr. Thomson explained, part of this purpose that the appellant should dispose of its members' surplus horses as advantageously as possible for them but the disposal of them was the main consideration. It was not intended that the appellant should embark on a scheme of profit making for itself or to make any profit for itself at the expense of its members.

That the appellant was not in the ordinary business of buying horses is manifest from the restricted nature of its membership and the manner in which it controlled the delivery of horses to it. Section 13 of the Act imposed membership limitations as follows:

13. Only persons who are engaged in the production of products to be handled by or through the association, including tenants of land used for the production of such products, and all landlords who receive as rent all or part of the crop upon premises leased by them, and such other persons as obtain title to or possession of products by due process of law, and associations having as their object or one of their objects the buying and selling or marketing of products on the co-operative plan and which are incorporated or registered under the provisions of *The Co-Operative Associations Act* or this Act or any former Act governing such associations, shall be admitted as members of an association.

And Organization Bylaws 1, 4 and 5 provided:

1. Subject to the approval of the directors, any horse breeder, owner of horses, or person who uses horses in his farming operations, shall be eligible for membership in the Association.

4. Subject to the approval of the directors, an association whose membership is composed of persons qualified for membership under provisions of section 1, hereof, shall be eligible for membership in the Association.

5. Shares in the Association may be allotted by the directors to such persons as meet the requirements of Sections 1 and 4 hereof, but shall include tenants of land used for the production of horses, landlords who receive as rent a share of the proceeds from the sale of horses produced on land leased by them, and such other persons as obtain title to horses by due process of law.

And the share certificates issued to members contained the following restriction:

No person shall have issued to him nor shall any person be entitled to hold shares in this association unless he is engaged in the production of the products handled by the association: and no co-operative association other than those admissible as members are permitted to have issued to them nor to hold shares in this association.

The original Organization Bylaws were consolidated on June 11, 1945, and again on September 26, 1946. Reference will be made to the 1946 consolidation, unless otherwise stated. The bylaws cited above indicate the closed nature of the appellant. It was a horse producers' association. The appellant carefully controlled the delivery of horses to it. For example, Organization Bylaw No. 3 provided:

3. As a further condition of membership, the directors may require each member, or applicant for membership, to furnish annually to the Association a list of horses which he has or expects to have for sale, together with such other information respecting such horses as the directors may require from time to time.

And Organization Bylaw 14 provided for quotas for delivery as follows:

14. To ensure as equitable a service as possible, each member may, from time to time, be assigned a quota of horses to be delivered to the Association from year to year, or for such other period as may be designated, provided however, that the directors may, in the assignment of quotas, give preference to those members who list horses for delivery to the Association within one year from the date of incorporation.

And Organization Bylaw No. 13, which had been No. 12 prior to the 1946 consolidation, provided:

13. Except under such conditions as may be approved by the directors, no member shall deliver a greater number of horses to the Association than were in his possession on the date of his admission to membership, in accordance with these bylaws, and except colts from mares in foal at the date of incorporation of the Association.

The purpose of this bylaw was to prevent members from acquiring horses from others and delivering them to the appellant in large numbers at the expense of other members. It was part of the scheme for the orderly and equitable disposition of the members' surplus horses. Dr. Thomson gave further evidence relating to the regulation of deliveries. It was not open to members to deliver horses as they chose. A delivery date had to be arranged with the appellant and a delivery date permit obtained from it before horses could be shipped to one of its processing plants. Horses were marked as being intended for it and delivered only according to its instructions or subject to a quota set by it.

It is unlikely that the appellant would have regulated deliveries in this manner if its purpose had been the making of profit for itself out of buying horses and processing and selling horsemeat.

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Moreover, the conditions subject to which members delivered horses to the appellant showed that it was not in the business of buying them from the members for a fixed price and making a profit out of its transactions with them. Dr. Thomson explained that from time to time the directors set an initial amount per pound to be paid to the members on the delivery of horses by them. This varied, according to conditions, as will be seen later. The initial payment per pound was made known to the members or intending members in various ways, one of which was by the circulation of a document, similar to Exhibit 23, called "Information for Owners and Shippers". A member or intending member would obtain a delivery date permit from the appellant and deliver his horse or horses to one of its agents for shipment to one of its processing plants. He knew the initial amount per pound that he would receive and that for each horse delivered there would be a deduction of $1 for a share and $3 for the reserve fund, made under the authority of Organization Bylaw No. 15, to which further reference will be made later, but he did not know what amount he would ultimately receive in respect of his delivery. It would be based on the grade and live weight of the horses delivered during the year but the amount to which he was entitled was dependent on the results of the year's operations.

By way of illustration of the manner in which the appellant dealt with its members Dr. Thomson referred to the transactions which it had with two of them, Mr. A. Koehmstedt, a farmer near Kerrobert, and Mr. John Weiman, a farmer near Bruno. I shall deal with the transactions with Mr. Koehmstedt first. On February 14, 1946, he applied for membership in the appellant and delivered a horse to it for which what was called a "Purchase Voucher" was handed to him. This showed the number of head of horses delivered (in this case only one), the grade, weight, the price per pound and the value, in this case $23.88. The voucher also listed the deductions made, namely, 1 share at $1 par value, reserve fund at $3 per horse delivered, freight charges, cleaning and commission, a total of $8.27, which left a balance of $15.61 under the heading of "Pay't herewith—Cheque No." A Bank of Montreal money order for $15.61 was sent to Mr. Koehmstedt with a covering letter, dated February 28, 1946, in which the amount of $15.61,

which had been called simply "Pay't herewith" on the "Purchase Voucher", was correctly described as "initial payment on horses delivered to the Association." Mr. Koehmstedt acknowledged the receipt of the cheque, confirmed the statement set out in the "Purchase Voucher" and signed an application for shares, in this case only one share because only one horse had been delivered. His application was approved by the directors and a share certificate was duly issued to him.

I now refer to his transactions in 1947. On May 29, 1947, he delivered two horses to the appellant and received a "Purchase Voucher" with the same headings as in the previous case except that there was a provision for shrinkage allowance of 100 lbs. per head at 5 cents per pound. The total value for the two horses was put at $57.50. The deductions, including 2 shares at $1 each and reserve fund at $3 per horse delivered, or $6, came to $10.68. The balance of $46.82 was described in the "Purchase Voucher" as "Initial Pay't Herewith" and the total of $57.50 was described as "Total Deductions and Initial Pay't". I should say here that while this "Purchase Voucher", as also the previous one, carried the heading "Price per lb" Dr. Thomson explained that this meant, and should have read, "Initial price per lb", that being the amount which the directors had set as such. I accept his explanation. It is reasonable, consistent with the rest of the document, which should be read as a whole, and in accord with the course of dealing between the members and the appellant. I find as a matter of fact that the term "Price per lb" on the "Purchase Voucher" should have read "Initial price per lb". That would have been a more nearly correct head. On July 17, 1947, Mr. Koehmstedt delivered 2 horses to the appellant and received a similar "Purchase Voucher". Finally, there was a "Purchase Voucher", dated December 11, 1947, on the shipment of 1 horse on that date, but this voucher carried an item of "Deferred Equalization Allowance" of 2½ cents per pound. On this voucher the value of the horse was shown as $25, the deductions at $5 and the initial payment at $20, leaving the deferred equalization allowance of $2.50 under the heading "Balance Due".

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Mr. Koehmstedt's account was set out in his share ledger sheet. For the year 1946 it showed the delivery of 1 horse weighing 1,365 lbs. Under the heading of "Earnings" there was a credit of $8.20 as an equalization and interim credit and $4.10 as a further credit. Dr. Thomson explained that it was the policy of the directors to make an equalization payment on all horses delivered in 1945 to 1946 and also an interim payment up to April, 1946. The sum of $8.20 was paid to Mr. Koehmstedt by cheque, dated November 24, 1947, on interim and final payment account leaving $4.10 as his credit balance for the horse delivered in 1946. Thus it appears that on February 14, 1946, he was credited with $12.30 over and above the $15.61 which was paid to him on February 28, 1946. This is consistent with Dr. Thomson's statement that the price per pound which was stated on the "Purchase Voucher" at 2½ cents was only an initial payment per pound. For 1947 the share ledger sheet shows that Mr. Koehmstedt delivered 4 horses with a weight of 4,400 lbs., that his equalization and interim credit was $2.50 and his further credit $47.08 and that these two amounts coming to $49.58 stood to his credit along with the $4.10 for 1946 which made his total credit come to $53.68. These credits were over and above the initial payments which had been made to him on the deliveries made by him on the dates mentioned.

I now refer to the transactions of Mr. John Weiman in 1947. These were of the same nature as those of Mr. Koehmstedt except that in the case of the 3 horses which he shipped on February 13, 1947, the price per pound for the 2 Grade A horses was stated as 2 cents and that for the one Grade C horse as 1½ cents. Dr. Thomson explained that these prices were initial payments per pound and that they had been set by the directors. Later in the same year, about June, this initial payment for Grade A horses was raised to 2½ cents per pound and this was the initial payment to Mr. Weiman for 6 Grade A horses shipped on August 21, 1947. Later, he was given an equalization credit of $19.70 in respect of the horses he had delivered on February 13, 1947, made up of an additional ½ per cent per pound for the Grade A horses and ¼ cent per pound for the Grade C one. These items appear on a "Purchase Voucher", dated February 13, 1947, filed as Exhibit 18. On this voucher the item

appears under the heading "Balance Due". While the voucher is dated February 13, 1947, it is obvious that it was issued later and dated back. It is also plain that although the items appear on what was called a "Purchase Voucher" there was no purchase at the time of its issue.

Mr. Weiman's share ledger sheet shows this item of $19.70 under the heading of "Earnings" as an equalization and interim credit. There was also under the same heading a further credit of $129.26 making a total credit of $148.96 over and above the initial payments of $72.05 on February 13, 1947, and $169.06 on August 21, 1947, which Mr. Weiman had received in respect of the horses delivered on the said dates.

The transactions referred to illustrate Dr. Thomson's evidence that the directors set initial payments per pound from time to time and then credited the members who had delivered horses when initial payments per pound were low with equalization allowances so that all members should receive the same initial payment per pound for the horses delivered by them during the year according to their grade, either by way of actual initial payments or by equalization credits.

The amounts in dispute in this appeal may now be explained. The amount of $102,917.84, described as equalization allotment, represents the total of the equalization allowances, such as the $2.50 in the case of Mr. Koehmstedt and the $19.70 in the case of Mr. Weiman, which were credited to the members' accounts to ensure that all members who had delivered horses in 1947 would receive the same initial payment per pound for the horses delivered by them in that year as if the initial payment per pound had been uniform throughout the year. It was, in a sense, a deferred balance of initial payment per pound credited to those members who had received less than the highest initial payment per pound set for the delivery of horses in 1947.

The amount of $742,665.23, described as further allotment, represents the total of such amounts as the $47.08 credited to Mr. Koehmstedt and the $129.26 credited to Mr. Weiman. It was the total of the balances due to the members, after the initial payments had been equalized as

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just explained, apportioned out of the net proceeds of the year's operation on the basis of the live weight of the horses delivered during the year, after the results of the year's operation had been ascertained.

The two amounts totalling $845,583.07 appeared in one of the statements filed with the appellant's income tax return called Statement of Members Equity. The two amounts were not paid to the members but credited to their accounts to be paid later. The credits were made pursuant to a resolution of the directors, dated December 13, 1947, to which further reference will be made.

The appellant did some business with non-members under special circumstances which were explained by Dr. Thomson. In certain months of the year, such as February, March and April, particularly in the hard winter of 1946-1947, horses were not coming in to the appellant in the proper condition to provide meat of the quality required to meet the Belgium contract. It, therefore, became necessary to acquire a limited number of horses in the desired condition and the appellant did so by purchasing them from non-members. An illustrative record of a transaction with a non-member, filed as Exhibit 21, shows that on May 31, 1947, Mr. J. L. Toews shipped 17 horses to the appellant for which he was paid 2·75 cents per pound. This was an outright purchase at that price, the amount of which was paid to Mr. Toews on June 2, 1947. This closed the transaction.

The transactions of the appellant with Mr. Koehmstedt and Mr. Weiman on the one hand and with Mr. Toews on the other show a fundamental difference between them. In those with a non-member, such as Mr. Toews, the appellant purchased horses from him for a specified price which was paid to him immediately without any deductions for shares or reserve fund. It was an ordinary transaction of purchase and sale at a specified price and when it was paid the transaction was closed. But when a member delivered a horse to the appellant the situation was different. On its delivery he received an initial payment, being the initial payment per pound as set by the directors less the deductions, including $1 for a share and $3 for the reserve fund. The appellant did not purchase the horse at the "price per lb" stated in the "Purchase Voucher". The total amount which the

member was entitled to receive was undetermined and could not be determined until after the results of the year's operations had been ascertained. In the meantime, the initial payment was really an advance on account of the total amount for which the appellant was accountable to the member. The idea of an initial payment on account was taken from other co-operative associations. It is commonly in use where a final payment awaits determination according to future events.

The difference between the results of direct sales by non-members to the appellant, as in the case of Mr. Toews, and deliveries by members to the appellant for co-operative marketing or processing by it, as in the case of Mr. Koehmstedt and Mr. Weiman, is an indication of the wisdom of the members in associating themselves together in the appellant association. The price per pound paid to non-members in 1947 never exceeded 3 cents and the average was 2·88 cents. On the other hand, the amount for which the appellant accounted to its members, including the initial price per pound, came to 3·71 cents per pound.

In addition to the evidence to which I have referred regard must also be had to the provisions of the Act under which the appellant was incorporated and the bylaws by which it and its members were governed. I shall first refer to section 7(1) of the Act and the steps taken under it. The section sets out the matters for which the organization bylaws may provide. Clauses (*v*) and (*w*) set out alternative schemes under which members could market their products. The clauses read as follows:

7. (1) Subject to the other provisions of this Act the organization bylaws may provide for any or all of the following matters:

(*v*) the sale or resale by the association of products delivered to it by its members or other person with or without taking title thereto, and the method, time and manner of the payment over to its members or other persons of the sale or resale price after deducting all necessary selling, overhead and other costs and expenses including reserves for retiring the shares, if any, and other proper reserves including those required for acquiring real or personal property, for the erection of warehouses or other buildings or the acquisition of any mechanical or other facilities connected with the handling, processing, manufacturing and marketing of the products, and interest not exceeding six per cent. per annum on shares and the amounts referred to in any organization bylaw passed under the provisions of section 8;

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(*w*) the purchase and sale or resale by the association of products delivered to it by its members or other persons and the method of apportionment of the surplus arising from the business of the association on a patronage basis among the members, after providing for all the necessary selling, overhead and other costs and expenses, including reserves for retiring shares, if any, and other proper reserves, including those required for acquiring real or personal property, for the erection of warehouses or other buildings or the acquisition of any mechanical or other facilities connected with the handling, processing, manufacturing and marketing of the products, and interest not exceeding six per cent. per annum on shares and the amounts referred to in any organization bylaw passed under the provisions of section 8.

There is a difference between the two schemes. Under the one described in clause (*w*) the association would purchase the members' products and then after marketing or processing them and selling the products would apportion the surplus arising from the business of the association among the members on a patronage basis. But under the scheme set out in clause (*v*) the association would take delivery of the members' products from them, market or process them and account to the members for the proceeds of their sale or processing. The members were free to choose which scheme they would adopt and deliberately adopted the scheme described in clause (*v*) rather than that set out in clause (*w*). This appears from Dr. Thomson's evidence and is established by Organization Bylaw No. 15, which was passed pursuant to section 7(1)(*v*) of the Act. As amended in 1945 and in effect in 1947 it reads as follows:

15. The directors shall provide for the sale or resale or processing of horses delivered to the Association, with or without taking title thereto, and shall determine the method, time and manner of the payment to be made to the members from the sale or resale price, or the proceeds from processing and the sale of any by-products thereof, after deducting all necessary selling, overhead and other costs and expenses, including:

(*a*) An amount equivalent to the unpaid balance on shares subscribed for and corresponding in number to the horses delivered to the Association by the members.

(*b*) For each horse delivered, a special deduction of an amount not exceeding three dollars per head, such deduction being over and above the share subscribed at the time of delivery of each horse, as otherwise provided in these bylaws, this special deduction to be used at such time and in such manner as the directors may determine for acquiring such real or personal property, warehouses, buildings, mechanical or other facilities required for processing horses and the marketing of the products and by-products of such processing.

It was under this Bylaw that the deductions of $1 for a share and $3 for the reserve fund per horse, referred to in the evidence of the transactions by Mr. Koehmstedt and Mr. Weiman, were made.

But no other deductions from the amounts to which the members were entitled were permitted. Section 43 of the Act provided:

> 43. No association incorporated or registered under this Act shall make any deductions from the gross amount received by it from the sale or resale of the products delivered to it by its members or by any other persons who deliver products to it except as provided by subsection (2) of section 11 or by a bylaw passed under clause (*v*) of subsection (1) of section 7 or by a bylaw passed under section 8.

We are not here concerned with subsection (2) of section 11, which deals with individual marketing contracts, or with a bylaw passed under section 8, which relates to a scheme for accounting to non-members for products delivered. These provisions have no application to the present case. Thus, the effect of section 43, so far as the appellant is concerned, is to prohibit it from making any deductions from the gross amount received by it from the sale or resale of the products delivered to it by its members except those made pursuant to a bylaw passed under clause (*v*) of subsection (1) of section 7, that is to say, Organization Bylaw No. 15. Thus, the appellant was required to account fully to its members for the proceeds of the sale of the horses delivered to it for marketing or processing and the processed products.

The manner in which the appellant did so may now be described. The original Organization Bylaws included No. 35 which provided:

> 35. All monies received by the Association from the sale of horses delivered to the Association for sale or processing shall, less the deductions, amounts and charges which the Association is entitled to make pursuant to these bylaws, be placed in a separate account and be used exclusively for the purpose of paying to persons delivering the horses to the Association, the monies they are entitled to receive.

In the 1945 consolidation this bylaw became No. 36. In 1945 the members found that in order to operate their association it was necessary to permit it to use on their behalf the proceeds which were to have been set aside in a

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separate account for them, with the result that the 1945 consolidation included Organization Bylaw No. 15 which provided as follows:

15. Subject to the provisions of the other Organization Bylaws of this Association, up to 100 per cent. of any net surplus arising from the business of the Association, and due to members, in accordance with Bylaw No. 14, may be retained in a special revolving reserve account, for the purpose of providing sufficient funds to carry on the operations of the Association in accordance with its objects, and after such amounts so retained have accumulated in an amount deemed sufficient for the operations of the Association, as aforesaid, the directors shall, at such time and in such manner as they may determine, pay to the member the amounts due him from such retention.

(*a*) The first payment to a member of amounts retained in accordance with the provisions of this Bylaw may be equivalent to the amount considered by the directors as available for payment at the time, and as may be warranted by the financial requirements of the Association, and subsequent payments from this reserve may be in amounts determined likewise by the directors at such future periods as they may decide.

(*b*) As amounts which have been retained by the Association are paid to a member, additional amounts may be retained from current proceeds due to him, in order that sufficient funds may be maintained to achieve the objects of the Association, provided however that amounts so retained shall in turn be paid to the member, in accordance with the provisions of this Bylaw.

(*c*) A member shall be entitled to a statement after the end of every fiscal year, showing the amount retained from proceeds due to him, in accordance with the provisions of this Bylaw, together with a statement of any amounts paid to him.

(*d*) Interest may be payable on any amounts retained for a member in the revolving reserve account.

The reference in this bylaw to Bylaw No. 14 is a reference to Organization Bylaw No. 15, which I have cited, it having become Bylaw No. 14 in the 1945 consolidation. A further change took place when the Organization Bylaws were consolidated in 1946. Bylaw No. 15, which had become No. 14 in the 1945 consolidation, became again No. 15, but Organization Bylaw No. 15 in the 1945 consolidation became subsection 1 of Organization Bylaw No. 16 and subsection (2) was added as follows:

16. (2) The directors may from time to time change the policy of the association as set forth in subsection (1) hereof not inconsistent with the objects of the association; provided the directors shall at the Annual Meeting in 1947 prepare and submit to the Annual Meeting a proposal for the allocation and/or distribution of all surplus proceeds to the end of the then preceeding fiscal year.

Under the circumstances, Organization Bylaw No. 35, which had become No. 36 in the 1945 consolidation, was no longer necessary and was repealed. Dr. Thomson explained that subsection 2 of Organization Bylaw No. 16 was passed so that the appellant might have wider authority to use the moneys standing to the credit of the members in their respective accounts. It should be noted that the directors were trustees for the members and that the bylaws were passed with their full approval.

Pursuant to subsection (2) of Organization Bylaw 16 the directors, on December 13, 1947, passed an important resolution entitled "Resolution Respecting Interim and Final Payment and Non-member Business of the Fiscal year ending December 31, 1947". It read as follows:

WHEREAS Section 16, Subsection (2) of the Organization By-Laws passed by the Delegates in the annual meeting assembled at Swift Current, Saskatchewan, provides that:

> The Directors may, from time to time, change the policy of the Association as set forth in Section 16, subsection (1) of the said By-Laws, not inconsistent with the objects of the Association.

AND WHEREAS it is deemed expedient to provide for the apportioning of the proceeds arising from the operation of the Association in 1947.

BE IT RESOLVED by the DIRECTORS of HORSE CO-OPERATIVE MARKETING ASSOCIATION LIMITED as follows:

1. That portion of the price received by the Association during the fiscal year ending December 31, 1947 from the sale, resale and products of horses delivered by members during the said fiscal year after deducting all necessary selling, overhead and other expenses and other lawful deductions applicable thereto, shall be and hereby directed to be apportioned as follows:

Firstly: To equalize the initial payment to all such members who delivered horses during the said fiscal year.

Secondly: The balance remaining shall then be apportioned *pro rata* according to the number of pounds of live weight of horses delivered by members during the said fiscal year.

2. The amounts apportioned to each member as directed in clause (1) hereof shall be forthwith credited to the account of each member in the records of the Association and such apportioning and crediting shall constitute final payment to each member for each horse delivered by him to the Association during the said fiscal year and such apportioning and crediting shall constitute a binding obligation on the part of the Association to discharge such obligation in cash or specie at such time or times and in such instalment or instalments as the Directors may from time to time determine.

3. Each member whose account according to the records of the Association has been credited as hereinbefore directed, shall as soon after the 31st day of December, 1947 as possible, be sent a statement showing:

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(a) The number of horses delivered by him to the Association during the said fiscal year, and the number of pounds of live weight of horses so delivered;

(b) The amounts so apportioned and credited to such member for such fiscal year;

(c) The amounts standing to the credit of each member in respect to any preceding fiscal year.

4. That portion of the price received by the Association during the fiscal year ending December 31, 1947, from the sale, resale and products of horses delivered to the Association during the said fiscal year by persons, other than members, after deducting therefrom portion of selling overhead and other costs and expenses and other lawful deductions applicable thereto, shall, after payment of income tax, if any, payable thereon, be transferred to a special account to be used for such purposes of the Association as the Directors may from time to time determine.

5. The Treasurer shall, at the first meeting of the Directors after January, 1948, report in writing:

(a) The amount realized during the said fiscal year ending December 31, 1947 after deducting selling overhead and other expenses.

(b) The net amount apportioned and credited to members:

(i) To equalize initial payments

(ii) By way of final payment on each horse delivered during the said fiscal year, and the amount per pound of live weight or horse so apportioned and credited.

(c) The net amount realized from business with persons other than members during such fiscal year.

It was under the authority of this resolution that the amounts in dispute in this appeal were credited to the members' accounts after the results of the year's operations had been ascertained, with a binding obligation on the part of the appellant to pay them.

With this review of the facts, the relevant provisions of the Act under which the appellant was incorporated and the governing organization bylaws I come to the conclusions to be drawn. In my opinion, they are clear.

The appellant would be taxable in respect of the amounts in dispute only if they constituted net profits or gain to it from a trade or business within the meaning of section 3(1) of the *Income War Tax Act*, R.S.C. 1927, Chapter 97, the relevant portion of which reads as follows:

3. (1) For the purposes of this Act "income" means the annual net profits or gain or gratuity, ... as being profits from a trade or commercial or financial or other business ....., directly or indirectly received by a person from ..... any trade, manufacture or business, ...

In my opinion, the amounts do not come within this definition of taxable income. There are two aspects from which the question may be viewed. In the first place, they did

not constitute profits or gains to the appellant from a trade, manufacture or business, and, secondly, they did not have the necessary quality of income to render them taxable in its hands.

The appellant was not engaged in "an operation of business in carrying out a scheme for profit making" for itself, within the meaning of the test laid down by the Lord Justice Clerk in *Californian Copper Syndicate v. Harris* (1) and, apart from its profit on its non-member business, did not make any profit or gain for itself that would render it subject to tax. I have already referred to the purpose for which the appellant was incorporated, namely, to dispose of its members' surplus horses as advantageously for them as possible. They associated themselves together for this purpose on a non-profit co-operative plan under section 4(1) of the Act and it was not intended that the appellant should make a profit for itself. While I agree that the presence or absence of an intention to make a profit is not conclusive of taxability or otherwise, the absence of an intention to make a profit is a factor to be taken into account. Nor does the mere fact that the word "Co-operative" is part of the appellant's name indicate absence of tax liability in respect of its activities. The important thing to determine is the true character of the amounts in dispute.

As I view the facts, they did not have the quality of income to the appellant that was essential to their being taxable income in its hands. In *Robertson Limited v. Minister of National Revenue* (2) I applied a test of the quality of income which had been used by Mr. Justice Brandeis in delivering the judgment of the Supreme Court of the United States in *Brown v. Helvering* (3). In that case the question was whether certain overriding commissions in respect of which the taxpayer had sought to deduct certain reserves for contingent obligations to return part of the commissions were income and Mr. Justice Brandeis held that they were. At page 199, he said of the commissions:

> The overriding commissions were gross income of the year in which they were receivable. As to each such commission there arose the obligation—a contingent liability—to return a proportionate part in case of

(1) (1904) 5 T.C. 159 at 165 (2) [1944] Ex. C.R. 170.
(3) (1934) 291 U.S. 193.

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cancellation. But the mere fact that some portion of it might have to be refunded in some future year in the event of cancellation or reinsurance did not affect its quality of income.

And he put the test of such quality in these words:

> When received, the general agents' right to it was absolute. It was under no restriction, contractual or otherwise, as to its disposition, use or enjoyment.

In the *Robertson* case (*supra*), at page 182, I adopted this test of whether an amount received by a taxpayer has the quality of income such as to make it taxable in his hands and put it in the form of a question as follows:

> Is his right to it absolute and under no restriction, contractual or otherwise, as to its disposition, use or enjoyment?

This test was also applied in *Canadian Fruit Distributors Limited v. Minister of National Revenue* (1). The amounts in dispute in this appeal cannot meet this test. The appellant's right to them was not absolute and it was not free to dispose of them or use or enjoy them. In fact, it did not own them at all. It was obliged as a matter of law to account to the members for them and it held them for the members. They belonged to the members in their own individual rights. It was definitely not a case of the amounts belonging to the appellant as its profits and the members becoming entitled to participate in such profits either as patronage dividends or as dividends on their shares in their capacity as shareholders of the appellant. The provisions of the Income War Tax Act relating to patronage dividends have no bearing in this case. And the corporate set-up of the appellant did not permit any declaration of dividends in respect of its transactions with its members. That was foreign to the principle which governed the association of the members together. They were entitled to the amounts credited to them in their own individual rights under the conditions subject to which they had delivered their horses to the appellant for co-operative marketing or processing by it.

The correctness of this conclusion is not affected by the fact that there were no individual contracts between the appellant and its members on which they could sue the appellant for the amounts to which they were entitled. They did not need contracts in order to become so entitled.

(1) [1954] Ex. C.R. 551 at 559.

The difficulties involved in having individual contracts had been realized in connection with the Wheat Pools and it was provided for by section 10 of the Act which provided:

> 10. The memorandum of association and the organization bylaws and amendments thereto shall, when registered, bind the association and the members thereof and the other persons who deliver products to the association, to the same extent as if they had respectively been signed and sealed by each member and by each such person and contained covenants on the part of each member and each such person, his heirs, executors and administrators to observe all the provisions thereof subject to the provisions of this Act.

Thus the members were entitled in their own rights to the amounts credited to them pursuant to Organization Bylaws No. 15 and No. 16 and to the resolution of December 13, 1947, as effectively and completely as if they had become entitled to them under contracts between them and the appellant.

The fact that the moneys to which the members were entitled were not actually paid to them is immaterial. The effect of what the appellant did was exactly the same as if it had paid the members the amounts to which they were severally entitled and then borrowed such amounts from them.

It is essential to the determination of the character of the amounts in dispute that the dealings between the members and the appellant should be properly ascertained. It does not follow from the fact that members received a document called a "Purchase Voucher" when they delivered horses to the appellant that they sold them to the appellant for the "price per lb" stated in it. Such a conclusion would be contrary to the evidence as a whole. The document must be read as a whole and also looked at in the light of the surrounding circumstances. It is the substance and reality of the transaction that should be considered, rather than the form in which it was expressed. In my view, it would be erroneous to conclude that the members sold their horses to the appellant for the specified "price per lb" stated in the so-called "Purchase Voucher". Such a conclusion would attribute an intention to them that was foreign to the basic purpose for which they became associated together and contrary to fact. Indeed, in my opinion, the transactions between the members and the appellant were really not transactions of sales in the ordinary sense at all. They were of a different nature.

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What the members really did in associating themselves together in the appellant association was to establish it as the means or machinery for accomplishing by co-operative action the purpose which they could not achieve individually, namely, the advantageous disposal of their surplus horses. When they delivered their horses to the appellant under the scheme described in paragraph 7(1)(*v*) of the Act they did not sell them to the appellant in the ordinary sense but delivered them to it for marketing or processing by it on their behalf and for them. In that view, it is not important that the document handed to the members on the delivery of horses by them was called a "Purchase Voucher". It might just as well have been called a receipt for that, in effect, is what it was. When the appellant received the horses it did so as agent for the members and was accountable to them for the net proceeds from their marketing or the sale of the processed products. The initial payments to the members were really advances to them on account of the total to which they were severally entitled. Thus, the surplus of the appellant's receipts over its expenditures did not belong to the appellant as its profits or gains but belonged to the members in their own individual rights and was held by it on their behalf and for them.

That being so, the appellant had no independent right to the amounts in dispute. Consequently, they did not constitute profits or gain to it and were not subject to tax in its hands.

While this finding disposes of the matter there are some further observations to make.

This case is distinguishable from *Commissioners of Inland Revenue v. Sparkford Vale Co-operative Society Limited* (1), for there the company bought milk from its own members and sold it to the public on its own account thereby making a profit for itself. And it is also distinguishable from *Fraser Valley Milk Producers' Association v. Minister of National Revenue* (2) on the facts of that case for there the members received dividends on their shares in their capacity as shareholders and these could come only out of the association's profits.

(1) (1925) 12 T.C. 891. (2) [1929] S.C.R. 435.

The conclusion that the members established the appellant as the means or machinery for accomplishing their purpose of disposing of their surplus horses is not affected by the fact that it is a corporation: *vide New York Life Insurance Company v. Styles* (1).

Nor is it material that the appellant processed the members' horses and sold the processed products. The object was to dispose of the horses as advantageously for the members as possible and it did not matter what means the appellant took to accomplish the desired purpose. Whatever it did with the horses it did for and on behalf of the members as its agent.

Nor is the correctness of the conclusion in this case affected by the fact that the appellant did some business with non-members: *vide Municipal Mutual Insurance Limited v. Hills* (2). It dealt with them in a very different manner from that in which it dealt with its members and the fact that it made taxable profits as a result of its business with non-members did not make it taxable for amounts which it received for and on behalf of its members and for which it was accountable to them as stated.

There is an alternative ground for finding that the assessment was erroneous. In a sense, it is immaterial whether the transactions between the members and the appellant were sales and purchases of the horses delivered by them or not. If they were to be regarded as sales and purchases then the purchase price would certainly not be at the rate of the "price per lb" stated in the "Purchase Voucher". That would only be an advance on the purchase price, it being understood that the balance would be a proportionate part, according to the live weight and grade of the horses delivered, of the surplus of the appellant's receipts over its expenditures during the year in which the horses were delivered. In that view, the amounts in dispute would be part of the cost of the horses to the appellant and there would be no remaining surplus to constitute profit or gain to it.

In any event, the item of $102,917.84 for equalization allotment would not be properly assessable against the appellant even if it were held that it was in business on its

(1) (1889) 14 A.C. 381 at 407. (2) (1931) 16 T.C. 430.

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own account for this was merely for the equalization of the prices per pound payable to the members on the delivery of their horses.

For the reasons given, I have no hesitation in finding that the amounts in dispute were erroneously included in the assessment appealed against and that the appeal herein should be allowed with costs and the assessment set aside.

Judgment accordingly.

1956

Sept. 7

Sept. 27

BETWEEN:

ROBERT TREMBLAY .....APPELLANT;

AND

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

Revenue—Income Tax—The Income Tax Act, S. of C. 1948, c. 52, s. 12(1)(a) and (b)—Purchaser of insurance business paid vendor part of commission on renewal of policies placed by latter prior to sale—Payments not part of sale price nor of purchaser's income.

The appellant purchased an insurance brokerage business in May, 1950 under a notarial contract which, in addition to the general terms covering the sale, contained the appellant's covenant to turn over to the vendor part of the commissions on renewals of policies placed by the vendor prior to his transfer of the business to the appellant. The maximum amount to be so remitted was fixed at $7,000 payable in consecutive monthly instalments of $250 each. The contract specified that such remittances were not to be considered as forming part of the sale price of the business but the carrying out by the appellant of his undertaking to the vendor. The appellant fulfilled the covenant and in his income tax returns for 1950, 1951 and 1952 claimed the relevant payments as deductions. The Minister disallowed the claims and ruled the remittances formed part of the sale price of the business. On appeal to the Income Tax Appeal Board the ruling was affirmed and the appellant again appealed maintaining the amounts in question at no time formed part of his income but had been received on behalf of the vendor to whom he had turned them over.

Held: At the time of the sale the vendor having concluded the commissions on renewals of policies placed by him prior to the sale would bring in a considerable sum, authorized the appellant to collect and out of the total in-comings remit a part thereof to him up to $7,000. The instalments so set aside, as was customary in transactions of this kind, were at no time mixed with the assets of the appellant but on the contrary were specifically set apart. It could not be said that they formed part of the sale price of the business nor part of the

appellant's future earnings. The decision of the Income Tax Appeal Board should therefore be set aside and it be declared that the amounts arising from commissions on insurance premiums remitted by the appellant to the vendor pursuant to the notarial contract in question at no time belonged to the appellant and could not be made subject to tax as part of appellant's income for the years in question.

APPEAL from a decision of the Income Tax Appeal Board.

Roland Fradette, Q.C. for appellant.

Maurice Paquin, Q.C. and *Alban Garon* for respondent.

DUMOULIN J. now (September 27, 1956) delivered the following judgment:

Cette cause fut entendue à Chicoutimi le 7 septembre 1956.

Il s'agit en l'occurrence d'un appel d'une décision rendue le 28 novembre 1955 par la Commission d'Appel de l'Impôt sur le revenu (1), confirmant, dans les circonstances ci-après relatées, une cotisation ministérielle pour fins d'impôt sur le revenu.

Le 11 mai 1950, devant le notaire Charles-Eusèbe Boivin, un nommé Robert Tremblay, l'actuel appelant, convenait d'acquérir l'achalandage commercial d'un courtier en assurances de Chicoutimi, M. Marcel-E. Julien, aux conditions qui suivent.

1. De payer aux compagnies jusqu'alors représentées par Marcel Julien les sommes dont il pouvait être débiteur évaluées à $17,000, selon liste annexée au contrat.

2. De payer au comptant $1,000 à Julien sur signature du contrat.

3. Par ailleurs, Marcel Julien cédait à Robert Tremblay tous ses comptes recevables, avec pièces justificatives et de comptabilité y relatives, actif d'affaires que le cédant estima à $12,600.

Le contrat faisait également foi d'une entente subsidiaire que je crois nécessaire de reproduire puisqu'elle est le noeud de tout le problème.

(1) 14 T.A.B.C. 151; 55 D.T.C. 621.

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La partie de seconde part, Robert Tremblay, s'engageait à:—"remettre ou verser à la partie de première part (Marcel Julien) une partie des commissions à retirer pour les prochaines années des différentes compagnies d'assurance représentées jusqu'à ce jour par M. Julien et ce jusqu'à concurrence d'une somme de sept mille dollars ($7,000)". Ces commissions étaient déclarées payables à raison de vingt-huit versements égaux de $250, mensuels et consécutifs depuis le 15 juin 1950. Puis la convention, se précisant davantage, indiquait:—"Il est entendu que ce montant de sept mille dollars ($7,000) ne devra par être considéré comme étant le prix de cette cession ainsi consentie par M. Julien à la partie de seconde part, mais comme l'exécution de cet engagement assumé par la partie de seconde part d'abandonner ou remettre à M. Julien une partie des commissions à retirer sur ces polices d'assurances vendues par son entremise et dont le chiffre total de ces commissions à être ainsi abandonnées a été fixé d'un commun accord entre les parties à la somme de sept mille dollars ($7,000)". D'autres clauses portaient qu'éventuellement cette retenue sur commissions, normalement payables à Julien, pourrait servir à combler des écarts à la baisse dans l'actif de $12,600, découlant d'erreurs cléricales ou d'annulations de polices antérieures au 11 mai 1950, ou encore toute majoration du passif de Julien au delà du total présumé de $17,000.

A l'enquête, les parties admirent comme prouvés tous les faits retenus par la Commission d'Appel de l'Impôt sur le revenu et rapportés dans sa décision en date du 28 novembre 1955 (*ubi supra*).

L'un de ceux-ci établit que pendant les années 1950, 1951 et 1952 Robert Tremblay a retiré des commissions sur des primes de renouvellement, dont les polices avaient été placées initialement par Marcel Julien, pour des montants de $4,689.68, $8,532.42 et $8,529.63 respectivement, soit au total, $21,751.73.

Selon l'entente relative aux commissions partiellement retenues, l'appelant versa au cédant $2,750 en 1950, $3,000 en 1951 et $1,250 en 1952, en tout $7,000, et déduisit ces ristournes de ses revenus pour les années précitées, déductions que le Ministre du Revenu national refusa de sanctionner.

L'intimé prétend que pareille remise, trois ans durant, effectuée par Tremblay à Julien, ne serait que l'un des éléments constitutifs du prix de vente du commerce d'assurances et, partant, des versements de capital en dérogation à la Loi de l'impôt sur le revenu, n'étant pas susceptible de produire ou d'aider à gagner un revenu [S.R.C. 1948, c. 52, art. 12(1)(*a*) et 12(1)(*b*)].

L'appelant (articles 7 et 8 de son exposé des motifs d'appel) soutient "qu'il n'a pas reçu pour lui-même ces sommes . . . mais qu'il les a perçues pour Marcel Julien et que, conséquemment, elles ne peuvent être incluses dans son revenu". Il nie que ce soit là un paiement et insiste que cette somme de $7,000 appartenait à Julien pour qui elle fut perçue.

Dans sa réplique orale, l'un des procureurs de l'intimé concrétisa son argumentation en disant que les primes de renouvellement, au total éventuel de $7,000, n'étant pas exigibles lors de la passation du contrat, le 11 mai 1950, Tremblay promettait donc de payer une somme dont la perception, fruit de son propre travail, se confondrait avec son patrimoine, de manière à constituer un gain personnel et une disposition subséquente de ses revenus.

Il s'agit de décider si nous sommes en présence d'une obligation équivalant à prix de vente, ou plutôt d'une convention secondaire, astreignante toutes choses étant égales, mais aussi, le cas échéant, soumise à de significatives fluctuations.

Demandons-nous quelle est la portée véritable de cette retenue d'une proportion des primes de renouvellement.

Supposé que les rentrées eussent rapporté moins que $7,000, Robert Tremblay n'aurait été redevable que du montant perçu. Pourrait-on soutenir, compte tenu des termes mêmes de la clause contentieuse, que Marcel Julien aurait possédé un recours pour plus que le montant effectivement recouvré, dans le cadre toujours d'un chiffre maximum de $7,000? Je ne saurais admettre à pareille question qu'une réponse négative. Ces stipulations contractuelles ne sont pas ambiguës et aucune preuve de simulation ne fut même tentée.

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Dans le commerce d'assurances, l'effort, l'habileté, le travail de l'agent portent sur la vente ou, selon l'expression courante, le placement du contrat, sur le recrutement de la clientèle, et c'est dans la poursuite de cet objectif que la concurrence s'agite. Les difficultés cessent à la conclusion du contrat d'assurance; il arrive rarement que la rentrée des primes subséquentes exige autre chose que l'avis réglementaire.

Il ne me paraît pas exagéré de dire que, durant une période raisonnable, en l'espèce trois ans, le courtier en assurances peut fonder mieux que des espérances sur les primes futures, conséquences normales de son travail antérieur d'active sollicitation.

Bien que la comparaison ne soit pas en tout exacte, n'y aurait-il point une permissible analogie entre ce courtier et le vendeur d'une conciergerie qui, le 1er février, date de la transaction, confierait à l'acheteur, jusqu'au 1er mai suivant, le soin de percevoir et de lui remettre les loyers à échoir?

Le 11 mai 1950, Marcel Julien, examen fait de sa comptabilité, constate que des commissions de renouvellement, découlant de polices négociées par son entremise, rapporteront de forts montants. Il donne mandat à Tremblay de percevoir et de lui remettre, à concurrence de $7,000, le produit de ces rentrées. Ces versements ainsi retenus, comme il est coutumier dans les transactions du genre, n'ont en aucun temps fait confusion avec le patrimoine de Robert Tremblay dont, au contraire, ils furent spécifiquement distraits.

Pour les motifs qui précèdent, je ne saurais reconnaître que la clause "c" du contrat doive, d'une part, constituer un élément du prix de vente, ni, d'autre part, un prélèvement par Robert Tremblay sur ces gains futurs.

J'infirme, conséquemment, la décision rendue en cette affaire le 28 novembre 1955 par la Commission d'Appel de l'Impôt sur le revenu; je déclare que les montants des commissions sur primes d'assurances, soit:—$2,750 en 1950, $3,000 en 1951 et $1,250 en 1952, au total:—$7,000, remis par Robert Tremblay à Marcel-E. Julien, selon contrat notarié, daté le 11 mai 1950, n'ont jamais appartenu au dit Robert Tremblay et ne peuvent être l'objet d'impôts sur ses

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revenus durant les années précitées. Enfin ce dossier sera référé à l'honorable Ministre du Revenu national pour que soit effectué en conséquence le dégrèvement fiscal requis.

L'appelant a droit à ses frais et honoraires taxables.

Jugement en conséquence.

1956

Nov. 5

Nov. 23

BETWEEN:

DAME YVETTE BERNIER-FREGEAU ..APPELLANT;

AND

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

Revenue—Succession Duty—Insurance—Civil Code—Husband and Wife—Community of property—Effect of bequest by husband of life insurance to wife where policy directs payment to executors—The Dominion Succession Duty Act, R.S.C. 1952, c. 89 as amended, s. 3(1)(h)—Quebec Civil Code, arts. 1265, 1272, 1292, 1293, 2585, 2589, 2591—The Husbands' and Parents' Life Insurance Act, R.S.Q. 1941, c. 301, as amended, ss. 3, 6, 12, 13 and 31.

The appellant, who as provided by the Civil Code of Quebec, lived in community of property with her husband, appealed from a ruling of the Minister of National Revenue declaring that under the *Dominion Succession Duty Act,* R.S.C. 1952, c. 89, as amended, the total proceeds of an insurance policy on her husband's life formed part of his succession. The husband had taken out the policy and paid the premiums out of the community's funds. Under the policy's terms the proceeds were payable to the husband on a determined date, or in the event of his prior death, to his executors, administrators or assigns. By his will the husband left all his property including his insurance to his wife.

Held: That the policy was issued subject to the provisions of art. 2585 C.C. *et seq.* relating to life insurance in general and was an asset of the community of property and so remained as long as the insured did nothing to appropriate the policy.

2. That under art. 1265 appropriation could only be made as provided by the *Husband's and Parents' Life Insurance Act,* R.S.Q. 1941, c. 301, and as the Act was an exception to the general law, it was necessary to establish that its provisions had been strictly complied with and, as this had not been done, the bequest of the insurance to the surviving consort applied only to the one half of the proceeds that the husband under art. 1293 was empowered to dispose of by will. That part fell into the insured's succession and was received by the appellant not in her capacity of designated beneficiary but of universal legatee. The other half belonged to her by virtue of the community of property.

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3. That the appeal should be allowed, the assessment set aside and the matter referred back to the Minister in order that a new assessment be made by deducting from the succession one half of the net proceeds of the policy to which the wife was entitled in her capacity of wife common as to property.

APPEAL, under the *Dominion Succession Duty Act*, R.S.C. 1952, c. 89.

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

Robert Lafrenière for appellant.

Maurice Paquin, Q.C. and *Alban Garon* for respondent.

FOURNIER J. now (November 27, 1956) delivered the following judgment:

Dans cette affaire, il s'agit d'un appel d'une décision du Ministre du Revenu national confirmant une cotisation pour fins de droits successoraux par laquelle le produit total d'une police d'assurance-dotation émise sur la vie de Lucien Frégeau fut ajouté à sa succession.

L'appelante était l'épouse en communauté de biens de l'assuré, Lucien Frégeau, décédé le 4 juin 1953, aucun contrat de mariage n'ayant été passé entre eux. Le 23 août 1945, la Compagnie d'Assurance "La Laurentienne" émit une police d'assurance-dotation sur la vie de l'assuré, pour un montant de $30,000, payable à lui-même le 23 août 1969, ou, au cas de décès antérieur, à ses exécuteurs testamentaires, administrateurs ou ayants droit. Le 30 décembre 1949, l'assuré fit un testament sous forme authentique par lequel il léguait tous ses biens à son épouse, y compris ses assurances. La clause du dit testament qui fait la base du présent litige se lit comme suit:

> Je donne et lègue tous mes biens meubles et immeubles, ainsi que mes polices d'assurances sur ma vie, à mon épouse Yvette Bernier, laquelle je nomme mon exécutrice testamentaire, la rendant indépendante de tout tuteur qui serait nommé à mes enfants.

La succession du dit Lucien Frégeau s'ouvrit à son décès, le 4 juin 1953. Le 10 août 1953, l'appelante, à titre d'exécutrice testamentaire, fit la déclaration, tel qu'exigé par la loi, des biens laissés par son époux, entre autres, le produit de la police d'assurance de la Compagnie d'Assurance "La Laurentienne" au montant net de $26,658.52, moins la moitié, soit $13,329.26, sa part de la communauté, et ajouta

l'autre moitié, soit $13,329.26 à la succession. Les droits de succession furent payés sur ce dernier montant. Le permis de disposer fut émis par le département et la Compagnie paya le produit total de la police à l'appelante. Subséquemment, le 19 mars 1954, le département fit des ajustements d'évaluation des biens de la succession et ajouta à la succession, entre autres, la somme de $13,329.26, que l'appelante avait retenue comme sa part de l'assurance comprise dans la communauté de biens, et réclama les droits de succession sur le montant total du produit de la police d'assurance. Cette cotisation fut confirmée par l'intimé, d'où le présent appel.

Les questions à déterminer sont de savoir si dans le cas de communauté légale le produit d'une police d'assurance sur la vie, payable, à sa face même, à ses exécuteurs, administrateurs ou ayants cause, est un bien de communauté; et, dans l'affirmative, la clause testamentaire: "Je donne et lègue tous mes biens, meubles et immeubles ainsi que mes polices d'assurances sur ma vie à mon épouse . . . ." suffit-elle à faire du produit de l'assurance qui nous intéresse un bien spécifiquement attribué à l'épouse et hors communauté?

La réponse à ces deux questions permettra de décider si le total ou seulement la moitié du produit de la police d'assurance est imposable en vertu des termes de l'article 3(1)(*h*) de la Loi fédérale sur les droits successoraux, S.R.C., 1952, c. 89.

L'appelante soumet qu'une police d'assurance sur la vie d'un époux commun en biens dont les primes sont payées par la communauté et dont le produit est payable à l'assuré lui-même à une date déterminée ou à ses exécuteurs testamentaires, administrateurs ou ayants cause au cas de décès antérieur à cette époque, est un contrat d'assurance régi par les articles 2585 et suivants du Code Civil et constitue une créance qui est "bien de communauté". Cette police ne peut devenir une assurance sur la vie des maris et des parents tant et aussi longtemps que les formalités prescrites par cette loi concernant l'application de la police n'auront pas été remplies. Dans le présent cas ces formalités n'ont pas été observées. Au décès de l'assuré, le produit de l'assurance était un "bien de communauté" et l'épouse en sa qualité de commune en biens avait droit à la moitié du

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produit et comme légataire universelle elle héritait de l'autre moitié. Par conséquent, les droits successoraux n'étaient imposables que sur la partie lui revenant à titre de légataire universelle.

L'intimé soumet que Lucien Frégeau, époux commun en biens, pouvait ou assurer sa vie au profit et au bénéfice de son épouse ou étant le détenteur d'une police d'assurance régie par les dispositions du Code Civil, il pouvait l'attribuer à son épouse par testament. Cette application de la police la faisait tomber sous l'empire de la Loi de l'assurance sur la vie des maris et des parents. Le produit ainsi attribué n'était pas censé provenir de la communauté de biens qui avait existé entre les époux et n'était non plus censé provenir de la succession de l'assuré aux termes de l'article 31 de la dite loi. Toutefois, le produit de cette assurance ainsi exclu de la communauté et de la succession de l'assuré était censé faire partie de sa succession et imposable pour les droits de succession aux termes de la Loi fédérale sur les droits successoraux. Lucien Frégeau était, de fait, détenteur d'une police d'assurance sur sa vie émise en vertu des dispositions du Code Civil et en fit subséquemment l'attribution à son épouse par son testament, avec le résultat que le produit en devint "bien hors communauté" et imposable pour droits de succession.

La réponse à la première question ne me semble pas présenter de grandes difficultés. La police d'assurance émise sur la vie de Lucien Frégeau, marié sous le régime de la communauté de biens, l'a été en vertu des articles 2585 et suivants du Code Civil. Le montant en était payable à l'assuré à une époque déterminée, et, au cas de son décès antérieur à la date fixée, à ses exécuteurs, administrateurs ou ayants droit.

Pendant l'existence de la communauté, le mari administre seul les biens de la communauté: art. 1292 c.c. Tous les contrats faits par le mari qui affectent les biens de la communauté sont faits pour le bénéfice de la communauté. C'est pendant la communauté que Lucien Frégeau, avec les biens de la communauté, a passé un contrat d'assurance sur sa vie à son bénéfice et au bénéfice de ses exécuteurs, etc. Après l'exécution du contrat et par le paiement des primes avec les biens communs, il devint acquéreur d'une créance conditionnelle de $30,000. La somme stipulée était d'abord

payable à lui-même et ensuite à ses exécuteurs, etc., s'il décédait avant une époque déterminée. Je n'ai aucun doute que cette créance était "bien de la communauté": article 2589 c.c. S'il avait vécu à l'époque déterminée la somme stipulée lui aurait été versée, il l'aurait reçue comme époux commun en biens et le montant serait devenu "biens de la communauté". L'actif de la communauté se compose, entre autres, des biens mobiliers que les époux possèdent le jour de la célébration du mariage et aussi de tout le mobilier qu'ils acquièrent ou qui leur échoit pendant le mariage: article 1272 c.c. L'assuré avait une créance, "bien de la communauté", dont l'exigibilité était soumise à une condition: sa survie à une époque fixe ou son décès.

Je suis d'opinion que dans le présent cas le capital de la police d'assurance sur la vie de Lucien Frégeau, époux commun en biens de l'appelante, payable à lui-même, sous une certaine condition, ou à ses exécuteurs testamentaires, etc., à son décès, est une créance qui fait partie des biens de la communauté.

Quelques décisions à cet effet ont été citées à la Cour.

Dans la cause de *Labelle* et *Dame Emma Barbeau* (1), la Cour supérieure (confirmée par la Cour d'Appel) a jugé:

Que le capital d'une police d'assurance sur la vie de l'un des époux mariés en communauté de biens, payable, à son décès, à ses exécuteurs, administrateurs ou ayants cause, tombe dans la communauté de biens, et doit être partagé également entre le survivant et les héritiers de l'époux prédécédé.

Dans la cause de *Scott v. Sun Life Assurance Co. of Canada* et *Dame de Liska Bourassa* (2), l'honorable juge Greenshields exprima la même opinion (p. 19):

Thomas Scott was insured in the Company defendant, for the sum of $5,000. By the terms of the policy itself, it was payable to his legal heirs. While the policy was in force, he made his last will and testament, by which he made special legacies, first to his wife, secondly to his son, the plaintiff, he constituting his five children his universal residuary legatees. He was married under "le régime de la communauté de biens". His widow claimed and demanded payment of one-half of the amount of the insurance, viz., $2,500, basing her claim upon the statement, that the insurance forms part of the assets of the community which existed between herself and her deceased husband. The plaintiff had claimed the whole amount of the policy on the ground that it was comprised in the insured's succession.

(1) (1888) 20 R.L. 607.

(2) (1932) 38 R. de J. 18.

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Plus loin, le savant juge ajoute (p. 32):

Upon the whole I have reached the conclusion that this policy fell into the community existing between the deceased and his widow . . .

Ayant décidé que la police d'assurance qui nous intéresse était une créance, un bien mobilier de la communauté, il est logique de conclure qu'elle devait demeurer telle tant et aussi longtemps que l'assuré n'en aurait pas fait l'attribution ou application. D'où le deuxième problème à résoudre, à savoir, si le testament constitue une attribution du produit de la police suffisante pour la sortir du patrimoine de la communauté et en faire une police payable à l'épouse aux termes du chapitre 301 des Statuts Refondus de la Province de Québec, 1941 (Loi concernant l'assurance sur la vie des maris et des parents).

Les parties admettent que la police telle qu'émise était régie par les articles du code civil relatifs à l'assurance sur la vie en général. L'article 2591 se lit comme suit:

Art. 2591. Une police d'assurance sur la vie ou la santé peut passer par cession, testament ou succession à toute personne quelconque, soit qu'elle ait ou non un intérêt susceptible d'assurance dans la vie de la personne assurée.

Il n'y a pas de doute que l'assuré pouvait passer ou transmettre par testament le produit ou l'intérêt qu'il avait dans cette police. Mais là n'est pas le débat. Il est évident que le testament est valide et que l'épouse a légalement reçu le produit de la police. La question est de savoir si le testament a eu pour effet de changer la nature de la police et d'en faire une police tombant sous la Loi concernant l'assurance sur la vie des maris et des parents.

Avant de considérer les dispositions de cette loi, il est bon de noter qu'elle fait exception à la loi générale. Le Code Civil, à l'article 1265, dit:

Art. 1265. Après le mariage, il ne peut être fait aux conventions matrimoniales contenues au contrat, aucun changement . . .

Toutefois, le législateur, le 10 juillet 1878, a ajouté un second alinéa à cet article. Il se lit ainsi:

Les époux ne peuvent non plus s'avantager *entre vifs* si ce n'est conformément aux dispositions de la loi qui permettent au mari, sous certaines restrictions et conditions, d'assurer sa vie pour le bénéfice de sa femme et de ses enfants.

Ceci veut dire qu'un époux peut avantager *entre vifs* son épouse en assurant sa vie pour le bénéfice de cette dernière, s'il se conforme aux dispositions d'une loi spéciale qui contient certaines restrictions et conditions.

Cette loi est celle de l'assurance des maris et des parents (S.R.Q., 1941, c. 301) qui a été passée et promulguée en vertu du dit alinéa. Elle ne s'applique qu'aux assurances visées par l'article 3 de la loi. Comme il ne s'agit dans le présent cas que de l'épouse, je ne citerai que cette partie de la disposition qui est pertinente.

3. Un mari peut assurer sa vie ou attribuer, s'il en est le détenteur, toute police d'assurance sur sa vie au profit et au bénéfice—

De sa femme; . . . .

La police émise sur la vie de l'assuré n'était pas une assurance au profit et au bénéfice de sa femme ou d'autres personnes mentionnées à l'article 3 précité, puisque le produit en était payable à ses exécuteurs et ayants cause à son décès. Pour tomber sous l'empire de cette loi spéciale et de droit strict, il fallait que l'assuré en fit l'application ou l'attribution spécifique prévue à l'article 3. Cette attribution spécifique se fait suivant les dispositions de l'article 6.

6. L'application de la police d'assurance mentionnée dans l'article 3 se fait au moyen d'une déclaration écrite au dos de la police ou y annexée et s'y référant.

Un double de la déclaration est déposé entre les mains de la compagnie qui a émis la police, et une note de ce dépôt est endossée par cette compagnie sur la police ou sur la déclaration.

Cet article est bien explicite et je ne crois pas faire erreur en l'interprétant comme voulant dire qu'un assuré qui est détenteur d'une police d'assurance dont l'application n'est pas spécifiquement attribuée, comme, par exemple, "payable à ses exécuteurs, etc." peut attribuer une telle police à son épouse ou à ses enfants en se conformant aux dispositions de cet article, s'il désire la convertir en une police régie par la Loi concernant l'assurance sur la vie des maris et des parents.

Les mots "sous certaines restrictions et conditions" mentionnés au second alinéa de l'article 1265 c.c. avaient en vue des conditions similaires à celles de l'article 6. Même en admettant que l'article 6 a été incorporé pour le bénéfice de l'assureur, cela n'exclurait pas le fait que c'est le seul mode indiqué dans la loi permettant de faire l'attribution ou

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l'application de la police à l'épouse et aux enfants, si l'assuré désire la faire tomber sous l'effet de cette loi spéciale.

Pour bénéficier des dispositions d'une loi spéciale, tout comme d'une loi fiscale, il faut établir clairement que celui qui en réclame le bénéfice rencontre toutes les exigences de cette loi. Il a été soumis que l'application ou attribution de la police pouvait se faire par testament et l'on a référé la Cour aux articles 12 et 13 de la Loi se rapportant à la révocation du bénéfice conféré. L'article 12 vise une police émise ou attribuée suivant les dispositions d'une loi spéciale. La loi envisage le cas où un assuré a favorisé ainsi sa femme ou ses enfants, c'est-à-dire qui a déjà désigné spécifiquement sa femme lors de l'émission ou l'attribution de la police; il lui est loisible, non pas de changer la nature de la police ou de la soustraire aux dispositions de la loi spéciale, mais de révoquer en tout temps le ou les bénéficiaires nommément désignés et d'en désigner d'autres, choisis parmi les personnes mentionnées à l'article 3. Cette révocation peut se faire par la même procédure que l'attribution ou par testament. Si la révocation se fait par testament, il faut qu'il y ait déjà des bénéficiaires; il est impossible de révoquer un bénéfice qui n'a pas été appliqué ou attribué à une ou des personnes désignées, mais simplement aux exécuteurs, etc.

Il est indubitable qu'une police d'assurance sur la vie peut passer par cession, testament ou succession, mais il faut que la transmission se fasse suivant les lois qui s'appliquent aux cessions, testaments et successions. Je crois qu'il ne faut pas perdre de vue le fait que la police d'assurance qui nous occupe avait été émise sous l'empire des dispositions du Code Civil. C'était une police émise sur la vie d'un époux commun en biens, dont les primes étaient payées par la communauté et constituaient un bien de la communauté.

Le testament est un document qui n'a d'effet qu'après la mort du testateur. Si le mari a l'administration des biens de la communauté pendant sa vie et des pouvoirs quasi

illimités de dispositions pendant que la communauté existe, à son décès ces biens sont divisés en parts égales et l'épouse a droit à sa part.

Art. 1293. L'un des époux ne peut, au préjudice de l'autre, léguer plus que sa part dans la communauté.

J'en suis venu à la conclusion qu'en l'absence des formalités requises par la Loi des maris et des parents une police d'assurance sur la vie d'un époux marié en communauté de biens, payable, à sa face même, aux exécuteurs, est un bien de communauté régi par les articles 2589 et suivants du Code Civil et que le legs de cette assurance au conjoint survivant n'affecte que la moitié du produit de la police en question, dont l'époux pouvait disposer par testament. L'autre moitié appartenait au conjoint survivant en vertu de la communauté de biens. Dans le présent cas l'épouse a touché la partie du produit de l'assurance qui est tombé dans la succession de l'assuré, non à titre de bénéficiaire désignée de la police mais en sa qualité de légataire universelle de l'assuré.

Dans la cause de *Labelle et al.* et *Dame Barbeau* (*ubi supra*), il a été jugé que "lorsque l'assuré était commun en biens, en l'absence de désignation de bénéficiaire de la police d'assurance la moitié seulement du produit de cette police est comprise dans la succession."

Dans la cause de *Scott v. Sun Life Assurance Co. of Canada* et *Dame de Liska Bourassa* (*ubi supra*), le juge Greenshields a jugé "qu'une police d'assurance payable aux héritiers légaux et non attribuée par un mari suivant l'article 3 de la Loi concernant l'assurance sur la vie des maris et des parents n'est pas une police au sens de cette loi et que le fait par un assuré de laisser par son testament ses enfants comme légataires universels n'est pas une attribution suivant la vraie interprétation de la loi".

Sur ce point le jugement rendu par l'honorable juge Greenshields a été confirmé par la Cour d'Appel.

Ce jugement est contraire à une décision antérieure rendue en 1901 par le juge Langelier dans la cause de *Dame Henriette Hardy v. Patrick Shannon ès qual. et al.* (1). Le jugé se lit comme suit (p. 325):

1. L'assignation d'une police d'assurance sous les articles 5581 et 5584 S.R.P.Q., peut être faite par testament.

(1) [1901] 19 R.C.S. 325.

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2. Il n'est pas nécessaire, à peine de nullité, que le testament soit annexé à la police; il suffit qu'il l'indique d'une manière incontestable.

Subséquemment les tribunaux ont décidé que les dispositions de cette loi spéciale sont impératives et que les règlements d'une société de secours mutuels ne peuvent prévaloir sur la loi. *Vide: Blondin et al. v. Supreme Council of the Royal Arcanum et al.* (1) et *Dame Rioux et al. v. La Société des Artisans Canadiens-Français* (2).

L'intimé, par ses procureurs, a référé la Cour à la cause de *Isaïe Adam, appelant,* et *Dame Marie-Blanche Ouellette, intimée,* et *Metropolitan Life Insurance, mise-en-cause* (3). Les faits dans cette cause étaient les suivants. La Metropolitan Life, en 1914, a émis une police d'assurance à la demande conjointe de l'appelant et de son fils Ovila Adam. Aux termes mêmes de la police il est mentionné que le fils est l'assuré et que le père sera bénéficiaire dans le cas de survie. L'une des clauses les plus importantes de cette police est à l'effet que le fils, avec le consentement du père, s'est réservé le droit de changer de bénéficiaire à son gré et de déterminer, par conséquent, toute autre personne de son choix comme devant recevoir à sa mort le produit de la police. Les conditions relatives au changement de bénéficiaire sont les suivantes:

Changement de bénéficiaire—Lorsqu'on s'est réservé le droit de révocation, l'assuré pourra, pendant que la police est en vigueur, s'il n'a été fait aucun transfert de la police tel que stipulé ci-après, désigner un nouveau bénéficiaire avec ou sans droit réservé de révocation, en déposant un avis par écrit au bureau central de la Compagnie, accompagné de la police pour être endossée en bonne et due forme. Un tel changement prendra effet sur l'endossement dudit avis sur la police par la Compagnie. Si un bénéficiaire quelconque, sous une désignation soit révocable ou irrévocable, meurt avant l'assuré, l'intérêt de ce bénéficiaire reviendra à l'assuré.

En 1940, le fils est décédé après avoir fait un testament léguant tous ses biens, y compris ses assurances, à son épouse, dame Ouellette. Le père réclamait le produit de la police comme bénéficiaire aux termes de la police; l'épouse, à titre de légataire en vertu du testament.

Il s'agissait de savoir si le père, bénéficiaire original, pouvait être révoqué. Le bénéficiaire et l'assuré avaient tous deux convenu que la révocation pourrait s'opérer par l'unique volonté du fils. La Cour suprême a décidé que la

(1) (1937) 4 Ins. Law Rep. 389. (2) (1939) 6 Ins. Law Rep. 204.
(3) [1947] S.C.R. 283.

révocation du bénéficiaire et la désignation d'un nouveau bénéficiaire pouvaient se faire par testament. Cette police était régie par les règles générales du Code Civil relatives aux assurances sur la vie et la santé: articles 2585 et suivants; or l'article 2591 autorise un assuré à passer (transmettre, léguer) ses polices d'assurance à toute personne quelconque. Comme le père avait convenu que le fils pouvait sans son consentement révoquer le bénéfice qu'il lui avait conféré et le léguer à une autre personne, il ne peut pas soutenir que le Code Civil n'a pas d'application dans ce cas.

Parce que la Cour suprême a décidé qu'un assuré, qui avait un droit de révocation du bénéficiaire d'une police d'assurance basé sur l'assentiment du bénéficiaire lui-même, pouvait par son testament faire la révocation et le legs de la police à une autre personne, faut-il conclure qu'il est permis par testament de la changer en une assurance régie par les dispositions d'une loi spéciale d'exception et de droit strict. Cette interprétation, à mon avis, ne serait pas conforme aux principes qui s'appliquent au droit statutaire.

Ici il s'agit de déterminer si un testament équivaut à une déclaration que des biens appartenant au conjoint survivant d'une communauté de biens seront hors communauté. J'ai déjà dit et je répète que je ne crois pas que dans le présent litige le testament a eu pour effet de changer la nature du contrat et d'enlever à l'épouse son droit de toucher la moitié des biens communs à la dissolution de la communauté.

Dans ce cas, la police ne peut être considérée comme bien hors communauté et ne fait partie de la succession de l'assuré que pour le quantum de l'intérêt de l'assuré dans la police et ne serait pas imposable sur le produit total d'icelle.

Voyons quels sont les termes de cette disposition de la loi (R.S.C., 1952, c. 89).

3. (1) A "succession" shall be deemed to include the following dispositions of property and the beneficiary and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to such property:

(*h*) money received or receivable under a policy of insurance effected by any person on his life, or effected on his life by a personal corporation, whether or not such insurance is payable to or in favour of a preferred beneficiary within the meaning of any statute of any province relating to insurance, where the policy is

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wholly kept up by him or by such personal corporation for the benefit of any existing or future donee, whether nominee or assignee, or for any person who may become a donee, or a part of such money in proportion to the premiums paid by him or by such personal corporation, where the policy is partially kept up by him or by such personal corporation for such benefit;

Dans la cause qui nous est soumise il a été établi que le testateur a assuré sa propre vie. Il a payé les primes avec les biens de la communauté, qui appartenaient à parts égales aux époux. Par son testament, il a légué ses assurances à son épouse. La disposition devrait être interprétée en la dépouillant de tout ce qui est étranger au problème à résoudre. En remplaçant les mots "personal corporation" par les mots "his wife", elle pourrait être paraphrasée comme suit:

Money received or receivable under a policy effected by any person on his life, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him and another person for the benefit of any person who may become a donee or legatee will be deemed to be included in a "succession".

Je comprendrais, si la police d'assurance sous considération était une police d'assurance régie par le chapitre 301 (Loi d'assurance sur la vie des maris et des parents) qui contient une disposition déclarant les polices de cette nature biens hors communauté, qu'elle pourrait peut-être être imposable comme partie de la succession de l'assuré, vu que les primes seraient censées avoir été payées par l'assuré avec ses propres biens. Mais pour toutes les raisons contenues dans mes remarques je suis d'opinion et j'ai décidé qu'elle n'appartient pas à cette catégorie d'assurance sur la vie; elle est "bien de communauté" et est régie par les dispositions du Code Civil.

La Cour permet l'appel, annule la cotisation et ordonne que le tout soit référé au Ministre afin qu'une nouvelle cotisation soit faite en déduisant de la valeur de la succession la somme de $13,329.26, étant la moitié du produit net de la police d'assurance qui appartient de droit à l'appelante en sa qualité d'épouse commune en biens, le tout avec dépens.

Jugement en conséquence.

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Mar. 27, 28

Sept. 28

BETWEEN:

THE D'AUTEUIL LUMBER COMPANY LIMITED ..... APPELLANT;

AND

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

Revenue — Income Tax — Timber limits — Depletion allowance — Income War Tax Act, R.S.C. 1927, c. 97, s. 5(1)(a) as amended by S. of C. 1946, c. 55, s. 4(1).

The appellant company in 1943 purchased a timber limit from one of its shareholders who held a controlling interest but who took no part in any of the meetings of its directors or shareholders relating to the purchase. On a cordage basis the limit had a value at least equal to the price paid by the appellant and the Minister for the taxation years 1943 to 1946 used such price as the basis of the allowance for depletion provided by s. 5(1)(*a*) of the *Income War Tax Act*, R.S.C. 1927, c. 97. The section as amended by 1946, S. of C., c. 55, s. 4(1), provided that in determining income derived from timber limits there may be deducted such an allowance for the exhaustion of the limits as may be fixed by regulation of the Governor in Council. By Order in Council P.C. 2771 of June 17, 1948, Regulations for the Depletion of Timber Limits applicable to the income of 1947 and subsequent taxation years were made and para. 3 thereof provided that:

> If the Minister is satisfied that the previous owner or holder of a timber limit . . . directly or indirectly had or has a controlling interest in the present owner . . . it shall be deemed that the capital cost was the capital cost to such previous owner . . . and the depletion already allowed such previous owner . . . will be regarded as having been allowed the present owner . . .

In its income tax returns for 1947 and 1948 the appellant claimed as a deduction from taxable income depletion of the timber limit based upon its cost to it. The Minister ruled that the deduction should be based on the cost to the former owner and used that figure as the basis for the 1947 and 1948 allowance for depletion in determining the appellant's assessments for those years. The assessment was affirmed on an appeal to the Income Tax Appeal Board. The appellant then appealed to this Court and submitted that Order in Council 2771 was *ultra vires* of the authority given the Governor in Council by s. 5(1)(*a*) of the Act.

Held: That Parliament had unlimited power to enact legislation relating to the depletion or exhaustion of timber limits and to delegate such power to the Governor in Council.

2. That s. 5(1)(*a*) of the *Income War Tax Act* as amended, was a valid enactment of Parliament, which gave authority to the Governor in Council to deal with the matter of depletion or exhaustion of timber limits by regulation without any restriction.

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3. That the regulations passed under Order in Council P.C. 2771 are legal, valid and binding and the Minister in determining the appellant's income was bound thereby and correctly applied the rule laid down in paragraph 3 thereof.

Pioneer Laundry and Dry Cleaners Ltd. v. Minister of National Revenue [1940] A.C. 130; *D. R. Fraser & Co. Ltd. v. Minister of National Revenue* [1949] A.C. 24. *Minister of National Revenue v. T. E. McCool Ltd.* [1950] S.C.R. 80, distinguished.

APPEAL from a decision of the Income Tax Appeal Board.

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

P. F. Fineberg for appellant.

Maurice Paquin, Q.C. and *Alban Garon* for respondent.

FOURNIER J. now (September 28, 1956) delivered the following judgment:

This is an appeal from the decision of the Income Tax Appeal Board dated May 6, 1953, dismissing the appellant's appeal from its income tax assessments for the taxation years 1947 and 1948, whereby the Minister of National Revenue disallowed as deductible from taxable income certain amounts for depletion of its timber limit and in respect of the Quebec Education Tax.

At the hearing, the appellant filed a withdrawal of the appeal or objections against the disallowance of amounts claimed as expenses with respect to the Quebec educational tax paid for the years 1947 and 1948.

In its income tax returns for the above taxation years, the appellant claimed as a deduction from taxable income depletion of the timber limit based upon its cost to the appellant in the sum of $1,500,000. The Minister of National Revenue based his assessments on a valuation of $591,667, representing the cost of the limit to the former owner.

At the trial, no verbal evidence was heard, but the parties admitted several facts for the purpose of this cause only, reserving their right to argue the relevancy or materiality of the several admissions. A summary of the facts admitted follows.

On April 19, 1943, K. C. Irving personally purchased from the New Brunswick Railway Co. 175,935 acres of timber lands, known as the Restigouche limit, for which he

paid the price of $710,000. Then on May 10, 1943, he sold part of this limit to the appellant, as appears in the copy of the contract of sale which is on file before the Court. Though the contract mentions that the sale was made for one dollar and other considerations, the parties admit that the true price paid by the appellant to K. C. Irving for the portion of the limit purchased was $1,500,000. The cost to K. C. Irving of that portion of the limit sold to the appellant was $591,667, which figure was used by the Minister of National Revenue as the basis for the 1947 and 1948 allowance for depletion in determining the appellant's assessments for the above taxation years.

At the time of the purchase of the Restigouche limit by K. C. Irving and his sale of a portion of the limit to the appellant, and thereafter up to and including the 1947 and 1948 taxation years of the appellant, he owned 856 out of the 1,550 common voting shares of the appellant, or a little more than fifty-five per cent of the appellant's voting stock. The offer to purchase the limit from K. C. Irving at the price of $1,500,000 was made for the company by Aime Gaudreau, the president of the appellant, after an expert appraisal of the timber limit established that, on a cordage basis, it had a value at the time of at least $1,500,000. The majority shareholder, K. C. Irving, owner of the limit, did not participate in any discussions or meetings of the directors and/or of the shareholders of the appellant, authorizing and/or ratifying the purchase of the limit by the appellant from the owner.

During the period the owner held the limit, that is, from April 19, 1943 to May 10, 1943, he took no depletion whatsoever on it for income tax purposes. The parties agreed that, at the time of the transaction, on a cordage basis, the portion of the limit purchased by the appellant had a value of at least $1,500,000. For the taxation years 1943 to 1946 inclusive, the Minister of National Revenue used as the basis of the allowance for depletion the cost to the appellant and the value of the timber limit on a cordage basis; that is to say, the sum of $1,500,000.

Then the respondent, in determining the allowance for depletion of the limit for the years 1947 and 1948 under paragraph (*a*) of s-s. (1) of s. 5 of the *Income War Tax Act*,

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c. 97, R.S.C. 1927 and amendments, and under the regulations of Order in Council 2771 of June 17, 1948, did not consider the cost to the appellant of the timber limit nor its value, but established the allowance on the basis of the cost of the timber limit to K. C. Irving, the former owner.

The question in the appeal relates to the authority given to the Governor in Council, when determining taxable income from timber limits, to fix by regulation deductible allowances for the depletion or exhaustion of the timber limits.

Before 1940 the above section read as follows:

Sec. 5. *Exemptions and deductions.*—"Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—

(a) *Depreciation and exhaustion. Depletion between lessor and lessee.* —Such reasonable amount as the Minister, in his discretion, may allow for depreciation, and the Minister in determining the income derived from mining and from oil and gas wells and timber limits shall make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair.

At that time the provisions for exemptions and deductions for depreciation and exhaustion were made under this section.

While this section was the law a case relating to depreciation, based on the above section, was heard and decided by the Privy Council and is known as *Pioneer Laundry v. Minister of National Revenue* (1).

In that instance, the appellant company, having acquired certain second-hand machinery and equipment which had formerly belonged to a company, which had gone into voluntary liquidation, of the same name as, and carrying on business similar to that of the appellant company, claimed in its return for taxation purposes certain allowances for depreciation in respect of the acquired machinery and equipment. The appellant company was in fact controlled by the same shareholders who formerly controlled the company to which the machinery and equipment in question had been fully written off by depreciation. The Minister of National Revenue refused the claim of the appellant company on the ground that there had been no actual change in ownership of the assets acquired.

(1) [1940] A.C. 127.

The Privy Council held that under s. 5(*a*) of the *Income War Tax Act*, R.S.C. 1927, c. 97, the appellant company was entitled to a deduction in respect of depreciation in "such reasonable amount as the Minister, in his discretion, may allow," and that the exercise of that discretion involved an administrative duty of a quasi-judicial character, to be exercised on proper legal principles. The decision of the Minister was not a proper exercise of his discretion inasmuch as he was not entitled, in the absence of fraud or improper conduct, to disregard the separate legal existence of the appellant company, and to inquire who its shareholders were and its relation to its predecessors. The taxpayer was the company, and not its shareholders.

In that decision, no doubt was left that the taxpayer had a statutory right to depreciation and that the Minister's authority was limited to the fixing of the quantum of the depreciation.

Following that decision, the above section was amended in 1940 to read:

> Sec. 5. *Exemptions and deductions.*—"Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—
>
> (*a*) *Depletion.*—The Minister in determining the income derived from . . . timber limits may make such an allowance for the exhaustion of the . . . timber limits as he may deem just and fair, . . .

It will be noticed that paragraph (*a*) of the section omitted to deal with depreciation, which was dealt with under another section of the statute to which I will refer later.

It would seem that, after the section was amended in 1940, the statutory right of deduction of allowances for the exhaustion of timber limits had disappeared and that the Minister was empowered, at his discretion, to allow or refuse such allowances.

A decision was rendered by the Privy Council based on the above amended section, relating to depletion of timber limits in the case of *Fraser v. Minister of National Revenue* (1). The above principle was held by the House of Lords in the following words:

> The provision in s. 5, sub-s. 1(*a*), of the Dominion Income War Tax Act, R.S.C. 1927, c. 97, as amended by s. 10 of c. 34 of S.C. 1940, that the Minister may make under the head of "depletion" "such an allowance for

(1) [1949] A.C. 24.

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the exhaustion of the . . . timber limits as he may deem just and fair", confers on him a discretion to determine whether the case before him is one for making any allowance at all and does not limit his discretion to determining the extent of the allowance to be made. The language is permissive not obligatory, and he has a double discretion, first, to determine whether the case is one for an allowance, and second, if so, to determine how much shall be allowed. The Minister was accordingly under no legal obligation to make a depletion allowance to the appellant company, in respect of their assessment to income tax for the fiscal year 1940-41, for the exhaustion of timber limits owned by the Crown on which the appellant company had been licensed to cut timber.

Though the above case related to timber limits under lease, the same principle applies to the owner of timber limits. In 1949 the Supreme Court heard a somewhat similar case, *T. E. McCool Ltd. v. Minister of National Revenue* (1). The decision in that case stated that the taxpayer had no statutory right to a depletion allowance on a timber limit and that the Minister had full discretion to allow or deny such an allowance.

Before 1940 the statute provided that the Minister "shall make such an allowance as he may deem just and fair". From 1940 to 1946, the word "shall" was replaced by the word "may", and instead of being imperative the wording was permissive. During that period, the Minister exercised the discretion of making allowances for depletion and fixing the amount of same, but in 1946 s. 5(1)(*a*) was further amended, and the amendment is applicable to this case. S. 5(1)(*a*) now reads:

> Sec. 5. *Exemptions and deductions.*—1. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—
>
> (*a*) *Depletion.*—In determining the income derived from mining and from oil and gas wells and timber limits there may be deducted such an allowance for the exhaustion of the mines, wells and timber limits as may be fixed by regulation of the Governor in Council . . .

The amendment provided that the taxpayer would be entitled to deductions for allowances for the exhaustion of timber limits only as may be fixed by regulation of the Governor in Council.

After this amendment became law, the Governor in Council passed Order in Council P.C. 4560 on November 7, 1947, replacing former regulations for the depletion of tim-

(1) [1950] S.C.R. 80.

ber limits. On June 17, 1948, this Order in Council was revoked and replaced by Order in Council P.C. 2771, which reads as follows:

WHEREAS by Order in Council P.C. 4560 of 7th November, 1947, regulations were established pursuant to the provisions of paragraph (*a*) of subsection (1) of section 5 of The Income War Tax Act for the depletion of timber limits for 1947 and subsequent years;

AND WHEREAS the Minister of National Revenue reports that it is advisable, for the purpose of clarification, to provide in the said regulations that not more than one hundred per cent of the capital cost to the original owner of such timber limits may be depleted and that the residual value, if any, of such timber limits be taken into consideration when determining the capital cost thereof;

THEREFORE, His Excellency the Governor General in Council, on the recommendation of the Minister of National Revenue and pursuant to the provisions to paragraph (*a*) of subsection (1) of section 5 of The Income War Tax Act, Revised Statutes of Canada, 1927, chapter 97 is pleased to order as follows:

1. The regulations for the depletion of timber limits established by Order in Council P.C. 4560 of 7th November, 1947, are hereby revoked; and

2. The following regulations are hereby made and established in substitution for the regulations hereby revoked;

REGULATIONS FOR THE DEPLETION OF TIMBER LIMITS TO BE APPLICABLE TO THE INCOME OF 1947 AND SUBSEQUENT TAXATION YEARS AND OF FISCAL PERIODS ENDING THEREIN

* * *

3. If the Minister is satisfied that the present owner or holder of the timber limits or rights directly or indirectly had or has a controlling interest in a company previously the owner or holder of the said timber limits or rights, or that the previous owner or holder (which term shall include a series of owners or holders) directly or indirectly had or has a controlling interest in the present owner or holder or that the present owner or holder and the previous owner or holder were or are directly or indirectly subject to the same controlling interest, it shall be deemed that the capital cost was the capital cost to such previous owner or holder or the first of such previous owners or holders where more than one, and the depletion already allowed such previous owner(s) or holder(s) will be regarded as having been allowed to the present owner or holder.

The respondent's assessment is based on paragraph 3 of the above Order in Council.

The above regulation seems to have been inspired by the first proviso of s. 6(1)(*n*) though this proviso applies to depreciation of assets while the ownership was in the hands of a former owner who has a controlling interest in the actual taxpayer company. The proviso reads as follows:

Provided, however, that the Minister shall not allow a deduction in respect of depreciation of assets owned by an incorporated taxpayer if he is satisfied that the said taxpayer directly or indirectly had or has a controlling interest in a company or companies previously the owner or

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owners of the said assets or that the said previous owner (which term shall include a series of owners) directly or indirectly had or has a controlling interest in the said taxpayer or that the said taxpayer and the previous owner were or are directly or indirectly subject to the same controlling interest and that the aggregate amount of deductions which have been allowed to the said taxpayer and/or the said previous owner in respect of the depreciation of such assets is equal to or greater than the cost of the said assets to the said previous owner or to the first of the previous owners where more than one:

It is contended that Order in Council 2771 is *ultra vires* of the authority given the Governor in Council in s. 5(1)(*a*) of the *Income War Tax Act* to deal with the fundamental difference between, and separation of, the legal personalities of an individual and an incorporated company. In support of this contention, it is argued that the existence of the proviso sections of s. 6(1)(*n*) of the *Income War Tax Act* on depreciation, where the ambit of discretionary authority is broader than in s. 5, indicates the legal requirement of express statutory authorization for the type of regulation applied in the present case and, in the absence thereof, any such regulations are *ultra vires*.

This argument clearly implies that the provisos of s. 6(1)(*n*) were *intra vires* of the powers of Parliament. This seems to have been the view of this Court in the case of *The Minister of National Revenue v. Simpson's Limited* (1) where the Honourable President of the Court held that

> . . . the first proviso to section 6(*n*) of the Act set a top limit to the total amount of deductions in respect of depreciation that could be allowed in the case of assets acquired under the circumstances of controlling interest specified in it and while it does not direct the Minister to base his allowance of deductions in respect of the depreciation of such assets on their cost to their former owner there is nothing in the proviso or elsewhere that precludes him from using such a base.

In the case of *Minister of National Revenue v. Stovel Press Limited* (2), the same view was expressed when the Court found that there was no valid reason why the Minister, in determining whether he should base his allowance of deductions in respect of depreciation of the assets in question on their cost to the former owner or on the amount for which they were acquired by the respondent, should not consider the proviso to s. 6(1)(*n*) and its possible effect in future.

(1) [1953] Ex. C.R. 93. (2) [1953] Ex. C.R. 169.

In these decisions it was held that, in determining whether the allowance of deductions in respect of depreciation of the assets could be based on their cost to the former owner, the Minister was not barred from applying the above rule, in assessing the taxpayer's taxable income. There is no doubt in my mind as to the validity of the provisos in s. 6(1)(*n*), and I agree with the view expressed in the *Stovel Press Limited* case.

These provisos were enacted in1946 at the same session of Parliament at which the actual s. 5(1)(*a*), applicable to this case, was passed. As to matters related to depreciation, the legislator thought best to enact the above provisos. In s. 5(1)(*a*), the legislator decreed that, in determining the income, an allowance, which may be fixed by regulation of the Governor in Council, may be deducted for the exhaustion of timber limits. This was a sweeping power which, in my opinion, gave a discretionary authority broader than in the first proviso of s. 6(1)(*n*).

Vested with this authority, the Governor in Council passed Order in Council 2771, embodying para. 3, which is in dispute in the present instance. Though Parliament cannot delegate to the Governor in Council any more authority than it itself possesses, it certainly can delegate to the Governor in Council powers which are *intra vires* of its authority.

The power given to the Governor in Council, embodied in s-s. (*a*), is in clear and easily understandable terms. The authority is to the effect that, in determining the income derived from timber limits, there may be deducted allowances as they may be fixed by regulation. In the exact words of the section, I find no restriction on the authority delegated to the Governor in Council. If Parliament had the unlimited power, which I believe it had, to enact legislation relating to depletion or exhaustion of timber limits, I find no valid reason why this power could not be delegated to the Governor in Council. The Governor in Council's authority, in my mind, was discretionary. This being the case, when the regulation was passed it was enacted that, in determining the income derived from timber limits, when the former owner or holder of a timber limit directly or

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indirectly had or has a controlling interest in the present owner or holder, it shall be deemed that the capital cost was the capital cost to the previous owner or holder.

Being of the opinion that s. 5(1)(*a*) was a valid enactment of Parliament, which gave authority to the Governor in Council to deal with the matter of depletion or exhaustion of timber limits by regulation without any restriction, I have to conclude that the regulations passed under Order in Council 2771 are legal, valid and binding. The Minister, therefore, in determining the appellant's income, was bound by the regulation. Having been convinced that the previous owner or holder of the timber limit in question had a controlling interest in the present owner or holder of the timber limit, the Minister applied the rule laid down in para. 3 of the Order in Council. In my judgment there is no reason for finding that his action in this case was otherwise than in accord with the terms of para. 3 of Order in Council 2771, enacted under the provisions of s. 5(1)(*a*).

The appellant having filed a withdrawal of his objection against the disallowance of the amounts claimed as expenses with respect to the Quebec Educational Tax paid for the years 1947 and 1948, the Minister's disallowance of this item in his assessments is hereby confirmed.

For these reasons, I have arrived at the conclusion that the Minister's assessments in the taxation years 1947 and 1948 were made according to the established facts of the case and to the provisions of the *Income War Tax Act* and the regulation passed thereunder by Order in Council 2771 on June 17, 1948.

The appeals are dismissed with costs.

Judgment accordingly.

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April 9

Nov. 13

BETWEEN:

SUBSIDIARIES HOLDING COMPANY LIMITED ..... } SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Revenue—Income Tax—Overpayment affirmed by assessment—No objection within time limit—Effect on recovery—"Overpayment", meaning of —The Income Tax Act, 1948, S. of C. 1948, c. 52 as amended, ss. 27(d), 38, 42(6), 47, 52, 53 and 127(1)(ay).

In filing its tax return for 1951 the suppliant, whose income was derived from a wholly-owned United States subsidiary and consisted of payments of dividends and interest, claimed as a tax allowance under s. 38 of *The Income Tax Act,* 1948, S. of C., c. 52, taxes withheld at the source on the interest payments. By notice of assessment its claim was disallowed but by a subsequent notice of re-assessment allowed. After the 60 day limit for filing notice of objection provided by s. 53 of the Act had expired, the suppliant under s. 52(1)(*b*) made application for a refund of the full amount of taxes withheld at the source. When refused, it sought to recover by Petition of Right. It alleged that it had in error omitted to claim as a tax allowance the U.S. taxes withheld at the source in respect of the dividends received and that but for such omission its tax return would have shown it was not liable to any tax; that consequently it had made an "overpayment" and under s. 52 was entitled to a refund.

At the trial the respondent admitted that had objection to the re-assessment been made within the time permitted by s. 53 the Minister would have varied the re-assessment so as to make the suppliant entitled to the refund claimed. In its statement of defence it pleaded that the aggregate of the amounts paid on account of income tax did not exceed the income tax payable as fixed by the re-assessment and that there had been no objection to the re-assessment within the time limit therefor by s. 53(1) of the Act as amended and therefore that having regard to s. 42(6) the re-assessment was valid and binding and that, having regard to s. 127(1)(*ay*), there was no overpayment.

Held: That in view of the definition of "overpayment" as contained in s. 53(4) and of the provisions of s. 127(1)(*ay*) the "overpayment" to which the taxpayer is entitled under s. 53 is the aggregate of all amounts paid on account of tax minus all amounts of tax payable as fixed by the assessment or re-assessment.

2. That notwithstanding the fact that the suppliant had paid a substantial amount of taxes, which on a proper construction of the Act it was not liable to pay, it could not now recover such taxes because of its failure to object to and appeal from the re-assessment within the time limited by s. 53.

PETITION OF RIGHT.

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

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SUBSIDIARIES HOLDING CO. LTD. v. THE QUEEN

C. F. H. Carson, Q.C. and *Allan Findlay, Q.C.* for the suppliant.

W. R. Jackett, Q.C., J. D. C. Boland and *P. M. Troop* for the respondent.

CAMERON J. now (November 13, 1956) delivered the following judgment:

This is a petition of right filed on October 7, 1954, in which the suppliant seeks to recover the sum of $66,411.31 (and interest thereon), said to be an "overpayment" of income taxes in respect of its taxation year ending on August 31, 1951. The issue is entirely a question of law, the parties relying on the pleadings and on an "Agreement as to Facts" and the appendices thereto (Exhibit 1), the admissions therein made being only for the purpose of the trial. At all relevant times *The Income Tax Act, 1948,* as amended, was in effect and all references herein to the "Act" will be understood as referring to that Act as it was in 1951, unless otherwise stated.

Before considering the relevant provisions of the Act, it is necessary to set out certain of the facts. The suppliant carries on business as a holding company having its head office at Windsor, Ontario. In its 1951 taxation year the suppliant's income totalled $4,894,907.12, of which $4,650,285.33 was received as dividends from its wholly-owned subsidiary Hiram Walker & Sons Inc. (carrying on business in the United States) and the balance of $244,621.79 as *interest* on inter-company advances made to the same company. In computing its taxable income for that year, the suppliant applied the provisions of s. 27(*d*) of the Act and deducted from its income the full amount of the dividends received from its subsidiary. In its return it showed taxable income for the fiscal period at $239,445.53, and that amount, and the tax on taxable income thereon of $103,104.59 are accepted as correct.

From that tax, however, the suppliant was entitled under the provisions of s. 38(1) of the Act to deduct from the tax otherwise payable, the lesser of (*a*) the tax paid by it to the government of a country other than Canada on its income from sources therein for the year, or a proportion thereof computed in accordance with the formula provided

in subsection (1)(*b*). I do not consider it necessary to discuss further the provisions of s. 38(1) in view of the "admission by the Attorney General of Canada", dated April 3, 1956, which will be later referred to.

The suppliant filed its 1951 T2 return at the District Office of the Department of National Revenue at London on February 27, 1952. The schedules attached thereto show that the United States taxes withheld at the source from payments made by Hiram Walker & Sons, Inc., to the suppliant, were at the rate of 15 per cent. on *interest*—a total of $36,693.28—and at the rate of 5 per cent. on *dividends*, a total of $232,514.25. In its return the suppliant claimed as a tax allowance under s. 38 only the former of those amounts, namely, $36,693.28; and after allowing for instalments of taxes already paid, amounting to $61,250, computed the balance of its estimated tax payable at $5,161.31 and paid that amount.

Pursuant to s. 42 the respondent, on March 27, 1952, sent to the suppliant a notice of assessment and therein disallowed the deduction of $36,693.28. On June 6, 1952, he sent a notice of re-assessment in which it was shown that the "foreign tax credit" of that amount was allowed. That notice of assessment showed a tax levied of $66,411.31 and taxes paid on account of a like amount; it therefore showed no overpayment of taxes and no balance of tax payable. In effect, the re-assessment confirmed the suppliant's own estimate of tax payable.

Section 53 confers on the taxpayer the right to object to the assessment by serving on the Minister a notice of objection within sixty days of the mailing of the notice of assessment. It is admitted that the suppliant did not at any time serve such notice of objection within the period provided therefor.

After the said period for serving a notice of objection had elapsed, the auditors, whose certificate appears on the financial statements attached to the return, pointed out to the suppliant that in their opinion a mistake had been made in that return, and that the tax allowance claimed therein should have been all of the United States taxes withheld at the source (that is, a total of $269,207.53, as shown in Schedule A of the return) instead of the amount of $36,693.28 which was only one of the items shown in that

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schedule. The item omitted was that for $232,514.25, being the United States tax withheld at the source in reference to *dividends* received by the suppliant from its subsidiary.

The suppliant immediately drew the matter to the attention of its solicitors and on their advice an application under the provisions of s. 52(1)(*b*) for a refund of the full amount of taxes paid—namely, $66,411.31—was made to the Minister by letter dated September 23, 1952. By letter dated February 4, 1953, the suppliant was notified that the said application would not be granted. Subsequently, there was further correspondence between the solicitors for the suppliant and the Department of National Revenue, the latter stating that "this division is not prepared to make any adjustment in the assessment".

By its petition of right, the suppliant alleges that it erroneously omitted to claim as a tax allowance the amount of $232,514.25 representing United States taxes withheld at the source in respect of *dividends* received by it from its subsidiary; that if such omission had not occurred, the return would have shown that the suppliant was not liable to any tax in that year; that it consequently made an "overpayment" consisting of "instalments previously paid" of $61,250 and its final payment of $5,161.31; and that under the provisions of s. 52(1)(*b*) it is now entitled to a refund of the whole of such "overpayment".

By admission made at the trial, it is now clear that the suppliant, by reason of the provisions of s. 38 of the Act as it read in 1951 (it was materially altered in the following year), was not liable to pay any income tax for the year in question. That admission was as follows:

> For the purpose of this trial, the Attorney General of Canada admits that, if there had been an objection to the re-assessment within the sixty day period permitted by s. 53 of *The Income Tax Act*, the Minister would have varied the re-assessment so as to make the Suppliant entitled to the refund of tax claimed by this Petition of Right—but not, of course, with interest at 6%.

That admission relieves me of the necessity of determining the amount of refund, if any, to which the suppliant may be entitled.

As I have noted, the suppliant relies on the provisions of s. 52 and as much of it is relevant, I shall quote it in full:

52. (1) If the return of a taxpayer's income for a taxation year has been made within two years from the end of the year, the Minister

(a) may, upon mailing the notice of assessment for the year, refund, without application therefor, any overpayment made on account of the tax, and

(b) shall make such a refund after mailing the notice of assessment if application therefor has been made in writing by the taxpayer within 12 months from the day on which the overpayment was made or the day on which the notice of assessment was sent.

(2) Instead of making a refund that might otherwise be made under this section, the Minister may, where the taxpayer is liable or about to become liable to make another payment under this Act, apply the amount of the overpayment to that other liability and notify the taxpayer of that action.

(3) Where an amount in respect of an overpayment is refunded, or applied under this section on other liability, interest at the rate of 2 per cent per annum shall be paid or applied thereon for the period commencing with the latest of

(a) the day when the overpayment arose,

(b) the day on or before which the return of the income in respect of which the tax was paid was required to be filed, or

(c) the day when the return of income was actually filed,

and ending with the day of refunding or application aforesaid, unless the amount of the interest so calculated is less than $1.00, in which event no interest shall be paid or applied under this subsection.

(4) For the purpose of this section "overpayment" means the aggregate of all amounts paid on account of tax minus all amounts payable under this Act or an amount so paid where no amount is so payable.

The claim of the suppliant is based on the provisions of subsection (1)(*b*) and of subsection (4). Mr. Carson submits that, subject to the provisions of subsection (2), subsections (1)(*b*) confers on the taxpayer a statutory right to a refund of the "overpayment" (where the Minister has not made the refund at the time of mailing the notice of assessment) provided that the requirements as to time contained therein have been complied with—as is admittedly the case here. I agree with that submission which is not disputed by Mr. Jackett, counsel for the respondent, who also agrees that a petition of right may be brought for the recovery of an "overpayment" in proper cases.

The real dispute between the parties relates to the interpretation to be put upon the word "overpayment" as defined in subsection (4) and more particularly on the phrase "all amounts payable under this Act". Mr. Carson

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submits that the latter phrase clearly means those amounts, which, upon the proper computation of his tax liability under all the provisions of the Act—including, as in this case, the allowance of all deductions from tax to which the suppliant is entitled—a taxpayer is liable to pay. It follows, therefore, he says, that in view of the admission that if an objection to the assessment had been taken in time, it would have been varied so as to make the suppliant entitled to a refund of the amount now claimed, no amount of tax is legally payable by the suppliant for its 1951 taxation year and it is therefore entitled to a refund in full of such "overpayment".

Paragraph 7 of the statement of defence discloses the main ground relied on by the respondent:

7. With reference to the Petition of Right as a whole, he says that the aggregate of the amounts paid by the Suppliant on account of income tax for its 1951 taxation year does not exceed the income tax payable by the Suppliant as fixed by re-assessment and that there has been no objection to the re-assessment within the time limit therefor by subsection (1) of section 53 of *The Income Tax Act*, c. 52 of the Statutes of 1948 as amended; and he says therefore that, having regard to subsection (6) of section 42 thereof, the re-assessment is valid and binding and that, having regard to paragraph (*ay*) of subsection (1) of section 127 thereof, there is no overpayment that can be repaid to the Suppliant.

The sections of the Act therein referred to are as follows:

53. (1) A taxpayer who objects to an assessment under this Part may, within sixty days from the day of mailing of the notice of assessment, serve on the Minister a notice of objection in duplicate in prescribed form setting out the reasons for the objections and all relevant facts.

* * *

42. (6) An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a re-assessment, be deemed to be valid and binding notwithstanding any error, defect or omission therein or in any proceeding under this Act relating thereto.

* * *

127. (1) In this Act,

* * *

(*ay*) the tax payable by a taxpayer under Part 1 or Part 1A means the tax payable by him as fixed by assessment or re-assessment subject to variation on objection or appeal, if any, in accordance with the provisions of Part 1 or Part 1A, as the case may be.

Put shortly, the submission on behalf of the respondent is that inasmuch as the amounts of tax paid by the suppliant did not exceed the amounts of tax payable *as fixed by the assessment*, there was no "overpayment"; and that as no objection was taken to the re-assessment within the

time limited by s. 53(1), the re-assessment is valid and binding and cannot be attacked indirectly in proceedings such as the instant one.

Now Mr. Carson admits that the re-assessment made upon the suppliant is valid and binding under s. 42(6) and that it cannot now be attacked. He submits, however, that Parliament in enacting s. 52(1)(*b*) conferred upon a taxpayer a right to a refund of an overpayment separate and distinct from and which did not in any way depend upon the provisions relating to objection to or appeals from the assessment, provided the taxpayer could prove compliance with the time limits set out in s. 52. He agrees at once that were it not for the provisions of s. 52, the suppliant would have no case. He says that the words "amounts payable under this Act" are clear and unambiguous and must be given their plain, ordinary meaning, namely, those amounts which under the Act, when fully and properly construed, are payable by a taxpayer.

He submits further that s. 127(1)(*ay*), which states that the tax payable under Part 1 and Part 1A means the tax payable by a taxpayer as fixed by assessment and re-assessment—subject to variation on objection or appeal—has here no application inasmuch as it refers to "tax payable", words which are not found in s. 52(4). In any event, he says that the definition of tax payable is inapplicable in many cases where the words "tax payable" are used in Part 1. Examples of such sections are s. 41, by which the taxpayer is required to estimate the *amount of tax payable,* and s. 47(1)(*b*) by which a corporation is required to pay certain monthly instalments of the remainder of the *tax payable,* as estimated by it, on its taxable income. In such cases, s. 127(1)(*ay*) would perhaps not be directly applicable inasmuch as the matters referred to were antecedent to the assessment.

After giving the most careful consideration to the very able argument submitted by Mr. Carson and to the various cases cited in support thereof, I have reached the conclusion that the petition must be dismissed. I shall now attempt to set out my reasons for so finding.

The purpose of the refund provisions of s. 53(2) of the *Income War Tax Act* was considered by the President of

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this Court in *Davidson v. The King* (1), and the following extract therefrom is, I think, equally applicable to the provisions of s. 52 of *The Income Tax Act*. At page 171 he said:

> It is, I think, clear that the primary purpose of the section was to simplify the process of making refunds. Without some such section no refund of an overpayment of tax could be made without an order in council under *The Consolidated Revenue and Audit Act*, R.S.C. 1927, chap. 178. Where it was clear from the returns that an overpayment had been made by a taxpayer it was deemed desirable that a refund should be made without the necessity of passing an order in council and the Minister was directed to make such refund.

In interpreting the provisions of s-s. (4) of s. 52, it is of the utmost importance to pay attention not only to the other provisions of s. 52 entitled "Refund of Overpayment" —but to the position which that section bears in relation to what may be called the "machinery" sections of the Act found in Division F of Part 1, entitled "Returns, Assessments, Payments and Appeals". Section 40 requires the filing of the taxpayer's return and s. 41 requires the taxpayer therein to make an estimate of the tax payable. Section 42 requires the Minister to examine the return and assess the tax, interest and penalties, if any, payable for the year; to send a notice of assessment to the person filing the return; and authority is given to the Minister to re-assess or make additional assessments. Sections 44 to 49 provide for payment of tax and sections 50, 51 and 51A provide for interest on tax and for penalties. Following the "refund" section, there are suitable provisions in sections 53, 54 and 55 for objections to assessment and for appeals to the Income Tax Appeal Board and to this Court.

The provisions of s. 52 establish beyond question that the Minister has carried out the duties imposed upon him by s. 42(1) *prior* to the time when he was called upon to ascertain whether the taxpayer has or has not made an overpayment; that is to say that he has assessed the tax payable, if any, and the interest and penalties, if such are payable. Subsection (1)(*a*) authorizes him to make a refund of the overpayment without application therefor "upon mailing the notice of assessment"; and subsection (1)(*b*) requires him to do so upon application "after mailing the notice of assessment" in certain cases.

(1) [1945] Ex. C.R. 160.

When the Minister has made his assessment and has determined thereby the tax payable by a taxpayer for the taxation year, the next step is to ascertain the aggregate of all amounts paid on account of such tax in order that it may be known whether there has been an overpayment or an underpayment; it may be found, also, in many cases that there is neither an overpayment nor an underpayment but that the amounts paid correspond precisely with the tax payable.

In the case of an underpayment, it seems clear that the other item to be taken into account is the amount of tax, interest and penalties *as fixed by the assessment or re-assessment.* Section 50(1) provides for the payment of interest on the difference between the *tax payable* for the year and the amount paid on account of *tax payable;* and by s. 127(1)(*ay*) the tax payable is that fixed by the assessment or re-assessment, subject to variation on objection or appeal. Then by s. 48(1), the taxpayer is required within thirty days from the day of mailing of the notice of assessment to pay any part of the *assessed tax,* interest and penalties then remaining unpaid whether or not an objection to or appeal from the assessment is outstanding.

It seems to me that the Minister in computing the amount of a refund in the case of an *overpayment* must use as the basis of his computation precisely the same data (the amounts paid on account of tax and the tax payable as fixed by assessment or re-assessment) unless the Act in the clearest of terms requires him to do otherwise. I cannot think that Parliament after requiring him to assess the tax payable intended that the Minister in computing the amount of the refund should disregard his own assessment and base the amount of the refund on another and quite different computation.

Were he to do so, the results would be strange indeed. If he were proceeding under subsection (1)(*a*) of s. 52 to make a refund upon mailing the notice of assessment, he would in effect be advising the taxpayer that his tax liability had been fixed by the assessment at a specific amount; but that, in determining the amount of the refund then made, he had disregarded that assessment as erroneously made and based the amount of the refund on some other computation, the details of which the statute does not require him to supply

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to the taxpayer. In effect, that would mean that the Minister is required in such cases to make two separate and perhaps contradictory computations of the tax which a taxpayer is liable to pay. It is obvious that confusion and uncertainty would follow from such a practice—one which I am confident Parliament did not intend.

The submission advanced on behalf of the suppliant means in effect that the Minister, in computing refunds of overpayment, should take into account the tax which under the Act he *should have assessed* against the taxpayer. In substance, therefore, if not in form, these proceedings are in the nature of an attack on the assessment inasmuch as the finding in favour of the suppliant would be equivalent to a finding that the assessment was erroneous. By subsection (6) of s. 42, however, the assessment (which includes a re-assessment) is declared to be valid and binding subject only to being varied or vacated on objection or appeal, or to a re-assessment. I am quite unable to understand how an assessment could remain valid and binding and as determining the tax liability of a taxpayer if, in proceedings other than those laid down for varying or vacating the assessment, a taxpayer has the right to establish that his tax liability is other than that fixed by the assessment. At one and the same time they cannot be both a binding and valid assessment and the right to a refund of an overpayment of tax based on the proposition that the assessment is, in fact, erroneous. To base the amount of the overpayment on anything other than the tax payable as fixed by the assessment would be to disregard entirely the validity and binding effect of the assessment.

If the submission that a claim for a refund is based in part on what the assessment should have been (rather than on the assessment) were approved, it would mean that a taxpayer in claiming a refund by a petition of right would have the right to put in issue any and all of the objections which would have been available to him had he taken advantage of the statutory right to object to and appeal from the assessment. In the present case, for example, if the respondent had not made the admission to which I have referred above, the suppliant would have been required to establish its right to the tax deduction in respect of the dividends received from its subsidiary. But as pointed out

in the *Davidson* case (*supra*), the refund section of the *Income War Tax Act* was not intended "to cover cases involving an adjudication as to rights". In my view, that comment is of equal application to the section now under consideration. Were it otherwise, the provisions of the Act relating to objections and appeals would be by-passed. The Minister would have had no opportunity of reconsidering the matter in the light of the taxpayer's objections; and the Court in considering a petition of right such as the instant one, would be empowered in effect to determine that the assessment was erroneous—an assessment which it would be powerless to declare invalid, since, by the terms of the statute, it is still valid and binding.

Mr. Carson submits that the words "amounts payable under this Act" means the amount for which the taxpayer was liable under the charging sections, including s. 36(1). Now it will be noted that the opening words of that section are "The tax payable by a corporation under this Part upon its taxable income . . ." I see no reason why the definition of "tax payable" as found in s. 127(1)(*ay*) (*supra*) should not apply to that section. I have above stated that the definition may not be applicable in every case in which the words "tax payable" are used in the Act, but it does not follow that the definition section should be totally disregarded. It must be given its full effect when it is clearly applicable such as in s. 36(1). As Mr. Jackett pointed out, s. 127 of the Act—the interpretation section—does not contain the phrase formerly used in such sections—"In this Act, unless the context otherwise requires". Those words were found in s. 2 of the interpretation section of the *Income War Tax Act* but apparently were not carried into *The Income Tax Act,* 1948, because of the applicability to every Act of the Parliament of Canada of the new provisions of *The Interpretation Act,* enacted in 1947 and now found in s. 2 of the *Interpretation Act,* R.S.C. 1952, c. 158. By reason of subsection (3) and (1) thereof, the interpretation section of *The Income Tax Act* may be read as though the opening words contained the expression "unless the context otherwise requires".

Mr. Carson also relied on certain portions of the judgment in the *Davidson* case, to which I have already referred. In that case, the suppliant claimed that he had

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made overpayments of income tax for each of the years 1917 to 1934 by mistake in failing to deduct from income received from his father's estate amounts allowed to it for depreciation; that while his own returns made no claim to such deductions, such mistake should have been known to the taxing authorities who had access to the T3 tax returns in his father's estate; and that he had a statutory right to a refund of such overpayment (notwithstanding the fact that he had not appealed from any of the assessments) under the provisions of that Act relating to refund, namely:

53. The returns received from the Minister shall with all due despatch be checked and examined.

2. In all cases where such examination discloses that an overpayment has been made by a taxpayer the Minister shall make a refund of the amount so overpaid by such taxpayer, . . .

The headnote to that case is in part as follows:

Held: (1) that where no claim for depreciation was made by a taxpayer there was no duty on the part of the Minister under section 5(*a*) to make any allowance of depreciation to him and the taxpayer had no statutory right to any allowance.

* * *

(3) That an assessment based upon the taxpayer's own return of his taxable income cannot be said to be an assessment made without jurisdiction to assess.

(4) That the term "such examination" in section 53(2) means the examination not only of the taxpayer's T-1 return but also of any other return that would normally be looked at in the course of the examination and that in the present case it would include the T-3 return made by the suppliant as executor of the estate.

(5) That section 53(2) was meant to cover cases where it is clear from the examination of the returns that there has been an overpayment of income tax by the taxpayer and where the exact amount of such overpayment is clearly ascertainable, as, for example, where the overpayment was due to an error in computation of rates or calculation of amounts or failure to make or subtract specified deductions. It does not cover cases involving an adjudication as to rights.

(6) That the suppliant having failed to take advantage of the provisions of the Act by way of appeal from the assessment is now barred from relief by section 69.

The suppliant there failed on the grounds (*inter alia*) that "the examination of the return did not disclose any overpayment of tax, having regard to the distribution made by the estate, but also, even if that were not so, it would be impossible for the Minister to determine from the returns what refund to make".

Mr. Carson's submission is that in the instant case the schedules attached to the suppliant's return clearly showed that the dividends from its subsidiary had been received and that notwithstanding that the suppliant had not claimed tax deduction in respect thereof, a proper examination and determination would have shown that no tax was payable. He submits that the learned President in the *Davidson* case (there being then no definition of "overpayment" in the *Income War Tax Act*) regarded "overpayment" in its ordinary and natural meaning as being "the excess of what was paid over what the taxpayer by the Act rather than the assessment was liable to pay". He refers particularly to paragraph 5 of the headnote which follows almost exactly a statement of the President at page 172. He submits also that the suppliant is in a stronger position than the suppliant in the *Davidson* case inasmuch as its right to the refund is not dependent on an "examination" of the return, that word not being found in s. 52.

I have read the *Davidson* case with care and cannot find therein any express statement that there was a right to recover an overpayment not disclosed by the assessment; that precise question does not seem to have been considered. But even if such an inference could be made, that case is distinguishable from the present one.

It is to be noted that in the *Income War Tax Act* there was no definition of "overpayment"; that s. 53 thereof directed the Minister to make a refund in cases where the *examination* disclosed an overpayment; and that s. 56 authorized him to refund any overpayment at or prior to the issue of a notice of assessment. Under that Act, therefore, it was at least arguable that there was a right to recover an overpayment not revealed by the assessment on the ground that the Act contemplated refund before assessment. In view of the entirely different provisions of s. 52 now under consideration, that it does not authorize the refunding of overpayments until *after the assessment* has been made, and that it contains a definition of overpayment, I am of the opinion that the *Davidson* case on this point is not of assistance in its interpretation.

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One final comment should be made in respect to the meaning of the phrase "amounts payable under this Act". The amounts referred to are undoubtedly amounts of tax (plus interest and penalties, if any). It would seem proper, therefore, to read the phrase as if it were "the amounts of tax payable under this Act"; and applying thereto the definition of "tax payable" found in s. 127(1)(*ay*), there seems little doubt that the phrase means the amounts of tax payable as fixed by the assessment. Such an interpretation, it seems to me, is entirely consistent with the other provisions of the Act in that the validity and binding effect of the assessment are maintained and all disputes between a taxpayer and the Minister as to the amount of tax which the former is liable to pay fall to be determined under the sections relating to objections and appeals from assessments, which I think was clearly the intention of the Act. I can find nothing in the section which suggests that the Minister in computing refund should for that purpose make any computation as to tax liability other than that which he has done in and by his assessment. In my view, he was required to do nothing more than subtract from the aggregate of all amounts paid on account of tax, the amounts of tax payable which he has fixed by his assessment or re-assessment.

Notwithstanding the fact that the suppliant has paid a substantial amount of taxes which, on a proper construction of the Act it was not liable to pay, it cannot now recover such taxes because of its failure to object to and appeal from the re-assessment within the time limited by s. 53.

For the reasons which I have stated the suppliant's claim fails. There will therefore be judgment declaring that the suppliant is not entitled to any of the relief claimed in the petition of right, and dismissing its petition with costs payable to the respondent.

Judgment accordingly.

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CROWN—*Continued*

Held: That the limitation of thirty days within which an application may be made under s. 164 of the Excise Act is statutory. There being no statutory provision permitting the limitation of time to be enlarged the Court has no jurisdiction to grant the order sought by claimant. 2. That sections 114 and 115 of the Excise Act, under which the claimant chose to proceed, confers on the Court no discretionary power, such as that conferred by section 164. The Court must release or condemn the truck "as the case requires". 3. That the words of s. 163(3) of the Excise Act are unequivocal. The fact that the use of the truck for the purpose of transporting unlawfully manufactured spirits was without the consent or knowledge of the owner or of the driver of the truck cannot affect the application or effect of that section of the statute. Condemnation is mandatory. There is no room for doubt as to the meaning of the words, "all vehicles that have been used for the purpose of transporting the spirits so manufactured shall be forfeited to the Crown". *The King* v. *Krakowec* [1932] S.C.R. 134; *Mayberry* v. *The King* [1950] Ex. C.R. 402 referred to and followed. JOE ZAROWNEY v. HER MAJESTY THE QUEEN..... **16**

2.——*Petition of right—Terms of Union of Newfoundland with Canada, s. 39(1)(2)(3), 13 Geo. VI, c. 1—Civil Service Act, 1926, Newfoundland—Pension right assured by Terms of Union.* Suppliant an employee of the Newfoundland Railway, a public work of and owned by Newfoundland, prior to the union of Newfoundland with Canada, became an employee of the Canadian National Railways after the union. In 1953 he retired from the service of the Canadian National Railways on a life pension. He now asks a declaration of the Court that "the Government of Canada do provide a pension for the said suppliant without loss of pension rights acquired by reason of his service in Newfoundland" and that his pension be increased accordingly. The Newfoundland Railway became the property of Canada on April 1, 1949 and clause 39(1) of the Terms of Union provide that "Employees of the Government of Newfoundland in the services taken over by Canada . . . will be offered employment in these services or in similar Canadian services . . . but without reduction in salary or loss of pension rights acquired by reason of service in Newfoundland". Suppliant submits that he was entitled to exactly the same pension from the Canadian National Railways as he would have been entitled to receive from Newfoundland had the whole of his services up to retirement been with the Newfoundland Railway. *Held:* That the only pension right acquired by suppliant by reason of his service in Newfoundland and which he was entitled to retain by reason of clause 39(1) of the Terms of Union was the right to a pension

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based on the provisions of the Civil Service Act, 1926, of Newfoundland, and computed on the basis of the last three years of his service in Newfoundland prior to union. That is the right which by clause 39(1) of the Terms of Union may not be lessened. JOHN POLLOCK v. HER MAJESTY THE QUEEN AND ATTORNEY GENERAL OF NEWFOUNDLAND (INTERVENER)..... **24**

3.——*Petition of Right—The Soldier Settlement Act, S. of C. 1919, c. 71—Land purchased from Soldier Settlement Board—Action for declaration that suppliants entitled to transfer of mineral rights—No order-in-council authorizing transfer—Employee of Crown cannot bind Crown in absence of authority of order-in-council.* Suppliants purchased land from the Soldier Settlement Board and after payment for same received title to the land subject to a reservation of mines and minerals by the board. Title to such lands had been acquired by the board from the Bobtail Band of Indians and the land was known as the Bobtail Reserve. The order-in-council which ordered transfer of the land to the board made no reference to mineral rights being reserved. The letters patent conveying the land to the board contained no reservation other than that of water rights. A news release issued by the Department of Veterans' Affairs stated that veterans under the Soldier Settlement Act of World War I who had completed or did complete their contracts would be granted mineral rights on their properties in all cases where the Soldier Settlement Board acquired those rights with title to the land. Subsequent to this certain correspondence had between the suppliants and the solicitor for the board resulted in the suppliants filing with the solicitor completed application forms for the mineral rights and remitting to him a fee which he had stated was required. In no case did this result in mineral rights being conveyed and suppliants now ask a declaration of the Court that such mineral rights be conveyed to them. *Held:* That since the board's solicitor had no authority to bind the Crown no contract to transfer mineral rights pertaining to the Bobtail lands resulted from his correspondence with any of the suppliants. 2. That regardless whether the mineral rights in question are vested in the board or some other agency of the Crown or whether any trust in favour of the Indians attaches there must be order-in-council authority for their transfer and since there is no order-in-council authorizing the grant of the mineral rights to any of the suppliants they are not entitled to the relief claimed in their petition of right. RICHARD L. REESE *et al* v. HER MAJESTY THE QUEEN..... **94**

4.——*Negligence—Motor car collision at street intersection—No proof intersection that of "through" street with "stop" street—Implied duty on driver of one car to obey*

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stop sign and yield right-of-way belonging to other—The Motor Vehicles Act (N.B.) 1934, c. 20, s. 42 A (3) as amended. Following a collision between a motor car owned by the Crown and driven by its servant and a motor car owned and driven by C, an action in damages for negligence was brought by each party against the other. The collision occurred in the City of Saint John at the intersection of Delhi street with City Road. Delhi street runs north and south and City Road, which forms part of a Provincial Highway, east and west. There was a "stop" sign erected at the southwest corner of the intersection and just around the corner on City Road a "speed limit 25 miles" sign. It was established at the trial that C was proceeding along Delhi street toward the intersection when, because of the downward slope of the street and the icy condition of the pavement he was unable to stop his car, and seeing no approaching traffic, continued on into the intersection. The driver of the Crown vehicle, an R.C.M.P. constable, testified he was proceeding easterly along City Road at a speed of from 25 to 30 m.p.h. and was 15 or 20 feet from the intersection when he saw C's car, that he applied his brakes and attempted to swerve to the right but was unable to avoid the collision. It was contended for C that it had not been proven that City Road was a "through", or Delhi street a "stop" street, or that the stop sign had been erected by the Provincial Highway Department or pursuant to a valid city by-law, and that as C's vehicle was to the right of the Crown's and had entered the intersection first, he had the right-of-way notwithstanding his failure to stop before entering it. *Held.* 1. That although it was not established that City Road was a "through" street or Delhi street a "stop" street, traffic signs are placed on highways for safety and guidance and should be observed and relied on. *Gibbons* v. *Fortune* [1935] M.P.R. 355; *Nelson* v. *Dennis* [1930] 3 D.L.R. 215. 2. That a driver about to enter a through highway from a stop street is required, by s. 42A(3) of the New Brunswick *Motor Vehicles Act*, to yield the right of way to any vehicle approaching on such through highway. C saw the "stop" sign and knew not only that he was required to stop but that City Road was a through street and his negligence was the *causa causans* of the collision. 3. That the speed at which the Crown vehicle was driven did not cause or contribute to the accident and under the circumstances its driver was not negligent. *Walker* v. *Brownlee* [1952] 2 D.L.R. 450 at 460. HER MAJESTY THE QUEEN v. JOSEPH CYR; JOSEPH CYR v. HER MAJESTY THE QUEEN **161**

5.——*Negligence—Explosives used in demolition exercise—Public attendance permitted—Spectators injured—Crown Liability Act, S. of C. 1952-53, c. 30, s. 1 (a).* The female suppliant while attending a field exercise of a reserve unit of the Royal Canadian Engineers, engaged in the demolition of the steel superstructure of a highway bridge, was injured by a fragment of steel following the detonation of explosives. The public had been permitted to attend the exercise and the spot where injury was suffered was one to which it had been directed by members of the Provost Corps. In an action for damages brought under the *Crown Liability Act*, 1952-53, S. of C. 1952-53, c. 30: *Held:* 1. That the officers and men of the unit were at the time servants of the Crown acting within the scope of their duties or employment and the Crown under s. 3 (1) (*a*) of the Act was liable for their acts or omissions to the same extent as a private person of full age and capacity would be; 2. That under the circumstances that existed it was their duty to exercise a degree of diligence and care amounting practically to a guarantee of safety to those who, like the suppliant, were known to be in a position where there was a possibility that injury might result. The evidence established the possibility existed and was known to them and the directing of the public to an area in such close proximity to the demolition and the failure to ensure that warnings to take cover were adequately given and carried out constituted negligence for which the Crown was liable. *Whitby* v. *Brock & Co.* 4 T.L.R. 241; *Holliday* v. *National Telephone Co.* [1899] 2 Q.B. 392, applied; 3. That on the evidence the maxim *volenti non fit injuria* did not apply and, since it was not established the warnings were given in such a way as to be brought to the attention of the suppliant, contributory negligence was not proven; 4. That even if negligence on the part of its servants had not been established, the Crown was still liable under the rule of strict liability as laid down in *Rylands* v. *Fletcher* L.R. 1 Ex. 263; L.R. 3 H.L. 330 applied in *Miles* v. *Forest Rock Granite Co.* 34 T.L.R. 500. HARVEY LINDSAY AND KATHLEEN LINDSAY v. HER MAJESTY THE QUEEN **186**

6.——*Petition of Right—Crown Liability Act, 1 & 2 Eliz. II, c. 30, s. 3 (1) (a)—Exchequer Court Act, R.S.C. 1952, c. 98, s. 18(1)(b), (c)—Crown not liable for damages resulting to ship grounded in channel—No duty on part of any officer of Crown to see that channel is safe for navigation.* Suppliant Cleveland-Cliffs Iron Company seeks to recover from respondent damages suffered by the ship *Grand Island*, chartered to suppliant, allegedly caused by the negligence of respondent due to respondent's failure to indicate accurately the depth of water on a chart and in the *Great Lakes Pilot*, both of which are publications of the Canadian Hydrographic Service, in consequence of which the ship became grounded when

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approaching Little Current in the Province of Ontario. *Held:* That the grounding of the ship was due to faulty navigation as it was outside the channel at the time of the grounding; that the ship should have depended on the range line and not on boundary buoys in navigating in such a narrow channel, and under the circumstances existing prior to approaching the channel and considering the size of the ship proper navigation would have been to stop dead and seriously consider how best to proceed instead of going even dead slow. 2. That there is no liability on the part of respondent since there was no officer of the Crown in any way in control of the channel or whose duty it was to see that the channel was safe for navigation. THE CLEVELAND-CLIFFS STEAMSHIP COMPANY AND THE CLEVELAND-CLIFFS IRON COMPANY v. HER MAJESTY THE QUEEN... **255**

7.—*Petition of Right—Damages—R.C.A.F. aircraft flown over mink ranch at low altitudes during whelping season, mink kittens destroyed by terrified mothers—N.A.T.O. pilots—Onus of proof on suppliants—Exchequer Court Act, R.S.C. 1952, c. 98, ss. 19(1)(c), 50A—Crown Liability Act, S. of C. 1952-53, c. 30, ss. 3(1)(a), 25(2)—Visiting Forces (North Atlantic Treaty) Act, S. of C. 1951, 2nd Sess., c. 28, s. 16—Canadian Forces Act, S. of C., 1953-54, c. 13, s. 17.* The suppliants, mink ranchers, claimed damages from the Crown for the loss of mink kittens during the whelping seasons of 1951, 1952 and 1953 which they alleged was caused by aircraft from R.C.A.F. station Gimli flying over the ranch at low altitudes thereby terrifying the mother mink causing them to destroy their young. At the trial it was established that the whelping season ran from mid April to the end of May and that aircraft had been flown at the time and in the manner alleged students undergoing instruction at courses conducted for North Atlantic Treaty Organization (NATO). The pilots comprised nationals of the United Kingdom, France, Belgium, the Netherlands, Norway and Italy as well as Canadian pilots. *Held:* That the claims were made under ss. 19(1)(*c*) and 50A of the *Exchequer Court Act* as amended, as to the 1951, 1952 and 1953 flights up to May 14, 1953, and under s. 3(1)(*a*) of the *Crown Liability Act* thereafter. 2. That to support a claim against the Crown under either Act the onus of proof rests on a suppliant to establish not only negligence by an officer or servant of the Crown but that the negligence occurred while such officer or servant was acting within the scope of his duties or employment, that the alleged loss resulted therefrom and that he would be personally liable therefor. *The King* v. *Anthony*, [1946] S.C.R. 569 at 571. 3. That although it was established that there had been low flying at the place and times in question, even if it could be shown the acts complained of constituted negligence and that loss resulted therefrom, an onus rested on the suppliants to prove such acts were done by persons for whose acts the Crown was responsible, namely pilots of the R.C.A.F., and this was not done. The students, who were not Canadians, were not members of the air forces of Her Majesty in right of Canada within the meaning of s. 50A of the *Exchequer Court Act* and its successor and could not in the absence of appropriate legislation be deemed servants of the Crown. They became such only after enactment of s. 16 of *The Visiting Forces (North Atlantic Treaty) Act*, S. of C. 1951, 2nd Sess., c. 28, which did not come into force until September 27, 1953, after the date of the acts complained of. Furthermore when s. 16 of *The Visiting Forces Act* came into force, s. 19(1)(*c*) of the *Exchequer Court Act* had been repealed by s. 25(2) of *The Crown Liability Act*, S. of C. 1952-53, c. 30 and it was not until *The Canadian Forces Act*, 1954, S. of C. 1953-54, c. 13, was assented to on March 4, 1954, that the Crown by s. 17 thereof became liable for a tort committed by a member of a visiting force. 4. That claims against the Crown under s. 19(1)(c) of the *Exchequer Court Act* or s. 3(1)(*a*) of the *Crown Liability Act* are statutory and would not exist apart from the statute by which liability was imposed upon the Crown, and the requirements of the statute by which it was imposed must be strictly met before the liability of the Crown can be engaged, (*The King* v. *Dubois* [1935] S.C.R. 378; *McArthur* v. *The King* [1943] Ex. C.R. 77) and the requirements of the statute must be shown by proof (*The King* v. *Moreau* [1950] S.C.R. 18 at 24; *Ginn et al.* v. *The King* [1950] Ex. C.R. 208 at 216). JOHN DAROWANY AND DMYTRO DAROWANY v. HER MAJESTY THE QUEEN..... **340**

CROWN LIABILITY ACT, S. OF C. 1952-53, C. 30, S. 1(a).

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CROWN LIABILITY ACT, S. OF C. 1952-53, C. 30, SS. 3(1)(a), 25(2).

See CROWN, No. 7.

CROWN LIABILITY ACT, 1 & 2 ELIZ. II, C.30, S. 3(1) (a).

See CROWN, No. 6.

CROWN NOT LIABLE FOR DAMAGES RESULTING TO SHIP GROUNDED IN CHANNEL.

See CROWN, No. 6.

CUSTOMS ACT, R.S.C. 1952, C. 58, S. 2(2).

See REVENUE, No. 18.

CUSTOMS ACT, R.S.C. 1952, C. 58, SS. 44,45.

See REVENUE, No. 14.

CUSTOMS & EXCISE.
See REVENUE, NOS. 14 AND 18.

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See REVENUE, NO. 11.

CUSTOMS TARIFF, R.S.C. 1952, C. 60, TARIFF ITEMS 427, 427(a).
See REVENUE, NO. 18.

CUSTOMS TARIFF ACT, R.S.C. 1952, C. 60, SCHEDULE A, TARIFF ITEMS 427a, 409m(1).
See REVENUE, NO. 11.

CUSTOMS TARIFF ACT, R.S.C. 1952, C. 60, SCHEDULE "A", TARIFF ITEMS 427a, 445g.
See REVENUE, NO. 14.

DAMAGE TO CARGO.
See SHIPPING, NOS. 8 AND 11.

DAMAGES.
See CROWN, NO. 7.

DAMAGES FOR DETENTION.
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DEBENTURES BOUGHT AS INVESTMENT SOLD SOON AFTER AT PROFIT.
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DEFENDANT LIABLE FOR TAX.
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DESTRUCTION OF CARGO BY FIRE.
See SHIPPING, NO. 9.

DOMINION SUCCESSION DUTY ACT, R.S.C. 1952, C. 89, SS. 2(m), 3(1) (i) AND 6(1) (a).
See REVENUE, NO. 17.

DOMINION SUCCESSION DUTY ACT, R.S.C. 1952, C. 89, S. 3(1) (h).
See REVENUE, NO. 21.

EFFECT OF BEQUEST BY HUSBAND OF LIFE INSURANCE TO WIFE WHERE POLICY DIRECTS PAYMENT TO EXECUTORS.
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EFFECT ON RECOVERY.
See REVENUE, NO. 23.

ELECTRIC MOTOR IMPORTED AS REPLACEMENT FOR ELECTRIC SHOVEL.
See REVENUE, NO. 14.

EMPLOYEE OF CROWN CANNOT BIND CROWN IN ABSENCE OF AUTHORITY OF ORDER-IN-COUNCIL.
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EVIDENCE OF HAPPENINGS IN ANOTHER COUNTRY CANNOT AFFECT VALIDITY OF CLAIMS IN CANADIAN PATENT.
See PATENTS, NO. 1.

EXCHEQUER COURT ACT, R.S.C. 1952, C. 98, S. 18(1) (b), (c).
See CROWN, NO. 6.

EXCHEQUER COURT ACT, R.S.C. 1952, C. 98, S.S. 19(1) (c), 50 A.
See CROWN, NO. 7.

EXCHEQUER COURT ACT, R.S.C. 1952, C. 98, S. 21(c),
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EXCISE ACT, R.S.C. 1952, C. 99, AS AMENDED, SS. 114(1) AND (2), 115(1), 163(3) AND 164(1) AND (2).
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GOODS MANUFACTURED SOLELY FOR DEFENDANT BY ANOTHER CORPORATION.
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HUSBAND AND WIFE.
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HUSBANDS' AND PARENTS' LIFE INSURANCE ACT, R.S.Q. 1941, C. 301, AS AMENDED, SS. 3, 6, 12, 13 AND 31.
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IMPLIED DUTY ON DRIVER OF ONE CAR TO OBEY STOP SIGN AND YIELD RIGHT-OF-WAY BELONGING TO OTHER.
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INCOME TAX ACT, R.S.C. 1952, C. 148.
See REVENUE, No. 12.

INCOME TAX ACT, R.S.C. 1952, C. 148, S. 3,4,139(1) (e).
See REVENUE, No. 4.

INCOME TAX ACT, S. OF C. 1948, C. 52, SS. 3 AND 4.
See REVENUE, Nos. 1 AND 9.

INCOME TAX ACT, S. OF C. 1948, C. 52, SS. 3, 4, 127(1) (e).
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INCOME TAX ACT, S. OF C. 1948, C. 52, SS. 3, 4, 139(1).
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INCOME TAX ACT, S. OF C. 1948, C. 52, SS. 11(1) (c), 12(1) (c).
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INCOME TAX ACT, S. OF C. 1948, C. 52, S. 12(1)(a).
See REVENUE, No. 7.

INCOME TAX ACT, S. OF C. 1948, C. 52, S. 12(1)(a) AND (b).
See REVENUE, No. 20.

INCOME TAX ACT, S. OF C. 1948, C. 52 AS AMENDED, SS. 27(d), 38, 42(6), 47, 52, 53 AND 127 (1)(ay).
See REVENUE, No. 23.

INCOME TAX ACT, S. OF C. 1948, C. 52 AS AMENDED, S. 58(4), (5), (6), (6A).
See REVENUE, No. 15.

INCOME WAR TAX ACT, R.S.C. 1927, C. 97, SS. 2(h)(k), 5(8) (9).
See REVENUE, No. 8.

INCOME WAR TAX ACT, R.S.C. 1927, C. 97, s. 3(1).
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See REVENUE, No. 22.

INCOME WAR TAX ACT, R.S.C. 1927, C. 97 AS AMENDED, SS. 5(1) (b), 6(5).
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MOTOR VEHICLES ACT (N.B.) 1934, C. 20, S. 42A(3) AS AMENDED.
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8. STATUTORY PRESUMPTION OF VALIDITY. No. 1.
9. TEST OF CORRECTNESS OF SPECIFICATION. No. 1.

PATENTS——*The Patent Act, 1935, S. of C. 1935, c. 32, ss. 35, 47—Invention to be defined in claim—Anticipation—Statutory presumption of validity—Onus of showing lack of inventive ingenuity on person attacking patent—Test of correctness of specification—Permissible to look to specification and drawings to determine meaning of word "obtuse" in claim 6—Evidence of happenings in another country cannot affect validity of claims in Canadian patent—Construction of re-issued patent.* The plaintiff sued for infringement of its patent for improvements in a mop of the self-wringing type. The validity of the patent was attacked for anticipation and lack of subject matter on the ground that the invention as claimed was broader than as described and was merely a workshop improvement over the prior art, and infringement was denied. *Held:* That the fact that there is a correct and full description of the invention and its operation or use in the specification will not avail the patentee unless the invention so described is defined in one of the claims for it is only the invention as claimed that falls to be considered. 2. That the invention as defined in claim 6 was not anticipated. 3. That in view of the statutory presumption in favour of the validity of a patent the onus of showing that the invention covered by it was merely an obvious workshop improvement lies on the person attacking the patent. 4. That the simplicity of a device is not proof that it was obvious and that inventive ingenuity was not required to produce it. 5. That where there has been a substantial and useful advance over the prior art the Court should not give effect to an attack on the validity of the patent covering it on the ground that the advance was an obvious workshop improvement unless it is clearly so. In view of the statutory presumption in favour of the patent the Court should not make the onus of showing its invalidity an easy one to discharge. 6. That the combination which the inventors finally worked out was the result of careful analysis of the prior art and thoughtful study and experimentation. It enabled them to produce a more efficient mop than any mop previously in existence. The combination involved a substantial exercise of inventive ingenuity and was not an

PATENTS—*Concluded*

obvious workshop improvement. 7. That it is essential that the Court should be fair to the inventors. There may be faults of expression in a patent specification but they do not necessarily affect the validity of the patent for a patent specification is not an exercise of composition to be judged by the canons of grammar or rhetoric. The specification is addressed to persons skilled in the art and the test of the correctness of the specification, including the claims with which it ends, is whether such persons, having the common knowledge of the art, would know without doubt exactly what the invention as defined in the claim is. It should be construed fairly. 8. That it is permissible to look to the specification and the drawings for the purpose of construing the meaning to be assigned to the word "obtuse" as used in claim 6 and to determine the degree of obtuseness of the angle referred to in the claim. 9. That, in any event, the degree of obtuseness of the angle is defined in the claim itself. 10. That claim 6 is not broader than the invention described in the specification and that it and claim 5 are valid. 11. That evidence of a patent application made after the date of the patent in suit but prior to the date of the re-issue of the patent is not admissible. 12. That what happened in another country under a different system of law cannot affect the validity or invalidity of the claims in a Canadian patent, and evidence of an application for a United States patent and a declaration of interference by the United States Patent Office is inadmissible. 13. That when a patent has been re-issued on a petition for re-issue the Court should look at the re-issued patent only in the light of its disclosures and claims without regard to how any changes came to be made in it as the result of the petition for re-issue. 14. That the defendant's mop was an infringement of the plaintiff's right to the invention defined in claim 6. O'CEDAR OF CANADA LIMITED v. MALLORY HARDWARE PRODUCTS LIMITED..... **299**

PATRONAGE DIVIDENDS PAID.

See REVENUE, No. 8.

PAYMENT NOT "RECEIVED" WHEN, IN FACT, WITHELD.

See REVENUE, No. 2.

PAYMENT TO APPELLANT NOT INCOME DERIVED FROM A BUSINESS OR ANY OTHER SOURCE.

See REVENUE, No. 3.

PAYMENTS NOT PART OF SALE PRICE NOR OF PURCHASER'S INCOME.

See REVENUE, No. 20.

PENSION RIGHT ASSURED BY TERMS OF UNION.

See CROWN, No. 2.

PERMISSIBLE TO LOOK TO SPECIFICATION AND DRAWINGS TO DETERMINE MEANING OF WORD "OBTUSE" IN CLAIM 6.

See PATENTS, No. 1.

PETITION OF RIGHT.

See CROWN, NOS. 2, 3, 6 AND 7.

PRACTICE.

See SHIPPING, No. 3.

PRACTICE.

1. APPLICATION FOR FURTHER AND BETTER AFFIDAVITS ON PRODUCTION. No. 1.
2. PATENT. No. 1.
3. REFUSAL TO DIRECT DETERMINATION OF QUESTION OF LAW BEFORE TRIAL. No. 1.
4. RULES 139 AND 143 GENERAL RULES AND ORDERS OF EXCHEQUER COURT. No. 1.

PRACTICE——*Patent—Rules 139 and 143 General Rules and Orders of Exchequer Court—Application for further and better affidavits on production—Refusal to direct determination of question of law before trial.* In an action for infringement of a patent which is denied by defendants who also allege plaintiff's patent to be invalid plaintiff moved for an order directing defendants to file further and better affidavits on production and that defendants be required to produce certain documents for which privilege had been claimed. Defendants submitted that the motion is premature and that before directing production the Court should order that an issue be first determined on a question of law, namely, whether or not certain allegations in the Particulars of Breaches would, if established, constitute infringement. *Held:* That as none of the acts of defendants specified in the Particulars of Breaches are admitted by the defendants no question of law should be submitted for determination since it would still be open to the defendants to contend at the trial that the facts were otherwise than as stated in the Particulars. 2. That the issue suggested by counsel for the defendants cannot be satisfactorily determined without evidence as to all of the facts, including, possibly, many or all the facts set out in the documents, the production of which is now said to be premature. 3. That all the issues including that of the validity of plaintiff's patent should be tried together. ROHM & HAAS COMPANY OF CANADA LIMITED v. THE SHERWIN-WILLIAMS COMPANY OF CANADA LIMITED AND JOCK FRASER..... **274**

PRACTICE IN ADMIRALTY.

See SHIPPING, No. 12.

PROFIT NOT REPORTED IN TAXPAYER'S INCOME TAX RETURN.

See REVENUE, No. 1.

PROFIT ON ISOLATED TRANSACTION SUBJECT TO INCOME TAX.
See REVENUE, No. 4.

PROFIT OR CAPITAL GAIN.
See REVENUE, No. 4.

PUBLIC ATTENDANCE PERMITTED.
See CROWN, No. 5.

PURCHASER OF INSURANCE BUSINESS PAID VENDOR PART OF COMMISSION ON RENEWAL OF POLICIES PLACED BY LATTER PRIOR TO SALE.
See REVENUE, No. 20.

QUALITY OF INCOME.
See REVENUE, No. 19.

QUEBEC CIVIL CODE, ARTS, 1265, 1272, 1292, 1293, 2585, 2589, 2591.
See REVENUE, No. 21.

R.C.A.F. AIRCRAFT FLOWN OVER MINK RANCH AT LOW ALTITUDES DURING WHELPING SEASON, MINK KITTENS DESTROYED BY TERRIFIED MOTHERS.
See CROWN, No. 7.

REAL ESTATE BOUGHT FOR FARM SOLD AS TOWN LOTS.
See REVENUE, No. 12.

REFERENCE.
See SHIPPING, No. 7.

REFUSAL TO DIRECT DETERMINATION OF QUESTION OF LAW BEFORE TRIAL.
See PRACTICE, No. 1.

REVENUE.

1. ADMISSIBILITY OF EVIDENCE OF MATTERS ARISING AFTER TAXATION YEAR. No. 5.
2. "ADVENTURE IN THE NATURE OF A TRADE". No. 6.
3. AMOUNT HELD IN ESCROW AND PAID IN YEAR FOLLOWING TAXATION YEAR. No. 2.
4. AMOUNT OF INCOME SUBJECT TO TAX. No. 8.
5. APPEAL ALLOWED. No. 3.
6. APPEAL DISMISSED. No. 4.
7. APPEAL FROM INCOME TAX APPEAL BOARD ALLOWED. No. 5.
8. APPEAL FROM INCOME TAX APPEAL BOARD ALLOWED IN PART. No. 2.
9. APPEAL FROM INCOME TAX APPEAL BOARD DISMISSED. No. 1.
10. APPEAL ON QUESTION OF LAW FROM TARIFF BOARD'S DECISION. No. 11.
11. APPELLANT AGENT FOR MEMBERS. No. 19.

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12. APPELLANT MACHINERY ESTABLISHED BY MEMBERS. No. 19.
13. APPELLANT TO PAY ONLY ONE SET OF COSTS. No. 18.
14. BENIFICIARY ENTITLED TO NET REVENUE FROM ENCUMBERED COMMERCIAL PROPERTY FOR LIFE WITH POWER OF APPOINTMENT AS TO INCOME AND CORPUS. No. 15.
15. BEQUEST TO BROTHER WHO PREDECEASES TESTATRIX LEAVING ISSUE HER SURVIVING. No. 17.
16. "BUSINESS". No. 4.
17. CAPITAL COST ALLOWANCE RETAINED BY TRUSTEE TO PRESERVE CORPUS. No. 15.
18. CAPITAL GAIN OR TAXABLE INCOME. Nos. 6 AND 16.
19. CIVIL CODE. No. 21.
20. CLAIM BY DOCTOR FOR EXPENSES INCURRED ATTENDING MEDICAL SOCIETY MEETINGS. No. 7.
21. COMMUNITY OF PROPERTY. No. 21.
22. COMPANY INCORPORATED TO BUY AND SELL SECURITIES. No. 16.
23. CO-OPERATIVE ASSOCIATION. No. 8.
24. CO-OPERATIVE MARKETING ASSOCIATION ACT. R.S.S. 1940, c. 180, ss. 4(1), 13, 7(1)(v), 7(1)(w), 10, 43. No. 19.
25. CUSTOMS ACT. R.S.C. 1952 c. 58, s. 2(2). No. 18.
26. CUSTOMS ACT. R.S.C. 1952. c. 58, ss. 44, 45. No. 14.
27. CUSTOMS AND EXCISE. Nos. 14 AND 18.
28. CUSTOMS DUTY. No. 11.
29. CUSTOMS TARIFF, R.S.C. 1952 c. 60, TARIFF ITEMS 427, 427(a). No. 18.
30. CUSTOMS TARIFF ACT. R.S.C. 1952, c. 60, SCHEDULE A, TARIFF ITEMS 427A, 409M(1). No. 11.
31. CUSTOMS TARIFF ACT, R.S.C. 1952, c. 60, SCHEDULE "A", TARIFF ITEMS 427A, 445G. No. 14.
32. DEBENTURES BOUGHT AS INVESTMENT SOLD SOON AFTER AT PROFIT. No. 16.
33. DEDUCTIONS. Nos. 7 AND 10.
34. DEFENDANT LIABLE FOR TAX. No. 13.
35. DEPLETION ALLOWANCE. No. 19.
36. DOMINION SUCCESSION DUTY ACT. R.S.C. 1952, c. 89, ss. 2(M), 3(1)(I) AND 6(1)(A). No. 17.
37. DOMINION SUCCESSION DUTY ACT R.S.C. 1952, c. 89, AS AMENDED, s. 3(1) (H). No. 21.
38. EFFECT OF REQUEST BY HUSBAND OF LIFE INSURANCE TO WIFE WHERE POLICY DIRECTS PAYMENT TO EXECUTORS. No. 21.
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40. ELECTRIC MOTOR IMPORTED AS REPLACEMENT FOR ELECTRIC SHOVEL. No. 14.
41. EXCISE TAX. No. 13.
42. EXCISE TAX ACT, R.S.C. 1952, c. 100, ss. 2(1) (ii), 23(1), 30(1)(i). No. 13.
43. EXPRESSION "OF A CLASS OR KIND NOT MADE IN CANADA" IN TARIFF ITEM 427(A) NOT REFERABLE SOLELY TO "MACHINERY". No. 18.
44. FACTS ON WHICH ASSESSMENT IS BASED. No. 1.
45. GOODS MANUFACTURED SOLELY FOR DEFENDANT BY ANOTHER CORPORATION. No. 13.
46. HUSBAND AND WIFE. No. 21.
47. HUSBANDS' AND PARENTS' LIFE INSURANCE ACT, R.S.Q. 1941, c. 301, AS AMENDED, ss. 3, 6, 12, 13, AND 31. No. 21.
48. INCOME. Nos. 1, 2, 8 AND 12.
49. INCOME EARNED DURING LIFE OF TAXPAYER BUT RECEIVED AFTER HIS DEATH. No. 2.
50. INCOME FROM BUSINESS. No. 1.
51. INCOME OR CAPITAL GAIN. No. 12.
52. INCOME TAX. Nos. 1, 3, 4, 5, 6, 7, 9, 10, 12, 15, 16, 19, 20, 22 AND 23.
53. INCOME TAX ACT, R.S.C. 1952, c. 148. No. 12.
54. INCOME TAX ACT, R.S.C. 1952, c. 148, s. 3, 4, 139(1)(E). No. 4.
55. INCOME TAX ACT, S. OF C. 1948, c. 52, ss. 3 AND 4. Nos. 1 AND 9.
56. INCOME TAX ACT, S. OF C. 1948, c. 52, s. 3, 4, 127(1)(E). Nos. 5 AND 16.
57. INCOME TAX ACT, S. OF C. 1948, c. 52, ss. 3, 4, 139(1). No. 6.
58. INCOME TAX ACT, S. OF C. 1948, c. 52, ss. 11(1)(c), 12(1)(c). No. 10.
59. INCOME TAX ACT, S. OF C. 1948, c. 52, s. 12(1)(A). No. 7.
60. INCOME TAX ACT, S. OF C. 1948, c. 52, s. 12(1)(A) AND (B). No. 20.
61. INCOME TAX ACT, 1948, S. OF C. 1948, c. 52, AS AMENDED, ss. 27(D) 38, 42(6), 47, 52, 53 AND 127(1)(AY). No. 23.
62. INCOME TAX ACT, S. OF C. 1948, c. 52, AS AMENDED, s. 58(4), (5), (6), (6A). No. 15.
63. INCOME WAR TAX ACT, R.S.C. 1927, c. 97, ss. 2(H)(K), 5(8)(9). No. 8.
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65. INCOME WAR TAX ACT R.S.C. 1927, c. 97, s. 5(1)(A) AS AMENDED BY S. OF C. 1946, c. 55, s. 4(1). No. 22.
66. INCOME WAR TAX ACT, R.S.C. 1927, c. 97, AS AMENDED, ss. 5(1)(B), 6(5). No. 10.

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67. INCOME WAR TAX ACT, R.S.C. 1927, c. 97, AS AMENDED, s. 11(4)(B). No. 2.
68. INSURANCE. No. 21.
69. "INTEREST ON BORROWED CAPITAL USED IN THE BUSINESS TO EARN INCOME". No. 10.
70. ISOLATED TRANSACTION. No. 4.
71. ISOLATED TRANSACTION UNRELATED TO TAXPAYER'S USUAL BUSINESS. No. 6.
72. LAND PURCHASED AND RESOLD AS BUILDING LOTS. No. 6.
73. "MANUFACTURER OR PRODUCER". No. 13.
74. MATTERS ARISING SUBSEQUENT TO ASSESSMENT. No. 1.
75. MEANING OF "ACCESSORY" WHEN APPLIED TO ANGLEDOZER USED WITH INTERNAL COMBUSTION TRACTOR. No. 11.
76. MEANING OF "CLASS OR KIND NOT MADE IN CANADA". No. 18.
77. NO LIABILITY FOR TAX. No. 12.
78. NO OBJECTION WITHIN TIME LIMIT. No. 23.
79. NO PRESUMPTION OF POLICY TO BE READ INTO TARIFF ITEMS 427, 427(A). No. 18.
80. NOMINAL DIPPER CAPACITY OF POWER SHOVELS A PROPER CRITERION OF CLASS OR KIND OF POWER SHOVELS. No. 18.
81. OF FREEHOLD LIMITS. No. 9.
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83. ONUS ON TAXPAYER TO PROVE INCOME EARNED TAXABLE OR IF BOTH TAXABLE AND NON-TAXABLE INCOME EARNED APPORTIONMENT OF BORROWED CAPITAL USED TO EARN EACH. No. 10.
84. OPTION TO BUY LAND SOLD AT A PROFIT. No. 1.
85. OVERPAYMENT AFFIRMED BY ASSESSMENT. No. 23.
86. "OVERPAYMENT" MEANING OF. No. 23.
87. OWNER NOT CARRYING ON BUSINESS. No. 12.
88. PATRONAGE DIVIDENDS PAID. No. 8.
89. PAYMENT NOT "RECEIVED" WHEN IN FACT, WITHHELD. No. 2.
90. PAYMENT TO APPELLANT NOT INCOME DERIVED FROM A BUSINESS OR ANY OTHER SOURCE. No. 3.
91. PAYMENTS NOT PART OF SALE NOR OF PURCHASER'S INCOME. No. 20.
92. PROFIT NOT REPORTED IN TAXPAYER'S INCOME TAX RETURN. No. 1.
93. PROFIT ON ISOLATED TRANSACTION SUBJECT TO INCOME TAX. No. 4.
94. PROFIT OR CAPITAL GAIN. No. 4.

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95. PURCHASER OF INSURANCE BUSINESS PAID VENDOR PART OF COMMISSION ON RENEWAL OF POLICIES PLACED BY LATTER PRIOR TO SALE. No. 20.
96. QUALITY OF INCOME. No. 19.
97. QUEBEC CIVIL CODE, ARTS. 1265, 1272, 1292, 1293, 2585, 2589, 2591. No. 21.
98. REAL ESTATE BOUGHT FOR FARM SOLD AS TOWN LOTS. No. 12.
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103. SUCCESSION DUTY. NOS. 17 AND 21.
104. TAXPAYER CARRYING ON A BUSINESS. No. 5.
105. TIMBER LIMITS. No. 19.
106. TRUSTS. No. 15.
107. TWO AND A HALF YARD DIPPER CAPACITY POWER SHOVELS. No. 18.
108. WHETHER BENEFICIARY ENTITLED TO CLAIM DEDUCTION AS AN EXEMPTION. No. 15.
109. WHETHER BEQUEST PART OF BROTHER'S ESTATE AND LIABLE TO SUCCESSION DUTY. No. 17.
110. WHETHER DUTIABLE UNDER TARIFF ITEM 445G: "ELECTRIC MOTORS AND COMPLETE PARTS THEREOF, N.O.P." OR ITEM 427A: "ALL MACHINERY COMPOSED WHOLLY OR IN PART OF IRON OR STEEL, N.O.P., AND COMPLETE PARTS THEREOF". No. 14.
111. WHETHER EVIDENCE OF SUBSEQUENT TRANSACTIONS ADMISSIBLE. No. 1.
112. WHETHER PROCEEDS OF EACH SALE TAXABLE INCOME. No. 9.
113. WHETHER PROFIT FROM FIRST TRANSACTION TAXABLE. No. 1.
114. WILLS ACT, R.S.O. 1950, c. 426, s. 36(1). No. 17.

REVENUE——*Income — Income tax — Option to buy land sold at a profit—Profit not reported in taxpayer's income tax return —Subsequent transactions to buy land—Facts on which assessment is based—Matters arising subsequent to assessment—Whether profit from first transaction taxable—Whether evidence of subsequent transactions admissible —The Income War Tax Act, R.S.C. 1927, c. 97, s. 3(1)—The Income Tax Act, S. of C. 1948, c. 52, ss. 3 and 4—Income from business—Appeal from Income Tax Appeal Board dismissed.* In 1945 appellant, then engaged in the coal and builders' supply business, secured from a municipality for $1,500, an option to purchase a tract of land which he intended to develop into a housing subdivision. He sold the option the same year for $36,000 to a company in which his brother was one of the promoters, receiving $1,500 in cash, the balance being paid to him in 1948 and 1949 in two instalments of $18,000 and $16,500 respectively. Appellant did not report the two latter amounts in his tax returns for those two years. Subsequently through three successive agreements with the same municipality carrying the same covenants and obligations as those contained in the 1945 option, appellant secured further options which he sold in 1949 and 1950 to the same company. In 1952 appellant was re-assessed for the 1948 and 1949 taxation years on the ground that the amounts then received by him as a result of the sale of the 1945 option amounted to annual net profits or gains from a trade or business. An appeal to the Income Tax Appeal Board from the Minister's reassessments was dismissed and appellant now appeals from the Board's decision to this Court. *Held:* That to determine whether an assessment or reassessment is justified evidence can be heard in respect to all the facts on which the assessment or reassessment is based and in respect to matters arising subsequent to the assessment or reassessment, provided such matters are relevant. *Nicholson Limited* v. *The Minister of National Revenue* [1945] Ex. C.R. 191 at 201; *Lincolnshire Sugar Co. Ltd.* v. *Smart* [1937] 1 All E.R. (H. of L.) 413. Here evidence respecting subsequent transactions is admissible in order to establish that the 1945 transaction marked the commencement of a series of similar transactions or of a course of conduct in the nature of a trade or business. The last transaction in respect of which evidence was given was entered into on June 19, 1950 two years before the reassessment made by the Minister on June 25, 1952. The reassessment was made having regard to the information available to the Minister at that date. 2. That appellant's securing the first transaction option and his assigning it to the company at a profit, standing by itself, constituted an adventure in the nature of trade or business and that the second, third and fourth transactions definitely establish a course of conduct indicating a continuance of that trade or business. *Atlantic Sugar Refineries Limited* v. *The Minister of National Revenue* [1949] S.C.R. 706; *Edwards (Inspector of Taxes)* v. *Bairstow and Another* [1955] 3 All E.R. 48 at 53 and 58. BEN ROSENBLAT v. MINISTER OF NATIONAL REVENUE.... 4

2.——*Income—Income earned during life of taxpayer but received after his death—The Income War Tax Act, R.S.C. 1927, c. 97, as amended, s. 11(4)(b)—Amount held in escrow and paid in year following taxation year—Payment not "received" when, in fact, withheld—Appeal from Income Tax Appeal Board allowed in part.* In 1944 one B, appointed the American ancillary executor of the appellant estate, brought an action before the New York courts on behalf of

REVENUE—*Continued*

the Canadian executrix of the appellant estate, Mrs. Butler, against an American corporation for unpaid salary due to her husband, who until his death in 1937 was for a number of years an officer and director of the company, and for compensation for services he rendered to the latter in that capacity in preparing and pressing certain claims of the company before the Mixed Claims Commissions in U.S.A. The action was contested by the company but eventually settled out of court in February, 1948, for an amount of $125,000. Out of that amount Mrs. Butler's American attorneys received $97,855 in March, 1948, and in April, 1948 remitted to her in Canada $50,000. Pursuant to an agreement between the parties the balance of the amount of the settlement was deposited on March 18, 1948, to be held in escrow pending the determination of the estate's federal and state tax liability. No such taxes being payable a first amount of $18,750 was released from the escrow and paid to the estate's American attorneys on May 4, 1948 and on January 13, 1949 the balance of the amount so withheld was paid to them. The appellant estate was first assessed on the basis of an income of $50,000 for the taxation year 1948 being the amount received in Canada by Mrs. Butler from her American attorneys in that year. However it was later reassessed on the basis of the amount of the settlement i.e. $125,000 less certain costs and expenses. An appeal from the reassessment to the Income Tax Appeal Board was dismissed and from the Board's decision appellant now appeals to this Court. *Held:* That on the evidence the whole of the amounts paid under the settlement relate to the salary and services of the late Mr. Butler and were "income earned during the life" of the deceased within the meaning of s. 11(4)(*b*) of the Income War Tax Act. 2. That s. 11(4)(*b*) of the Income War Tax Act relating specifically as it does to "income earned during the life of any person" its words are satisfied whether the income was earned before or after January 1, 1940, when the section came into effect. 3. That on the evidence the claims were advanced by the Butler estate as a *bona fide* claim and settled on that basis. Any evidence relating to the manner in which the action was financed, or evidence in regard to the disposition to be made of the "income earned" *after* it had been received are wholly irrelevant to the question before the Court as to whether or not the moneys paid as the result of the settlement represent "income earned" by the deceased during his lifetime. *Goldman* v. *Minister of National Revenue* [1953] 1 S.C.R. 211 at 214. 4. That on the evidence the two payments received by the American attorneys in 1948 were constructively received by Mrs. Butler on behalf of her husband's estate in that year and the fact that a portion thereof was not remitted to her in

REVENUE—*Continued*

Canada until the next year is of no importance. 5. That, however, the amount of $8,395 held in escrow until January, 1949 was not received in 1948 by anyone in a fiduciary capacity for the Butler estate. A payment cannot be considered as having been "received" when, in fact, it was withheld. The amount was not at the disposal of the estate and it was not reduced into its possession until 1949. The reassessment therefore should be reduced from $125,000 to $116,605. THE ESTATE OF THE LATE WILSON WORKMAN BUTLER v. MINISTER OF NATIONAL REVENUE.... **36**

3.——*Income tax—Payment to appellant not income derived from a business or any other source—Appeal allowed.* Appellant company in 1949 entered into an arrangement with B & M, a United States partnership, whereby appellant was to participate in a United States Army contract, herein called the York contract. Appellant was unable to provide the money agreed upon as its share of the necessary capital to carry out the York contract because of the refusal of the Foreign Exchange Control Board of Canada to permit the export of such money from Canada to the United States. In December 1950 B & M paid to appellant the sum of $225,000 in United States funds in consideration of its relinquishing any claim to any interest or right of profit participation it might have in the York contract. The respondent assessed appellant for income tax on the basis that such payment represented its share of the profits realized on the York contract. Appellant appealed to this Court. *Held:* That since appellant's contribution of capital for the York contract depended on approval of the Foreign Exchange Control Board which approval was never obtained, and therefore appellant did not contribute any capital for the York contract nor participate in the management of the York contract or its re-negotiation and the payment to appellant was made before the profits from the York contract had been fully determined, the payment was not income of the appellant derived from the business or income of appellant derived from any other source. 2. That the payment to appellant was not a transaction which resulted in a benefit being conferred on it by persons with which it was not dealing at arms length. NATIONAL PAVING CO. LTD. v. MINISTER OF NATIONAL REVENUE..... **72**

4.——*Income Tax—The Income Tax Act, R.S.C. 1952, c. 148, s. 3, 4, 139(1)(e)—"Business"—Profit or capital gain—Isolated transaction—Profit on isolated transaction subject to income tax—Appeal dismissed.* Appellant purchased four engines and resold them at a profit. Appellant's sole occupation is that of manager of a company manufacturing wire rope. Appellant was assessed for income tax on the profit

REVENUE—*Continued*

realized from the sale of the engines and appealed to this Court. He contends that the engines were purchased for re-sale and not for use and that the profit is a capital gain the transaction being an isolated one. *Held:* That the purchase of the engines cannot be regarded as an ordinary investment; they were purchased for the purpose of re-sale at a profit and not for the purpose of deriving any income through the leasing or rental of them; the transaction was a deal in machinery and constituted an adventure in the nature of trade or business and the profit is a gain made through an operation of business in the course of carrying out a scheme for profit making and attracted income tax. GORDON CHUTTER v. MINISTER OF NATIONAL REVENUE..... **89**

5.——*Income tax—The Income Tax Act, S. of C. 1948, c. 52, s. 3, 4, 127(1)(e)—Taxpayer carrying on a business—Admissibility of evidence of matters arising after taxation year—Appeal from Income Tax Appeal Board allowed.* Respondent sold black loam from his farm at a profit and was assessed for income tax for the year 1951 on the money received as being income from a business. Respondent contends that because of nearby industrial development his farm was rendered unsuitable for use as a farm and that he had taken the only course open to him for disposing of it. *Held:* That the sale of the loam from the farm load by load and day by day in 1951 establishes a course of conduct which is conclusive that while respondent acquired the land with the intention of working it for farming purposes or market gardening he in 1951 abandoned his original intention and in that year and since has been engaged in the business of selling black loam. 2. That on income tax appeals evidence may be received in respect to any matters that have occurred up to the time of the actual hearing of the appeal, provided such matters have relevancy to the taxation year to which the assessment or reassessment under appeal applies. MINISTER OF NATIONAL REVENUE v. JOHN PAWLUK (SR.)..... **119**

6.——*Income Tax—Land purchased and resold as building lots—Isolated transaction unrelated to taxpayer's usual business—Capital gain or taxable income—"Adventure in the nature of a trade"—The Income Tax Act, 1948 (Can.) c. 52, ss. 3, 4, 139 (1).* The respondent, a retired grocer, joined with one L in purchasing a parcel of land with the intention of dividing it into lots and building houses thereon. After the purchase and the division the respondent decided not to proceed with the scheme but to sell his share of the lots totalling 55. In 1952 he sold twenty on which he realized a profit of some $12,087. This amount was assessed by the appellant as income under ss. 3, 4 and 139 (1) of *The Income Tax Act.* The respondent, contending the profit was a capital accretion, appealed to the Income Tax Appeal Board and the assessment was set aside. *Held:* That although the transaction was an isolated one and not in any way related to the respondent's usual or ordinary business, it was still a venture or speculation and not an investment in the ordinary sense. The sale was a venture of a trade or business and the profit a gain made through an operation of business in the course of carrying on a scheme for profit making and therefore properly taxable. *Atlantic Sugar Refineries Ltd.* v. *Minister of National Revenue* [1949] S.C.R. 706, followed. MINISTER OF NATIONAL REVENUE v. RONALD GORDON MCINTOSH..... **127**

7.——*Income Tax — Deductions — Claim by doctor for expenses incurred attending medical society meetings—The Income Tax Act, 1948 (Can.) c. 52, s. 12 (1) (a).* The appellant, a medical doctor specializing in the field of anaesthesia, claimed as a deduction from his taxable income under s. 12 (1) (*a*) of *The Income Tax Act,* 1948 (Can.) c. 52, expenses incurred for transportation, meals and lodgings while attending meetings of medical societies in Canada, the United States and the British Isles. S. 12 (1) (*a*) provides: In computing income no deduction shall be made in respect of (*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer. *Held:* That to obtain the deduction allowed under s. 12 (1) (*a*) of the Act the taxpayer must establish that the expense claimed was incurred with the object of actual or immediate profit. The contention here that while there was no immediate profit, the resulting prestige would eventually lead to the taxpayer gaining or producing a profit in the future, was too remote for consideration. HAROLD GRIFFITH v. MINISTER OF NATIONAL REVENUE..... **132**

8.——*Income — Co-Operative Association —Patronage dividends paid—Amount of income subject to tax—The Income War Tax Act, R.S.C. 1927, c. 97, ss. 2 (h) (k), 5 (8) (9).* The respondent, a corporation registered under the *Co-Operative Association Act,* R.S.S. 1947, c. 179, was incorporated in 1914 on a share capital basis to purchase and sell commodities upon the co-operative plan. In 1945 it re-purchased all shares held by each member except two by crediting him in a Demand Loan account an amount equal to their value. In 1947 it re-purchased the remaining shares by depositing an amount equal to their value to each member's credit in a Member's Deposit account. The latter deposits were repayable on a member leaving the district, on his death, by resolution of the directors or, on the dissolution of the Association. The

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practice of other retailers was followed by the Association in its purchases and sales except that at the end of its fiscal year, after deduction of overhead, the payment of interest on the Demand Loan and Members' Deposit account and payment of one per cent of total sales to a Patrons' Emergency Fund, the remaining surplus was credited in even percentages to the Members' Deposit account as a patronage dividend calculated on each member's annual purchases. By by-law it was provided a member could make additional deposits to this account payable on demand and that any purchaser could become a member but that no refund be paid him in cash until he had $20 on deposit and that any patronage refund due him be credited his deposit account until that amount was reached. The Association was assessed under the *Income War Tax Act*, R.S.C. 1927, c. 97 as amended, for the years 1947 and 1948 on amounts shown in its financial statements for each of those years. It appealed the assessment to the Income Tax Appeal Board contending it had no income as it had distributed all its profits in the form of cash or goods in even percentages to its patrons and that the residue held in a surplus fund was the property of all its patrons. The appeal was allowed and the present appeal is from the Board's decision. *Held:* 1. That the respondent was a legal entity as distinguished from its members and a taxpayer as defined by s. 2(*h*) and (*k*) of the Act. 2. That it carried on business for its own purposes and the profits it made were subject to income tax. *Minister of National Revenue* v. *Saskatchewan Co-Operative Wheat Producers* [1930] S.C.R. 402. 3. That having pursuant to s. 5(8) deducted the amounts it paid out as patronage dividends it was left with income subject to tax under s. 5(9) and such income was 3 per centum of the capital employed in its business at the beginning of the relevant taxation year less any allowable deductions for interest paid on borrowed moneys, other than moneys borrowed from a bank or credit union, and deductible as an expense in computing income. All other deductions for interest claimed by the respondent were not allowable under the Act. *Jones* v. *South West Lancashire Coal Owners Assn.* [1927] A.C. 827 and *Municipal Mutual Insurance Ltd.* v. *Hill*, 147 L.T.R. 62, distinguished. MINISTER OF NATIONAL REVENUE v. DAVIDSON CO-OPERATIVE ASSOCIATION LTD..... **138**

9.——*Income Tax—Sale by logging operator—Of standing timber—Of freehold limits—Whether proceeds of each sale taxable income—The Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4.* The appellant, carrying on the business of a logging operator, sold in 1950 the standing merchantable timber remaining on a freehold tract of land it had logged in 1936. In 1952 it sold the land itself. The proceeds of each sale were credited to

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capital surplus and allocated to the purchase of timber limits contiguous to the appellant's other holdings. To the taxable income reported by the appellant for the taxation year 1950 the Minister added the amount received from the sale of the timber, and to that reported by the appellant for the taxation year 1952, the amount received from the sale of the land. The appellant appealed the reassessments to the Income Tax Appeal Board which dismissed both appeals. *Held:* 1. That the sale of the residue of a mature timber crop was the sale of a current asset made in the course of the appellant's carrying on the business of dealing with timber either by logging operations conducted by the appellant itself or by the sale of stumpage. The proceeds of that sale were revenue and were properly included in the taxable income of the appellant. 2. That the sale of the freehold was the sale of a capital asset and the proceeds of that sale were not revenue received from the conduct of a trade or business and did not constitute taxable income. *Anderson Logging Co.* v. *The King*, [1925] S.C.R. 45, distinguished. *Commissioner of Taxes* v. *Melbourne Trust Ltd.*, [1914] A.C. 1001 at 1010 approving *Californian Copper Syndicate* v. *Harris*, 5 T.C. 159, applied. C. W. LOGGING CO. LTD. v. MINISTER OF NATIONAL REVENUE.... **175**

10.——*Income tax—Deductions—"Interest on borrowed capital used in the business to earn income"—Onus on taxpayer to prove income earned taxable or, if both taxable and non-taxable income earned apportionment of borrowed capital used to earn each—Income War Tax Act, R.S.C. 1927, c. 97, as amended, ss. 5(1)(b), 6(5)—Income Tax Act, S. of C. 1948, c. 52, ss. 11(1)(c), 12(1)(c).* The appellant and M company were incorporated in Canada as wholly-owned subsidiaries of a United States Corporation. The appellant to carry on a retail chain grocery business and M company a wholesale grocery and warehousing business to supply the requirements of the appellant. In 1947 the appellant issued debentures in the sum of three million dollars and preferred stock in the sum of two million and turned the entire proceeds so raised over to the parent company receiving from it all the outstanding stock of M company. No change was made in the operations of the two subsidiaries but thereafter the net profits of M company were paid to the appellant. In filing its income tax returns for the years 1947, 1948 and 1949 the appellant claimed as a deduction the interest paid by it on the debenture issue in each of these years as deductions authorized by the *Income War Tax Act* and the *Income Tax Act* as money paid on borrowed capital to earn income. The deductions were disallowed by the Minister and appeals from his decisions to the Income Tax Appeal Board were dismissed. *Held:* That as the parent company was the sole

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owner of the appellant's capital stock there was no reason to believe that it would to its own detriment dispose of M company to outsiders and no evidence was adduced to establish such action was contemplated nor that the purchase by the appellant was the reason for the expansion of the latter's business. 2. That following the purchase the net profits of M company became the property of the appellant and the latter in claiming exemption from its taxable income had to establish that every condition required by the exempting section had been complied with. *Lumbers* v. *Minister of National Revenue* [1943] Ex. C.R. 202; *Robert Addie & Sons' Collieries* v. *Commissioner of Inland Revenue* [1924] S.C. 231. 3. That on the evidence no portion of the borrowed monies was applied to the appellant's business and therefore the interest paid on the debentures was not paid on borrowed capital actually used by it in its business to earn taxable income as defined by s. 5(1)(*b*) of the *Income War Tax Act*. *Strong* v. *Woodifield* [1906] A.C. 448. 4. That as to the contention that the expenses were incurred to earn both taxable and non-taxable income and that the Minister, under s. 6(5) of the *Income War Tax Act* and s. 12(1)(*c*) of the *Income Tax Act*, had power to apportion the expenses, the onus resting on the appellant to prove the necessary facts was not met. *Dezura* v. *Minister of National Revenue* [1948] Ex. C.R. 10; *Johnston* v. *Minister of National Revenue* [1948] S.C.R. 486; [1947] Ex. C.R. 483. CANADA SAFEWAY LTD. v. MINISTER OF NATIONAL REVENUE.... **209**

11.——*Customs Duty—Appeal on question of law from Tariff Board's decision—Meaning of "accessory" when applied to angledozer used with internal combustion tractor—The Customs Tariff Act, R.S.C. 1952, c. 60, Schedule A, tariff items 427a, 409m(1).* The respondent imported two angledozers, the one on June 10, 1952, the other on January 6, 1953. Each consisted of a steel blade and two connecting arms, the latter being used to attach the blade to the main component, namely the tractor. The lifting and tilting mechanism which control the operations of the blade formed a permanent part of the tractor itself. The Customs appraiser classified the angledozers under Schedule A, tariff item 427*a* to the *Customs Tariff Act*, R.S.C. 1952, c. 60, as machinery of a class or kind not made in Canada and the classification on review by the appellant at the request of the respondent was confirmed. The respondent appealed to the Tariff Board and it held that the angledozers were "accessories" for internal combustion tractors and therefore classifiable under Tariff item 409(*m*)(1) of the Act, and allowed the appeal. The sole question for determination in the present appeal is whether the Tariff Board erred as a matter of law in its decision. *Held:* That there was material before the Board

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which indicated that in some parts of the trade angledozers were considered to be "accessories" and it was for it to determine whether that evidence should be accepted rather than that which would lead to a contrary conclusion. It was also for the Board to determine whether on the evidence the relationship of the angledozer to the tractor was that of a subsidiary adjunct and therefore an accessory to the tractor within the dictionary definition of "accessory" and since it was not established that the Board in reaching its conclusions acted unreasonably or erred as a matter of law its decision must be upheld. DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS & EXCISE v. GENERAL SUPPLY CO. OF CANADA LTD..... **248**

12.——*Income—Income tax—Income Tax Act, R.S.C. 1952, c. 148—Income or capital gain—Real estate bought for farm sold as town lots—Owner not carrying on business—No liability for tax.* Appellant in 1940 purchased a farm for a home intending to live on it and at time of hearing of the appeal herein was living on it. In 1949 he subdivided part of it into 52 lots of which 20 lots were sold in the years 1949, 1950, 1951 and 1952. Appellant was assessed for income tax on the profits from the sale of these lots which assessment was affirmed by the Income Tax Appeal Board from whose ruling appellant now appeals to this Court. *Held:* That the decision of the Income Tax Appeal Board must be reversed as appellant did not purchase the land as a venture or for speculation and there is no distinction between selling the land as a whole or in parts. 2. That defendant was not carrying on a business, but was selling his own property in a way that was not speculative. 3. That the money received from the sale of the lots was not income but a capital gain and not subject to income tax. JOHN LLOYD MCGUIRE v. MINISTER OF NATIONAL REVENUE.... **264**

13.——*Excise tax—Sales Tax—Excise Tax Act, R.S.C. 1952, c. 100, ss. 2(1)(ii), 23(1), 30(1)(i)—Goods manufactured solely for defendant by another corporation—"Manufacturer or producer"—Defendant liable for tax.* Defendant company entered into an agreement with a company herein called Radio for the manufacture and deliverance by Radio solely to defendant of electrical appliances made in accordance with drawings and specifications furnished by defendant and under patent rights owned by defendant's parent company. The price paid for such appliances was fixed by the agreement subject to variations under certain circumstances. Plaintiff contends that defendant is a manufacturer or producer of such appliances and seeks to recover excise and sales tax thereon. *Held:* That the appliances in question were being manufactured on behalf of defendant and for no other purpose and defendant is

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liable for the excise and sales tax claimed by plaintiff. HER MAJESTY THE QUEEN v. REXAIR OF CANADA LTD..... **267**

14.——*Customs and Excise—Electric motor imported as replacement for electric shovel —Whether dutiable under tariff item 445 g: "electric motors and complete parts thereof, n.o.p." or item 427a: "All machinery composed wholly or in part of iron or steel, n.o.p., and complete parts thereof"—Customs Tariff Act, R.S.C. 1952, c. 60, Schedule "A" Tariff items 427a, 445g—Customs Act, R.S.C. 1952, c. 58, ss. 44, 45.* The appellant imported from the United States a motor as a replacement to be installed in an electric shovel. The appraiser classified the motor under tariff item 445*g*: "Electric motors and complete parts thereof, n.o.p.". The appellant contending it was classifiable under tariff item 427*a*: "All machinery composed wholly or in part of iron or steel, n.o.p. and complete parts thereof", requested a review by the Deputy Minister who upheld the appraiser. The Tariff Board unanimously dismissed an appeal to it and the present appeal, by leave granted under s. 45 of the *Customs Act*, is on the question of law: "Did the Tariff Board err as a matter of law in deciding that a part, namely a 125 h.p. open ball bearing vertical shaft motor for P & H Model 1,500 5-cubic yard electric shovel is dutiable under Tariff item 445*g* rather than Tariff Item 427*a*?". It was agreed on appeal that the motor was imported for the purpose of installing it as a replacement motor in an electric shovel and that the electric shovel (in which the imported motor was to be installed) as a complete unit would have been classifiable under item 427*a* and the appellant conceded that if the phrase "not otherwise provided for" did not appear in item 445*g* it would have been properly classifiable under that item but it contended that while the imported article was an electric motor, item 445*g* refers only to motors "not otherwise provided for" and that the motor as part of an electric shovel was otherwise provided for, namely as part of an electric shovel, and therefore within the ambit of "complete parts of the foregoing" in item 427*a* and that the Tariff Board has misinterpreted the meaning of the phrase by giving it an unwarranted and limiting effect. *Held:* That the appeal being on a question of law only, the issue was not whether the motor was properly classifiable under Item 445*g* but whether the Board erred as a matter of law in deciding that it was. *Deputy Minister of National Revenue for Customs and Excise* v. *Parke, Davis & Co.* [1954] Ex. C.R. 1 at 20. 2. That there was material before the Board from which it could reasonably decide, and it was within its powers to decide as it did, that as Parliament had seen fit to establish an *eo nomine* classification for electric motors it must have intended to classify such

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articles in a special category separate and apart from the general and residuary items of machinery or parts thereof in tariff item 427*a*. ACCESSORIES MACHINERY LTD. v. DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS & EXCISE *et al*..... **289**

15.——*Income Tax—Trusts—Beneficiary entitled to net revenue from encumbered commercial property for life with power of appointment as to income and corpus—Capital cost allowance retained by trustee to preserve corpus—Whether beneficiary entitled to claim deduction as an exemption —The Income Tax Act, S. of C. 1948, c. 52, as amended, s. 58(4), (5), (6), (6A).* Under a trust agreement involving two parcels of real property, "A" and "B", it was directed that the net income from "A" be divided among the testator's four children share and share alike for their respective lives each with power of appointment as to an undivided one fourth share of the income and corpus; that property "B" be sold and the proceeds used to discharge a mortgage on "A", the surplus if any, to be equally divided among the beneficiaries. Property "A" consisted of a commercial building, "B" a vacant lot. As the revenues from "A" and "B" proved insufficient to pay off a mortgage on "A", a court order was obtained authorizing the trustee to refrain from selling "B", to build thereon a store and apartment building, and to apply the revenues from the two properties to paying off encumbrances. To provide funds for the maintenance of "A" and "B" and pay off the mortgages, the beneficiaries agreed to the trustee setting up a depreciation or capital cost allowance fund into which was paid sums withheld from the revenue derived from "A" and "B". The appellant in computing his income from "A" claimed as a deduction one quarter of the capital cost allowance. The respondent ruled that he was not entitled to the deduction under s. 58 of the 1948 Income Tax Act as under the trust he was entitled to one quarter of the income without reduction of any amount in respect of capital cost allowance. The Income Tax Appeal Board affirmed the disallowance. *Held:* That the operation of property "A" was the operation of a business, or at least in the nature of a trade or business, and there was a duty on the trustee to preserve the "corpus" in the interest of the residuary legatees. To assure that, reasonable yearly depreciation was necessary. *Re Estate John Ross Robertson* [1953] 2 S.C.R. 1 at 7. The net revenue was what was left after payment of taxes, interest, licenses and reasonable depreciation, and the four children of the testator were not entitled to claim more than the revenue remaining after deducting the said charges. It followed that the appellant was never entitled to any part of the amount set aside for depreciation. He never did receive it and since

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it never became his personal income, it was not taxable in his hands. HAROLD ERNEST MANNING v. MINISTER OF NATIONAL REVENUE..... **350**

16.——*Income Tax—Company incorporated to buy and sell securities—Debentures bought as investment sold soon after at profit—Capital gain or taxable income—The Income Tax Act, 1948, S. of C. 1948, c. 52, ss. 3, 4, 127(1)(e).* The appellant was incorporated under the Companies Act (B.C.) as a private company to carry on the business of underwriters and investment dealers in government, municipal and industrial securities and that of stock brokers. By its Memorandum of Association it was authorized to purchase either as principal or agent and absolutely as owner to sell the debentures of any public or private corporation. In September 1949 it joined a nation-wide group of investment dealers in disposing to the public at a profit a $17,000,000 issue of Interprovincial Pipe Line Co. convertible debentures due in 1970. At the same time it purchased on the open market, allegedly for its investment account and not for trading or trading account, $91,500 principal amount of the debentures. In 1950 in two separate transactions it sold part of the debentures so purchased at a profit of $54,776.25. The Minister of National Revenue included the amount in the appellant's taxable income for 1951 ruling that the two profitable transactions constituted a part of the appellant's ordinary business operations, or in the alternative constituted a concern in the nature of a trade. The appellant, contending that the transaction represented a capital gain and that the purchase had no relation to any class of profit-making operation but was intended solely as an investment of its idle funds, appealed to the Income Tax Appeal Board and its appeal having been dismissed, now appeals to this Court. *Held:* That the appellant's Memorandum of Association provided for the particular species of business exercised by it in the purchase and sale of the debentures in question and the profit ensuing therefrom was correctly included as an item of taxable income. *Anderson Logging Co.* v. *The King* [1925] S.C.R. 45 at 56 affirmed by [1926] A.C. 140; *Gairdner Securities Ltd.* v. *Minister of National Revenue* [1952] Ex. C.R. 448, followed. MCMAHON & BURNS LTD. v. MINISTER OF NATIONAL REVENUE **364**

17.——*Succession Duty—Bequest to brother who predeceases testatrix leaving issue her surviving—Whether bequest part of brother's estate and liable to succession duty—The Wills Act, R.S.O. 1950, c. 426, s. 36(1)—Dominion Succession Duty Act, R.S.C. 1952, c. 89, ss. 2(m), 3(1)(i) and 6(1)(a).* T died in 1949 having by his will directed that the interest on the residue of his estate be paid his widow for life and on her death the

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residue be distributed among his three sons. Probate of the will had been granted and the duties levied under *The Dominion Succession Duty Act*, R.S.C. 1952, c. 89, paid, when in 1950 T's sister died survived by T's widow and sons. The sister by her will drawn some five months prior to T's death bequeathed him a legacy of some $62,992. In view of this bequest the respondent, the Minister of National Revenue, made a further assessment of T's estate and claimed additional succession duty. The appellant contested the demand contending that T's estate was merely a "conduit pipe", that the real and immediate successors of the sister were the beneficiaries under T's will and that no succession duties were properly chargable against T's estate which had been closed before his sister's death. *Held:* That the bequest, which at Common Law would have lapsed, took effect by virtue of *The Wills Act*, R.S.O. 1952, c. 36, s. 1, as if T's death had happened immediately after his sister's. T was to be presumed alive at the time of his sister's death. The legacy thus became part of T's estate and was properly assessable for succession duties as claimed by the respondent. *In re Scott* [1900] 1 K.B. 372; [1901] 1 K.B. 228 applied. TORONTO GENERAL TRUSTS CORPN. (THE ESTATE OF HENRY HERBERT HILDER) v. MINISTER OF NATIONAL REVENUE..... **373**

18.——*Customs and Excise—Two and a half yard dipper capacity power shovels—Customs Tariff, R.S.C. 1952, c. 60, Tariff items 427, 427(a)—Customs Act, R.S.C. 1952, c. 58, s. 2(2)—Meaning of "class or kind not made in Canada"—No presumption of policy to be read into Tariff Items 427, 427(a)—Expression "of a class or kind not made in Canada" in Tariff Item 427(a) not referable solely to "machinery"—Nominal dipper capacity of power shovels a proper criterion of class or kind of power shovels—Appellant to pay only one set of costs.* In October 1953 the respondent, A. B. Wing Limited, imported a Northwest Power Shovel, crawler-mounted, convertible full revolving, Model 80D, of a 2½ cubic yard dipper capacity. It was entered under Tariff Item 427 of the Customs Tariff, R.S.C. 1952, c. 60, and the Deputy Minister confirmed this classification. The respondent appealed to the Tariff Board which reversed the Deputy Minister's decision and held that the power shovel was properly classifiable under Tariff Item 427*a* of the Customs Tariff. The appellant appealed from the declaration of the Tariff Board on a question of law pursuant to leave, the question being whether the Tariff Board erred, as a matter of law, in holding that the power shovel was properly classifiable for tariff purposes under Tariff Item 427*a*. *Held:* That there is no presumption that it is the purpose of Tariff Items 427 and 427*a* to protect Canadian manufacturers against the importation of com-

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petitive machinery from foreign countries or that the words "of a class or kind not made in Canada" in Tariff Item 427*a* should be construed in such a way as to afford Canadian manufacturers of power shovels the intended protection in cases where, by reason of closeness in sizes, an imported power shovel would compete in the Canadian market or on the job with a domestic one or, on the other hand, that they should be construed in such a way as to give Canadian users of power shovels the fullest possible opportunity of importing power shovels of the desired capacity under the lower rates of Tariff Item 427*a*. 2. That full effect should be given to each of the Tariff Items 427 and 427*a*. Each must be read fairly and without the distortion of an assumption of policy that one is to override the other. 3. That the expression "of a class or kind not made in Canada" in Tariff Item 427*a* is not referable to the expression "all machinery composed wholly or in part of iron or steel" by itself, but to the whole expression that precedes it, including the words "n.o.p.", and that the question for determination by the Tariff Board was not whether the imported power shovel was of a class or kind *of machinery* not made in Canada, but whether it was of a class or kind *of power* shovel not made in Canada. 4. That the nominal dipper capacity of power shovels is a proper criterion to apply to the classification of power shovels even where the difference between them is one of neighbouring capacities and that it was within the competence of the Tariff Board to settle where the line of difference of classes or kinds of power shovels according to the difference in their nominal dipper capacities should be drawn. 5. That the Tariff Board's decision to draw the line where it did was a decision of fact with which this Court has no jurisdiction to interfere. 6. That the appellant will be required to pay only one set of costs. DOMINION ENGINEERING WORKS LTD. v. A. B. WING LTD. *et al*..... **379**

19.——*Income Tax—Income War Tax Act, R.S.C. 1927, c. 98, s. (3)(1)—The Co-Operative Marketing Association Act, R.S.S. 1940, c. 180, ss. 4(1), 13, 7(1)(v), 7(1)(w), 10, 43—Quality of income—Substance and reality of transaction to be considered—Appellant machinery established by members—Appellant agent for members.* The appellant was incorporated under The Co-Operative Marketing Association Act, R.S.S. 1940, c. 180. Its members associated themselves together as an incorporated association on a non-profit co-operative plan for the purpose of disposing of their surplus horses by collective and co-operative action. At first the appellant sold live horses but later it processed horse meat and sold it largely in Belgium. The appellant was not in the ordinary business of buying horses. Its members delivered horses to it as instructed and on such

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delivery received an initial payment per pound, the balance of the payment being dependent on the year's operations. At the end of the year 1947 the appellant credited its members with two amounts, which it styled equalization allotment and further allotment, the totals of which came to $102,917.84 for the former and $742,665.23 for the latter. In assessing the appellant the Minister added these two amounts to the amount of taxable income reported by it. The appellant objected and appealed to the Income Tax Appeal Board which dismissed its appeal and the appellant appealed against this decision. *Held:* That the amount of $102,917.84, described as equalization allotment, represents the total of the equalization allowances which were credited to the members' accounts to ensure that all members who had delivered horses in 1947 would receive the same initial payment per pound for the horses delivered by them in that year as if the initial payment per pound had been uniform throughout the year. It was, in a sense, a deferred balance of initial payment per pound credited to those members who had received less than the highest initial payment per pound set for the delivery of horses in 1947. 2. That the amount of $742,665.23, described as further allotment, is the total of the balances due to the members, after the initial payments had been equalized, apportioned out of the net proceeds of the year's operations on the basis of the live weight of the horses delivered during the year, after the results of the year's operations had been ascertained. 3. That the appellant was required to account fully to its members for the proceeds of the sale of horses delivered to it for marketing or processing and the processed products. 4. That what the members really did in associating themselves together in the appellant association was to establish it as the means or machinery for accomplishing by co-operative action the purpose which they could not achieve individually, namely, the advantageous disposal of their surplus horses. When they delivered their horses to the appellant they did not sell them to the appellant in the ordinary sense but delivered them to it for marketing or processing by it on their behalf and for them. 5. When the appellant received the horses it did so as agent for the members and was accountable to them for the net proceeds from their marketing or the sale of the processed products. The initial payments to the members were really advances to them on account of the total to which they were severally entitled and the surplus of the appellant's receipts over its expenditures did not belong to the appellant as its profits or gains but belonged to the members in their own individual rights and was held by it on their behalf and for them. 6. That, alternatively, the amounts in dispute would be part of the cost of the horses to the

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appellant and there would be no remaining surplus to constitute profit or gain to it. HORSE CO-OPERATIVE MARKETING ASSOCIATION LTD. v. MINISTER OF NATIONAL REVENUE..... **393**

20.——*Income Tax—The Income Tax Act, S. of C. 1948, c. 52, s. 12(1)(a) and (b)—Purchaser of insurance business paid vendor part of commission on renewal of policies placed by latter prior to sale—Payments not part of sale price nor of purchaser's income.* The appellant purchased an insurance brokerage business in May, 1950 under a notarial contract which, in addition to the general terms covering the sale, contained the appellant's covenant to turn over to the vendor part of the commissions on renewals of policies placed by the vendor prior to his transfer of the business to the appellant. The maximum amount to be so remitted was fixed at $7,000 payable in consecutive monthly instalments of $250 each. The contract specified that such remittances were not to be considered as forming part of the sale price of the business but the carrying out by the appellant of his undertaking to the vendor. The appellant fulfilled the covenant and in his income tax returns for 1950, 1951 and 1952 claimed the revelant payments as deductions. The Minister disallowed the claims and ruled the remittances formed part of the sale price of the business. On appeal to the Income Tax Appeal Board the ruling was affirmed and the appellant again appealed maintaining the amounts in question at no time formed part of his income but had been received on behalf of the vendor to whom he had turned them over. *Held:* At the time of the sale the vendor having concluded the commissions on renewals of policies placed by him prior to the sale would bring in a considerable sum, authorized the appellant to collect and out of the total in-comings remit a part thereof to him up to $7,000. The instalments so set aside, as was customary in transactions of this kind, were at no time mixed with the assets of the appellant but on the contrary were specifically set apart. It could not be said that they formed part of the sale price of the business nor part of the appellant's future earnings. The decision of the Income Tax Appeal Board should therefore be set aside and it be declared that the amounts arising from commissions on insurance premiums remitted by the appellant to the vendor pursuant to the notarial contract in question at no time belonged to the appellant and could not be made subject to tax as part of appellant's income for the years in question. ROBERT TREMBLAY v. MINISTER OF NATIONAL REVENUE. **416**

21.——*Succession Duty—Insurance—Civil Code—Husband and Wife—Community of property—Effect of bequest by husband of life insurance to wife where policy directs payment to executors—The Dominion Succession Duty Act, R.S.C. 1952, c. 89 as amended, s. 3(1)(h)—Quebec Civil Code, arts. 1265, 1272, 1292, 1293, 2585, 2589, 2591—The Husbands' and Parents' Life Insurance Act, R.S.Q. 1941, c. 301, as amended ss. 3, 6, 12, 13 and 31.* The appellant, who as provided by the Civil Code of Quebec, lived in community of property with her husband, appealed from a ruling of the Minister of National Revenue declaring that under the *Dominion Succession Duty Act*, R.S.C. 1952, c. 89, as amended, the total proceeds of an insurance policy on her husband's life formed part of his succession. The husband had taken out the policy and paid the premiums out of the community's funds. Under the policy's terms the proceeds were payable to the husband on a determined date, or in the event of his prior death, to his executors, administrators or assigns. By his will the husband left all his property including his insurance to his wife. *Held:* That the policy was issued subject to the provisions of art. 2585 C.C. *et seq.* relating to life insurance in general and was an asset of the community of property and so remained as long as the insured did nothing to appropriate the policy. 2. That under art. 1265 appropriation could only be made as provided by the *Husbands' and Parents' Life Insurance Act*, R.S.Q. 1941, c. 301, and as the Act was an exception to the general law, it was necessary to establish that its provisions had been strictly complied with and, as this had not been done, the bequest of the insurance to the surviving consort applied only to the one half of the proceeds that the husband under art. 1293 was empowered to dispose of by will. That part fell into the insured's succession and was received by the appellant not in her capacity of designated beneficiary but of universal legatee. The other half belonged to her by virtue of the community of property. 3. That the appeal should be allowed, the assessment set aside and the matter referred back to the Minister in order that a new assessment be made by deducting from the succession one half of the net proceeds of the policy to which the wife was entitled in her capacity of wife common as to property. DAME YVETTE BERNIER-FREGEAU v. MINISTER OF NATIONAL REVENUE..... **421**

22.——*Income Tax—Timber Limits—Depletion Allowance—Income War Tax Act, R.S.C. 1927, c. 97, s. 5(1)(a) as amended by S. of C. 1946, c. 55, s. 4(1).* The appellant company in 1943 purchased a timber limit from one of its shareholders who held a controlling interest but who took no part in any of the meetings of its directors or shareholders relating to the purchase. On a cordage basis the limit had a value at least equal to the price paid by the appellant and the Minister for the taxation years 1943 to 1946 used such price as the basis of the allowance for depletion pro-

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vided by s. 5(1)(*a*) of the *Income War Tax Act*, R.S.C. 1927, c. 97. The section as amended by 1946, S. of C., c. 55, s. 4(1), provided that in determining income derived from timber limits there may be deducted such an allowance for the exhaustion of the limits as may be fixed by regulation of the Governor in Council. By Order in Council P.C. 2771 of June 17, 1948, Regulations for the Depletion of Timber Limits applicable to the income of 1947 and subsequent taxation years were made and para. 3 thereof provided that: If the Minister is satisfied that the previous owner or holder of a timber limit . . . directly or indirectly had or has a controlling interest in the present owner . . . it shall be deemed that the capital cost was the capital cost to such previous owner . . . and the depletion already allowed such previous owner . . . will be regarded as having been allowed the present owner . . . In its income tax returns for 1947 and 1948 the appellant claimed as a deduction from taxable income depletion of the timber limit based upon its cost to it. The Minister ruled that the deduction should be based on the cost to the former owner and used that figure as the basis for the 1947 and 1948 allowance for depletion in determining the appellant's assessments for those years. The assessment was affirmed on an appeal to the Income Tax Appeal Board. The appellant then appealed to this Court and submitted that Order in Council 2771 was *ultra vires* of the authority given the Governor in Council by s. 5(1)(*a*) of the Act. *Held:* That Parliament had unlimited power to enact legislation relating to the depletion or exhaustion of timber limits and to delegate such power to the Governor in Council. 2. That s. 5(1)(*a*) of the *Income War Tax Act* as amended, was a valid enactment of Parliament, which gave authority to the Governor in Council to deal with the matter of depletion or exhaustion of timber limits by regulation without any restriction. 3. That the regulations passed under Order in Council P.C. 2771 are legal, valid and binding and the Minister in determining the appellant's income was bound thereby and correctly applied the rule laid down in paragraph 3 thereof. *Pioneer Laundry and Dry Cleaners Ld.* v. *Minister of National Revenue* [1940] A.C. 130; *D. R. Fraser & Co. Ld.* v. *Minister of National Revenue* [1949] A.C. 24; *Minister of National Revenue* v. *T. E. McCool Ltd.* [1950] S.C.R. 80, distinguished. D'AUTEUIL LUMBER CO. LTD. v. MINISTER OF NATIONAL REVENUE..... **433**

23.——*Income Tax—Overpayment affirmed by assessment—No objection within time limit—Effect on recovery—"Overpayment", meaning of—The Income Tax Act, 1948, S. of C. 1948, c. 52 as amended, ss. 27(d), 38, 42(6), 47, 52, 53 and 127(1)(ay).* In filing its tax return for 1951 the suppliant, whose income was derived from a wholly-owned United States subsidiary and consisted of payments of dividends and interest, claimed as a tax allowance under s. 38 of *The Income Tax Act*, 1948 S. of C. c. 52, taxes withheld at the source on the interest payments. By notice of assessment its claim was disallowed but by a subsequent notice of re-assessment, allowed. After the 60 day limit for filing notice of objection provided by s. 53 of the Act had expired, the suppliant under s. 52(1)(*b*) made application for a refund of the full amount of taxes withheld at the source. When refused, it sought to recover by Petition of Right. It alleged that it had in error omitted to claim as a tax allowance the U.S. taxes withheld at the source in respect of the dividends received and that but for such omission its tax return would have shown it was not liable to any tax; that consequently it had made an "overpayment" and under s. 52 was entitled to a refund. At the trial the respondent admitted that had objection to the re-assessment been made within the time permitted by s. 53 the Minister would have varied the re-assessment so as to make the suppliant entitled to the refund claimed. In its Statement of Defence it pleaded that the aggregate of the amounts paid on account of income tax did not exceed the income tax payable as fixed by the re-assessment and that there had been no objection to the re-assessment within the time limit therefor by s. 53(1) of the Act as amended and therefore that having regard to s. 42(6) the re-assessment was valid and binding and that, having regard to s. 127(1)(*ay*), there was no overpayment. *Held:* That in view of the definition of "overpayment" as contained in s. 53(4) and of the provisions of s. 127(1)(*ay*) the "overpayment" to which the taxpayer is entitled under s. 53 is the aggregate of all amounts paid on account of tax minus all amounts of tax payable as fixed by the assessment or re-assessment. 2. That notwithstanding the fact that the suppliant had paid a substantial amount of taxes, which on a proper construction of the Act it was not liable to pay, it could not now recover such taxes because of its failure to object to an appeal from the re-asssesment within the time limited by s 53. SUBSIDIARIES HOLDING CO. LTD. v. HER MAJESTY THE QUEEN..... **443**

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13. CORRECTION OF MISNOMER DOES NOT SUBSTITUTE A NEW PLAINTIFF AND DOES NOT DEPRIVE DEFENDANT OF ANY RIGHT. No. 3.
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22. IMPROPER NAVIGATION OF DEFENDANT'S BOAT CAUSE OF COLLISION. No. 5.
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SHIPPING——*Action for breach of contract—The Canada Shipping Act, R.S.C. 1952, c. 29, s. 657—Defendant not entitled to limitation of liability.* In an action for damages for breach of contract for the failure of defendant to carry safely plaintiff's goods the Court found that defendant was wholly to blame for the loss sustained by plaintiff. *Held:* That defendant was not entitled to limitation of liability under the Canada Shipping Act since he had not proved that the occurrence giving rise to the loss was without his fault or privity. MIDDLEPOINT LOGGING CO. LTD. v. I. D. LLOYD *et al*..... 1

2.——*Motion to dismiss action for want of jurisdiction—Action in rem lies for death caused by a ship. Held:* That an action *in rem* will lie for death caused by a ship. MARJORIE MANZ LEVAE *et al* v. THE STEAMSHIP *Giovanni Amendola*..... 55

3.——*Practice—Misnomer in name of plaintiff a mistake in form only—Correction of misnomer does not substitute a new plaintiff and does not deprive defendant of any right—Appeal from District Judge in Admiralty dismissed. Held:* That it is proper practice to allow the correction of a misnomer in the name of a corporate plaintiff and the defendant is not harmed thereby. VANCOUVER TUG BOAT CO. v. PACIFIC LIME CO. LTD..... 111

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4.——*Costs of application for limitation of liability. Held:* That costs of an application for limitation of liability follow the event. WILLIAM ROBERTSON v. THE OWNERS OF THE SHIP *Maple Prince et al.* **135**

5.——*Collision — Improper navigation of defendant's boat cause of collision—Judgment for plaintiff. Held:* That in an action for damage to plaintiff's motor boat by reason of a collision between it and a boat owned and driven by the defendant judgment should go for the plaintiff when such collision was caused by defendant's improper navigation of his boat. HONEY HARBOUR BOAT WORKS LTD. v. GORDON WISHART **136**

6.——*Collision—Motion to have name of party stricken from record—Motion dismissed. Held:* That where, after a collision between two vessels, the solicitors acting for the owners of one of the colliding vessels give to the owners of the other vessel an undertaking to appear in any proceedings which may be instituted, the former when an action *in rem* is instituted against their vessel, become defendants in the suit from its inception without it being actually necessary to specifically name them as such. DEEP SEA TANKERS LTD. *et al* v. THE SHIP *Tricape et al*..... **219**

7.——*Reference — Collision — Charterparty —No recovery for damages claimed for loss of use of vessel—Costs.* Plaintiffs seek to recover damages for loss of the use of a vessel owned by one plaintiff and chartered by the other plaintiff due to detention necessary for repairs following a collision with defendant ship. *Held:* That where the owners of a vessel are entitled to receive owners' hire in full throughout the period of detention of a ship due to damage caused by a collision and there is nothing in the Charterparty requiring them to repay or reimburse all or any part of this hire to to the charterer neither the owners nor the charterer have the right to recover damages for loss of use of the vessel during the time required to make repairs necessitated by the collision. DEEP SEA TANKERS LTD. *et al* v. THE SHIP *Tricape et al*..... **221**

8.——*Damage to cargo—measure of damages. Held:* That the amount of damages recoverable for delivery of a cargo in a damaged condition is the difference between the cargo's arrived sound wholesale market value and its arrived damaged wholesale market value. Decision of Sidney Smith, D.J.A. [1954] Ex. C.R. 450 affirmed. THE SHIP *Trade Wind* v. DAVID MCNAIR & CO. LTD..... **228**

9.——*Destruction of cargo by fire—Bill of lading subject to The Water Carriage of Goods Act, 1936, S. of C., c. 49—Negligence in management of ship in port—No proof fire caused by "actual fault or privity of carrier"—The Water Carriage of Goods Act, 1936, S. of C., c. 49, article IV, r. 2(a), (b).* The appellant's goods were shipped from Montreal to Kingston, Jamaica under a through bill of lading which provided it should have effect subject to *The Water Carriage of Goods Act, 1936* (Can.). The Act by Article IV r. 2 provides that "neither the carrier nor the ship shall be responsible for loss or damage resulting from, (*a*) act, neglect or default of the master . . . or servant of the carrier in the navigation or management of the ship; (*b*) fire unless caused by the actual fault or privity of the carrier." The contract of carriage was delivered to the appellant at Montreal by the Canadian National Railways, the agent of the respondent, and the goods, after carriage by rail to Halifax, were loaded aboard the respondent's ship. Subsequently, and before the vessel sailed, the ship's captain gave orders that certain frozen pipe lines be thawed out and in the carrying out of the order the ship was set afire and the appellant's goods destroyed. *Held:* That the respondent, the carrier, by its acceptance of the goods owed the appellant a duty to carry them to their destination or, in the event of loss due to its negligence, to answer for such loss unless relieved by some provision of the law. 2. That the ship from a cargo point of view was seaworthy and since the negligent acts which gave rise to the fire were acts done in the management of the ship the respondent was entitled to the benefit of the exemption provided by article IV, r. 2(*a*). 3. That the loss was the direct result of the fire and the respondent was also entitled to the immunity provided by article IV, r. 2(*b*) unless the fire was caused by its actual fault or privity as to which the onus of disproof rested on it. The negligence which caused the fire was that of the employees of the respondent but since neither the fact that the pipes in question were frozen nor the means to be used to clear them were communicated to any one who represented the carrier or who had power to act on its behalf, it could not be said that the actions of those responsible for the fire (and to whom alone negligence was attributable), were the very actions of the respondent or of its directing mind. Moreover since the operation which caused the fire was unknown to it, it could not be found that the fire was caused by its privity and having satisfied the onus cast upon it, it was entitled to the immunity provided by r. 2(*b*). Judgment of Smith D.J.A. [1952] Ex. C.R. 569, affirmed. MAXINE FOOTWEAR CO. LTD. *et al* v. CANADIAN GOVERNMENT MERCHANT MARINE LTD..... **234**

10.——*Loss of cargo—Contract to transport, discharge and deliver cargo above high water mark—Liability for loss suffered in landing operations.* By a written offer and an amendment thereto made to the King in

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the right of Canada the defendants, the Blue Peter Steamships Co. Ltd. as contractor and the Montreal Steamships Co. Ltd., as guarantor, agreed for a total payment of $125,000 (the sum to include freight, stevedoring, loading and discharging including the use of any special loading or unloading gear and barges and all other costs and expenses) to transport and deliver aviation gasoline and other cargo to points on Hudson Bay and the Eastern Arctic including the delivery and discharge of 8,000 drums of gasoline "above high water mark at road leading to airstrip at Coral Harbour". Acceptance of the offer and the amendment thereto was authorized by Orders in Council. Pursuant to the undertaking the defendants' schooner arrived at Coral Harbour late in September 1947 at the end of the navigation season. As no docking facilities were available the schooner's captain requested the use of four barges, the property of the Crown, and the aid of a party of Eskimos to bring the cargo ashore. Through the intermediary of the local representative of the Department of Trade and Commerce, the request was granted. Toward the close of the unloading operations, due to rough weather and the leaky condition of one of the barges, two of them capsized and 290 drums of gasoline were lost. After payment to defendants of the agreed sum in an action brought by the Crown to recover the loss the defendants pleaded that their undertaking was to deliver the cargo at ship's side but not otherwise to discharge it and that any loss occurred after the cargo had been delivered in accordance with the contract as understood and interpreted by the parties; that the landing of the cargo was performed by the agents of the plaintiff acting in performance of their duties while under its direction and control; that the barges were kept and operated by the plaintiff for the purpose of bringing cargo ashore and that the loss was caused by the negligence of the plaintiff's agents. *Held:* That the general rule that a shipowner's liability is discharged by delivery of cargo at ship's side is susceptible of being varied or extended by pertinent stipulations in the contract or charterparty and the contracting parties are at liberty to stipulate any special terms and conditions they please as to the manner of discharging the cargo. Here the contractor undertook not only to "deliver" in the legal sense of the word but if necessary to provide and pay for the use of any special crew, gear and barges. The captain, the legal representative of the defendants in the performance of the contract, was in charge and control of the unloading job and the plaintiff was entitled to recover from the defendants the amount of the loss. HER MAJESTY THE QUEEN v. MONTREAL SHIPPING CO. LTD. *et al*..... **280**

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11.——*Damage to cargo—Bills of lading—Australian Sea Carriage of Goods Act, 1924—Cargo not fit for voyage—Onus on defendants discharged—Risk not contemplated by Act—No liability on part of defendants.* In an action for damages brought by the owners of a cargo of onions shipped from Melbourne, Australia to Vancouver, British Columbia, against the steamer, her owners and time-charterers, in which breach of contract contained in the bills of lading and negligence were alleged, the Court found that defendants had discharged the onus to show there was no want of care on the part of the ship and that they had exercised due diligence as required by Article III of the Australian Sea Carriage of Goods Act, 1924. *Held:* That the nature of the onions, which were damaged was such, that they could not stand the voyage and they decayed, not because of the ship or of the sea, or of the route, but because they were onions which were not fit to make the voyage in the ordinary way, and this is the kind of risk which the Act does not call on the shipowner to bear. EASWEST PRODUCE CO. *et al* v. THE SHIP *Nordnes et al*..... **328**

12.——*Practice in Admiralty—General Rules and Orders in Admiralty, R. 215—General Rules and Orders. R. 2(1)—Rules of Supreme Court, 1883 of England, O. XIX, Rs. 7, 7B—Particulars not to be ordered when effect would be to hamper plaintiff and prevent full discovery.* The appellant appealed from the decision of Smith D.J.A. of the British Columbia Admiralty District ordering the plaintiff to give particulars of certain allegations in the statement of claim. *Held:* That the prime consideration that should govern the exercise of the discretionary power implicit in the rules relating to the ordering of particulars is that justice should be done. 2. That where particulars are not required to enable the defendants to plead they should not be ordered when their effect would be to hamper the plaintiff in the prosecution of his claim and prevent him from obtaining full discovery from the defendants. 3. That where the defendant knows the facts and the plaintiff does not the defendant should give discovery before the plaintiff delivers particulars. 4. That the particulars ordered were neither necessary nor desirable to enable the defendants to plead and the order for them was premature. HER MAJESTY THE QUEEN v. THE SHIP M/V *Island Challenger et al*..... **334**

13.——*Damages for detention—Mitigation—Contract with 3rd party—Lien de droit created by consignee.* The respondents pursuant to a contract entered into with a third party transported two cargos of lumber to Montreal and there made delivery to the appellant. On each occasion the latter when notified of the arrival of the respondents' vessel sent trucks to

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take delivery but because it did not supply the trucks continuously the unloading was delayed. The respondent sued to recover damages for losses sustained by reason of the unlawful detention of their vessel beyond the normal time required to discharge cargo and were awarded judgment by the trial court. *Held:* That although there was no contractual relationship between the parties the fact that the appellant on notice of the vessel's arrival undertook to send its trucks and take delivery, created a *lien de droit* between them and established the manner in which the cargo was to be delivered and the appellant became legally bound to proceed with the unloading without interruption until the vessel was discharged. 2. That the respondents were engaged in the "Coasting Trade in Canada" as defined by s. 2(12), *Canada Shipping Act, 1934*, S. of C. 1936, c. 49, and were not compelled to issue bills of lading under the provisions of articles V and VI of *The Water Carriage of Goods Act, 1936*, S. of C. 1936, c. 49: the mode of discharge was to be determined by the verbal undertaking of the appellant and the respondents could not change the manner in which the unloading was to take place. Carver's, *Carriage of Goods by Sea*, 5 Ed., p. 700; *Syeds* v. *Hay* 4 T.R. 260; *Grey* v. *Butler's Wharf* 3 Com. Ca. 67; *Smailes* v. *Hans Dessen* 12 Com. Ca. 117 ; 10 Asp. M.C. 319; 95 L.T. 809. 3. That there was a delay, the result of the unlawful act of the appellant in not taking delivery in a reasonable time, but the respondents could have mitigated their loss by requesting permission to unload on the wharf and the trial judge was right in deciding the responsibility for the vessel's detention should be shared and as to the amount of damages the respondents were entitled to recover. LEO PERRAULT LTD. v. CAPTAIN DAVID TREMBLAY *et al*... 358

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WHETHER BEQUEST PART OF BROTHER'S ESTATE AND LIABLE TO SUCCESSION DUTY.
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WHETHER DUTIABLE UNDER TARIFF ITEM 445g: "ELECTRIC MOTORS AND COMPLETE PARTS THEREOF, N.O.P." OR ITEM 427a: "ALL MACHINERY COMPOSED WHOLLY OR IN PART OF IRON OR STEEL, N.O.P., AND COMPLETE PARTS THEREOF".
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WHETHER EVIDENCE OF SUBSEQUENT TRANSACTIONS ADMISSIBLE.
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"*Interest on borrowed capital used in the business to earn income*". *See* CANADA SAFEWAY LTD. v. MINISTER OF NATIONAL REVENUE **209**

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"*Manufacturer or producer*". *See* HER MAJESTY THE QUEEN v. REXAIR OF CANADA LTD. **267**

"*Obtuse*". *See* O'CEDAR OF CANADA LTD. v. MALLORY HARDWARE PRODUCTS LTD. **299**

"*Of a class or kind not made in Canada*". *See* DOMINION ENGINEERING WORKS LTD. v. A. B. WING LTD. *et al* **379**

"*Overpayment*". *See* SUBSIDIARIES HOLDING CO. LTD. v. HER MAJESTY THE QUEEN **443**

"RECEIVED". *See* ESTATE OF THE LATE WILSON WORKMAN BUTLER v. MINISTER OF NATIONAL REVENUE **36**