1964

CANADA

LAW REPORTS

RAPPORTS JUDICIAIRES

DU CANADA

Exchequer Court of Canada

Cour de l'Échiquier du Canada

PAUL A. RAYMOND, C.R.
WILLIAM C. McBRIDE, B.A. Sc.
Official Law Editors
Arrêtistes

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Ottawa, 1965

90139—3½

JUDGES

OF THE

EXCHEQUER COURT OF CANADA

During the period of these Reports:

PRESIDENT:

THE HONOURABLE JOSEPH T. THORSON
(Appointed October 6, 1942)
THE HONOURABLE WILBUR ROY JACKETT
(Appointed May 4, 1964)

PUISNE JUDGES:

THE HONOURABLE J. C. A. CAMERON
(Appointed September 4, 1946)
THE HONOURABLE JOHN DOHERTY KEARNEY
(Appointed November 1, 1951)
THE HONOURABLE JACQUES DUMOULIN
(Appointed December 1, 1955)
THE HONOURABLE ARTHUR LOUIS THURLOW
(Appointed August 29, 1956)
THE HONOURABLE CAMILIEN NOËL
(Appointed March 12, 1962)
THE HONOURABLE ANGUS ALEXANDER CATTANACH
(Appointed March 27, 1962)
THE HONOURABLE HUGH FRANCIS GIBSON
(Appointed May 4, 1964)
THE HONOURABLE ALLISON ARTHUR MARIOTTI WALSH
(Appointed July 1, 1964)

DISTRICT JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

The Honourable W. ARTHUR I. ANGLIN, New Brunswick Admiralty District—appointed June 9, 1945.
His Honour VINCENT JOSEPH POTTIER, Nova Scotia Admiralty District—appointed February 8, 1950.
The Honourable ARTHUR IVES SMITH, Quebec Admiralty District—appointed June 16, 1950.
The Honourable ROBERT STAFFORD FURLONG, Newfoundland Admiralty Distirct—appointed October 8, 1959.
The Honourable DALTON COURTWRIGHT WELLS, Ontario Admiralty District—appointed January 28, 1960.
The Honourable THOMAS GRANTHAM NORRIS, British Columbia Admiralty District—appointed September 28, 1961.
The Honourable GEORGE ERIC TRITSCHLER, Manitoba Admiralty District—appointed October 19, 1962.
GORDON R. HOLMES, Q.C., Prince Edward Island Admiralty District—appointed May 24, 1963
The Honourable HAROLD GEORGE PUDDESTER, Newfoundland Admiralty District—appointed June 4, 1963.
The Honourable JAMES DOUGLAS HIGGINS, Newfoundland Admiralty District—appointed May 28, 1964.

DEPUTY JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

The Right Honourable JAMES L. ILSLEY, Nova Scotia Admiralty District—appointed November 3, 1958.
The Honourable CHARLES WILLIAM TYSOE, British Columbia Admiralty District—appointed January 31, 1963.
JOHN STAIRS, Q.C., Quebec Admiralty District—appointed May 7, 1964.

SURROGATE JUDGE IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

ALFRED S. MARRIOTT, Q.C., Ontario Admiralty District—appointed February 21, 1957.

ATTORNEY-GENERAL OF CANADA:

The Honourable LIONEL CHEVRIER
The Honourable GUY FAVREAU

SOLICITOR GENERAL OF CANADA:

The Honourable J. WATSON MACNAUGHT

JUGES

DE LA

COUR DE L'ÉCHIQUIER DU CANADA

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

PRÉSIDENT:

L'HONORABLE JOSEPH T. THORSON
(*nommé le 6 octobre 1942*)

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

JUGES PUÎNÉS:

L'HONORABLE J. C. A. CAMERON
(*nommé le 4 septembre 1946*)

L'HONORABLE JOHN DOHERTY KEARNEY
(*nommé le 1er novembre 1951*)

L'HONORABLE JACQUES DUMOULIN
(*nommé le 1er décembre 1955*)

L'HONORABLE ARTHUR LOUIS THURLOW
(*nommé le 29 août 1956*)

L'HONORABLE CAMILIEN NOËL
(*nommé le 12 mars 1962*)

L'HONORABLE ANGUS ALEXANDER CATTANACH
(*nommé le 27 mars 1962*)

L'HONORABLE HUGH FRANCIS GIBSON
(*nommé le 4 mai 1964*)

L'HONORABLE ALLISON ARTHUR MARIOTTI WALSH
(*nommé le 1er juillet 1964*)

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

L'Honorable W. ARTHUR I. ANGLIN, district d'amirauté du Nouveau-Brunswick—nommé le 9 juin 1945.

Son Honneur VINCENT JOSEPH POTTIER, district d'amirauté de la Nouvelle-Écosse—nommé le 8 février 1950.

L'Honorable ARTHUR IVES SMITH, district d'amirauté de Québec—nommé le 16 juin 1950.

L'Honorable ROBERT STAFFORD FURLONG, district d'amirauté de Terre-Neuve—nommé le 8 octobre 1959.

L'Honorable DALTON COURTWRIGHT WELLS, district d'amirauté d'Ontario—nommé le 28 janvier 1960.

L'Honorable THOMAS GRANTHAM NORRIS, district d'amirauté de la Colombie-Britannique—nommé le 28 septembre 1961.

L'Honorable GEORGE ERIC TRITSCHLER, district d'amirauté de Manitoba—nommé le 19 octobre 1962.

GORDON R. HOLMES, C.R., district d'amirauté de l'Île du Prince-Édouard—nommé le 24 mai 1963.

L'Honorable HAROLD GEORGE PUDDESTER, district d'amirauté de Terre-Neuve—nommé le 4 juin 1963.

L'Honorable JAMES DOUGLAS HIGGINS, district d'amirauté de Terre-Neuve—nommé le 28 mai 1964.

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

Le Très Honorable JAMES L. ILSLEY, district d'amirauté de la Nouvelle-Écosse—nommé le 3 novembre 1958.

L'Honorable CHARLES WILLIAM TYSOE, district d'amirauté de la Colombie-Britannique—nommé le 31 janvier 1963.

JOHN STAIRS, C.R., district d'amirauté de Québec—nommé le 7 mai 1964.

JUGE SUBROGÉ EN AMIRAUTÉ DE LA COUR DE L'ÉCHIQUIER DU CANADA

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

PROCUREUR GÉNÉRAL DU CANADA:

L'Honorable LIONEL CHEVRIER
L'Honorable GUY FAVREAU

SOLLICITEUR GÉNÉRAL DU CANADA:

L'Honorable J. WATSON MACNAUGHT

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L'Honorable J. C. A. Cameron, juge puîné de la cour a donné sa démission au cours de l'année courante.

CORRIGENDA

At page 19, line 14 in the case cited the name *Heap* should read *Heaps*
At page 19 the footnote should read (1931) 40 O.W.N. 580.

At page 29 in the headnote the caption *Customs Act R.S.C. 1952, c. 58, s. 45 and s. 44 as enacted by S. of C. 1958, c 56, s. 2* should read *Customs Act R.S.C. 1952, c. 58, s. 35(1), (2) and (3) as re-enacted by S. of C. 1955, c. 32, s. 2(2), s. 43(4) and (5) as enacted by S. of C. 1955, c. 32, s. 3. s. 44 and s. 45 as re-enacted by S. of C. 1958, c. 26, s. 2(1).*

At page 29 in the headnote the caption *Customs Tariff Act, R.S.C. 1952, c. 60, s. 35(2)(3)* should read *Customs Tariff, R.S.C. 1952, c. 60, s. 3.*

At page 145 the first word in the captions *Admiralty* should read *Shipping.*

At page 298 in the 7th line of the last paragraph the word *imported* should read *imparted.*

At page 479 in the fourth line the words *it was held* should be deleted.

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DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

CAUSES

ADJUGÉES PAR

LA COUR DE L'ÉCHIQUIER DU CANADA

EN SA JURIDICTION DE COUR DE PREMIÈRE INSTANCE

ET

EN SA JURIDICTION D'APPEL

BETWEEN: 1960

HERB PAYNE TRANSPORT LIMITED .... APPELLANT;

Dec. 5, 6, 7, 8
1962
Sep. 17
1963
Feb. 25

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 11(1)(a), 20(1), 20(6)(g)—Sale of business as going concern—Determination of consideration received for depreciable property—Appeal allowed.

Appellant in March, 1956, sold its trucking business for $200,000. The appeal is from an assessment made by respondent in respect of the 1956 taxation year under which the sum of $117,540.99 was added to appellant's income as recaptured capital cost allowance under s. 20(1) of the Act. Other items added are not disputed. The matter at issue is what parts of the total sale price might reasonably be regarded as being the consideration for the disposition of the appellant's depreciable properties of various classes.

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The valuation to be attributed to goodwill was a key point to the allocation of the total consideration and after considering various factors the Court placed an evaluation of $50,000 as being reasonable for the goodwill of appellant's business, inclusive of its trucking licence.

Held: That a determination under s. 20(6)(*g*) of the Act is not necessarily based on the fair market value of the property in question and may be more or less than that value, depending on the circumstances.

2. That the fact that in five of the sub-sections of s. 20(6) which precede s-s. (*g*) the term "fair market value" is used and that it is not used in s-s. (*g*) (where the term "can reasonably be regarded" is used) is a clear indication that it was not intended by Parliament to be the standard to be used in applying s-s. (*g*).
3. That such a determination depends solely on what part of the total consideration can be allotted to each property in the light of all the circumstances of the particular case.
4. That after examining the matter item by item the appeal be allowed in part.

APPEAL under the *Income Tax Act.*

The appeal was heard before the Honourable Mr. Justice Noël at Ottawa.

John G. McDonald, Q.C. and *David A. Ward* for appellant.

Gordon D. Watson, Q.C. and *F. J. Dubrule* for respondent.

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

NOËL J. now (February 25, 1963) delivered the following judgment:

This is an appeal from a notice of reassessment issued by the respondent in respect of the 1956 taxation year under which the sum of $117,540.99 was added to the appellant's income as recaptured capital cost allowance under s. 20(1) of the *Income Tax Act,* $4,163.60 as the proceeds of sale of inventory and $6,110.73 as mortgage and loan interest. The appellant does not dispute the inclusion of the proceeds of sale of inventory and subsequent to this appeal it has been agreed between the parties that the amount of mortgage and loan interest properly includible in the income of the appellant is $5,181.49 and not $6,110.73 and a formal consent was filed with the Court.

The appellant's rather profitable trucking business in Peterborough, Ontario, was built up by its principal officer, Mr. Herbert M. Payne, over a 25-year period from a one-truck to a 30-truck operation with a substantial truck warehouse and a large staff. It did all the transporting of the goods of Canada Packers, in Ontario, which was 60 per cent of its business as well as that of the Hinde and Dauch Paper Co., Quaker Oats Company, Whittiker Wood Co. and others of a minor nature who were manufacturers in Peterborough and in 1955 it acquired a new customer, Johnson Motors, an outboard marine manufacturer in Peterborough.

The appellant owned a garage built on a parcel of land located at the south end of the south side of the main section of Peterborough with a paved area in front of this garage. The building proper was constructed in different parts. When, during the last war, the appellant first bought the east half of the lot, the east six-door part of the garage was built. The next five-door part was built in 1953 or 1954. It is a concrete block construction with a cement floor. The total cost of this building was approximately $29,000.

Sometime in the beginning of the year 1956, Mr. Donald A. Paxton, of Peterborough, Ontario, approached Mr. Payne, the owner of the appellant company, and asked him what he wanted for his company. Mr. Payne replied that he valued the appellant company at $250,000 of which $100,000 was for goodwill and the balance for its fixed assets.

In March 1956, negotiations were begun by Mr. Paxton for the acquisition of the shares of the appellant company and a draft agreement, dated March 1956, was forwarded to Mr. Herbert Marshall Payne, the principal shareholder of the appellant company for this purpose. This agreement provided *inter alia* that:

> The Vendor agrees to sell and the Purchaser agrees to purchase all the outstanding shares of the Company having a capital value of $90,321.96 as shown on the balance sheet dated December 31, 1955 for the sum of $200,000.

For the purpose of the proposed purchase of the shares, a list of depreciable property owned by the appellant as at December 31, 1955, was supplied to the purchaser's accountant, a Mr. Black, which included a tabulation of the original cost of the appellant's tangible assets as appears from Ex. B.

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This preliminary offer was refused by Mr. Payne for some undisclosed reason and a further proposal was later made by the same Mr. Paxton but this time the offer was not for the shares but for the purchase of "the trucking and transport business carried on under the name of Herb Payne Transport Limited and all interest and goodwill thereof together with all trucks, tractors, trailers, fixtures, motor vehicles, licences, land and buildings, as set out in Schedules "A" and "B" attached to the said agreement", Ex. 3, dated March 13, 1956, which agreement was accepted by the appellant on March 19, 1956, at a special meeting of shareholders of the appellant company.

It would appear from the evidence that the purchaser's accountant and solicitor, in preparing Schedule "A", which was afterwards attached to Ex. 3, the agreement document, and which Schedule "A" was signed by both Mr. and Mrs. Payne the owners of the shares of the appellant company, transposed as the value of the fixed assets, which appears on Schedule "A", the original capital cost of the appellant company's tangible assets, as contained in Ex. "B" and which had been supplied previously for the proposed share purchase. The original capital cost of its tangible assets totalled $203,461.47 and underneath the above total on Schedule "A" of Ex. 3 the words "Total consideration" were added and opposite a price of $200,000 was mentioned. As the individual figures on Schedule "A" add to more than the aggregate purchase price, they should, in my opinion, be subject to caution. Furthermore the words "Total consideration $200,000" may apply to not only the items listed in Schedule "A" but also to the goodwill of the business as the latter is specifically mentioned in Ex. 3 to which Schedule "A" is attached. Now the valuation of the fixed assets of the business for the purpose of the sale of assets was apparently never discussed with the appellant's main shareholders, by the purchaser or his representatives nor by the appellant's own accountant and solicitor with the result that Mr. and Mrs. Payne both signed Schedule "A" for the sole purpose of identifying the depreciable property without appreciating the possible significance of the figures on the sheet, which sheet, of course, contained no amount for the goodwill of the business although, as we have seen, goodwill was mentioned in the agreement document, Ex. 3. The same would apply to two other documents signed by Mr. Payne, Ex. 5, the bill of sale, and Ex. 6, the bill of sale of the goods, chattels, both of which were in effect filed in the office of the clerk of the County Court of Peterborough. These documents contained a list and values of the depreciable assets of the appellant company. Let me say here that no evidence was adduced on behalf of the respondent to establish any agreement between the appellant and Mr. Paxton concerning the value of the assets of the appellant sold to Mr. Paxton and the evidence adduced by the appellant affirmatively denied any such agreement.

Schedule "A", "Statement of Fixed Assets as of December 31st, 1955" listed the following items and amounts:

Land	$ 1,125.00
Concrete block garage	29,012 62
Lights and light fixtures	2,850 00
Machinery and equipment	1,185.67
Furniture and fixtures	837.40
Refrigeration units	15,960.00
Asphalt driveway	2,700.00
Automotive equipment	149,790 78
	$203,461.47
Total consideration	$200,000 00

No allocation was made, therefore, of the sales value of the depreciable assets and the value of the goodwill of the business.

Schedule "B" listed registration plates and P.C.V. licence plates at $5,686.50 and this amount was paid separately and in addition to the $200,000 price.

This agreement, Ex. 3, was subject to the transfer of all licences pertaining to the said business and a condition of same was for the vendor not to "directly or indirectly, act or become employed in any capacity whatsoever in any road transport or trucking company or concern operating in the Province of Ontario, nor will he have any interest, financial or otherwise, in any such company, so as to compete with the purchaser operating the business being the subject matter of this sale operating as a public vehicle transport business, for a period of five years from the date hereof."

As all the items listed in Schedule "A", except land, were classes of depreciable property in respect of which capital cost allowance had been claimed by the appellant

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in prior years pursuant to the provisions of s. 11(1)(*a*) of the *Income Tax Act* and as the aggregate proceeds of the disposition of such property exceeded the aggregate undepreciated capital cost to the appellant of all such classes of property, it becomes necessary to consider what portion of such proceeds, if any, shall be deemed to be recaptured capital cost allowance which should be added to income for taxation purposes pursuant to s. 20(1) and (6) of the Act.

The appellant, in reporting its income for 1956, calculated its capital cost recapture at $13,954.26 by assuming a recapture of $113,954.26 and deducting therefrom $100,000 re goodwill. When reassessing the appellant, the respondent, among other things, increased capital cost allowance recapture by $117,540.99. It is admitted by the appellant that $5,115.01 (i.e. recapture on its concrete block garage) of the $117,540.99 claimed to have been recaptured is properly assessed and the sole issue now is with respect to the balance of $112,425.98.

The appellant, on the other hand, contends that the $200,000 consideration for the purchase of the business should be apportioned as follows:

Land and buildings	$ 78,000.00
Refrigeration units	6,400 00
30 automotive units	37,500 00
Goodwill	78,100.00
	$200,000.00

The assessment must be presumed to be valid and correct unless and until the appellant satisfies the onus of establishing error on the part of the Minister, cf. *Noralta Hotel Limited v. M.N.R.*[1].

The relevant provisions of the *Income Tax Act*, R.S.C. 1952, c. 148, are as follows:

11.(1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year:

(*a*) such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation;

20. (1) Where depreciable property of a taxpayer of a prescribed class has, in a taxation year, been disposed of and the proceeds of disposition exceed the undepreciated capital cost to him of depreciable property of that class immediately before the disposition, the lesser of

[1] 54 D.T.C. 1080.

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(a) the amount of the excess, or

(b) the amount that the excess would be if the property had been disposed of for the capital cost thereof to the taxpayer,

shall be included in computing his income for the year.

20. (6) For the purpose of this section and regulations made under paragraph (a) of subsection (1) of section 11, the following rules apply:

* * *

(g) where an amount can reasonably be regarded as being in part the consideration for disposition of depreciable property of a taxpayer of a prescribed class and as being in part consideration for something else, the part of the amount that can reasonably be regarded as being the consideration for such disposition shall be deemed to be the proceeds of disposition of depreciable property of that class irrespective of the form or legal effect of the contract or agreement; and the person to whom the depreciable property was disposed of shall be deemed to have acquired the property at a capital cost to him equal to the same part of that amount;

The issue in this appeal is to determine what part of the amount of $200,000 which the appellant received from Mr. Paxton can reasonably be regarded as being the consideration for the disposition of the appellant's depreciable property, i.e. its buildings, lights and light fixtures, machinery and equipment, furniture and fixtures, refrigeration units, asphalt driveway and automotive equipment. Whatever amount is so regarded shall be deemed to be the proceeds of the disposition of its depreciable property within the meaning of s. 20(1) of the Act.

If one should rely entirely on the documentary evidence produced and particularly Schedule "A" to Ex. 3, which was signed by Mr. Payne, the appellant's principal shareholder, the portion of the price attributable to each group of assets would have been conclusively determined by the arm's length agreement of the parties.

There is no doubt that ordinarily, the price of an asset arrived at by *bona fide* negotiations at arm's length in a commercial transaction should establish the value of that asset at that time and place.

However, as we have seen, the evidence discloses that in the present instance although values appear opposite all of the depreciated assets of the appellant they had not been agreed between the parties as establishing the value of the said assets. These values would, therefore, under the circumstances, be open for determination under s. 20(6)(g) of the *Income Tax Act* which, as we have seen, specifically states that: "the part of the amount that can *reasonably* be regarded as being the consideration for such

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disposition *shall* be deemed to be the proceeds of disposition of depreciable property of that class irrespective of the *form* or *legal* effect of the contract or agreement;".

The above rule appears to be mandatory and would apply to any case where a disposal of depreciable property occurs. It also, in my opinion, would have the effect of permitting evidence with respect to the reasonableness of the consideration for such depreciated property to be adduced notwithstanding the ordinary rules of evidence which, as suggested by counsel for the respondent, might apply here to prevent contradiction by oral evidence of the terms of a written document and this would be especially so in a case such as we have here where the purchaser and the appellant, as we have seen, were never *"ad idem"* concerning the valuation of assets of the business for the purpose of the sale of assets.

The only matter, therefore, remaining is to examine the amounts set down in Schedule "A" of Ex. 3 for the appellant's fixed assets and determine if, in view of the evidence presented, they can be reasonably regarded as being the consideration for such disposition, which, or course, is a question of fact to be determined by examination of the peculiar features applicable to each case.

Because of the reciprocal effect on purchaser and vendor of any such finding here I am prepared to accept, as suggested by counsel for the respondent, that the matter should be considered from the viewpoint of the purchaser as well as from the viewpoint of the vendor.

There is also no question that if the purchaser and vendor acting at arm's length, reach a mutual decision as to apportionment of price against various assets which appear to be reasonable under the circumstances, they should be accepted by the taxation authority as accurate and they should be binding on both parties.

However, in the present instance, the consideration for the fixed assets as set down in the reassessment of the respondent appears to me to be most unreasonable for the following reasons. In the first place, the mere fact that the purchaser here was prepared to pay $200,000 for the shares of the appellant company, and therefore take over the company with its fixed depreciated assets as they were at that time, indicates that he had then implicitly assumed that a certain amount was carried in the $200,000 for goodwill. Indeed, the incidence of income tax upon the purchaser in such a case would, I believe, indicate that he was prepared to pay a high price for goodwill or for the right to future profits and that he expected the continuation of such profits for a long period.

The appellant urges that the only yardstick to apply in determining what "can reasonably be regarded" as being the consideration for disposition of depreciable assets is their "fair market value."

This, in my opinion, as pointed out by counsel for the respondent, is not so and the fact that in five of the subsections of s. 20(6) which precedes s-s. (*g*), the term "fair market value" is used and that it is not used in s-s. (*g*) (where the term "can reasonably be regarded" is used) is a clear indication that it was not intended by Parliament to be the standard to be used in applying s-s. (*g*).

Indeed, the consideration given and received for the disposition of depreciable property may, but need not, necessarily coincide with "fair market value".

In some cases the consideration may be less or more than fair market value according to the surrounding circumstances and the differing reasons which may have activated the buyer or the seller but in all cases, under s. 20(6)(*g*) of the Act, the consideration must be reasonable.

Before dealing with the apportionment of the sale price in accordance with Schedule "A" of Ex. 3, the matter of goodwill should now be examined. As stated by Lord MacNaughton in *Commissioners of Inland Revenue v. Muller Limited*[1] goodwill is a thing very easily described but very difficult to define. He however defined goodwill by embracing the elements which are the sources of goodwill.

His definition was:

> Goodwill is the benefit and advantage of a good name, reputation and connection of a business. It is the attractive force which brings in customers. It is the one thing which distinguishes a well established business from a new business at its first start . . . Goodwill is composed of a variety of elements. It differs in its composition in different trades and on different bases in the same trade. One element may preponderate here and another there.

[1] [1901] A.C. 217.

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Other factors to be considered are good relations with employees, favourable commercial contracts, franchises, good financial relationships and finally good management. All these advantages are interrelated and form a composite which will assist in estimating the value of goodwill in a business.

It is then necessary to examine a number of things such as the profits over a selected number of past years, placing a value on net tangible assets used in the business as a going concern, determining a normal rate of return which an investor in a business would receive on his capital, estimating the possible duration of the profits from the business.

The evidence of Mr. David York Timbrell, a chartered accountant called on behalf of the appellant, establishes that the latter's business had a substantial value in view of the considerable and constant income earned by the taxpayer in the last five years preceding March of 1956. Its net profit after proper deductions of capital allowances for the following years is as hereunder set down:

1952	for twelve months	$36,241.31
1953	for twelve months	$27,451.54
1954	for twelve months	$31,408 66
1955	for twelve months	$26,989.98
1956	for a three month period ending March 31, 1956	$22,332.71

Further evidence of the substantial value of goodwill in this transaction can be found in the fact that the purchaser, according to the evidence of Mr. Brown, an officer of Canada Packers Limited, the main customer of the appellant company, called him before the transaction was entered into and asked for and received Mr. Brown's assurance that the appellant's business with Canada Packers Limited would continue.

There is also additional evidence of the value of the goodwill here in the fact that the P.C.V. licence owned by the appellant under which it carried on its trucking business had a value of $35,000 as indicated by the evidence of the purchaser himself who placed the value upon that licence for the purpose of the sale by him to his private corporation of the business purchased in March 1956. Mr. Black, the purchaser's accountant, stated that as Mr. Paxton was receiving shares for the above value in his own corporation where he already owned practically all the shares, this value is not too significant. It may well be that the value here was blown up but it would still seem that this trucking licence had some value which, in my opinion should be added to the figure one would obtain based on the appellant's past earning record and the possible duration of its profits.

I might also add that the purchaser's requirement that Mr. Payne, the appellant's main shareholder, should enter into a covenant not to compete in the trucking business for five years, that he should assist in arranging for the transfer of the P.C.V. licence and that the appellant company should consent to the use of its name by a company to be formed by the purchaser to carry on the business acquired, all indicated in some measure the value of the goodwill of this business.

On the basis of the above evidence and taking into consideration values to be attributed to the fixed assets of the appellant company which I have already done, which values I will shortly deal with individually, I consider that an evaluation of $50,000 for the goodwill of appellant's business, inclusive of its trucking licence, would be most reasonable.

The question now to be determined is whether the apportionment of the sale price in accordance with Schedule "A" of Ex. 3 was, under the circumstances, reasonable. In order to do so, I shall follow the order in which the depreciation items appear on Schedule "A".

The first item is land and concrete block garage and I shall also include here the asphalt driveway.

The appellant, as we have seen, admits that $5,115.05 should be included in computing its income for the 1956 taxation year, representing recaptured capital cost allowance on this garage and adds that the difference between original cost, as shown by Ex. 2, and the value of $78,000 (of which $66,067.06 for buildings and $12,357 for land) ascribed to the garage and land by Messrs. Sands and Saxby, its expert evaluators, was a capital receipt.

The value ascribed to the garage and land by respondent's evaluators, Oliver Roberts, Carter & Company, is $44,000 and the difference between the parties with respect to the evaluation of the land and buildings becomes significant only because the apportionment of a large

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portion of the price to real estate would leave less available for the apportionment to other assets. It would, therefore, be of some assistance to establish the value of the land and buildings.

The property is located on the north side of Romaine Street, in the City of Peterborough, and is surrounded by a multiple housing area. It is within easy access to a number of factories. The property with a frontage of 139.36 feet on Romaine Street by a depth of 231 feet, contains a total of 32,192 square feet. It is as a trucking terminal a non-conforming user as it is now situated in a multiple residence area. Originally, this property was in many smaller parts and has been assembled since the year 1936 to 1953. It was improved by the building of a cement block trucking terminal which was completed in the latter part of 1954. There is room within the terminal to store approximately thirty-five trucks. In addition to this truck terminal, a portion of the yard is paved. It contains a total building area of 12,800 square feet of which 400 square feet are in office rooms and 293 square feet in furnace and stock rooms the balance being entirely free for all purposes of truck storage. There is also a one and a half storey frame house on the land.

Messrs. Sands and Saxby, real estate agents and appraisers, established the value of the garage and land at $78,000. Both of these gentlemen are experienced professional valuers with knowledge of local conditions and Mr. Saxby had, in addition, considerable experience in the construction business. On the other hand, respondent's valuer, Mr. Richard Roberts, who valued the land and buildings at $44,000, admitting to no experience in the construction of buildings, made an error of several dollars per square foot when comparing the cost of the Bell Telephone building with appellant's garage.

Mr. Payne testified that in the original negotiations with Mr. Paxton, he valued the garage at $75,000 out of a price of $250,000 and that when the prospective purchaser suggested that the price was a little high, Mr. Payne admitted that one thing he was high on was the price put on the garage.

Cf. p. 69 of the transcript:

Q. 1 You didn't take anything for goodwill?

A. No, my goodwill I said was worth $100,000. I still held out for my goodwill.

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Q. 2 When did you decide that?

A. All the time. I said first of all as I said when I first started to talk it was $100,000 goodwill and when the agreement came along that I reduced, I reduced the garage $25,000 which made it $50,000. Well then when we got the final figure $200,000, in my own mind I said I would forget the refrigeration units and I left it at the garage at the $50,000, the rolling stock at $50,000 and $100,000 goodwill is the way I sold as far as I was concerned.

In view of Mr. Payne's own estimate of the garage at $50,000 and the evidence adduced by the evaluators, I do feel that this amount of $50,000 is the one that should be adopted as a reasonable consideration for the garage and house of the appellant. With respect to the land, bearing in mind the comparable land sales, I do feel that the average of thirty cents a square foot is a reasonable basis and would therefore give a total for 32,192 square feet of $9,657. I also find that the 1,200 square yards at $2.25 a square yard, which is the cost of the paved surface, is also a reasonable consideration for same at $2,700.

The evidence discloses that other tangible assets such as the following were old and partially obsolete and on that basis I believe that a reasonable consideration for these items would be as follows:

Lights and light fixtures	$1,425.00
Machinery and equipment	593.00
Furniture and fixtures	418.70

We shall now deal with the eight refrigeration units which appear on Schedule "A" at $15,960 but which the appellant has estimated at $6,400.

Mr. Payne admitted that these units were originally acquired by the appellant company at bargain prices because the distributor was anxious to break the ice in opening a market for the product. He testified that he valued these units at $25,000 in negotiations with Mr. Paxton and he had $24,400 insurance on them. He however explains his value of $25,000 at p. 69 of the transcript:

His Lordship: I don't see how your mind was working. In the Fall of '55 you put a value in your mind of $25,000 on those refrigeration units and six months later in '56 you just cleaned the slate. They had no value at all in your mind.

A. Well, My Lord, they had been used for a number of years and they were getting where they should be maybe replaced and that exactly I just let the refrigerations go that was all.

His Lordship: Yes but in '55 they weren't going. They were worth $25,000 in your mind.

A. Yes.

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His Lordship: That is why I have difficulty in following you.

A. That is where I draw my figure to get my price up to the $250,000. I figured he was going to try to chisel me down some place.

Q. You were trying to get the highest price and he was trying to get the lowest?

A. Well I left myself there that I could come down.

Mr. David Grinstead, an employee of the Freehaul Trailer Co., on the basis that these units were six or seven years old and were of the smaller size would have allowed between $800 and $1,000 per unit if they were in good working condition. He admits, however, that his company would have done everything in 1956 to get out of taking the equipment in because of the limited market at the time. This no doubt must have unduly influenced this witness, a salesman, who would bear in mind the possibility that the appellant may want to turn in these units for a trade-in. For the purchaser, however, these units together had a substantial value in excess, I believe, of their market value. One thousand two hundred dollars per unit would, in my estimation, be a reasonable consideration in the circumstances, which for eight units would total $9,600.

We have now reached the automotive equipment which appears on Schedule "A" of Ex. 3 in an amount of $149,790.78 and which the appellant has estimated at $37,500.

The amount of $149,790.78 was the original cost of this equipment which was purchased between 1948 and 1955.

Mr. Grinstead evaluated in 1956, fourteen trailers at $27,800 as it appears from his letter dated February 1956 (Ex. 11) after, however, examining only 50 per cent of them.

This amount of $27,800 was what his company Freehaul would have been willing to pay for these vehicles on a trade-in. He testified that although he could not recall the exact state of the used trailer market in 1956, he would say that he would be able to buy quite a few of these trailers at approximately the prices he mentioned above in used trailer markets in Ontario at the time.

Mr. James Wilson, a garage operator, also sold cars and trucks, new and used, in Lindsay, Ontario. During the winter of 1955 and 1956 he inspected the trucks and tractors owned by the appellant company and made an appraisal on them upon Mr. Payne's request in February 1956 which appears in a letter dated February 16, 1956 (Ex. 12). His appraisal of these units totals $19,275. The total amount of the trucks and trailers would, according to both Mr. Wilson and Mr. Grinstead, total $47,075.

This in my opinion is far below a reasonable consideration for these units. Here again both of these witnesses are salesmen who would try to whittle down the trade-in price to a minimum and I believe this is what they did. Furthermore, I believe, as urged by counsel for the respondent, that this equipment available in a group such as here definitely had an enhanced value beyond what the individual items might have sold for individually on the market, because of the utility of this equipment as a unit in enabling the purchaser to carry on with them a very profitable business with no delays or interruptions.

On that basis, I would think that the balance remaining of $75,606.30 after deducting the value of the goodwill as determined above and the other fixed assets would in the circumstances be a reasonable consideration for the automotive equipment.

I therefore find that the amounts set out hereunder with respect to the following items are those that can reasonably be regarded as being the consideration for the disposition of those assets within the meaning of s. 20(1) of the *Income Tax Act:*

Goodwill	$ 50,000.00
Land	9,657.00
Concrete block garage and house	50,000.00
Lights and light fixtures	1,425.00
Machinery and equipment	593.00
Furniture and fixtures	418.70
Refrigeration units	9,600.00
Asphalt driveway	2,700.00
Automotive equipment	75,606.30
	$200,000.00

Accordingly, the appeal will be allowed and the matter referred back to the Minister to reassess the appellant in accordance with my findings with the addition of $4,163.60 as the proceeds of sale of inventory and the agreement reached by the parties as to the amount of $5,181.49 added as mortgage and loan interest.

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I have considered the question of cost and have reached the conclusion that in the circumstances of this appeal, one half of its taxable cost only should be awarded to the appellant. While it has succeeded in having its 1956 assessment reduced somewhat, it is mainly responsible for the position taken by the respondent in assessing it as he did by allowing Schedule "A" of Ex. 3 to form part of the sale document of its assets with an apportionment of the various items of its fixed assets based on original cost and a very substantial part of the time of this hearing was occupied in taking evidence with respect to that document.

I am satisfied that if this had not been done a considerable part of the dispute would not have arisen.

Judgment accordingly.

1963 Mar. 4

1963 Mar. 4

ONTARIO ADMIRALTY DISTRICT

BETWEEN:

BILTMORE HATS LIMITED ....PLAINTIFF,

AND

CANADIAN PACIFIC RAILWAY COMPANY, CANADIAN PACIFIC STEAMSHIPS LIMITED, MARCH SHIPPING AGENCY LIMITED AND ZIM ISRAEL NAVIGATION COMPANY LIMITED ..DEFENDANTS.

Shipping—Admiralty—Practice—Misjoinder of Party—Order adding defendant set aside.

Held: That no person in whose favour the limitation period has run should be added as a defendant to an action.

APPLICATION to have order adding defendant set aside.

The application was heard before Mr. A. S. Marriott, Q.C., Surrogate Judge in Admiralty at Toronto.

D. L. D. Beard for plaintiff.

J. A. Bradshaw for defendant Zim Israel Navigation Company Limited.

G. C. Butterill for defendants Canadian Pacific Railway Company and Canadian Pacific Steamships Limited.

Per MARRIOTT, Q.C., Surrogate Judge in Admiralty:

This is an application by the defendant Zim Israel Navigation Company Ltd., hereinafter referred to as Zim for an order setting aside the order made by me on the 8th day of June, 1962, adding the said defendant as a party to this action on the ground that at the time the said order was made the time within which an action could properly be brought against the said defendant had expired.

The cause of action arose through the alleged failure of the defendants or one of them to deliver at the end of July, 1960 a quantity of hat fur shipped from Spain and consigned to the plaintiff at Guelph, Ontario. When the goods were eventually delivered in October of that year the plaintiff had already purchased fur from other sources necessary for its fall business and rejected the goods in question. It then commenced this action on the 11th of July, 1961 claiming damages resulting from the alleged breach of contract and making as defendants in the first place Canadian Pacific Railway Company, Canadian Pacific Steamships Limited and March Shipping Agency Limited. From the statements of defence delivered by those defendants the plaintiff concluded that the applicant and others should be added as defendants and the order in question was made *ex parte* as against them. To summarize, the cause of action arose at the end of July 1960; the action was commenced July 11th, 1961 and the order in question made on 8th of June, 1962.

I understand it is agreed that pursuant to the terms of the bills of lading which incorporate the Hague Rules, that the statutory period of limitation applies, which for convenient reference are set out in Section 6 of Article III of *English Carriage of Goods by Sea Act,* (1924), to be found in Carver's Carriage of Goods by Sea 10th ed. p. 191. It is 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.

The chief ground relied on as a defence to this application is that a fair and proper interpretation of the wording of this section is that the carrier can be properly added as a defendant so long as an action has been commenced

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against somebody for the same relief within one year after the date the goods should have been delivered. It is sought to obtain support for this interpretation by pointing out that the wording of the limitation section does not read "unless suit is brought *against them* within etc."; the implication being that there is no limitation period against the carrier or ship so long as an action has been brought against someone within the limitation period.

Having regard to the fact that the purpose of the section is to provide a limitation period within which an action against a carrier or ship must be brought I think that on the face of it, it is beyond question that the limitation period could only apply to an action brought against a carrier or ship and not against somebody else. It was applied in this sense in *Jensen v. Matsen Navigation Co. et al.*[1]. While it is true that some statutory limitation periods are framed more directly, as for example, s. 10(1) of the *Public Authorities Protection Act,* R.S.O. 1960 c. 318, others such as s. 43 of *The Medical Act,* R.S.O. 1960 c. 234 are framed in somewhat the same language as the section in question here, and I think there can be no question that the relevant date for commencement of the action would be when it was commenced against the person entitled to the benefit of the limitation period.

It is further contended by counsel for the plaintiff that the goods having eventually been delivered in Ontario that it would not have been reasonable for it to sue the owner of the ship in the first place. However, it seems to me that in such cases before all the facts are known the plaintiff should consider all persons against whom it has any possible claim for relief and should make them all parties. From the bills of lading it knew that the goods were carried on the ship *Shomrow* and there is of course no difficulty in obtaining information as to the owner of the ship from Lloyd's Register of Shipping. That the plaintiff knew this appears clear from paragraph 10 of the affidavit filed in support of the application for the order in question. Furthermore, the action was not commenced until about two weeks prior to the expiration of the limitation period, and therefore no margin was left within which to correct the proceedings. See *Davies v. Elsby Brothers Ltd.*[2].

[1] 70 F. Supp. 1020.

[2] [1961] 1 W.L.R. 170.

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Another point raised by counsel for the plaintiff was that under the circumstances of this case there is a legal question as to who the shipper is and whether or not this particular owner, the defendant Zim, entered into a contract or carriage with the shipper to qualify it as a carrier. However, that may be it is to be noted that the plaintiff has as one alternative sued the defendant Zim as owner of the *S.S. Shomrow* and thus appear to claim relief against Zim as the carrier within the meaning of the statute.

Having then found that the defendant is entitled to rely on the limitation section as a defence it follows as being the well-settled practice that the Court should not add a person as a defendant in whose favour the limitation period has run; *Lattimor v. Heap*[1]; see also the other cases cited in the Ontario Annual Practice (1963) p. 171. That it is the appropriate and recognized practice in Admiralty actions to strike out the addition of a party in such circumstances is clear from the decision of the United States Federal Court in *Jensen v. Matsen Navigation Co. et al.* (*supra*), a case almost on all fours with this.

Originally the application was to have been brought before the District Judge in Admiralty but as he was not available, on consent I heard the application, and also as I made the original order I am setting aside an order made by myself which I think I have power to do in any event under Rule 89.

In the result an order will go setting aside the order adding Zim Israel Navigation Company Ltd. as a party defendant. No order as to costs.

These reasons replace those issued on February 26, 1963.

Order accordingly.

[1] [1940] O.W.N. 580.

1960 Jun. 1 — 1963 Mar. 28

BETWEEN:

RICHARD K. WURTELE, EDWIN A. JARRETT and THE ROYAL TRUST COMPANY, Executors under the will of CHARLES WURTELE, deceased . . APPELLANTS;

AND

THE MINISTER OF NATIONAL REVENUE . . . . RESPONDENT.

Revenue—Succession duties—Dominion Succession Duty Act R.S.C. 1952, c. 89, ss. 3(1)(f)(g)(h)—Life insurance policies proceeds—Policies placed in trust pursuant to separation agreement and leisury settlement—Income interest to wife at death of insured husband—Capital to children at death of wife—Whether a disposition for succession duty purposes—"Successions"—"Donees"—Appeal allowed.

The deceased husband, prior to 1930, took out seven policies of insurance on his life, with his wife named as sole beneficiary. In that year his wife sued him for alimony and obtained a judgment directing a reference to the Local Master to fix the amounts. He also drew up a settlement which was found to be invalid as being a step taken by him without authority. In 1938 a valid settlement was arrived at. It provided that the policies were irrevocably transferred to trustees on these trusts: on the death of the insured husband to pay to the wife a lump sum of $20,000 plus the net income from the balance for her lifetime, after investment of the proceeds, and on her death to pay the entire remaining sum to the children of the marriage. The husband retained the right to borrow on the policies to the extent of $30,000 for business purposes, such loans to be repaid; he also convenanted to pay the premiums, to not change beneficiaries and not allow the policies to lapse. The agreement recited that the assured was doing all this "for valuable consideration".

The husband died in 1957. His wife and children survived him. The trustees paid the wife the $20,000 and held the balance on the aforementioned trusts. The Minister levied succession duty under the *Dominion Succession Duty Act* upon the amount of the fund held for the children contending that their interests in the proceeds of the insurance policies came to them as "successions" and dutiable accordingly. On appeal to this Court the appellants contended that the children were not "donees" and that their interests arose out of a transaction in which valuable consideration had been given.

Held: That the appeal be allowed.

2. That the proceeds of the insurance policies held for the children are not dutiable.

3. That valuable consideration had been given by the widow in the covenant under which the trust was effected and that the interests of the children, arising in 1938 under the trust, did not come to them by way of a donation or gift.

4. That the proceeds of the policies could not be held dutiable under s. 3(1)(*f*) of the Act as the property in question did not pass to the children on the death of the father but only on the death of the mother.

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5. That the insurance monies were not within the words of s. (1)(*g*) as "any annuity or other interest purchased or provided by the deceased".
6. That the entire history of the matter from the beginning of the disputes between the husband and wife and the action at law against the husband to the settlement agreement reached in 1938 showed that the wife had in reality renounced her future or alternative benefits from her husband's property and income and the reservation of a right to borrow on the policies by the husband, all showed that the transaction was made for hard consideration and at arm's length and not as a donation to the children, and that the policies had not been kept up "for the benefit of any existing or future donee" as provided in s. 3(1)(*h*) of the Act.

APPEAL under the *Succession Duty Act.*

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

John DesBrisay for appellants.

Terence Sheard, Q.C. and *F. J. Cross* for respondent.

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

DUMOULIN J. now (March 28, 1963) delivered the following judgment:

The matter hereunder decided, a succession duty case, heard in Toronto, on 1st of June, 1960, by the late Mr. Justice Fournier, was referred to me for adjudication by the President of this Court, pursuant to the parties' written consent, filed on December 17, 1962.

One Charles Wurtele, late of the City of Victoria, B.C., died "on or about the 12th day of October, 1957, having duly made his Last Will and Testament, Probate whereof was issued out of the Victoria Registry Office of the Supreme Court of British Columbia on the 9th day of January, 1958, to the Appellants as the Executors therein named".

"By assessment dated the 23rd day of July, 1958, succession duties in the amount of $65,789.88 were levied by the Respondent in respect of the dispositions of the Will and Estate of the deceased and this sum included duty levied in respect of a part of the proceeds of certain policies of insurance on the life of the deceased, which part was valued by the Respondent at $49,062.67 and was payable to the Royal Trust Company and Richard K.

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Wurtele as Trustees to be held in trust for children of the deceased..." (Statement of Claim, para. 2).

The seven life insurance policies, maturing at the Insured's demise, were taken out by him prior to 1930, with as sole beneficiary his wife, Lily Wurtele.

Paragraph 6 of the Statement of Claim next explains that:

> 6. In the year 1930 Lily Wurtele instituted in The Supreme Court of Ontario proceedings against the deceased for alimony and by Judgment of that Court dated the 13th day of April, 1931, it was declared that she was entitled to alimony and a Reference was directed to the Local Master of The Supreme Court at Goderich to ascertain and fix a proper allowance to be paid her. (cf. exhibit 1, para. 2).

Implementation of the judgment for alimony in favour of the aforesaid plaintiff, Mrs. Lily Wurtele, "...during the lifetime of the parties and so long as the plaintiff shall live separate and apart from the Defendant..." (exhibit 1, para. 4), was delayed until September 16, 1932, when the Local Master of the Court, after stipulating a monthly payment of $600.00 to the wife, purported to draw up a settlement deal "...in connection with the existing insurance policies upon the life of the Defendant. . ." (cf. exhibit 2, paras. 3 & 4). Presumably, the Court Official, in exceeding thus the authority imparted to him by Mr. Justice Wright's directives of April 13, 1931, assumed he was empowered so to do by the joint consent of the solicitors mentioned in exhibit 2.

Some six years later, on June 29, 1938, this estranged couple duly assented to a covenant (exhibit 3) appointing as Trustee the Royal Trust Company and a son, Richard K. Wurtele, and witnessing, *inter alia*, that:

> . . . in consideration of the premises and of *valuable consideration* (emphasis is mine throughout these notes) the Insured (Charles Wurtele) and the Party of the Second Part (Lily Wurtele) agree that the proceeds of the said policies shall be held by the Trustee and they hereby *irrevocably direct the Trustee to hold the said proceeds* when received by it on the following trusts, namely:
>
> 1. In the event of the death of the Insured in the lifetime of the Party of the Second Part, to pay to the Party of the Second Part out of the proceeds of the said policies when received by the Trustee the sum of Twenty Thousand Dollars ($20,000.00) for her own use absolutely and to invest and keep invested the corpus of the balance of the proceeds of the said policies (the said corpus being hereafter referred to as the "Trust Estate") and to pay the net annual income derived from the Trust Estate to the Party of the Second Part (at least once every three months) during her lifetime for her sole use and benefit without power

of anticipation and upon the death of the Party of the Second Part and subject as hereinafter provided to pay the said Trust Estate and any accrued and unpaid income derived therefrom in one sum to Richard K. Wurtele and Anna Lloyd Wurtele, children of the Insured and the Party of the Second Part share and share alike or to the survivor.

There next follow the customary dispositions of this Trust Estate in the eventualities of predecease of either of the relatives concerned, with or without issue.

Clause 5 of the covenant provides for the eventual borrowing "on the security of the said policies...for the benefit of the Goderich Salt Company Limited only (obviously the Insured's business), sums not exceeding in the aggregate the sum of Thirty Thousand Dollars ($30,000.00)...".

Clauses 6 and 8 put on record that:

6. The Insured hereby covenants and agrees with the Party of the Second Part and the Trustee *to pay all premiums on the said policies and the principal of and interest on any amounts borrowed by him as aforesaid* as and when the same become due and payable respectively, provided, in the event of default of payment by the Insured of the said premiums and the said principal and interest, the Trustee shall not be bound to pay the said premiums and the said principal and interest.

7. . . .

8. The Insured will not, by his will or otherwise, make any change in the beneficiary of said policies or any of them except as hereinbefore provided, will not surrender the said policies or any of them for the cash surrender values thereof, will not permit the said policies or any of them to lapse and will not . . . so deal with the said policies or any of them that the full amount of the proceeds thereof shall not be payable to the Trustee on the death of the Insured . . .

Furthermore, clause 9 enforces upon the Insured the usual delivery of the policies to the Trustee who will retain possession of them.

Since the transactional settlement, exhibit 3, legally entered into by Charles Wurtele and his consort, cannot be seriously challenged, no more need be said about that most dubious Court Report of September, 1922 (exhibit 2), insofar as it attempts to deal with matters dehors the judicial instructions contained in exhibit 1.

When Wurtele died, October 12, 1957, he was survived by his wife, (still alive as this case came up for hearing, June 1, 1960) and his two children. The insurance moneys were paid to the Trustees who, thereupon proceeded to pay $20,000.00 to the widow and are now holding the remainder in accordance with the mandatory terms of the

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Trust deal. The Respondent's claim to a $49,062.67 succession duty tax, a decision affirmed by him under Section 38 of the *Dominion Succession Duty Act* (R.S.C. 1952, ch. 89), is succintly formulated in paragraph 6 of the Statement of Defence, thus:

> 6. . . . The interest of Richard K. Wurtele and Anna Lloyd Wurtele in the money received under the policies of insurance on the life of the said deceased came to them as successors by a Succession from the deceased as predecessor within the meaning of Sections 3(1)(*g*), 3(1)(*f*) and 3(1)(*h*) of the Succession Duty Act, Revised Statutes of Canada, 1952, Chapter 89 and amendments thereto.

To this enunciation of fact and law the Appellants retort as follows in paragraph 13 of their Statement of Claim:

> 13. The said remainder of the proceeds of the policies of insurance (deduction made of $20,000.00 paid outright to Mrs. Wurtele) is not dutiable under the provisions of Section 3(1)(*h*) for the following reasons:
> (*a*) the children are not "donees" within the meaning of the said Section;
> (*b*) the assignment of the said proceeds for the benefit of the children was made for valuable consideration moving to the deceased;
> (*c*) the policies of insurance were kept up by the deceased for his own benefit pursuant to an obligation imposed on him by law and were not therefore kept up for the benefit of an existing or future donee;
> (*d*) the children did not and will not receive any money under a policy of insurance. All proceeds of the aforesaid policies of insurance were payable to Trustees.

A careful and protracted probing of this moot question leads the Court to believe that one section only of the Act, more precisely Section 3 (1) and its s-s (*h*) should provide the required solution. The latter text enacts that:

> 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 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.

The doctrine of the stringent word for word applicability of fiscal statutes is so well known as to defy repetition. Conformably then to these dictates of the law, and since the text above clearly foresees something in the nature of a gift or donation, let us look into the transaction and inquire whether or not it evinces the distinguishing traits of benevolence, free and spontaneous. In order to do this, one must step back many years to 1930, when Mrs. Lily Wurtele, reproaching her husband with grievous moral delinquencies, sued him for alimony (cf. exhibit 4), and set up her own establishment after recovery of a consent judgment before the Supreme Court of Ontario (cf. exhibit 1). When this conjugal rift occurred, Mrs. Wurtele, according to an averment found in the opening paragraph of exhibit 3, had been previously designated as the beneficiary of the seven insurance policies taken out by her husband on his life. We have seen, *supra*, the essential changes effected regarding those policies and that for "...*valuable consideration* the Insured and the Party of the Second Part agree that the proceeds of the said policies shall be held by the Trustee and they (the estranged couple) hereby irrevocably direct the Trustee to hold the said proceeds when received by it on the following trusts", etc.

Unquestionably we are confronted, in this bickering separation deal, with an arms' length transaction, if ever there was one, wherein nothing was given, but everything contentiously liquidated in the bitter atmosphere of matrimonial wreckage. Alarmed, and justifiably so, at the possible loss of her rights as original beneficiary, not to mention her children's expectations, Mrs. Wurtele bartered those rights against a $20,000 payment upon the Insured's demise, the receipt during her lifetime of the net annual income derived from the remainder or Trust Estate, then, as a devoted mother, she *stipulated* the devolution to her son and daughter, at her death, of the Trust Estate accruing from the insurance fund. A tacit renunciation to ulterior benefits of her husband's property, beyond the terms of the deed (exhibit 3), was another "valuable consideration" paid out, if I may say so, by Mrs. Wurtele. This understanding of the prompting motives and circumstances of the separation agreement, although unwritten, is clear to anyone possessed of professional experience in that melancholy order of things. Moreover, Charles Wurtele

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contracted the formal obligation of keeping in force the insurance policies, waived all possibility of their surrender or of any substitution of beneficiaries, which expression designates the Trusteeship set up in the transactional covenant exhibit 3.

Also, it will be remembered that this same man reserved a borrowing power of $30,000 for his company, Goderich Salt, "on the security of said policies". In the light of each and every pertinent fact it can hardly be held that the insured's children will truly receive "under a policy of insurance effected by any person on his life...since their right to the Trust Estate arose in 1938, nineteen years before the father's death, and will materialize only when their mother passes on. And it can no more be successfully argued that these policies were *wholly kept up* by Wurtele "for the benefit of any existing or future donee". Here again this condition is defeated by the retention of a borrowing provision and other above mentioned dealings.

I would therefore admit as sound the Appellant's submission that "...the policies were kept up by the wife, by Mrs. Wurtele..." who might have legal recourse for the enforcement of her husband's categorical promises, which from June 29, 1938, he was powerless to alter, vary or revoke.

The definitions attempted by authoritative lexicons do not tally with the word "donee" of subsection (*h*) of section 3(1), nor with the notion of "gift" thereby conveyed. In the Shorter Oxford Dictionary "donee" is defined as:

"One to whom anything is given especially in law", and further down: "One to whom anything is given gratuitously".

Jowett's Dictionary of English Law suggests this definition of "donee":

"One to whom a *gift* is made".

Next, the Shorter Oxford Dictionary in turn defines "gift" as:

"A transfer of property in a thing *voluntarily and without any valuable consideration*".

Black's Law Dictionary, 4th ed. 1951, lends additional emphasis on the voluntary and gratuitous characteristics of a gift, I quote:

Gift: "A voluntary transfer of personal property without consideration. A parting by owner with property *without pecuniary consideration. A voluntary conveyance* of land, or *transfer of goods,* from one person to another, *made gratuitously,* and not upon any consideration of blood or money".

In the Court's view none of these essential factors qualify the *ab irato* separation settlement reached by the quarrelling couple.

Several English precedents were cited, mainly by Appellant's counsel, among which that of *D'Avigor-Goldsmid v. Inland Revenue Commissioners*[1] offers some worthwhile similitude. The reported facts read as hereunder:

By a marriage settlement, made in 1907, a settlor settled a policy on his life for 30,000 £ with profits, dated May 3, 1904. On June 10, 1930, a resettlement of the policy was made by the settlor and his eldest son under joint powers of appointment. On November 10, 1934, the settlor and the son, under a joint power of appointment conferred by the resettlement, appointed the policy and other settled property, known as No. 27 Wood Street, London, to the son absolutely. From the date of that appointment the premiums previously paid by the deceased were paid by the son, but to the extent of the income from No. 27 Wood Street, premiums so paid were by s. 30 of the Finance Act, 1939, attributed to the deceased. The settlor died in 1940, and the son received under the policy the sum of 48,765 £. The Estate Duty Office claimed to be entitled to charge duty, alternatively under paras. (*c*) and (*d*) of s. 2, subs-s. 1 of the Finance Act, 1894, and a summons was taken out by the son to have determined whether estate duty was payable as claimed by the Inland Revenue Commissioners.

The judgment of the Court was read by Evershed, Master of Rolls, who, *inter alia,* said that:

. . . In this court Mr. Tucker sought to sustain the judgment of Vaisey, J., on this part of the case, by taking a point not taken in the court below, namely, that, assuming in favour of the Crown that the plaintiff's right to the policy moneys was referable to the settlement of 1907, nevertheless he was not a "donee" within the relevant paragraph of the section, since the settlement was made on the marriage of the deceased, and the plaintiff as a child of such marriage, was within the marriage consideration; and this point became the main issue on the claim to charge under s. 2, sub-s. 1 (*c*). As we have stated, it appeared possible that the argument for the view that the settlement of 1907 had been superseded by the resettlement of 1930 might be adopted by Mr. Upjohn as an alternative to his main submission; since on that hypothesis he could say that the relevant disposition, being post-nuptial, was without

[1] [1951] L.R., Ch. D. 1038 at 1039, 1052.

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consideration. But Mr. Upjohn expressly disclaimed the argument and was content that his claim under s. 2, sub-s. 1(*c*) should stand or fall on the basis that the plaintiff's right to the policy moneys was referable to the settlement of 1907. The issue being so defined, we have come to the conclusion . . . that Mr. Tucker's new argument is well founded and should defeat the claim to charge under s. 2, sub-s. 1(*c*).

The explanation follows that:

> Marriage settlements, no less than marriage articles, have always been treated as made for good consideration so that not only the spouses but also the issue of the marriage (as being within the "marriage consideration") can enforce them.

Needless to say an abyss yawns between a marriage contract and a separation settlement, but this long quotation stresses the impossibility of a donation or gift ever flowing from a transactional covenant for *valuable consideration*. In a marriage settlement such good or valuable consideration enjoys the irrebuttable presumption of the law; elsewhere it must be proved as in the instance at bar.

In order to complete this exhaustive perusal, I might point out the irrelevancy of s. 3(1), sub-s. (*f*) concerned merely, and such is not the case actually, with:

> (*f*) Property passing to a beneficiary upon or in consequence of *the death of the deceased* . . . .

The property involved here will pass on to the Wurtele children from the Trust Estate on the death of their mother.

Sub-section (*g*) is also of no relevancy as the insurance moneys cannot adequately be likened to "any annuity or other interest purchased or provided by the deceased...".

For the reasons outlined this Court doth adjudge and decide:

1) That, in the present phase of the case, it has no jurisdiction to make any pronouncement in relation with paragraph (*b*), article 15 of the Appellants' claim;

2) that the Appellants' appeal on the remainder should be allowed, and the value of the said estate for succession duty purposes be reduced by the sum of $49,062.67, as claimed in paragraph (*a*) of article 15.

The Appellants will recover their taxable costs.

Judgment accordingly.

BETWEEN: 1963 Mar. 4 — Mar. 15

W. B. ELLIOTT .... APPELLANT;

AND

DEPUTY MINISTER OF NATIONAL REVENUE, CUSTOMS AND EXCISE .... RESPONDENT.

Revenue—Customs and Excise—Goods subject to duty—Reloading tool shipped in U.S.A.—Duty—Jurisdiction of Tariff Board—Customs Act R.S.C. 1952, c. 58, s. 45 and s. 44 as enacted by S. of C. 1958, c. 56, s. 2—Customs Tariff Act R.S.C. 1952, c. 60, s. 35(2)(3)—Appeal dismissed and cross-appeal allowed.

Appellant, a resident of Ontario, received a tool designed to reload used cartridge shells, in Niagara Falls, New York State, whence he imported it into Canada. The article was shipped to appellant, charges of $5.59 prepaid, by a firm in California, U.S.A. As a method of advertising the California firm gave away each year as free samples, several of these tools and shipped them, charges prepaid, to selected recipients. The imported tool was such a sample, no monetary consideration being given or required of appellant who placed the tool on display and felt bound not to use it for any purpose except display or demonstration. The price at which like goods were sold by the California firm was $237.50 less a discount of 20% f.o.b. without prepayment or allowance of any delivery charges. The evidence is clear that the goods were shipped to Canada from Niagara Falls, N.Y. and not from California. The tool was entered under item 427*a* of the *Customs Tariff Act* which imposes a customs duty of 7½ per cent *ad valorem*. Before the Tariff Board and in this appeal the appellant submitted that while no monetary consideration had been paid by him, nevertheless the transaction was a sale within the meaning of "comparable conditions of sale" under s. 35(2) of the Act, and the value for duty should be determined in accord with that subsection and as comparable free transactions had been carried on in the U.S.A. the value for duty should be 7½ per cent of zero dollars. The Tariff Board dismissed the appeal to it on the ground that the transaction was not a sale but a gift without monetary consideration and that the value for duty is $190.00 plus $5.59 transportation charges. Appellant appealed to this Court, contending that the transportation charges should not be included on the ground that the tool was shipped to him from California and not from Niagara Falls. The respondent cross-appealed contending that the decision of the Tariff Board should be varied, as the Board had not jurisdiction to order that its declaration should not be construed to confer upon the respondent the right to levy upon the appellant's imported article customs duties in excess of those payable under the Deputy Minister's original decision.

Held: That the appeal be dismissed.

2. That the goods were shipped to Canada from Niagara Falls.

3. That the Board was justified in deciding that the fair market value of the goods "at the time when and place from which the goods were

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shipped to Canada" included the sum representing the prepaid freight charges to Niagara Falls.

4. That the cross-appeal be allowed.

5. That the Board had increased the value for duty by $6.00 beyond that fixed by respondent and respondent was specifically given the right under the *Customs Act* to re-appraise the value for duty of any goods at any time to give effect to a decision of the Board, and the Board erred in law to its ruling in this regard.

APPEAL and CROSS-APPEAL under the *Customs Act*.

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

W. B. Elliott on his own behalf.

J. D. Lambert for respondent.

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

CAMERON J. now (March 15, 1963) delivered the following judgment:

This is an appeal taken under the provisions of s. 45 of the *Customs Act*, R.S.C. 1952, c. 58, as amended, from a declaration of the Tariff Board dated May 16, 1962, in Appeal No. A-541, dismissing the appellant's appeal from the ruling of the respondent as to the value for duty of an article imported by the appellant under Niagara Falls Entry No. 6553, dated June 6, 1958, and called "Hollywood Super-Turret Reloading Tool", a tool which is designed to reload used cartridge shells.

At the hearing of the appeal in this Court, two additional exhibits were filed by consent to complete the record, namely,

(1) Exhibit D-9, a copy of a letter from the respondent to the appellant dated January 20, 1960, in which in response to the appellant's request that the respondent make a ruling so that the appellant should take an appeal to the Tariff Board, it is stated: "The case has been reviewed and my decision is that the lowest value which may be accepted for duty purposes in this instance is $185 Canadian funds.

(2) Exhibit D-10, a letter from the appellant to the Tariff Board dated February 9, 1960, in which the

appellant appealed from that ruling of the respondent to the Tariff Board.

Section 45 of the *Customs Act* as enacted by s. 2 of c. 26, Statutes of 1958, and relating to appeals from the Tariff Board, was in force at the time the appellant appealed to this Court. While it is not now necessary to first obtain leave to appeal from this Court or a Judge thereof, the right of appeal so given is "upon any question of law". As stated by the President of this Court in *The Dentists' Supply Company of New York v. The Deputy Minister of National Revenue (Customs and Excise)*, an unreported judgment dated June 16, 1960:

> Thus to the extent that the declaration of the Tariff Board in the present case was a finding of fact this Court has no right to interfere with it unless it was so unreasonable as to amount to error as a matter of law.

The Board's declaration contains the following clauses which I think I may accept as its findings of fact:

> The appellant is a resident of St. Catharines, Ont., Canada but, for convenience, the reloading tool was shipped to, and received by him in Niagara Falls, N.Y. in the United States of America, whence he imported it into Canada in April, 1958; the relevant Customs Entry for Home Consumption is dated June, 1958. The article was shipped to the appellant, charges of $5.59 prepaid, by the Hollywood Gun Shop located in Hollywood, California, in the United States of America.
>
> The documents entered as Exhibits A-1 and A-6 support the oral evidence of the appellant that, as a method of advertising, the Hollywood Gun Shop followed the practice of giving away each year as free samples, several reloading tools and of shipping them, charges prepaid, to selected recipients, that the imported tool was such a sample, that no monetary consideration was given by or required from him, but that he had placed the tool on display and that he felt bound not to use it for any purposes except display or demonstration.
>
> The respondent introduced evidence to show that the price at which like goods were sold in single units by the Hollywood Gun Shop, was $237.50, less a discount of 20%, f.o.b. Hollywood, without prepayment or allowance of any delivery charges. It was not disputed that the transportation charges on the article delivered to the appellant in Niagara Falls, New York were $5.59. It is clear from the evidence that the goods were shipped to Canada not from Hollywood, California but from Niagara Falls, New York.

The reloading tool in question was entered under Item 427*a* of the *Customs Tariff Act* and no appeal has been taken from that classification. Under that item, a customs duty of 7½ per cent. *ad valorem* is imposed. Accordingly, it was necessary to apply the provisions of s. 35, the

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relevant portions of which at the date of entry were as follows:

35. (1) Whenever duty *ad valorem* is imposed on goods imported into Canada, the value for duty shall be determined in accordance with the provisions of this section.

(2) The value for duty shall be the fair market value, at the time when and place from which the goods were shipped to Canada, of like goods when sold in like quantities for home consumption in the ordinary course of trade under fully competitive conditions and under comparable conditions of sale.

(3) When the value for duty cannot be determined under subsection (2) for the reason that like goods are not sold under comparable conditions of sale, the value for duty shall be the fair market value, at the time when and place from which the goods were shipped to Canada, of like goods when sold in like quantities for home consumption in the ordinary course of trade under fully competitive conditions.

Before the Tariff Board and in this appeal, the appellant submitted that while no monetary consideration had been paid by him to Hollywood Gun Shop for the reloading tool, nevertheless the transaction was a "sale" within the meaning of that word as used in the phrase "comparable conditions of sale" in s-s. (2) of s. 35; that accordingly, the value for duty should be determined in accordance with that subsection; and that as there was evidence that Hollywood Gun Shop had on some occasions had similar transactions with parties in the United States of America in which there was no monetary consideration, the value for duty should be $7\frac{1}{2}$ per cent. of 0 dollars—that is, nothing.

For the respondent it was submitted before the Tariff Board and in this Court that the transaction by which the appellant became the owner of the reloading tool was not a sale, but a gift without monetary consideration; that the words "under comparable conditions of sale" as found in s-s. (2) could not be applied to the acquisition and importation of this reloading tool; and that, consequently, the value for duty could not be determined under that subsection. It was therefore submitted that the value for duty should be determined under the provisions of s-s. (3).

The conclusions of the Board were stated as follows:

In the opinion of the Board the transfer of ownership without monetary consideration is not a sale within the meaning of that word in subsection (2) of section 35.

The Board agrees with the respondent that the provisions of subsection (3) of section 35 are applicable and finds that the value for duty is

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$190.00 plus the $5.59 transportation charges from Hollywood to Niagara Falls, New York, the place from which the goods were imported to Canada; however, this declaration should not be construed to confer upon the respondent the right to levy upon the appellant's imported article, customs duties in excess of those payable under the Deputy Minister's original decision.

Accordingly the appeal is dismissed.

The evidence of the appellant before the Board clearly shows that the Hollywood Gun Shop advised him that it was sending him a gift, the nature of which he did not know until it was received; that he did not know why it was being sent to him; and that he gave no consideration of any kind for the tool.

In *Deputy Minister of National Revenue for Customs and Excise v. Parke, Davis and Company, Limited*[1], the President of this Court said at p. 15:

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

The word "sale" has a variety of meanings, but the following dictionary definitions would seem to be most relevant.

The Shorter Oxford English Dictionary: The exchange of a commodity for money or other valuable consideration. Also disposal of goods for money.

Funk and Wagnall's New Practical Standard Dictionary: The act of selling; the exchange or transfer of property for money or its equivalent.

Webster's New International Dictionary: A contract whereby the absolute or general ownership of property is transferred from one person to another for a price or sum of money, or loosely, for any consideration.

Further reference may also be made to the following. In *Halsbury's Laws of England,* Third Ed., Vol. 34, at p. 5, sale is defined as the transfer, by mutual assent of the ownership of a thing from one person to another for a

[1] [1954] Ex. C.R. 1.

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money price. And in *Benjamin on Sale*, 8th Ed., p. 2, it states:

> By the common law a *sale* of personal property was usually termed a "bargain and sale of goods." It may be defined to be a transfer of the *absolute* or *general* property in a thing for a price in *money*. Hence it follows that, to constitute a valid sale, there must be a concurrence of the following elements, viz.:
>
> (1) Parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or promised.

And at p. 3:

> So in relation to the element of price. It must be *money*, paid or promised, according as the agreement may be for a cash or a credit sale; but, if the consideration given be something other than money, it is not a sale.

I am in full agreement with the conclusion of the Board that to constitute a "sale" within the meaning of that word in s-s. (2), there must be a monetary consideration. In the present case, there was no monetary or any other consideration and consequently the Board was right in reaching the conclusion that in determining the value for duty, that subsection was inapplicable. It is to be noted, also, that the subsection declares that the value for duty shall be *"the fair market value"* determined as therein provided, and "in respect of like goods when sold . . . *in the ordinary course of trade under fully competitive conditions*". The use of the phrases which I have emphasized would seem to preclude the possibility of establishing the value for duty by reference to gifts made without consideration.

It is not disputed that if the value for duty of the reloading tool should not be determined under s-s. (2), it should be made under s-s. (3). But the appellant objects to the inclusion of $5.59 transportation charges which the Board added to the value of the goods, on the ground that the goods were "shipped" from Hollywood, California, and not from Niagara Falls, New York. It will be noted that the valuation for duty under s-s. (3) is "the fair market value at the time when and place from which goods were *shipped to Canada* . . ."

It is admitted that the Hollywood Gun Shop prepaid transportation charges of $5.59 for transferring the tool from Hollywood, California, to Niagara Falls, New York;

that the tool was consigned to the appellant at Niagara Falls, New York, instead of to his home address at St. Catharines, Ontario, at his request; and that he himself picked up the tool at Niagara Falls, New York, and caused it to be transported into Canada at Niagara Falls, Ontario, Port of Entry, and thence to St. Catharines.

The word "ship" also has a large number of meanings. As used in the subsection, I am of the opinion that one of the definitions given in *Funk and Wagnall's New Practical Standard Dictionary* is here applicable, namely, "to send by any established mode of transportation, as, by rail". No doubt Hollywood Gun Shop shipped the tool from Hollywood to Niagara Falls, New York, but it was from Niagara Falls, New York, that the goods were shipped to Canada. Accordingly, the Board was fully justified in deciding on the evidence that the fair market value of the goods "at the time when and place from which the goods were shipped to Canada" included the sum of $5.59, representing the pre-paid freight charges to Niagara Falls, New York.

For these reasons, I am of the opinion that the Tariff Board in so far as the appellant's appeal is concerned, did not err upon any question of law and that accordingly the appellant's appeal should be dismissed, with costs.

I should note here that the appellant was not represented by counsel at the hearing of the appeal, but conducted his own case. For that reason the errors in law which he attempted to establish were not clearly defined, and accordingly I have reached my conclusions on the assumption (but without so deciding) that the matters I have dealt with involved errors in law on the part of the Board. Reference may usefully be made to the decision of the President of this Court in the case of *The Dentists' Supply Company of New York* (*supra*) in which he points out the limitations imposed on this Court in hearing appeals from the Tariff Board.

I turn now to the cross-appeal taken by the respondent under the provisions of s. 45(10) of the *Customs Act* as enacted by s. 2(1) of c. 26, Statutes of 1958:

Take notice that the respondent intends to contend that the decision of the Tariff Board should be varied by an Order of this Honourable Court that the Tariff Board erred in law and had no jurisdiction to order that the declaration of the Board should not be construed to confer upon the respondent the right to levy upon the appellant's imported articles, cus-

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toms duties in excess of those payable under the Deputy Minister's original decision.

In the cross-appeal, the respondent relies on the *Customs Act* as amended and particularly on s. 44 thereof, and on the *Customs Tariff Act* R.S.C. 1952, c. 60., and in particular on s. 3 thereof.

The ruling of the Deputy Minister from which an appeal was taken to the Tariff Board was that "the lowest value which may be accepted for duty purposes in this instance is $185 Canadian funds"; the appellant submitted that the value for duty should be 0 dollars and the Board found that the proper value for duty was $195.59 which, while not so stated, must, I think, have been in U.S. dollars as its constituent parts were both in that currency. It was agreed that at the date of entry, $195.59 U.S. currency was the equivalent of $191 Canadian currency. By its decision, therefore, the Board increased the value for duty by $6 beyond that fixed by the ruling of the respondent.

The appeal taken to the Board was made under s. 44(1)(*a*) of the *Customs Act* as to "value for duty". Under s-s (3), the Board is empowered to make

such order or finding as the nature of the matter may require, and without limiting the generality of the foregoing, may declare

* * *

(*b*) the value for duty of the specific goods or class of goods

and an order, finding or declaration of the Tariff Board is final and conclusive subject to further appeal as provided in s. 45.

Now if the Board had merely intended to intimate to the appellant that its decision was not a re-appraisal, no serious objection could be taken, as the right of reappraisal following a decision of the Board is in the respondent. But it seems to me that the language used goes much further than that and in effect purports to deny to the respondent the right of re-appraisal following the Board's decision.

Were it not for the special provisions of s-ss. (4) and (5) of s. 43 of the *Customs Act* (as amended by s. 3 of c. 32, Statutes of Canada, 1955), it might perhaps be argued that as the appeal to the Tariff Board was made by the appellant from a re-appraisal made by the respondent, the latter was in some way bound by that re-appraisal or ruling and could not for the advantage of the National Revenue and to the detriment of the importer, levy or collect any tax in excess of that resulting from the re-appraisal which was the subject of the appeal to the Board. Those subsections are as follows:

(4) The Deputy Minister may re-determine the tariff classification or re-appraise the value for duty of any goods

(a) in accordance with a request made pursuant to subsection (3),

(b) at any time, if the importer has made any misrepresentation or committed any fraud in making the entry of those goods,

(c) at any time, to give effect to a decision of the Tariff Board, the Exchequer Court of Canada or the Supreme Court of Canada with respect to those goods, and

(d) in any other case where he deems it advisable, within two years of the date of entry of those goods.

(5) Where the tariff classification of goods has been re-determined or the value for duty of goods has been re-appraised under this section

(a) the importer shall pay any additional duties or taxes payable with respect to the goods, or

(b) a refund shall be made of the whole or a part of any duties or taxes paid with respect to the goods,

in accordance with the re-determination or re-appraisal.

It will be observed that Parliament by s-s. (4)(*b*) has specifically given to the respondent the right to re-appraise the value for duty of any goods at any time to give effect to a decision of the Tariff Board, of this Court or of the Supreme Court of Canada, with respect to those goods; and by s-s. (5)(*a*) has directed that the importer shall pay any additional duties or taxes payable with regard to the goods when the value for duty has been re-appraised under s. 43, including, of course, the re-appraisal made under s-s. (4)(*c*). In view of these statutory provisions and of s. 3 of the *Customs Tariff Act*, R.S.C. 1952, c. 60, I am satisfied that the Tariff Board erred as a matter of law and had no jurisdiction to order that its declaration should not be construed so as to confer upon the respondent the right to levy upon the appellant's imported article, customs duties in excess of those payable under the Deputy Minister's original decision.

Accordingly, the cross-appeal will be allowed, but without costs.

Judgment accordingly.

1962
Jun. 20
1963
Apr. 19

BETWEEN:

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

PENINSULAR INVESTMENTS LIMITED .... RESPONDENT.

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 11(1)(c) (ca), and 70(1)(4)—Non-resident-owned investment corporation—Deductibility of interest paid on bank loan—Whether interest paid on "other indebtedness"—Ejusdem generis rule—Appeal allowed.

Section 70(1) of the *Income Tax Act* provides that in computing its income a non-resident-owned investment company shall not make any deduction in respect of interest on its bonds, debentures, securities or other indebtedness. Respondent in computing its income for 1959 deducted $22,402.12 representing interest on a bank overdraft paid to the Bank of Nova Scotia in New York. This was disallowed by the Minister. An appeal to the Tax Appeal Board was allowed and the Minister appealed to this Court.

Held: That the appeal be allowed.

2. That a distinction exists between interest expense incurred in temporary financing which is an integral part of a business being carried on and interest incurred in respect of capital invested in the business.
3. That the only limitation here imposed by the *ejusdem generis* rule is that the "other indebtedness" should relate to the acquisition of capital assets or the raising of capital to be employed in the business, rather than to indebtedness of the kind incident to and incurred in the day-to-day transactions of the business.
4. That the material before the Court fails to disclose that the respondent was engaged in a business in which the financing of its transactions was itself an integral part and in fact does not establish that the respondent was engaged in a business at all, and fails to show that the indebtedness in question falls outside the meaning of "other indebtedness".
5. That whether the source of respondent's income was the holding of investments or the business of trading in investments, its indebtedness to the bank was indebtedness of a capital nature and the interest in question was interest on such indebtedness and its deduction from income prohibited by s. 70(1) of the Act.

APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Thurlow at Halifax.

T. E. Jackson and *E. E. Campbell* for appellant.

H. B. Rhude and *G. A. Caines* for respondent.

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

THURLOW J. now (April 19, 1963) delivered the following judgment:

This is an appeal by the Minister from a judgment of the Tax Appeal Board[1] allowing the respondent's appeal and vacating an assessment of income tax for the year 1959. The appeal raises a question on the interpretation of s. 70(1) of the *Income Tax Act*, R.S.C. 1952, c. 148, the issue being whether the respondent, a non-resident-owned investment corporation as defined in s. 70(4), is entitled in computing its income to deduct an amount of $22,402.12 which it paid to its bank in the year for interest on the debit balance from time to time outstanding on its current account.

Section 70 of the Act which deals with the taxation of non-resident-owned investment corporations occurs in Division H entitled "Exceptional Cases and Special Rules". By it provision is made for a special tax rate of 15% on the taxable income of a corporation which can qualify under its definition and elects to do so but while this rate of tax is lower than would otherwise be applicable, the section prescribes certain modifications in the computation of the income and the taxable income of the corporation which may result in it being disadvantageous for the corporation to be taxed under it rather than under the other provisions of Part 1 of the Act. As applicable to the year 1959 s-s. (1) of s. 70 read as follows:

> 70(1) In computing the taxable income of a non-resident-owned investment corporation for a taxation year, notwithstanding Division C, no deduction may be made from its income for the year, except
>
> (a) dividends and interest received in the year from other non-resident-owned investment corporations, and
>
> (b) taxes paid to the government of a country other than Canada in respect of any part of the income of the corporation for the year derived from sources therein,
>
> and in computing its income no deduction shall be made in respect of interest on its bonds, debentures, securities or other indebtedness.

The appeal turns on whether the interest in question was interest on the respondent's "bonds, debentures, securities or other indebtedness" within the meaning of this provision.

[1] 28 Tax A.B.C. 161.

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By s-s. (4) of s. 70 as applicable to the year 1959 a non-resident-owned investment corporation was defined as meaning

a corporation incorporated in Canada that during the whole of the taxation year in respect of which the expression is being applied complied with the following conditions:

(a) at least 95% of the aggregate value of its issued shares and all of its bonds, debentures and other funded indebtedness were

(i) beneficially owned by non-resident persons,

(ii) owned by trustees for the benefit of non-resident persons or their unborn issue, or

(iii) owned by a corporation, whether incorporated in Canada or elsewhere, at least 95% of the aggregate value of the issued shares of which and all of the bonds, debentures and other funded indebtedness of which were beneficially owned by non-resident persons or owned by trustees for the benefit of non-resident persons or their unborn issue or by several such corporations;

(b) its income was derived from

(i) ownership of or trading or dealing in bonds, shares, debentures, mortgages, hypothecs, bills, notes or other similar property or any interest therein,

(ii) lending money with or without security,

(iii) rents, hire of chattels, charterparty fees or remunerations, annuities, royalties, interest or dividends, or

(iv) estates or trusts;

(ba) not more than 10% of its gross revenues was derived from rents;

(c) its principal business was not

(i) the making of loans, or

(ii) trading or dealing in mortgages, hypothecs, bills, notes or other similar property or any interest therein;

(d) it has, not later than 90 days after the commencement of the taxation year, elected in prescribed manner to be taxed under this section; and

(e) it has not, before the taxation year, revoked in a prescribed manner the elections so made by it.

It may be noted at this point that a corporation of the kind defined may derive its income from the simple holding of investments or from the carrying on of a business or businesses of the kind contemplated by clauses (b), (ba) and (c) of the definition.

I turn now to the facts. On the hearing of the appeal no evidence was offered by either party but a written agreement as to facts was filed and it was agreed by counsel that this together with the respondent's income tax return for the year including the financial statements attached thereto, the notice of assessment, the respondent's notice of objection, the Minister's notification in reply and the admitted fact that the respondent was incorporated under the laws of Nova Scotia would constitute the material upon which the appeal should be determined.

The agreement as to facts is short and rather than attempt to paraphrase it, I shall quote it in full.

1. At all times during the taxation year 1959 the Taxpayer was a non-resident-owned investment corporation as defined in Section 70(4) of the Income Tax Act.
2. The 1959 taxation year of the Company ended April 30, 1959.
3. The financial statements of the Taxpayer for the year ended April 30, 1959, disclose no bonds, debentures or securities issued by the Taxpayer.
4. During the taxation year 1959 the Taxpayer borrowed money from the Agent of The Bank of Nova Scotia at 37 Wall Street, New York, U S A., for the purpose of purchasing investments.
5. On April 30th, 1959, the Company owed the Bank on current account the sum of $445,832 21 (U S) which had been used by it to purchase investments. During the 1959 taxation year the Company paid interest to the Bank on the debit balance from time to time outstanding in its current account in the amount of $22,402.12.
6. The investments purchased by the Company with the money borrowed from the Bank on current account were lodged with the Bank under the terms of two agreements, copies of which are attached hereto.
7. By Notice of Assessment dated February 11, 1960, the Minister of National Revenue assessed the Taxpayer for tax in the sum of $11,352 80 and in so doing treated the interest payment of $22,402 12 as a charge not properly deductible in the computation of income.
8. On or about the 6th day of May, 1960, the Taxpayer filed with the Minister of National Revenue a Notice of Objection against its assessment dated the 11th day of February, 1960, in respect of income for the taxation year 1959. By Notice dated September 1, 1960, the Minister of National Revenue confirmed the said assessment.
9. On or about the 29th day of September, 1960, the Taxpayer filed a Notice of Appeal to the Tax Appeal Board against the confirmation of the said assessment by the Minister of National Revenue. This appeal was subsequently heard and was allowed by the Tax Appeal Board on a Judgment dated November 20, 1961.

To this were attached copies of two agreements between the respondent and the Bank of Nova Scotia hypothecating certain securities to the bank as security for any indebtedness of the respondent to the bank. The earlier of these agreements was dated October 24, 1957 that is, prior to the commencement of the taxation year, and the later December 11, 1958.

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The balance sheet which accompanied the respondent's income tax return for the year in question indicates that on April 30, 1959 the respondent had assets totalling $754,046.88 of which $752,560.43 was represented by investments in stocks and bonds. The shareholders' equity in the company at that date consisted of $10,000 in paid up share capital and $68,292.83 in earned surplus. Liabilities totalled $675,754.05 and included what was referred to as a deferred liability of $198,317.36, the respondent's overdraft at the Bank of Nova Scotia in New York of $445,314.71 and a number of other smaller liabilities. Included with the statements accompanying the return was one entitled "Statement of Investment Income and Expenditures" which showed under *Revenue*

Dividends	$ 5,852.00
Bond Interest	57,368.75
Premium on Exchanges	11,698.64
Profit on Sale of Investments	1,376.34
Sundry Interest	3.70
	$ 76,299.43

and under *Expenditures* the following:

Interest Bond charges and Brokerage fees	$ 22,700.15
Miscellaneous expenses	174.34
	$ 22,874.49

Also included with the statements were schedules entitled "Schedule of Share Investments and Income Thereon" and "Schedule of Bond Investments and Income Thereon". The first of these showed investments held at the beginning of the year totalling $188,575 in shares of 18 companies, purchases of shares in two other companies during the year amounting to $14,835 and no disposals during the year, leaving investments held at the end of the year totalling $203,410 in shares of 20 companies. The schedule of bond investments listed 15 investments on hand at the beginning of the year totalling $703,574, 14 additions during the year totalling $325,626.42 and six disposals during the year totalling $481,426.33, leaving investments on hand at the end of the year totalling $549,150.43. Five of the six disposal transactions related to investments which were on

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hand at the beginning of the year and three of these resulted in gains totalling $4,319.22 while the other two resulted in losses totalling $4,224.14 leaving a net gain of $95.08. The other disposal was of an investment acquired during the year and it resulted in a gain of $1,281.26 making with the $95.08 the amount of $1,376.34 which as previously mentioned appeared in the Statement of Investment Income and Expenditures. The one investment which was acquired and disposed of during the year amounted to $48,781.24 and 10 of the investments held at the beginning of the year totalling $272,305.25 were still on hand at the end of the year. There is no other indication of how long any of the bond investments were held but combining the figures for shares and bonds it becomes apparent that the respondent continued to hold at the end of the year investments in shares of 18 companies and in 10 issues of bonds totalling $460,880.25 all of which had been on hand at the beginning of the year and which exceeded by a considerable amount the shareholders' equity in the company and the deferred loan. It would seem to follow as a matter of inference that a substantial portion at least of the overdraft in question was outstanding at the beginning of and throughout the year. There was no explanation of the revenue item of $11,698.64 entitled "Premium on Exchanges". In the return itself on the line provided on p. 1 for a statement by the taxpayer of the nature of its business the answer given is "non-resident-owned investment corporation". There appears to be nothing further in the return or the financial statements which accompanied it or in the other material before the Court to indicate that the respondent was actually engaged in any business and the material as a whole leaves me unsatisfied that the respondent was engaged in a business as opposed to merely holding investments and changing them from time to time as occasion to do so arose. Moreover even if the respondent should be regarded as having been engaged in a business of trading in investments during the year the material does not indicate the manner in which the transactions were carried out or what the ordinary course of the business involved.

The Minister's case for disallowing the deduction of the interest in question is that the amount in question is interest on the respondent's "securities or other indebtedness" within

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the meaning of the prohibition of s. 70(1). His argument in support of this contention was that the scheme of the Act was such as to indicate an intention to tax the non-resident-owned investment corporation on the same basis as non-residents are taxed by s. 106 on dividends, interest, rents, royalties, etc., and that in any case the only genus suggested by the words bonds, debentures and securities in s. 70(1) was that of secured indebtedness which was exhausted by the three words themselves leaving the words "other indebtedness" to be given their broadest meaning which would include the overdraft in question. The respondent on the other hand submitted that the overdraft was obviously not indebtedness on bonds or debentures, that though the bank held security for the overdraft it was not indebtedness on "securities" within the ordinary meaning of the word in the context in which it is found, and that the amount was not interest on "other indebtedness" within the meaning of s. 70(1) because the scope of that expression was as a matter of interpretation limited by the *ejusdem generis* rule to other indebtedness like that upon bonds, debentures and securities and the overdraft was not an indebtedness of that kind. In support of his contention counsel argued that if the legislative intention was to prohibit the deduction of interest paid on all indebtedness it would have been easy to say so in a word or two and there would have been no occasion first to single out bonds, debentures and securities and then to follow this enumeration with the expression "or other indebtedness" and he went on to submit that the overdraft in question did not have the attributes of bonds, debentures or securities, that it was merely a current liability on an open account, an overdraft and part of the circulating capital of the company, that its amount was not formalized by an instrument, and that the time for repayment was not fixed, all of which distinguished it from indebtedness like that on bonds, debentures and securities.

In approaching the question of the interpretation to be put upon the words of s. 70(1) it is, I think, important to bear in mind several things which are part of the setting in which the subsection is found. The first of these is that the *Income Tax Act* is a statute which imposes a tax on income and that in applying it the distinction between receipts and disbursements of an income nature and receipts and disbursements of a capital nature is one of general importance. The second is that by s. 4 of the Act income from a business or property is declared, subject to the other provisions of Part 1 of the Act, to be the profit therefrom for the year. The third is that while express provisions with respect to the deduction of interest payments in computing the income of a taxpayer for the purposes of Part 1 of the Act are contained in paragraphs (*c*) and (*ca*) of s-s. (1) of s. 11, such payments would not ordinarily enter into a computation of the profit either from a property or from a business except in cases falling within the principle of *Farmer v. Scottish North American Trust Ltd.*[1] where the incurring of the liability to pay the interest is itself an ordinary incident of the business. In *Bennett & White Construction Co. Ltd. v. M.N.R.*[2], a case which arose under the *Income War Tax Act* Rand J. put the matter thus at p. 292:

> The acquisition of capital may be by various methods including stock subscriptions, permanent borrowings through issues of securities, or term loans; and ordinarily it should make no difference in taxation whether a company carried on financially by one means or another. In the absence of statute, it seems to be settled that to bring interest paid on temporary financing within deductible expenses requires that the financing be an integral part of the business carried on. That is exemplified where the transactions are those of daily buying and selling of securities: *Farmer v. Scottish North American Trust* [1912] A.C. 118; or conversely lending money as part of a brewery business: *Reid's Brewery v. Mail* [1891] 2 Q.B. 1.
>
> Now the Crown has allowed the deduction of interest paid to the bank, and it must have been either on the footing that the day-to-day use of the funds was embraced within the business that produced the profit, or that the interest was within section 5, paragraph (*b*).

It may also be well to note at this stage that what may be deducted under s. 11(1)(*c*) in computing the income of a taxpayer for the purposes of Part 1 of the Act is interest on

> (i) borrowed money used for the purpose of earning income from a business or property; or
>
> (ii) an amount payable for property acquired for the purpose of gaining or producing income therefrom or for the purpose of gaining or producing income from a business;

and that what is deductible under s. 11(1)(*ca*) is interest on an amount that would be deductible under para. (*c*). These provisions are no doubt broad enough to authorize the

[1] [1912] A.C. 118. [2] [1949] S.C.R. 287.

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deduction in computing the income of a taxpayer of both interest which would be deductible under the principle of *Farmer v. Scottish North American Trust*[1] in computing the profit from a business and other interest, such as interest in respect of capital invested in the business, as well but the distinction between interest of the former kind which is a business expense and the latter which is a capital expense nevertheless exists.

Turning then to s. 70(1) it appears to me that the words "bonds", "debentures" and "securities" suggest a class of obligation which while generally arising from borrowings may arise from other types of transactions as well—which may account for the reference to "other indebtedness" in the words which follow "bonds, debentures, securities" rather than to the more restricted connotation of "other borrowings", and that indebtedness represented by the bonds, debentures and securities of a corporation ordinarily at least is indebtedness arising from the acquisition of capital assets or the raising of capital to be employed in its business rather than indebtedness of the kind incident to and incurred in the day-to-day transactions of the business. In my opinion this is the only limitation which the application of the *ejusdem generis* rule would impose on the broad ordinary meaning of the words "other indebtedness" for I am unable to discern in the context any sufficient reason for thinking that the fact that ordinarily obligations arising on bonds, debentures and securities are secured in some manner and are evidenced by formal documents which state the amount of the indebtedness and prescribe a fixed time for payment and a fixed rate of interest should be held to limit the meaning of the words "other indebtedness" in s. 70(1) to obligations so secured or evidenced.

In the present case, the material before the Court, in my opinion, does not show that the indebtedness in respect of which the interest in question was paid falls outside the meaning of "other indebtedness" in s. 70(1) as so interpreted. It could fall outside such meaning only if the respondent was in fact engaged in a business in which the financing of its transactions was itself an integral part and as previously mentioned it does not clearly appear from the material that the respondent was engaged in a business at

[1] [1912] A.C. 118.

all and even less does it appear that it was engaged in a business in which the financing of the transactions was an integral part. For this purpose the submission that the moneys in respect of which the indebtedness arose were used as circulating capital if correct in my opinion disposes of the matter in favor of the Minister since money used as circulating capital is nevertheless capital (*vide European Investment Trust Co. Ltd. v. Jackson*[1]) and may itself be raised through the issue of bonds, debentures and securities as well as in other ways including other types of borrowing. In the view I take of the facts while the overdraft may have been of uncertain and in that sense temporary duration because no time for repayment had been set, the material is just as consistent with the view that the respondent was simply engaged in holding investments paid for largely with capital borrowed from the bank and changing them from time to time as occasion arose as with the view that it was engaged in trading in investments. It is thus in my view not established that the respondent was engaged in a business at all. But even if contrary to this view the respondent's purchases, holding and sales of investments indicate the carrying on of a business of trading in such investments, having regard to the size of the amounts, other than those borrowed on overdraft, which were available to the respondent as capital for the carrying on of such a business on the scale indicated and having regard also to the absence of evidence that the investments were being actively traded by the respondent rather than held for lengthy periods it appears to me that the proper inference to draw is that the moneys borrowed on the overdraft were obtained and employed not as mere temporary accommodations incidental to the carrying on of a business of which the obtaining of such accommodations was an integral part but were in truth moneys obtained and employed as additional circulating capital in the business. Thus whether the source of the respondent's income is regarded as the holding of investments or as a business of trading in investments the amount in question was interest on indebtedness of a capital nature the deduction of which in computing its income was prohibited by s. 70(1) if the respondent was to be taxed as

[1] (1932) 18 T.C. 1.

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a non-resident-owned investment corporation. I am accordingly of the opinion that no error in the assessment has been established.

The appeal will therefore be allowed and the assessment restored. The appellant is entitled to his costs of appeal.

Judgment accordingly.

1962 Mar. 27, 28, 29, 30 — 1963 May 2

BETWEEN:

ALEXANDER B. DAVIDSON ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 4, 12 (1) (b), 27 (1)(e), 139 (1)(e)—Stockbroker loss in shares—Capital loss or business loss—Deductibility of loss from taxable income of a previous year—Appeal allowed.

Appellant was a stockbroker and promoter and the senior parter of a brokerage firm. He and an associate had engaged in a venture involving the shares of Eastern Steel Products, Limited as early as 1939 and in 1945 they had succeeded in acquiring 76% of the outstanding shares of that company. Thereafter both served on the board of directors and as President of the company, and in the years following purchased and sold on the stock market a large number of the shares of the company, always retaining substantial holdings therein. He resigned from the directorate in 1953. In 1957 the steel company was in financial difficulties, the market price of the shares dropped and appellant sustained a substantial loss of over $500,000 on his holdings. Appellant deducted this loss from his taxable income as a trading or business loss but the Minister disallowed such deduction on the ground that the loss was a capital loss. Appellant also claimed the right to deduct the unabsorbed portion of his 1957 loss in computing taxable income for 1956. The appellant appealed from income tax assessments for 1957, 1958 and 1959.

Held: That from 1945 to 1958 appellant was engaged in a trading venture in the shares of Eastern Steel Products Limited and that his loss therefrom was a trading loss.

2. That the appellant's trading activities in Eastern Steel Products Limited shares were separate from his other business activities and since he had no income therefrom in 1956, no part of the 1957 loss was deductible in 1956 under s. 27 (1)(*e*) of the Act as it applied then but the loss was deductible in 1958 and 1959 as provided in the section as amended in 1958.

3. That, the appeal be allowed, the assessment of 1957 be vacated and the assessments of 1958 and 1959 be referred back to the Minister for re-assessment.

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ALEXANDER B. DAVIDSON *v.* MINISTER OF NATIONAL REVENUE

APPEAL under the *Income Tax Act.*

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

P. B. C. Pepper, Q.C. and *J. G. McDonald, Q.C.* for appellant.

W. J. Smith, Q.C. and *T. Z. Boles* for respondent.

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

THURLOW J. now (May 2, 1963) delivered the following judgment:

This is an appeal from assessments of income tax for the years 1957, 1958 and 1959. In making the assessments the Minister disallowed as a deduction in computing income a loss of $591,495.75 admittedly sustained by the appellant in 1957 in connection with his shareholdings of Eastern Steel Products Limited and the first and main question which arises in the appeal is whether the Minister was right in so doing. The appellant's case is that the loss in question was a trading or business loss while the Minister takes the position that it was a capital loss which was not deductible in computing income. If the Minister was right in disallowing the loss as a deduction that is the end of the matter. But if not, the assessment for 1957 cannot stand because the deduction of $591,495.75 would reduce the appellant's income for that year to zero and leave a business loss balance available for deduction under s. 27(1)(*e*) of the *Income Tax Act,* R.S.C. 1952, c. 148 in computing his taxable income for other years. In that event a second question arises with respect to the amount of such loss available for deduction in computing the appellant's income for 1958 and 1959.

The appellant is a stockbroker and promoter. In 1936 after serving for 12 years as a salesman he left the brokerage firm by which he was employed and founded A. B. Davidson & Co. Ltd. a corporation which has since then been engaged in underwriting and trading as a principal in securities. The

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appellant owns the capital stock of this company and is its president. In 1949 the name of the company was changed to Davidson Securities Ltd. to avoid confusion with a partnership which had in the meantime in 1947 commenced carrying on business under the firm name of Davidson & Co. as a commission or brokerage house acting on behalf of clients.

The appellant is also the senior partner of Davidson & Co. In 1942 he had become associated with Roy Robertson in a similar brokerage partnership known as Robertson and Davidson which operated in Montreal and Toronto, and in that year the firm had acquired seats on the Montreal Stock Exchange and the Montreal Curb. In 1944 it acquired as one of the assets of a going brokerage concern which it purchased, a seat on the Toronto Stock Exchange. This partnership was dissolved in 1947, Robertson taking the Montreal business and seats and the appellant taking the Toronto business and seat. Davidson & Co. was then formed. By 1962 the firm consisted of 12 partners, it had 200 employees and branches in five Canadian cities and its business had grown to the point where the transactions which it handled involved 8 to 14% of the volume of shares traded on the Toronto Stock Exchange.

In 1939 before they became associated in the partnership the appellant and Robertson had been engaged in a venture in connection with shares of Eastern Steel Products Limited. They had obtained options to purchase the shares at fixed prices and over a period of some months they had exercised the options and sold the shares at a profit. The appellant was unable to say whether his share of these profits accrued to him directly or belong to A. B. Davidson & Co. Ltd.

In 1945 the appellant again became interested in shares of Eastern Steel Products Ltd. when he and a Mr. Denton who was a member of Burns Brothers & Denton Ltd. a company engaged in a business similar to that of A. B. Davidson & Co. Ltd. arranged to acquire some 54,000 shares representing 76% of the issued share capital of the company. Shortly afterwards both Denton and the appellant became members of the board of directors of the company. According to the appellant their object was to build up the company and sell the stock to the public to make a profit. The company was paying substantial dividends at that time and continued to do so for about four years thereafter. It was also negotiating to acquire the stock of W. B. Beath & Sons Ltd. At the end of 1945 the shares of Eastern Steel Products Ltd. were split on the basis of four for one and early in the following year the Beath shares were acquired and paid for with the proceeds of a debenture issue of $1,500,000 which was underwritten and sold by Burns Brothers & Denton Ltd. and A. B. Davidson & Co. Ltd. The same firms also underwrote and sold another debenture issue of Eastern Steel Products Ltd. amounting to $260,000 in November 1947. Interest rates were low at the time and debenture borrowing was considered to be a good way of financing the company without diluting the control of the company which Denton and the appellant had acquired.

The appellant's portion of the new stock amounted to 108,000 shares but he immediately sold about one-third of them to Robertson and a man named Hunter. He also said that he both bought and sold a large volume of the stock in 1945, 1946 and 1947 and from such sales made profits which in 1950 came to the attention of the Department of National Revenue but that he referred the matter to his solicitors and was not taxed on the profits. I see no reason to doubt this evidence.

In the years that followed 1945 the appellant apparently bought more shares of Eastern Steel Products Ltd. than he sold for by the end of 1953 he held 126,527 shares and Davidson Securities Ltd. had on hand a further 8,500 shares amounting together to nearly half of the issued common stock of the company. In the meantime Mr. Denton who had become president of the company in 1947 had died and in May 1949 the appellant had become its president and assumed an active role in the conduct of the company's affairs. He relinquished this office in May 1953 to become chairman of the Board of Directors, a post which he held until October 1953 when he resigned from the Board. At this stage the company which had discontinued paying dividends in 1949 was having troubles with its banker and at the appellant's request a Mr. Pritchard assumed the presidency of the company and the management of its affairs.

Shares of the company were being traded on the Toronto Stock Exchange at that time and throughout 1954, 1955,

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1956 and the first half of 1957 at prices which ranged from a low of $\$3\frac{3}{4}$ to a high of $\$8\frac{1}{4}$. Transactions on the Toronto exchange involved 19,036 shares in 1954, 66,959 shares in 1955, 45,381 shares in 1956 and 76,811 shares in 1957. These figures may be compared with purchases and sales by the appellant and Davidson Securities Ltd. involving a total of 28,986 shares in 1954, 50,498 shares in 1955, 47,121 shares in 1956 and 29,345 shares in 1957. Purchases and sales by the appellant personally were as follows:

	Number of Transactions		*Shares Involved*		
	Purchases	*Sales*	*Purchases*	*Sales*	*Total*
1954	78	31	8750	16586	25336
1955	24	2	5700	3044	8744
1956	39	23	4891	7980	12871
1957	55	25	6670	8750	15420
	196	81	26011	36360	

During the same period the appellant made a number of attempts to dispose of the whole of his holdings of Eastern Steel Products Ltd. by a block sale but was not successful.

In July 1957 the company's bank called in its loan and in consequence the market price of shares declined to about 50¢ and the appellant sustained the loss already mentioned. A portion of this loss was, however, retrieved early in the following year when the appellant disposed of substantially all of his shares of Eastern Steel Products Ltd. at $1 per share.

On the main question raised in the appeal I am of the opinion that the appellant throughout the period from 1945 to 1958 was engaged in a venture in trading in shares of Eastern Steel Products Ltd. and that the loss in question was a trading loss. I do not think for a moment that he or Denton bought up the control of the company with an eye only to the dividends which the company was paying and I am satisfied that their purpose was to make profit through their ownership of the shares and the control of the company which this ownership gave them in any way that might appear expedient including taking dividends, directors' fees and salaries, and underwriting the company's financing transactions, but above all by promoting investor interest in the company and selling the shares either in block or piecemeal at higher prices than they had paid for them. For

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the appellant the scheme fell short of a complete success but that the appellant was engaged in such a scheme and acted as a trader throughout in my view clearly appears from the facts. He bought shares over a considerable period both when dividends were being paid and when no dividends were being paid and borrowed money to do so. He sold shares during the same period. He made purchases to support the market, a course scarcely consistent with a long term investment object, and at the same time sold shares to dealers at less than market price in order to maintain their interest in making sales and thus prevent the market from fading away. While the number of shares involved in his personal transactions was not large in comparison with the number of shares he controlled, in the years 1954, 1955, 1956 and 1957, it represented a substantial volume compared with the volume of trading of the stock on the Toronto exchange. Dealing in stocks and bonds and promoting companies was his calling and with the facilities available to him through the commission house in which he was the senior partner and through his company he required nothing in the way of an organization to carry on his trading. Throughout the whole period he was in my view trying to stimulate a market in which he could unload his holdings at a profit and awaiting the opportunity to do so. Had he made such a profit on disposing of his holdings in my opinion it would clearly have been a trading profit subject to tax as income from a business within the meaning of the definition in s. 139(1)(*e*) of the *Income Tax Act* and the loss which he in fact sustained was equally a trading or business loss rather than one of a capital nature. This conclusion is I think further supported by the evidence of trading by the appellant in shares of United Asbestos Corp. Ltd., Peruvian Oils & Minerals Ltd. and Quebec Chibougamau Ltd. but I would reach it even in the absence of such evidence.

It was conceded at the argument that if the loss was a trading loss the assessment for 1957 would be reduced to nil and it follows from this and from my conclusion that the loss was a trading loss that the assessment in respect of that year cannot stand.

I turn now to the other question in the appeal relating to the assessments for 1958 and 1959. As applicable to the

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years 1958 and 1959 s. 27(1)(*e*) of the *Income Tax Act* read as follows:

> 27(1) For the purpose of computing the taxable income of a taxpayer for a taxation year, there may be deducted from the income for the year such of the following amounts as are applicable:
>
> . . .
>
> (*e*) business losses sustained in the 5 taxation years immediately preceding and the taxation year immediately following the taxation year, but
>
> (i) an amount in respect of a loss is only deductible to the extent that it exceeds the aggregate of amounts previously deductible in respect of that loss under this Act,
>
> (ii) no amount is deductible in respect of the loss of any year until the deductible losses of previous years have been deducted, and
>
> (iii) no amount is deductible in respect of losses from the income of any year except to the extent of the lesser of
>
> (A) the taxpayer's income for the taxation year from the business in which the loss was sustained and his income for the taxation year from any other business, or
>
> (B) the taxpayer's income for the taxation year minus all deductions permitted by the provisions of this Division other than this paragraph or section 26.

A similarly worded provision had been in the Act for some years prior to 1957 but the words "and his income for the taxation year from any other business" were not present in subclause (A) of clause (iii) prior to the enactment of s. 12(1) of S. of C. 1958, c. 32, which by s. 12(3) of the same Act was made applicable to 1958 and subsequent years. The permissible deduction was thus limited in 1957 and earlier years to the amount of the taxpayer's income for the taxation year from the business in which the loss was sustained. *Vide M.N.R. v. Eastern Textiles Limited*[1], *Utah Company of the Americas v. M.N.R.*[2] and *Orlando v. M.N.R.*[3]. Accordingly, if there was profit in the year 1956 from the business in which the 1957 loss was sustained that loss would first be applicable as a deduction in computing income for 1956 and applicable only to the extent of the balance of such loss in computing taxable income for 1958 and 1959. It is agreed that for the year 1956 the appellant's taxable income excluding trading losses was $338,269.74 of which $338,082.41 was income from Davidson & Co., and that in that year the appellant sustained a loss of $19,863.07 on

[1] [1957] C.T.C. 48. [2] [1960] Ex. C.R. 128.
[3] [1962] S.C.R. 261.

Eastern Steel shares and an overall loss of an even greater amount on his investment income and his business activities, other than Davidson & Co., taken as a whole. The 1957 loss on Eastern Steel trading is accordingly deductible in computing the appellant's taxable income for 1956 only if the appellant's trading in Eastern Steel and his activities in Davidson & Co. were activities of the same business. If so, most of the 1957 loss would be deductible in the computation of the appellant's taxable income for 1956 leaving a small amount for deduction in 1958 and nothing for deduction in 1959. On the other hand, if the loss was incurred in a different business from that of Davidson & Co. none of it would be deductible in computing the appellant's taxable income for 1956 and the whole loss balance remaining after computing his income for 1957 would be available for deduction in subsequent years including 1958 and 1959 in accordance with the statutory provisions applicable thereto.

Counsel for the appellant submitted that the appellant had only one business, that of trading in stocks and bonds whether as principal or as commission agent at his Adelaide Street premises and that in this business he used his corporation, Davidson Securities Ltd., to support his operation as a commission agent and trader. From this position he argued that the loss was first deductible in 1956 to the extent of practically the whole of the appellant's income for that year and that the remainder of the loss would be deductible in 1958 but that if the loss was not deductible in the 1956 computation, it would be deductible in 1958, 1959 and subsequent years.

I do not agree with the submission that the appellant had only one business. The trading by the appellant as principal was his alone. The trading transactions of Davidson & Co. on the other hand were not his alone but transactions to which his partners were parties as well. The latter were not transactions as principals but transactions as agents. They were carried out to earn commissions rather than to earn profits from the transactions themselves. The partners were not concerned with whether profit was arising from the transactions or not. Moreover, where these transactions concerned the appellant, he was treated as a customer of the firm and was charged a commission for the services rendered. His securities like those of any other customer indebted to

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the firm were used by the firm as collateral for its financing. The firm had its own employees and accounting system which so far as appears were used entirely for the purposes of recording the firm's transactions rather than those of the appellant except insofar as he was a customer. While the appellant in his trading made use of the firm's facilities as a customer, it does not appear that his trading activities were interwoven with those of the firm except as a customer or that there was either interdependence of the one upon the other or union of the two into a single operation. Moreover, though the appellant was the president and the sole owner of the capital stock of Davidson Securities Ltd., and no doubt dictated its courses of action, there is nothing in the evidence to indicate that the company was in fact or in law an agent for the appellant in carrying out its transactions or that its business was not its own and a separate one from that of the appellant. In my opinion, the appellant's trading activities in Eastern Steel Products Ltd. shares were not part of or carried out in the course of a single business embracing such activities as well as the brokerage activities of Davidson and Co. and the trading activities of Davidson Securities Ltd. but were separate both from those of Davidson & Co. and those of Davidson Securities Ltd. It follows that no part of the appellant's 1957 loss in Eastern Steel Products Ltd. trading was deductible in computing his taxable income for 1956 and that the loss is deductible to the extent indicated in s. 27(1)(*e*) in computing his taxable income for 1958 and 1959. As no account has been taken of this by the Minister in making the assessments for 1958 and 1959, it becomes necessary to refer these assessments back to him to be revised accordingly.

The appeal will therefore be allowed with costs, the assessment for 1957 will be vacated, and the assessments for 1958 and 1959 will be referred back to the Minister for re-assessment in accordance with these reasons.

Judgment accordingly.

BETWEEN:

1963
Apr. 10
May 3

RONALD D. GRANT ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Income Tax Act R.S.C. 1952, c. 148, ss. 3, 4, 85B(1)(b)(d)(e) and 139(1)(e)—Capital gain or income—Appraiser—Sale of farm purchased for alleged residence—Secondary intention—Adventure in the nature of trade—Appeal dismissed.

Appellant who described himself as an agrologist and appraiser, was a regional supervisor for the Department of Veterans Affairs and as such was very familiar with rural property in his district. In 1953 he purchased a farm for a residence. According to the appellant he soon found that part of his farm was to be appropriated for a highway and consequently he began to look for another farm which he could use as a residence. In 1955 he purchased a farm of 140 acres for about $48,000, using borrowed money for the purpose. A few months later he accepted an unsolicited offer of $170,000 for the property. At the hearing of the appeal the bank manager to whom appellant applied for a loan testified that at no time did appellant suggest to him that he intended to occupy the farm as his home and that the appellant's stated intention was to subdivide the property and sell lots. He was assessed for income tax on the profit made on this transaciton. An appeal from the assessment to the Tax Appeal Board was dismissed and a further appeal was taken to this Court.

Held: That appellant's profit on the land transaction was taxable as income from an adventure in the nature of trade.

2. That it was established that appellant acquired the farm for speculative purposes and using the farm as his own residence was not his sole intention.

3. That appellant's main intention was to subdivide the property into lots and sell it off as such as soon as there was a suitable opportunity to do so.

4 That the appeal be dismissed.

APPEAL under the *Income Tax Act.*

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

R. P. Anderson for appellant.

T. C. Marshall and *A. J. Irving* for respondent.

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

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CAMERON J. now (May 3, 1963) delivered the following judgment:

This is an appeal from a decision of the Tax Appeal Board dated April 5, 1962[1], dismissing the appellant's appeals from re-assessments dated April 25, 1960 and made upon him for the years 1955 to 1958 inclusive. The sole question in the appeal is whether certain profits made by the appellant in the purchase and sale in 1955 of some 140 acres of land in the Municipality of Surrey, British Columbia (and which I shall refer to as the Surrey property) are taxable profits or whether, as the appellant contends, they are capital appreciations.

In his tax returns, the appellant did not include any portion of the said profits as taxable income. In re-assessing the appellant, however, the Minister took into consideration the fact that the property had been purchased for $45,500; that expenses of $2,568.74 had been incurred in the purchase and sale of the property; that it was sold for $170,000 under an agreement of sale which provided for payments over a number of years and that, accordingly, the provisions of s-ss. (*b*), (*d*) and (*e*) of s. 85B(1) of the *Income Tax Act* relating to Special Reserves, were applicable; and added to the declared income of the appellant the amount of profits so computed. It was agreed that the amounts so added had been properly computed and there remains only the question as to whether such gains are taxable.

In the tax returns, the appellant stated that he is an agrologist and appraiser. After receiving the degree of B.S.A. from the University of Saskatchewan in 1942, he served in the armed forces until 1946. Following his discharge, he started a farming operation in Northern Alberta but abandoned it in that year and moved to British Columbia where he entered the Civil Service of Canada as a regional counsel under the *Soldiers' Settlement Act* and the *Veterans' Land Act*. In 1947, he was appointed regional supervisor, continuing as a full-time employee of the Department of Veterans' Affairs until 1956 when he resigned to go into business on his own account.

In 1953, when he was living at Burnaby, he purchased a farm property consisting of some 58 acres at Clearbrook,

[1] 29 Tax A.B.C. 65.

west of Abbotsford on the Trans-Canada Highway, and shortly thereafter took up residence there. This farm I shall refer to as the Clearbrook property. On May 24, 1955, he entered into the agreement filed as Exhibits 2 and 3 regarding the purchase of the 140 acre Surrey property from the owner, J. A. Winter, for $45,500. The agreement (Exhibit 2) provides for the sale of three parcels, the total price being $43,000, of which $500 was paid on that date to the vendor, $2,000 was paid to the solicitor and the balance of $39,000 was to be paid not later than October 31, 1955, or the cash payments were to be forfeited to the vendor. By the terms of Exhibit 3 he was also given the first right to purchase a further adjacent parcel for $3,500. On July 21, 1955, he secured conveyances of the property (or most of it) and of the total cost, $30,000 was borrowed from the Bank of Montreal at New Westminster and $15,000 was borrowed from private sources.

On September 20, 1955, a friend introduced him to one Peter Barnes who offered to purchase the entire property for $170,000. On the same day, he entered into an agreement of sale with Barnes to sell en bloc at that price, the terms of sale providing that $5,000 be paid in cash, $25,000 on July 1, 1956, and $35,000 on the first day of September in each of the years 1957, 1958, 1959 and 1960.

The appellant gave evidence, but no other witness was called on his behalf. He stated that as he was brought up on a farm he had always wanted to acquire, live on and operate a farm and that it was for that purpose that he acquired the Clearbrook property in 1953. Shortly after he moved there in 1954, he noticed that surveyors' pegs were placed across his property, indicating the possibility that the Department of Highways was preparing to construct a new road. From inquiries made, he came to the conclusion that there was a strong likelihood that part of his property would be expropriated for that purpose; that it would seriously interfere with his farm operations and that the road might be very close to his residence; and that if constructed it might sever his property and create a serious difficulty in reaching some portions of it. He could get no definite information as to just when or where such a road might be built. In fact, it was not until 1958 that he did sell a part of that property for that purpose, and later he

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sold the rest of the Clearbrook farm at a very substantial profit. He and his family now reside on a 2,500 acre farm, or ranch, in the Penticton area.

Faced with the possibility of an expropriation of part of his property for a road and the difficulties that might follow, he says he began to look around for a substitute farm which would be available if his own property were so taken. He made a number of inspections of other farms and in May, 1955 decided to purchase the Surrey property. His sole intention, he says, was to use it as a farm where he could take up residence with his family. Only ten acres were cleared, the rest being brushwood or timber. The soil, he said, was suitable, if cleared, for agricultural purposes.

There was no residence on the property purchased, but the vendor, it is stated, assured him that he would be given the first option to buy the residence property which he had retained. In fact, the appellant some years later did acquire it and sold it at a profit. He says that he planned to construct a house on the property if he could not buy the existing one.

When he bought the Surrey property, he said he had no intention whatever of selling. He points out that he did not advertise or list it for sale or seek out buyers; and that he did not previously know Barnes, the purchaser, who was brought to him by a friend. As evidence of his intention to work the property as a farm, he says that in the summer of 1955 he cut the hay thereon with a tractor-mower brought from Clearbrook, but I consider that to be of no importance as it was a very small operation and the machinery was returned to Clearbrook. Nothing else was done on the property prior to sale.

There is other evidence, however, which establishes quite clearly that even before he purchased, he was fully aware of the potentialities of the property for subdivision and sale, or sale en bloc, at an early date and that there was an active and increasing demand for building lots in the area. While it was zoned as farm property, there were a substantial number of houses constructed in the immediate vicinity, many of them under the *Veterans' Land Act*.

His chief problem was that of financing the purchase of the property. Accordingly, he approached Mr. Byrom, manager of a branch of the Bank of Montreal in New Westminster who was known to him, and asked for a loan of $50,000 in addition to some $1,650 that he already owed that bank. Mr. Byrom was called as a witness on behalf of the respondent and identified Exhibit A dated May 12, 1955 (i.e., prior to the purchase of the property) as the application for a loan which he prepared at the request of and from information supplied by the appellant and then sent to the bank's assistant general manager at Vancouver, it being beyond his powers as local manager to grant a loan of that nature and amount. After stating that the loan would be payable on demand and would be repaid from sale of lots within one year, the report reads:

Mr. Grant, Regional Supervisor for the Veterans Land Act has the opportunity to purchase 120 acres of land @ $375. an acre and has requested our assistance for a non-revolving advance of $50,000. The land is situated 1½ miles from Whalley, B C. on the Ferguson road and at present belongs to an estate, beneficiaries being residents of the United States of America who are anxious to obtain an immediate wind up of the estate. A portion of the land is cleared with the remainder covered with scrub brush. The adjacent property is cleared with a large number of the lots sold and houses built or being constructed under N H.A. The property in question is serviced for water by the Greater Vancouver Water District and it is Mr. Grant's intention to gradually sub-divide the property into 466 lots of which 57 sites are immediately available. A breakdown of the anticipated expenses for servicing the lots is attached. Real estate firms value the land in the area at $1,750 an acre and there is a parcel of 80 acres listed for $120,000.

Mr. Grant is a very shrewd appraiser and in our opinion can be classified as one of the leading appraisers in Canada. As Regional Supervisor for the V.L.A. it is his duty to be familiar with all property in the Valley and in 1949 in the line of his duty an aerial survey was made of this particular district and all property valued. It was during this time that he became interested in the property and made his intentions known to the owner that he would be interested in the purchase. The property passed to the estate and the beneficiaries have just informed Mr. Grant that they would be interested in a quick cash sale.

Financial position of Mr. Grant is approximately the same as outlined in our form 516 of the 21st of July last with the exception that he informs us that property values have increased from the purchase price of $500 an acre to $1,500 an acre making a potential sale value of the property $87,000. The credit requested $45,000 for the purchase of the land and $5,000 for additional expenses clearing etc. will be repaid from sale of individual lots or in parcels and Mr. Grant is confident that no trouble will be experienced. The purpose of the request for accommodation and the security offered is not a normal banking proposition and is a definite promotion scheme but we have a very high opinion of Mr. Grant's ability as an appraiser and we are satisfied that sale of sufficient land say at $800 a lot would be made to repay our advances within one year. Last year Mr. Grant received $5,000 in independent appraisal fees which was used for farm improvements. He also informs us that he appraised a new subdivision on Lula Island and the costs of development were in accordance

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to his estimates. Without disclosing the location of the property he has been offered outside financing, at a premium but does not wish to avail himself of this offer. If the credit is granted there is a good possibility that the branch will derive some new mortgage business. Application recommended and a reply by telephone would be appreciated.

Attached thereto was "the breakdown of the anticipated expenses for servicing the lots", a copy of which was filed as Exhibit 4. This was prepared by the appellant personally and given to the bank manager to be forwarded with the report. It refers to four parcels in which there would be a total of 486 lots; the lots if sold at $800 each (after allowing for sales commissions, roads and water, taxes, surveys, legal expenses and main roads) would yield a profit of $234,838.

The proposed loan was not then granted and after a further interview with the appellant, Byrom again asked for approval of the loan on May 24, 1955 (Exhibit A). After repeating that the purpose of the loan for $50,000 was to assist in purchasing the property and that the demand loan, if granted, would be repaid from the sale of lots within one year, the report stated:

A recent survey of the proposed purchase of 120 acres near Whalley, B.C. revealed, we are informed, that there appears to be enough cordwood, poles etc. on the property to cover the costs of survey, taxes etc. without any additional expense to Mr. Grant. He also informs us that plans are on the drawing boards for the construction of a new highway from Peterson Hill direct to Abbotsford which would indicate that it will cut diagonally across this property and would require 100 of the 466 lots. The Provincial Government purchases land at the going market price and have in the past obtained appraisals from Mr. Grant.

While we realize that the proposition is speculative and not attractive from a Banking point of view we have every confidence in Mr. Grant's ability to valuate the potentiality of the district for development purposes. Also as a civil servant he is closely associated with certain department of the Provincial Government and in this way is in a position to obtain information as to proposed new highways. We have been informed from other sources that it is the intention to build a new highway direct from Peterson Hill to Abbotsford by-passing Whalley, therefore it would appear that his information is authenticate as to the proposed construction but could be problematical as to the actual route to be taken. With 57 sites available almost immediately Mr. Grant is confident that there would be no difficulty in disposing of them at around $800 a lot grossing $45,600. If the advance is granted and not retired within one year Mr. Grant has assured us that he would obtain outside financing at any time the Bank requested to retire outstanding advances and as we consider him a man of integrity, held in high esteem by his employers, we have no reason to doubt his word. He has again mentioned that if we cannot assist him he will be forced to obtain outside financing that has already been promised at a premium.

Recommended on a non-revolving basis for a period of one year, a reply by telephone would be appreciated.

The proposed loan was not approved. However, on June 16, 1955, the manager, after a further discussion with the appellant, applied for a new loan (Exhibit A) of $40,000, $30,000 of which was to complete the purchase and $10,000 for development, if required. It states:

With reference to our forms 516 of the 12th and 24th of May we apply on behalf of Mr. Grant for a Non-revolving credit of $40,000—$30,000 for the purchase of 120 acres of land and $10,000 if required for temporary development. The cost of the land is $40,000 and Mr. Grant has already paid $2,000 on an option to purchase which expires on the end of this month He will have by that time $8,000 in cash from undisclosed sources and if his request for our assistance is granted he will complete the purchase and lodge title with us. However he has definitely informed us that he is going ahead with the purchase, with or without our assistance as he states he can if necessary obtain outside support.

Your Manager accompanied Mr. Grant on a tour of the property which is a 5 minute drive from Whalley shopping centre and there are 2 schools close by which also lends to the desireability of the land for a subdivision and when developed should be very attractive. Fraser Valley Lands Ltd. have approached Mr. Grant to see if he would be interested in selling all or a portion of the land. They have tentatively offered for the 120 acres $200,000 with $50,000 down and the balance over a period of 5 years and he has informed them that he is interested in the proposition of that nature. However it is still in the discussion stage and may take a week or two before final decision is reached. We have suggested that he take their offer and be satisfied with a profit of $160,000 spread over a 5 year period. However the option to purchase expires on the end of this month and he is desirous of finalizing arrangements to complete the purchase of the property in event the sale of the land to Fraser Valley Lands Ltd. is held up or does not materialize. Therefore he has again applied to us for the reduced credit for a period of not more than one year with the security as outlined in the panel of the form. Application recommended as we are very confident that Mr. Grant would not enter into this obligaiton if he were not satisfied that he could either sell the property outright, or by piece meal if necessary and retire our advance within the period of one year.

In the result a bank loan of $30,000 was granted about June 30, thus enabling the appellant to complete the purchase assisted by other loans privately arranged.

Mr. Byrom was a careful witness and after refreshing his memory by referring to these three reports, stated that the data contained therein came entirely from the appellant (except that he had authenticated from other sources the appellant's statement as to the possible route of the new road from Peterson Hill to Abbotsford) and that at no time did the appellant state or suggest to him that he planned to occupy the property as his own home. I accept his evidence

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unreservedly. In general the appellant did not disagree with Byrom's evidence, although he said he could not recall having mentioned one or two items in the reports, but would not deny Byrom's statement that he had, in fact, done so.

The appellant, however, does say that notwithstanding the information given to Byrom as to his intentions regarding the property, he had, in fact, no intention of disposing of it at any time until Barnes offered him $170,000, an offer which was so large that he was "staggered" by it and consequently immediately accepted it so as to make a substantial profit. He says that in order to secure the bank loan it was necessary to satisfy the bank authorities that the loan was well secured, that it would be liquidated within one year and that the property he wished to secure was of such a nature that, if the bank had to take it over, it could readily sell the property in lots or en bloc at prices much in excess of the amount of the loan. While he had made no definite plans for re-paying the loan within one year, he felt he could rely on sources other than the sale of the Surrey lots. There was a strong likelihood that part of the Clearbrook property (in which he had an equity of $21,000) would be expropriated and through that and the sale of the balance, he could pay off the loan. Alternatively, he had discussed the matter with his father who had agreed to and could advance monies to pay off the bank.

On the whole of the evidence, I must come to the conclusion that the appellant has failed to satisfy me that his intention in acquiring the property was to secure a farm which he would occupy and operate with his family in the event that the Clearbrook property was expropriated. His evidence on the point is entirely uncorroborated. On the other hand, his intention as disclosed to Byrom was without doubt to buy the land for speculative purposes, to subdivide and develop it by installing facilities and to sell it off in lots or en bloc as soon as there was a suitable opportunity. His costs of development and his estimate of potential profits were carefully worked out and he gave assurances to the bank that he proposed to pay off the loan by such sales within one year.

Moreover, he was well aware of the potentialities of the purchase when it was made. In his official capacity as a supervisor, he had acquired a full knowledge of land values in the whole of the Fraser Valley. He knew of the demand for building lots in the Surrey area where many houses were being built under the *National Housing Act*. He knew that a new road was likely to be built in the vicinity which would enhance the value of his property and facilitate its sale. The estimated profits which he anticipated by subdivision, development and sale, as shown by Exhibit 4, indicate quite clearly not only what his intentions were, but also that prior to his purchase he was fully aware that the property could be acquired at a bargain and that he would in all likelihood reap a substantial profit by selling it. As shown by the bank manager's third report dated June 16, 1955, the appellant was interested in an informal offer from Fraser Valley Lands Ltd. to purchase the whole property for $200,000; that was before the bank loan was made and prior to completion of the purchase.

In my opinion, the appellant acquired the property for speculative purposes. I think his main intention was to subdivide it into lots suitable for residences, install the necessary facilities and then sell the lots as soon as possible; but that he was always prepared to dispose of it in some other way, such as by sale en bloc. It is therefore similar in many respects to the case of *Day v. Minister of National Revenue*[1] in which I held that the profits received by the taxpayer from the purchase and sale of 129 acres of land were taxable as an adventure or concern in the nature of trade, notwithstanding the fact that there was only one venture and that the original intention of the taxpayer was to subdivide the property, develop it in the usual way and then sell off the lots; and that intention was frustrated by a lack of capital and accordingly the taxpayer sold the property en bloc. In that case I followed *McIntosh v. Minister of National Revenue*[2], a decision of the Supreme Court of Canada which upheld the judgment of Hyndman, D.J. in this Court[3]. In that case the Court unanimously agreed with Mr. Justice Hyndman's findings with reference to the appellant, that "Having acquired the said property there was no intention in his mind to retain it as an investment,

[1] [1958] Ex. C.R. 44. [2] [1958] S.C.R. 119.
[3] [1956] Ex. C.R. 127.

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but to dispose of the lots, if and when suitable prices could be obtained".

But even if I had accepted the evidence of the appellant in the present case that he had in mind the intention to acquire the property as a farm for his own use, it is abundantly clear that such was not his sole intention. At all relevant times there was at least an alternative, and probably the main, intention to dispose of the property as soon as possible, either by promoting a subdivision and selling lots or by sale en bloc. In such circumstances, the case falls clearly within the principles laid down by the Supreme Court of Canada in *Regal Heights Limited v. Minister of National Revenue*[1]. In that case Judson J., in delivering judgment for the majority of the Court, agreed with the opinion of Dumoulin J. at trial, that the primary aim of the partners in the acquisition of the properties was the establishment of a shopping centre, but that there was also an intention to sell at a profit if they were unable to carry out their primary aim. At p. 907, Judson J. said:

> Their venture was entirely speculative If it failed, the property was a valuable property, as is proved from the proceeds of the sales that they made. There is ample evidence to support the finding of the learned trial judge that this was an undertaking or venture in the nature of trade, a speculation in vacant land. These promoters were hopeful of putting the land to one use but that hope was not realized. They then sold at a substantial profit and that profit, in my opinion, is income and subject to taxation.

I must therefore hold that the appellant's profit from the sale of the real estate in the 1955 taxation year (and as computed in the re-assessments in question) was a profit derived from an adventure or concern in the nature of trade and was therefore income from a business within the meaning of ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act*.

Accordingly, the appeal will be dismissed with costs and the re-assessments made upon the appellant for each of these years will be affirmed.

Judgment accordingly.

[1] [1960] S.C.R. 902.

1963
Mar. 18
May 6

BETWEEN:

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

ROBERT VERNON TOMKINS ....RESPONDENT.

Revenue—Income tax—Income Tax Act, R S C. 1952, c. 148, ss. 3, 5(1)(a) and 85A (1)(2)(3)—Benefits to employees—Whether s. 85A applies to transfer of escrow shares to taxpayer—Shares of employing company acquired below value—Election to pay tax on special basis—Appeal allowed

Respondent was induced to enter the services of two companies by an offer of shares of stock therein which at the time were held in escrow as parts of blocks of shares issued to their President Respondent elected to be taxed under s 85A of the Act on benefits so received in 1955 and 1956. On the ground that the shares were not issued or sold to him by the companies but by the President in his personal capacity the election was refused An appeal to the Tax Appeal Board was allowed and the Minister appealed from that decision to this Court.

Held· That the escrow shares made available to the respondent were the personal property of the President of the companies and there was no agreement whereby the companies had agreed to sell or issue shares to respondent.

2 That the benefits deemed to have been received by an employee of a Corporation on benefits conferred on the employee by the Corporation and then the employing company did not agree to sell or issue any of its shares to respondent who did not acquire any shares under such agreement

3. That all the escrow shares were the property of the President and what respondent received was entirely the result of steps taken by the President and as the shares were provided by and at the expense of an individual the requirements of s 85A(1) had not been met and the respondent is not entitled to the benefits of the section.

4 That the appeal be allowed

APPEAL under the *Income Tax Act*.

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

E. C. Leslie, Q.C. for appellant.

P. H. Gordon, 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 (May 6, 1963) delivered the following judgment:

This is an appeal by the Minister of National Revenue from a decision of the Tax Appeal Board dated January 26, 1962[1] which allowed the respondent's appeals from re-assessments dated July 25, 1958 and made upon him for the taxation years 1955 and 1956. In the re-assessments, the Minister added to the declared income of the respondent for 1955 the sum of $5,150, and for 1956 the sum of $10,828.12, stated in each case to be "Amount received from Allied Securities and Allied Securities Ltd."

By Notices of Objection dated August 22, 1958 the respondent, after setting out certain facts, alleged that he was entitled in respect of the amounts above mentioned to the benefits of s. 85A(1)(*a*) of the *Income Tax Act*; and alternatively, that these amounts were not taxable income but rather an appreciation of capital. By the Minister's notifications dated May 19, 1959, he confirmed the said assessments as having been properly made in accordance with the provisions of the Act, and added, "The provisions of s. 85A of the Act are not applicable". The decision of the Tax Appeal Board was that the provisions of s. 85A were applicable to the sums in question and accordingly the appeals of the respondent were allowed, the re-assessments set aside and the matter referred back to the Minister for re-assessments.

At the hearing of the present appeal it was agreed that the evidence given before the Tax Appeal Board, together with the exhibits there filed, should constitute the evidence on this appeal, supplemented only by a number of questions and answers taken from the Examination for Discovery of the respondent on February 28, 1963. It was also agreed that the sums so added by the re-assessments were not in the nature of accretions to capital, but were taxable income of the respondent. The only question remaining for consideration, therefore, is whether, as the respondent contends, he is entitled to the benefits of the provisions of s. 85A(1); or whether, as submitted by the Minister, that section has no application to the case.

[1] 28 Tax A.B.C. 276.

While the Minister is the appellant, the onus is on the respondent to prove that the re-assessments are erroneous (*Minister of National Revenue v. Simpson's Ltd.*[1]).

There is little dispute as to the facts. In 1954 the respondent was employed by the Department of Mineral Resources of the Province of Saskatchewan as Director of the Industrial Minerals Research Branch. Mr. Ray Hauer was the president of Aggregates and Construction Products Ltd. (hereinafter to be called Aggregates), a company which he had promoted and caused to be incorporated on September 1, 1954, and in which he held the controlling interest. Mr. Hauer wished to secure the services of the respondent for that company and after some verbal discussions, the respondent wrote Hauer on November 13, 1954 (Exhibit A-1) outlining the general terms on which he would enter the services of Aggregates. One of the terms was "I will receive 10,000 shares of company stock".

On November 19, 1954, Mr. Hauer as president of Aggregates wrote the respondent (Exhibit A-2), giving the general terms on which the respondent could enter the services of the company, the relevant portions thereof being as follows:

1. Your services will commence January 1, 1955.
2. You will receive a salary of $8,250 per year, payable at $687 50 per month.
3. You will receive 10,000 shares of Escrow stock in Aggregates & Construction Products Ltd. The first 2,000 shares to be released to you not later than January 31, 1955. Balance of 8,000 to be released as stock is sold, (or you will receive cash, less commission, to compensate for the stock).
7. We are also planning on forming a new company for the Saskatoon or Unity area as soon as the issue of stock is sold in this Company. We will then be able to give you a similar offer as you have with this Company. This would mean you would be holding two jobs, which would increase your income considerably.

By letter dated November 22, 1954 (Exhibit A-3) the respondent wrote to Mr. Hauer as president of Aggregates, accepting the offer of employment under the conditions detailed in Exhibit A-2.

Pursuant to the said agreement, the respondent entered the service of Aggregates on January 2, 1955 as chief engineer, remaining with the company until February, 1957;

[1] [1953] Ex. C.R. 93.

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throughout the whole of that period his agreed salary was paid by Aggregates.

It will be convenient to first consider the appeal for the year 1955 as the amounts in question for that year were the proceeds of sales of certain shares in Aggregates, while those in question for the year 1956 were the proceeds of sales in another company.

It will be recalled that by the terms of the accepted offer, the respondent was *to receive* 10,000 shares of *escrow stock* in Aggregates, or, alternatively, if such shares were sold, cash less commission, to compensate for the stock. Now the only escrow shares in Aggregates were those issued to Hauer personally as payment for his transfer to the company of rights which he had acquired from the Province of Saskatchewan to prospect and explore for clay in certain areas. Exhibit R-1 is a prospectus of Aggregates dated September 20, 1954, and the following extract from the Statutory Information is shown to be accurate.

> (ii) The names and addresses of all vendors of property purchased or intended to be purchased by the company and the consideration paid therefor and the property acquired from each are as follows—
>
> Ray Hauer, 201 Connaught Blk, Saskatoon, Sask, 100,000 fully paid up shares for securing and transferring direct to the Company the property interests set forth in (1) hereof being the immediately preceding subparagraph hereto 90,000 of such shares are being held in escrow by the Toronto General Trusts Corporation under an escrow agreement and may only be released upon authority from the Registrar, Securities Act, Province of Saskatchewan

All the escrow shares in Aggregates were at all relevant times the personal property of Hauer. He was also the sole partner in a proprietorship called Allied Securities and the sole owner of all the shares in Allied Securities Ltd., a corporation which he later formed and which took over the business of Allied Securities. The date of the take-over is not stated and I shall refer to both organizations as Allied Securities. It was engaged in the sale of shares to the public.

On two occasions in 1955, the Saskatchewan Securities Commission released portions of Hauer's escrow shares for sale and presumably at his direction they were turned over by the Toronto General Trusts Corporation to Allied Securities and were sold by it to the public in that year. Allied Securities, no doubt by the direction and authority of Hauer, the owner of the shares, paid to the appellant a total of

$5,150 in 1955, representing the proceeds of the sale of 4,500 of the escrow shares. It was that amount that was added by the Minister to the respondent's declared income for 1955.

I find it unnecessary to review in detail all the evidence on this point. There is no evidence to indicate that Aggregates at any time took any steps to cause the respondent "to receive 10,000 shares of escrow stock" in that company or any part thereof, or the proceeds of the sale thereof. The evidence is conclusive that what the respondent did receive was entirely the result of steps taken by Hauer, namely, the sale by Allied Securities of his personally owned escrow shares in Aggregates and the allocation by Hauer personally to the respondent of the proceeds of the sale of 4,500 such shares. As I recall the evidence, the respondent has not as yet received any escrow shares or other shares in Aggregates, the unsold block of such shares still being held in escrow by the Toronto General Trusts Corporation.

The facts in regard to the 1956 taxation year are similar. In June, 1955, Hauer organized another company called "Winnipeg Light-Aggregate Limited" and about the end of that year a further company named "Western Clay Products Ltd." By arrangement with Hauer, the respondent became the chief engineer of both companies, continuing with the former until February, 1957 and with the latter until June, 1957. The terms of his employment were not in writing, but it is agreed that in respect of each of these companies, the arrangements were similar to those regarding Aggregates. I need say nothing further as to Western Clay Products Ltd. as the respondent in 1955 and 1956 neither received any escrow or other shares therein, nor the proceeds of sales thereof.

It was one of the terms regarding the Winnipeg Light-Aggregate Limited that the respondent would receive 15,000 escrow shares of that company, or the proceeds thereof if sold (less commission) to compensate for the stock. In this case, also, it is clear from the prospectus, Exhibit R-2, (and the evidence) that there had been issued to Hauer personally 120,000 shares as consideration for the purchase from him of the lands described of which "110,000 are held

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in escrow on the terms and conditions set out in para. 8 hereof", which reads:

> 8. A total of One Hundred and Ten Thousand (110,000) shares are held in escrow by The Toronto General Trusts Corporation, Saskatoon, Saskatchewan and will be released only upon the written consent of the Saskatchewan Securities Commission. The written consent of the Saskatchewan Securities Commission is also required for the transfer or other alienation of the shares within the escrow. The escrowed shares when released may be sold at the market price but the proceeds thereof will not accrue to the benefit of the treasury of the Company.

In January, 1956 the Saskatchewan Securities Commission released a part of the escrow shares which were then sold by Allied Securities to the public, and the respondent in that year received from Allied Securities $10,828.12, representing the amount received by Allied Securities (less its commission) from the sale of 8,250 shares in Winnipeg Light-Aggregate. It was that amount which was added by the Minister to the declared income of the respondent for 1956.

On the evidence and the admissions made, I have reached the same conclusion in regard to this matter as I did in regard to Aggregates, namely, that the escrow shares which were so sold by Allied Securities were the personal property of Hauer; that they were sold by his direction and that he allocated the proceeds to the respondent, Winnipeg Light-Aggregate Limited having nothing to do with the matter. Later, several portions of such escrow shares were released and Exhibit A-7 is a certificate for 6,750 shares of the company in the name of the respondent dated December 29, 1958. It is admitted that the shares represented by that certificate formed part of the 110,000 escrow shares issued to and owned by Hauer.

Exhibit A-8, a letter from Hauer personally to the respondent dated May 29, 1957, confirms the conclusion which I have reached in regard to all three companies. It reads:

> In reply to your letter of May 23rd, 1957, I wish to advise that all escrow stock is held by Toronto General Trusts Corporation in my name. This cannot be changed.

The amount of escrow stock which I have allocated to you and which is recorded in our records is as follows:

Aggregates & Construction Products Ltd.	10,000 shares		
Less: Shares sold & monies paid to you	4,500	Balance—	5,500 sh.
Winnipeg Light-Aggregate Ltd.	15,000 shares		
Less: Shares sold and monies paid to you	8,250	Balance—	6,750 sh.
Western Clay Products Ltd.			20,000 sh.

The transfer of these shares to you is dependent upon the manner in which they are released from escrow by the Saskatchewan Securities Commission.

The question for consideration is whether in these circumstances the respondent is entitled to the benefits of the provisions of s. 85A(1) of the *Income Tax Act*. It is unnecessary to consider the manner in which the tax is computed thereunder; it is sufficient to state that it confers a very substantial benefit on a taxpayer coming within its provisions and who elects to compute his tax thereunder. It is agreed that the respondent duly made his election and that in both years the tax, if so computed in reference to these gains, would be negligible.

Section 85A(1) reads as follows:

85A. (1) Where a corporation has agreed to sell or issue shares of the corporation or of a corporation with which it does not deal at arm's length to an employee of the corporation or of a corporation with which it does not deal at arm's length,

(*a*) if the employee has acquired shares under the agreement, a benefit equal to the amount by which the value of the shares at the time he acquired them exceeds the amount paid or to be paid to the corporation therefor by him shall be deemed to have been received by the employee by virtue of his employment in the taxation year in which he acquired the shares;

(*b*) if the employee has transferred or otherwise disposed of rights under the agreement in respect of some or all of the shares to a person with whom he was dealing at arm's length, a benefit equal to the value of the consideration for the disposition shall be deemed to have been received by the employee by virtue of his employment in the taxation year in which he made the disposition;

(*c*) if rights of the employee under the agreement have, by one or more transactions between persons not dealing at arm's length, become vested in a person who has acquired shares under the agreement, a benefit equal to the amount by which the value of the shares at the time that person acquired them exceeds the amount paid or to be paid to the corporation therefor by that person shall be deemed to have been received by the employee by virtue of his employment in the taxation year in which that person acquired the shares; and

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(*d*) if rights of the employe under the agreement have, by one or more transactions between persons not dealing at arm's length, become vested in a person who has transferred or otherwise disposed of rights under the agreement to a person with whom he was dealing at arm's length, a benefit equal to the value of the consideration for the disposition shall be demed to have been received by the employee by virtue of his employment in the taxation year in which that person made the disposition.

It will be convenient to consider the provisions of the section in regard to Aggregates only, since it is agreed that the legal position is the same in respect to each company.

To come within the provisions of the opening paragraph of the section, the respondent in this case must establish that Aggregates, had agreed to sell or issue shares of that company to him, an employee thereof. For the purposes of this case, I shall assume (without deciding) that the respondent was an employee of Aggregates, although it is clear that at the time he entered into the agreement he had not then entered its service but agreed to do so later, and in fact did so.

Inasmuch as the respondent did not transfer or otherwise dispose of his rights under the alleged agreement with Aggregates, he does not fall within the provisions of clauses (*b*), (*c*) or (*d*), and, in order to succeed, must come within the provisions of clause (*a*) and establish that he *acquired* the shares under the agreement, i.e., an agreement to sell or issue shares of Aggregates to him.

Now I am unable to find anything in the offer of employment dated November 19, 1954 (Exhibit A-2) which would indicate that Aggregates agreed to sell or issue to the respondent any shares in that corporation. The relevant clause reads:

3. You will receive 10,000 shares of Escrow stock in Aggregates & Construction Products Ltd The first 2,000 shares to be released to you not later than January 31, 1955 Balance of 8,000 to be released as stock is sold, (or you will receive cash, less commission, to compensate for the stock)

When that letter was written and signed by Hauer, he knew that all the escrow shares were his personal property and were registered in his name, and that Aggregates had no interest in such shares. He knew, also, that he alone could carry out that part of the agreement by allotting the agreed number of such shares to the respondent or by paying him the proceeds thereof when sold. As I have found, that is precisely what was done.

I think, also, that the respondent was well aware that Hauer would be the one to implement that part of the agreement, and that it was from Hauer personally that he would receive the escrow shares or the proceeds thereof. Aggregates had no escrow shares of its own and there is no evidence which suggests that the respondent ever looked to that company to fulfill that part of the agreement; he knew also that all the escrow shares were the personal property of Hauer.

In or about 1957, when he felt that he should have some evidence as to his interests in the shares or proceeds thereof which he had not received, he secured from Allied Securities three receipts, all signed by Hauer as agent for Allied Securities, being Exhibits A-4, A-5 and A-6, indicating that he had paid Allied Securities two cents per share for all the shares in the three companies. These receipts are dated January 2, 1955, July 15, 1955 and January 2, 1956, all relating to escrow stock in Aggregates, Winnipeg Light-Aggregate Limited, and Western Clay Products Ltd., and are for $200, $300 and $400 respectively. It is now admitted that no money changed hands. It is shown, however, that the respondent in his Notice of Objection stated in his alternative submission that "These transactions have to be treated as a capital gain whereby I purchased the shares from Mr. Hauer at two cents per share".

From Exhibit A-8 it will also be seen that he accepted Hauer's statement that all the escrow shares were in Hauer's name and that in the case of all three companies, it was Hauer who had allocated the shares or the proceeds to him.

On these findings I think it is clear that all parties understood clearly that such escrow shares or the proceeds thereof, which the respondent was to receive, would be allocated to him by Hauer as was actually done. The agreement was that the respondent would *receive* them or the proceeds thereof, and not that Aggregates would sell or issue its shares to him.

On these facts I have come to the conclusion that the respondent is not entitled to the benefits of s. 85A(1) and that the appeal must be allowed.

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I find as a fact and for the reasons stated earlier, that there was no agreement between the respondent and Aggregates by which Aggregates agreed to sell or issue its shares to the respondent. In my opinion, the agreement referred to in the section, insofar as it is here applicable, must be one in which that corporation agreed either (a) to *sell* its shares to the employee and "sell", I think, means to sell at a fixed or ascertainable price; or (*b*) to *issue* its shares and "issue", I think, means in the context to issue its own treasury shares, possibly without monetary consideration. Then para. (*a*) is applicable only if the employee has *acquired* shares under the agreement. The facts in the instant case indicate clearly that Aggregates did not agree *to sell* any of its shares or to *issue* any of its treasury shares to the respondent, and also that the respondent in each of the taxation years in question acquired no shares under any such agreement. What he did receive was the proceeds of the sale of escrow shares in Aggregates owned by Hauer (and as allotted by Hauer to him) as provided for in the agreement of employment.

After a careful consideration of the whole of s. 85A, I have also come to the conclusion that the benefits deemed to have been received by the employee as therein mentioned are benefits conferred on the employee *by the corporation.* It is submitted by counsel for the respondent that the agreement of employment was with Aggregates, and that it makes no difference if (as I have found to be the case) the shares—or rather the proceeds of the sale thereof—which came into the respondent's hands were the personal property of Hauer and were allotted to him by the respondent. I cannot agree with this submission.

It seems clear to me that the section relates to an agreement in which by the sale or issue of the shares, not only may a benefit be acquired by the employee, but some detriment, loss or cost may be sustained by the corporation through having sold or issued its shares. Subsection (5)(*b*) provides that the corporation in computing its taxable income may not deduct any of the cost of conferring the benefits referred to in the section. As amended by s. 25 of c. 54, Statutes of Canada 1955, and made applicable to the 1955 and subsequent taxation years, it reads:

(5) Where a corporation has agreed to sell or issue shares of the corporation or of a corporation with which it does not deal at arm's length to an employee of the corporation or of a corporation with which it does not deal at arm's length,

* * *

(b) the income for a taxation year of the corporation or of a corporation with which it does not deal at arm's length shall be deemed to be not less than its income for the year would have been if a benefit had not been conferred on the employee by the sale or issue of the shares to him or to a person in whom his rights under the agreement have become vested.

Section 85A was first enacted by s. 73(1) of c. 40, Statutes of 1952-53 and made applicable to the 1953 and subsequent taxation years in cases where the agreements were made after March 23, 1953. Paragraph (b) of s-s. (5) as so enacted read as follows:

(5) Where a corporation has agreed to sell or issue shares of the corporation or of a corporation with which it does not deal at arm's length to an employee of the corporation or of a corporation with which it does not deal at arm's length,

* * *

(b) the income of the corporation for a taxation year shall be deemed to be not less than its income for the year would have been *if it had not conferred a benefit on the employee* by the sale or issue of the shares to the employee.

That paragraph which applied to the agreements referred to in s. 85A(1) and to the section as a whole, in clear terms refers to benefits conferred *by the corporation.* While the paragraph as amended in 1955 is couched in somewhat different language, I think that in disallowing the deduction by the corporation of any amounts relative to the benefits conferred on the employee, there is a clear inference that Parliament was speaking of benefits conferred by the corporation.

That view of the matter is supported, I think, by the provisions of s-s. (1)(a) (*supra*). It provides a formula for the ascertainment of the amount of the benefit deemed to have been received by the employee under the agreement, namely, by deducting from the value of the shares at the time of acquisition the amount "paid or to be paid to the corporation therefor by him". The second item in that computation relates only to the terms of the agreement with the corporation and to the amount which by the agreement has been or is to be paid to it. It can have no application

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to a case in which the shares are provided by and at the expense of an individual such as I have found to be here the case.

For these reasons, the appeal will be allowed with costs, the decision of the Tax Appeal Board set aside, and the re-assessments made upon the respondent affirmed for each year.

Judgment accordingly.

1962 Oct. 16

1963 May 14

BETWEEN:

DERBY DEVELOPMENT CORPORATION .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Income Tax Act R S C. 1952, c. 148, ss. 15(1), 27(1)(2), Quebec Civil Code Arts 1830 and 1831—Contractor to receive fixed fee and twenty-five per cent of any profits for construction of houses in agreement with appellant—Losses fully deductible from taxable income—Profit sharing venture in construction business—Agreement not a partnership agreement—Interpretation of contract—Contract one of principal and agent—Appeal allowed.

Appellant with head office in Montreal, Quebec, was engaged in the business of building houses for sale He entered into an agreement with a construction company whereby the two would carry on a contracting and construction business. Appellant was to obtain suitable land, subdivide it and arrange financing and sell the homes erected by the contractor who would be reimbursed for all costs and receive a fixed annual fee of $5,000 plus 25% of the profits after payment of a stated salary to a member of appellant's staff Appellant was to receive 75% of the profits Losses were incurred which led to the termination of the contract by mutual consent, after 26 months The total losses were borne by the appellant and it deducted these losses from its income as provided in s 27(1)(*e*) of the Act. These claimed losses were reduced by 25% by the Minister who contended that the agreement between appellant and the contractor was a partnership one and that losses should be apportioned in the same manner as the profits An appeal to the Tax Appeal Board was dismissed and a further appeal was taken to this Court.

Held: That the appeal be allowed.

2 That the agreement between the appellant and the contractor was not a partnership agreement but rather a contract for the lease and hire of services or one of principal and agent, that the parties never intended

a partnership and their conduct confirmed that their intention was not to do so.

3. That the agreement did not constitute a partnership agreement.

APPEAL under the *Income Tax Act*.

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

Harry Aronovitch for appellant.

Paul Boivin, Q.C., and *Rolland Boudreau* for respondent.

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

KEARNEY J. now (May 14, 1963) delivered the following judgment:

This is an appeal from a decision of the Tax Appeal Board, dated January 8, 1962[1], dismissing the appellant's appeal from a reassessment of its declared income for its taxation year 1959, notice of which was given by the Minister on August 23, 1960, and whereby losses incurred in the construction and sale of homes, amounting to $134,667, during the years 1956 to 1959, inclusive, and claimed in full as deductions by the taxpayer, were disallowed to the extent of 25% thereof or $33,667.

The appellant's income tax return for the year 1959 discloses taxable income amounting to $146,184.74, from which it deducted as a loss the sum of $55,197.08 which included a balance of loss carried forward from the aforesaid previous years, thereby reducing its taxable income to $90,987.66. As a result of the above-mentioned disallowance of $33,667.01, the appellant's taxable income was raised to $124,654.67, thereby adding $13,220.18 to its tax otherwise payable for the said year.

The appellant objected to the said reassessment but on reconsideration the Minister confirmed it on the grounds that the said losses resulted from what constituted a partnership agreement entered into on April 26, 1955 between the appellant and J. H. Smith Construction Co. Limited (hereinafter referred to as "Smith Co.") which stipulated that the profits were to be shared to the extent of 75% by the appellant and 25% by Smith Co. and

[1] 28 Tax A.B.C. 221.

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that as consequence losses, although not specifically referred to in the agreement, must be borne by the parties in like proportions.

The appellant denies that the agreement in question constitutes a partnership and submits that it is a management contract entailing lease and hire of services. It also submits alternatively that, even assuming a contract of partnership existed, as claimed by the respondent, nevertheless the appellant was justified in deducting the entire losses incurred, *inter alia,* because it was required to pay them, since Smith Co., which became a declared bankrupt in 1959, was not at any time in a position to pay any portion of them. Consequently, the appellant is entitled to write off as worthless any claim which it might have against Smith Co. to the extent of $33,667.01 and this Court should refer the record back to the Minister to be dealt with accordingly.

The respondent concedes that should it be found that the agreement does not constitute in law and in fact a partnership the appellant is entitled to succeed.

The record for the purposes of the present appeal consists of the evidence of one witness, M. J. Prupas, C.A., who was the auditor of both the appellant and Smith Co. and was heard on behalf of the appellant, together with the transcript of proceedings and the exhibits filed before the Tax Appeal Board.

There is no dispute as to the facts and no disagreement as to the amounts of losses and profits involved.

Counsel also agree that ss. 15(1) and 27(1)(*e*) of the *Income Tax Act* are relevant to the issues and that in order to determine the nature of the agreement recourse must be had to the civil law of the province of Quebec.

The agreement is short and reads as follows:

WHEREAS the Parties hereto desire to associate themselves for the purpose of carrying on a contracting and construction business;

WHEREAS the Parties have agreed upon terms and conditions subject to which their enterprise will be carried on;

NOW THEREFORE IT IS AGREED AS FOLLOWS:

1. That the Party of the First Part will secure suitable land, and will arrange for the subdivision of such land, and the financing, mortgages and sale of the houses and other buildings to be erected thereon, such land to be vested in and belong to the Party of the First Part;

2. That the Party of the Second Part will manage the execution of the said project, carry on the work of construction, supervise all field opera-

tions, set up efficient construction systems, and perform all services, technical and otherwise, that may be required, and keep books of account and cost records in connection therewith. The books of account shall be the joint property of both parties, and accessible to either at any time. The books and accounts shall be audited periodically by an accountant named by the Party of the First Part;

3 That before entering upon any such project, the suitability and cost of such land, as well as the commission to be paid on sales of the buildings to be erected, shall be agreed upon by both Parties hereto;

4. That should opportunities arise, the Party of the First Part shall secure contracts for the construction of buildings, roads and public works;

5. That no bids for such work and no contracts for same shall be entered into without the consent of both Parties;

6 That the execution of such contracts shall be similarly managed by the Party of the Second Part;

7. That the Party of the Second Part shall, while the present agreement is in force, engage in no other activity or enterprise, and shall work exclusively for and with the Party of the First Part;

8. That the present agreement shall be for a period of five years from this date, subject to termination by the Party of the First Part upon giving three months notice in writing to the Party of the Second Part;

9. That the Party of the First Part will reimburse the Party of the Second Part all its disbursements in carrying out the work hereinabove described, together with an annual fee of $5,000 00. Said disbursements shall include rent of office space and salaries to staff required, such staff however, to be engaged after consultation with, and consent of the Party of the First Part;

10. That the profits from the said enterprise shall then be divided in the following proportions:—

> To the Party of the First Part, Seventy-five per cent (75%);
> To the Party of the Second Part, Twenty-five per cent (25%). The Party of the Second Part shall be allowed to draw on account of such profits the sum of Four hundred dollars ($400 00) per month.

11. That before such profits are so divided, provision shall be made for taxes, and there shall be deducted as an expense a salary of $100.00 per week to a representative of the Party of the First Part.

12. That the Party of the First Part guarantees to the Party of the Second Part a minimum of $10,000 00 to include fee and share of profit, for the first twelve months of the present agreement, or lesser period if notice of termination be given in accordance with paragraph 8 hereof.

Before proceeding with the examination of the legal aspect of the case, the following further facts are worth noting.

I think I should first observe, in passing, that the appellant was incorporated on May 14, 1954, its head office being in the city of Montreal. Smith Co., which also had its head office in the city of Montreal, was incorporated on March 24, 1955.

Shortly after incorporation, the appellant began, on a modest scale, with the aid of one Wilfrid Bédard, building

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contractor, to erect and sell homes on lands it had acquired. The appellant then increased its land holdings and decided to extend its construction and selling operations, and in furtherance thereof, it entered into the aforementioned agreement. Beginning on May 31, 1955, Smith Co. proceeded to build numerous homes on the lands of the appellant. The appellant relied on the building skill of Smith Co. but apparently the type of homes thus built were not readily saleable at remunerative prices and losses ensued which, in its first year of operations ending May 31, 1956, amounted in round figures to $43,000, and in 1957 exceeded $72,000. As a result, although the agreement contemplated continuance for five years, it was prematurely terminated by mutual consent on July 31, 1957 and the relationship between the parties to the contract was severed. The appellant, however, continued its real estate development and its losses in 1958 on the homes constructed by Smith Co. diminished and in 1959 they practically ceased and in the same year, with its new operations, the Company showed a net profit, as we have seen, of more than $146,000.

For as long as the agreement lasted the appellant, as provided in paragraph 9 of the agreement, paid Smith Co. all costs and expenses incurred by it in carrying out the work it had undertaken, with the result, as appears by statements of operations for 1956 and 1957 Exhibits A^3 and A^4, it experienced neither a loss nor a gain. The evidence does not disclose whether Smith Co. took on any other assignments after the dissolution, but it lingered on until, on October 27, 1959, it went into bankruptcy.

I might here interject that, apart from the appellant, its president, Mr. Ezra Shamoon, signed the agreement in his personal capacity as Party of the First Part. Mr. Jack H. Smith, president of Smith Co., likewise, was made a party, and he and his company are together described as Party of the Second Part. It would appear that Mr. Shamoon, who was a man of means, was made party to the agreement in order to guarantee the performance of the undertakings of the appellant company and that Mr. Smith, who was supposed to supply the building skill, was made a Party of the Second Part in order to guarantee that the Smith Co. would be assured of his personal services. Neither of the two presidents were in any way impleaded nor was it suggested that anything turned on the fact that they were parties to the agreement, and I think the two companies alone can be regarded as Party of the First Part and Party of the Second Part respectively.

Did the agreement in question constitute in fact and in law a contract of partnership?

The first article of the Civil Code with which we are most concerned is Art. 1830, which reads as follows:

> It is essential to the contract of partnership that it should be for the common profit of the partners, each of whom must contribute to its property, credit, skill or industry.

A glance at some of the provisions of the agreement, particularly paragraphs 1, 2 and 10 thereof, suffices to show that one party was to contribute skill and the other credit, and both would participate in profits, and as paragraphs 3 and 5 indicate that the work was to be undertaken by mutual consent, at first sight it would appear that all prerequisites to a partnership have been met and that the appeal must fail. Such a conclusion could only be reached, however, if Art. 1830 is to be read as constituting a definition of the contract of partnership and provided the agreement does not contain other clauses which, as suggested by the appellant, tend to show that we are here concerned with a more common type of contract whereby the appellant hired the services of Smith Co. as manager of construction projects at a fixed fee plus a commission or bonus of 25% of the net profits realized.

Art. 1830 C.C. does not purport to define the contract of partnership nor does it include all the essential elements necessary to constitute such a contract, as stated in Mignault, *Droit Civil Canadien*, vol. 8, p. 81, "Le Code ne définit pas la société." The same author, after discussing the elements of mutual contribution by the parties to the partnership and the right to participate in the benefits to be derived from it, makes mention in the following terms at page 183, *supra,* of another essential element which often serves to distinguish it from the kindred contract of lease and hire of services—namely "l'intention de contracter une société", or (as it is often called by the authors) *affectio societatis*:

> Il ne suffit pas qu'il y ait un apport réciproque ou même un partage de bénéfices, il faut de plus qu'il y ait intention de contracter une société.

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See also:

Affectio societatis discussed Revue Trimestrielle de Droit, 1925, vol. 24, p. 761; notes on element of risk, p. 775.

Bourboin v. Savard[1], Rivard J.:

. . . pour qu'il y ait société, il faut à défaut de contrat exprès, que les faits fassent apparaître clairement, chez l'un et l'autre des prétendus associés, l'intention de former un contrat de société et non pas tel ou tel autre contrat qui peut présenter avec la société plus ou moins d'analogie. C'est à cela que revient ce que les auteurs ont appelé *affectio societatis.*

Pinsky v. Poitras et al.[2], where the importance of the intention of the parties is stressed and where, in this connection, the following admonition is found:

On ne doit pas recourir aux autorités anglaises, vu qu'il semble que les principes du droit anglais sur ce point ne sont pas semblables aux nôtres.

Planiol & Ripert, *Droit Civil,* vol. 11, p. 236:

981. . . .

5° aux quatre éléments énumérés ci-dessus on en ajoute généralement un cinquième consistant dans l'*affectio societatis,* c'est-à-dire l'intention de former une société ou, de façon plus exacte et plus précise, la volonté de coopérer en acceptant délibérément certains risques. C'est parfois sur l'absence de cet élément que l'on s'est oppuyé de façon prépondérante pour refuser le titre d'associé l'employé ou au prêteur d'argent participant aux bénéfices. . . .

Dalloz, *Nouveau Répertoire,* vol. IV (S-W), p. 156:

106. Pour qu'il y ait contrat de société, il faut, en troisième lieu, que toutes les parties contractantes aient consenti à former entre elles une *société,* et non pas tel ou tel contrat présentant avec la société plus ou moins d'affinité (prêt, ou louage de services, accompagné d'une clause de participation aux bénéfices, par exemple).

110. La société se distingue, en particulier, du *contrat de travail avec participation aux bénéfices,* dans lequel l'employé conserve une situation subordonnée et ne contribue pas normalement aux pertes de son patron.

Laurent, *Droit Civil Français,* vol. 26, p. 152:

. . . Il est incontestable que la participation aux bénéfices éventuels d'une entreprise est de l'essence de la société, et que sans cette participation il n'y a pas de société possible. Mais de là il ne faut pas conclure que toute convention dans laquelle se rencontre cet élément constitue nécessairement une société. Il y a d'autres éléments dont il faut tenir compte. La cour de cassation les énumère dans un arrêt rendu sur le rapport de M. Bau: «Le contrat de société exige comme conditions essentielles de sa formation l'intention des parties de s'associer, une chose mise en commun, et la participation aux bénéfices et aux pertes de l'entreprise.»

[1] 40 R.J.Q. (B.R.) 68, 71. [2] 44 R. de J. 63 at 74.

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Furthermore, in endeavouring to ascertain the true intent and meaning of the type of agreement here in issue consideration, I think, must be given to such additional factors as the language in which it is couched; whether and to what extent mutually shared elements of speculation or risk exist; the extent of inequality, if any, of the authority which it vested in the parties; and the *de facto* conduct of the parties in giving effect to the agreement. See notes and authorities, beginning with paragraph 2 on page 337, in *Traité de Droit Civil du Québec,* Trudel Series (Hervé Roch and Rodolphe Paré), vol. 13.

Speaking of the rule of interpretation where the language of a convention is doubtful or obscure, in *Dufort v. Dufresne*[1] Duff J. (as he then was) said:

> The rule of interpretation for such a case (in substance it is the same in the province of Quebec as in France), seems to be well settled. Where the language of a private convention is doubtful or obscure, to quote Huc, *Commentaire du Code Civil,* vol. 7, Art. 175,
>
> «le juge doit, avant tout, rechercher quelle a été la commune intention des parties pourvu cependant que cette intention paraisse douteuse. Cette intention peut d'ailleurs être recherchée, en dehors de l'acte, dans d'autres écrits et les circonstances de la cause. Comme aussi l'exécution donnée par les parties à une convention en sera souvent le meilleur interprète.»

After the above-mentioned quotation, the learned Judge goes on to say:

> The authorities recognize in the most explicit way the principle adverted to in the concluding words that the conduct of the parties in the execution of a contract expressed in doubtful language affords a very important clue to their real intention.

In my opinion, the following provisions of the agreement indicate that we are here concerned with a contract of lease and hire of services, or one of principal and agent, rather than partnership. Paragraph 1 makes it clear that the title to the ownership of the homes to be erected was vested solely in the appellant. Paragraph 7 states that the Party of the Second Part, during the continuance of the agreement, shall engage in no other activity or enterprise and shall work exclusively *for* and with the appellant (emphasis supplied)—which signifies the notion of master and servant and the subservience of the Party of the Second Part to the appellant. This, I think, is accentuated by the fact that the Party of the First Part was in no way

[1] [1923] S.C.R. 130, 131.

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bound to give its whole or any designated part of its time and attention to the enterprise referred to in the agreement.

The above observations, I think, are equally apposite in respect of paragraph 8, wherein the Party of the Second Part was firmly bound for a period of five years and could not earlier terminate the agreement, except for cause, and such dominant right was reserved to the Party of the First Part.

By paragraph 9 the Party of the First Part undertook, in addition to paying all expenses incurred by the Party of the First Part in the enterprise, to pay an annual fee of $5,000 to the Party of the Second Part. In short, the Party of the Second Part was insured against losses and guaranteed a remuneration of $5,000 per annum.

Paragraph 12 goes even further and it guarantees for the first twelve months, or such shorter time as the agreement might be in effect, that the Party of the Second Part will receive, *as a minimum,* $10,000, to include fee and share of the profits, if any, which meant that, if profits exceeding $5,000 were realized, the Party of the Second Part, in addition, would be entitled to 25% thereof, and if losses, regardless of the amount, were incurred, it would, nevertheless, be remunerated to the extent of $10,000.

The foregoing provisions serve to indicate, I think, that rather than being a partner in the accepted sense of the term, the Party of the Second Part, which, it is admitted, had no financial resources to speak of, who had only skill to offer, accepted a subservient role in consideration of guaranteed payment of services and repayment of all its disbursements, including materials and operating costs, in carrying out the work. Thus, during the 26 months which the agreement lasted Smith Co. received about $16,000 as remuneration for services, without any risk of having to pay losses incurred in the event that the costs of construction and sale of the houses exceeded their realizable market value, while, at the same time, retaining the right, if the enterprise prospered, to share in any profits which might be realized. Insofar as consultation and consent is concerned, as the agreement did not provide any arbitration clause if Smith Co. failed to give its consent the agreement was heavily loaded in favour of the appellant since the right to terminate it was vested in him alone.

It appears to me unlikely that the Party of the Second Part intended to enter into an agreement which, according to the respondent, *inter alia* entailed the assumption vis-à-vis third parties of losses to which it could not put an end in less than five years and which it was in no position to pay. By the same token, it is unreasonable to suppose that the Party of the First Part, who was underwriting all losses, would not reserve the sole control of bringing the enterprise to an end at any time on three months' notice.

Apart from seeking to ascertain the intention of the parties as reflected in the wording of the agreement, it is important, as stated earlier, to examine the manner in which it was treated by the parties.

In the above connection, counsel for the respondent drew attention to the fact that Exhibit A[2], which brought about the cancellation of the agreement, mentions that it was "subject to a rendering of accounts between them, all Parties reserving such rights and recourses as to them in law and justice appertain in the premises." I do not think such clause, which is not uncommon, serves to indicate the existence of any particular type of agreement. In the instant case it would serve to cover such contingencies as unfinished construction or prior commitments signed by Smith Co. for undelivered material or labour yet to be furnished and the unpaid proportion of the $5,000 fee payable to the said Company.

As appears from the testimony of M. J. Prupas, C.A., he was auditor for the appellant before he had any dealings with Smith Co. and, as it was privileged to do, the appellant appointed him as the auditor of the latter Company. The auditor recognized that the agreement was expressed in doubtful language, and on being informed, after consultation with the parties, that Smith Co. was acting in the capacity of a general contractor, he accordingly set up the books of the said Company to reflect the existence of a contract of lease and hire of services.

The evidence before this Court is that which was filed by consent and nowhere does it appear that either of the parties to the agreement held out to the public that by registration, as required by Art. 1834 of the Civil Code, or otherwise a partnership existed between them. Apparently,

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the subcontractors who dealt with Smith Co. knew only Smith Co. and the purchasers of homes from the appellant only knew and dealt with the latter.

In the *Dufort* case *(supra)*, the Court in coming to the conclusion that a partnership existed was influenced by the fact that the parties repeatedly described their contract and themselves by the words "société" and "associé", which are the French equivalent of "partnership" and "partners". Mignault J. (p. 136):

> Après avoir examiné le contrat du 1er septembre 1912, je suis d'avis que c'est un contrat de société. Les parties déclarent expressément qu'elles consentent à se mettre en société, et les mots «société» ou «associés» sont répétés presque à chaque clause. Sans doute les termes dont les parties se servent pour désigner le genre de contrat fait par elles ne constituent pas toujours un indice infaillible de la nature juridique de ce contrat, mais cela aide beaucoup à découvrir quelle a réellement été leur intention, et si les conventions peuvent se concilier avec la description que les parties en ont faite, cet indice peut être accepté comme décisif par les tribunaux.

Nowhere in the instant agreement did the parties to it make use of the words "partnership" or "partner". The nearest approach to doing so is a single instance in the opening paragraph which states, "The parties hereto desire to *associate* themselves for the purposes of carrying on a contracting and construction business." The words "associate" and "association" are generic and have a much wider meaning than "partner" or "partnership", and although they may include the latter they may also signify a mere companion or companionship.

Counsel for the respondent, in support of disallowance by the Minister of the 25% of the losses which he claimed should be charged to Smith Co. and cannot be claimed by the appellant, refers to Art. 1831 C.C. and comments thereon by Mignault.

> Art. 1831. Participation in the profits of a partnership carries with it an obligation to contribute to the losses.
>
> Any agreement by which one of the partners is excluded from participation in the profits is null. An agreement by which one partner is exempt from liability for the losses of the partnership is null only as to third persons.

Mignault at page 212 *(supra)*, states:

> . . . Il est évident que les parties peuvent régler ce partage comme elles l'entendent, à la condition toutefois de ne point accorder tous les bénéfices à l'un des associés ou d'en priver entièrement l'un d'eux (art. 1831). Si elles établissent une règle pour le partage des bénéfices, sans parler des pertes, celles-ci se partageront dans la même proportion.

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As pointed out, however, by the same author at p. 184, Art. 1831 has no application to agreements other than a partnership, and in order to make it applicable, one must necessarily suppose the existence of a partnership. For the reasons already mentioned, in my opinion, it is established that the agreement in issue did not constitute a contract of partnership, that the parties to it never intended to enter into such an agreement and their conduct serves to confirm that their intention was not to do so.

In view of the above-mentioned conclusion, I find it unnecessary to deal with the appellant's subsidiary submission—namely that even if a partnership did exist the appellant was entitled to regard the $33,667 owing by Smith Co. as uncollectable and that the decision of the Minister to disallow it as a deduction should be set aside and the record referred back to the respondent for revision accordingly.

The appeal is consequently allowed with costs and the record will be accordingly referred back to the Minister for the purpose of reassessment.

Judgment accordingly.

1963
Apr. 9, 10
May 15

BETWEEN:

ROBERT JAMES RANDOLPH RUSSELL .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT;

AND BETWEEN:

CLIFFORD W. TANNER .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Income Tax Act R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e)—Real estate transaction—Capital gain or income—Share-

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holders of trucking company—Purchase of suburban land as site for trucking terminal and sale of surplus land at a profit—"Salvage" operation leading to capital gain or scheme for profit making and income—Appeals dismissed.

Appellants were the two shareholders of a trucking company in which appellant Tanner had been employed as Manager. In order to expand parking and terminal facilities appellants purchased a sixteen and one-half acre tract in the name of Mrs. Tanner for $20,000 in 1950. The tract contained more land than needed by the corporation and the surplus was sold off in a number of transactions over a period of years, after a survey had been made. One sale consisting of 11.2 acres was to the corporation which resold it. Appellants made a profit of $116,000 on these sales. They were assessed for income tax on such profits and an appeal therefrom to the Tax Appeal Board was dismissed. They appealed to this Court. The appeal is concerned with the taxation years 1955, 1956, 1957 and 1958 and the appeals of both appellants were heard together.

Held: That the property was acquired with the intention of disposing of it and was acquired for the purpose of trade since appellants by participating in the transactions as they did were engaged in a business within the meaning of the Act.

2. That the whole course of action of the appellants was indicative of dealing in real estate and they had embarked on an adventure or concern in the nature of trade and that the profits from the sales in question are income within the meaning of the Act.

3. That appellants had intended to sell the property after acquiring it to the company as required and of disposing of the balance, and the land was therefore the subject of trade and was so purchased.

4. That the appeals be dismissed.

APPEALS under the *Income Tax Act.*

The appeals were heard before the Honourable Mr. Justice Cattanach at Toronto.

Colin S. Berg for appellants.

Thomas Z. Boles and *E. E. Campbell* for respondent.

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

CATTANACH J. now (May 15, 1963) delivered the following judgment:

These are appeals from judgments of the Tax Appeal Board[1] dismissing appeals by the appellants from assessments of income tax for the taxation years 1955, 1956, 1957 and 1958. As the same problem is involved in both cases, the appeals, eight in number, being the four assess-

[1] 29 Tax A.B.C. 246, 254.

ments for the taxation years mentioned with respect to each appellant, were heard together. The question for determination is whether profits realized on the sales of portions of a parcel of certain real estate in the taxation years 1955 and 1956 were income for purposes of the *Income Tax Act,* or a capital gain. While the assessments for the taxation years 1957 and 1958 are also in issue, they are so in issue incidental to the assessments for the taxation years 1955 and 1956 by reason of section 85B which permits the appellants to carry unearned portions of mortgage interest arising from the real estate sales in 1955 and 1956 into the years 1957 and 1958.

The appellant, Robert James Randolph Russell, Esq., Q.C. is a member of the legal profession who practices his profession from two offices in the suburbs of the City of Toronto. The appellant, Clifford W. Tanner, also of Toronto, has spent his entire working lifetime in the motor transport business. Neither of the appellants had engaged in any speculative venture in real estate prior to the events to be related, although the legal firm of which Mr. Russell is the senior member, owns the two premises it occupies and Mr. Russell personally owns two office buildings from which he derives rental income and the general law practice in which he is engaged is comprised of about 40 percent conveyancing work.

Mr. Tanner first engaged in a transportation business operated by his family. This business was sold to Toronto-Peterborough Transport Company Limited (hereinafter referred to as the Company) in 1930 and Mr. Tanner continued in the employ of the Company as manager. All of the issued shares in the capital stock of the Company, being 400 in number, were owned by Mr. Roy Andrews, with the exception of qualifying shares. Mr. Andrews died in 1946 and the business was continued under the ownership of his widow with Mr. Tanner as manager until 1948 when Mrs. Andrews expressed the wish to be out of the business.

Accordingly, in that year Mr. Tanner and Mr. Russell entered into an agreement to purchase the outstanding shares of the Company in the proportion of 45 and 55 percent respectively.

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To finance this purchase Mr. Russell paid $50,000 of which $15,000 were his own funds and the balance of $35,000 was borrowed by him. Mr. Tanner was able to raise $15,000. At the outset Mr. Tanner purchased 94 shares, but by subsequent borrowing and an application of profits derived from the transactions which are the subject matter of the present appeals, he was able to purchase 86 more shares and so fulfilled his agreement with Mr. Russell to the effect that the shares would be purchased in the proportion of 55 and 45 percent between them.

At the time of the acquisition of the shares by the appellants, the Company carried on its business from leased premises on De Grassi Street in the eastern section of Toronto which were inadequate for the efficient operation of the Company's activities. There were insufficient parking and terminal facilities for the Company's equipment. Increased demands for service from the Company's customers could not be met from that location. In addition, the Municipality was in the course of expropriating properties to extend the street so that what facilities as were available to the Company would be further diminished. It was manifestly imperative that new and larger premises be obtained forthwith.

Therefore, the appellants, in concert and on their individual initiative, began an extensive and diligent search for property suitable for the Company's needs, which search extended over a period of approximately ten months from the latter part of 1949 to the early part of 1950 without satisfactory result. Mr. Russell took no part in the management of the transportation business which he was content to leave to the experience and proven ability of Mr. Tanner, nor did he hold any elected office in the Company. Nevertheless, Mr. Russell was vitally interested in the eventual success of the Company as a major shareholder, for which reason it is obvious that he gave unstintingly of his efforts to ensure that success. He was aware of the size and type of property which was required by the Company.

Eventually, Mr. Russell found a property in North York Township bounded by O'Connor Drive and Victoria Park on the east and west and on the north by Sunrise Avenue, comprising approximately 16.5 acres. The property afforded ready access to major highways not subject to half-load restrictions at any time. A ravine ran through the southern portion of the property. The land was undeveloped and devoid of services. It was used for farming purposes. There was a house and barn on the land. The surrounding lands were similar.

The appellants agreed that this property was eminently suited to the Company's requirements and at that time it was estimated that an area of 5 acres was needed by the Company.

The land was owned by the Harris Estate and a sign advertising it for sale was erected thereon inviting inquiries of the National Trust Company which was acting on behalf of the estate.

Accordingly, Mr. Russell telephoned the real estate department of the trust company and advised that the Company would submit an offer. He was informed that the land was not for sale and that to make an offer was futile because it would be rejected. Despite this advice an offer was made by the Company to the National Trust Company in an amount of $15,000 for the entire property. The offer was promptly rejected.

Some four months later, on April 25, 1950, Mr. Russell wrote the trust company inquiring whether the estate would be interested in selling approximately 5 acres and the price expected therefor. A reply, dated April 27, 1950, was received advising that the estate was not interested in dividing the land.

Later, Mr. Russell was passing the property and saw a new sign by a different trust company advertising the land for sale. He therefore telephoned the new advertiser and was exasperated on being informed the land was not for sale. Having been so rebuffed in his attempts to purchase the property, Mr. Russell spoke with a member of the Harris family who was an executor of the estate and was informed by him that an offer of $20,000 for the property would be accepted.

Accordingly, after consultation with Mr. Tanner, Mr. Russell drafted an offer for the property dated May 11, 1950 conditional upon the conduct of a transport and warehousing business being permitted by the municipal authority. The offer was made by the Company and signed by Mr. Tanner as President. The offer was accepted.

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No attempt was made to negotiate the purchase of a lesser portion of the property commensurate with the Company's estimated requirements from the executors of the estate, but such omission was undoubtedly prompted by the previous rebuffs experienced by Mr. Russell from the two trust companies and by the necessity of an expeditious relocation of the Company's business.

Mr. Russell then ascertained that the Township of North York would approve the conduct of the Company's business from the property.

Mr. Tanner was of the opinion that $20,000 was an excessive price, but it was agreed by the appellants that the surplus to the Company's needs could be sold.

Although the offer had been made in the name of the Company, a direction was issued to the vendor to cause the deed to be made to Mrs. Maude Tanner, the wife of the appellant Clifford W. Tanner, as trustee for both appellants herein.

The reasons advanced for the adoption of this procedure were that the Company did not have funds available for the purchase of the land and to not impair the accommodation advanced to the Company by its bank. Mr. Russell advanced $10,000 to the Company and a further $10,000 was borrowed on the security of a mortgage on part of the land to close the sale. Subsequently, in 1951 Mr. Russell advanced the Company $25,000 in amounts of $5,000 on five dates between March and July of that year and further amounts of $12,500 and $20,000 in March and August of 1956, on the security of promissory notes from the Company which were endorsed by him to the Company's bank which then continued its accommodation to the Company. The advances made by Mr. Russell were for the construction of terminal facilities by the Company.

In response to questions, Mr. Russell gave the following answers as to why the deed to the land was made in Mrs. Tanner's name as trustee for the appellants and why the land was not placed in the Company's name forthwith:

> Well, that may have been one of the reasons why it was not in my name as trustee or Mr. Tanner's name as trustee. As it worked out we could deal with the property, as we did deal with it, to advantage.
>
> It was to save our investment . . . If the Company had gone into bad times we would at least have had the land.

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In the fall of 1950 or the beginning of 1951, the Company abandoned its premises on De Grassi Street and used the premises acquired.

Between the years 1951 and 1956 the appellants disposed of a major part of the land so purchased in eight different sales realizing a profit of $116,500.

The sales were as follows:

	Year	*Purchaser*	*Sale Price*
(1)	1951	Trinidad Leaseholds	$12,500
(2)	1952	W. A. Cain	7,500
(3)	1953	Sun Oil Co Ltd.	22,500
(4)	1954	Trinidad Leaseholds	10,000
(5)	1955	Byers Motors Ltd.	20,000
(6)	1955	B. & H. Realty Ltd.	15,000
(7)	1955	Toronto-Peterborough Transport	26,376
(8)	1956	W. A. Milne	21,000

The amounts of the assessments for income tax are not in dispute between the parties and the present appeals relate to sales in the years 1955 to 1956 so that items 5 to 8 constitute the material transactions, although reference is made to items (1) to (4) to illustrate the appellants' complete course of conduct.

In 1952, 5.6 acres were to be sold to the Company for a total consideration of $13,000. The original sale price negotiated between the appellants and the Company was $10,000 for the land and $10,000 for the buildings. However, the Department of National Revenue considered the transaction not to have been at arm's length and consequently was at a value greater than the value of the property. The price was accordingly reduced to $13,000 as representative of the fair value, to which all parties agreed. However, this sale was never consummated.

In the meantime, under the expert management of Mr. Tanner, and due to the remarkable development of the area in which the Company was located, it enjoyed a phenomenal success. Initially the Company possessed some seventy vehicles and in 1955 had increased its equipment to over three hundred vehicles. Therefore, the ultimate sale to the appellants in 1955 was 11.2 acres for a consideration of $26,376 which was worked out by the appellants on the same basis as the tentative sale to the Company in 1952 for $13,000. The southerly portion of the property deeded to the Company through which a ravine

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runs was being filled from excavations for construction in the immediate area of which there were many.

The sales in 1951 and 1954 to Trinidad Leaseholds were for the purpose of erecting a gasoline station. The purchaser had negotiated an arrangement for the sale of gasoline and oil to the Company at a mutually satisfactory price. For a short time the filling station was operated by the appellants through an employee, but the project was unsuccessful because adequate supervision was not possible.

The land sold to W. A. Cain by the appellants for $7,500 in 1952 was later purchased by the Company for $47,000. The acquisition of this property at an enhanced price was explained by the circumstances that Cain had erected a substantial building which was eminently suitable for the Company's use as a garage, repair shop and office accommodation.

An offer to purchase additional property was refused by the appellants because at that time the needs of the Company were not ascertained. The land which was the subject of this offer was included in the 11.2 acres later transferred to the Company. The Company subsequently sold the land to B. & H. Realty Ltd. for $15,000 so that in effect the land retained by the Company was acquired for $11,376.

At the time of the purchase of the land by the appellants from the Harris Estate, a plan of survey was done, the cost of which was shared equally by the vendor and purchasers. Mr. Russell explained that this survey was made to determine the precise limits of the property being purchased by the appellants and to permit a correct description being drawn. There were four further plans of survey made on April 28, 1953, October 2, 1953, August 20, 1955 and February 14, 1956.

The area in which the property was situated was zoned for industrial and commercial development and had been designated by the Township of North York as an area of subdivision control wherein no parcel of land could be divided for sale or sale in part or agreed to be sold in part save where the land was shown in a duly registered plan of subdivision.

Mr. Russell insisted that a plan of survey preceded each individual sale to comply with the municipal control by law.

I conclude that the survey on April 28, 1953 related to the Cain sale, the survey on August 20, 1955 to the sales to Byers Motors, Ltd. and B. & H. Realty Ltd. and the survey on February 14, 1956 to the sale to Milne. However, I am unable to relate the survey of October 2, 1953 to any immediately subsequent sale.

The title on the plan of October 2, 1953 originally read "Proposed Subdivision", but on Mr. Russell's instruction those words were struck out and replaced by the words "Plan showing" because, he stated, it was a plan to show what lands the appellants had available. In 1953 the adjacent lands were being rapidly developed which circumstance was indicated upon the plan as well as additional information to the effect that lots were shown for commercial use, no municipal water or services were available, but good wells were on the property and the soil was suitable for septic tanks.

This plan of subdivision was not registered, which accounts for subsequent sales being preceded by still further plans.

The sales to Cain, Byers Motors, Ltd., B. & H. Realty Ltd. and Milne, were all negotiated by a real estate agent who was a member of the same service club as the appellants and to whom the appellants paid a commission, although the lots were not listed for sale with the agent nor were they advertised for sale.

Prior to the commencement of these proceedings, Mr. Russell wrote a letter, approved by Mr. Tanner, to the Department of National Revenue, which was introduced in evidence as Exhibit R1, the penultimate paragraph of which reads as follows:

From the information we were able to get from your Department, and taking all the circumstances into consideration, it appears that there was no other course to be taken, and the writer respectfully submits that any moneys received by Mr. Tanner and the writer should be considered capital gain. It was only because of the phenomenal growth of the area subsequent to the purchase of the property that enhanced its value, and due to the heavy and increased taxation, it could have been that we would have lost considerable money. This was definitely a risk capital venture, and it was not even known at that time whether or not the Company would be permitted to operate in that location. Mr Harris, through his Solicitor, wrote on June 21st 1950 sending a copy of a letter he had received objecting to a Transport Company becoming established adjacent to a proposed residential sub-division. This, of course, was after the Offer to Purchase had been made, and accepted Enclosed is a copy of Mr. Harris' Solicitors' letter, and a copy of the Planning Board's letter re the objection.

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By s. 3 of the *Income Tax Act* the income of a taxpayer for the purposes of Part I of the Act is declared to be his income from all sources inside and outside Canada and to include income for the year from *inter alia* all business. By s. 4 income from a business is declared to be, subject to the other provisions of Part I, the profit therefrom for the year and by s. 139(1)(*e*) business is defined as including a profession, calling, trade, manufacture or undertaking of any kind whatsoever and as including an adventure or concern in the nature of trade but not an office or employment.

On the facts above recited the issue to be resolved is whether the land was bought by the appellants to serve the Company's interest and the possibility of sale of the surplus at a future time was in the nature of a salvage operation and not a scheme of profit making, or whether the appellants' whole course of action was indicative of dealing in real estate, not only with respect to the land surplus to the Company's need, but also with respect to the land eventually sold to the Company.

The test for resolving such an issue is that stated in *Californian Copper Syndicate v. Harris*[1] as follows:

> It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit 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. 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 realization, 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 realizing a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

The test so outlined is not always susceptible of easy application for there is no single criterion by which the

[1] (1904) 5 T.C. 159 at 165.

issue may be resolved, and cases, such as the present one, frequently arise in which the circumstances and facts point to either conclusion.

In my view the appellants acquired the property with the intention of disposing of it which they did in fact, in eight separate sales including the sale to the Company, at substantial profit. In the Notice of Objection to the assessments the appellants state, "We intended that the Company would purchase only the required land and we would dispose of the balance when occasion arose."

The deed to the property was made in the name of Mrs. Tanner as trustee for the appellants and while the appellants owned all the issued shares of the Company, nevertheless, the Company is an entity separate and apart from its shareholders. It was the acknowledged intention of the appellants to sell the land required by the Company to it and to dispose of the surplus. In my view, therefore, the land acquired by the appellants was the subject of trade and was so purchased for that purpose.

The sales were negotiated through the intervention of a real estate agent known personally to both appellants, and while the lands were not advertised for sale by usual means, nevertheless, this particular real estate agent knew that the appellants had land available and were willing to sell it.

The sales of the land began within a comparatively short period after its acquisition by the appellants and consistently continued for a period of six years thereafter.

The land reserved for use of the Company was the interior portion with a right of way to the street. While such land was equally suitable for the Company's purpose, nevertheless, it did have the effect of leaving the surplus abutting paved streets and accordingly more attractive for sale to prospective purchasers.

Despite Mr. Russell's protestations to the contrary, I conclude that the plan dated October 2, 1953 was, in fact, what it purported to be, that is a plan of subdivision even though no lots were actually staked. Mr. Russell admitted that he may have asked the surveyor to sketch out the land remaining. This plan of subdivision was not registered which accounts for the subsequent sales being preceded

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by still further plans to comply with the municipal requirements.

Had the sales been dedicated to the benefit of the Company such would negative the conduct of a business in real estate. The two sales to Trinidad Leaseholds may well have been advantageous to the Company in order to have a supplier of gasoline and oil readily accessible, but I cannot conceive of the appellants' foreseeing the resale of the Cain property to the Company with a structure thereon so adaptable to use by the Company.

The sales to Byers Motors Ltd., B. & H. Realty Ltd. and to Milne were not dictated by any relationship of suppliers to the Company, but rather such sales were completely independent of such consideration.

The letter of February 29, 1960 written to the Department of National Revenue by Mr. Russell and approved by Mr. Tanner emphasises the speculative nature of the undertaking.

The cumulative effect of the foregoing factors leads me to the conclusion that the appellants by participating in the transactions as they did, were engaged in business within the meaning of the *Income Tax Act* in that they embarked upon an adventure or concern in the nature of trade and that the profits from the sales in question were income within the meaning of the Statute.

The appeals are therefore dismissed with costs.

Judgment accordingly.

1962 Oct. 9, 10 — 1963 May 23

BETWEEN:

CONSOLIDATED DENISON MINES LIMITED and THE RIO TINTO MINING COMPANY OF CANADA LIMITED *et al.* .... APPELLANTS;

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE .... RESPONDENT.

Revenue—Sales tax—Excise Tax Act, R.S.C. 1952, c. 100, ss. 30, 32, 57, 58, Schedule III—Customs Act R.S.C. 1952, c. 58, s. 45—Exemptions—

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Safety devices exempt from sales tax—Rock bolts used in mining underground operations for support of ceilings and walls of mine—Jurisdiction in appeals from Tariff Board decisions—Appeal allowed.

Appellants used bolts of a special type, consisting of several parts, when opening up new underground workings of mines, to prevent the fall of rock by securing rock that might fall from the ceilings and walls to more stable, undisturbed rock strata. These rock bolts had to a considerable extent superseded the use of timbering for the prevention of rock fall. The Tariff Board decided that these rock bolts were not exempt from sales tax under Schedule III of the *Excise Tax Act* as "safety devices and equipment for the prevention of accidents in the manufacturing or production of goods" The majority of the Board found that rock bolts were essentially a structural device rather than a safety device and were comparable to the use of rivets or bolts in the steel beams of a factory building. The appeal comes before this Court pursuant to leave, on a question of law: Did the Tariff Board err as a matter of law in deciding that the rock bolts were subject to sales tax? Expert evidence was heard at the hearing before the Board.

Held: That the appeal be allowed.

2. That rock bolts used in underground mining are exempt from sales tax.

3. That the rock bolts are machinery or apparatus according to the dictionary definitions and are, on the evidence, safety devices or equipment for the prevention of accidents.

4. That rock bolts used in underground mining are "safety devices" and both "apparatus" and "machinery" and fall within the exemption provided in s. 32 of the *Excise Tax Act.*

5. That the device had two essential attributes of equal importance, for safety and structural use.

6. That the safety aspect of a device for the purposes of the statute should be related to the distinctive hazards of the particular circumstances rather than to the effect of measurable forces.

7. That the Tariff Board in deciding the issue by the consequences based upon a false analogy fell into an error of law.

8. That the appellants have discharged the onus lying on them to establish that there is error in law in the decision under appeal.

9. That the language of the exemption section is clear and unambiguous and appellants have shown that every constituent element necessary to the exemption is present

10. That the Tariff Board had before it sufficient evidence to decide that rock bolts were also safety as well as structural devices and in deciding as it did, erred in law and an appeal lies to this Court.

11. That the safety aspect or element of the rock bolt was as significant and important as its structural aspect or element, and any decision contrary thereto would be contrary to the weight of evidence.

12. That the first issue in the appeal is not whether rock bolts are a safety device within the meaning of the exemption clause but whether the Tariff Board erred as a matter of law in deciding that they were not and if there was material before the Board from which it could properly 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 put before it.

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APPEAL from a decision of the Tariff Board.

The appeal was heard before the Honourable Mr. Justice Noël at Ottawa.

G. F. Henderson, Q.C. and *Jean D. Richard* for Consolidated Denison Mines Limited.

S. Thom, Q.C. and *J. Goodwin* for The Rio Tinto Mining Company of Canada Limited *et al.*

G. W. Ainslie and *D. G. H. Bowman* for respondent.

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

NOËL J. now (May 23, 1963) delivered the following judgment:

This is an appeal, pursuant to leave, under s. 58 of the *Excise Tax Act,* R.S.C. 1952, c. 100, from the majority declaration of the Tariff Board, dated May 15, 1961, in appeal number 528, that certain articles called "rock bolts" are not exempt under s. 32 of the *Excise Tax Act* and are therefore properly subject to a consumption or sales tax imposed by s. 30 of the Act. This matter came before the Tariff Board by way of a reference under s. 57 of the *Excise Tax Act.*

The sole issue before the Court is whether rock bolts are exempt from an eight per cent consumption or sales tax imposed under s. 30 of the *Excise Tax Act,* R.S.C. 1952, c. 100 by virtue of s. 32 of the same Act which exempts from the said tax "the sale or importation of the following articles mentioned in Schedule III of the Act." The relevant part of Schedule III reads as follows:

MACHINERY AND APPARATUS TO BE USED IN MANUFACTURE OR PRODUCTION.

Machinery and apparatus that, in the opinion of the Minister, are to be used directly in the process of manufacture or production of goods, and the following machinery or apparatus:

Coal crushers and stokers;

Structures that are adjuncts to or provide access to the machinery and apparatus mentioned herein;

Repair and maintenance equipment used by manufacturers or producers for servicing their machinery and apparatus mentioned herein;

Safety devices and equipment for the prevention of accidents in the manufacturing or production of goods;

Leave under s. 58 of the *Excise Tax Act* to appeal to this Court from the decision of the Tariff Board was obtained on the following question of law:

> Did the Tariff Board err as a matter of law in deciding that articles known as "rock bolts" used in underground mining are subject to sales tax under Section 30 of the Excise Tax Act, R.S.C. 1952, chapter 100, and are not exempt from sales tax under the schedule of exemptions laid down by Section 32 of the said Act as either safety devices and equipment for the prevention of accidents in the manufacturing or production of goods or as materials consumed or expended directly in the process of manufacture or production of goods.

At the hearing, counsel for the appellants stated that for the purpose of the present appeal, they were confining their submissions on the point of law as propounded in respect of safety devices and equipment for the prevention of accidents in the manufacturing or production of goods and abandoned that in respect of materials consumed or expended directly in the process of manufacture or production of goods.

Before setting out the main issues in this appeal I should give a brief description of the activities of the mining companies involved and of rock bolts and explain the manner in which and the purpose for which the latter are used.

The mining companies here are all involved in the production of ore by underground operations. The evidence discloses that when one starts constructing a mine, the first thing to do is to build a shaft and some rock bolts are used here. Then, haulageways are built which are low tunnels and rock bolts are not used here unless they are more than 22 feet in width; then from the tunnels, which run in parallel series, pilot raises are excavated; these are small secondary tunnels. As soon as the pilot raise is driven it is bolted and the ore is slashed out.

In the Consolidated Denison Mines it has become the practice to use rock bolts in all overhead backs. In the Rio Tinto Mines, rock bolts were used where, in the opinion of the supervisors, it was necessary for the protection of the miners and to prevent the fall of rocks after a blast has been completed and the miners are operating at the ore face. In the Hollinger Mines, where mining is conducted on a vertical plane, we have a different kind of operation; it is the cut and fill method which is

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used, which builds up from below. It is the practice here to use rock bolts even more sparingly than in the Rio Tinto Mines, in cases, however, where, again in the opinion of the supervisor, the pressure of the surrounding rock is such as to impose a threat of rock bursting or sprawling or ravelling.

The evidence further indicates that when an underground aperture is blasted or when a slice is taken from the mine's face, the first step after the dust is settled is to hose down the area to lay the dust and bring down what is termed as small loose. Then a man goes in with a scaler, which is a long prodding and cutting instrument, and scales down the back and the walls. Then there is still rock which might fall if further steps are not taken. Indeed, before the miners are permitted to go the next four or five feet towards the rock face, they are required to drill holes up and out depending upon the mine and insert rock bolts and tighten them with a special tortional wrench which shows when the required amount of pressure has been extended and only when that has been done to the satisfaction of the supervisors in the case of all the mines where rock fall is feared are the miners then allowed to proceed about their business in the mines. However, no drilling is done in any stope until the area is rock bolted to within five feet of the face because blasting operations are going to take place adjacent thereto. A next slice is then taken, holes are drilled, dynamite is placed therein, the fuses are set, the miners retire again and the mining process goes on. The miners bolt as they go and the bolting is therefore a progressive operation. As the work progresses, a tunnel is created which, after being used to break up the ore, is then used to haul it to the surface.

The basic principle of rock bolting is to try to achieve back, and in some cases wall control, by maintaining existing stresses in the rock, preventing the release of latent energy and limiting the movement of the rock strata. According to Ex. D-6, in rock bolting two basic theories are involved: (1) to tie enough stratified formation together to form something resembling a beam that will support itself by anchoring one end of a bolt in a hole drilled in the rock and tightening a nut against a bearing plate on the other end. This compresses the layers of rock so that no lateral or horizontal shearing action is possible between the bedding planes and (2) to tie a weak or loose formation to the solid formation above it, or to the self-supporting rock above the natural arch or "cave line" of the excavation.

There are two main types of rock bolts. The most common, Ex. A-2, is the split rod and wedge type which is driven to a seat and has a nut tightened on the exposed end. The second type, Ex. A-1, known as the expansion shell type of rock bolt, is not driven but is inserted in the hole and turned to the desired tightness.

These rock bolts consist of three parts, namely the bolt proper, the expansion shell and the washer plate. Rock bolts come in various lengths and range from two to eight feet, the five and six foot sizes being most popular.

The split rod and wedge type of rock bolt (Ex. A-2) is installed by drilling a hole in the rock to a depth about four inches less than the length of the bolt. The wedge is started into the slot of the bolt and the bolt is then inserted in the hole. A threaded or cup-shaped driving dolly is inserted in the stoper chuck and the bolt is then driven to refusal. The final operation is tightening the nut with an impact wrench.

In installing a shell type bolt (Ex. A-1), the bearing plate and the nut are put on and the expansion cone is then expanded sufficiently so the bolt may just enter the hole. The bolt head is then pushed to the collar of the hole and tightening is done with an impact wrench.

In the case of both types of rock bolts, the expansion shells or wings go out and compress the surrounding rock or earth radially.

When a rock bolt is properly installed and there is no slipping in the anchorage, the actual tension around the axis of the bolt amounts to six, seven or even eight tons. It also had a radial influence of $2\frac{1}{2}$ feet.

In some mines bolts alone are not sufficient and it is necessary to run metal bands from one bolt to another or to use metal mesh or fences. Rock bolts are used in the mines in patterns which must not exceed five feet but which may go down to three or two and this pattern is established by the supervisor of the mine.

The main disadvantage in the use of rock bolts is that there is no visual indication of rock bolt failure; with

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timber it can be discerned that it is taking weight by posts squeezing up into the timber they support and long before these horizontal members supported by posts will fall, remedial measures can be taken.

However, in some stopes wood is placed under most of the rock bolts. The reason for this, according to one witness (Mr. Perry, p. 202 of the transcript) "is that the rock bolt here only holds superficial incipient loose ground and by placing the wooden bloc underneath it we can watch to see if ground started to move a little bit by the crushing of the washer into the wood. If it does that, proper action can be taken to correct the situation."

The expert witnesses agreed that mining geologists today are not completely sure just what exactly is being done in rock bolting. They do know that certain actions will have certain results but exactly what happens when they put the rock bolt into the back or wall of a mine is to a considerable extent theoretical. What they hope to do is to drive the shaft of this device hard enough to reach undisturbed rock and hold the rock that might fall in place. Professor Rice, one of the expert witnesses, stated that a rock bolt had two effects, one of compression and the other of friction and both assist in effecting its purpose.

Rock bolts became of a fairly general use shortly after World War II; they had an expanding and accelerating acceptance which has now grown to a point where it is very unlikely there is an underground operation in Canada which does not use them. Indeed, according to the Ingersoll-Rand booklet on rock bolting (Ex. D-6) "rock bolting came into its own in 1948, when the coal mines and the United States Bureau of Mines undertook an extensive program for safety and economy in mine mechanization." Since 1948 rock bolting has become almost universal in mines and, according to Professor Rice, rock bolts have to a considerable extent superseded the use of timbering.

Now the right of appeal conferred by s. 58 of the *Excise Tax Act* is not an appeal *de plano* and is confined to an appeal upon leave being obtained from this Court or a judge thereof upon a question that in the opinion of the Court or judge is a question of law and in the present case, as we have seen, it is limited to one of the questions stated only. Indeed, the jurisdiction of this Court is restricted to determining whether the Tariff Board erred as a matter of law in holding as it did.

The nature of the right of appeal conferred by s. 45 of the *Customs Act* was considered in an unreported case bearing number 134640 of this Court, *The Dentists' Supply Company of New York v. The Deputy Minister of National Revenue (Customs and Excise)*. At p. 5 Thorson P. stated:

If the decision of the Tariff Board was a finding of fact, and there was material before it on which it could reasonably have based its finding, it is not within the competence of this Court to interfere with it, no matter what its conclusion might have been if a right of appeal *de plano* from the decision had been conferred by the *Customs Act*. There is no right of appeal from the decision of the Tariff Board on findings of fact and it seems to me that the same is true in respect of findings of mixed law and fact. The only right of appeal conferred by s. 45 of the *Customs Act* is an appeal upon a question that in the opinion of this Court or a judge thereof is a question of law and even in such a case, only after leave to appeal on such question has been obtained Thus to the extent that the declaration of the Tariff Board in the case was a finding of fact, this Court has no right to interfere with it unless it was so unreasonable as to amount to error as a matter of law. But it cannot be too strongly stressed that this does not mean that there was an error in the finding of fact merely because the Court might have found otherwise if a full right of appeal had been conferred. Thus, this Court has no right to substitute its own conclusion for the finding of the Tariff Board if there was material before it from which it could reasonably have found as it did.

However, in *Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue for Customs and Excise*[1] the Supreme Court, by Kellock J. dealt with this right of appeal in a somewhat different manner at p. 498 when referring to *Edwards v. Bairstow*[2]. He said:

While the construction of a statutory enactment is a question of law, and the question as to whether a particular matter or thing is of such a nature or kind as to fall within the legal definition is a question of fact nevertheless if it appears to the appellate Court that the tribunal of fact had acted either without any evidence or that no person, properly instructed as to the law and acting judicially, could have reached the particular determination, the Court may proceed on the assumption that a misconception of law has been responsible for the determination;

The onus of proof necessary to establish the right of appeal lies on the appellants and it is now necessary to examine whether this onus has been discharged.

The decision of the Tariff Board expressed by way of a declaration, dated May 15, 1961, is a majority decision, Mr. Gerry, one of the members, dissenting.

[1] [1956] 1 D.L.R. (2d) 497.   [2] [1955] 3 All E.R. 48.

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The majority decision found that rock bolts are not safety devices nor equipment for the prevention of accidents in the manufacturing or production of goods within the meaning of the schedule of exemption, and this decision can be summarized as follows:

The basic purpose of rock bolts is the prevention of rock or earth fall which is inimical to human safety and even to the preservation of equipment or inanimate things and when rock or earth falls it is an accident.

However, mining operations become impossible if the underground operations are not kept structurally intact by means of pit props, steel arches, cement walls or rock bolts. When so used, the rock bolt becomes akin to a beam supporting the roof or ceiling of a building on the surface of the earth or like the arch supporting a viaduct or overpass. These structural devices undoubtedly contribute to safety because there is real hazard and peril in a collapsing building or viaduct. However, such beams and arches are essentially structural devices and not safety devices; they contribute to safety because they contribute to structural soundness. This is also true of rock bolts. The majority decision then stated that:

> The rock bolt's function extends well beyond the mere preservation of life and limb by the prevention of the hazard of rock fall; it preserves in existence the underground aperture without which there is no access to the ore for man, beast or machine, no space for the many phases of the mining operation and indeed no mine itself.

The majority then refused to accept the proposition that if the rock bolt had as a real purpose safety, even though safety is not its sole purpose, it should qualify under the safety clause, on the basis that "such a broad interpretation of the safety clause would bring within its ambit every apparatus, device or equipment used in building construction to prevent the collapse of a factory building" such as "the bolts used to hold together the steel beams or girders in the factory;" that in mining it would apply to "the hoisting cable in the elevator which contributes to safety by preserving the life and limb of the elevator's occupants;" that, "however, the cable is not safety equipment in the same sense as the safety dogs that arrest a fall of the elevator should the cable fail; instead of being safety equipment it is of the very essence of the elevator—without these there simply is no elevator."

The dissenting member's opinion that rock bolts should fall within the exemption clause is based on the fact that he attached considerably more weight to that part of the evidence dealing with the true place and purpose of the installation of rock bolts than that dealing with their use in maintaining a structure of any permanence. He believes "that the intention of Parliament in providing exemption for safety devices and equipment for the prevention of accidents in the manufacturing or production of goods, was in respect to the accidents peculiar to the particular manufacturing or production processes involved" rather than those common to all occupations.

He added that:

> If it is necessary that a process be carried out in proximity to high pressure steam or air units, the devices designed to minimize the danger of explosion of the various production units could be deemed safety devices for the prevention of accidents in the manufacturing or production of goods; in the production of ore it is necessary that the process be carried on at the location of the ore and, in most underground mines, the danger of accidental fall of rock from ceilings and wall including, in some cases, the ore body yet to be excavated, creates the greatest single hazard in the process of production.

He was of the opinion that the evidence showed clearly

> that the greatest danger from rock fall is in the area most recently opened; it also shows that safety measures, including in many cases rock bolting, are applied immediately after an area has been opened. Subsequent additional precautions may be taken in areas which appear to have become unsafe even with the precautions taken at the time the area is opened. These additional precautions may also include rock bolting.

And finally that

> mine openings, be they working stopes or passageways, are only of value during the time that ore is available from the working surfaces in the area serviced by the openings.

Now, as we have seen, the first issue in this appeal is not whether rock bolts are a safety device within the meaning of the exemption clause but whether the Tariff Board erred as a matter of law in deciding that they were not. If there was material before the Board from which it could properly decide as it did, this Court should not tamper with its decision even if it might have reached a different conclusion if the matter had been originally put before it.

At the hearing before the Tariff Board, several expert witnesses were called on behalf of all parties and we may

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now examine this evidence and see whether it supports the Board's finding that rock bolts are essentially a structural device.

Mr. H. R. Rice, of the University of Toronto, a mining professor, although stating that rock bolts in his opinion are safety devices, as we shall see later, admitted that rock bolts are also used as support and that it would be virtually impossible to work in an underground aperture thirty feet wide without some support in the roof. He also admitted that if rock bolts were not used something else, such as timber, would have to be used for support. Rock bolts, according to Professor Rice, have to a considerable extent superseded the use of timbering. He declared that since 1948 rock bolting as a means of support in mines has become almost universal and that at the present time there are few mines on the continent where rock bolting does not find a place in the supporting picture. In answer to a question by the Chairman he agreed that the maintenance and position of the ceiling has more than safety considerations attached to it and that if the ceiling keeps falling to the floor, the stope will become unworkable.

Mr. Sullivan, underground superintendent for the Rio Algoma Mines Limited and the Panel Mine, although also stating that in his opinion rock bolts are safety devices, admitted that rock bolts in patterns would give a more competent and more homogenous structure immediately above the back than would a post. In cross-examination he admitted that in certain of the mines, bolts are not sufficient and that in order to prevent either dilution or rock coming down, it is necessary in addition to the bolts to run metal bands from one bolt to another bolt, and in other mines it is necessary to run underneath the bolts a metal mesh or fence. He agreed with Mr. Glass, Vice-chairman of the Board, that rock bolting was done to keep the roof from falling down and that at the Denison Mine, where Mr. Sullivan is employed, rock bolts are used to keep the roof up.

Mr. P. G. Forsyth, safety director for Denison Mines Limited also stated that in his opinion the primary purpose of a rock bolt was as a safety device. He however admitted that rock bolt support is in fact put into effect throughout the Denison Mine. In cross-examination he agreed that a method of support aside from rock bolting would be to widen the width of the pillars and to increase their number.

Mr. Herbert H. Cox was called on behalf of the respondent. He is a consulting mining engineer. Prior thereto, however, he was surveyor and later chief engineer at Stirling Mines, Cape Breton, Nova Scotia. He then went to Malartic Mines and was supervisor and later engineer. In 1939 he went to the Malartic Gold Fields and stayed there until 1956 serving as chief engineer and then line superintendent and assistant manager, manager and general manager and vice-president. He also did some consulting work for the Underwriters of Stanleigh Uranium Mines and Stanrock. He assimilated rock bolts used in patterns to a beam of one inch boards one on top of the other, supported close to the ends by two supporting points; he suggested that if a load is applied to the center of these boards you immediately see the bowing effect or sagging; however, if these bolts are bolted together or if they are glued together as is the case with laminated wood structures, they would immediately form a rigid member; a beam was thereby created out of the boards. In his opinion it is possible for a system or pattern of rock bolting to have so created the effect of a beam and if that is so, then it is not necessary for the ends of these bolts to be seated in rock above the intra-dosal area or up in the solid part of the rock above. In cross-examination, he however agreed that you do not get a beam effect if you rock bolt at random. He also admitted that by rock bolting in mines you are preventing an area around the opening from becoming loose and falling and that the prevention of that fall is for the purpose of making that opening safe for working; he agreed that that was one of the purposes. He also agreed that the safety factor by virtue of the prevention of rock fall was a real purpose in mining.

There is no doubt that there was sufficient material in the evidence for the Board to decide that rock bolts are structural devices and that their structural aspect was important.

However, whether they are essentially structural devices is another matter. Indeed, the adverb "essentially", if one goes to the dictionary (cf. Webster's Third International Dictionary) means "the most significant element, attribute, quality, property or aspect of a thing".

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If one could say without going any further that the evidence supports the Board's finding that rock bolts are essentially structural devices and that they have no other essential properties, the matter might end there and the appeal be rejected.

However, it is not as simple as that due to the fact that the Board did state that rock bolts were devices and implied from a number of assertions that these devices were undoubtedly related to safety, which of course would make them safety devices, and it is now necessary to consider whether these rock bolts are essentially structural or essential safety devices or even both structural and safety devices.

In their declaration the Board found that "rock bolts prevent rock or earth fall" and that the latter "is inimical to human safety and even to the preservation of equipment or inanimate things which may at any time be in the area of such potential fall" and that "the rock bolt's function extends well beyond the mere preservation of life and limb by the prevention of the hazard of rock fall."

Indeed, how can the Board make such statements unless it had implicitly decided that rock bolts were used for the protection and safety of animate and inanimate things by the prevention of the hazard of rock fall. Any doubts in this regard could be easily dispelled by an examination of the evidence and if the latter indicated that these devices were safety devices, then we may well be faced with a device which could have two essential properties one structural and the other safety.

Let us now examine the evidence with regard to the safety aspects of rock bolts and see if it supports the above assumption.

Professor Rice, who described the suspensory and frictional effects of rock bolts stated that because of these effects rock bolts prevented the fall or sloughing or ravelling of portions and particles from the roof or back from falling upon the workmen who happen to be underneath and thereby rendered the area where the workmen are working safe from the hazards which otherwise might be there and that, therefore, the hazards are reduced to a minimum that the skill and will of man can devise. He affirmed that rock bolts are safety devices and that they make the working areas safer for utilization.

In cross-examination when asked as to whether one of the primary things for a person in charge of a mine to do was to conduct the operations in such a way that as little rock as possible is mixed with the ore (this is called dilution) he stated that that was really a secondary consideration to the safety consideration of holding all of the particles of rock represented on the walls of that stope from falling and injuring men who are passing along the floor. His answer as to why there has been an acceleration in the use of rock bolts since World War II was that he could not suggest one except that there was a growing and wider appreciation of their utility as a safety measure.

In answer to Mr. Gerry, a member of the Board, to a question regarding rock bolts being described as for safety purposes and also as an aid to mechanization of the mine and to some extent as an economy and to place the emphasis on these three factors he stated at p. 94:

> Well, of course, it is primarily there as a safety measure to prevent the fall of ground—it is primarily there The ease which it lends to the adaptability of mechanization is also a factor; but the prime consideration is always safety. It is the first rule in the devising of any mining operation—safety Also, these bolts are out of the way, which is perfectly apparent and obvious, of mechanical devices for the removal of the broken ore. If we had a situation where these requirements were so perfectly combined as not to require support, this same condition would obtain as well: there would be no obstruction placed in the way of the mechanization of the ore removal process. But we still use these primarily as a safety measure.
>
> The other point that has been raised is, is it an advantage of also a matter of dilution? It does have an economic effect which operates to a great or lesser extent depending upon many things, primarily the grade of the ore itself A low grade mine cannot afford much dilution and that sort of thing That is the kind of consideration I am introducing here So, that again is a factor, but I hold that they are contributory factors, and that the main and predominantly important factor is the use of a rock bolt as a safety measure

And, to a question by the Chairman of the Board that a mine would cease to be a mine without the preservation of the ceiling, he answered: "Oh yes, but we preserve it as a safety measure."

Mr. R. L. Smith, assistant chief engineer of mines for the Province of Ontario, with prior experience in the safety aspects of mines and who visited the Rio Tinto and the Consolidated Denison Mines agreed that rock bolts are to be used where the enclosing rock is not safe and that rock bolts prevent accidents. He stated that the greatest functional hazard in underground mining operations, one of the

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largest causes of accidents in the province of Ontario, had been due to falling ground. In cross-examination he stated that according to his records, seventy-two accidents occurred in Ontario during the period 1954 to 1960 from fall of ground and that none of them occurred where there were rock bolts. Mr. Sullivan stated that rock bolts were used in the Panel Mine operations for the purpose of preventing falls of ground and that they were 100 per cent effective. In answer to Mr. Glass, who queried whether it would be a fair conclusion to say that rock bolts are not safety devices but something essential to the operation of the mine, he answered that he could not see how they would be anything but a safety device in their application. Mr. Forsyth who agreed that all parts of the mine at Denison are bolted explained this by saying "We have found at Denison that we can't safely mine without the use of these bolts." Asked by the Chairman as to whether as safety director he would accept timber if the height were less, as being a reasonable and proper substitute for rock bolting he said he would not because he believed it would not give the results required. Asked by the Chairman as to whether there are other reasons, he answered: "From my point of view there are no other reasons because I deal primarily with safety of people and I have no other reasons." (cf. p. 165 of the transcript).

THE CHAIRMAN: Your basic reason, then would be . . . ?

THE WITNESS: Safety.

THE CHAIRMAN: That timber does not keep the roof in place as well as the rock bolt?

THE WITNESS: I believe you have stated my thinking correctly.

Asked in cross-examination by counsel for the respondent if in an area where you feel the rock is perhaps not as strong or weaker, he would use another method of support by putting in additional pillars in addition to rock bolts, he stated that it was possible that he might by widening the width of the pillars or increasing its number.

Mr. E. A. Perry, a graduate engineer, manager of Hollinger Consolidated Gold Mines, who has been in the mining field since 1934, at p. 211 of the transcript when asked whether at Hollinger Consolidated Gold Mines one of the purposes of putting the rock bolts would be to stabilize the wall rock answered "No, no, it just keeps the loose pieces from coming off as a matter of safety practice" and that it is not required to stabilize the wall back. He also added that

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rock bolts are put into solid ground and that timber support was used in ground that was not solid. He described solid ground as ground that is not drumming and that you can always detect ground that is loose by tapping it with a steel bar, and if it is drumming, then that ground is loose and that has to come down or else be supported with timber. He stated, at p. 216 of the transcript, that at Hollinger they did not try to hold ground that they knew was "badly faulted with cracks in it with rock bolts but that they used rock bolts where they felt that rock bolts can serve a purpose where they have a great deal of advantages in that they can supply the limited amount of . . . it is not support—it is corrective action, I suppose. We do not put them in broken ground, but we put them in ground so that it won't break and we put them in the kind of ground where we know we are not going to be caught by trying to support more weight than a rock bolt will stand."

Mr. Cox cross-examined by one of the appellant's counsel agreed that by the tendency of nature to close in an opening one had constant hazard in mind, the fall of earth or rock and that the prevention of that fall is for the purpose of making that opening safe for working.

It will be readily seen that if there was sufficient material for the Board to decide as they did that rock bolts are structural devices, there was also sufficient and abundant material in the evidence to decide that they are also safety devices, and may I add that the safety property or quality or attribute or aspect or element of the rock bolt is as significant as its structural property, quality, attribute, aspect or element and any decision contrary thereto would, in my opinion, be perverse and contrary to the weight of the evidence.

Counsel for the respondent's argument to the effect that a tunnel, stope, raise or adit rock bolted gives a cathedral-like quality or a permanent building-like quality to the ceiling or walls of a mine is not in my opinion supported by the evidence. Indeed, the evidence appears to be to the effect that for a period of time a rock bolt, or rock bolting, may keep a situation in hand for the protection of the miners who break down and haul out the ore, i.e. during the period of production, and once the operation is terminated, the ceiling and walls would probably give in due to the imponderables in underground operations and the tendency

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of nature to close in man-made underground apertures. Whatever structural properties rock bolting may have would therefore at the most be of a temporary nature.

We are therefore faced with a device which has two essential attributes, aspects or uses and both of these are of equal importance.

In *Javex Company Limited and Oppenheimer v. The Deputy Minister of National Revenue for Customs and Excise*[1] a very similar situation was dealt with by Cameron J. In this case, although a product called "Clorox" was found by the Tariff Board to be used primarily as a bleach and secondarily as a disinfectant, it was still held to be admissible under a tariff item covering disinfectants only although it performed more important functions (bleaching) at the same time.

Cameron J. at p. 448 stated:

> The meaning to be placed on Tariff Item 219*a* is clear If the product named is for disinfecting, and this has been found as a fact, the product is properly classified under this Item If Parliament had intended that such product should be classified under that Item only if the sole and primary use were "for disinfecting" it would have been a simple matter to have so provided.

This decision was confirmed by the Supreme Court[2].

This, in my opinion, is sufficient authority to apply the same reasoning to the present case where instead of having a primary and secondary use, we have two important and real uses.

Now, if rock bolts have two important uses, and we believe that it is so, on what legal basis could the Board disregard one real important use because of the existence of another real important use.

It appears from the analogy used by the Board, i.e. by comparing rock bolting in mines to structural beams and pillars in buildings on the surface, that it arrived at the conclusion that to accept rock bolts as safety devices within the exemption would bring within its ambit "every apparatus, device or equipment used in building construction to prevent the collapse of a factory building upon the heads of its unsuspecting occupants" and that it would even include "the bolts used to hold together the steel beams or girders in the factory."

[1] [1959] Ex. C R. 439. [2] [1961] S C R. 170.

Now, although this analogy has some resemblance to the situation created by rock bolting in some cases in mines, it is not entirely true as we shall now see. Indeed, in buildings, the stress and strain which must be carefully calculated in order to provide adequate structural beams, posts or pillars can be so calculated to a point where the structure erected is a building which is entirely safe for those who are called upon to use it. Although the beams in this building and its structural parts prevent the building and its posts from falling on the heads of its users and in that sense contribute to its safeness, the resemblance with the situation found in mines stops there. Indeed, there is no specific hazard here as found in mines where the evidence abundantly shows that the great single hazard there is rock or earth fall nor are the imponderables found in underground mines existent in ordinary surface buildings, which imponderables are due to the fact, as explained by all the expert witnesses, of the tendency for nature to close any underground opening no matter what means are used to prevent this be they pillars, wood props or even rock bolts, and in the case of rock bolts, as we have seen, even the geologists are not too sure what they are doing when they rock bolt.

It seems to me that the proper way to interpret this exemption clause is to take it, not piecemeal, but in its entirety and when that is done it appears that the safety device or equipment which must also be either machinery or apparatus, is directed at those accidental happenings which are peculiar to the industry or manufacture involved due to the existence of some distinctive important hazard particular to the process of manufacture or production involved.

If this exemption clause is so limited there is no possibility nor necessity of extending the clause to the building industry in general as the Board did. Indeed, its limitations are well within what Parliament may have contemplated.

The use of the above analogy by the Board indicates clearly that the majority of the Board read into the exemption clause an intent broader than the words themselves permitted and through a consideration of the consequences of doing this took rock bolts out of the exemption clause.

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Indeed, the majority decision of the Board can be summarized as follows:

Rock bolts do not come within the exemption clause because, although they are devices with safety aspects, properties or characteristics and are directed at protecting human beings or inanimate things from the danger of rock fall, they have essential structural properties and because of these properties, one would have to include within the exemption the beams and bolts which support the roof or ceiling of surface buildings which would, in the mind of the Board, be too broad an interpretation.

Now, to decide by the consequences, as the Board did, and in this case, as we shall see, by the consequences of a misconception is, in my opinion, a serious error in law.

Indeed, where the words are clear they must be given effect to unless, of course, they would lead to absurdity.

In *The Commissioner of Patents v. Winthrop Chemical Company Incorporated*[1] Rand J. said:

> . . . What has been called the Golden Rule of construction is that the language of a statute should be given its grammatical and ordinary sense unless that would lead to absurdity, repugnancy or inconsistency, in which case that sense may be modified so as to avoid the absurdity or inconsistency but no further;
>
> * * *
>
> . . . But the intention of a legislature must be gathered from the language it has used and the task of construing that language is not to satisfy ourselves that as used it is adequate to an intention drawn from general considerations or to a purpose which might seem to be more reasonable or equitable than what the language in its ordinary or primary sense indicates.

In the interpretation of a statute no other consideration should move a court than that of giving effect to the intention of Parliament as that intention is expressed from the language employed.

In *Attorney-General v. Carlton Bank*[2] Russel C.J. stated:

> The Duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject, namely to give effect to the intention of the Legislature as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed. The Court must no doubt ascertain the subject matter to which the particular tax is by the statute intended to be applied, but when once that is ascertained, it is not open to the Court to narrow or whittle down the operation of the Act by seeming considerations of hardship or of business convenience or the like. Courts have to give effect to what the Legislature has said.

[1] [1948] S.C.R. 46. [2] (1899) 2 Q.B. 164.

Due to this serious misconception there would appear to be no question here that no person properly instructed as to the law and acting judicially could have reached the decision reached or could have so construed the exemption clause.

This misconception of the Board appears more so if, when bearing in mind both the structural and safety aspects of the rock bolt, one considers that in order to take the rock bolt out of the exemption section the words "solely" and "exclusively" had to be added to this section. Such a proposition was advanced by the respondent at p. 10 of a brief presented to the Tariff Board where it is stated:

> "Equipment for the prevention of accidents in the manufacturing or production of goods" to be found in Schedule III of the Act includes only that equipment whose *sole* function as it is then being used is to prevent damage or harm to persons or property.

This, of course, is contrary to the proper interpretation of the statute and to the authorities.

In *Timkan v. Perry*[1] Sir Raymond Eversher, M.R. stated that:

> . . . Words plainly should not be added by implication into the language of a statute unless it is necessary to do so to give the paragraph sense and meaning in its context. In this case I cannot see any need to read the words in other than their ordinary sense.

And at p. 93:

> I fully accept the force of those considerations, and indeed it looks as though Parliament may not have chosen its language with all its customary care, but the fact is that sense can perfectly well be given to this paragraph by reading the words as they are written and according to their ordinary context . . . I agree with the Judge that we cannot introduce into this paragraph the words which Mr. Blundell asks should be inserted.

It would therefore appear that the Board by finding a broader interpretation than the words permitted and by falling into the error of a false analogy committed an error in law.

Such an error of interpretation should be sufficient to allow the granting of this appeal providing, however, that rock bolts are machinery or apparatus, device or equipment within the wording of the exemption schedule.

Now admittedly we have here either device and/or equipment; we also have a safety device for the prevention of

[1] [1951] 1 T.L.R. 91.

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accidents in mining. Indeed, one cannot read the language of the Board's declaration other than as a finding of fact with regard to the safety characteristics of the rock bolt.

At p. 3 the Board states:

> The evidence shows clearly that the basic purpose of the rock bolt is the prevention of rock or earth fall.
>
> There is no doubt that rock fall is inimical to human safety and even to the preservation of equipment or inanimate things which may at any time be in the area of such potential fall.
>
> There is no doubt either that the rock fall of which we speak is an accident in the sense that it is an unintended contingency and unforeseen in its timing.

All this is supported by the language that follows in the third paragraph that:

> The rock bolt's function extends well beyond the mere preservation of life and limb.

Counsel for the respondent argued at length that reading from the supplementary volume to the full Oxford Dictionary the words "safety device" would have a certain circumscribed significance, namely that the safety device contemplated must prevent harm or injuries arising from the malfunctioning of some other piece of machinery or equipment such as a safety catch on a gun, or a safety dog on an elevator, to ensure safety from falling in case the mechanism fails to operate, or a safety guard on a piece of jewelry in case the clasp fails.

I cannot agree with this interpretation. Indeed, in the examples given in the same dictionary cited by the respondent of what is a safety device, are also included such things as a safety paper, on which one can write cheques that cannot be erased, safety zone, a place where a pedestrian can stand safely as he crosses a busy street, a safety glass in an automobile, or used by workmen on their glasses and a safety curtain, the fire curtain in a theatre. None of these relate to the malfunctioning of another piece of equipment nor are within that suggested circumscribed ambit of a safety device.

They are, however, for the prevention of accidents of various sorts in the same manner as rock bolts prevent accidents from rock or earth fall in mines.

As a matter of fact, the dictionary ascribes a very wide meaning to the words "safety device" and I believe it is well within the purview of this Court to decide whether rock bolts are safety devices or not bearing in mind the context of the exemption schedule and the industry concerned. On that basis it would appear to me that there is no question but that rock bolts are safety devices.

This, however, does not end the matter as in order to be a safety device within the meaning of the exemption it must be shown that the safety device is either a machinery or apparatus.

According to Webster's International Dictionary, second edition, p. 129, the word apparatus in its second sense is:

> A collection or set of materials, implements or utensils for a given work, experimental or operative.

It is also, according to the same dictionary:

> Any complex instrument or appliance, mechanical or chemical for a specific action or operation, machinery, mechanism

Funk and Wagnalls' New Practical Dictionary at p. 68 defines apparatus as:

> a complex device or machine or a set of tools, appliances, etc.

According to the dictionary, the word "complex" does not necessarily mean that a thing is complicated, but that it consists of parts and it appears to me that both rock bolts produced as exhibits and which I have carefully examined, are apparatus. They are as well, in my opinion, "machinery" if one should take the meaning of "machinery" in Webster's International Dictionary, second edition, p. 1474 (fourth sense):

> any device consisting of two or more resistant relatively restrained parts which by a certain predetermined inter motion may seem to transmit and modify force and motion so as to produce some given effect or to do some desired kind of work.

The rock bolt has three different parts, it transmits and modifies force and motion and produces a given effect, that of maintaining existing stresses in the rock and preventing the release of latent energy and limiting the movement of the rock strata.

I have, therefore, come to the conclusion that the appellants have discharged the onus lying on them to establish that there is error in law in the decision under appeal.

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With respect to the interpretation of an exemption clause, I am familiar with the rule that the intention to exempt must be expressed in clear unambiguous language, that taxation is the rule and exemption the exception and that it should be strictly construed. cf. *Wylie v. The City of Montreal.*[1]

However, the language of this exemption section here is clear and unambiguous and the appellants have shown that every constituant element necessary to the exemption is present in this case.

In view of this there is no alternative but to give effect to the clear expression of the law.

As Fitzgerald J. in *Canadian Northern R. Co. v. City of Winnipeg*[2] said:

> Although a statute is to be construed according to the intent of them that made it, if the language admits of no doubt or secondary meaning it is simply to be obeyed. As Lord Watson said in *Salomon v. Salomon & Co.* [1897] A.C. 22, at p. 38:
>
> > "In a Court of law or equity what a legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact either in express words or by reasonable and necessary implication."

I therefore reach the conclusion that rock bolts used in underground mining fall within the exemption provided in s. 32 of the *Excise Tax Act* and the present appeal is therefore allowed with costs but with one set of counsel fee at the hearing only as agreed upon by counsel for the appellants.

Judgment accordingly.

[1] (1885) 12 Can. S.C.R. 384 at 386. [2] 36 D.L.R. 222.

BETWEEN:

1962

Oct. 9, 10, 11

1963

Jun. 12

BROOKVIEW INVESTMENTS LIMITED .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT;

AND BETWEEN:

FRANK WILSON ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT;

AND BETWEEN:

MORRIS WILSON ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT;

AND BETWEEN:

SYDNEY WILSON . .. .APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT;

AND BETWEEN:

ELLENDALE INVESTMENTS LTD. ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT;

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AND BETWEEN:

BRUCE FINKLER .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT;

AND BETWEEN:

ELLIOT L. MARRUS .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Income Tax Act R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e)—The Corporation Act 1953, Ontario, S.O. 1953, c. 19, s. 295(2)—Joint purchase of land—Real estate transaction entered into by group—Land held on behalf of group by Corporation formed for that purpose—Loss on foreclosure of mortgage—Company as trustee for individuals—Loss in real estate transaction—Deductions—Whether loss one sustained from an adventure in the nature of trade—Whether deductible by members of the group—"An operation of business in carrying out a scheme for profit making"—Appeals allowed.

Appellants were members of a group of individuals and corporations formed to acquire a 60% undivided interest in a parcel of land consisting of approximately 200 acres, for development and sale at a profit. One member of the group acted for all as trustee. A down payment on the purchase price was made in April, 1956 by the group and on September 25, 1956 a private company was incorporated to take title to the interest of the group in the land, to give a mortgage back to the vendors for the unpaid balance of the purchase price and to convey the property at the direction of the group, the money required to complete the purchase to be contributed by the members of the group. This transaction was consummated. The existence of the company was disregarded by the group, no officers were appointed, no shares being issued or meetings held, no minute book was begun and the company's letters patent were eventually cancelled for default in filing annual returns. The mortgage was allowed to go by default, the members of the group having decided that the venture was a mistake and not to put up any more money. A final order of foreclosure was obtained by the mortgagees in 1958. The loss sustained was $92,000 and in computing taxable income each of the members of the group claimed a deduction in respect of his or its share of this loss as resulting from an adventure in the nature of trade. The Minister disallowed the deductions and an appeal was taken to this Court.

Held: That the appeals be allowed.

2. That appellants were entitled to deduct from income their respective proportions of the loss incurred in the real estate transaction since

the interest in the land was purchased for sale in the course of "an operation of business in carrying out a scheme for profit making".

3. That the corporation formed by the appellants did not have a beneficial interest in the property but held it as a bare trustee for the group and subject to the obligation to convey it at the direction of the group.

4. That the true nature and substance of the transaction was an adventure in or concern in the nature of trade conducted on behalf of the group members, individually, through the interposition of the corporation, and the loss was therefore deductible by the members of the group in their respective proportions.

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APPEAL under the *Income Tax Act.*

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

John G. McDonald, Q.C. for appellants.

W. J. Smith, Q.C. and *M. A. Mogan* for respondent.

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

CATTANACH J. now (June 12, 1963) delivered the following judgment:

These are appeals against the appellants' income tax assessments for their respective taxation years ending March 31, 1958, with the exception of the appellant, Brookview Investments Limited which is an appeal against the assessment for the taxation year ending March 31, 1959 and in the case of the appellant, Ellendale Investments Limited the appeal is against the assessments for the taxation years ending March 31, 1958 and March 31, 1959.

The appellants were members of a group of individuals and corporations (hereinafter referred to as "the group") formed to acquire a parcel of land located in the Township of Toronto, in the County of Peel, consisting of approximately 200 acres.

The group consisted of Leon E. Weinstein, A. Posluns and his brothers, Frank Wilson, Morris Wilson, Sydney Wilson, Ellendale Investments Limited, Maxwell S. Lewis, Bruce A. Finkler, Elliot L. Marrus and Brookview Investments Limited.

Assessments have not issued with respect to Leon E. Weinstein, A. Posluns and his brothers and Maxwell S. Lewis. However, assessments have issued with respect to the

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remaining members of the group all of whom have appealed against their respective assessments.

As the same problem is involved in all cases, the appeals were heard together.

On April 25, 1956 two agreements of purchase and sale were entered into by Maxwell S. Lewis "as trustee for companies to be incorporated", one with Allanthorpe Holdings Limited for approximately 100 acres and the other with Burnhamthorpe Holdings Limited also for approximately 100 acres. The land which was the subject of the two foregoing agreements together comprised the parcel of land sought to be acquired by the group. Mr. Lewis signed both agreements "as trustee". Mr. Lewis is the senior partner in the legal firm of Lewis, Marrus & Finkler, which firm acted as solicitors for the group as well as participating in the group in their individual capacities. Mr. Lewis was the prime motivator of the venture and acted as manager for the group. The group had individually and collectively decided to purchase the land in question and had instructed Mr. Lewis to act on their behalf.

The purchase price for the 200 acre parcel was $2,725 an acre, a total of $545,000. A deposit of $40,000 was paid by two cheques drawn by Lewis, Marrus & Finkler both dated April 25, 1956 payable to Earle Freeman Real Estate Ltd., the agent of the vendors, Allanthorpe Holdings Limited and Burnhamthorpe Holdings Limited (herein referred to as "the vendors"). A further sum of $110,000 was to be paid on the closing date, being August 24, 1956 and the balance of $395,000 was to become due and payable in half yearly instalments as provided in the agreements.

By letters dated May 11, 1956, Mr. Lewis made an interim report to the members of the group on the transaction, outlining the particulars thereof and the contributions made by the respective members of the group to make up the deposit of $40,000. He also advised that ample notice would be given of the contributions required on closing. The question whether a special company or companies would be formed to hold the land, or if it should be held in the names of the individual members was raised and reserved for future decision.

Prior to the closing date of August 24, 1956 the group concluded that land values were depreciating. Consideration was given to abandoning the purchase and accepting a loss of $40,000, being the amount of the deposit. However, the group negotiated a further agreement, through the agent of the vendors, whereby instead of buying a 100 percent interest in the land, the group was to buy an undivided 60 percent interest therein at a total price of $321,004.80 of which $40,000 had already been deposited, a further $50,000 to be paid on closing and a mortgage to be delivered to the vendors for the sum of $231,004.80.

This agreement was reduced to writing in a document introduced in evidence as Exhibit 5 and executed under seal by the parties, Allanthorpe Holdings Limited and Burnhamthorpe Holdings Limited as vendors and Maxwell S. Lewis as purchaser on an unspecified date in September 1956. Mr. Lewis was again described as "trustee for a company or companies to be incorporated."

In the recitals to the agreement reference is made to the previous agreements for purchase and sale dated April 25, 1956 and that the parties, who were identical, had agreed to amend the terms thereof.

Paragraph 1 provides for the sale by the vendors, Allanthorpe Holdings Limited and Burnhamthorpe Holdings Limited and the purchase by Maxwell S. Lewis, as trustee of an undivided 60 percent interest in the land described in the previous agreements and sets out the purchase price.

Paragraph 2 then sets out an acknowledgment of the receipt of $40,000 to be applied on the purchase price, that on the closing date a further $50,000 shall be paid and outlines the terms of the mortgage for the balance of purchase price.

Paragraph 3 of the agreement reads as follows:

3. The parties hereto agree that the lands shall be owned by them in partnership and they shall proceed in such partnership with the development and/or sale of the lands in question. All costs involved in connection with the carrying charges of such lands, excluding the mortgages hereinbefore dealt with, and the costs of development thereof shall be borne by the parties in the following proportions:

The Companies of the First and Second Parts	40%
The party of the Third Part	60%

The profits shall belong to the parties hereto in the same proportions as have been outlined above, and for the purpose of calculating such profits the cost price of the lands in question shall be $2,725 00 per acre.

In paragraph 4 it was provided that neither party should sell its interest in the land without first offering such interest

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to the other party. If not purchased by the other party the interest could then be sold to any other *bona fide* purchaser subject to the right of the other party to purchase the interest desired to be sold at the same price and under the same terms as it would be sold to the prospective *bona fide* purchaser.

Meanwhile on August 7, 1956 the corporate name of Armley Investment Limited had been reserved with the Provincial Secretary of Ontario in contemplation of an application for incorporation thereunder.

By letters patent dated September 25, 1956 Armley Investments Limited (hereinafter referred to as "Armley") was incorporated pursuant to the laws of the province of Ontario following an application therefor by Maxwell S. Lewis, Bruce A. Finkler and three other members or employees of the legal firm, all of whom were named in the letters patent as first directors.

At the time of entering into the agreement of September 1956 (Exhibit 5) the application for incorporation of Armley had been made.

A letter dated September 27, 1956 was sent by the legal firm of Lewis, Marus and Finkler to all members of the group setting out a schedule of further payments required of each member to make up the amount of $50,000, and costs to be paid on closing under the agreement of September 1956.

By letter dated September 28, 1956 the firm of Lewis, Marrus & Finkler requested the solicitor for the vendors to make the conveyance in the transaction, entered into with them by Maxwell S. Lewis, as trustee, to Armley Investments Limited.

On October 1, 1956 an agreement was entered into between Armley and all members of the group which agreement was filed in evidence as Exhibit 11. The agreement recites that Maxwell S. Lewis, as trustee for a company to be incorporated, had entered into an agreement to purchase a 60 percent interest in the land in the Township of Toronto, that Armley had been incorporated and that the members of the group had agreed the land was to be purchased in the name of Armley as trustee for them in their individual capacities. The operative portion of the agreement then provided that the members agreed to contribute such sums as were required to complete the purchase in the proportions stipulated in the agreement and that Armley held the land as trustee only for the members of the group and undertook to convey the land to the members of the group in accordance with their respective proportionate interest therein as and when called upon to do so by them.

As requested in the letter from Lewis, Marrus & Finkler dated September 28, 1956 to the vendors' solicitor, the vendors conveyed an undivided 60 percent interest in the land to Armley "to have and to hold to and for its sole and only use forever" by deed dated October 9, 1956 and on the same date a mortgage of the land securing payment of the unpaid balance of the purchase price was given by Armley to the vendors.

The amount of $50,000 agreed to be paid on closing was so paid by a cheque dated October 9, 1956 drawn on the trust account of Lewis, Marrus & Finkler payable to the vendors.

The total amount contributed and paid by the group was $92,213.76 made up of (1) the deposit of $40,000 paid on April 25, 1956, (2) $50,000 paid on closing the transaction on October 9, 1956 and (3) $2,316.76 for legal fees and disbursements.

This amount was apportioned among the members of the group in the following percentages and amounts:

Brookview Investments Limited	33⅓—$30,848.67
Leon E. Weinstein	13⅓— 12,339.46
Wilson Brothers	13⅓— 12,339.46
Posluns Brothers	13⅓— 12,339.46
Ellendale Investments Limited	13⅓— 12,339.46
Lewis, Marrus & Finkler	13⅓— 12,110.25
TOTAL	100%—$92,316.76

The transaction with respect to the land was considered subsequently by the group as likely to be unsuccessful. The land was not developed or sold as contemplated in paragraph 3 of the agreement of September 1956 (Exhibit 5) between the vendors and Maxwell S. Lewis, as trustee.

The group concluded the venture had been a mistake and therefore resolved to put no further monies into it. This conclusion began to be formed between the negotiation of

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the first agreements of sale and purchase by Mr. Lewis as trustee dated April 25, 1956, which uncertainty prompted the group to acquire the lesser interest of 60 percent in the land rather than a 100 percent interest. This doubt became a certainty shortly after closing the transaction on October 9, 1956.

Accordingly no payments were made under the mortgage delivered to the vendors to secure the balance of the purchase price. By letter dated May 9, 1957 the vendors' solicitor advised Armley of its default of interest and principal pursuant to the terms of the mortgage and demanded payment by May 13, 1957. This letter was unanswered. A further letter was written by the vendors' solicitor, dated May 30, 1957, to Armley reiterating the demand for payment and intimating if payment was not received by June 3, 1957 further action would be taken. This letter was also ignored.

A writ of foreclosure was then issued on September 13, 1957 on behalf of the vendors as plaintiffs against Armley as defendant to recover payment due under the covenant, to recover immediate possession of the mortgaged premises and claiming the balance of the monies under the mortgage.

On September 18, 1957 Lewis, Marrus & Finkler, as solicitors for Armley, the defendant in the mortgage action filed a notice of desire to redeem, which was a step taken on the initiative of Mr. Lewis to obtain further time although it was admitted the group had no intention of redeeming.

A final order of foreclosure was issued on May 8, 1958.

Meanwhile the corporate proceedings of Armley were cavalierly disregarded. No organization meeting was held following the incorporation of the Company on September 25, 1956, but it could function as a legal entity by reason of section 295 of the *Ontario Corporation Act,* 1953 S. of O., c. 19, subsection (2) of which reads as follows:

> The first directors of the Corporation have all the powers and duties and are subject to all the liabilities of directors.

Armley took title to the land on October 9, 1956. It executed a mortgage to the vendors, Bruce A. Finkler signing the instrument as president and it also entered an appearance in the foreclosure action through its solicitors on September 18, 1957. Armley also entered into the agreement with all members of the group on October 1, 1956.

However, no officers were appointed, no shares were issued, no meetings of shareholders or directors were held and no minute book was begun. A corporate seal was obtained but no meeting was held authorizing the adoption of a seal.

On November 19, 1956, Lewis, Marrus and Finkler in response to an inquiry from the Department of National Revenue, advised that Armley Investments Limited had not commenced carrying on active business, but that when it did returns would be filed.

On September 11, 1958 the Deputy Provincial Secretary wrote to Armley pointing out its failure to file Annual Returns of Information for the years 1957 and 1958. On November 13, 1958 the Deputy Provincial Secretary again brought this omission to Armley's attention and pointed out the statutory penalties. Both such letters were ignored.

On April 2, 1959 the Comptroller of Revenue for Ontario wrote to Mr. Lewis at his home address pointing out the failure of Armley Investments Limited to file its Corporation tax return for December 31, 1957. Mr. Lewis was advised that the obligation to file such return existed whether the Company was operating or not and that penalties were imposed on the directors personally.

This letter elicited a reply from Mr. Lewis dated April 8, 1959 that the Company had been incorporated for the purpose of holding a title to certain lands, but after the acquisition thereof a final order of foreclosure had issued pursuant to foreclosure proceedings and accordingly the Company was without assets.

The Comptroller of Revenue for Ontario then suggested by letter dated April 27, 1959 that the letters patent be forwarded to him with an affidavit of an officer of the Company that it had ceased carrying on business, was entirely without assets and no distribution had been made to its shareholders. When such material was received it was suggested that consideration would be given to cancelling the letters patent.

A statutory declaration in such terms was completed by William Slater, as secretary-treasurer of the Company and

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forwarded to the Comptroller of Revenue for Ontario under cover of a letter dated April 20, 1959.

On August 3, 1960 the Deputy Provincial Secretary advised that by order of the Provincial Secretary dated July 25, 1960 the letters patent had been cancelled for default in filing annual returns and the Company was dissolved as of August 29, 1960.

In compiling their income tax returns for their taxation years ending March 31, 1958 each appellant claimed as a deduction from other income their respective proportion of the amount of $92,316.76 as a loss incurred in the real estate transaction described except in the case of the appellant, Brookview Investments Limited, where the deduction was claimed in its income tax return for the taxation year ending March 31, 1959.

By notices of assessment and reassessment issued to the appellants, the Minister disallowed their respective claims for deduction.

It is from these assessments that appeals are brought to this Court.

The sole issue for determination is whether the appellants are entitled to deduct from other income their respective proportions of the loss incurred in the real estate transaction.

The determination of this issue is, in turn, dependent upon whether the transaction constituted a business or an adventure or concern in the nature of trade.

By section 3 of the *Income Tax Act* the income of a taxpayer for a taxation year for the purposes of Part I of the Act is declared to be his income from all sources inside and outside Canada and includes income for the year, *inter alia*, from all businesses. By Section 4 income from a business is declared to be, subject to the other provisions of Part I, the profit therefrom for the year and by section 139(1)(*e*) business is defined as including a profession, calling, trade, manufacture or undertaking of any kind whatsoever and as including an adventure or concern in the nature of trade.

The classical test of such an issue is that stated in *Californian Copper Syndicate v. Harris*[1] as follows:

It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment

[1] (1904) 5 T C 159 at 165.

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 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 realization, 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 realizing a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

Applying the foregoing test to the facts in the present appeals as outlined herein, I have no hesitation in finding that the undivided 60 per cent interest in the lands in question was purchased for sale in the course of "an operation of business in carrying out a scheme of profit making".

In my view Armley held no beneficial interest in the lands or the transaction.

The agreements for purchase and sale dated April 25, 1956 and the agreement of September 1956 (Exhibit 5), entered into by Lewis as trustee for a company to be incorporated enured to the benefit of Armley by reason of section 285 of *Ontario Corporations Act, 1953* reading as follows:

Every corporation shall, upon its incorporation, be invested with all the property and rights, real and personal, theretofore held by or for it under any trust created with a view to its incorporation.

The partnership contemplated in paragraph 3 of the agreement of September 1956 did not come into effect. An agreement to carry on business at a future time does not render the parties to it partners before they actually carry on business since the test of partnership is the carrying on business and not the agreement to carry it on. Authority for the foregoing proposition is found in Lindley on Partnership, 1962 Edition at p. 17.

Therefore, what Armley held was title to an undivided 60 percent interest in the land.

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It is manifest from the evidence that the function of Armley was to take and hold title to the land, give a mortgage back to the vendors, and to convey the property at the direction of the group. This arrangement is recorded in the agreement dated October 1, 1956 between Armley and the members of the group.

The land was purchased with money supplied by the group.

Accordingly I conclude that the land was held by Armley as a bare trustee for the group and subject to the obligation to convey it at the direction of the group.

Assuming that a profit had been realized, such profit would not represent taxable income of Armley, for as Thorson P. said in *Kenneth B. S. Robertson v. M.N.R.*[1] and approved by Taschereau J. as he was then, in delivering the unanimous decision in *Sura v. M.N.R.*[2]

> . . . it lacks the essential quality of income, namely, that the recipient shall have an absolute right to it and be under no restriction, contractual or otherwise, as to its disposition, use or enjoyment.

Conversely it follows that the loss incurred is clearly deductible as a loss from a business or adventure or concern in the nature of trade and it further follows that the loss is that of the appellants in the proportion of their respective contributions, the true nature and substance of the transaction being that it was a business transaction in the nature of trade conducted on their behalf through the interposition of Armley.

Therefore, in my opinion, the amounts claimed by way of deductions are so deductible.

Accordingly the appeals herein are allowed with costs.

Judgment accordingly.

[1] [1944] Ex. C.R. 170, 184.

[2] [1962] S.C.R. 65 at 68.

BETWEEN: 1963

Apr. 8

GORDON A. MACEACHERN LTD. ......APPLICANT; Jun. 14

AND

NATIONAL RUBBER CO. LTD. ....RESPONDENT.

Trade mark—Trade Marks Act R.S.C. 1952, c. 49, ss. 4(1), 6, 16, 37, 58—Application for order to expunge respondent's trade mark—"Heel Pruf"—"Heelpruf"—"Rubber matting"—"So associated"—Prior use—Affidavit and invoices—Evidence of notification and use—Application granted.

Applicant had used in Canada the trade mark "Heel Pruf" since January 1959, in respect of floor matting. Respondent on November 18, 1959, applied for and obtained registration of the trade mark "Heelpruf" used in association with wares described as rubber matting. A motion for an order expunging respondent's trade mark was brought by the applicant on the ground that it was confusing with its own trade mark. It presented an affidavit of its president and two company invoices as evidence of prior use. Respondent contended that the applicant failed to discharge the onus imposed on it of establishing invalidity and that an invoice did not constitute use in association with wares. The Court found the trade marks confusing and practically identical.

Held: That an order go expunging respondent's trade mark.

2. That the applicant had discharged the onus of proof on it and had established that it was the first user of the trade mark and had not abandoned it.

3. That the invoices were to be taken in conjunction with the affidavit and showed a continuous number of sales from January, 1959, to January 31, 1962, the date of the affidavit.

4. That the reception of the invoices by the buyers with the trade mark inscribed thereon in association with the goods was sufficient evidence of notification and use required by s. 4(1) of the *Trade Marks Act.*

APPLICATION for order expunging trade mark.

The application was made before the Honourable Mr. Justice Noël at Ottawa.

Christopher Robinson, Q.C. for the motion.

Gordon F. Henderson, Q.C. contra.

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

NOËL J. now (June 14, 1963) delivered the following judgment:

This is a motion for an order expunging the registration made on May 27, 1960, under the *Trade Marks Act,* R.S.C.

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1952, c. 49 of the trade mark "Heelpruf" which was registered as of November 18, 1959, under the respondent's application for use in association with wares described as "rubber matting".

The motion for expungment was commenced by a notice of motion filed in this Court on February 7, 1962.

Section 56(1) of the *Trade Marks Act* provides as follows:

> 56 (1) The Exchequer Court of Canada has exclusive original jurisdiction, on the application of the Registrar or of any person interested, to order that any entry in the register be struck out or amended on the ground that at the date of such application the entry as it appears on the register does not accurately express or define the existing rights of the person appearing to be the registered owner of the mark.

The validity of the registration here is attacked on the ground that pursuant to s. 16(3) of the *Trade Marks Act* the respondent was not the person entitled to registration of the said trade mark "Heelpruf" because at the date of the filing of the application for the said registration, namely November 18, 1959, the said trade mark was confusing with the trade mark "Heel Pruf" which had been used in Canada by the applicant since at least January 1959 in respect of floor matting.

Section 16, s-ss. (3)(*a*), (4) and (5) of the *Trade Marks Act* provide that if one files an application of a proposed trade mark, then he is entitled to obtain its registration if, at the date he has filed the trade mark he applied for, it was not confusing with:

> (*a*) a trade mark that had been previously used in Canada or made known in Canada by any other person;

The trade marks of the respondent and of the applicant here are not only confusing, but practically identical except that in the case of the respondent, the letters are spelt out in one word whereas in the applicant's case, there is a space between "Heel" and "Pruf" and because of this they are certainly confusing within s. 6 of the *Trade Marks Act.*

In the present instance, respondent's application, according to the true copy of file 253989 of the Trade Marks Office, was filed on November 18, 1959, its affidavit of use was filed on May 17, 1960, and the registration was obtained on May 27, 1960.

As this was an application for registration of a proposed trade mark, the critical date under s. 16(3) of the *Trade*

Marks Act is the date on which the application was filed, i.e. November 18, 1959. If on that date there had been no prior use of a confusing mark, the respondent's registration would be good; however, if there had been prior use by the applicant as it so contends here, the respondent's registration would not be good.

The evidence in the present case was presented by means of an affidavit of Mr. Gordon MacEachern, the president of the applicant company, and two invoices of the latter company, as permitted by s. 58(3) of the *Trade Marks Act* which provides that:

58. . . .

(3) The proceedings shall then be heard and determined summarily on evidence adduced by affidavit unless the court otherwise directs, in which event it may order that any proceedings permitted by its rules and practice be made available to the parties, including the introduction of oral evidence generally or in respect of one or more issues specified in the order.

Mr. MacEachern's affidavit states *inter alia* that the applicant company is engaged in the business of building maintenance and floor finishing and in the sale of floor mats made of vinyl plastic.

Although, as we have seen, respondent's trade mark states that it is in association with "rubber matting" and the affidavit of the applicant's president mentions vinyl plastic, it would appear that nothing turns on this apparent difference as, according to counsel for the applicant, when one speaks of "rubber matting" one speaks of matting generally be it tile, plastic or rubber. This is also confirmed by a letter from the respondent to the Trade Marks Office when, after the advertisement, the respondent's patent attorney wrote to the Trade Marks Office for the purpose of changing the description from "rubber matting" to "matting". Upon the office's refusal to change this description, he wrote back and acquiesced to this decision adding that in his view rubber matting is taken by the public to mean matting no matter whether it is in fact rubber or some other kind of plastic.

Mr. MacEachern's affidavit then states:

4. That in January, 1959, the applicant company commenced the sale in Canada of floor mats under the name HEEL PRUF and has, since that time, made substantial sales of mats in association with the said name HEEL PRUF.

5. That attached hereto and marked Exhibit A to this my affidavit are two invoices by my company in the month of January, 1959,

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for floor mats in association with the said name HEEL PRUF, the said invoices being respectively No. 4158, dated January 19, 1959, and No. 4688, dated January 27, 1959.

The two invoices mentioned in the above affidavit are related to two sales, one on January 19, 1959, and the other on January 27, 1959. The first invoice (January 19, 1959) deals with the sale of a "white Ulta Mat HEEL PRUF for recess w/'ElDorado' in Gold" for a price of $110.40 to Silverton Construction Co. Limited, Toronto, Ontario. The second invoice (January 27, 1959) deals with the sale of a "Heel Pruf Vinyl Link Mat /w alternating Terra Cotta & Black Squares—approximately 3″ square w/ Terra Cotta nosings—bevelled on front, Butt on three sides" for a price of $104.88 to Medical Arts Building, Toronto, Ontario.

Now use in the *Trade Marks Act* is defined as follows:

4. (1) A trade mark is deemed to be used in association with wares if, at the time of the transfer of the property in or possession of such wares, in the normal course of trade, it is marked on the wares themselves or on the packages in which they are distributed or it is in any other manner so associated with the wares that notice of the association is then given to the person to whom the property or possession is transferred.

The applicant in the present case contends that the sales evidenced by the two above invoices on which appear the trade mark "Heel Pruf" is evidence of use as provided for by the words in s. 4(1), particularly with respect to the following, "or it is in any other manner so associated with the wares that notice of the association is then given to the person to whom the property or possession is transferred", and that the two above invoices establish two normal sales in the ordinary course of business or in the normal course of trade as required by this section.

Counsel for the applicant submits that those two invoices bring to the attention of a purchaser of these goods that these goods are being sold as "Heelpruf" and, therefore, the required notice of association of the trade mark and the goods has been made within the meaning of s. 4(1) of the Act.

Section 18(1) of the Act provides that a registration is invalid in the case of (*a*), (*b*), (*c*) and

subject to s. 17, . . . if the applicant for registration was not the person entitled to secure the registration.

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The applicant submits here that the respondent was not entitled to secure the registration of the trade mark as it did because at the time it applied, the applicant company had used the trade mark.

Section 18 referred to above is, however, as we have seen, subject to s. 17(1) of the Act which provides in effect that a registration will not be expunged on the ground of a prior use by somebody else unless the applicant for expungment is the person who has previously used or made known the confusing trade mark or trade name and that person must show that he had not abandoned the trade mark at the date of advertisement of the respondent's application.

According to the applicant, the only person who had in fact used the trade mark first, and therefore can attack it, would be the applicant and he therefore must, in order to successfully do so, establish that he had not abandoned the trade mark at the date of advertisement which here, as we have seen, is March 30, 1960.

The applicant submits that such evidence of non-abandonment has been established by Mr. MacEachern's affidavit, dated January 31, 1962, which, as we have seen, states that the applicant company has made substantial sales under the trade mark since the date of first use which goes back to January 1959. As the advertisement took place on March 30, 1960, the applicant submits that there is, therefore, proof of fourteen months of use or sale of goods associated with the trade mark.

The applicant therefore requests that the respondent's registration be expunged because it was not the person entitled to the registration under s. 16(3) of the Act since, at the date of application, the mark had been used previously by Gordon MacEachern Limited, that the latter had not abandoned it at the date of advertisement and that hence the registration is invalid under s. 18 of the Act.

As s. 19 of the Act gives to the registrant of a trade mark a statutory right to use that trade mark, it is incumbent upon the applicant to show the mark to be invalid and the latter, therefore, has the burden of establishing this invalidity.

The respondent challenges the evidence of the applicant on the basis that the applicant has failed to meet the onus imposed on it. Indeed, according to the respondent, the evi-

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dence submitted by the applicant to establish that the latter used the mark before respondent and had not abandoned it as at the date of advertisement is not sufficient to enable him to succeed. Respondent asserts that the invoices produced by the applicant are not sufficient to establish use nor even sufficient to establish anything relating to a trade mark and that the affidavit, at paragraph 4, does not state specifically that there was any trade mark used. It speaks of a trade name or the name of a product and it is not even asserted that there is a relationship of mark and wares. The notice of motion uses the words "trade mark Heel Pruf" but the affidavit is very careful not to use the words trade mark. It does not say that "Heel Pruf" is a Gordon MacEachern's product and there is nothing there identifying it with these wares.

Mr. MacEachern in his affidavit does use the word "name" instead of the word "mark" in relation to "Heel Pruf". Now, to call a word applied to or used in association with wares a name may, in some cases, be a misnomer such as here; it does not, however, follow, as suggested by the respondent, that because of this the applicant has not established anything relating to a trade mark. Indeed, the notice of motion, which is supported by the affidavit, describes "Heel Pruf" as a trade mark and the context, in paragraph 4 of the affidavit, indicates also that the word name is used in the sense of a mark. As for the relationship of the mark and wares of the applicant, paragraph 4 of the affidavit, as well as the notice of motion, clearly set out this relationship. This, in my opinion, is sufficient to dispose of respondent's first contention.

Respondent's basic submission, however, is that an invoice does not constitute use in association with wares.

According to s. 4(1) of the Act there must be an association of mark and wares at the time of transfer of the property in or possession of such wares. In the present case the respondent submits that there is no evidence that there was any transfer of the property in any wares at all; the evidence does not indicate that the invoices and goods or wares were even sent or that they were ever received; that incidentally the invoices are copies and not the originals; that use under s. 4(1) of the Act must be given in respect to certain conditions, i.e. in the normal course of trade and one isolated transaction or instance is not enough adding that evidence should have been adduced by the applicant establishing that this transaction was not just a single transaction or a single invoice and that finally the association of mark and wares must be notified to the person to whom property or possession is transferred.

The two invoices produced by the applicant must not be taken alone but in conjunction with Mr. MacEachern's affidavit and particularly paragraphs 2 to 5 thereof. If this is done, it then appears that the applicant began to sell mats "under the mark HEEL PRUF in January 1959 and that since that date to the date of the affidavit, i.e. January 31, 1962, it had made substantial sales in association with the words HEEL PRUF". Evidence is therefore shown of a continuous number of sales from January 1959 to January 31, 1962, which, of course, covers the period of March 30, 1960.

In my opinion, the expression in the affidavit "has since that time made substantial sales" implies sales going on at the time of the signing of the affidavit and that these sales have been made over the period between the time of the first sale to the time that the affidavit was sworn to.

Such is, I believe, the normal interpretation to be given to this expression and I cannot accept respondent's submission that this expression would merely indicate that substantial sales had been made prior to the date of advertisement.

The two invoices indicate a date for the first sales of the applicant and the manner in which "Heel Pruf" has been associated with its wares or goods. They are however only two of many sales made by the applicant and are, therefore, used also as an illustration of the manner in which all the other sales of the applicant were made.

Blackstone defines sales as a "transmutation of property from one man to another in consideration of some price."

Mr. MacEachern's sworn statement that substantial sales were made by his company therefore establishes that many transmutations of property were made from his company to a number of buyers and the normal inferences to be drawn from this is that sales having been made for a price, the goods sold as well as the invoices must have been delivered. Now, had respondent required further particulars with respect to the evidence contained in the affidavit and

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the two invoices, he could have, under Rule 165 of the Exchequer Court Rules, cross-examined Mr. MacEachern with respect to the broad statement he made as to the substantial sales made by his company as well as require production or examination of the original invoices.

I am therefore of the opinion that respondent must fail here also; indeed, the applicant has established the necessary transfers of property, in the normal course of trade; the evidence indicates that we have here not one isolated sale but many sales and the invoices with the trade mark indicated thereon in association with its wares which invoices, as we have seen, by inference must be taken to have been received by the buyers, are sufficient notification under s. 4(1) of the Act to establish use.

The applicant has also established continuous use through to the time of March 30, 1960 as well as showing that it at no time intended to abandon the mark. I am satisfied that such is the effect of the evidence submitted in the present instance and may I add that the *"Nodoz"* case[1] referred to by the respondent has no application here. Indeed, in that case there was evidence of one sale only over a period of five years and that sale had not even been proven to the satisfaction of the Court. In the present instance, as we have seen, we have sworn evidence of many sales.

I would now like to deal with the respondent's suggestion that the words "so associated" in s. 4(1) of the Act had a rather special meaning in that they would be related to the preceding words and not to the words that follow "so associated" which are "that notice of the association is then given to the person to whom the property or possession is transferred". After examining the French text of s. 4(1) of the Act it appears clearly to me that respondent's submission in this regard is partly correct in so far as the words "at the time of the transfer of the property in or possession of such wares" and the words "in the normal course of trade" apply to the three cases mentioned in this section: (1) if the trade mark is marked on the wares, (2) on the packages, (3) or it is in any other manner so associated with the wares that notice of the association is then given to the person to whom the property or possession is transferred.

[1] [1962] R.P.C. 1.

I cannot agree, however, with respondent's suggestion that the latter part of s-s. (1) of s. 4 is not related to the words "so associated". Indeed, if one takes the French text, the above words are translated by the words "lié aux marchandises au point" which, of course, mean associated or bound to the wares to a point "that notice of the association is then given to the person to whom the property or possession is transferred". The words "so associated" appear clearly here to have a very close relationship to the words which follow as the former express the sort of association of the trade mark with the wares required to establish notice under the Act.

Now the question as to whether an invoice or invoices with the inscription of the trade mark thereon in association with wares are associated to a point that the receiver would thereby get notice of the association is, of course, a question of fact.

Having decided that proof of a number of sales or transmutations of goods or wares is before this Court and that in all cases invoices were forwarded and received by the buyers, I have no difficulty in finding that the reception of these invoices with the trade mark inscribed thereon in association with the goods, in the normal course of trade of the applicant company, is sufficient evidence of notification and of use as set down in s. 4(1) of the Act and that, consequently, the trade mark is thereby "so associated with the wares that notice of the association is then given to the person to whom the property or possession is transferred".

Before concluding I would like to deal with a preliminary objection raised by the respondent with regard to the fact that the applicant did not oppose the respondent's application for registration when it might have under s. 37 of the Act. There appears to be nothing in this section or in the Act which obliges one to oppose it; indeed, the language used is "within one month from the advertisement of an application, any person may, upon payment of the prescribed fee, file a statement of opposition with the registrar". This, I believe, clearly indicates that the procedure contemplated is not compulsory and if not exercised shall not prevent an interested person from using subsequently another means of attacking a registration such as the present motion of expungment.

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I am therefore satisfied that the applicant has discharged the onus of proof which was incumbent on it and has established that it was the first user of this trade mark and that it had not abandoned it on the date of advertisement of the respondent's application.

There will be judgment ordering the expungment from the registry of Trade Marks of the word mark "Heelpruf" registered by the respondent as of May 27, 1960 under number 118302. The applicant is entitled to the cost of the application.

Judgment accordingly.

ONTARIO ADMIRALTY DISTRICT

1963
June 10

BETWEEN:

THE TORONTO HARBOUR COMMISSIONERS .... PLAINTIFF;

AND

THE SHIP *ROBERT C. NORTON* *et al.* .... DEFENDANT.

Admiralty—Practice—Requirements in answer to plea of res ipsa loquitur —Application to strike out plea granted.

Held: That a defendant who intends to prove some reasonable explanation for an accident in answer to the plea of *res ipsa loquitur* raised by the plaintiff must give sufficient information for the accident which he intends to raise or may raise in order that the plaintiff may plead to it.

MOTION to strike out an allegation in a statement of defence.

The motion was heard before Mr. A. S. Marriott, Q.C., Surrogate Judge in Admiralty in Chambers.

A. J. Stone for the motion.

J. A. Bradshaw contra.

Per MARRIOTT, Surrogate Judge in Admiralty:

Where a plaintiff pleads *res ipsa loquitur* it is well settled that it is open to the defendant to attempt to prove some reasonable explanation for the damage which will excuse him and preclude operation of the said principle; Salmond on Torts 13th ed. p. 453-4. However, if the defendant wishes to make such an allegation in his statement of defence it should be made in accordance with the rules of pleading.

Here the defendant has followed that rule in paragraph 5(*a*) and (*b*), but so far as (*c*) is concerned it gives no information to the plaintiff at all as to the nature of the explanation for the accident which the defendant intends to raise or may raise and therefore the plaintiff cannot plead to it and thus define the issue. So that the plaintiff is put in the position of having to go to trial with this unidentified allegation overhanging him and possibly may be caught by

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Marriott S J.

surprise. For that reason the pleading in my view is embarrassing.

The allegations contained in paragraph 5(*a*) and (*b*) are far reaching and it seems that they are sufficient to enable the defendant to conduct a wide discovery and if anything is unearthed which may give rise to a defence not covered by paragraph 5(*a*) and (*b*), leave may be obtained to amend the statement of defence either prior to or even at the trial. For these reasons I do not think it would be proper for the Court to allow the allegation in question to stand.

For these reasons the application will be granted and paragraph 5(*c*) will be struck out. Time for reply extended to ten days after entry of this order. Costs of the application to the plaintiff in the cause.

Order accordingly.

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Apr. 30, May 2

Sept. 18

BETWEEN:

HER MAJESTY THE QUEEN ....PLAINTIFF;

AND

THE CITY OF DORVAL AND ELM RIDGE COUNTRY CLUB INC. } DEFENDANTS.

Crown—Injunction—Expropriation—Expropriation Act R.S.C. 1952, c. 106, ss. 27, 28, 29 and 30—Cities and Towns Act (Quebec) R.S. 1925, c. 102, s. 519—British North America Act s. 125—Claim for local improvement taxes on compensation money—Prescription—Action properly instituted by information—Privilege under Quebec law—"Encumbrance"—"Charge"—Date for determining prescription of claims for taxes—Land abutting on street—Interest—Costs.

The Crown on March 20, 1957 expropriated certain lands in the Province of Quebec belonging to the defendant Elm Ridge Country Club Inc. and paid to it the sum of $900,000, in two instalments, in full payment of all claims arising out of the expropriation. At the time the first instalment was paid the club executed a partial release and remitted to the Crown a cheque for $15,571 58 in payment of a claim by the defendant, the City of Dorval for local improvement taxes alledgedly owing on the lands by the club at the time of the expropriation, without admitting such liability. It was agreed that the said sum would be held by the Crown in a suspense account pending the negotiation of a settlement between the club and the City of Dorval. This settlement was not arrived at and the sole question in issue in this case is whether the City of Dorval is entitled to claim compensation and, if so, in what amount The Court decided that the City of Dorval was entitled to compensation in the sum of $7,469 75 with interest to run on various portions of that amount as set forth in the reasons for judgment.

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Held: That as provided in the *Expropriation Act,* R.S C. 1952, c. 106, ss. 27, 28, 29 and 30 the action is properly instituted by information exhibited in this Court by the Crown

2 That a privilege exists and becomes a charge on the land assessed when determined by an assessment roll completed and deposited and the time when the delay for objection thereto has expired, and the contention that it becomes a charge on the land only when an action is taken to have the land sold fails.

3. That although the privilege or claim is usually maintained by a judgment of the Court before the three year prescription there was no necessity nor possibility of proceeding in this manner in view of s 23 of the *Expropriation Act* which provides "The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property; *and any claim to or encumbrance upon such land or property shall, as respects Her Majesty, be converted into a claim to such compensation money or to a proportionate amount thereof"*.

4 That a privilege under Quebec laws "is a right which a creditor has of being preferred to other creditors according to the origin of his claim" and cannot exist alone as it secures the fulfillment of some obligation and it therefore follows that the privilege considered here is a lien or liability attached to property or a charge thereon and being so meets with the definition of "encumbrance" in the English text and "charge" in the French text of s. 23 of the *Expropriation Act.*

5 That the date for determining if any of the City of Dorval's claims for taxes were prescribed under the three year prescription of s. 519 of the *Cities and Towns Act (Quebec)* R S. 1925, c. 102 is the date of expropriation of the lands by the Crown, i.e. March 20th, 1957 and not July 24th, 1962, the date of the information herein, and any such claim or claims should be deducted from the amount held in escrow by the Crown.

6 That the prescription against any right, whatever it may be, can start running only from the day it is open, and even then only if the action to enforce it is available and in the present instance, action could have been taken only on the due date of the taxes in each year and it is from that date only that prescription of the taxes can start running.

7 That the City of Dorval's contention that prescription runs from the date of each instalment the taxes for 1954 were payable, i e. January 1, April 1, July 1 and October 1 fails since the whole amount of the local improvement tax for the year 1954 was due and exigible on January 1, 1954, the other instalments applying only to municipal taxes.

8. That the taxes for the year 1954 were prescribed on March 20, 1957 more than three years after their due date namely January 1, 1954 and the City of Dorval has no right to claim them.

9. That the club failed in rebutting the evidence contained in the city's by-laws and the "Procès-verbal" rolls and other documents and has failed to establish that its land does not abut upon the street and is therefore liable for the local improvement tax

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10 That the City of Dorval having succeeded in recovering taxes for two years instead of four is entitled to half of its taxable costs only to be recovered from the Crown which is entitled to recover them from Elm Ridge Country Club Inc.

11. That since the present information forms part of the expropriation proceedings to take over the property of the Club and in this instance the Crown has remained a passive bystander, it is not entitled to costs.

INFORMATION exhibited by the Crown to have property expropriated by it valued by the Court.

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

Paul Ollivier, Q.C. for plaintiff.

R. C. Amaron for City of Dorval.

J. J. Spector, Q.C. for Elm Ridge Country Club Inc.

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

NOËL J. now (September 18, 1963) delivered the following judgment:

In this proceeding the Crown seeks a declaration as to whether the City of Dorval is entitled to claim compensation for municipal local improvement taxes as a result of the expropriation, on March 20, 1957, of a parcel of land being part of lots 13 and 14 of the official plan and book of reference for the Parish of Lachine, County of Jacques Cartier, Province of Quebec, the property on the date of expropriation of the defendant, Elm Ridge Country Club Inc., and if so entitled, the amount of such compensation; that should it be decided that the defendant, the City of Dorval, is entitled to compensation and the amount of such compensation exceeds the sum of $15,571.58 deposited by the defendant, Elm Ridge Country Club Inc., the said club be condemned to reimburse the amount of such excess to Her Majesty; and such further and other relief including such order as to cost, as to this Honourable Court may seem meet.

At the hearing, however, counsel for the Crown stated that he had considerable doubt as to the legality of one part of the information, i.e., s. 9(*b*) of the conclusions which deals with the request for a condemnation of the Elm Ridge

Country Club Inc., to reimburse the amount of any excess over the sum of $15,571.58 to Her Majesty and permission to withdraw this part of the information as requested is granted.

The sole question, therefore, which remains in issue in the present case is whether the City of Dorval is entitled to claim compensation and if so, in what amount.

The circumstances under which the claim of the City of Dorval arose were unusual and its determination is not free of difficulty and it is therefore necessary to relate in some detail the facts which gave rise to the present issue.

The lands belonging to the Elm Ridge Country Club Inc. were taken by the Crown under the provisions and authority of the *Expropriation Act,* being c. 106 of the Revised Statutes of Canada 1952, for the purpose of a public work of Canada, by depositing of record on March 20, 1957 under the provisions of s. 9 thereof, a plan and description of such lands in the Registry Office for the registration district of Montreal under number 1260826 whereby the said lands became vested in Her Majesty the Queen.

Pursuant to an agreement between the Crown and the Elm Ridge Country Club Inc. the owner of these lands on the date of expropriation, the latter agreed to accept a total sum of $900,000 in full payment of all claims arising out of the said expropriation. This amount was paid by the Crown to the Elm Ridge Country Club Inc. in two instalments, the first on June 28, 1957 in the sum of $400,000 upon execution by the club of a partial release before notary Hyman Ernest Herschorn, of Montreal, under number 15136 of his minutes and in which the club declared that it was at the date of expropriation the sole owner of the said lands and that there were no taxes owing on the said lands which were free and clear of all encumbrances; the second instalment in the sum of $500,000 was paid on March 14, 1958, upon execution by the defendant of a release of all claims arising out of the expropriation before the same notary under number 15353 of his minutes.

At the time of the execution of the partial release, Elm Ridge Country Club Inc. remitted to the Crown a cheque for $15,571.58 to cover a claim by the defendant, the City of Dorval, for local improvement taxes allegedly owing on the said lands by the club at the time of expropriation. This

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remittance was made by the club without any admission or recognition that the City of Dorval was entitled to the said sum of $15,571.58 or to any amount for taxes or otherwise and it was expressly agreed between the Crown and the club that the said sum would be held by the Crown in a suspense account pending the negotiation of a settlement between Elm Ridge Country Club Inc. and the City of Dorval.

As both the City of Dorval and the club were unable to reach an agreement with respect to the question of the taxes owing on the property at the time of expropriation the present proceedings were taken under the authority of the *Expropriation Act,* R.S.C. 1952, c. 106, ss. 27, 28, 29 and 30 which read as follows:

27. In any case in which land or property is acquired or taken for, or injuriously affected by the construction of any public work, the Attorney General of Canada may cause to be exhibited in the Court an information in which shall be set forth:

(*a*) the date on which and the manner in which such land or property was so acquired, taken or injuriously affected;

(*b*) the persons who, at such date, had any estate or interest in such land or property and the particulars of such estate or interest and of any charge lien or encumbrance to which the same was subject, so far as the same can be ascertained;

(*c*) the sums of money which the Crown is ready to pay to such persons respectively, in respect of any such estate, interest, charge, lien or encumbrance; and

(*d*) any other facts material to the consideration and determination of the questions involved in such proceedings.

28. (1) Such information shall be deemed and taken to be the institution of a suit against the persons named therein, and shall conclude with a claim for such a judgment or declaration as, in the opinion of the Attorney General, the facts warrant.

29. Any person who is mentioned in any such information or who afterwards is made or becomes party thereto, may by his answer, exception or defence, raise any question of fact or law incident to the determination of his rights to such compensation money or any part thereof, or in respect of the sufficiency of such compensation money.

30. Such proceedings, so far as the parties thereto are concerned, bar all claims to the compensation money or any part thereof, including any claim in respect of dower, or of dower not yet open, as well as in respect of all mortgages, hypothecs or encumbrances upon the land or property; and the Court shall make such order for the distribution, payment or investment of the compensation money and for the securing of the rights of all persons interested as to right and justice and according to the provisions of this Act, and to law appertain.

May I say here that although at the hearing I did express some doubt as to the legality of the procedure followed in the present information and suggested that it might have been better for the Crown to have proceeded under s. 1823 of the *Civil Code of the Province of Quebec*, by, having a sequestrator nominated, depositing the disputed amount with him and allowing both the City of Dorval and the club to fight it out before a provincial court, the above sections of the *Expropriation Act* seem to justify the information as taken.

According to the City of Dorval, the municipal taxes owed to it by Elm Ridge Country Club Inc. are due as a result of special assessments made upon abutting owners of which it alleges the club was one, for aqueduct, sewer and paving works.

Indeed pursuant to petition number 214, by-law number 331 was passed by the City of Dorval authorizing pavement and aqueduct works on a total taxable frontage of 3,709.9 ft. on lot 13 of the official plan and book of reference for the Parish of Lachine, County of Jacques Cartier of which the Elm Ridge Country Club Inc. was the abutting owner of 1,930 ft., at a total yearly instalment of $1,223.17 of which $622.73 would be the club's proportionate share, the said instalments to be paid yearly over a period of 25 years and the first instalment being due in the year 1954.

The same by-law 331 also authorized the construction of sewers on a total taxable frontage of 5,730.9 ft. on the same lot of which the club was the abutting owner of 2,870 ft. at a total yearly instalment of $3,088.19 of which $1,546.56 would be the club's proportionate yearly share over a period of 25 years and the first instalment being due in the year 1954.

Pursuant to petition 215, by-law number 358 was passed by the City of Dorval authorizing work on roads on a total taxable frontage of 3,790.9 ft. on the same lot, of which the club was the abutting owner of 1,930 ft. at a total single instalment of $1,105.63 (comprising interest charges paid on loan during 1955) of which $562.79 would be the club's proportionate share, the said instalment to be paid in the year 1955.

The same by-law 358 also authorized road work on the same total taxable frontage of 3,790.9 ft. of which the club was the abutting owner of 1,930 ft. at a total yearly instalment of $5,044.48 of which $2,568.38 would be the club's

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proportionate yearly share, over a period of 20 years and the first instalment being due in the year 1956.

By-law number 359 was then passed by the City of Dorval authorizing pavement work on a total taxable frontage of 7,425.08 ft. of part of lot 13 of which the club was the abutting owner of 1,861 ft. at a total yearly instalment of $5,402.40 of which $1,353.88 would be the club's proportionate yearly share over a period of 20 years, the first instalment being due in the year 1956. Although the third sheet of Ex. DD-2 indicates that the first instalment was to be paid in the year 1959, this would however appear to be an error, the evidence being that it was to be paid in 1956.

In accordance with the above-mentioned by-laws the City of Dorval forwarded to Elm Ridge Country Club Inc. a number of tax bills (Ex. DD-5) for each of the years 1954, 1955, 1956 and 1957.

The bill for the year 1954 is for an amount of $2,169.29 and the due date which appears on the left hand side of it is January 1, 1954. For the year 1955 the amount is $2,732.08 for which January 1, 1955 is the due date for $2,169.29 of the above amount and October 25, 1955 the due date for $562.79 of same. For the year 1956 the amount is $4,737.57 and the due date is June 25, 1956. For the year 1957 the amount is $4,737.67 and the due date is April 20, 1957.

These amounts form a sum of $14,376.71 which, with whatever interest at the rate of 5 per cent applies, the City of Dorval claims should be paid it as compensation for the loss of its taxes.

Elm Ridge Country Club Inc. on the other hand contests the right of the City of Dorval to this compensation money on four main points. Counsel for the club urged firstly that although the law creates a privilege without the necessity of registration for municipal rates of which, however, only five years of arrears, besides the current year, can be claimed (s. 2011 C.C., s-s. 3 and s. 2084, s-s. 1) this privilege could only be maintained by a judgment of the Superior Court obtained before the three year prescription provided by ss. 518 and 519 of the *Cities and Towns Act (Quebec)* R.S. 1925, c. 102.

He then added that it becomes a charge on the land only when an action is taken to have the land sold and then the city would be paid in accordance with the classification of its privilege; that the city has to bring the land to a judicial sale before it can effect its privilege.

Although there is no doubt that the above procedure is the ordinary manner in which a privilege such as we have here is realized and payment is obtained of the privileged claim, the privilege itself exists and becomes a charge on the land long before any action is taken to realize it. Indeed it exists and becomes a charge on the land assessed when determined by an assessment roll completed and deposited and the time when the delay for objection thereto has expired.

In *Surprenant v. Brault*[1] the Quebec Court of Appeal indeed so decided, Tellier J. at p. 486 having this to say:

D'après la loi des cités et villes . . . le trésorier de la cité fait son rôle, le dépose au bureau du conseil, et donne ensuite un avis public annonçant aux contribuables que le rôle est fait et déposé et que la taxe devra être payée dans les 20 jours qui suivent la publication de cet avis (S. Ref. (1909) 5749).

C'est bien différent de la loi scolaire. Pas besoin d'homologation. Un avis public seulement. C'est cet avis qui met le rôle en vigueur. Le conseil n'est pas supposé intervenir au moins en l'absence de plainte. Suivant l'article 7527 les taxes municipales et leurs intérêts constituent une créance privilégiée, exempte de la formalité de l'enregistrement. *A quel moment le privilège prend-il naissance? Je crois que c'est au moment de la publication de l'avis public.* Un rôle n'est qu'un document privé, que le greffier peut retoucher à volonté tant qu'il n'a pas été rendu public au moyen de la publication d'un avis public. Comment voudrait-on qu'il puisse affecter le contribuable avant que celui-ci le connaisse, ou soit légalement présumé le connaître. Je tiens donc que le privilège doit dater de la publication de l'avis.

And in the above decision it was also held that:

Une hypothèque ne constitue une charge sur un *immeuble* qu'à compter de son enregistrement. Les taxes municipales et scolaires sont des charges réelles sur les biens-fondés qui y sont assujettis, mais seulement qu'à compter de l'entrée en vigueur du rôle de perception pour les taxes municipales et à compter de leur échéance pour les taxes scolaires.

As the privilege on the land exists long before any action is taken to realize it, the club's contention in this regard must therefore fail. Furthermore although the privilege or claim is usually maintained by a judgment of the Court before the three year prescription there was no necessity nor possibility of proceeding in this manner here in view of

[1] (1922) 32 R.J.Q. (B.R.) 481.

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s. 23 of the *Expropriation Act,* R.S.C. 1952, c. 106 which states that:

> The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property; *and any claim to or encumbrance upon such land or property shall, as respects Her Majesty, be converted into a claim to such compensation money or to a proportionate amount thereof,* and shall be void as respects any land or property so acquired or taken, which shall, by the fact of the taking possession thereof, or the filing of the plan and description, as the case may be, become and be absolutely vested in Her Majesty.

Counsel for the club, however, adds that the privilege the city has for the taxes claimed herein is not an encumbrance upon or a claim for such land or property as required by the above section. The French text of s. 23 of the *Expropriation Act* uses the words "réclamation et charge" whereas as we have seen the English text uses the words "claim and encumbrance". Now a privilege under the laws of Quebec "is a right which a creditor has of being preferred to other creditors according to the origin of his claim (cf. 1983 C.C.)." It is a real right against the property subject to it, and gives to the creditor the right to follow the property subject to it, if immovable, into the hands of any person who may have it in his possession and cause him to surrender it so that it may be sold and that he be paid out of its proceeds. In a privilege there are indeed these two elements, the right of preference and the "droit de suite".

A privilege cannot subsist alone, it secures the fulfillment of some obligation. If the obligation is partially paid, it secures the unpaid remainder. If the obligation is extinguished, the privilege which secured it becomes extinguished with it.

It therefore follows that the privilege we are dealing with here is a lien or liability attached to property or a charge thereon and being so meets with the definition of "encumbrance" in the English text and "charge" in the French text. Indeed in Wharton's Law Lexicon "incumbrance" is "a claim lien or liability attached to a property, as a mortgage, a registered judgment, etc.". The city's privilege therefore is a charge on the land and meets with the requirements of s. 23 of the Act.

We must now determine whether or not, in fact any privileged claims or encumbrances existed at the relevant date.

Here counsel for the club raises his third contention, the matter of prescription and urges that as municipal taxes, under the *Cities and Towns Act,* are outlawed in three years (cf. ss. 518-519) all claims for taxes in the present case were prescribed on July 24, 1962, date upon which the present information was taken.

The City of Dorval on the other hand submits that the important date as far as prescription is concerned is not July 24, 1962, the date upon which the present information was taken, but March 20, 1957 the date upon which the Crown took the land by expropriation and that at that time the city was still within the period to sell the land for the unpaid taxes on it. The city adds that from the date of expropriation the three year prescription no longer ran and when the Crown took over the ownership of the club property, the municipality lost its recourse against the land; indeed, it could no longer sell the property now belonging to the Crown for the taxes existing against it and its recourse was then transformed from a claim for taxes to a claim for compensation.

I must say that s. 23 of the *Expropriation Act* quoted above is clear on this point and supports the city's contention. Indeed, it does explicitly state that any claim or encumbrance upon the land or property is converted to a claim to the compensation money or to a part thereof, and consequently from then it is no longer a claim for taxes.

It appears then that the only matter to be determined now on this point is whether any of the claims for taxes for the years 1954, 1955, 1956 and 1957 were prescribed under the three year prescription of s. 519 of the *Cities and Towns Act* at the date of expropriation, i.e., March 20, 1957 and not on July 24, 1962, the date of the present information as suggested by the club, and any such claim or claims should be deducted from the amount held in escrow by the Crown.

Now prescription against any right whatever it may be, can start running only from the day it is open, and even then only if the action to enforce it is available, because as long as it cannot for some reason or other be usefully taken, prescription does not run; the reason for this is that prescription is based on the neglect of the creditor who cannot be taken to have neglected to take action, as long as he

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could not take action usefully. In the present instance, action could have been taken only on the due date of the taxes in each year and it is from that date only that prescription of the taxes can start running.

The city contends that in 1954 as the taxes were payable in four instalments, i.e., on January 1, April 1, July 1 and October 1, the only possible amount of taxes which could be prescribed by the three year prescription was the first instalment, namely that payable on January 1, 1954 and that the remaining instalments may still be recovered. Taxes for 1955 and 1956 of course would not be prescribed. As for 1957, the city contends that under the terms of the taxing by-laws, taxes are due on the first of the year in each subsequent year, although they may not be exigible on that date, as the *Cities and Towns Act* provides that the taxes will be paid by the person owning the property taxed twenty days after the notice of the deposit of the collection roll. On that basis the taxes for 1957 would have become due on the first of the year 1957 although they were not payable until twenty days after the deposit of the roll, sometime in April 1957, after the land had been taken over by the Crown.

With respect to the year 1954, it is hardly possible to accept the city's contention that the prescription runs from the date of each instalment for that year in view of the fact that Mr. J. L. Roy, a witness and employee of the city, stated, at p. 109 of the transcript, that the whole amount of the local improvement tax for the year 1954 was due and exigible on January 1, 1954, the other instalments applying only to the other municipal taxes:

Q. That is the due date, January 1, 1954?

A. Right.

Q. With a privilege to pay in instalments, you say?

A. Not the tax itself, the whole bill, but the local improvements tax. The first instalment includes 25% of municipal tax and special tax plus 100% of local improvement tax

Q. I am sorry I do not understand that.

A. That was the provision The taxpayers had to pay their taxes, municipal, school taxes and all other taxes in four instalments, but the first instalment includes 100% of the local improvement tax.

For the year 1957 as the city established the due date of the taxes on their invoice as of April 20, 1957, i.e., after the expropriation by the Crown, and as at that date the latter was the owner of the land against whom under s. 125 of the *British North America Act,* no taxes or privilege could be charged, no claim in this respect can be entertained. The fact that under the terms of the taxing by-laws, taxes are stated to be due on the first of the year of each subsequent year, cannot, in my opinion, prevail against the city establishing April 20, 1957, as the due date. Indeed having done so, it cannot now maintain that the due date is January 1, 1957. At p. 79 of the transcript, Mr. J. L. Roy, the city's treasurer, questioned by counsel for the city stated:

> Q. The question which I put to you, Mr. Roy I believe was on what date you considered the taxes, as treasurer of the City of Dorval, you considered these taxes to be due in each consecutive year?
>
> A. The due date as far as the City of Dorval in concerned is 20 days after the invoices are *mailed* and 20 days after the public notices are given in the local newspapers.

This witness added that this applies to all taxes including special improvement taxes and at p. 108 of the transcript in cross-examination he stated:

> Q. How are these due dates determined—who determines it?
>
> A. As soon as we insert the public notices in the local newspapers, both French and English, and the due date is 20 days after that publication.

There is also here a further argument which I believe is peremptory and which is that under s. 23 of the *Expropriation Act* the right to claim the compensation money is predicated on the fact that prior thereto when the land was acquired by the Crown, a claim or an encumbrance upon such land existed and it is this claim or encumbrance which is converted into a claim to the compensation money. If there was no claim or encumbrance upon the land at that time, there can be no claim to the compensation money. Indeed we have seen that the privilege is created at the time of the publication of a public notice and as according to the city's treasurer the due date is 20 days after the public notices which for 1957 is April 20, 1957, the city's claim or charge could have existed only as of March 31, 1957, 11 days after the Crown took over the land by expropriation. The city would therefore have no right to any part of the compensation money for the year 1957.

It would therefore appear that as far as the taxes for the year 1954 are concerned, i.e., $2,169.29, they were prescribed on March 20, 1957 more than three years after their due

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date, which as we have seen, was January 1, 1954, and therefore the City of Dorval has lost the right to claim them. With respect to those claimed by the city in 1957 in the amount of $4,737.67, for the reasons mentioned above, they also cannot be entertained. On this basis, the city would be entitled to $14,376.71, less $6,906.96 which is $7,469.75.

Counsel for the club, however, advanced a fourth argument with which I must now deal and which is that in order for the city to hold the club liable for whatever share of improvement taxes it has been charged with, the club must be an adjoining proprietor to the street where the improvements were made, and this he submits has not been established by the city.

May I say here that it is not necessary in the present case for the city to establish that the club's properties abut the street on which the improvements were made. Indeed, in view of the city's by-laws, "procès-verbal" rolls and resolutions and other documents produced as exhibits herein there is *prima facie* evidence that the club's lands do so abut and it is for the club to establish that this is not so.

I must also add that in every case in issue the formalities necessary for the passing of the by-laws, their approval by the authorities, the voters, the municipal commission or the Minister as well as the public notices were all complied with.

Now, these by-laws as well as the "procès-verbal" rolls, resolutions or other orders of the Council remain in force until they are judicially set aside within three months after their coming into force as provided by ss. 381 and 422 of the *Cities and Towns Act*. Furthermore, ss. 393 and 396 of the *Cities and Towns Act* read as follows:

> 393 Every by-law shall be executory and remain in force until amended, repealed, disallowed or annulled by competent authority, or until the expiration of the period for which it has been made.
>
> 396 Every by-law passed by the council shall, when published, be deemed public law within the municipality and outside of the same insofar as within the jurisdiction of the council, and it shall not be necessary to allege it specially.

In view of the above can the club at this late date after the expiry of the three months provided for attacking the above documents raise this issue and now attempt to establish that it is not an abutting owner?

The authorities are to the effect that when resolutions and by-laws are affected by nullity and are *ultra vires* they can be attacked by direct action or defence by those who are exempt from their application and the prescription of three months does not apply (cf. *L'Œuvre de Patronage de St-Hyacinthe v. Cité de St-Hyacinthe*)[1].

In the case of *Shannon Realties v. Ville St-Michel*[2] the Privy Council recognized that the company, Shannon Realties, had been illegally taxed and that it has the right to be freed from these taxes. Although rejecting the taking of a direct action, Lord Shaw declared that the plaintiff could invoke this illegality in an action taken by the corporation to recover these taxes. Subsequent to this decision in the case of *Aubertin v. La Cité de Montréal*[3] Martineau J. decided that the imposition of taxes being *ultra vires* there was no doubt that the delay of three months would not apply.

In the case of *La Ville de La Tuque v. Desbiens*[4] the Quebec Court of Appeal decided that when the acts of a municipal council are *ultra vires* any taxpayer has a recourse to a direct action to cause the nullity of the offending act to be pronounced and this action is not affected by the prescription of three months which governs the petition to quash for illegality.

The same principle was decided in the case of *Cité de Montréal v. Décarie*[5], *Laberge v. Cité de Montréal*[6] and *Ville de East Angus v. Westgate*[7] where Archambault J. declared that as the rolls of perception were illegal and *ultra vires* the taxpayer sued for recovery of taxes can take advantage of this illegality of the roll as far as he is concerned notwithstanding the three months prescription established by the *Cities and Towns Act*.

I see no reason why I should not apply the above principles to the present case providing of course the club has satisfactorily established that their land does not abut the street on which the improvements were made. This I am afraid it has not done. It has produced some verbal evidence to the effect that between the property and the land of the

[1] (1918) 27 R.J Q., (B.R.) 496.
[2] (1923) 130 L.T.R. (P.C.) 518 at 522.
[3] (1925) 31 R.L , N.S. 163.
[4] (1921) 30 R J.Q , (B.R.) 20.
[5] (1918) 24 R.L., N.S. 241.
[6] (1918) 27 R J.Q. (B R.) 1.
[7] (1928) 66 R J.Q. (C.S.) 531.

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club and the street along which the improvements were made, there is a ditch of approximately some 10 ft. in width, there is a fence on the inside of the ditch which allegedly would have marked the boundary of the club's property, and there is a distance from the fence to the street of approximately 50 ft. This is the extent of the club's evidence on this point. On the other hand, the evidence of the city on this particular aspect is to the effect that the fence is the dividing line between lots 12 and 13, that the club owned all of lot 13 and the city owned the strip or right-of-way which is the street of a width of 66 ft. located on the western boundary of lot 12. The paving of course was 25 ft. in width but the width of the right-of-way was 66 ft. This in my opinion is why some of the witnesses were confused in thinking that the club's property did not abut the street. As for the ditch, it is not clear to whom it does belong, although it would seem from its purpose and the fact that it serviced the community, that it would belong to the city.

In any event, I must conclude that the club has not succeeded in rebutting the evidence contained in the city's documents and has therefore failed to establish that its land does not abut upon the street.

There will therefore be judgment declaring that the City of Dorval is entitled to compensation which I assess at an aggregate sum of $7,469.75 with interest at the rate of 5 per cent to run on the following amounts for the following periods, $2,169.29 and $562.79 for the year 1955 commencing on January 1 thereof, $4,737.67 for the year 1956 commencing also on January 1 thereof, the said interest to run until the date of judgment.

Although the due date for the amount of $562.79 is October 25, 1955 and June 25, 1956 for the amount of $4,737.67, I have started the interest on January 1 of each of these years for the following reasons.

We have indeed seen that in order that a municipal tax exist on land, a roll of evaluation or of perception must be made. It is only when the roll of perception based on the roll of evaluation is made and prepared that the tax becomes exigible or demandable in a city such as Dorval where such rolls are made every year. Most of the time, and this is what occurred here, the evaluation roll is made and prepared several months after the commencement of the fiscal year;

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it then takes another period of time, one or two months before the roll is homologated, and a roll of perception is made and deposited and it is only when both rolls are in force that the taxes become due. Until then they do not even exist. Indeed their existence coincides with the date upon which they become demandable or exigible. However, at this stage they become retroactive to the first of the fiscal municipal year, and the interest thereon runs from the first day of the municipal fiscal year.

In view of the fact that the City of Dorval here has been successful in recovering taxes for two years instead of four, it will be entitled to half of its taxable costs only to be recovered from the Crown and the latter will be entitled to recover these costs from Elm Ridge Country Club Inc. As for the Crown, in view of the fact that the present information forms part of the expropriation proceedings to take over the property of the club and as in the present instance it remained a passive bystander, I see no reason why it should be allowed any costs.

Judgment accordingly.

1963 Sep. 5 — Sep. 17

BETWEEN:

SAM SORBARA .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Practice—Amendment of Notice of Appeal—General Rules and Orders of Exchequer Court 115, 119, 165—Income Tax Act, R.S.C. 1952, c. 148, ss. 46(4), 85 (E) and 99(2)—Withdrawal of admission of fact—Effect on Minister's power to re-assess.

After he had filed a notice of appeal from his assessment of income tax on a profit realized upon the sale of land, the appellant made an application to amend his notice of appeal. The main point was appellant's desire to withdraw an admission of fact which placed the date of the land transaction in July 1955 and substitute therefor an allegation that it took place prior to April 5, 1955, and to argue that he should have been assessed in the taxation year 1955. This was objected to by the Minister on the ground that he would be statute-barred from making a re-assessment for 1955 and also that the appellant had to satisfy the Court that the admission was inadvertently made and was not correct.

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Held: That the application be granted and the amendment allowed; the Minister is entitled to costs in the cause in any event of the cause.

2. That the Minister would not be prevented from re-assessing for 1955 taxation year if the profit should be found to have been earned in that year because the error in date, if an error should be found to have been made, would amount to a "misrepresentation" which would render the four-year limitation in s. 46 of the Act inapplicable.
3. That the Minister would not suffer permanent injury in the granting of the application and could be adequately compensated by costs.
4. That the proposed amendment did not result from an attempt to gain a dishonest advantage.
5. That the appellant's affidavit, not contested by cross-examination under Rule 165, was sufficient proof of inadvertent error and that the admission was not correct.
6. That under the Exchequer Court Rules and principles established by the Courts, amendments should be allowed if they are necessary for the purpose of determining the real question or questions in controversy between the parties and do not cause an irremediable injustice to the other party.

APPLICATION for leave to amend a Notice of Appeal.

The application was made before the Honourable Mr. Justice Noël in Chambers at Ottawa.

P. N. Thorsteinsson for the motion.

N. A. Chalmers contra.

NOËL J. now (September 17, 1963) delivered the following judgment:

This is an application made by the appellant to amend his Notice of Appeal by deleting paragraph 9 of Part A and paragraph 6 of Part B of the said Notice and substituting a new paragraph 9 and 6 as follows:

The loss of this area necessitated complete redesign of the subdivision and after review by the Crown and Bel-Air Builders Company, this proved to be impossible. Consequently negotiations were entered into between Bel-Air Builders Company and the Crown in 1954 and in the early part of 1955 which resulted in the Crown agreeing to pay seven hundred and twenty-five thousand dollars ($725,000) for the purchase of the lands owned by Bel-Air Builders Company. The Purchase Agreement was made in March of 1955 and the formal document giving effect thereto which was prepared by the Crown was signed by the parties at a subsequent date. This purchase by the Crown effectively terminated the business of Bel-Air Builders Company.

That in the alternative if the said gain is found to have arisen from the sale inventory in the form of land belonging to Bel-Air Builders Company, then no part of such gain could have constituted taxable income in the hands of the Appellant, because it resulted from a slump transaction.

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and by adding a new paragraph 7 to Part B of the said Notice of Appeal which reads as follows:

> That the sale of the residue of the land belonging to Bel-Air Builders Company to the Crown took place before Section 85E of the Income Tax Act came into effect.

In support of this application an affidavit was filed by James Andrews Grant, a member of the firm of Stikeman & Elliott, counsel for the appellant, stating in substance that subsequent to the service and filing of the Notice of Appeal and the reply, correspondence bearing upon the matters in issue came to the knowledge of counsel for the appellant and that the amendments here sought are for the purpose of raising an alternative argument in support of the appellant's position herein and are based upon the above documents.

These amendments, if permitted, will allegedly allow the appellant to introduce proof in the form of the recently discovered correspondence establishing that the transaction giving rise to the profits upon which the tax in dispute has been assessed is a "slump transaction" i.e. one where all the assets of the appellant's distinct business were sold and that all the proceeds of such sale were capital in his hands, which transaction did not take place in July of 1955 as formerly alleged in paragraph 9 of the Notice of Appeal, but took place prior to April 5, 1955, date upon which s. 85E of the *Income Tax Act* was made applicable in respect of sales made after April 5, 1955, and from which date slump sales were no longer exempt from taxation.

The appellant for these amendments relies on Rules 115 and 119 of the General Rules and Orders of the Exchequer Court of Canada which read as follows:

> The Court or a Judge may at any state of the proceedings allow either party to amend his pleadings, and all such amendments shall be made as may be necessary for the purpose of determining the real question or questions in controversy between the parties.
>
> In addition to the foregoing powers of amendment, at any time during the progress of any action, suit or other proceeding, the Court or a Judge may, upon the application of any of the parties, and whether the necessity of the required amendment shall or shall not be occasioned by the error, act, default, or neglect of the party applying to amend, or without any such application, make all such amendments as may be deemed necessary.

The appellant urges that although the beginning of Rule 115 appears to be permissive, the latter part seems to

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be mandatory, as it would appear that any amendment "necessary for the purpose of determining the real question or questions in controversy between the parties", should be allowed.

Counsel for the respondent on the other hand objects to the present application for several reasons. Firstly on the basis that if the amendments sought for are permitted, it may be open to the appellant to argue that the Minister has assessed the profits arising from this transaction in the wrong year and that the assessment here should be for the year 1955 and not for the taxation year 1956; consequently, it would be statute-barred by the four year limitation provisions of s. 46 of the *Income Tax Act* from assessing the profit in the earlier year, the original assessment of the appellant's income for 1955 having been mailed on May 9, 1958.

He further urges that we are not only concerned with an amendment but also with the withdrawal of an admission which was contained in paragraph 9 of Part A of the Notice of Appeal consisting in the statement that negotiations between Bel-Air Builders and the Crown were entered into July 8, 1955, which date the appellant would like to replace by 1954 and the early part of 1955 as contained in the new proposed paragraph 9 of Part A.

According to the respondent, the withdrawal of such an admission of fact cannot now be done on the basis that before an admission of fact in a pleading can be withdrawn, the party seeking to withdraw it must satisfy the Court that the admission was inadvertently made and was not correct. He referred to the case of *Chechik v. Bronfman*[1] where, at p. 517, Martin J.A. stated:

> That the appellant here had not satisfied the onus which is upon him of showing that the admission in the Notice of Appeal was inadvertently made and was not correct. That the affidavit supporting the application is not sufficient evidence to establish that the original admission was not correct.

Before dealing with the two main grounds raised by the respondent herein, I would like to say that under Rule 2 of the Exchequer Court Rules, reference must be made to the practice and procedure in force in similar suits, actions and matters in Her Majesty's Supreme Court of Judicature in England. The practice in England with respect to amend-

[1] (1923-4) 18 Sask L R 512

ments would appear to be very similar to the practice before this Court. Indeed, the principle with regard to amendments has been settled in England as well as in this country for many years and can be found in the following decisions: *Stewart v. Metropolitan Tramways*[1]; *Williams v. Leonard et al.*[2] as follows:

The rule of conduct of the Court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but if the amendment will put them into such a position that they must be injured, it ought not to be made.

In the case of *Stewart v. Metropolitan Tramways* referred to above, Pollock J. stated at p. 180:

The test as to whether the amendment should be allowed, is whether or not the defendant can amend, without placing the plaintiff in such a position that he cannot be recouped as it were, by any allowance of costs or otherwise. Here the action would be wholly displaced by the proposed amendment and I think it ought not to be allowed.

In 25 Halsbury's Law of England, 2nd ed. 1937, at p. 256 *et seq.*, s. 425 reads as follows:

If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend is granted if the amendment can be made without injustice to the other side. There is no injustice if the other side can be compensated by an order as to costs; but if owing to the way in which the pleading has been framed the other party has been put into such a position that an injury would be done to him by an amendment, the Court will not give leave.

It therefore appears that under the rules governing this Court, and bearing in mind the accepted practice with respect to amendments, the latter should be allowed if they are necessary for the purpose of determining the real question or questions in controversy between the parties and do not cause an irremediable injustice to the other party although it may cause the latter considerable inconvenience which, of course, can be compensated by costs.

I might also add that the proposed amendments must not enable a litigant to obtain a dishonest advantage.

Although the original assessment of the appellant's income for the year 1955 was made on May 9, 1958, and consequently the four year limitation provisions of s. 46 of the said act have elapsed, I believe the Minister could

[1] (1886) 16 Q.B.D. 178.

[2] (1895) 16 Ont. P.R. 544; (1896) 26 Can. S.C.R. 406.

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still re-assess the appellant even at this late date on the basis that the appellant has made a misrepresentation with respect to the date of the transaction which, under s. 46(4)(*a*)(1) would prevent the four year limitation provisions from operating. This misrepresentation appears to be particularly so in view of counsel for the appellant's statement in his memorandum dated September 9, 1963, where he admits on behalf of his client that there was such a misrepresentation. The respondent would, therefore, suffer no permanent injury and could be adequately compensated by an award of costs. I am also satisfied that the proposed amendments do not result from an attempt to obtain a dishonest advantage.

With respect to respondent's second point, i.e. the inadequacy of evidence that the admissions were inadvertently made and not correct, the affidavit produced by the appellant herein appears to be sufficient in this regard, the deponent of the affidavit not having been cross-examined as he could have been under s. 165 of the Rules of this Court. May I also add that his argument in this regard is considerably weakened by the fact that in paragraph 9 of his reply, by a general denegation he denies the very admission that the appellant wishes now to withdraw.

I therefore consider that this is a case where the amended pleadings should be allowed and the application is therefore granted with costs in the cause to the respondent in any event of the cause.

Judgment accordingly.

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Nov. 29
1963
Jul. 30

BETWEEN:

GOLDWIN CORLETT ELGIE ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Income Tax Act R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e)—Profits capital gain or income—Mortgages purchased at a discount or acquired with a bonus—Investment—Mortgages held until maturity or prior payment—Circumstances negative indicia normally characterizing an investment—Appeal dismissed.

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Appellant, a solicitor, a small part of whose practice consisted of real estate conveyancing, acquired, over a period of years, a number of mortgages at a discount or with a bonus and held them to maturity. All were acquired by appellant alone, without advertising or solicitation, but were handled for him by his office staff. The mortgagors in the transactions were not able to obtain loans from lending institutions and the mortgages had been peddled in the market with the result that appellant was approached because he gave a better deal, and even then the bonuses and discounts were quite substantial, never below 25 per cent and in some instances as high as 50 per cent. The appellant assumed the entire risk himself and the greatest part of his income was obtained from such transactions.

The Minister assessed these profits for income tax, adding them to the appellant's income and from that assessment he appealed to this Court.

Held: That the appeal be dismissed.

2 That the profits or gains realized by the appellant from bonuses or discounts were taxable income.

3. That the transactions were not ordinary investments and as securities they were risky and of a second class nature and the appellant therefore expected a greater return to compensate him for the greater risk.

4. That the multiplicity of the transactions, considered together with the surrounding circumstances, the second class nature of the mortgages, the short term in which the bonuses and discounts were realized, all are indicative of determining that the transactions were business transactions carried out for a scheme of profit-making and not those which characterize an investment.

APPEAL under the *Income Tax Act.*

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

W. D. Goodman for appellant.

Donald Guthrie, Q.C. and *M. Barkin* for respondent.

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

CATTANACH J. now (July 30, 1963) delivered the following judgment:

This is an appeal from the appellant's income tax assessments for the taxation years 1956, 1957, 1958 and 1959.

The Minister in reassessing the appellant for the years 1956 to 1959 inclusive added the sums of $2,582, $7,360, $9,035 and $2,380 to the amounts of taxable income reported by him in his income tax returns for these four respective years, which sums represented the total of the difference

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between the amounts advanced by the appellant on the security of mortgages or to purchase existing mortgages at a discount or with a bonus and the amounts received by the appellant on the maturity of the mortgages in the years in question.

The issue in the appeal is, therefore, whether the profits realized by the appellant from the transactions into which he had entered were capital accretions from investments, as claimed by him, and, therefore, not subject to income tax as profits from a business or an adventure in the nature of trade as claimed by the Minister, and, therefore, taxable income within the meaning of sections 3 and 4 and section 139(1)(*e*) of the *Income Tax Act,* R.S.C. 1952, c. 148.

By section 3 of the Act the income of a taxpayer for the purposes of Part 1 of the Act is declared to be his income from all sources inside and outside Canada and to include income for the year from *inter alia* all businesses. By section 4 of the Act income from a business is declared to be the profit therefrom for the year and by section 139(1)(*e*) business is defined as including a profession, calling, trade, manufacture or undertaking of any kind whatsoever and as including an adventure or concern in the nature of trade but not an office or employment.

The distinction between profits that are subject to income tax as income from a trade and those that are not, was stated in the well known case of *Californian Copper Syndicate (Limited and Reduced) v. Harris*[1] and the test for resolving such an issue was outlined by the Lord Justice Clerk at page 166 as follows:

> 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?

In *M.N.R. v. Spencer*[2] the President of this Court referred at page 115 to many cases in which the test so laid down had been approved, and, at page 125 to numerous cases in which the principle that each case must be considered according to its facts has been stated by the Supreme Court of Canada.

[1] (1904) 5 T.C. 159 [2] [1961] C.T.C. 109.

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It is essential to ascertain the facts respecting the appellant's transactions in mortgages and the circumstances surrounding them to ascertain their true nature and determine whether the profits arising from them were taxable income or not.

There is no dispute about the facts which were given in considerable detail by the appellant himself, nor about the accuracy of the figures outlined above, but the dispute lies in the inference to be drawn from these facts.

The appellant is a barrister-at-law and Queen's Counsel and has been practising his profession in the City of Toronto since January 20, 1920. He has conducted, what in common parlance might be termed a one man office, that is, at no time did he have a partner although he usually employed two and sometimes three lawyers as well as a student-at-law. The stenographic staff consisted of two girls, one of whom had been with the appellant for a number of years and as is almost always the case, she became very valuable to him being, in effect, the office manager.

The appellant's practice was a general one, but he tended to specialize in litigation which in later years was predominately motor vehicle accident cases. Real estate work and conveyancing comprised a very low percentage of his practice which the appellant estimated at 2 percent over twenty years and in the years in which real property was moving extensively he estimated that percentage may have risen to six. The appellant said that about one real estate deal a month went through the office and that he never handled such work personally, but left it to the solicitors he employed.

However, the circumstance that the appellant's law office did not act extensively on behalf of clients in real estate matters, does not preclude the appellant from personally entering into mortgage transactions.

Counsel for the Minister filed in evidence as Exhibit "B" a schedule of mortgages held by the appellant during the period 1956 to 1960. There were 71 mortgages listed in Exhibit "B" which were held by the appellant in the period covered thereby which extends one year beyond the taxation years now under review.

The appellant quite frankly admitted that he began to acquire mortgages in all years from 1950 on, a number of

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which had matured prior to the year 1956, the assessment for which year is the first of the four presently under appeal. The appellant explained that prior to the depression years he had held mortgages, as well as a number of properties on some of which he had suffered a loss in the depression, but a number of properties he had been able to retain through these years. He sold those houses at a profit, although not as great a profit as he might have realized had he sold them later. These sales gave the appellant some money and mortgages were taken back by the appellant for the balance of the unpaid purchase price. In 1950 the appellant suffered an illness which prompted him to sell his own home and move to a smaller house which he owned. The sale of his home put the appellant in further funds. The implication I take from this testimony of the appellant is that these sales of real property constituted the source of the funds with which he entered into mortgage transactions.

A general summary of the discounted mortgages or those acquired with a bonus held by the appellant which matured and were paid during the years 1956 to 1959, both inclusive, was filed by his counsel as Exhibit 1.

It shows for each year in question the date of purchase of the mortgage, which is identified by the street address, the amount paid therefor, the amount of the discount or bonus, the term of the mortgage, how the mortgages were financed, when each mortgage was paid off, the face value and the name of the mortgagor.

In the year 1956 four mortgages were paid. The first listed mortgage was acquired on November 30, 1951 with a term of five years. It was paid on December 19, 1956, that is very shortly after due date. The face value was $2,700, the price paid was $1,890, the discount realized was $810 or 30 percent. The information on Exhibit 1 and on Exhibit "B" does not disclose whether the mortgage was a first or second one. The interest rate was 6 per cent. The appellant stated it was a second mortgage. The appellant explained that a young man known to him since the young man's birth wanted to buy a business. He had sold a house at a profit but had been obliged to take back a second mortgage for $2,700. Being in immediate need of more money he sold the second mortgage to the appellant for the consideration of $1,890.

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The second listed mortgage was acquired on May 14, 1953 with a term of 6 months and was eventually paid on May 16, 1956, that is two years and 6 months after due date. The face value was $1,800 and an amount of $1,228.53 was advanced by the appellant resulting in a bonus of $572 or approximately 33⅓ percent. This was a third mortgage. There were peculiar circumstances surrounding the acquisition of this mortgage. The appellant's law office was acting for the mortgagor who was being dispossessed by the holder of the second mortgage. The appellant was unaware of the proceedings and apparently the lawyer employed by him who had charge of the matter neglected to take any action on behalf of the client. The appellant, therefore, felt morally obliged to advance the client $1,228.53 on the security of a third mortgage to permit the client to retain possession of the premises. The interest rate was 6 percent. The record of payments on this mortgage was particularly bad. The appellant received nothing for two years, but cheques on accounts without sufficient funds. Eventually the mortgagor raised a further mortgage the funds from which were used to pay off the appellant.

The third listed mortgage was acquired on March 5, 1953 for a term of 5 years and was paid on May 16, 1956 well before due date. The face value was $4,000 and it was acquired for $3,200, a bonus of $800 or 25 percent. Exhibit "B" discloses this was a second mortgage bearing interest at 6 percent, but the appellant testified it was a first mortgage acquired as security for funds advanced by him to the mortgagor at a bonus.

The fourth mortgage listed on Exhibit 1 and which was paid in 1956, was acquired on October 1, 1955, the term was not given but the mortgage was paid on March 5, 1956. The face value was $1,000 for which $599.60 was paid by the appellant who thereby realized a discount of $400 or 40 percent. The interest rate was 8 percent but no information was given as to the type of mortgage.

Three of the mortgages were acquired by the appellant with his own available funds, but one such mortgage was acquired when he had an overdraft at his bank.

The total discounts and bonuses realized by the appellant in 1956 was $2,582, the amount added by the Minister to his income for that year. The total face value of the four

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mortgages held was $9,500 for which the appellant paid $6,918 or an average discount or bonus of approximately 30 percent.

In 1957 six mortgages were paid from which the appellant realized by way of bonus or discount the sum of $7,360 which was added to his income for that year by the Minister. The total face value of the six mortgages was $20,875 which were acquired by the appellant for a total outlay of $13,515 or a discount of approximately 36 percent. Each of the six mortgages was paid on or before the due date. Five of the mortgages were for a term of five years and one was for a term of two years. Four of these six mortgages paid in 1957 were second mortgages, one was a first mortgage and there is no information as to the type of the remaining mortgage. The one first mortgage bore interest at 6½ percent, three of the second mortgages bore interest at 6 percent, another second mortgage bore interest at 5½ percent and the remaining unidentified type of mortgage bore interest at 7 percent.

One mortgage was specifically mentioned by the appellant as being taken as security for monies advanced by him with a bonus and which he identified as a first mortgage but which is described in both Exhibits 1 and "B" as a second mortgage.

Another of the six mortgages was an existing mortgage purchased by the appellant at a discount. No information was forthcoming as to whether the remaining four mortgages were existing and purchased by the appellant or were taken as security for monies advanced by him. However, it is certain that on each either a substantial bonus or discount was realized by the appellant. Two of the mortgages were purchased by the appellant when he had a bank overdraft, one when he had no such overdraft and there is no information in this respect as to the remaining three mortgages.

In the year 1958 four mortgages were paid from which the appellant realized the sum of $9,035 by way of bonus or discount which amount was added to his income for that year by the Minister.

The total face value of these four mortgages was $22,215 for which the appellant paid or advanced $12,354. The discrepancy in the difference between the total face value and the total outlay to acquire the mortgages (which is $9,861) and the sum of $9,035 actually realized by the appellant is accounted for by the fact that the full face value was not paid on discharge.

All four mortgages were for a term of five years. Three of the mortgages were second mortgages and no information was given as to the remaining mortgage. Two bore interest at 6½ percent and two bore interest at the rate of 6 percent.

Each of the four mortgages was paid on or before the due date and all four were acquired by the appellant when he had an overdraft at his bank.

In 1959 only one mortgage was paid from which the appellant realized $2,380 by way of either discount or bonus. This mortgage had a face value of $6,800 and was acquired by the appellant for $4,420. It was a second mortgage bearing interest at 6 percent and was for a term of 5 years but was paid before maturity. This mortgage was acquired when the appellant had an overdraft at his bank.

The appellant testified that during the years 1956 to 1959 he held 51 mortgages of which 20 were first mortgages, 27 were second mortgages, 3 were third mortgages and one which he could not identify in rank. He further stated that the mortgages were normally for terms of five years with minor variations with very few exceptions, two of which he knew to be for a lesser term. He also considered that all mortgages bore reasonable rates of interest, the majority at 6 percent, with one or two at 5½ percent, two he thought at 6½ percent and one at 7 percent.

My own review of the evidence discloses that the appellant's estimate is substantially correct, although in the 15 mortgages which were paid in the years 1956, 1957, 1958 and 1959 I have observed three bearing interest at 6½ percent and one at 8 percent.

The appellant further testified that he never borrowed money for the purpose of lending on mortgages, but that there were occasions when he had a substantial amount of cash on hand and others when there were overdrafts on a general range of credit. He was not obliged to make any special arrangement to purchase or lend on mortgages since the line of credit was available to the appellant if he needed it for this purpose at the branch of the bank in which he kept his personal account. The appellant's office accounts were in a different branch of the same bank.

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The proceeds by way of principal and interest payments on mortgages held by the appellant were deposited in his personal bank account.

Before lending money on the security of a mortgage or purchasing an existing mortgage, the appellant invariably made an inspection of the premises and also placed reliance of the mortgagors whose plans he made it a policy to discuss with them to ascertain if they were persons who would maintain the premises in good repair and intended to remain there.

The appellant never held himself out publicly as being ready to lend money on mortgages or to purchase them. He never advertised in any way. The appellant had been a member of the City Council and of the legislature for many years and was accordingly extremely well known to people in the district in which he lived so that he was frequently approached by persons for mortgage loans at a bonus or by persons who wished to dispose of mortgages at a discount. He also explained that he was approached by these people because he gave them a better deal than they could get on the general market for second mortgages.

The appellant never disposed of any mortgages but held them until maturity or prior payment. He also stated that he had diversified investments. He had always owned dividend paying shares in Canadian mining companies and in Canadian, British and foreign industrial companies.

In addition, the appellant had, at one time, rather extensive real estate holdings producing rental income but because of his unfortunate experience during the depression years he explained that he did not wish to become "lopsided" again for which reason he did not accept all mortgages offered him for purchase or every opportunity to lend money on the security of mortgages even if he had funds with which to do so.

However, it is obvious, from the facts recited above, that the appellant held a number of mortgages and in each instance the discount or bonus which he received on each such mortgage was very substantial, ranging from approximately 25 percent to 50 percent.

On cross-examination, when the substantial amounts and percentages of the discounts and bonuses were pointed out to the appellant he replied that they were less than those prevailing on the market and he acknowledged there was an element of capital risk in second mortgages.

The appellant concluded his testimony by stating he had bought these mortgages as an investment because he was reaching an age when he had to think of retirement without pension and, therefore, had to have an investment with interest. He also stated he had been working less arduously which circumstance was reflected in his professional income as disclosed in his income tax returns.

On referring to the appellant's income tax return for the year 1956 I observe that the appellant received a net income of $2,358.15 from his profession, an investment income of $2,700 from stocks, a rental income of $955 and income from mortgage interest in the sum of $10,691.53 from 40 current mortgages.

In his income tax return for 1957 the appellant disclosed a net professional income of $2,166.89, rental receipts of $2,486 cancelled out by expenses, dividends of approximately $950 and income from mortgage interest in the sum of $10,733.56 from 44 current mortgages.

The appellant's 1958 return reveals similar information. His net professional income disclosed was $4,452.86, dividends of $1,271.94 and interest from 40 mortgages in the amount of $9,285.83.

Therefore, as the appellant indicated in giving evidence, his income from interest on mortgages far exceeded his income from other sources. The prevailing rates of interest on prime first mortgages on Toronto residential properties where the loan did not exceed 60 percent of the valuation were 5½ percent to 6 percent in the year 1951, 6 percent in the years 1952 and 1953, and 6½ percent in 1954 and later years.

The appellant kept a comprehensive record of his mortgage transactions at his law office, being a mortgage ledger and a file with respect to each transaction. These records were maintained by the clerical staff employed by the appellant.

From the foregoing facts it is apparent that the appellant had substantial funds available and as a result of knowing a great number of people from his political connections in the municipal and provincial fields, he was able to acquire, with these funds, a number of mortgages which

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yielded him a substantial interest income thereon and in addition a substantial yield by way of bonus or discount.

I repeat that the issue herein is whether the profits from the mortgage transactions under review were enhancements of the value of investments or profits from a business, including therein transactions that were adventures in the nature of trade and accordingly, income within the meaning of sections 3 and 4 of the Act and the determination of this issue must depend on the totality of the facts and surrounding circumstances of the case because no single criterion has been laid down upon which to decide whether the transactions were investments or adventures in the nature of trade.

On the facts as above outlined I have no hesitation in finding, from what I conceive to be the true nature of the transactions, that the profits or gains realized by the appellant from bonuses or discounts were taxable income.

The transactions were not ordinary investments of the kind referred to in the *Californian Copper case* (*supra*). As securities they were risky and of a second class nature which follows from the fact that the mortgagors were not able to obtain loans from lending institutions and that they had been peddled in the market with the result that the appellant was eventually approached because, as he put it, he gave a better deal. Despite the better deal given by the appellant, the bonus or discounts were substantial, never being below 25 percent and in some instances being as high as 50 percent. These factors, to me, emphasize the element of risk involved.

The appellant never entered into these transactions in concert with others which would have had the effect of minimizing the risk, but on the contrary he assumed the entire risk himself and it is, therefore, natural that he should expect a greater bonus or discount to compensate for the greater risk.

There is no doubt from the information in the income tax returns filed by the appellant that the greatest source of his income was from interest on mortgages held by him and his income from other sources such as real estate holdings, dividend bearing stocks, bonds and from the practice of his profession, was small in comparison. This disparity negatives the appellant's avowed intention of preventing his investments from becoming "lop-sided" for to me that is precisely the position in which the appellant has placed himself.

While an attraction to the appellant of these transactions was, as he stated, the income by way of interest, it is logical to infer that an equal, if not greater attraction, was the prospect of profit that would result when the bonuses or discounts were realized.

In every instance the mortgages were held until maturity or until paid prior thereto. Therefore, the appellant received exactly the amounts he expected when the mortgages were acquired. The holding of the mortgages to maturity might well be a feature of an operation of a business because such a policy would result in greater profits to the appellant than if he sold them prior to maturity with the obligation of giving the purchaser a discount. The appellant stressed the necessity of providing himself with a source of income in contemplation of his gradual and eventual complete retirement. To me it, therefore, follows that it would be most advantageous to the appellant to amass as much as possible in his remaining active years and it is logical to assume that this is the course he had adopted. The comparatively short terms of the mortgages enabled him to realize the maximum profit quickly which profits would be available to finance still further transactions.

The multiplicity of the transactions confirm my conclusion that this was the course of conduct designedly embarked upon by the appellant. The multiplicity of transactions, in addition to confirming the foregoing conclusion is also a very strong factor, when considered together with other surrounding circumstances, in determining they were operations of business in carrying out a scheme of profit-making.

In my view the cumulative effect of the circumstances under which all transactions were entered into by the appellant negative any *indicia* that normally characterize an investment, but rather, the multiplicity of the transactions, the second class nature of the mortgages and the comparatively short time within which bonuses and discounts were realized are indications that the transactions in question were business transactions.

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There is support for this view in *Noak v. Minister of National Revenue*[1] in which case Kerwin J. as he then was, said at p. 137:

> The number of transactions entered into by the appellant and, in some cases, the proximity of the purchase to the sale of the property indicates that she was carrying on a business and not merely realizing or changing investments.

While this was a decision on whether the appellant in that case was carrying on a "business" within the meaning of the term used in the *Excess Profits Tax Act,* nevertheless the statement is applicable to the facts of the present case.

I think it can be reasonably inferred from the appellant's course of conduct that he was not looking for investments that would yield a moderate and safe return on his money, but rather he sought to realize a maximum amount in as short a time as possible. If his object had been to secure investments he would have invested in first mortgages that earned the same rate of interest without the attendant risk attaching to more speculative mortgages carrying bonuses or discounts.

I do not overlook the appellant's statement he was making provision for his retirement. I think he was postponing his investment in safer but less rewarding securities to a later time when he would have the greater funds which would be required to ensure an equivalent return.

It was not necessary for the appellant to set up an organization for the mortgage transactions. He was already equipped for that purpose. In fact his business premises and the time of the clerical staff must have been more devoted to these transactions than to the legal practice of the appellant. Furthermore, a line of general credit had been established by the appellant with his bank which could be and was utilized by him for the purpose of the mortgage transactions.

The fact that the appellant did not seek out the mortgages or advertise that he was in the market for them does not make the appellant an investor in them. He did not have to do so. The prospective borrowers or vendors of existing mortgages sought the appellant out and he was in a position to select those he considered most advantageous.

[1] [1953] 2 S.C.R. 136.

I am also of the opinion, that even on the facts, it is impossible to distinguish those of this case from those in *Scott v. Minister of National Revenue*[1] in which the decision of the President of this Court was unanimously confirmed by the Supreme Court of Canada, or from the facts in *Minister of National Revenue v. MacInnes*[2] in which case the Supreme Court of Canada in a unanimous decision reversed the decision of the Exchequer Court, and wherein the Supreme Court of Canada decided that the appellant and respondent in those respective cases were in the highly speculative business of purchasing obligations of this nature at a discount and holding them to maturity in order to realize the maximum profit out of the transactions.

I, therefore, find that the discounts and bonuses realized by the appellant in the taxation years in question were taxable income since they were profits or gains from a trade or business within the meaning of sections 3 and 4 of the *Income Tax Act* aforesaid.

The Minister was, therefore, right in assessing the appellant as he did for the taxation years 1956 to 1959 inclusive with the result that the appeal herein is dismissed.

The Minister is also entitled to costs to be taxed in the usual way.

Judgment accordingly.

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Nov. 28, 29
1963
Jul. 30

BETWEEN:

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

ARTHUR MINDEN .... RESPONDENT.

Revenue—Income tax—Income Tax Act, 1948, S. of C. 1948, c. 52, ss. 3, 4, 21(1) and 127(1)(e)—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e)—Capital gain or income—Purchase of agreements for sale and second mortgages at a discount and held to maturity—Investments—Husband and wife joint venture—Profits capital gain or income—Profits of wife in joint trading venture taxable to husband —Appeal allowed.

[1] [1963] C.T.C. 176. [2] [1963] C.T.C. 311.

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Respondent, a solicitor and senior partner in a law firm doing a considerable amount of real estate work, acquired an interest in a number of short term mortgages and agreements for sale purchased from clients at a discount and held to maturity or until paid in full. These were acquired without advertisement or solicitation, the purchase money coming from either the law firm's surplus funds or being supplemented by small bank loans. They were acquired in most cases in bulk lots in relatively few transactions and all legal work and collection and accounting were carried out by respondent's firm.

Respondent's wife also, on his advice and with his assistance together with a loan from him of $13,000 00, she putting up $8,000 00 of her own money, acquired a number of short-term agreements for sale at a discount and held them to maturity, realizing in 1950 and 1951 profits therefrom.

The Minister of National Revenue assessed respondent for income tax on the profits realized from those transactions engaged in by him and also for 13/21's of the profits of his wife in her own transactions as having been derived from property transferred to her from him within the meaning of s. 21 of the Act. An appeal to the Tax Appeal Board was allowed and from that decision the Minister appealed to this Court.

Held: That the appeal be allowed.

2. That the profits were income from a business within the meaning of ss. 3 and 4 of the Act, since the agreements for sale and the mortgages were acquired for the purpose of realizing the profits that would result from the discounts.

3. That the multiplicity of the transactions, the second class nature of the mortgages and agreements for sale and the short period of time within which the discounts were realized were indicia of a profit making scheme.

4. That the high rate of discount and the short terms giving the prospect of immediate profits from the agreements and mortgages rather than the income receivable by way of interest on them were the motives impelling respondent to enter into the transactions.

5. That the profits of the wife whose transactions were initiated, guided and inspired by the respondent, who was the dominant person throughout, were in reality from a joint venture in the nature of trade and also income from a business in which both participated and so taxable.

6. That the profits were income and not capital gains.

APPEAL from a decision of the Tax Appeal Board.

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

Donald Guthrie, Q.C. and *M. Barkin* for appellant.

W. D. Goodman for respondent.

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

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MINISTER OF NATIONAL REVENUE *v.* ARTHUR MINDEN

CATTANACH J. now (July 30, 1963) delivered the following judgment:

This is an appeal from the decision of the Income Tax Appeal Board, *subs. nom. No. 544 v. M.N.R.*[1] allowing the respondent's appeals against his income tax assessments for the taxation years 1950, 1951, 1952, 1953, 1954 and 1955.

The Minister in reassessing the respondent for the taxation years 1950 to 1955 inclusive, added to the amounts of taxable income respectively reported by him in income tax returns for the years in question the following sums:

1950	$ 3,137.03
1951	11,266.99
1952	1,660.58
1953	3,105.33
1954	5,293.68
1955	4,373.53

The notices of reassessment dated December 26, 1956 for the 1950 and 1951 taxation years, and May 1, 1957 for the 1952, 1953, 1954 and 1955 taxation years, were predicated upon the assumption that $4,044.33 of the sum of $11,266.99, being the amount added to the respondent's taxable income for the year 1951 and the amounts set forth above for the years 1952 to 1955 represented the total of the difference between amounts advanced by the respondent to purchase existing mortgages and agreements for sale and the amounts received by the respondent on the maturity of the said mortgages and agreements for sale.

The amount of $3,137.03 added to the respondent's taxable income for the year 1950 and $7,226.66 of the sum of $11,266.99 added to the respondent's income for the year 1951, were so added as representing the total of amounts of income from property which was transferred by the respondent to his spouse, Beatrice Minden.

After compliance with the statutory requirements regarding notice of objection to the assessments, the respondent appealed against them to the Income Tax Appeal Board. The appeals were heard together and allowed, the Income Tax Appeal Board being under the impression it was bound to do so by reason of the judgment of Cameron J. in *Cohen v. Minister of National Revenue.*[2] It is from this decision that the present appeal is taken.

[1] (1958) 20 Tax A B C. 29. [2] [1957] Ex. C.R. 236.

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Cattanach J.

In *Minister of National Revenue v. Spencer*,[1] the President of this Court expressed the opinion that it was erroneous to regard the Cohen case as laying down a pattern of principles of general application in cases when a person had purchased mortgages at a discount or acquired them with a bonus and realized profits from them at maturity and he reiterated the well established principle that in determining whether the profits realized were enhancements of the value of investments or gains made in the operation of a business in a scheme of profit-making and, therefore, income within the meaning of sections 3 and 4 of the *Income Tax Act* is a question of fact and its determination must depend on the facts and circumstances of the case and the true nature of the transactions from which the profits were realized.

It therefore follows that the decision in the present case must be made according to its own facts and surrounding circumstances so that the true nature of the transactions from which the respondent realized the profits which the Minister included in the assessments under review, may be determined.

The issues underlying the present appeal are two in number. The first and principal issue is the now familiar one, whether the profits realized by the respondent from the transactions into which he had entered were capital accretions from investments as claimed by him, and, therefore, not subject to income tax on profits from a business or an adventure in the nature of trade, as found by the Minister, and, therefore, taxable income within the meaning of sections 3 and 4 and section 127(1)(*e*) of the *Income Tax Act*, S. of C. 1948, c. 52 as amended, or sections 3 and 4 and section 139(1)(*e*) of the *Income Tax Act*, R.S.C. 1952, c. 148.

The second and secondary issue is whether the amounts of $3,137.03 and $7,226.66, which were added to the respondent's income by the Minister in the taxation years 1950 and 1951 respectively, were income from a business or adventure or concern in the nature of trade within the meaning of the before-mentioned provisions of the *Income Tax Act* in the hands of the respondent's spouse, Beatrice Minden, and if found to be so, whether or not such amounts are deemed to be income of the respondent by virtue of

[1] [1961] C.T.C. 109.

section 21(1) of the Act, as arising from property transferred by the respondent to his spouse or property substituted therefor.

The facts in the present appeal are not in dispute, but rather the dispute is upon the proper inferences to be drawn therefrom. I, therefore, proceed with a review of the facts.

The respondent is a barrister and solicitor practising in the City of Toronto from 1935 to date and the senior partner in the law firm of Minden, Pivnick and Gross (hereinafter referred to as the law firm). The law firm had a general commercial practice including conveyancing in connection with real estate development by clients and in connection with mortgages. In the course of attending to legal work of this nature, and on other occasions, the respondent and his associates in the law firm and other associates encountered holders of agreements for sale and mortgages, almost exclusively second mortgages, who were desirous of selling such securities at a discount.

The transactions in which the respondent was concerned may be divided into six general categories which for convenience I shall refer to as (1) the Zingrone mortgages, (2) the Pears' mortgages, (3) the Syndicate or group mortgages, (4) the General mortgages, being those owned exclusively by the respondent, (5) the Seaton agreements for sale and (6) the Beatrice Minden transaction. General summaries of the facts relating to the transactions in the six categories mentioned, were filed in evidence by counsel for the respondent, Exhibit "D" with respect to the Zingrone mortgages, Exhibit "E" with respect to the Pears' mortgages, Exhibit "F" with respect to the Syndicate mortgages, Exhibit "G" with respect to mortgages owned 100 percent by Mr. Minden, Exhibit "H" with respect to agreements for sale purchased from a person named Seaton and Exhibit "A" with respect to the transaction involving Beatrice Minden.

I now summarize the facts and circumstances surrounding the purchase of the Zingrone mortgages.

On March 3, 1952 Mr. Minden as trustee for his law partners, Mr. Pivnick and Mr. Gross and on his own behalf entered into an agreement with Joseph F. Zingrone for the purchase of twenty-five second mortgages owned by him. Appended to the foregoing agreement and forming a part

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thereof was a schedule listing twenty-five mortgages having the face value of $48,893.58. The purchase price paid for the mortgages was $36,120.80 so that the mortgages were acquired at about 25 percent of their face value. Mr. Zingrone was a builder and client of the law firm and who was considered by Mr. Minden to be a better than average builder of very good repute. The mortgages held by Mr. Zingrone were encumbered by a loan in the amount of $15,197.61 which together the interest due thereon was assumed by Mr. Minden and his law partners as part of the purchase price and a balance of $20,922.57 in cash was paid to Mr. Zingrone. The money for which the mortgages owned by Mr. Zingrone were encumbered as security therefor, had been loaned to him by another client of the law firm on their recommendation.

The members of the law firm found it necessary to supplement their own resources by a bank loan of between $8,000 and $9,000. Both the loan assumed as part of the purchase price and the bank loan were paid off within a year from the proceeds of the acquired mortgages by way of principal and interest. Mr. Zingrone disposed of the mortgages to relieve himself of the loan on them and to acquire funds for further building ventures.

The mortgages in question were second mortgages taken back by Mr. Zingrone on houses he had built and sold. Most of the houses were in the Western area in Metropolitan Toronto and of modest quality, all of which had been sold subject to first mortgages.

Exhibit "D" was filed in evidence by counsel for the respondent and was a schedule prepared by the officers of the Department of National Revenue from the respondent's records and which schedule was acknowledged by the respondent as being correct. The information therein contained is more extensive than that contained in the Schedule to the agreement dated March 3, 1952 between Joseph E. Zingrone and Arthur Minden which only showed the face value, that is the amounts remaining unpaid on the twenty-five mortgages at the date of their purchase.

Exhibit "D" lists twenty-six mortgages, that is one more than listed in the Schedule mentioned above. The additional mortgage was acquired from Mr. Zingrone by the purchasers subsequent to the agreement between them. Each of the twenty-five mortgages were acquired by Zingrone in 1951 excepting the additional one listed in Exhibit "D" which was acquired by him in 1952. The total face value of the twenty-six mortgages is $50,332.98. The total amount paid therefor by the respondent and his partners was $38,369.58, so that the total discount thereon was $11,963 of which the respondent's share was $4,787.36.

All of the twenty-six mortgages were second mortgages, the amounts of the face value of which ranged from a low of $270 to a high of $6,325. Six of the mortgages had but one year to run to maturity, seven had two years to run, four had three years to run, seven more had four years to run and two matured in five years.

Two of the mortgages bore interest at the rate of 4½ percent, twenty-two at 5 percent, one at 5½ percent and one at 6 percent. The respondent's interest in the twenty-six Zingrone mortgages was 40 percent and that of his partners, Pivnick and Gross, was 30 percent each.

The next transaction to be considered is that entered into with Allen W. Pears by the respondent, again in association with his legal partners, Pivnick and Gross and with the same distribution of interest, namely, 40 per cent to the respondent and 30 per cent to each of his partners, under circumstances closely comparable to the acquisition of the Zingrone mortgages.

In the month of December 1953 the respondent, together with his law partners, acquired seven mortgages from Allen W. Pears.

The particulars of the Pears mortgage transaction are set forth in Exhibit "E" which was filed in evidence. Exhibit "E" lists the seven mortgages acquired as having a total face value of $11,760.43, a total purchase price of $9,245 and a total amount of the discount of $2,515.43 of which the respondent's share was $1,006.17.

All seven of the mortgages acquired from Pears were second mortgages, three maturing in 1954 (the year after acquisition), three maturing in 1956, that is within two years of acquisition, and one maturing in 1957, that is within three years.

The availability of the Pears' mortgages was brought to the attention of the respondent and his legal partners by a realtor for whom the law firm had done legal work. Pears

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was an auditor associated with the realtor. The respondent did not conduct an inspection of the premises which were security for the mortgages and neither was he certain if either of his partners did so. However, the respondent did know that the premises were located on a subdivision in the east end of Toronto with which the realtor had some connection.

Exhibit "E" does not disclose the rate of interest which the mortgages bore, but this lack was supplemented by evidence of the respondent who testified they all bore interest at the rate of 6 percent, to the best of his recollection.

The funds with which the Pears' mortgages were purchased came from a general account maintained by the respondent's law firm and may also have been supplemented by a small bank loan, although the respondent was not certain that a loan was required to complete the transaction.

Again all of the seven Pears' mortgages were held to maturity and were paid on maturity.

The next transaction to be considered is that which for the purpose of convenience I shall call the Syndicate mortgages, the particulars of which are listed in Exhibit "F" and sets forth, by my count, 123 mortgages acquired between 1949 and 1956 which period extends before and after the taxation years under review.

The total face value of the 123 mortgages listed in Exhibit "F" was $336,234.33 and the total amount paid therefor was $253,839.56, the total discount being $82,403.77.

The members of the group which comprised the mortgage syndicate were Leon Pape and his brother Benjamin as one member, Alexander Cole, Zola Morgan and the respondent. All the members were close friends. Pape was a chartered accountant and Morgan and Cole were associated together in a rug business.

There was no written agreement among the four initial members, but the four made equal contributions and shared the profits equally. A separate bank account was opened on behalf of the Syndicate in which all receipts were deposited.

At the outset, in May of 1949, each member contributed $4,000, a total of $16,000. As the bank account which was established grew from the proceeds of the mortgages already owned, that money and further monies contributed by the members were used to acquire further mortgages.

When the funds in the bank account were insufficient to purchase an attractive group of mortgages which was available for purchase, further levies were made upon the members. Between May 1949 and July 1952 six such levies were made upon the four members each of whom contributed $28,000 or a total amount of $112,000. The respondent held the monies as trustee for the group and Mr. Pape, a chartered accountant, set up a system of accounting within the law firm.

Since an amount of $112,000 was contributed in equal shares by the four members of the Syndicate and the total face value of the mortgages acquired by them was $253,839.56, it follows that the difference of $141,839.56 must have come from the proceeds from the mortgages by way of principal and interest received by the group and was used by them to acquire the still further mortgages comprising their portfolio.

The mortgages were mostly second mortgages which were offered to the Syndicate in a series of blocks of mortgages at substantial discounts. They all bore interest ranging from 5 to 6½ percent, but the greater number bore interest at either 5 or 6 percent.

The mortgages were acquired in the same pattern as those in the transactions previously mentioned. There was no advertisement or solicitation, but they were acquired through clients of the legal firm or persons having some relationship with the law firm.

The respondent explained the Syndicate's purposes in acquiring these mortgages as being a good return upon the outlay of a small amount of money which he qualified forthwith by deleting the adjective "small".

The composition of the membership of the Syndicate changed from the original members. At the end of 1954 the Pape brothers disposed of their interest to the remaining three members, Mr. Cole, Mr. Morgan and the respondent in equal shares. Mr. Cole retired from the group in 1957 and his share was purchased by the respondent leaving Mr. Morgan and the respondent as the only persons interested in the mortgages. A short time later the respondent and Mr. Morgan agreed upon a division between them of the mortgages then held by them.

It was the intention of the group to hold all mortgages until maturity thereby realizing the amount of the discount

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as well as the interest payable. However, in June 1954 some members of the group, who were not identified in evidence, wished to withdraw some monies for their own purposes, so ten mortgages having a face value of \$28,983.71 were sold to S. Rosenthal, a client of the law firm for \$24,793.71. No further mortgages were disposed of by the Syndicate and, excepting the ten mortgages sold, all were held to maturity.

By reason of the withdrawal of members of the Syndicate the respondent's interest in the mortgages changed from 25 percent at the outset in 1949 to $33\frac{1}{3}$ percent on the retirement of the Pape brothers at the end of 1954, then to 50 percent on the retirement of Mr. Cole in 1957 and 100 percent of those purchased by the respondent from Mr. Cole and to an ultimate 100 percent on the division of the mortgages held by the respondent and Mr. Morgan between them.

Apart from the foregoing syndicate mortgages a portion of which the respondent eventually came to own in whole, there was a still further number of mortgages which the respondent owned to the extent of 100 percent which I have called the "general mortgages", again for the purpose of convenience.

The particulars of the "general mortgages" in question were outlined in Exhibit "G". There were five mortgages in all, two of which were acquired by the respondent in 1949 with four years to run to maturity, two in 1951 maturing in one year and two years respectively and one maturing in 1956, but the date of acquisition to this last mentioned mortgage by the respondent was not given. The face value of the mortgages ranged from a low of \$662.10 to a high of \$11,250 with the face value of the three between averaging slightly over \$4,000.

The total face value of these five mortgages was \$24,987.10 all of which were acquired at a discount for the price of \$22,350, the total amount of discount which the respondent stood to realize and did realize being \$2,637.10. Again these mortgages were acquired from clients of the respondent or the law firm without advertisement or solicitation.

The next category of transaction to be considered is that entered into by the respondent with Benjamin Seaton which is what I have referred to as the Seaton agreements for sale.

A general summary of the facts relating to their purchase was filed in evidence as Exhibit "H". It showed that in a single transaction in 1950 the respondent acquired from Benjamin Seaton thirty-two agreements for sale, the sale price of which had averaged about $1,500 per lot when originally sold by Seaton. In the interval between the original sale by Seaton to the purchasers and the acquisition of the agreements by the respondent, payments were made by the purchasers to Seaton so that at the time of acquisition by the respondent the total balance of $20,-465.71 was outstanding. The consideration paid by the respondent to Seaton was $17,000 so that the total discount thereon was $3,465.71.

The respondent had acted in his professional capacity for Seaton in placing a registered plan of subdivision upon an area in the Township of North York. It was from the sale of lots in this subdivision that the agreements for sale arose. The area was of a virgin nature not then fully developed. Seaton, in addition to being a client of the respondent, was also a friend and being in need of money had borrowed slightly in excess of $17,000, without interest, from the respondent. Seaton was anxious to discharge this loan and the most convenient way for him to do so was to transfer the agreements for sale to the respondent at the discount mentioned which the respondent was willing to accept. The agreements were held to maturity and collected by the respondent. No specific information was given as to the length of time the agreements had to run to maturity nor the interest rate on the agreements, although the respondent did say they were interest bearing.

The last category of transactions to be considered, which gives rise to the issues now in dispute, is one involving Beatrice Minden, the wife of the respondent.

In the three year period between September 1949 and September 1952, Mrs. Minden purchased a total of 124 agreements for sale in eleven transactions spread over the period.

Exhibit "A" was filed in evidence by counsel for the respondent which gave particulars of these agreements, that is, the date of each transaction, the number of agreements involved in it, the name of the vendor, the face value of

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the agreements at the date of purchase, the amount of the discount at which they were purchased and the cost of the agreements to Mrs. Minden.

The total face value of the agreements at the time of their purchase was $103,393, the total amount of the discount was $21,971.20 and the total cost to Mrs. Minden, the purchaser, was $81,421.80. Mrs. Minden knew very little about the transactions. She entered into them at her husband's suggestion and left everything to him.

There were three vendors involved in the transactions, namely, R. H. Legget, Granite Securities Ltd. and Mrs. Mary E. Welch. Mr. Legget was the sole owner of all shares in Granite Securities Ltd. and the son-in-law of Mrs. Welch. Mr. Legget was a client of the respondent's law firm and the only person with whom the respondent dealt in these transactions. The respondent also represented his wife in the transactions.

The lots covered by the agreements for sale were remnants of old subdivisions which had not been sold at the time of the original promotion and were situated in the vicinity of the DeHaviland Airport in Toronto. Most of the lots were in subdivisions without water mains and all of them were vacant.

The lots had been sold under agreements for sale at small purchase prices ranging between $800 and $1,200 per lot with the average price being $1,000. There was usually a small down payment of about $100 with the balance payable in small monthly instalments usually about $20 per month. A typical agreement for sale, from which the foregoing information was gathered, was filed in evidence as Exhibit "B". The agreements normally had two or three years to run until their maturity. They were all interest bearing, the greater number at 5 percent though the respondent thought the later agreements might have carried interest at the rate of 6 percent.

The lots were vacant and had been sold to persons who wished to own land upon which to build a home in the future. The houses in the area were modest. The risk factor was the small down payment and the unimproved nature of the lots, but the respondent considered the purchases to be reasonably reliable. He, therefore, recommended the purchases to his wife since she had money available. An amount of $21,000 was required by the respondent's wife to complete the purchase of the agreements for sale in 1949. Apparently the respondent's wife, at that time, had $8,000 available in Government bonds and the respondent advanced her the balance of $13,000. This information was confirmed by evidence of an officer of the Department of National Revenue as a result of investigations conducted by him. It was not disputed and I accordingly accept it as correct.

The respondent advanced Mrs. Minden monies on three occasions, (1) $12,500 on October 31, 1949, $5,700 on March 2, 1950, and $2,000 on June 20, 1950, a total of $20,200. Mrs. Minden issued two cheques payable to her husband, the respondent, the first on October 30, 1950 in the amount of $7,200 and the second on March 2, 1951 in the amount of $13,000, a total of $20,200. The first advance of $12,500 related to the purchase by Beatrice Minden of the agreements for sale and the respondent stated that the two lesser amounts were advanced to his wife for a purpose bearing no relation to the purchase of the agreements for sale. I should add that no interest was charged by the respondent on the advances made to his wife.

In addition to being a housewife and mother of three children, the oldest of which was 13 years of age in 1950, Mrs. Minden also had a business interest. She owned a golf driving range which was operated under the supervision of a manager employed by her. Prior to her marriage she had worked for various companies and it was from her savings before her marriage to the respondent that constituted the $8,000 which she used to purchase the agreements for sale in question which amount was supplemented by an advance of $13,000 to her by the respondent. The total advances by the respondent to his wife as outlined above were returned to him by March 1951. The notices of reassessment for the respondent's taxation years 1950 and 1951 were dated December 26, 1956.

There is no doubt that the respondent was his wife's counsellor and advisor in the transactions in question as well as her agent. She gave the respondent a free hand to act for her.

There are certain factors common to all six categories of transactions enumerated above.

In each category of transactions the law firm handled all legal work in connection with the acquisition of the mort-

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gages and agreements for sale and the collection of principal and interest thereon. For these services the law firm charged legal fees in accordance with the applicable tariff of fees, with the exception of the category of general mortgages being those owned exclusively by the respondent.

In every instance where mortgages and agreements for sale were acquired, they were so acquired because of a relationship of the vendor thereof with the law firm usually being the relationship of client or associate of a client.

Because of the manner in which the securities were acquired by the respondent and his associates, it follows that they were acquired without solicitation or advertisement and at no time did the respondent, or the respondent and his associates, hold themselves out publicly as being in the market for securities of the type and nature of those acquired.

None of the premises which were security for the mortgages or agreements for sale were inspected by the respondent or by anyone on his behalf, but he did have a general knowledge of the area in which they were located and their nature. The respondent relied upon the various vendors of whom he had intimate knowledge because of his relationship with them.

In explaining these transactions the respondent stated that he never advertised he was willing to buy second mortgages or agreements for sale, and made the general statement that the securities which were acquired would be dependent, in each instance, on some particular situation which prevailed in the office of the law firm. The respondent explained such statement as meaning that the securities were acquired from clients of the law firm or from persons who had some association with the firm. He also stated that he did not purchase all mortgages or agreements for sale which were offered, but rather he chose those he considered to be more desirable placing reliance on the person with whom he was dealing rather than upon the real estate which was the security.

The second mortgages which were acquired were admittedly riskier than first mortgages would have been, but they were all held to maturity (with the exception of ten Syndicate mortgages mentioned above) and were all paid on due date. In testifying, the respondent explained that first mortgages were not acquired because, while a better security, first mortgages ran for a longer time and accordingly he and his associates never regarded themselves as being in a position to acquire first mortgages thereby tying up their funds for a protracted time. On the contrary, the respondent felt that he and his associates were in a position as he put it, "to take a little more risk and expect a little more yield," and I might add, realize that greater yield in a much shorter time.

The prevailing rates of interest on prime first mortgages on Toronto residential properties where the loan did not exceed 60 percent of the valuation of the property were as follows:—1949 to 1953 5 percent, 1951 5½ percent to 6 percent, 1952 to 1953 6 percent and 1954 and later years 6½ percent.

On the facts as above recited, I have no hesitation in finding that the profits which the respondent realized from his participation in the acquisition of the Zingrone mortgages, the Pears' mortgages, the Syndicate mortgages, the Seaton agreements for sale, and from those mortgages which he owned himself exclusively were taxable income. Neither do I have any hesitation in similarily finding that the profits which Mrs. Minden realized from her agreements for sale were also taxable income.

It was not necessary for the respondent to set up an organization for the conduct of the mortgages and agreements for sale transactions. He was already well equipped for that purpose. The law office looked after the legal work necessary in the transactions as well as the collection of, and accounting for payments under the mortgages and agreements as they fell due just as was done for clients for the firm.

Cases such as *Rutledge v. C.I.R.*[1] and *Lindsay et al. v. C.I.R.*[2] establish that it is not essential to a transaction in the nature of trade that an organization should have been set up to carry it into effect. But, obviously, the fact there was such an organization goes some way to the conclusion that such an adventure was contemplated. As I have already said, the respondent did not have to set up an organization because it was in existence. All that was needed to be done was to utilize it. Further, it was from

[1] (1929) 14 T.C. 490. [2] (1932) 18 T.C. 43.

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the existence of this organization that the opportunity to acquire mortgages and agreements for sale arose. The transactions into which the respondent entered were closely related to his legal work and they arose out of his connection with clients or associates in every instance.

The fact that the respondent did not seek out the mortgages and agreements for sale or advertise that he was in the market for them, does not make the respondent an investor in them. In fact he did not have to do so because they came to him and he was in a position to select those he considered most advantageous.

The respondent held his interest in all mortgages and agreements which he had acquired until their maturity or until paid, except ten. These ten were part of the mortgages held by the Syndicate and were sold to a client of the respondent at a discount to accommodate those members of the group who wanted an immediate return.

Therefore, I conclude the mortgages and agreements were acquired for the purpose of realizing the profits that would result from the discounts within the short time the mortgages had to run to their maturity. They were not the kind of securities a prudent investor would consider. Their attraction to the respondent was the high rate of discount and short terms giving the prospect of immediate profit therefrom, rather than the income receivable by way of interest on them. I base these conclusions on the evidence of the respondent when he stated he and his associates were not interested in first mortgages because of the longer terms thereof, but were prepared "to take a little more risk and expect a little more yield".

The multiplicity of the transactions into which the respondent entered does not by itself determine that they were operations of business in carrying out a scheme of profit-making, but when considered in the light of the surrounding circumstances it is a very strong factor. In the present case the mortgages or agreements which were acquired by the respondent on his own account and in association with others were numerous. Excluding those agreements for sale which Mrs. Minden purchased, I compute the number of mortgages and agreements in which the respondent held an interest as 193. However, there were not 193 separate transactions since substantial numbers of the securities were acquired in a block in one transaction.

The 26 Zingrone mortgages were one purchase as were the seven Pears' mortgages and the 32 Seaton agreements. However, the 123 Syndicate mortgages were acquired over a period of time and there were a series of transactions in each of which a block of mortgages was acquired. The five mortages held by the respondent on his own account were acquired in five separate transactions.

In my opinion the multiplicity of transactions, in the circumstances of the present case, is a very strong indication that they were not entered for investment purposes.

It may also be fairly considered that the fact the respondent entered into many of the transactions with associates, indicates that they were joint ventures for profit-making rather than joint investments. I refer, of course, to those transactions entered into by the respondent with his legal partners and particularly those transactions which have been described herein as the Syndicate mortgages.

The circumstance that in the purchase of the Zingrone and Pears' mortgages the respondent and his legal partners required small bank loans to complete the transactions, which loans were liquidated within a short time from the proceeds of the mortgages as they fell due, as was the encumbrance on the Zingrone mortgages, and the circumstance that the proceeds from the Syndicate mortgages, to the extent of $141,839.56 was used to acquire further mortgages, indicates to me that the policy of the respondent and his associates was to embark upon a course of conduct in purchasing mortgages and agreements for sale at a discount that were risky and of a second class nature with only a short time to run to their maturity with a view to realizing profits on the discounts. It is reasonable to infer from such course of conduct that the true nature thereof was the operation of a scheme of profit-making rather than that of an investment.

In my view the cumulative effect of the circumstances under which all transactions were entered into by the respondent negative any *indicia* that normally characterize an investment, but rather the multiplicity of the transactions, the second class nature of the mortgages and agreements for sale and the short period within which the discounts were realized are indications that the transactions in question were business transactions. There is support for

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this view in *Noak v. Minister of National Revenue*[1] in which case Kerwin J. as he then was, said at p. 137:

> The number of transactions entered into by the appellant and, in some cases, the proximity of the purchase to the sale of the property indicates that she was carrying on a business and not merely realizing or changing investments.

While this was a decision on whether the appellant in that case was carrying on a "business" within the meaning of the term used in the *Excess Profits Tax Act*, S. of C. 1940 c. 32 nevertheless the statement is applicable to the facts of the present case.

I am also of the opinion, that even on the facts, it is impossible to distinguish those of this case from those in *Scott v. Minister of National Revenue*[2] in which the decision of the President of this Court was unanimously confirmed by the Supreme Court of Canada, or from the facts in *Minister of National Revenue v. MacInnes*[3] in which case the Supreme Court of Canada in an unanimous decision reversed the decision of the Exchequer Court, and wherein the Supreme Court of Canada decided that the appellant and respondent in the respective cases were in the highly speculative business of purchasing obligations of this nature at a discount and holding them to maturity in order to realize the maximum profit out of the transactions.

I, therefore, find that the discounts realized were taxable income since they were profits or gains from a trade or business within the meaning of sections 3 and 4 of the *Income Tax Act*, S. of C. 1948, c. 52 or sections 3 and 4 of the *Income Tax Act*, R.S.C. 1952, c. 148.

The Minister was, therefore, right in assessing the respondent as he did for the taxation years 1952 to 1955 inclusive and in adding an amount of $4,044.33 to the respondent's taxable income for the taxation year 1951.

There remains to be considered whether the amounts of $3,137.03 and $7,226.66 were properly added by the Minister to the respondent's taxable income for the taxation years 1950 and 1951 respectively which amounts were realized as a consequence of what I have described as the Beatrice Minden transactions.

[1] [1953] 2 S.C.R. 136.
[2] [1963] C.T.C. 176.
[3] [1963] C.T.C. 311.

The respondent, as his wife's counsellor and advisor as well as her agent, recommended that she should purchase the agreements for sale, previously described, at a discount. At the outset an amount of $21,000 was required to effect the purchase of the agreements of which amount Mrs. Minden contributed $8,000 of her own money and the balance of $13,000 was advanced to her by the respondent.

The Minister in assessing the respondent for income tax for the taxation years 1950 and 1951 attributed the profit realized from the discounts on the agreements for sale received in these respective years, the proportions of 8/21's to Mrs. Minden and 13/21's to the respondent with the mathematical result that the amounts of $3,137.03 and $7,226.66 represented the proportion of the profits realized and which were attributed to the respondent by the Minister in the taxation years 1950 and 1951 respectively and were so added by him to the respondent's taxable income for those years.

The proportions attributed to Mrs. Minden for the years 1950 and 1951 and which were added to her income for those years (as well as profits for subsequent years) were the subject of an appeal to this Court and the decision of the President is reported in *Minister of National Revenue v. Beatrice Minden*[1] wherein he held that Arthur Minden, as agent, engaged his wife with the responsibility for a scheme of profit-making and that on the evidence, the profits realized by her were profits from a business within the meaning of sections 3 and 4 of the *Income Tax Act* applicable or in the alternative were profits from an adventure or adventures in the nature of trade and, therefore, profits from a business within the ambit of the definition of "business" as contained in the above Acts.

The transactions which give rise to the present appeal by the respondent herein as to the amounts of $3,137.03 and $7,226.66 for the taxation years 1950 and 1951 respectively, were the identical transactions under consideration by the President in the Beatrice Minden case *(supra)* and I am in complete concurrence with his decision and reasons therefor. It follows, therefore, that the sole question remaining for determination is whether the foregoing amounts are taxable income in the hands of the respondent in the years in question.

[1] [1962] C.T.C. 79.

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The respondent, in giving testimony, stated that he advanced his spouse the amount needed to initially complete the transactions by way of a loan and that subsequently in March 1951 the loan was repaid. His auditor testified that entries in the respondent's books indicated that sums of money in varying amounts had been deposited to Mrs. Minden's account and further entries indicated that monies in the same total were credited from Mrs. Minden to the respondent on divers dates.

It is significant that the respondent did not charge interest on the advances made to his wife, no promissory note was in existence, no particulars were given as to the terms of the alleged loan and no security was given therefor. In short, none of the normal written and tangible indications of a loan were present. These unusual circumstances might be normal in a transaction between a husband and wife, but because the husband in this case is a lawyer of ability and familiar with the provisions of the *Income Tax Act,* particularly section 21 thereof, the purpose of which is to prevent the avoidance of tax by transfer of property between persons who are in the close relationship of husband and wife, it seems incongruous to me that he did not take extraordinary caution to create and retain these normal evidences of a loan.

The material time at which the intention of the respondent must be determined is at the time he made the advance to his wife and it is well established that a taxpayer's statement of what his intention was in entering upon a transaction, made subsequently to its date, should be carefully scrutinized.

There are three possible categories into which the advance by the respondent to his spouse might fall, (1) a loan, (2) a gift and (3) a joint venture of the respondent and his wife in the nature of trade, carried on in the name of the wife, in the proportion of their respective contributions thereto.

The respondent, by his *ex post facto* declaration maintained the advance to his wife was a loan, which while possible, does not appear to me to have been probable bearing in mind the complete lack of other extrinsic evidence which normally accompanies a loan.

The presumption of gift is rebutted by the fact that the monies advanced to his wife were returned to him and the circumstance that the monies were so returned, leads me to the conclusion that this was the return of a capital asset with which a business or adventure in the nature of trade was begun. I am confirmed in this conclusion by the circumstance that the total cost of the agreements of sale, as shown by Exhibit "A", was $81,421.80. Mrs. Minden did not have that amount of money available when the transaction was entered into. It follows, therefore, that as the proceeds of the agreements of sale were received they were used to complete the transaction and as there was no further need of the advance made by the respondent, it was returned to him.

At the time the advance was made, its nature was susceptible of the three possible interpretations I have enumerated and it follows that, at that time, there should have been a clear and unequivocal expression by the respondent of his intention supported by the usual indications thereof and the respondent should not be left in the enviable position of being able to select, at a later time, the interpretation most advantageous to his own interest.

In short, having heard the respondent's testimony that the advance to his wife was by way of a loan, and although such was possible, I am not convinced that such was probable or that it was the true nature and substance of the transaction.

On the contrary, it is my view, on the respondent's entire course of conduct, as the dominant person throughout and initiator of the transactions in which his wife participated, that the transaction between them was in reality a joint venture in the nature of trade.

In the alternative it might be argued that the amount of $13,000 which the respondent transferred to his wife was a transfer of property within the meaning of section 21(1) of the *Income Tax Act* and that any income derived by Mrs. Minden from that property or property substituted therefor could properly be deemed to be income of the respondent within the meaning of the aforesaid section.

It follows that, under the circumstances, the Minister was right in assessing the respondent as he did with the

1963 result that the appeal herein must be allowed and the Minister's assessments confirmed.

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The Minister is also entitled to costs to be taxed in the usual way.

Judgment accordingly.

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BETWEEN:

JACK BLUSTEIN ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT;

AND BETWEEN:

MURRAY BLUSTEIN ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT;

AND BETWEEN:

IRVING BLUSTEIN ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 85B(1), 139(1)(e)—Capital gain or income—Mortgages acquired at a discount or with a bonus—Whether profit realized upon maturity or prior sale—Profit from a business—Whether profit on resale of foreclosed property income from a business—Circumstances surrounding transactions negative characteristics of an investment—Appeals dismissed.

Appellants are three brothers who carried on a furniture business in partnership with their father. Prior to 1955 all had participated in investing money in mortgages which were purchased at a discount. After 1954 appellants continued the practice and in 1955 and 1956, on the recommendation of their solicitor, purchased 23 second mort-

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gages and 2 first mortgages, some of which were purchased at a discount and some obtained as security for money advanced, in which case either a bonus was provided or a high rate of interest was demanded. Most of the mortgages were for very short terms and most of them involved a high degree of risk. It was only when no funds were available that they refused offers to buy mortgages. A separate partnership was formed by the three brothers in connection with their mortgage activities and registered in 1956. They did not advertise money to loan or solicit mortgages. Later in the same year they caused a corporation to be formed for the same purpose. Some of these mortgages matured, some were sold at a profit, and one was foreclosed upon and the property sold at a profit. Appellants in computing their income claimed such profits were capital gains from the realization of investments and they were deductible. The Minister disallowed the deductions and assessed the profits for income tax. An appeal to the Tax Appeal Board was dismissed and a further appeal was taken to this Court.

Held: That the appeals be dismissed.

2. That the discounts on the matured mortgages, the gain arising from the re-sale of mortgages, and the gain made on the sale of the foreclosed property were all income from a business within the meaning of sections 3 and 4 of the Act and taxable accordingly.
3. That the number of transactions, the second class nature of the mortgages and the short period of time within which the discounts were realized were indicative that the transactions in question were business ones.
4. That the appellants had engaged in the highly speculative business of purchasing mortgages at a discount in order to realize the maximum amount of profits out of the transactions. *M.N.R. v. MacInnes* [1963] S.C.R. 229 followed;
5. That the appellants did not carry out the various transactions for the purpose of receiving the interest from the mortgages but rather for the prospect of profit that would result when the discounts were realized.
6. That the appellants were engaged in a profit-making scheme or business, and the gains made by reselling mortgages and selling foreclosed upon property were just as much profits of this business as discounts realized when mortgages matured.
7. That the sale of the foreclosed upon property was an incidental remedy inherent in the business and the profit therefrom as much a profit as were the discounts realized.
8. That the fact that appellants did not seek out the mortgages or advertise they were in the market for them does not make the appellants investors in them and the circumstances under which all transactions were entered into by the appellants negative any *indicia* that normally characterize an investment.

APPEALS under the *Income Tax Act*.

The appeals were heard before the Honourable Mr. Justice Cattanach at Toronto.

W. D. Goodman for appellants.

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Donald Guthrie, Q.C. and *M. Barkin* for respondent.

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

CATTANACH J. now (June 25, 1963) delivered the following judgment:

These are appeals from judgments of the Tax Appeal Board[1] dismissing appeals by the appellants from assessments of income tax for the year 1956. As the same problem is involved in all three cases the appeals were heard together.

The three appellants are brothers who are partners with their father, Samuel Blustein, in a furniture and appliance business in the City of Toronto, Ontario known as Blustein's Furniture and have been so associated with their father for approximately twenty-five years.

Between the years 1949 to 1954 the four partners in Blustein's Furniture were in the practice of acquiring mortgages at a discount. The evidence of the witness, Jack Blustein was vague as to the number, total monetary amount and the nature and particulars of the mortgages acquired during this period which might be explained by the circumstance that the information was elicited in cross-examination. However, he did state that the amount of the mortgages purchased by Blustein's Furniture was between $30,000 and $40,000. The financial statement of Blustein's Furniture for the year 1956 contained an item "mortgages receivable—$86,784.09". The witness explained that the amount of $86,784.09 included two mortgages taken back on two buildings sold by Blustein's Furniture which were no longer required for the partnership business in the amounts of $45,000 and $6,000. Therefore, it follows that an approximate amount of $35,784 was receivable on outstanding mortgages in 1956. The witness stated that eight or nine mortgages were acquired in 1954.

At the end of the year, 1954, Samuel Blustein, the father, did not wish to participate any further in the acquisition of mortgages and the activities of Blustein's Furniture in this type of mortgage transactions ended.

Beginning on January 5, 1955 the appellants in partnership began to acquire mortgages on their own behalf as dis-

[1] (1961) 26 Tax A.B.C. 238, 240.

tinct from the partnership known as Blustein's Furniture consisting of themselves and their father.

Between January 5, 1955 and November 1956 the appellants acquired twenty-five mortgages, eleven during the year 1955 and fourteen during the year 1956.

Eighteen of the twenty-five mortgages were existing second mortgages purchased by the appellants at substantial discounts and each such mortgage had but a short time to run to maturity. In only one instance did the unexpired term extend to four years.

The seven other mortgages acquired by the appellants during the same period were taken as security for monies advanced in each instance except three with bonuses. Of the three mortgages on which bonuses were not obtained, one bore interest at the rate of 12 percent, the second was taken back on the sale of a property which had been foreclosed and the third was on a first mortgage bearing interest at the rate of 10 percent in which a half interest was owned by the appellants.

Twenty-three of the twenty-five mortgages held by the appellants were second mortgages and the other two were first mortgages. Fifteen bore interest at 6 percent, five bore interest at $6\frac{1}{2}$ percent, two at 12 percent and one at 10 percent. Two mortgages purchased by the appellants at a discount in the latter part of 1956 were acquired on behalf of a joint stock company which the appellants had caused to be incorporated under the name of Gary Securities Ltd. and were transferred to this Company early in 1957 at cost.

The prevailing rate of interest on prime first mortgages of Toronto residential properties where the loan did not exceed 60 percent of the valuation of the property in the years 1954 to 1956 was $6\frac{1}{2}$ percent.

The three appellants contributed the monies wherewith the mortgages were acquired in equal shares and any profits realized were also shared in equal proportions. The appellant, Jack Blustein, was the youngest of the three appellants and any decision to obtain any mortgage offered to them for purchase was left by the other two appellants to his sole discretion. The three brothers were comparatively young men actively engaged in their businesses with the exception of Murray Blustein who was in poor health.

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The manner in which the appellants came to purchase the mortgages may be described briefly. They did not go out looking for mortgages to purchase or upon which to advance funds, nor did they advertise in any public way their willingness to acquire such mortgages.

A solicitor, practising in Toronto, Mr. Sidney Roebuck, who had been a friend of the Blusteins, would telephone to say that mortgages were available at a discount. He would advise the appellants of the amount of the discount, the terms of the mortgage and would express the view that it was a relatively safe transaction. He would also advise the appellants of the amount of their cheque necessary to consummate the transaction. If the appellants had funds available they would invariably acquire the mortgages so offered relying exclusively on the recommendations of the solicitor. It was only when the appellants had no monies available that offers were refused. They made no investigation of the premises on their own initiative prior to acquiring a mortgage thereon.

In this the appellants followed the identical procedure and routine as had been followed by Blustein's Furniture between 1949 and 1955 so in effect they merely continued the pattern adopted when their father had also been a participant.

The greater number of the recommendations to the appellants to purchase mortgages as above described emanated from Mr. Sidney Roebuck, but in other instances they were advised of the availability of mortgages at a discount or bonus by another solicitor, Mr. Irving Aitkin, also a friend of the Blusteins and on one occasion by Mr. Arthur Zadlin, also a solicitor and a friend of the appellants' father.

The funds required to effect the purchases or loans were provided by the appellants by drawing on surplus funds available to them in Blustein's Furniture with the full concurrence of their father and recorded in the books of Blustein's Furniture as advances to the appellants. These advances by Blustein's Furniture were not in the nature of loans, but rather monies to which they were entitled as partners in Blustein's Furniture. However, Blustein's Furniture operated its business with a bank overdraft during the relevant period and the funds of the appellants consequent upon their mortgage transactions were available to and in fact utilized by Blustein's Furniture on one occasion to discharge an outstanding account.

The total face value of the twenty-three mortgages held by the appellants was $94,207, the amount paid therefore was $62,500.47, so that the appellants stood to realize by way of discounts or bonuses an amount of $31,706.53 on maturity. From these figures I have excluded the amounts of the two mortgages acquired on behalf of Gary Securities Ltd. and transferred to that Company by the appellants in early 1957.

The nature of the securities held by the appellants is best illustrated by the testimony of Jack Blustein when in reply to a question concerning the risk involved in the mortgages, he answered, "Well, they must have been pretty poor. . . two or three of them turned out bad . . . we lost them."

Three of the mortgages were foreclosed. The appellants found that payments were usually late and resort was frequently had to legal proceedings or the threat thereof to assist in collection.

There was no set pattern followed by the mortgagees in paying the amounts due under the mortgages. In most instances payments were made to the solicitors' offices and were then forwarded to the appellants by them and in other instances payments were made directly to the appellants.

On November 21, 1956 the three appellants signed and filed a Declaration of Partnership in the Registry office for the County of York reciting that they had carried on and intended to carry on trade and business as mortgage brokers at 531 Queen Street, Toronto, Ontario, in partnership under the name of Gary Mortgage Company and that the said partnership had subsisted since October 2, 1956. The address, 531 Queen Street, is that of one of the retail stores of Blustein's Furniture. Of the twenty-five mortgages acquired by the appellants between January 5, 1955 and November 26, 1956 seventeen were acquired prior to October 2, 1956 and eight subsequent to that date.

The appellant, Jack Blustein, in giving evidence stated that the Declaration of Partnership was completed and filed merely as a convenient method of segregating the mortgages acquired by the appellants and those held by Blustein's Fur-

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niture and to facilitate the establishment of a separate bank account in which all receipts from mortgages held by the appellants were deposited.

The only partnership records maintained by Gary Mortgage Company was a mortgage ledger in which was recorded the particulars of the mortgages held by the appellants and entries of payments received, all of which were personally made by the appellant Jack Blustein. This mortgage ledger also contained identical information with respect to mortgages held by Blustein's Furniture.

Late in 1956 the appellants caused to be incorporated a joint stock company under the name of Gary Securities Limited for the purpose of conducting any further mortgage transactions of the nature described above through this particular corporate entity. The last two of the twenty-five mortgages acquired by the appellants in late 1956 were acquired on behalf of the Company while the incorporation thereof was pending and they were transferred to the Company at their cost to the appellants in early 1957 immediately following its incorporation.

During the appellants' 1956 taxation year, two mortgages acquired by the appellants at discounts matured, the face values thereof being $2,950 and $1,500 for which they had paid $2,250 and $955, thereby realizing profits of $700 and $545 respectively, being a total profit of $1,245, which was allocated to the appellants in equal amounts of $415.

On December 5, 1956 and on December 3, 1956 the appellants sold two mortgages which had been purchased on November 22, 1956 and November 26, 1956 for $4,920 and $1,950 at prices of $5,450 and $2,400 thereby realizing profits thereon of $530 and $450 respectively, being a total profit of $980 which was allocated to the appellants as follows, Jack Blustein, $326.67, Irving Blustein, $326.67 and Murray Blustein, $326.66.

In the 1956 taxation year a second mortgage held by the appellants on a property in the City of Toronto municipally described as 45 Maybourne Avenue, fell into default. Foreclosure action was instituted and a final order received in May 1956 following which the property was sold for $10,600. The profit on the sale amounted to $4,433.82 after deducting costs of $6,166.18 comprised of the advance of $2,200 on the second mortgage which was foreclosed, less $385 principal payments received at the date of foreclosure, being unrecovered costs of $1,815, a $3,535 first mortgage assumed by the purchaser, $292.35 arrears of principal and interest on the first mortgage paid by the appellants and $523.83 legal costs of foreclosure.

After deducting a reserve for the profit elements in a second mortgage taken back by the appellants in accordance with section 85B(1) of the *Income Tax Act* an amount of $1,754.75 is arrived at as being the net income for taxation purposes. This amount is allocated among the appellants as follows, Jack Blustein, $584.92, Irving Blustein $584.91 and Murray Blustein $584.91, totalling $1,754.74.

The foregoing figures were agreed upon between counsel before trial and constitute a recalculation of the assessments of the appellants' income, the taxability of which is in dispute in these appeals.

The appellants in completing their 1956 income tax returns included the interest received upon mortgages held, but did not include the amounts realized from the two mortgage discounts, profit from the purchase and sale of two mortgages and the profit arising from the sale of the property acquired by foreclosure proceedings which in accordance with the recalculations outlined above are Jack Blustein $1,326.59, Irving Blustein $1,326.58 and Murray Blustein $1,326.57.

The Minister in assessing the appellants added the profits from these sources to the appellants' taxable income to which addition the appellants lodged a Notice of Objection alleging that the profits so received were realization of investments.

After reconsideration the Minister notified the appellants that the profits from the transactions in mortgages were properly taken into account in computing the appellants' income in accordance with the provisions of sections 3 and 4 of the *Income Tax Act* and that the profit from the sale of the property foreclosed upon was also properly included in computing the appellants' income in accordance with sections 3 and 4 and paragraphs (b) and (d) of subsection (1) of section 85B of the Act.

The issue in these appeals is thus a now familiar one, namely, whether the profits realized by the appellants from the transactions into which they had entered were capital

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accretions from investments as claimed, by them, and, therefore not subject to income tax on profits from a business or an adventure in the nature of trade, as found by the Minister, and, therefore, taxable income within the meaning of sections 3 and 4 and section 139(1)(*e*) of the *Income Tax Act*. R.S.C. 1952, c. 148.

Sections 3 and 4 above referred to read as follows:

3. The income of a taxpayer for a taxation year for the purpose 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.

Section 139(1)(*e*) defines business as follows:

(*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 distinction between profits that are subject to income tax and those that are not, together with the test to be applied in determining on which side of the dividing line they fall, was clearly stated in the classical case of *Californian Copper Syndicate (Limited and Reduced) v. Harris*[1] as follows:

It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit 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. 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 realization, 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

[1] (1904) 5 T.C. 159 at 165.

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?

It is well settled that each case must be considered according to its facts. This principle has been stated by the Supreme Court of Canada in many decisions the citations of which are referred to by Thorson P. in *The Minister of National Revenue v. L. W. Spencer.*[1]

On the facts as above outlined herein, I have no hesitation in finding that the profits realized by the appellants were taxable income since I fail to see how the appellants' purchases of mortgages of the kind in question can be considered as investments. They were certainly not ordinary investments of the kind referred to in *Californian Copper Syndicate (Limited and Reduced) v. Harris (supra).* The mortgages were not the kind of securities that a prudent investor would consider. They were attractive to the appellants only because of the high rate of discount at which they could be purchased or the bonuses which were obtainable and the prospect of profit therefrom. All were second mortgages, except two. They were, therefore, very second class securities and highly speculative in nature. These conclusions follow irrebuttably from the evidence of the appellant, Jack Blustein, who admitted the mortgages were in fact a poor risk and that his prime concern was the amount of the discount when advised by the solicitors of their availability for purchase.

In my view the mortgages were purchased or obtained for the purposes of realizing the profits that would result from the discounts or bonuses within the short time the mortgages had to run to their maturity. The attraction to the appellants of these transactions was not the income receivable by way of interest on them, but rather the prospect of profit that would result when the discounts or bonuses were realized.

The appellants cannot avail themselves of an excuse similar to that put forward by the taxpayer in *Cohen v. Minister of National Revenue*[2] that they entered into short

[1] [1961] C.T.C. 109 at 125. [2] [1957] Ex. C.R. 236.

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term mortgages to keep themselves "as liquid as possible" or that it was desirable to do so because of advanced age as was the case of the taxpayer in *Minister of National Revenue v. MacInnes*.[1] In the present case all three appellants were young men and the purchase of short term mortgages is more indicative of a business operation than of an investment for it makes for a more rapid turnover and an increased opportunity for profit-making. I am confirmed in this conclusion by the fact that the appellants from November 21, 1956 (the date of filing of a Declaration of Partnership) maintained a separate bank account under the partnership name of Gary Mortgage Company in which deposits were made of all receipts from the mortgages held by them and with the funds in that account further mortgages were purchased.

In my view the statement in the formal declaration of partnership that the appellants had carried on trade or business as mortgage brokers is conclusive of the fact that such business subsisted since October 2, 1956. However, two of the categories of the transactions the consequences of which are now in issue arose prior to October 2, 1956, namely, the realization of a profit on the discount on the two mortgages acquired in 1955 and which matured in 1956 and the profit upon the sale of property subject to a second mortgage acquired in 1955 which was foreclosed during May 1956.

The only logical inference which can be drawn from the facts recited herein is that the partnership of the appellants subsisted in fact from January 5, 1955 and the declaration of partnership signed and filed by the appellants on November 21, 1956 is an *ex post facto* recognition thereof.

In Hannan and Farnsworth "The Principles of Income Taxation", it is stated on page 177, "The existence of a partnership implies the existence of a business, . . .". While such implication is not conclusive, since a partnership can exist to hold investments, nevertheless, the course of conduct of the appellants from 1949 to 1955 when the three appellants participated in identical transactions with their father as they did on their own behalf from 1955 onward indicates that the transactions were joint ventures for profit rather than joint investments.

[1] [1962] Ex. C.R. 385.

The third category of transaction in issue is the sale at a profit during the first week of December 1956 of two mortgages acquired in the last week of November 1956. These transactions were subsequent to the formal declaration of the appellants that they were engaged in the trade or business of mortgage brokers. In my opinion it is inconceivable and unrealistic to consider these sales at a profit as a realization of investments.

The fact that the appellants did not seek out the mortgages or advertise they were in the market for them, does not make the appellants investors in them. The mortgages were acquired by the appellants on the recommendations of certain solicitors in the manner described and the only times that mortgages so offered for purchase were refused was when the appellants did not have funds available. No investigation was made of the premises which were the subject of security by the appellants until after the mortgages had been acquired and were in default.

To me the circumstances under which all transactions were entered into by the appellants negative any *indicia* that normally characterize an investment.

On the contrary, in my opinion, the number of the transactions, the second class nature of the mortgages and the short period within which the discounts were realized, are indications that the transactions in question were business transactions. There is support for this opinion in *Noak v. Minister of National Revenue*[1] in which case Kerwin J. as he then was said at page 137:

> The number of transactions entered into by the appellant and, in some cases, the proximity of the purchase to the sale of the property indicates that she was carrying on a business and not merely realizing or changing investments.

While this was a decision on whether the appellant in that case was carrying on a "business" within the meaning of the term as used in the *Excess Profits Tax Act*, S. of C. 1940 c. 32, nevertheless the statement is applicable to the facts of the present case.

On the evidence I have no hesitation in finding that the appellants, in the language of Judson J. in delivering the unanimous judgment of the Supreme Court of Canada, in *Minister of National Revenue v. MacInnes*[2] reversing the

[1] [1953] 2 S.C.R. 136. [2] [1963] S.C.R. 229.

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decision of the Exchequer Court, "had engaged in the highly speculative business of purchasing mortgages at a discount and holding them to maturity in order to realize the maximum amount out of the transaction".

Counsel for the appellants particularly emphasized that the profit realized upon the sale of the property which the appellants were forced to foreclose upon was a capital profit and not assessable to income tax since the appellants had no history of trading in real estate and, therefore, the profit did not arise from the conduct of a business.

Since I have found that the present appellants were engaged in a scheme of profit-making, it follows that the sale of a property under the covenant in a mortgage thereon or the instigation of foreclosure proceedings are incidental remedies of that business and any profit arising therefrom is as much a profit in the business as holding the mortgage to maturity and realizing the discount thereon where no foreclosure proceedings were necessary. In highly speculative ventures such as the appellants engaged in, they must be taken to have contemplated that the monies might have to be realized by foreclosure and sale rather than by being collected at maturity.

I find, therefore, that the profits realized by the appellants are income from a business within the meaning of sections 3 and 4 of the Act and are taxable accordingly.

The Minister was, therefore, right in assessing the appellants as he did by adding to their taxable income the profits arising from the discounts on the mortgages, the gain arising from the sale of the foreclosed property and from the resale of two mortgages with the result that the appeals herein must be dismissed and the assessments referred back to the Minister to be adjusted in accordance with the recalculation thereof as outlined herein and as agreed upon by counsel. The figures were agreed upon well before trial so the only dispute was on the principles involved. The Minister is, therefore, entitled to costs to be taxed in the usual way.

Judgment accordingly.

BETWEEN: 1963 Apr. 23 — Jun. 18

SEPT ILES EXPRESS INC. (*Plaintiff*) ..APPELLANT;

AND

CLEMENT TREMBLAY (*Defendant*) ..RESPONDENT.

Shipping—Water carriage of goods Act, R.S.C. 1952, c. 191, Art. IV(5)—"Package or unit"—Responsibility of shipper—Truck transported by respondent's vessel lost overboard—Limitation of liability of carrier—Failure to comply with requirement of Act to declare value of shipment—Appeal from District Judge in Admiralty dismissed.

Appellant sued respondent on a bill of lading to recover the sum of $19,788, the price it paid for a new truck which was lost, while being transported as deck cargo on respondent's vessel, due to high winds and heavy seas causing the truck to break away from its cable fastenings and was washed overboard and never recovered. The bill of lading did not contain a declaration by the appellant of the value of the lost vehicle. The trial judge held that inasmuch as there was a non-valued bill of lading, the damages recoverable from the carrier could not exceed $500 as the defendant was entitled to invoke the immunity or limitation referred to in the *Water Carriage of Goods Act* R.S.C. 1952, c. 291, Art. IV(5).

On appeal to this Court the appellant contended that the word *"unit"* as used in the Act meant a unit of weight or customary freight unit and not the unit actually shipped as contended by respondent.

The appeal was heard on the question of damages only.

Held: That the appeal must be dismissed.

2. That the definition of the word *unit* as contended by respondent is more in keeping with its natural and usual meaning especially as the word formed part of the phrase *Package or Unit.*

3. That the responsibility of seeing that the value of the thing shipped is declared and inserted on the bill of lading is on the shipper.

4. That any consequential hardships due to failure to comply with the requirement of the Act are to be charged against the shipper's own failure to do so.

5. That there was nothing in the evidence to absolve the appellant from the consequence of its omission to cause evaluation of the truck to be inserted in the bill of lading.

APPEAL from the decision of the District Judge in Admiralty for the Quebec Admiralty District.

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

Peter Walsh for appellant.

T. H. Bishop for respondent.

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

KEARNEY J. now (June 18, 1963) delivered the following judgment:

By judgment rendered by the Honourable Mr. Justice Smith of the Admiralty District of Quebec on November 6, 1962, the (Defendant) Respondent was condemned to pay damages to the (Plaintiff) Appellant to the extent of $500, together with interest and costs. The (Plaintiff) Appellant being dissatisfied with the amount of damages thus awarded instituted the present appeal.

At the opening of the case counsel for the parties stated that they had already exchanged written submissions on the matter in issue and made a request, which was granted, to file them in lieu of oral argument.

The (Plaintiff) Appellant (sometimes referred to as "the shipper") sued on a bill of lading (Ex. P[1]) to recover the sum of $19,788, being the price which it paid for a new White Motor Company truck which was lost, on or about January 14, 1959, while being transported from Quebec City to Sept Iles by the (Defendant) Respondent (sometimes referred to as "the carrier"), as deck cargo, aboard carrier's M/V *Savoy*. The evidence shows that when at a point in the St. Lawrence River, about midway between Trinity Bay and Cariboo Islands, the vessel ran into high winds and heavy seas, and the vehicle, which weighed 14,000 lb., broke away from its cable fastenings, was washed overboard and never recovered.

It is not disputed that the respective rights of the parties are governed by the bill of lading the original of which was issued to the shipper or its agent by the vessel and that it did not contain a declaration by the shipper of the value of the lost motor vehicle.

The learned trial judge, after dismissing as unfounded certain defences of non-responsibility which can be ignored since no counter-appeal has been filed, maintained an alternative defence, namely, that since the case concerns a non-valued bill of lading, the damages recoverable from the carrier cannot exceed five hundred dollars as he was entitled to invoke the immunity or limitation referred to in Art. IV(5) of the *Water Carriage of Goods Act* which reads as follows:

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount

exceeding five hundred dollars per package or *unit*, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading (emphasis added).

This declaration if embodied in the bill of lading shall be *prima facie* evidence but shall not be binding or conclusive on the carrier.

The judgment made no comment in respect of a further alternative defence whereby the carrier sought to limit its liability to $38.92 per ton under s. 657(1) of the *Canada Shipping Act*, 1952 R.S.C., c. 29.

The issue in the case is a narrow one and concerns the meaning to be attributed to the word "unit" *supra*. It is submitted on behalf of the appellant that it means a unit of weight, or customary freight unit, and not the unit actually shipped as alleged by the respondent and as found by the learned trial judge.

The reasons given by the learned trial judge for reaching the above-mentioned finding appear at pages 10 and 11 of the said judgment and read as follows:

In the present instance, although the nature of the said cargo was apparent, no declaration of the value of the car was inserted in the Bill of Lading which document does not indicate, and *there is no evidence to show what freight was charged or whether freight was charged at a flat rate or was based on the tonnage of said vehicle*. All that is shown is a description of the cargo and an indication that its weight was 14,000 lbs. (Emphasis added.)

This being the case the question of whether or not the Defendant is entitled to limit his liability in accordance with the provisions above-quoted appears to be settled by the judgment of the Supreme Court of Canada in the case of *Anticosti Shipping Co. v. St-Amand*, [1959] S C R. 372 That case concerned the loss of a truck which was being transported under a contract of carriage by water evidenced by a Bill of Lading which contained no statement of the value of the vehicle. It was held that the said vehicle was a "unit" within the meaning of Art. IV, Par. 5, of the Water Carriage of Goods Act and therefore the carrier's liability for the loss was limited to $500.

Counsel for the appellant submits that the findings underlined in paragraph 1 *supra* were reached because the learned trial judge inadvertently omitted to take into account the evidence of witness Jean-Pierre Simard (pp. 78, 79 and 80 of the transcript) and Exhibits P^4 and P^5 which furnished specific proof that the freight charge amounted to $396.72 and was based in the manner described in the

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plaintiff's statement of claim and referred to at page 4 of the judgment in the following terms:

> . . . It is alleged moreover that freight for carriage of the auto-car was based on a rate of $2.82 per unit of 100 lbs and that the said auto-car weighed 14,000 lbs, so that the limitation of Section 5 of Article IV of the rules contained in the Water Carriage of Goods Act would be $500 as multiplied by 14,000, a total of $70,000.

It is also claimed for the appellant that the *Anticosti* case[1] is not directly in point and, moreover, it is as favourable to the appellant's claim as to that of the respondent.

Counsel for the respondent stressed the fact that the bill of lading itself contained no reference to freight charges, and while conceding that the learned trial judge overlooked the other evidence above-referred to concerning these charges, such oversight in no way affected the validity of his judgment and he was, nonetheless, justified in following the findings in the *Anticosti* case.

I think the definition given by the respondent to the word "unit" is more in keeping with its natural and usual meaning than the one advocated by the appellant, especially since the word forms part of the phrase "package" or "unit". Although it is etymologically possible to give a different generic meaning to the two words, I think there is insufficient law or fact in the circumstances to warrant doing so.

It cannot be disputed that s. 5 of Art. IV was designed for the protection of carriers, and, if the appellant's interpretation of "unit" were accepted, it would, in my opinion, for reasons hereinafter mentioned, serve to defeat the purpose of the legislation and render the immunity or limitation meaningless.

Furthermore, to allow the appellant's omission to make a declaration of value to prevail would not be unlike allowing the shipper to invoke his own omission to penalize the carrier by substituting $70,000 instead of $500 as the latter's limit of liability. Perhaps this word "omission" is not the appropriate term because there is no evidence that the failure of the shipper or its agent to cause a valuation to be inserted in the bill of lading was due to inadvertency. Indeed, if the appellant anticipated that the meaning it now seeks to attribute to the word "unit" would prevail, doubtless it would have been careful to refrain from making any declaration of value.

[1] [1959] S.C.R. 372.

It is well recognized that in fixing freight rates, whether on land or sea, there are more than a dozen factors which are taken into consideration: see Freight Traffic Red Book, 1955, published in the United States. In my opinion, the most important of these are the value, bulk, weight and risk of handling the article. I place value first since it is an ever-present factor which accounts for the rate differential applicable to the carriage of two articles of the same size and weight but where the value of one greatly exceeds the value of the other. But this is not the only reason why great importance is attached by the carrier to the shipper's valuation of the object to be shipped. True, such declared valuation, insofar as the carrier is concerned, is only *prima facie* evidence of the actual value of the article shipped, and is not binding on him, but as I read the Act it is not open to the shipper to claim any damages in excess of the amount of his declared valuation.

Counsel for the shipper pointed out that acceptance of the definition given by the respondent leads to an anomaly in as much as it permits a carrier who, as in the present case, has been found negligent for failure to properly stow a new motor vehicle, which could be readily seen to be worth far more than $500 and for which, as subsequent evidence shows, the shipper had paid approximately $20,000, to argue that his liability be restricted to $500.

In the *Anticosti* case, in the court of first instance the learned trial judge relied on such an anomaly, particularly since the truck in question was not boxed and the carrier could easily see that its value far exceeded $500, and condemned the defendant to pay $4,222. On appeal that reasoning in the Court of Queen's Bench was not accepted by Owen J., but he affirmed the said judgment on other grounds, namely, that no bill of lading (or similar document) existed and that in consequence Art. IV(5) was inapplicable.

It is interesting to note that Owen J., who delivered the said judgment, observed that, in his opinion, the reasons given by the trial judge were untenable. Rand J. in rendering the judgment of the Supreme Court agreed with Owen J. in this latter respect, but found, contrary to the judgment of the Court of Appeal, that a bill of lading had been filled out but mislaid, that Art. IV(5) was applicable

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and that the amount of damages must be limited to $500, and he maintained accordingly the appeal.

It is important to note that the so-called anomaly referred to by counsel for the appellant could have been eliminated and would never have arisen if the shipper had inserted the valuation which he attached to the motor vehicle in question; and if he had inserted its valuation at approximately $20,000, which is a large sum, this would have permitted the carrier to charge more freight or take special precautions in protecting the unit from loss or damage.

Counsel for the shipper pointed out that in the United States the word "unit", as contained in our Act and the corresponding British Act, was replaced with the phrase "customary freight unit". (See Carver—Carriage of Goods by Sea, 9th ed., at pp. 1102 and 1108.) Although it is said that this alteration "would appear to have been made to clarify the meaning of unit rather than change it", I am not satisfied that such is the case.

Mr. Justice Goddard, in the case of *Studebaker Distributors Ltd. v. Charlton Steam Shipping Co. Ltd.*[1] wherein a bill of lading contained a clause by which it was agreed that the value of each "package" did not exceed $250, expressed the opinion that both the terms "package" or "unit", as found in The Hague Rules, referred to an individual piece of cargo, as appears from the following extract found at page 467 of his judgment:

> . . . The goods are expressly stated to be unboxed, and the case was argued before me by both parties, who doubtless want a decision on what are known to be the actual facts, on the footing that the cars were put on board without any covering, or, to state it in another way, just as they came from the works. I confess I do not see how I can hold that there is any package to which the clause can refer "Package" must indicate something packed It is obvious that this clause cannot refer to all cargoes that may be shipped under the bill of lading; for instance, on a shipment of grain it could apply to grain shipped in sacks, but could not, in my opinion, possibly apply to a shipment in bulk *If the shipowners desire that it should refer to any individual piece of cargo, it would not be difficult to use appropriate words, as, for instance, "package or unit", to use the language of The Hague Rules*

The preceding case concerned damage to uncrated automobiles shipped under a bill of lading not subject to Rule IV(5) of the British *Carriage of Goods by Sea Act,* which is similar to the same rule in the Canadian Act and both of which are in conformity with The Hague Rules.

[1] [1938] 1 K B. 459

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In the case of *Pendle and Rivet, Ltd. v. Ellerman Lines, Ltd.*[1], the plaintiff sent shipping instructions to the defendant by a document addressed to the Western Laurence Line, Ltd. in regard to a case of wool and silk the contents of which was stolen in transit. The document stated, *inter alia*, that the value of the goods was £256 8s. 1d. However, when the bill of lading was issued it did not include anything about the value of the goods. Mackinnon J. held that Rule 5 of Art. IV of the British *Carriage of Goods by Sea Act*, and which conforms to The Hague Rules and from which the Canadian Art. IV, Rule 5, was taken, applied and that the amount of damages recoverable was limited to £100.

I made mention earlier of the carrier's other alternative plea of immunity based on s. 657 of the *Canada Shipping Act*. The evidence discloses that during the storm on the voyage in question another vehicle was lost and other automobiles were somewhat damaged. These factors together with the tonnage of the ship would require consideration insofar as the application of s. 657 is concerned, but because I am of the opinion that Art. IV(5) is applicable I do not think it necessary to deal with the aforesaid supplementary defence.

The following is an extract from the judgment in the *Anticosti* case, at page 337:

> The responsibility of seeing that the value of the thing shipped is declared and inserted on the bill is on the shipper and any consequential hardships must be charged against his own failure to respect that requirement.

In my opinion, notwithstanding that the factors in the present case differ from those in the *Anticosti* case to the extent previously indicated, I think the above-mentioned finding is applicable and I propose to follow it.

Regrettable as it may appear for the shipper, I do not consider that there is anything in the evidence before me which absolves it from the consequence of its omission (if omission it was) to cause a valuation of its motor vehicle to be inserted in the bill of lading. On the other hand, notwithstanding the inadvertent mis-statement of fact contained in the judgment *a quo* and the evidence contained in Exhibit P4, I think the respondent is entitled to the

[1] [1927] 33 Comm Cas 70 at 78.

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immunity as found in the judgment of the learned trial judge and, for the above reasons, I would affirm the said judgment and dismiss the appeal with costs.

Judgment accordingly.

Reasons for judgment of A. I. Smith, D.J.A.:—

The plaintiff sues to recover the value of a White Motor Company Auto-car which was lost at sea while being transported on board M/V *Savoy* from Quebec City to Sept Iles on or about January 14, 1959.

It is alleged that the said motor-car was delivered by The White Motor Company of Canada Limited, acting on behalf of plaintiff, to the defendant in good order and condition and was placed on board said vessel for carriage and delivery to Sept Iles in accordance with the terms and conditions of a bill of lading issued by the defendant of January 14, 1959. (Exhibit P.1.)

The plaintiff alleges that it was the owner of the said motorcar in virtue of a Conditional Sale Contract between The White Motor Company and the plaintiff, dated January 12, 1959, and moreover is responsible for the said motorcar in virtue of the said contract and is the consignee of the aforesaid shipment and vested with all right, title and interest in and under the said bill of lading.

It is alleged that in breach of its undertaking and in dereliction of its duty, the defendant failed to deliver the said motorcar, the whole to the prejudice of plaintiff who, as a consequence, has sustained loss and damage representing the value of the said motorcar, amounting to $19,788.00.

By way of defence to plaintiff's action, the defendant admits having received the said motorcar from The White Motor Company, at Quebec City, for carriage to Sept Iles in accordance with the said bill of lading; alleges that it was a condition of said bill of lading that in accepting same the shipper, owner and consignee of the goods and the holder of the bill of lading agreed to be bound by all the stipulations and conditions thereof which were to be read with the provisions of the *Water Carriage of Goods Act*, 1957 R.S.C. ch. 291, which bill of lading with its conditions were accepted by plaintiff.

The defendant alleges that in view of the provisions of the *Water Carriage of Goods Act* and particularly the definition of the term "goods" contained therein, the defendant was free to impose whatever conditions he chose with regard to his liability for loss or damage to cargo carried on deck and that plaintiff's said auto-car was to the knowledge of plaintiff carried on deck and by reason of its size and the size of the vessel could not have been carried otherwise.

The defendant invokes all the provisions of the bill of lading and particularly the so-called condition of non-responsibility for deck cargo which appears therein, in virtue of which it is alleged that the defendant is not liable for the loss of said car.

Under reserve of the foregoing, the defendant invokes the exceptions from liability afforded by the *Water Carriage of Goods Act*.

It is alleged that the M/V *Savoy* was tight, staunch and strong and well and sufficiently manned, provisioned, equipped and furnished with all things needful and necessary and in every way fit and proper to perform the voyage safely and the said cargo was properly ar-

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ranged and in every respect properly stowed on deck . . . the defendant alleges that during the voyage and especially on January 16, 1960, at 1600 hours when the vessel was abeam Trinity Bay, suddenly an easterly wind of hurricane force started blowing, accompanied by extremely rough seas, snow and rain; that the engines of the vessel were put at half speed ahead and course set for Egg Island for shelter. The very rough and heavy weather encountered caused the loss of some deck cargo, including the said auto-car, which was washed overboard, its loss being due to perils of the sea and or force majeure or cas fortuit.

The defendant alleges moreover that in any event and without prejudice to or waiver of the foregoing he is not responsible for the loss of said auto-car by reason of the clause of non-responsibility contained in the bill of lading and again without prejudice to or waiver of the foregoing, the defendant alleges that he is entitled to limit his liability in accordance with the clauses contained in the bill of lading and *Water Carriage of Goods Act* and subsidiarily and without prejudice, the defendant pleads his right to limit his liability in accordance with the provisions of the *Canada Shipping Act*.

By way of reply to defendant's statement of defence, plaintiff prays acte of the defendant's admission that it received the said auto-car at Quebec for carriage to Sept Iles, as well as his admission that said auto-car was lost en route; alleges that the said bill of lading, as well as the *Water Carriage of Goods Act* and *Canada Shipping Act* speak for themselves and otherwise denies the defendant's statement of defence.

Plaintiff alleges moreover that the bill of lading does not contain any statement that the motorcar was to be carried on deck; alleges that the defendant had carried an identical motorcar on the same vessel in January 1959; plaintiff alleges that there is no express statement in the bill of lading that the motorcar was to be carried on deck as is required by Article 1 of the rules relating to bills of lading contained in the schedule of the *Water Carriage of Goods Act* and to the extent that it purports to limit or exclude the liability of the defendant, is contrary to Article (2) of the said rules and is of no force or effect.

The plaintiff alleges also that the defendant is not entitled in any event to raise the defence of "perils of the sea" by reason of its failure to discharge its obligation to properly load, stow and secure cargo in a safe place having regard to the conditions which should have been anticipated. It is alleged moreover that freight for carriage of the auto-car was based on a rate of $282 per unit of 100 lbs. and that the said auto-car weighed 14,000 lbs., so that the limitation of Section 5 of Article IV of the rules contained in the *Water Carriage of Goods Act* would be 500 as multiplied by 14,000, a total of 70,000.

The proof shows that the M/V *Savoy* sailed from Quebec City on or about the 14th of January, 1959 for Sept Iles and that when at a point approximately abeam of Trinity bay, at 1600 hours, on the 16th day of January, she encountered wind and gales of force 4 and heavy seas accompanied by rain and snow. It appears to have been reported to the captain that plaintiff's auto-car, which had been stowed crosswise on the ship's deck over No. 1 hold, was moving backwards and forwards indicating slackness in the cables with which it was secured to the deck and the First Mate and a sailor attempted to tighten these cables. The prevailing conditions however made it difficult and dangerous for them to accomplish this and they were warned by the Master of this danger. Approximately ½ hour later, the plaintiff's auto-car and another truck, which had been stowed alongside of it,

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broke from their moorings and were seen to disappear into the sea.

The first ground of defence raised is that by reason of the so-called non-responsibility clause which is contained in the bill of lading, the defendant cannot be held liable for the loss of the said auto-car This clause reads as follows:—

> Les marchandises couvertes par connaissement peuvent être arrimées sur ou sous le pont à la discrétion du voiturier; et lorsqu'elles sont chargées en pontée elles sont, en vertu de cette disposition, censées être déclarées comme étant ainsi chargées en pontée et cela même si aucune mention spécifique à cet effet n'appert à la face de ce connaissement Relativement aux marchandises chargées en pontée ou déclarées comme étant ainsi chargées à la face de ce connaissement, le voiturier n'assume aucune responsabilité quant aux pertes, avaries ou au retard se produisant en n'importe quel moment et résultant de toutes causes que ce soit, y compris la négligence ou le mauvais état de navigabilité du navire au départ ou à n'importe quel moment du voyage.

Notwithstanding the fact that the bill of lading expressly stipulated that the contract of carriage which it evidences is subject to all of the terms and conditions of the *Water Carriage of Goods Act,* it is submitted on behalf of the defendant that the *Water Carriage of Goods Act,* does not apply in the circumstances of the present case, because the plaintiff's auto-car was not "goods" within the meaning of that term as it is defined in paragraph (*c*) of Article 1 of the *Water Carriage of Goods Act* 1952 R S C c. 291 to wit:

> "goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried;

The defendant takes the position that the said auto-car was not within the meaning of the said definition because it was in fact "cargo which by the said contract of carriage is stated as being carried on deck and is so carried".

In point of fact the contract of carriage, that is the bill of lading which was delivered to the shipper at the time of shipment, does not contain statement that the said cargo was to be carried on deck and there is no proof that the plaintiff was aware that it was to be so carried It is true that what otherwise purports to be a copy of this bill of lading (Exhibit D-2) bears on its face the following inscription in small print apparently imprinted by means of a rubber stamp "chargée en pontée sans aucune responsabilité, perte ou dommage quelle qu'en soit la cause."

Counsel for defendant attempted to get around the difficulty arising from the fact that the bill of lading which was signed by and given to the shipper (Exhibit P.1) bears no such inscription by invoking the statement contained in the non-responsibility clause above-quoted to the effect that if cargo is in fact stowed on deck, it is deemed to be declared to be so stated even though no statement appears on the bill of lading.

This however is a proposition which this court is unable to accept. As above noted, the bill of lading is expressly stated to be subject to the terms, conditions and dispositions of the *Water Carriage of Goods Act* and therefore subject to Article 1, para. C of the rules relating to bills of lading

In the opinion of the undersigned, the bill of lading does not contain a statement that the said auto-car was to be carried on deck and therefore the so-called clause of non-responsibility contained in the bill of lading and above-quoted, insofar as it purports to limit the liability of the defendant, is contrary to Articles 1 and 2 of the said rules and is of no force and effect.

Svenska Traktor Aktiebolaget v. Maritime Agencies (Southampton) Ltd.[1]

Under reserve of the abovementioned defence, it is pleaded that even if the *Water Carriage of Goods Act* is held to apply and the non-responsibility clause in the bill of lading is without effect insofar as it purports to exclude or limit liability on the part of the defendant, the latter nevertheless is not liable for the damages claimed since he is entitled to avail himself of the immunity provided by the *Water Carriage of Goods Act*. These exceptions however can only avail as a defence, if the ship-owner either stowed said cargo on deck with the express agreement of the shipper or in doing so acted in accordance with a clearly established custom.

Scrutton, 15th Edit, p 157:

> The goods are to be loaded in the usual places The shipowner or master will only be authorized to stow goods on deck (1) by a custom binding on the trade, or port of loading, to stow on deck goods of that class on such a voyage; or (2) by express agreement with the shipper, of the particular goods to so stow them;
>
> The effect of stowage not as authorized will be to set aside the exceptions of the charter or bill of lading and to render the shipowner liable under the contract of carriage for damages.

In the present case, although some evidence was brought with a view to establishing the existence of a custom of trade, no such custom was alleged, and, in the opinion of the undersigned, none was proved.

I am unable to find in the evidence proof of a general custom of the trade that cargo of that kind, weight and dimensions was carried on deck in the case of vessels of the size, type and tonnage of the M/V *Savoy* on voyages from Quebec to Sept Iles during the winter months It may well be that some vessels did make it a practice to stow such cargo in this manner without the knowledge or authorization of the shipper and contrary to their obligations under the contract of carriage and it may equally well be that had such cargo been lost or damaged the shipowner would have been liable to the owner of the goods. In any event, since no custom of trade has been allowed no evidence relating to one can be considered.

Therefore, were it not for the first part of the so-called non-responsibility clause above-quoted, the effect of which is to grant liberty to the shipowner to carry on deck, this Court would be obliged to find that the defendant had, by reason of his failure to establish such a custom of trade or to prove any agreement or authorization for such stowage, deprived himself of any protection the exceptions of the *Water Carriage of Goods Act* might otherwise have afforded.

However in view of the liberty to carry on deck which was granted in the bill of lading, the defendant was free to carry the said cargo on deck subject however to his obligation to comply with the requirements of Art III, rule 2 of the *Water Carriage of Goods Act* to properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried." (*Svenska Traktor* case (*supra*))

The burden of proving that the said auto-car had been properly and carefully loaded, handled, stowed, carried, kept and cared for rested upon the defendant

Carvers Carriage of Goods By Sea, 9th Edit, page 185:—

> . if the goods owner proves that the goods shipped have not been delivered, or have been damaged after shipment, the carrier is liable unless he can prove affirmatively (I) that he has taken reasonable care of the goods while they were in his custody; and (II) that the loss or damage falls within one of

[1] [1953] 2 Q B 295

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the immunities specified in Article IV r. 2.

Scrutton, 15th Edit., p. 215;

Svenska Traktor case (*supra*) p. 303;

In the present case the auto-car, a very heavy and bulky vehicle, was stowed crosswise on the deck above hold No. 1 (slightly forward of mid-ship) and was secured to the deck by means of four cables. On the 2nd day after leaving Quebec and while the vessel was proceeding through heavy seas with winds of gale proportion, it was observed that the cables, some at least of which had previously shown signs of slackness, were sufficiently loose to permit the said auto-car forward and backward movement and the Captain ordered the First Mate and sailor to tighten the cables. This however was exceedingly difficult and dangerous to accomplish under the circumstances and it is doubtful if in fact anything effective was done in this connection. About a half-hour later said auto-car and another truck came loose from their moorings and were lost overboard.

In the opinion of the undersigned, the evidence as to the cause of the loss is at least consistent with negligence on the part of the defendant or his servants and the presumption that there was negligence in respect of the loading, handling, stowing, carrying and keeping said cargo has not been rebutted.

Although those in charge of the M/V *Savoy* should have anticipated the possibility that the vessel at that time of the year and in those waters would encounter winds of gale proportion and rough seas, it does not appear that any special attention was given to the stowing and securing of the auto-car. Captain Dery testified that he left these matters to the First Mate although before leaving Quebec he himself inspected the lashings in a general way and found them to be "comme on fait toujours" and "normal".

There is no evidence that the elementary precaution of placing chocks before and behind the wheels of the vehicle was taken and there is evidence to at least suggest that the auto-car was not even left in gear.

From the following excerpt from the testimony of the First Mate it would appear that no particular attention was directed to the lashings with which the auto-car was secured until about half an hour prior to the accident at which time it was impossible to take any effective action owing to the boisterous seas and high winds.

Page 28:

Q. Vérifiez-vous vous-même l'arrimage du vaisseau avant de partir de Québec?

R. Aux alentours d'une demi-heure, avant l'accident, le capitaine m'a envoyé avec un matelôt aller vérifier les «wires» et nous avons fait notre possible, nous avons pris un peu de «slack», comment je disais bien ça? Vous savez, ce que je veux dire et puis là le capitaine nous a lâché un cri en disant «Faites attention à vous autres, la mer est haute, vous allez vous faire emporter» Nous avons fait tout notre possible pour exempter l'accident,

and at p. 47:

Q. Est-ce que vous n'auriez pas pu à ce moment-là renforcer l'arrimage?

R. Non, monsieur, parce que la mer était trop grosse, c'était dangereux de nous faire emporter.

The weather conditions which prevailed at the time and place of the accident were not abnormal for that season and in those waters and the circumstances were such that ordinary care and prudence required that special precautions be taken to stow and secure cargo of the weight, size and description of plaintiff's motor-vehicle, which was being carried on open deck in a manner which exposed it to the full effect of the rolling of the ship and the force of waves breaking on the deck.

The undersigned is forced to conclude that it has not been established that all reasonable care was taken in respect of the loading, stowing and safe-guarding of said auto-car, the loss of which was brought about by the failure of defendant and his servants to comply with Art. III, para. 2 of the *Water Carriage of Goods Act* and that therefore the defendant must be held responsible for the loss of said cargo.

It remains to deal with the question of whether or not the defendant is entitled to limit his liability in virtue of Art. IV, para. 5, of the *Water Carriage of Goods Act*, which reads as follows:

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding five hundred dollars per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

In the present instance, although the nature of the said cargo was apparent, no declaration of the value of the car was inserted in the bill of lading which document does not indicate, and there is no evidence to show that freight was charged or whether freight was charged at a flat rate or was based on the tonnage of said vehicle. All that is shown is a description of the cargo and an indication that its weight was 14,000 lbs.

This being the case the question of whether or not the defendant is entitled to limit his liability in accordance with the provisions above-quoted appears to be settled by the judgment of the Supreme Court of Canada in the case of *Anticosti Shipping Co. v. St. Amand*[1]. That case concerned the loss of a truck which was being transported under a contract of carriage by water evidenced by a bill of lading which contained no statement of the value of the vehicle. It was held that the said vehicle was a "unit" within the meaning of Art. IV, para. 5, of the *Water Carriage of Goods Act* and therefore the carrier's liability for the loss was limited to $500.

In the opinion of the undersigned the defendant in the present case is for the same reason entitled to invoke the limitation of liability afforded by the statute.

CONSIDERING that in the circumstances disclosed by the proof the defendant must be held reponsible for the loss of plaintiff's auto-car, but he is entitled to limit his liability in respect of said loss at the sum of $500.

DOTH MAINTAIN plaintiff's action AND DOTH CONDEMN the defendant to pay to the plaintiff the said sum of $500, with interest and costs.

Judgment accordingly.

[1] [1959] S.C.R. 372.

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May 27
Jul. 22

BETWEEN:

J. K. SMIT & SONS INTERNATIONAL LIMITED .... APPLICANT;

AND

PACKSACK DIAMOND DRILLS LTD. ..RESPONDENT.

Trade Marks—Originating Motion—"Dinky"—"Winkie"—Mark expunged—Mark not used or made known as a Mark in Canada—Diamond drills—Trade Marks Act S. of C. 1952-53, c. 49, ss. 12(1)(b)(c)(d), 16(1), 36, 37, 38(1), 55(1), 56(1)(2)—Objections to motion dismissed.

Applicant moved to expunge the registration on August 24, 1962, of respondent's mark "Dinky" in respect of diamond drills on two grounds (1) that when written or sounded in the English language the word "Dinky" is clearly descriptive of the character or quality of the wares in association with which it is used and its registration is therefore contrary to s 12(1)(*b*) of the *Trade Marks Act,* and (2) that the registration is contrary to s. 12(1)(*d*) of the Act because Dinky is confusing with the applicant's mark "Winkie" registered on February 2, 1962 for use in association with portable diamond drills

Held: That the word "Dinky" used in association with respondent's small portable drills called attention to features which distinguish these drills from larger models having greater capacity and was "clearly descriptive of the character of the wares in association with which it is used" within the meaning of s. 12(1)(*b*) of the Act, and therefore was not registrable.

2 That respondent was not entitled to have the mark registered in respect of diamond drills as a general class because the mark had never been used or made known in Canada as a mark used by respondent for the purpose of distinguishing its diamond drills generally from those of others.

3. That since the entry in the register purported to say that the respondent was entitled to the exclusive use of the mark "Dinky" in respect of diamond drills, which was not in accordance with the facts, the entry as it appeared in the register did not accurately express or define the rights of the respondent and the registration might be expunged on a motion to the Court under s. 56(1) of the *Trade Marks Act.*

4. That the decision of the Registrar under s 36(1) to advertise the respondent's application for registration of "Dinky" was not a decision from which the applicant had the right to appeal and the applicant's failure to appeal therefrom accordingly did not bar its right to move to expunge the respondent's registration.

5. That since the registration was made under s. 38(1) on the basis of no opposition thereto having been filed rather than under s. 38(3) following consideration of an opposition the failure of the applicant to appeal the registrar's decision to register the mark did not bar its right to move to expunge the registration.

MOTION for expungement of trade mark.

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

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

Redmond Quain Jr. for respondent.

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

THURLOW J. now (July 22, 1963) delivered the following judgment:

This is a motion to expunge the registration under the *Trade Marks Act,* S. of C. 1952-53, c. 49 made in the name of the respondent on August 24, 1962 under number 127724 of the mark DINKY in respect to diamond drills. The motion is made on two grounds the first of which is that when written or sounded in the English language the mark DINKY is clearly descriptive of the character or quality of the wares in association with which it is used and its registration is thus contrary to s. 12(1)(*b*) of the Act. The other ground of attack is that the registration is contrary to s. 12(1)(*d*) of the Act because DINKY is confusing with the applicant's mark WINKIE which was registered on February 2, 1962 for use in association with portable diamond drills.

The evidence discloses that the respondent is engaged primarily in the manufacture of portable diamond drilling equipment and that since it introduced the first effective portable diamond drill in 1954 its sales have expanded to the point where in 1962 they amounted to $90,000. What is known as the Packsack "DINKY" Diamond Drill was first publicly advertised in September 1961. It is a prospector's portable diamond drill capable of drilling a $1\frac{1}{8}$ inch hole not more than 15 feet into rock. It weighs 29 pounds and sells for about $200. The applicant's portable drills sold in association with its mark WINKIE weigh 45 pounds, and their minimum price is in the vicinity of $800. Their capacities vary with the size of the particular model, one being rated as being capable of drilling a 3 inch hole to a depth of 40 feet and another $1\frac{1}{4}$ inch hole to a depth of 200 feet. There is no evidenec as to the size, capability or price of other diamond drills made or sold by the respondent or by any other manufacturer or dealer but the affidavits

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and exhibits thereto leave the impression that the word DINKY as used by the respondent is intended to distinguish the small portable prospector's drill having the characteristics I have mentioned from other models of drills. As defined in the Oxford English Dictionary—Supplement and Bibliography Edition, printed in 1933—the adjective "dinky" means neat, trim, dainty and tiny and when used as a substantive as applied to contrivances it connotes those of smaller size than the usual standard. As an adjective the use of the word in this country is not uncommon and when used in association with the respondent's small portable prospector's drill it appears to me to call attention to features which distinguish these drills from larger models having greater capacity and to be "clearly descriptive of the character of the wares in association with which it is used" within the meaning of s. 12(1)(*b*) of the Act. It was therefore not registrable in respect of such drills in the absence of evidence sufficient to satisfy the requirements of s. 12(1)(*c*) that it had been so used in Canada by the respondent or its predecessor in title as to have become distinctive within the meaning of the act at the date of filing of the application for its registration. Moreover, under s. 16(1) an applicant for registration who has used a registrable trade mark in Canada or made it known in Canada is entitled to secure its registration only in respect of the wares in association with which he has used it or made it known and since the respondent's application was based entirely on its use of the mark and the affidavit of Reginald J. Minogue, which was filed on behalf of the respondent, indicates that such use has been entirely in association with the small portable prospector's drill of which the mark is in my opinion clearly descriptive, the use so made of the mark would not entitle the respondent to registration of it in respect of other diamond drills of which it may not be descriptive. The respondent therefore in my opinion was not entitled to have the mark registered either in respect of diamond drills of the kind in respect of which it had in fact been used because it was clearly descriptive of their character nor was the respondent entitled to have it registered in respect of diamond drills as a general class because the mark had never been used or made known in Canada as a mark used by the respondent for the purpose of distinguishing its diamond drills generally from those of others. It follows that the trade mark was not registrable, that the respondent was not entitled to the registration which it secured and that the registration ought to be expunged.

In view of his conclusion, it is unnecessary to deal with the second ground on which the present motion was made but several objections which were advanced on behalf of the respondent with respect to the right of the applicant to bring this motion remain to be considered.

The first of these was that though the Court has jurisdiction under s. 21(*b*) of the *Exchequer Court Act* to expunge a trade mark on any adequate ground in proceedings commenced by a statement of claim, the jurisdiction of the Court to strike out or amend the registration of a trade mark on an originating motion such as this, arises under s. 56(1) of the *Trade Marks Act* and may be exercised only on the ground therein mentioned, i.e., that at the date of the application to the Court "the entry as it appears on the register does not accurately express or define the existing rights of the person appearing to be the registered owner of the mark", and that this provision for striking out or amending registrations cannot apply where as in this case the entry in the register contains no expression or definition of the rights of the respondent.

The registration in fact consists simply of the following:

"Application No. 267108	Registration No. 127724
Filing Date: Jan. 19, 1962	Registration Date: Aug. 24, 1962
Registrant:	PACKSACK DIAMOND DRILLS LIMITED 1385 Hammond Street North Bay, Ontario
Used in Canada since	October 1, 1961
Wares:	Diamond drills.
Trade Mark:	DINKY"

In my opinion this entry purports to say that the mark DINKY is a trade mark in respect of diamond drills and that it was registered in the name of the respondent on August 24, 1952, and having regard to the nature of the book or record in which the entry is made its purport in my opinion is that the respondent, being the person in whose name the mark is registered, is entitled to the exclusive rights provided by the statue to use the mark DINKY as

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its trade mark in association with diamond drills. Such an entry does not in my opinion accurately express or define the existing rights of the person appearing to be the registered owner of the mark when as in this case the person appearing to be the registered owner was not entitled to have the mark registered as his trade mark in respect of the wares referred to in the entry. While the grounds of attack on the registration as set out in the notice of motion do not repeat the wording of s. 52(1) they amount in my opinion to statements of particular reasons why the registration does not accurately express the existing rights of the respondent and are I think sufficient for the purposes of such a motion. The respondent's objection to the motion on this ground accordingly fails.

The remaining objections taken by the respondent were based on s. 56(2) of the *Trade Marks Act* which provides that "no person is entitled to institute under this section any proceeding calling into question any decision of the Registrar of which such person had express notice and from which he had a right of appeal." By s. 55(1) an appeal lies to this Court from any decision of the Registrar under the Act within two months from the date upon which notice of the decision was despatched by the Registrar or within such further time as the Court may allow. The respondent contended that there were two decisions of the Registrar of which the present applicant had express notice in connection with the respondent's application for registration of its mark and from which the applicant had the right to appeal and that contrary to s. 56(2) the applicant by this proceeding is calling these decisions into question. It appears that on or about June 6, 1962 the Registrar having considered the respondent's application for registration of DINKY came to the conclusion that it should be advertised in accordance with s. 36(1) and on July 16, 1962 he notified the present applicant pursuant to s. 36(3) that the application would be advertised in the Trade Marks Journal on July 18, 1962 and referred to the rules of procedure relating to oppositions. This the respondent now contends was a decision on the part of the Registrar from which the applicant had a right to appeal.

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Section 36 of the Act provides as follows:

36. (1) The Registrar shall refuse an application for the registration of a trade mark if he is satisfied that

(*a*) the application does not comply with the requirements of section 29;

(*b*) the trade mark is not registrable; or

(*c*) the applicant is not the person entitled to registration of the trade mark because it is confusing with another trade mark for the registration of which an application is pending,

and where the Registrar is not so satisfied, he shall cause the application to be advertised in the manner prescribed.

(2) The Registrar shall not refuse any application without first notifying the applicant of his objections thereto and his reasons for such objections, and giving the applicant adequate opportunity to answer such objections.

(3) Where the Registrar, by reason of a registered trade mark, is in doubt whether the trade mark claimed in the application is registrable, he shall, by registered letter, notify the owner of the registered trade mark of the advertisement of the application.

By s. 38(1) it is further provided that:

38. (1) When an application either has not been opposed and the time for the filing of a statement of opposition has expired or it has been opposed and the opposition has been decided finally in favour of the applicant, the Registrar thereupon shall allow it.

In my opinion the action taken by the Registrar in determining to advertise an application amounts at the most to an act somewhat in the nature of an order *nisi* since its effect, in view of s. 38(1), appears to be to put the matter in a position where the Registrar will no longer have authority to refuse the application if no opposition is filed within the time limited therefor by the statute. Any matters on which he had provisionally reached a conclusion, as well as some others, may, however, be put in issue by any opponent who may come forward in which case it becomes the Registrar's duty, after following the procedure provided by the Act, to reach a decision and to notify the opponents accordingly. When determining to advertise, however, the Registrar does not in my opinion decide anything adversely to the interest of anyone who may wish to oppose the registration. Such persons at that stage are not parties to the application and have no status in connection with the proceeding. No possible ground of opposition is concluded against them and in my opinion they have no right to appeal against a determination by the Registrar to advertise the application whether they have express notice of it

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under s. 36(2) or not. The respondent's objection on this point is therefore unfounded.

The other action of the Registrar's relied on by the respondent as a decision from which the applicant had a right of appeal was his allowance of registration of the respondent's mark. It was said that here there were really two decisions the first being a decision that the applicant's opposition would not be recognized because it was too late and was not accompanied by the required fee and the second being a decision to allow the registration.

To explain these points it is necessary to relate some further facts. The respondent's application having been advertised on July 18, 1962 the last day for filing an opposition was August 18, 1962. On August 17, applicant's agent in Toronto sent to the Registrar a notice of opposition which reached its destination the following day but was not accompanied by the fee of $10 prescribed by the Trade Marks Rules. A cheque for $10 had in fact been enclosed but that had been appropriated by the sender to the payment of the fees on filing two trade mark assignments which were also enclosed in the envelope. On September 5, 1962 the Registrar wrote to the applicant stating *inter alia* that the opposition had been received but was not accompanied by the prescribed fee and that the respondent's application had been allowed on August 21, 1962 and the mark registered on August 24, 1962 and that since the applicant had not met the requirements of s. 37(1) of the Act the actions so taken were in accordance with s. 38(1) of the Act. It would seem from the Registrar's letter that the statement of opposition had not in fact come to his attention prior to his allowing the registration for he refers to the document as having been received on August 21, 1962 and not noted amongst the assignment documents which accompanied it until August 31. The office stamp on the document however indicates that it was in fact received on the 18th.

Section 37(1) provides that:

37. (1) Within one month from the advertisement of an application, any person may, upon payment of the prescribed fee, file a statement of opposition with the Registrar.

Subsection (2) defines the grounds on which an application may be opposed and s-s. (3) prescribes the information to be set out in a statement of opposition. The procedure subsequent to the filing of a statement of opposition is provided for as follows in s-ss. (4) to (8):

(4) If the Registrar considers that the opposition does not raise a substantial issue for decision, he shall reject it and shall give notice of his decision to the opponent.

(5) If the Registrar considers that the opposition raises a substantial issue for decision, he shall forward a copy of the statement of opposition to the applicant.

(6) Within the prescribed time after a statement of opposition has been forwarded to him, the applicant may file a counter statement with the Registrar and serve a copy upon the opponent in the manner prescribed, and if he does not file and serve a counter statement within the prescribed time he shall be deemed to have abandoned his application.

(7) Both the opponent and the applicant shall be given an opportunity, in the manner prescribed, to submit the evidence upon which they rely and to be heard by the Registrar if they so desire.

(8) After hearing the parties, if so required, and considering the evidence, the Registrar shall refuse the application or reject the opposition and notify the parties of his decision and his reasons therefor.

Having regard to these provisions it is clear that whether or not the applicant's statement of opposition to the respondent's application was validly filed, the application was not allowed following due consideration of and rejection of the opposition in accordance with the procedure prescribed by s. 37 but was in fact allowed pursuant to s. 38(1) on the basis of no opposition having been filed. I incline to the view that this was the correct way for the Registrar to deal with the matter for under s. 37(1) a statement of opposition may only be filed "on payment of the prescribed fee." But even if the statement was validly filed the registration which the respondent has obtained is plainly based on the provision of s. 38(1) applicable to a situation in which no opposition has been filed and I do not think the respondent who seeks to uphold the Registrar's action can be heard to support the registration as one allowed following the rejection of the opposition under s. 37(8). The applicant on the other hand is I think in a position, even if the statement of opposition was validly filed, to accept and abide by the Registrar's treatment of it as having been not validly filed. The position must accordingly in my opinion be treated as one in which the Registrar allowed an application which under s. 38(1) he no longer had authority to refuse because it was unopposed and the time for filing an opposition had expired.

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Now in the present proceeding the applicant in my opinion is not calling into question the action—or decision, if it can be so called—of the Registrar in treating its statement of opposition as having been invalidly, and thus ineffectively, filed for there is nothing in the bringing of the motion which is inconsistent with the Registrar's action having been properly taken and nowhere in the proceeding is that action attacked or challenged. And since the respondent's application was allowed on the basis that it was not opposed the proceeding by which registration was secured was in my opinion one to which the applicant never became a party and therefore never became entitled to notice of the action taken by the Registrar on it or to appeal therefrom. This I think disposes of the respondent's objection.

The motion will accordingly be allowed with costs and an order will go striking out the whole of the entry in question.

Order accordingly.

1962

Nov. 19, 20

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Sept. 5

BETWEEN:

DORWIN SHOPPING CENTER LIMITED .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income tax—Income or capital gain—Sale of newly constructed shopping centre—Income Tax Act, R S C. 1952, c. 148, ss. 3, 4, 85B and 139(1)(e).

In 1954, Eastern Construction Limited, a company owned and controlled by the Odette family of Windsor, Ontario, built a supermarket for Dominion Stores Limited on a 36 acre parcel of land owned by Dominion Stores Limited in Sandwich West Township, near the City of Windsor The store and adjoining parking lot occupied about 4 acres Late in 1954, Dominion Stores Limited offered to sell the surplus 32 acres to the Odette family for the purpose of erecting a shopping centre thereon. The Odettes caused extensive surveys and studies to be made by shopping centre specialists, architects, etc. to determine the probability of success of a $1,000,000 shopping centre on this site. Upon receipt of favourable reports and an oral assurance from the president of Detroit Mortgage and Realty Company that the required $800,000 mortgage financing was available, the Odettes accepted the offer, Eastern Construction Limited being the purchaser. The deed conveying title to Eastern Construction Limited was dated April 29, 1955.

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Appellant company was incorporated in May 1955, for the purpose of acquiring the said land and constructing and operating a shopping centre thereon. It was owned and controlled by the Odette family. The first wing of the proposed shopping centre was completed by Eastern Construction Limited in May 1956. The evidence was that the buildings and services were overbuilt, i e were above the minimum required standards. During construction, in August 1955, Detroit Mortgage and Realty Company withdrew its mortgage commitment. The appellant launched a drive for tenants and was comparatively successful It also made vigorous but unsuccessful attempts to attract a large department store to the centre. Shortly after the withdrawal of Detroit Mortgage and Realty Company, the appellant came in need of funds. Efforts were made to borrow on mortgage from several insurance companies both in Canada and the U S A, but without success. These activities of the appellant took place during the period from September 1955 to March 1956 and it was during this period that the appellant rejected several offers to purchase the shopping centre Finally, in April 1956 when appellant had reached the limit of its financial resources, was without funds to pay sub-contractors and had been unable to gain access to additional funds, it contracted to sell the centre to Principal Investments Limited. On the sale, the appellant realized a profit of $424,035 23, which the Minister of National Revenue assessed as income in the hands of the appellant.

Held: That appellant was not in the business of dealing in real estate nor was it engaged in an adventure or concern in the nature of trade.

2. That when appellant acquired the land and constructed the shopping centre it did not intend to turn it to account by resale, although it was eventually compelled to do so, but rather to create a capital asset from which to realize rental income.

3 That appellant created a capital asset which it disposed of at a profit, which was not income within the meaning of sections 3, 4 and 139(1)(*e*) of the *Income Tax Act*.

4. That the appeal is allowed.

APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Cattanach at Windsor.

Keith Laird, Q.C. for appellant.

F. J. Dubrule and *E. E. Campbell* for respondent.

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

CATTANACH J. now (September 5, 1963) delivered the following judgment:

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Cattanach J.

This is an appeal against the appellant's income tax assessments for the taxation years 1957 and 1958, whereby the Minister added the sums of $222,619.33 and $7,606.47 as the estimated profit element on the sale of a shopping centre, known as Dorwin Shopping Center, in the respective taxation years.

The appellant, by notices of objection dated September 23, 1959 lodged its objection against the assessments contending that a profit of $424,035.23 on the sale of the shopping centre was the capital accretion from an investment.

After reconsideration, the Minister by notification dated March 1, 1960 advised the appellant that he confirmed the assessments as being in accordance with the provisions of the *Income Tax Act,* R.S.C. 1952 c. 148 and particularly on the ground that the profit on the sale of the shopping centre had been properly taken into account in computing the appellant's income in accordance with the provisions of sections 3, 4, 85B and 139(1)(*e*) of the Act. It is against these assessments that the appellant brings its appeal to this Court.

The issue in the appeal is thus, a narrow one, namely, whether the profit accruing to the appellant in its taxation years 1957 and 1958 was income from a business, including therein, by virtue of section 139(1)(*e*) of the Act, an adventure or concern in the nature of trade.

There is no dispute as to the accuracy of the foregoing figures nor upon the facts, but the dispute lies in the proper deduction to be drawn from the facts.

In 1954 Dominion Stores Limited, (hereinafter called Dominion) a company operating an extensive chain of food markets, built a super food market on a site at the intersection of Dougall Avenue and Eugenie Street in Sandwich West Township just outside the city limits of Windsor, Ontario. The site had a frontage of 1840 feet on Dougall Avenue, a principal thoroughfare leading into the city of Windsor and contained approximately 36 acres, the entire area being owned by Dominion. The building and parking space contiguous thereto constructed by Dominion occupied approximately 4 acres leaving an unoccupied area of 32 acres.

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The general contractor for the erection of this building for Dominion was Eastern Construction Limited (hereinafter referred to as Eastern) a company owned and controlled by the Odette family, a family long prominent in the business and social life of the Windsor community. Eastern was engaged in the business of a general contractor, that is the company built on behalf of others and did not engage in speculative building although the company did build and own an office building for its own use, the ownership of which building was subsequently transferred to another company.

On completion of the Dominion store building one of the Odettes made a proposal to Dominion to purchase the store building and lease it back to Dominion. This proposal was briefly considered and rejected by Dominion because the proposed rental was less advantageous than that obtained by Dominion in a subsequent similar arrangement with another party.

However, Dominion countered with a proposal that the surplus land owned by it should be sold to the Odettes for the purpose of erecting thereon a shopping centre of which the Dominion food market would be a component part. This suggestion was made by the officers of Dominion on December 6, 1954. The Odettes interested in this proposal were T. C. Odette, a lawyer, his cousins L. L. Odette Jr. and E. G. Odette, and L. L. Odette his uncle, all of whom were shareholders and directors of Eastern.

At this time the development of shopping centres in Canada was not extensive but resort for information was had by the Odettes to the United States experience where the impetus to this type of merchandising was achieving major proportions.

They were impressed by the possibilities and projected a million dollar centre financed by a $200,000 personal advance and an $800,000 mortgage which they concluded would be self-liquidating in twenty years and yield an annual return of 19%.

The project was discussed with a firm of Detroit architects who recommended a firm of research specialists in this field, as well as Detroit Mortgage and Realty Company, as also having a wide experience and a record of successful participation in projects of this kind.

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The research specialists, Real Estate Research Corporation of Chicago, Illinois, was engaged and conducted a survey of the area. The results of this survey were embodied in a written report dated March 1, 1955, although frequent verbal reports were made by the investigators before completion of the written report which was introduced in evidence as Exhibit 1. It was concluded by the investigators so engaged that the site met all of the physical and locational requirements of an effective retail district and that a modern centre of 244,950 square feet of net sales area in enclosed space, built at this location, would have gross annual business volume of $20,293,000. This volume estimate was based on the assumption that the centre would attract a major department store tenant not previously represented in Windsor by a full sized retail store.

It was estimated that in the primary shoppers' goods category alone there was a market for 156,950 sq. ft. of net sales area which would gross $10,608,000 annually and in convenience goods categories alone there was a market for 36,000 sq. ft. of net sales area grossing an annual volume of $6,033,000. It was also estimated that a department store of the type envisaged would gross an annual volume of business of $5,077,000 and would require approximately 77,000 sq. ft. of sales area.

A local realtor was also engaged by the Odettes to make a survey of the downtown business section of Windsor and other sections to find the actual rents paid for stores of all types who made a report dated February 21, 1955, filed in evidence as Exhibit 2.

Discussions were initiated with Mr. Peas, the president of Detroit Mortgage and Realty Company (hereinafter referred to as Detroit Mortgage) who verbally assured the Odettes that financing by way of an $800,000 mortgage would be readily forthcoming. In addition to being the financial agents of the proposed shopping centre, Detroit Mortgage was also to act as leasing agent and there was also the possibility of Detroit Mortgage buying shares in a company to be incorporated for the purpose of owning and operating the shopping centre.

Based upon the optimistic and favourable report of the research specialists engaged, the information as to prevailing rental rates, the oral assurance of the president of

Detroit Mortgage that mortgage financing would be available, coupled with their own appraisal of the possibilities and the encouragement of Dominion, the Odettes decided to undertake the project. Accordingly, L. L. Odette Jr. and E. G. Odette in the respective capacities of Secretary Treasurer and Vice President of Eastern Construction Limited as purchaser, executed an offer to purchase the surplus 32 acres owned by Dominion, the vendor, for a purchase price of $127,304; $10,000 of which price was deposited on the execution of the offer and the balance of $117,304 was paid on the closing date of March 31, 1955. The offer was made and accepted subject to conditions summarized as follows; (1) that the property would be developed solely as a regional shopping centre in such a manner as to include the building erected by Dominion as an integral part thereof; (2) that the purchaser covenanted (such covenant to run with the land) for a period of 25 years not to erect or permit to be erected any building for the purpose of carrying on any business which would conflict or compete with the business carried on by Dominion, (3) that the general layout and minimum size of the shopping centre should be subject to the approval of Dominion, and (4) that the purchaser should commence actual construction of the initial phase of the shopping centre within 10 months from the date of the conveyance of the land and in the event of construction not being so commenced the purchaser was obligated to offer the land purchased for repurchase by the vendor at the same price as was paid therefor. The vendor was given forty days within which to accept or reject the offer and if the offer to repurchase was not accepted within that time, then the purchaser could deal with the property as it deemed fit subject to the restrictions laid down. There were other restrictions included in the offer which I have not included in the foregoing summary because they have no bearing on the issue involved in this appeal.

The offer was executed by Eastern Construction Limited through its signing officers as above described on March 15, 1955 and was accepted by Dominion Stores Limited also on March 15, 1955 although the date of the acceptance by Dominion Stores Limited was inserted in error in the instrument as being February 15, 1955.

By deed dated April 29, 1955 Dominion Stores Limited conveyed title in the lands in question to Eastern Construc-

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tion Limited subject to the restrictive covenant prohibiting competition with Dominion.

The offer to purchase was executed by Eastern Construction Limited and the land was conveyed to Eastern by Dominion because Dorwin Shopping Center Limited, the appellant herein had not been incorporated at that time, although the corporate name had been reserved with the provincial incorporating authority.

Letters Patent dated May 9, 1955 issued pursuant to the laws of the Province of Ontario incorporating the appellant under the corporate name of Dorwin Shopping Center Limited with an authorized capital divided into 100,000 preference shares of the par value of $10 each and 300,000 common shares without nominal or par value which might be issued for a consideration not to exceed in amount or value the sum of $300,000. The head office of the Company was fixed as being in the Township of Sandwich West and the objects for which incorporation was obtained read in part as follows, "to acquire by purchase, exchange, concession or otherwise lands and premises" and here is inserted the precise description of the lands conveyed by Dominion to Eastern, "and to develop thereon a shopping centre and, without limiting the generality of the foregoing, for that purpose to lay out parking areas and to erect stores, shops, offices, restaurants and buildings of every description and to own, operate and maintain the same and to rent, lease, mortgage or otherwise charge or encumber the same or any part thereof."

The appellant was forthwith organized and shares in the capital stock were allotted and issued to the extent of $76,150, of which amount $60,000 was in preference shares of the par value of $10 each. L. L. Odette, E. G. Odette and L. L. Odette Jr. each subscribed and paid for 2,000 preference shares. The 161,500 common shares without nominal or par value were subscribed for and issued at 10¢ per share of which 126,020 were subscribed and paid for by the Odettes and members of their family, E. G. and L. L. Odette Jr. each subscribing for 45,000 common shares, L. L. Odette, 20,000 common and T. C. Odette 5,000 common. The balance of 11,020 common shares was acquired by the members of their families. A further balance of 35,480 common shares were issued to other persons closely associated with the Odettes.

The cash received in the treasury of the appellant was $75,400, made up of $60,000 for the preferred shares, $15,400 for the common shares and $750 was unpaid on 7,500 common shares subscribed for.

By deed dated July 26, 1955 the land which had been conveyed from Dominion to Eastern by deed dated April 29, 1955 was in turn conveyed by Eastern to the appellant. Neither of these deeds was registered in the Registry Office for the County of Essex until March 16, 1956. This delay was explained by the circumstance that both Eastern and the appellant had the utmost confidence in the business integrity of Dominion and further that the Odettes did not wish to disclose they were the principals in the shopping centre because of a bitter controversy in the City of Windsor concerning night shopping from which the Odettes wished to remain aloof and speculators, real estate agents and potential rivals could identify the principals in the centre by a search of the registry records.

The shopping centre in its ultimate development was to consist of three wings, Wing A, the initial phase was to be built immediately adjacent to the existing Dominion store building with a frontage of approximately 600 ft. Wing B was to be the department store with a frontage of approximately 200 ft. in the centre of the development and the third phase, Wing C was to be similar in size and structure to Wing A and on the other side of the department store, Wing B. There was also in contemplation the possibility of constructing at some future time a high rise office building beyond the third wing.

A formal agreement was entered into between Eastern and the appellant on June 8, 1955 whereby Eastern undertook to construct Wing A of the shopping centre for the appellant for the compensation of cost plus $3\frac{1}{2}$ percent thereon.

However, prior to the incorporation of the appellant and the execution of the construction agreement between the appellant and Eastern, construction had already been begun by Eastern, which is understandable because the Odettes comprised the directorates of both Eastern and the appellant as well as owning all the shares in Eastern and an overwhelming majority of the shares of the appellant. A sub-contractor of Eastern began clearing the site of trees

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and a small cement block structure as well as filling and levelling during the latter part of April 1955.

On June 1, 1955 Eastern had placed an order for the bricks to be used and the Municipality of West Sandwich had begun the construction of a drainage sewer to serve the proposed parking area pursuant to an arrangement negotiated by Eastern.

Excavation for the building was begun during the first part of July 1955.

The form work was on the site on August 10, 1955 and the first concrete was poured on August 19, 1955. Also during the month of August the sub-contractor for paving was engaged in filling and laying asphalt on the parking area.

On August 18, 1955 the electrical sub-contractor began the installation and erection of lighting standards for the parking area. August was an extremely busy month.

The work order for the structural steel had been placed on September 19, 1955 and the steel was erected on October 20, 1955. The order for the steel roof deck had been placed on September 1, 1955 and its installation began on November 10, 1955.

Before the end of January 1956 the shell of the building was completed, that is the walls and roof excepting the front.

An outside canopy was erected in January of 1956. The final completion of the interior could not be undertaken until the requirements of the tenants were known.

The formal opening of the building took place on June 1, 1956. The tenants by the terms of their leases were entitled to four to six weeks notice of the premises being ready for occupancy. Accordingly it follows that for all practical purposes the building was completed on May 1, 1956.

Exceptional quality was built into the structure and novel features were incorporated. The Dominion store building was serviced by a septic tank installed at a cost of $6,000. While it was possible to service Wing A of the shopping centre with a septic tank, nevertheless, a sewage disposal plant, sufficient to service the needs of the proposed department store and Wing C, was installed at a cost of $35,000.

The drainage sewers for the run-off from the parking area were over built by the Municipality at the insistence of the appellant, the cost of which would be borne by the appellant by way of increased taxes. Similarly the lighting capacity for the parking area was over built by 30 percent.

Structural steel was used throughout the building to permit easier variation in store sizes to suit the needs of tenants.

The suggestions of insurance brokers were invited and adopted so as to render each store fireproof with the result that the lowest of insurance rates was obtained.

The front of the building was raised to accommodate store signs with a consequent increase in building costs.

A 12 foot outside canopy was constructed in a manner to permit its eventual enclosure with heating and air conditioning in the appropriate seasons.

The parking area was constructed with an 8 inch compact fill and a two inch surface rather than with the usual four inch compact fill and lesser thickness of surface. All such features were designed to lower maintenance costs and for the increased convenience of tenants and patrons.

The estimated building cost of Wing A was $1,000,000 and the actual building cost coincided with that estimate.

A calculation based upon the estimated rental income less maintenance costs allowing for a mortgage of $800,000 at 5½ percent and a personal outlay of $200,000 resulted in an estimated yield of 19 percent. A similar calculation based on a mortgage of $700,000 and a personal outlay resulted in an approximate yield of 13 percent.

The method of financing contemplated by the appellant was by way of a first mortgage of $800,000 and a $200,000 outlay by it.

The appellant, through the Odettes who became directors of and shareholders in the appellant, was orally assured by the president of Detroit Mortgage that $800,000 secured by a mortgage would be available, which assurance was made prior to the project being embarked upon.

However, no firm written commitment was given the appellant. It is not the practice in the trade to give a written mortgage commitment until the construction of the building is well advanced and a substantial portion of the building has been leased to responsible tenants.

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Accordingly interim financing was essential which was undertaken by Eastern and in part from the resources of the appellant.

Funds for interim financing came from the following sources, $75,400 from the share capital of the appellant and $125,652.06 from shareholders as loans to the appellant, a personal loan to Eastern in the amount of $80,000 by L. L. Odette Jr. and E. G. Odette which they, in turn, had obtained from their bank, a tender loan of $44,500 Eastern had obtained from its bank which had not been heretofore required or taken, and a bank overdraft carried by Eastern in the amount of $193,000.

Prior to this time Eastern had never operated on a bank overdraft but had always sufficient cash available to discharge its business obligations and to cover any tender made by it. In addition the appellant borrowed $100,000 from its bank on the security of a promissory note. I total the foregoing amounts to a rounded figure of $518,500.

The mortgage monies, when and if received, would be used to discharge these obligations, as well as unpaid construction costs incurred, with the exception of $75,400 from the share capital of the appellant and the possible exception of the shareholders' loans to the appellant in the amount of $125,652.06. It was left to a future decision whether such shareholders' loans would be taken up by a further issue of shares from the treasury of the appellant or repaid in cash if mortgage funds were available for that purpose.

Meanwhile commitments for the costs of construction were incurred and assumed by Eastern. A monthly schedule thereof was filed in evidence as Exhibit 8. The costs incurred at the material dates of August 1955 and April 1956 were shown therein as $211,442.92 and $719,436.82 respectively. However, these amounts do not include the cost of verbal work and purchase orders but only those actual orders received. In many instances a verbal order would be placed for materials and the written order would not be given until some time later. Therefore, the schedule (Exhibit 8) does not reflect the cost of verbal orders placed in each month and the commitments in each month might well be and usually were greater than the amounts shown therein.

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While construction was proceeding, negotiations were being conducted with prospective tenants. Mr. Peas, the president of Detroit Mortgage made several trips into Ontario to secure tenants and consulted well and favourably known retail merchants. His activities came to the notice of the provincial official in charge of the supervision of real estate and business brokers who advised Detroit Mortgage by letter dated July 25, 1955 that it could not qualify to act as a leasing agent in Ontario and was therefore precluded from doing so. However, Detroit Mortgage continued to act as leasing agent in the State of Michigan and the remaining States. Shortly after Detroit Mortgage was advised of its incapacity to act as leasing agent in Ontario, the time being fixed by witnesses as the middle of August 1955, Detroit Mortgage withdrew entirely from the project in all capacities so that mortgage money was not forthcoming from that source. At this time the construction of the centre was well advanced.

The officers of the appellant themselves began a vigorous campaign to obtain tenants which was comparatively successful. A letter of intent was received from S. S. Kresge Company, a variety store, and from Cunningham Drugs, a company which operated a large chain of drug stores in the United States and contemplated extending its operations into Canada. Because of the proximity of Windsor to the City of Detroit, this drug chain was extremely well known in the Windsor area. Further it was a condition of the S. S. Kresge Company lease that the centre should contain a drug store. On March 21, 1956 Cunningham Drugs advised the appellant it would not lease premises in the centre. However, the appellant was successful in leasing premises to another drug store chain.

The first three tenants were obtained in November of 1955. As at April 27, 1956 the centre was leased to the extent of over 60 percent but not exceeding 70 percent.

On November 1, 1956 the centre was leased to the extent of 75 percent. It had been a further condition of the S. S. Kresge Company lease that the centre should be leased to the extent of 80 percent but this condition was foregone at the request of the appellant.

The recommendations and conclusions of the research specialist engaged and as embodied in its report, Exhibit I,

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dated March 1, 1955 were predicated upon the assumption that the centre would contain a major department store, which the location and population would justify, and upon which assumption its estimate of business volume was based.

The officers of the appellant recognized that the presence of a major department store in the centre would be of great advantage, but not necessarily an essential feature. It was their opinion that the Dominion food market, as an integral part of the centre, the presence of the S. S. Kresge variety store, and the chain drug store, together with the remaining desirable tenants obtained, would ensure the success of a neighbourhood shopping centre. Nevertheless, they were fully conscious that a department store would render the centre much more attractive and profitable, for which reason efforts were made to induce such a store to locate in the centre.

There were overtures made by the appellant to such well known department stores as Eatons, Morgans, Woodwards, Simpsons-Sears and Great Universal Stores of England. Eatons and Morgans indicated some interest with a rental based upon a percentage of sales with no minimum provided. An arrangement of this nature was not acceptable to lenders as security for a loan.

The appellant also offered a gift of four acres of land to the department stores mentioned to induce them to erect a building and establish a store in the centre. None of the stores so approached accepted the appellant's offer.

The appellant resorted to other means to raise money and obtain a department store for the centre. A letter dated October 14, 1955, Exhibit 13, was written to John Penturn & Son Limited, realtors of Toronto, Ontario offering to sell land for an office building as well as for a department store. A letter dated October 20, 1955, Exhibit 15, was written to R. B. Slaven of Tower Investment Corp., Ltd. also of Toronto, Ontario, making a similar offer. Neither of such letters produced any result.

Within a short time from August 1955 when Detroit Mortgage withdrew its support of the project, the appellant came in need of further funds. Eastern had committed itself to construction costs in the excess of $200,000 and had exhausted its bank credit. Therefore it became of paramount importance to obtain a mortgage loan.

The appellant then began to make applications to the outstanding lenders of mortgage monies. In September 1955 the appellant wrote to New York Life, in December 1955 to Prudential Life, on January 3, 1956 to Canada Life, on February 22, 1956 to Metropolitan Life, on March 28, 1956 to London Life, on March 29, 1956 to Great West Life, all of which, after consideration, declined to advance monies to the appellant on security of a first mortgage.

The appellant's most promising effort was an application to Massachusetts Mutual Life Insurance Company (hereinafter referred to as Massachusetts), a company which did extensive financing of shopping centres. The appellant telephoned the head office in Springfield, Massachusetts and was referred to the regional office in Detroit, Michigan. Mr. T. Strehlow, the assistant regional supervisor of the company, together with the regional supervisor, thoroughly investigated the centre and other material factors and requested the appellant to complete the company's standard form of application for a mortgage in the amount of $800,000 which was done on January 19, 1955. Mr. Strehlow testified the application was forwarded to head office with his recommendation for its approval and that he had every expectation the loan would be approved. On February 10, 1956 the head office requested to be supplied with further information which was supplied. The application was subsequently refused.

Mr. Strehlow began his investigation in November 1955 at which time only three of the twenty-three stores in Wing A had been leased. He explained that the small number of leases would not be an impediment to the Massachusetts giving a letter of commitment, but the commitment would be given subject to the requirement of leasing being completed to a specified percentage and he stated that satisfactory leasing was an important factor to a mortgage loan. Had a letter of commitment been forthcoming from Massachusetts, the bank would have been prepared to advance Eastern further funds by way of overdraft.

The first approach by the appellant to Canada Life was for a loan of $800,000 which was refused. A second approach was made to Canada Life in March of 1956 for a loan in the lesser amount of $600,000 which was also refused.

The appellant, through its officers, made frequent and continuous pleas to Dominion for assistance in financing.

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While Dominion gave help in negotiating leases by assuring prospective tenants that its supermarket on the site was one of its most successful markets, nevertheless, no financial help was given to the appellant.

T. C. Odette testified that during the latter part of 1954 and the initial half of the year 1955, mortgage money was in plentiful supply and that Mr. Peas of Detroit Mortgage had repeatedly and emphatically assured him that a mortgage loan of $800,000 would be forthcoming to the appellant. Mr. Odette further testified that subsequent to the withdrawal of Detroit Mortgage from participation in the project in August of 1955, the appellant's attempts to obtain a mortgage from the other sources mentioned above were thwarted by a policy of tight money and retrenchment and that the lending institutions approached were stringently allocating their funds available to applications previously received. In this he was confirmed by Dr. Gilbert Horne, Director of the School of Business Administration at Assumption University at Windsor, who had made a survey of the money market in the years 1955 and 1956 from which he concluded that beginning in the third quarter of 1955 money tightened, credit conditions became tight and money rates went up until the end of 1956, as a consequence of which loans and mortgage funds became difficult to obtain during this period. Evidence to like effect was also given by Mr. Walter Blum, the manager of the Canadian Imperial Bank at Walkerville. Mr. Blum also testified that the appellant and Eastern for whom he acted as banker had both borrowed to the extent of their credit from the Bank.

While the appellant's centre was in the course of construction there were press announcements and rumours of several other shopping centres to be built in Windsor, few of which materialized.

In September 1955 L. Cousens, a real estate agent acting on behalf of Principal Investments Limited (hereinafter referred to as Principal), a company extremely active in shopping centre developments from 1953 forward, approached the appellant with an offer to purchase the appellant's centre which was summarily rejected. Cousens repeated his offer again in December 1955 and was again refused.

In March 1956 another real estate agent, acting on behalf of Ecclestone, a building contractor, attempted to buy the appellant's shopping centre and was refused. Ecclestone thereupon built on another site far removed from that of the appellant.

Again in March 1956 a real estate agent named Casey made an offer to purchase the appellant's centre. The appellant informed the agent it was not interested and turned him down.

Cousens, on behalf of his principal, persisted in his efforts to acquire the centre, calling on the appellant on frequent occasions throughout January, February and March of 1956. On each visit he was rebuffed.

Following one such refusal to sell by the appellant, Cousens reported to Principal and an officer of that company then approached the president of Dominion suggesting the appellant was willing to sell the centre to Principal provided Dominion consented. Dominion therefore, by letter dated September 6, 1955, Exhibit 12, requested clarification from the appellant. The appellant replied by letter dated September 8, 1955, Exhibit 16, advising of the repeated approaches made to it by Cousens and stated that even appointments to discuss a sale were emphatically declined. The appellant also assured Dominion in this letter that no agreement for sale would be entered into without Dominion being consulted and the concluding assurance was made that "there is at present no thought of selling".

In March 1956 the appellant's financial situation had become desperate. It was unsuccessful in its efforts to obtain mortgage financing. Both the appellant and Eastern had reached the limit of their bank credit. Bills incurred for construction costs were unpaid. At that time the construction costs so incurred were in the amount of $719,000 a substantial part of which was unpaid. The Bank was aware that Eastern was slow in making many payments and that many subcontractors and suppliers of material were unpaid and so advised Eastern and the appellant. Although no creditors had sued for payment, nevertheless, both the appellant and Eastern faced the prospect of bankruptcy. It was apparent to the officers of the appellant and Eastern that in order to salvage the successful and prosperous Eastern, the shopping centre must be sold.

On March 29, 1956 the appellant wrote a letter Exhibit 9, to William Zekendorf, president of Webb and Knapp Inc.

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of New York, a large real estate developer which had extended its operations into Canada. In its letter the appellant stated it was in the business of building shopping centres throughout Ontario and as they neared completion, selling them to investment firms. Data respecting the Dorwin Shopping Center was enclosed and the letter concluded by stating it was expected that the Windsor centre would be sold within the next month. Such statements were flagrant puffing. Neither Eastern or the appellant had constructed any shopping centres other than the Dorwin centre, nor were any centres sold. An acknowledgment was received from William Zekendorf dated April 2, 1956 expressing interest but no further communication was received from him.

Principal Investments Limited was very active in the development of shopping centres from 1953 to 1955 owning eleven which it had built during this period. This company was particularly anxious to obtain a shopping centre in the Windsor area and concluded that the site of the appellant was the most desirable one. Principal looked at land across the road from the appellant's centre, but concluded it would be more advantageous to purchase the appellant's centre than to build on its own account thereby eliminating a competitor. The anxiety of Principal to acquire the appellant's centre was obvious from the efforts of Cousens the real estate agent it employed for this purpose.

Accordingly the appellant having decided to sell, T. C. Odette visited Principal at its office in Toronto, Ontario to negotiate the sale of the shopping centre. He took with him a draft offer of purchase in which a great many particulars were incomplete and were dependent on negotiation on which T. C. Odette described the appellant's position as being flexible. The draft offer was left and after an exchange of correspondence with the legal department of Principal, L. L. Odette Jr. went to Toronto on either April 25 or 26, 1956 to discuss and complete an offer for purchase. The offer was completed by Principal and accepted by the appellant on April 28, 1956. A copy of the offer to purchase was introduced in evidence as Exhibit 10 and provided for a purchase price of $1,500,000, a deposit of $50,000 to be made forthwith, $700,000 in cash on the closing date of June 15, 1956, and the balance of $750,000 to be secured by a second mortgage on the developed land, being the 600 ft. shopping centre and a first mortgage on the undeveloped land of the shopping centre site, with interest at 5 percent. The offer also included a provision for extending the time for closing and an assignment of all existing leases. The appellant undertook to negotiate and execute further leases on behalf of Principal. All leases of units in the premises as outlined in Exhibit 11, were negotiated by the appellant, but Principal did renegotiate a lease with Tamblyn Drug Store for a longer term.

Principal did not close the transaction on June 15, 1956 as covenanted, expressing the wish to abandon the purchase and forego its $50,000 deposit. The appellant, however, was adamant in its anxiety to sell with the result that a further deposit of $50,000 was made and instead of a $750,000 mortgage, the appellant took mortgages for $1,000,000 at 5 percent, a $600,000 second mortgage on the developed land and a $400,000 first mortgage on the undeveloped land. The eventual closing date of the sale was November 1, 1956.

It was agreed among the appellant, Principal and Cousens that the appellant would pay Cousens a real estate commission of $30,000.

As shown in Exhibit 8, the costs incurred by Eastern on behalf of the appellant for construction of the centre amounted to $851,626.94. The contract of sale with Principal was for the centre with all store units fully finished which accounts for the ultimate cost of construction being in the approximate amount of $1,000,000.

The centre was formally opened on June 1, 1956 and the sale to Principal was not consummated until November 1, 1956. Therefore, the appellant received rent from the tenants during that interval.

The Vice-President of Principal testified that in the year 1958 the gross income from the centre was $141,840 with operating expenses of approximately $25,000 leaving a net income of $116,800 without provision for mortgage payments or depreciation. There were always a few vacancies in the centre.

The question to be determined on the facts outlined is whether the profit of $424,035.23 realized by the appellant on the sale of its shopping centre was income within the meaning of sections 3 and 4 of the *Income Tax Act*. The

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appellant was certainly not in the business of dealing in real estate in the ordinary meaning of the term "business". Accordingly the question remains whether the appellant, by its actions, was within the meaning of "business" as defined by section 139(1)(*e*) in that it was engaged in "an adventure or concern in the nature of trade" and whether its profit was a profit from such an adventure as contended by the Minister or whether the amount so realized by the appellant was merely an enhanced value received upon the sale of a capital asset or an investment as contended by the appellant.

I have had no hesitation in concluding that the appellant was not in the business of dealing in real estate. I do not consider the offers of free land to department stores, or the possible sale of land for the erection of an office building as significant, firstly, because no sale or gift was made and secondly, the appellant's willingness to sell a portion of the land was dictated by the necessity of obtaining money therefrom and the presence of an office building and a department store would increase the attractiveness of the property as security for a mortgage loan.

Furthermore, I dismiss the offer to sell to Webb and Knapp as being without significance because the statements made by the appellant were wholly untrue and exaggerated and were made for the purpose of stimulating the interest of the recipient and were prompted by the desperation of the appellant.

From the facts, as above outlined, I am convinced that at the time of the acquisition of the land the appellant did not have the intention of turning it to account by profitable resale, but rather that the appellant sought to create a capital asset from which to realize rental income. The appellant did derive rental income from the centre during the period between June 1, 1956, the date of the opening of the centre and November 1, 1956, the date upon which the sale to Principal was finally closed, although the appellant received rental income by reason of Principal's inability to close the transaction at an earlier date as agreed.

There is no doubt that the Dominion food market on the site was a successful venture, the success of which Dominion wished to still further increase by the addition of a shopping centre. Eastern was favourably known to

Dominion as a building contractor, having undertaken several works on its behalf, and it was a logical consequence that the suggestion of building a shopping centre should have been made by Dominion to Eastern.

In my view the Odettes, as officers and directors of Eastern and prospective officers and directors of the appellant and successful and experienced businessmen, were justified in undertaking construction of Wing A, the initial phase of the shopping centre and placing reliance on the repeated and emphatic oral assurances of the President, the most responsible officer, of Detroit Mortgage, that a first mortgage of $800,000 would be readily forthcoming. It was reasonable to begin construction without a formal written commitment because such commitments are not forthcoming in the trade until construction has reached a certain stage and a specified percentage of the space in the building has been leased. It follows that responsibility for interim financing and any attendant risk must be assumed by the initiators which Eastern and the appellant did assume. In fact personal financing was contemplated to the extent of $200,000 at the outset and later when difficulties were encountered, the appellant was prepared to double that amount and get along on a mortgage for $600,000 rather than $800,000. Interim financing was done by Eastern and the appellant to the extent of and beyond their respective means and when the source of mortgage monies disappeared the appellant was left with the sole recourse of the sale of the centre dictated by the precarious position in which the appellant and Eastern found themselves.

On the positive evidence adduced, I have no doubt that in the latter part of 1955, that mortgage money was difficult to obtain and at the time when the appellant's need was most urgent. In this conclusion I am confirmed by the difficulty which Principal found in obtaining a first mortgage to close the sale by the appellant to it on the closing date and found it necessary to request an extension of time from the appellant thereby forfeiting two deposits in the amount of $100,000. The appellant, on its part, was anxious to consummate the sale and was prepared to make concessions to do so since it was only by sale that the appellant could extricate itself and conserve the established and successful Eastern Construction Limited. It is my view that the agreement by the appellant to pay a commission of $30,000 to

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the real estate agent, Cousens, was one of such concessions so made by the appellant to facilitate the sale.

The offer to purchase dated March 15, 1955 from Eastern as purchaser to Dominion as vendor, specifically provided that the property should be developed as a shopping centre with Dominion as an integral part thereof, the plans being subject to the approval of Dominion and that construction of the centre should be commenced within 10 months of the conveyance of the land, otherwise the purchaser was obligated to offer the land to the vendor for repurchase. These stringent provisions convince me that Dominion sought to ensure that a shopping centre would be built forthwith and that the provisions were also designed to preclude speculation in the land. The appellant accepted the land fully aware of the conditions imposed and conscientiously sought to fulfill them.

It is also my view that the high quality of construction incorporated in the building by the appellant is indicative of an intention to retain the building as its own rather than for resale because I am satisfied that on sale the cost of the built-in quality would not be reflected in the sale price commensurate with the cost thereof. If sale had been contemplated corners could have been cut without a corresponding diminution in the sale price.

The appellant, through its officers and directors, thoroughly investigated the possible yield from a shopping centre on this particular site and were impressed thereby. That its impressions were sound has been proven by subsequent events. The centre has been profitable. While a much more ambitious project was first contemplated complete with a department store with even greater possibilities for more substantial returns, nevertheless, the less pretentious undertaking has been a success yielding a reasonable return.

The cumulative effect of the foregoing facts leads me to the conclusion that the appellant was not engaged in an adventure or concern in the nature of trade and that the profit realized by the appellant on the sale of its shopping centre did not constitute "a gain made in an operation of business in carrying out a scheme for profit-making" within the meaning of that expression as used by the Lord Justice

Clerk in *Californian Copper Syndicate (Limited and Reduced) v. Harris*[1].

I do not regard the situation as one in which it should be inferred that the appellant purchased the land and built the shopping centre upon it as a speculation looking to resale or that it was intended to turn the property to account by any method whatsoever as might be expedient although as events turned out that is what the appellant found it necessary to do.

As I have previously stated, it is my view that the appellant sought to create and did create a capital asset which it disposed of at a profit.

I find, therefore, that the appellant was not engaged in an adventure or concern in the nature of trade and the profit made by it on the sale of its shopping centre was not income within the meaning of sections 3, 4 and 139(1)(*e*) of the Act. The Minister was, therefore, wrong in assessing the appellant as he did and its appeal against the assessments must be allowed with costs.

Judgment accordingly.

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Jun. 20, 21, 22

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Jul. 19

BETWEEN:

M/S *WILLOWBRANCH* ....APPELLANT;

AND

IMPERIAL OIL LIMITED ....RESPONDENT.

Shipping—Collision in approach to Halifax harbour—Dense fog—Negligence—Narrow channel rule—Alterations of course—Excessive speed—Improper radar outlook—Appeal from District Judge in Admiralty allowed.

Respondent's tanker *IH* outbound from Halifax collided in a dense fog with appellant's tanker *W* inbound, in the approach to Halifax harbour. The *IH* entered the fog bank at full speed. Half speed was then ordered and about this time the echo of an approachign ship 3° on the starboard bow and about 1½ miles ahead was noticed on the radar screen. Slow speed was ordered about a half minute after half speed had been ordered. The bearing of the approaching ship appeared to broaden to 4° when the ships were about a mile apart and the master of the *IH* thereupon assumed that the approaching ship was on a course exactly opposite to his own and that the ships would pass star-

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

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board to starboard and his subsequent actions were based on such assumptions. Shortly before the echo of the approaching ship disappeared in the clutter on the radar set it was observed to be moving across the screen in such a way as to indicate that the ship was on a course which would cross that of the *IH* from starboard to port. Shortly thereafter a whistle was heard directly ahead and the engines were reversed. At or about that time the *W* was seen about 100 feet ahead of the bow of the *IH* and collision occurred shortly afterwards, the bow of the *IH* striking the port bow of the *W*. At the time of impact the speed of the *IH* was about 4 knots.

The *W* had proceeded inward at reduced speed and had altered her course four times in order to pass port to port. Though the whistle of the *IH* had been heard about two minutes before the *IH* came into view the engines of the *W* had been kept at slow speed ahead. They were reversed immediatley the *IH* came into view and the forward way was off the *W* by the time the impact occurred. The trial Judge held her to be two-thirds to blame and the *IH* one-third to blame. On appeal to this Court the appellant contended that the narrow channel rule or alternatively the meeting end-on rule applied and justified her four alterations of course to starboard in order to pass port to port and that in the circumstance she was justified in maintaining her engines at slow speed even after hearing the whistle of the *IH*. The respondent contended that the area was open sea and that it was the duty of the appellant to maintain her course without alteration so that the ships would pass starboard to starboard.

Held: That the appeal be allowed and the cross appeal dismissed.

2. That respondent's tanker is two-thirds to blame and appellant's tanker one-third.

3. That the evidence showed that seamen regarded the locality of the collision as a channel where ships passed port to port.

4. That even if the narrow channel rule was inapplicable in the circumstances it was not wrong for the *W* to alter course to starboard to get out of the way of the *IH* but that her alterations were negligent, the first two in being too small to put the *W* well out of the way of the *IH* or to be readily detectable by the *IH* and the latter two in having been made blindly after the whistle of *IH* had been heard and before her position was ascertained. It was not, however, clear that a collision would not have occurred even if the latter two alterations had not been made.

5. That upon hearing the fog signal of the *IH*, the *W* should have stopped her engines.

6. That the *IH* was negligent in entering the fog bank at the grossly excessive speed of twelve knots and in failing to keep an adequate radar lookout which created the danger of the collision, and in failing to take effective action to reduce speed and in persisting in the unwarranted assumption that the ships would pass starboard to starboard.

APPEAL from a decision of the District Judge in Admiralty for the Nova Scotia Admiralty District.

The appeal was heard before the Honourable Mr. Justice Thurlow sitting with an assessor at Halifax.

Donald Kerr for appellant.

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Donald McInnes, Q.C. and *John Dickey, Q.C.* for respondent.

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

THURLOW J. now (July 19, 1963) delivered the following judgment:

This is an appeal by the M/S *Willowbranch* from a judgment of the District Judge in Admiralty of the Nova Scotia Admiralty District holding her two-thirds to blame and the respondent's ship, *Imperial Halifax* one-third to blame for a collision which occurred between the two ships in the approach to Halifax Harbour on July 16, 1959. There is also a cross-appeal by the respondent against the finding that the *Imperial Halifax* was one-third to blame.

Both ships are tankers and at the time of the collision both were equipped with radar. The *Imperial Halifax* is a ship of 3,734 tons gross register and is 357 feet long and 48 feet wide. Her full speed is 12 knots. She was carrying 4,967 tons of stove oil and furnace oil and was out-bound on a voyage to Charlottetown. The *Willowbranch* is a ship of 2,153 tons gross register, 259 feet long and 43.9 feet wide. She is a lake ship with a blunt bow and a large rudder which when put hard over acts as a brake. Her full speed is 9 knots. She was carrying 27,000 barrels of gasoline and was in-bound from Montreal.

The collision occurred in dense fog shortly after 0823 a.m. A.D.S.T. in the area to the northward of Neverfail Shoal. The sea was calm and the tide was ebbing at about one-quarter knot.

The *Imperial Halifax* which was being navigated by her master, Captain William G. Kent, without a harbour pilot had left her dock at Imperoyal on the eastern side of the harbour at 0751 on the morning in question and had shaped a course to pass west of Ives Knoll Buoy. The weather at this point was fine, the sky was overcast but the visibility was clear. At 0801 her engines, which had been working at half speed for seven minutes, were advanced to full speed and on rounding the buoy at 0804 the ship was put on a course of 163° T which would take her about midway

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between Mauger's Beach Light and Outer Middle Ground Buoy about $1\frac{1}{4}$ miles away, and directly towards Neverfail Bell Buoy some $4\frac{1}{2}$ miles away. At this time there was a United States naval ship also proceeding out of the harbour about two cables distant to starboard and slightly ahead and one or more other naval vessels following. Assuming that these ships would probably be proceeding to the westward and would pass to the westward of Neverfail Shoal, Captain Kent decided to go out to the eastward of Neverfail. By 0813 when the ship passed Mauger's Beach she had attained her full speed of twelve knots and at that point fog was observed about a mile and a half ahead. Two minutes later at 0815 course was altered to 159° T, a course which would take the ship to the eastward of Neverfail Shoal and directly toward what will be referred to as the Inner Automatic Buoy some $4\frac{1}{2}$ miles ahead. This course is the same as that of a line shown on the charts the projection seaward to and beyond the Inner Automatic Buoy of the line between two harbour lights. The line on the charts indicates a clear course east of Neverfail Shoal from inside the harbour to the Inner Automatic Buoy and it has been referred to in these proceedings as the range line. At 0815 when the course was altered to 159° T an order to "stand by engines" was given and sounding of the whistle at one minute intervals was commenced, but no reduction in speed was made until 0819 by which time the ship was entering or had entered the fog bank. Half speed was then ordered. About this time, whether shortly before or shortly afterwards, Captain Kent noticed for the first time on the radar screen the echo of an approaching ship which he estimated to be $1\frac{1}{2}$ miles ahead and 3° on the starboard bow. The bearing of the approaching ship appeared to him to broaden to 4° at a distance which he estimated at about a mile and he then assumed that she was on a course of 339° T, (exactly opposite to his own) and that the ships would pass each other starboard to starboard. At $0819\frac{1}{2}$ engine speed was reduced to slow. Slow speed when attained would be about four knots but it would take several minutes to reduce to that speed from twelve knots. Between that time and 0822 the whistle of a ship apparently on the starboard bow was heard by an officer on duty outside and on the starboard side of the bridge and at 0822 the engines were stopped. By this time, according to Captain Kent, the ship's speed should have been reduced to about seven knots. Shortly before the echo of the approaching ship disappeared in the clutter (3/16 of a mile) on the radar set, it was observed to be moving across the screen in such a way as to indicate that the ship was on a course which would cross that of the *Imperial Halifax* from starboard to port. At about 0823 another whistle was heard, this time directly ahead, and an order to reverse the engines was given. At or about that time, the *Willowbranch* was first seen about 100 feet ahead of the bow and the collision occurred shortly afterwards, the stem of the *Imperial Halifax* striking the port bow of the *Willowbranch* some twenty feet from the stem at a speed which the learned trial judge found to be about four knots. At some point between 0819 when the engines were put on half speed and the time of the collision, the course of the *Imperial Halifax* had been altered 4° to port and at the time of impact it was 155° T.

Earlier that morning the *Willowbranch* had approached the Inner Automatic Buoy from the east on a course of 264° T in dense fog at slow speed (about three knots) and at 0800 A.D.S.T. o'clock when about a cable west of the buoy had taken on board Captain Michael M. Cox, a Halifax Harbour pilot. Before Captain Cox reached the bridge her master, Captain Roland Patenaude, had altered to 330° T, a course which would have taken him into the harbour to the westward of Neverfail Shoal which lay one and three-quarter miles ahead. Captain Cox was, however, aware that a flotilla of United States warships was proceeding out of the harbour to the westward of Neverfail and therefore suggested that the *Willowbranch* go to the eastward of it. The course was accordingly altered to 340° T and shortly afterwards to 345° T. At 0803 the engines were advanced to full speed ahead. This course and speed were maintained until 0813 during which period there were ships passing at some distance to port none of which were seen except by radar and none were seen directly ahead by radar or otherwise. At 0813 Captain Patenaude remarked that he was in no hurry and thereupon rang for half speed (6.5 knots). By this time his ship would have travelled about one and a half miles of the distance from the Inner Automatic Buoy to Neverfail. Shortly thereafter Neverfail Bell Buoy was passed at a distance which the trial judge found

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was about two cables. The bell was heard but the buoy was not seen, visibility at that point being estimated at 600 feet.

The estimate so made of the ship's position at that time would for practical purposes place her on the range line as shown on the charts. After passing Neverfail Bell Buoy the ship's course was altered to 340° T or 1° east of the course of the range line. Up to this point no ship presenting any hazard had appeared ahead on the radar screen but shortly after altering to 340° T the echoes of several ships ahead were seen. The evidence of the chief officer who was watching the radar and of Captain Patenaude and Captain Cox, each of whom took at least one look, varies as to what was observed, probably because they looked at different times and were speaking of what the radar showed when they looked, but on this point the trial judge appears to have adopted the evidence of Captain Cox who observed two ships, at a distance of two miles, one of which was 10° or more on the port bow and the other directly ahead. Captain Cox interpreted this as indicating that the ship directly ahead was coming out of the harbour on the course of the range line, 159° T, but when he first saw her echo and for some time afterwards her position was such that it was still open to her to pass either to the west or to the east of Neverfail and there was nothing to indicate to those on board the *Willowbranch* which course she would take. When the approach of this ship had been under observation for from two to three minutes and the *Willowbranch* had reached the vicinity of Neverfail Can Buoy, the course of the *Willowbranch* was altered to 345° T and later to 350° T to put her to the eastward and out of the path of the oncoming ship. Shortly afterwards the chief officer having reported that the ship was approaching at high speed and that the angle of her approach on the port bow created by the alteration of course of the *Willowbranch* was not broadening the course was altered to 355° T and still later to 360° T.

The evidence does not make clear precisely how long any of the courses 340° T, 345° T, 350° T or 355° T was maintained but it seems probable that the first of them was taken at about 0815 or from two to three minutes after speed was reduced to half speed. By that time the *Willowbranch* should have reached the point where Neverfail Bell Buoy was abeam and at her reduced speed it would take her from two to three minutes more to travel the distance of three cables from that buoy to Neverfail Can Buoy. It was while traversing the distance between these buoys that the ship was on 340° T. The trial judge has found that

> when abeam of Neverfail, course was altered to 340° T and when Neverfail Can Buoy was abeam two vessels were observed by radar, one right ahead and one 10° on the port bow distant two miles. Speed was reduced to slow and course was altered to 345°.
>
> The vessel on the port bow was seen to be going clear to pass west of Neverfail but the vessel ahead did not appear to change her bearing so after a couple of minutes, course was again altered to 350° T.

That the alteration to 345° T was made when Neverfail Can Buoy was abeam is supported by the evidence of Captain Cox and the same witness also stated that speed was reduced to slow at that time. As the reduction to slow speed was made at 0819, it would appear that the alteration to 345° was made about four minutes before the collision or when the ships were just over a mile apart. By that time it must I think have become apparent that the approaching ship would probably be passing east of Neverfail and that some alteration of course would be required to avoid collision. About two minutes before the collision the whistle of the *Imperial Halifax* was heard apparently on the port bow. The whistle was heard a second time and Captain Cox was outside on the wing of the bridge listening and expecting to hear it a third time when the bow of the *Imperial Halifax* came into view about 30° on the port bow and at a distance estimated by him at 300 feet. No action had been taken to stop the engines of the *Willowbranch* on hearing either of the fog signals of the approaching ship but when the latter came into view full astern and hard astarboard were immediately ordered and most if not all of the way was off the *Willowbranch* by the time of the impact which occurred about half a minute after the *Imperial Halifax* was first sighted. The order for full astern was recorded twice in the engine room log at 0822 which would be the time recorded for any order received in the minute preceding 0822½. There was probably a variation in the times shown by the clocks of the two ships, the time of the *Willowbranch* being slower than that of the *Imperial Halifax*, but the difference seems to have been less than a minute and it does not appear to me to be of importance. It also appears that the alterations of course to 355° and to 360° were made after the first fog signal of the *Imperial*

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Halifax had been heard and at a time when her position was not ascertained, but as the evidence does not show how long the several courses were maintained, it is not possible to estimate with accuracy how far to the eastward the last two or the earlier two alterations carried the *Willowbranch*. Having regard to her speed and the time available a rough calculation indicates that the four alterations would not account for a lateral distance of much more than about 350 feet, but even so it appears to me that but for the several alterations from 340° the ships would probably have passed each other starboard to starboard without colliding though it would have been a passing at very close quarters.

The learned trial judge found that the *Willowbranch* was chiefly to blame for the collision. He considered that the prudent thing for her to have done on observing the echo of the *Imperial Halifax* directly ahead at a distance of two miles was to stop the vessel and run a check of the radar bearings of the approaching ship and he found that instead of doing this the *Willowbranch* had "proceeded at slow speed and continued altering course to starboard without knowing what course the *Imperial Halifax* was steering," the result of which in his opinion was that she put herself directly in the path of that ship. The learned judge also found the *Imperial Halifax* to blame though to a lesser extent and expressed his view of her fault thus.

> When the "IMPERIAL HALIFAX" ran into dense fog after passing Mauger's Beach the engines were put on stand-by and then on half speed at 0815 hours and were not put on slow speed until 0819 hours, in spite of the fact that a radar signal of an approaching vessel had been observed bearing 3° on the starboard bow. It would have been more prudent to have stopped at this time and then run a check on the radar bearings, particularly in view of the fact that the "IMPERIAL HALIFAX" had a full cargo and was therefore hard to fetch up. The engines of the "IMPERIAL HALIFAX" were not stopped until 0822 hours when the fog signal of the "WILLOWBRANCH" was heard and a minute later the vessel itself was seen. The "IMPERIAL HALIFAX" had too much way on her to bring up in time and struck the "WILLOWBRANCH" at a speed of about 4 knots, doing heavy damage to both vessels.

Turning to the fault found against the *Willowbranch* the first question that apepars to me to arise is whether it was wrong for her in the circumstances to alter to starboard as she did on four occasions from about 0819 until 0822 when the *Imperial Halifax* came into view.

The appellant took the position that the narrow channel rule applies in the locality in which the collision occurred

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and that it was not wrong for the *Willowbranch* on detecting the approach of the *Imperial Halifax* to alter to starboard so as to get to the eastward of the range line and into her own proper water to pass. Alternatively it was submitted that the meeting end on rule would apply and justify her alterations to starboard. The respondent on the other hand submitted that neither rule applied, that the area is not a narrow channel but open sea in which the buoys simply mark shoals, that there was no rule applicable to require the ships to pass port to port and that in the circumstances it was the duty of the *Willowbranch* on detecting the approach of the *Imperial Halifax* to maintain her course without alteration.

The first of the contentions advanced by the appellant raises at the outset the question whether the locality in which the collision occurred is one in which the narrow channel rule applies. So far as I am aware there is no reported case in which either the approach to Halifax Harbour to the eastward of Neverfail Shoal or that to the westward of it or the area north of the shoal, where the collision occurred, has been determined to be a narrow channel within the meaning of the rule, and it appears to me that the question must be resolved on the evidence with the assistance of the knowledge and experience of Captain Bird, the assessor appointed to assist me in the case, one of the determining factors being the way in which seamen treat the locality and behave in navigating it. *Vide Jaroslaw Dobroswki*[1]; *The Anna Salem*[2]; and *The Sedgepool*[3]. There is in my opinion evidence that seamen regard the locality in question as a channel and that in navigating in it ships pass port to port. *Vide* Captain Patenaude at pp. 135 and 142, Mr. Gerard at p. 164, and Captain Cox at pp. 223, 224, 231 and 245 and it is noticeable as well that both Captain Kent at pp. 34, 58 and 90 and Mr. Kearley at p. 107 exhibited a tendency to refer to the locality as a channel though Captain Kent did not regard it as a place in which Rule 25 applied. In the opinion of Captain Bird the whole of the area from the Inner Automatic Buoy into the harbour is a locality in which the narrow channel rule applies. He regards the system of red and black buoys shown on the charts (*vide* Ex M/U) as indicating a channel or channels

[1] [1952] 2 Lloyds Rep. 20 at 26. [2] [1954] 1 Lloyds Rep. 474 at 478.
[3] [1956] 2 Lloyds Rep 668 at 678

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one to the eastward and the other to the westward of Neverfail Shoal and he advises me that ships approaching the harbour pass between the buoys keeping red buoys to starboard and black buoys to port and when passing outcoming ships in clear weather keep to their side of the fairway the centre of which for the channel to the eastward of Neverfail Shoal is indicated by the range line to which I have referred. From his experience as a Halifax Harbour pilot and regarding the locality as one in which the narrow channel rule applied, Captain Bird considered that altering her course to starboard was the natural thing for the *Willowbranch* to do in the circumstances when she observed the *Imperial Halifax* directly ahead for it was a move that would put her on her own proper side of the fairway in case the *Imperial Halifax* should be coming out by the channel lying east of Neverfail. In his opinion however it would have been better to alter by 10° or 15° at once rather than merely by 5° as was initially done.

It does not appear to me to be necessary for the present purpose to consider whether the whole of the approach from the Inner Automatic Buoy into the harbour is an area in which Rule 25 applies. In particular, I do not find it necessary to decide whether the rule would apply in the area to the southward of Neverfail Shoal. But while the matter is not entirely free from doubt, having regard to the evidence and to the advice given me, I think the preponderance favors the view that the portion of the approach to the harbour consisting of an area approximately eight cables wide and bounded eastwardly by a line from Thrumcap Shoal to Lighthouse Bank Bell Buoy and westwardly by a line from Neverfail Can Buoy to the Whistle Buoy off Mars Rock, which embraces the locality in which the collision occurred, is a narrow channel within the meaning of Rule 25 and adopting this view of the nature of the locality I am of the opinion, again relying to a considerable extent on Captain Bird's advice, that in the particular circumstances it was not wrong for the *Willowbranch* on detecting the approach of the *Imperial Halifax* directly ahead to alter to starboard in an effort to get to her side of the midchannel or fairway. *Vide The Sedgepool*[1]. On the other hand even treating the narrow channel rule as inapplicable it appears to me that having observed that the approaching

[1] [1956] 2 Lloyds Rep. 668 at 680.

ship was directly ahead and might be going to the westward to pass west of Neverfail, in which case no problem would arise, or might be coming straight towards the *Willowbranch* to pass east of Neverfail, in which case a dangerous situation might arise, but would have no probable or reasonable course further to the eastward, especially in a dense fog, and having observed as well that this ship was approaching at high speed I do not think it was wrong for the *Willowbranch* to alter to starboard to take herself well out of the way in case the oncoming ship should be passing east of Neverfail. In either case however it appears to me that the initial alteration to starboard was negligent in that it was too slight either to put the *Willowbranch* well to the eastward or to be easily detectable by those on board the approaching ship and the same criticism applies as well to the subsequent alteration to 350° T which appears to have been made for the same purpose and at a time when the ships were still more than half a mile apart.

With respect to the subsequent alterations to 355° and 360° it is I think clear that they were negligent as well since they were made blindly after the echo of the *Imperial Halifax* had been lost in the clutter of the radar and before she was seen and her position ascertained and at a time when something different from what could reasonably have been expected earlier was obviously happening since despite the changes of course which the *Willowbranch* had made the bearing of the approaching ship had not broadened as expected. To alter course in these circumstances was in my view a fault on the part of the *Willowbranch* even though the situation in which the rapid approach of the *Imperial Halifax* had placed her was a difficult one, but having regard to the reduced speed of the *Willowbranch,* the minor nature of the alterations and the short time left for them to take effect, it seems to me unlikely that they could have carried her many feet to the eastward of the projection of her course of 350° or that a collision of some sort would not have occurred even if these alterations had not been made.

The other element of the fault found by the learned trial judge against the *Willowbranch* was that she proceeded at slow speed instead of stopping some time earlier. She had in fact reduced from half to slow speed at 0819 but it would take her some time to get down to three knots and it is clear that she did not stop her engines as required by

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Rule 16(*b*) upon hearing the whistle of the *Imperial Halifax* apparently forward of her beam some two minutes before the collision occurred. It was argued on her behalf that considering the highly inflammable nature of her cargo and the rapid approach of the *Imperial Halifax* it was essential that the *Willowbranch* maintain steerageway and manoeuverability, that if she had stopped her engines the tide would have tended to cause her bow to fall off either to starboard or to port as she slowed down thus exposing her side to the oncoming ship and at the same time she would have been unable to take effective action to get out of the way and that the fact that she was able to stop very quickly and in a very short distance when the *Imperial Halifax* ultimately came into view showed that the speed which she maintained by keeping her engines on slow speed was not excessive. On this question Captain Bird advises me that it would not be necessary to maintain a speed of three knots to provide steerage way and manoeuverability, that at three knots the way on the ship would probably have afforded steerage for about two minutes after stopping the engines, that steerageway if lost could be restored by restarting the engines briefly from time to time, and that in his opinion the circumstances mentioned would not as a matter of seamanship justify failure to stop her engines. I accept and adopt this advice. The rule requiring a vessel so far as the circumstances admit to stop her engines on hearing the fog signal of a vessel apparently forward of her beam is not calculated merely to ensure that she will be able to stop quickly if necessary. The difficulties of estimating distances and directions of sounds in fog are well known and one of the purposes which stopping engines serves is to afford to both ships a better opportunity to hear and appreciate the signals of the other. If the engines of the *Willowbranch* had been stopped as the rule required and her speed thus reduced earlier, Captain Cox might well have heard another signal from the *Imperial Halifax* before she came into view and had the advantage of a further and better warning of her position and a somewhat longer time would also have been afforded to the *Imperial Halifax* to reduce her excess way. In my opinion therefore the *Willowbranch* is not free from blame for the collision and damage and to the extent and in the senses indicated I would affirm the finding of fault on her part in proceeding at slow speed and altering to starboard. I should add, because it appears to me to afford a standard against which to estimate the gravity of her fault that in the opinion of Captain Bird, with which I am in agreement, what the *Willowbranch* should have done on detecting the approach of the *Imperial Halifax* directly ahead was to reduce her speed either by stopping her engines immediately or by going to slow speed until the whistle was heard, when the engines should have been stopped and if she was to alter to starboard before the ship came into view she should have made a larger alteration initially at an early stage rather than a series of minor alterations.

I turn now to the conduct of the *Imperial Halifax*. According to her logs and the uncontradicted evidence she approached and entered the fog at her full speed of twelve knots and maintained that speed until 0819. She was thus travelling at twelve knots until about 4½ minutes before the collision. In the remaining 4½ minutes according to the evidence of Captain Kent she traversed a distance of eight cables which indicates an average speed in excess of ten knots in the interval and she was still moving at a speed of about four knots when the impact occurred. Having regard to the fact that she was fully loaded and could not be brought up quickly and the fact that there was a ship approaching ahead, her speed from the time she approached and entered the fog bank was grossly excessive and even with "unremitting attention to the radar screen and the sharpest appreciation of what it revealed" (*Vide* Rand J. in *The Dagmar Salen v. The Chinook*[1]), it would be impossible to justify it in the circumstances. In my opinion, however, the radar lookout which was being maintained did not meet the required standard. By 0819½ when she went on slow speed the echo of the *Willowbranch* had been seen and by that time I think that the observations of her bearing 3° on the starboard bow at 1½ miles and 4° on the starboard bow at one mile must also have been made for by 0819½ the ships appear to have been no more and probably less than a mile apart. The echo however could and should have been seen earlier and even when it was seen if what is said to have been observed is to be taken as accurate, what was in fact revealed was that the ships were not on exactly opposite courses but were indeed on converging courses since an

[1] [1951] S.C.R. 608 at 612.

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angle of 3° at $1\frac{1}{2}$ miles subtends 450 feet while an angle of 4° at one mile subtends but 400 feet. The assumption that the *Willowbranch* was on a course of 339° was therefore not indicated by what had been observed, and since at that stage nothing was known of the speed of the approaching ship or of the distance which she had travelled between the two observations there was not sufficient information upon which to base a precise estimate of what her course was and the assumption that the ships would pass starboard to starboard was accordingly unwarranted as well. It may be difficult to make the observations and calculations necessary to determine the exact course of an approaching ship on the spur of the moment but unless they can be made and the correct inferences drawn, whether by instruments or by plotting, in my opinion for a ship such as the *Imperial Halifax* there is no justification for high speed in a dense fog when there are other ships in the vicinity.

Moreover, even with the assumption that the ships were on reciprocal courses it should have been apparent that there was danger of the *Imperial Halifax* becoming involved with the approaching ship since at best the ships would pass at close quarters and it ought in my opinion to have been appreciated that if there was any error in the radar machine or in the reading of it, or in maintaining the *Imperial Halifax* exactly on her course the approaching ship might be or become even finer on the bow and that a difference of a degree or two in the assumed course of the approaching ship could bring them even closer together. In my view, by 0819 a highly dangerous situation already existed because of the speed of the *Imperial Halifax* and of her failure to detect the echo of the *Willowbranch* earlier and take appropriate measures to reduce to a moderate speed and in my opinion and in that of Captain Bird when the echo of the *Willowbranch* was finally seen the observation of the bearing of the echo at 3° at $1\frac{1}{2}$ miles and later at 4° at one mile should not have been regarded as significant or as indicating either that the approaching ship was on an exactly opposite course or that the ships would pass starboard to starboard. Instead the approaching ship should have been regarded as for practical purposes directly ahead and action should have been taken immediately to get the excess way off the *Imperial Halifax* by reversing her engines instead of attempting to pass the approaching ship starboard to starboard at what would obviously be close quarters and at a speed which would not permit the *Imperial Halifax* to stop in time to avoid collision when the ship came into view. Moreover in my opinion it should not have been assumed that the approaching ship, with the *Imperial Halifax* bearing down on her at high speed, would steer in dense fog an opposing course which would take her between the out-coming warships, with which Captain Kent had been preoccupied, on her port side and this fast moving ship, which at best would pass at close quarters, on her starboard side. It should also in my opinion have been appreciated that the approaching ship might have already observed the approach of the *Imperial Halifax* and taken action to get to the eastward and out of her way—as had I think in fact already occurred—and for this reason as well effective action to get the excess way off the *Imperial Halifax* should have been taken at once so that she would be able to take avoiding action when the position and course of the approaching ship were finally ascertained. In my opinion it was the grossly excessive speed of the *Imperial Halifax* prior to 0819 and the inadequacy of the radar lookout which was being maintained at that stage which created the danger of a collision and these faults together with the failure to regard the *Willowbranch,* when finally detected, as directly ahead and to take effective action to reduce to a moderate speed, the misinterpretation of what the radar revealed and the attempt to pass starboard to starboard based on an unwarranted assumption as to the course of the *Willowbranch* and what she was doing, were to my mind by far the chief causes of the collision and damage.

It was argued on behalf of the *Imperial Halifax* that she obeyed the rules because she stopped her engines when she heard the signal of the *Willowbranch* but though she may have complied with the rules in that respect, she was clearly guilty of travelling at an excessive sped in fog contrary to Rule 16(*a*) and this excessive speed in my view made it impossible for her to comply with the requirement of Rule 16(*b*) that she navigate with caution until the danger of collision should pass.

It was also strongly urged on behalf of the appellant that the *Imperial Halifax* was further to blame in having altered her course 4° to port after having observed the echo of the *Willowbranch,* and thus put herself in the path of that ship.

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To alter to port was in my opinion and in that of Captain Bird clearly wrong but the alteration so made was in my view part of the fault of attempting to pass starboard to starboard at excessive speed under such circumstances and while if made early enough it alone may with the greater speed of the *Imperial Halifax* have effectively counteracted the efforts of the *Willowbranch* to get to the eastward of the course of the *Imperial Halifax,* I do not regard it as a separate or as an additional cause of the collision. The trial judge found that it was made at about 0822, his finding on the point is in my opinion supported by the evidence and while the expression "about 0822" might mean somewhat earlier than 0822, there is in my view no sufficient basis in the evidence for interfering with his finding or for treating the alteration as having in fact been made somewhat earlier. From 0822 to the time of collision, the alteration of 4° would not have carried the bow of the *Imperial Halifax* very far to the eastward of her earlier course of 159° T (probably less than say 70 feet) and while it was a wrong manoeuver and part of what I regard as a negligent attempt to pass starboard to starboard at high speed and at close quarters, I am unable to reach the conclusion that a collision, which might have been more severe than that which occurred, would not have resulted if the alteration had not been made.

In the result therefore I am of the opinion that the collision was due to faults on the part of both ships but that the faults of the *Imperial Halifax* were chiefly responsible for the collision and damage and were of a much greater degree than the faults of the *Willowbranch.* As the apportionment of blame made by the learned trial judge does not reflect the substantial preponderance of fault which in my view should be attributed to the *Imperial Halifax* and may have been considerably influenced by the impression which he appears to have had that the *Imperial Halifax* began to reduce her speed at 0815 which, with respect, is I think not supported by the evidence, the case is in my opinion one in which an appellate court is justified in substituting its own apportionment of the blame and I would apportion it two-thirds to the *Imperial Halifax* and one-third to the *Willowbranch.*

The appeal will therefore be allowed with costs and the judgment of the court below will be varied so as to pro-

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nounce the respondent liable to make good two-thirds and the appellant liable to make good one-third of the damages. The cross-appeal will be dismissed with costs.

Judgment accordingly.

Reasons for judgment of V. J. Pottier, D J.A.:—

The *Imperial Halifax* is a motor-driven tanker owned by Imperial Oil Limited, 3,734 tons gross, 1,982 tons net and 345 feet overall. She was bound from #4 Jetty, Imperoyal, Halifax, to Charlottetown with a full load of stove oil and furnace oil.

The *Willowbranch* is a motor-driven canal type tanker, 2,153 tons gross, 1,489 tons net and 259 feet overall. She was bound from Montreal to Halifax with a full load of gasoline.

The weather at the time of the collision was dense fog with a visibility of approximately 200 feet. It was calm with a smooth sea and the tide was ebbing at about one quarter knot.

The time of collision was 0823 hours, A.D.S.T., July 16, 1959 and it occurred about one mile 011° true from Neverfail Bell Buoy in the approaches to Halifax Harbour.

The *Imperial Halifax* left Jetty #4, Imperoyal at 0751 hours, A.D.S.T., July 16, 1959 in charge of her Master, Captain William G. Kent. No pilot was taken and the Master was doing his own piloting. The weather at the time was fine, overcast and clear with smooth sea. The vessel rounded Ives Knoll Buoy at about 0804 hours and a course of 163° was then steered by gyro with the engines at full ahead to pass between Mauger's Beach Lighthouse and Outer Ground Buoy. Mauger's Beach was abeam dist. 2 cables at 0813 hours and course was then altered to 159° to go out of the Harbour east of Neverfail Buoy. The Master stated that the reason he made this decision was because a number of warships were observed to the westward also leaving the Harbour and he decided to keep to the eastward in order to keep clear of them.

Immediately after passing Mauger's Beach Lighthouse, the vessel ran into thick fog at 0815 hours, the engines were put on Standby and then on Half Speed and the regulation fog signal was given on the whistle about every minute. On the bridge of the *Imperial Halifax* were the Master, in charge, the Chief Officer, Third Officer, Helmsman and Lookout.

On entering the fog bank the pip of a vessel was observed on the radar screen bearing 3° on the starboard bow distant 1½ miles and at 0819 hours the engines were put on slow speed. The radar pip changed from 3° to 4° on the starboard bow and at 0822 the Chief Officer reported hearing a ship's whistle on the starboard bow, so the engines were stopped and course was altered to 155°. Shortly after this, the bow of another vessel loomed out of the fog and at 0823 the engines were rung full astern. A few seconds later, the stem of the *Imperial Halifax* struck the *Willowbranch* on the port bow, cutting a gash in the shell plating below the main deck, flooding the dry cargo hold and inflicting extensive damage to the deck rails and fittings and the port wing of the bridge. At 0824 hours the *Imperial Halifax* engines were stopped.

The *Willowbranch* bound from Montreal to Halifax with a full cargo of gasoline, arrived off the Inner Automatic Buoy in dense fog and picked up her Halifax pilot, M. M. Cox, at about 0800 hours,

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A.D S.T., July 16. The pilot boarded about one cable west of the buoy and the course was set on 340° towards Neverfail Shoal Buoy. As Pilot Cox knew that a flotilla of war craft was leaving port, he suggested to the Master that the vessel be taken in east of Neverfail. The Master agreed, so course was then altered to 345°. Speed was increased from slow ahead to full ahead. About 0810 hours Neverfail Buoy was abeam to port distant approximately two cables. The buoy was not sighted on account of fog, but the bell was distinctly heard Speed was then reduced to half ahead. On the bridge at this time was the Master, in charge, the Pilot, Chief Officer and the wheelsman. The watchman was keeping a lookout on the forecastle head and there were three deckhands up there with him as well. The whistle was being blown at intervals of about one minute or so.

When abeam of Neverfail, course was altered to 340° and when Neverfail Can Buoy was abeam two vessels were observed by radar, one right ahead and one 10° on the port bow distant two miles. Speed was reduced to slow ahead and course was altered to 345°.

The vessel on the port bow was seen to be going clear to pass west of Neverfail but the vessel ahead did not appear to change her bearing, so after a couple of minutes, course was again altered to 350°.

As the bearing of the approaching vessel did not appear to be opening up on the port bow course was again altered to 355° and after a few minutes to 360°. No radar plot was kept nor were actual times noted when the course was altered. Apparently the *Willowbranch* was swung slowly to starboard from 340° to 360°, steadying up for a minute or two on 345°, 350°, 355°, and 360°.

When the *Willowbranch* was heading 360° and steaming at slow speed a fog signal was heard on the port bow and almost immediately afterwards the bow and bow-wave of the *Imperial Halifax* was observed about 30° on the port bow distant about 300 feet, and heading directly for the *Willowbranch*. The helm was immediately put hard astarboard and the engines given a triple ring astern. The *Imperial Halifax*, which apparently had a forward speed of about 4 knots at the time, struck the *Willowbranch*, which by this time was about stopped in the water with her stem on the port bow, cutting into the *Willowbranch* just abaft the forecastle head. The collision took place at 0823 hours. After the first impact, the bow of the *Imperial Halifax* scraped down the port side of the *Willowbranch*, being rails and stanchions and buckling the port wing of the bridge. The two vessels then drifted clear of one another and the *Willowbranch* let go an anchor. On examination it was found that neither vessel was in danger of sinking and they each proceeded into port under their own steam.

The court finds that the *Willowbranch* was chiefly to blame for this collision for the following reason.

According to the evidence, the first intimation those on board the *Willowbranch* had of the approach of the *Imperial Halifax* was when she was observed by radar right ahead. The prudent thing to have done under these circumstances would have been to stop the vessel and then run a check on the radar bearings of the approaching vessel. If this had been done it would have been possible to find out what course the approaching vessel was steering and take action accordingly. Instead of doing this, the *Willowbranch* proceeded at slow speed and continued altering course to starboard without knowing what course the *Imperial Halifax* was steering. The result was that she put herself directly in the path of the *Imperial Halifax* and when the two vessels sighted one another through the fog it was too late to avert collision, although the *Willowbranch* immediately went full astern on her engines and was able to stop her headway before the vessels actually struck. This was due to the fact that the *Willowbranch* had good backing power and was only proceeding at slow speed prior to the collision.

The *Imperial Halifax* was also to blame but to a lesser extent.

When the *Imperial Halifax* ran into dense fog after passing Mauger's Beach the engines were put on stand-by and then on half speed at 0815 hours and were not put on slow speed until 0819 hours, in spite of the fact that a radar signal of an approaching vessel had been observed bearing 3° on the starboard bow. It would have been more prudent to have stopped at this time and then run a check on the radar bearings, particularly in view of the fact that the *Imperial Halifax* had a full cargo and was therefore hard to fetch up. The engines of the *Imperial Halifax* were not stopped until 0822 hours when the fog signal of the *Willowbranch* was heard and a minute later the vessel itself was seen The *Imperial Halifax* had too much way on her to bring up in time and struck the *Willowbranch* at a speed of about 4 knots, doing heavy damage to both vessels.

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The blame is apportioned as follows:

Willowbranch two-thirds to blame.

Imperial Halifax one-third to blame.

Judgment accordingly.

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BETWEEN:

ROBERT A. SHEPHERD, JR. ....SUPPLIANT;

AND

HER MAJESTY THE QUEEN IN RIGHT OF CANADA .... } RESPONDENT.

Crown—Petition of Right—Expropriation—Servitude on land adjoining Airport—Public needs—Expropriation Act R.S.C. 1952, c. 106, ss. 2(g) and 3(b)—Aeronautics Act R.S.C. 1952, c. 2, ss. 3(c), 9(1)(2), 23—Expropriation Act not ultra vires—Damages—Limited ownership of air space over property.

The Crown registered a servitude on suppliant's lands adjoining the Montreal International Airport prohibiting building beyond a certain altitude, and prohibiting the maintenance of any obstruction, tree, or any construction of a greater vertical elevation than prescribed, and including "the right of employees of the respondent to enter upon the said land for the purpose of cutting down any tree that exceeds the height allowable for structures as aforesaid". Suppliant is the owner of the land, the instrument of transfer to him containing a clause "the said property is sold subject to the Montreal Airport Zoning Regulations".

Suppliant brings his petition of right claiming that the *Expropriation Act* R S C. 1952, c. 106 is *ultra vires*, and a permanent injunction prohibiting aircraft from violating his air rights and claiming further damages in the sum of $36,000 alleged to have resulted from the operation of the adjoining airport by reason of low flying jets, glaring runway lights, resulting in loss of tenants, and for violation of air rights and the loss of certain trees.

Held: That compensation for depreciation of the value of the land be fixed at $1,500, and for the trees felled on the property, $500.

2. That by pleading that the *Expropriation Act* is invalid suppliant jeopardized the sole relief he might expect, namely, compensation for the depreciation of his property which defect was obviated by respondent in its statement of defence and suppliant could not claim any procedural surprise.

3. That a government shorn of the power of expropriation would lack one of the essential attributes of sovereignty, one pertaining to the furtherance of peace, order and generally speaking good government of the country.

4. That the servitude imposed for the public needs of Canada, legally authorized and executed, vested possession thereof in the Crown.

5. That the exploitation of a government built airport under government control was a perfectly normal enterprise, the sequels of which might be annoying, but in fact were blameless in law, save in the event of negligence.

6 That the owner of land had a limited right in the air space over his property which limited ownership vindicated a legalized expropriation wherever the public interest demanded.

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PETITION OF RIGHT claiming damages from the Crown for injury to property through imposition of a servitude.

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

Frank F. Hubscher for suppliant.

Paul Ollivier, Q.C. and *Roger Tassé* for respondent.

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

DUMOULIN J. now (July 3, 1963) delivered the following judgment:

On January 9, 1963, the respondent, in right of Canada, filed and deposited in the Montreal Registration Office a plan and description of a servitude on, *inter alia*, lot 184-4 situate along Montée St. François Road in the City of St. Laurent, Quebec Province, Robert A. Shepherd being the owner of the above parcel of land, bearing civic number 1587.

Exhibit A, the certificate of Expropriation, in its more relevant passages mentions the taking of:

> . . . a limited interest (in part of lot 184 and of lot 184-4), being a servitude in perpetuity . . . for the purpose of a public work to wit: Montreal International Airport; the said servitude to consist of a prohibition from erecting or constructing on the said land any building, chimney, pole, tower or other structure whose highest point would exceed in height the elevation allowable by a 50:1 ratio for approach surfaces and 7:1 ratio for transitional surfaces calculated from a datum elevation of 106 feet A.S.L. at Station 0-00 being a point 300 feet horizontally distant from the end of the hard surface of said Runway 24-R . . . The said servitude shall, in addition, include the right of employees of Her Majesty the Queen to enter upon the said land for the purpose of cutting down any tree that exceeds the height allowable for structures as aforesaid.

This selfsame certificate also specifies that the easement is obtained "under the authority of the *Expropriation Act*, Chapter 106, R.S.C. 1952".

Robert A. Shepherd, Jr., acquired this parcel of land by notarial deed of sale, dated December 30, 1958, from his father, Robert Austin Shepherd, for a price of one dollar

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($1.00) and other good and valuable considerations (cf. Ex. 1). Clause 3, p. 3 of this instrument stipulates that:

> 3. . . . the said property is sold subject to the Montreal Airport Zoning Regulations,

a warning clause sufficiently explicit to have put the purchaser "on inquiry", had such cautioning been required to draw a buyer's attention to the local conditions when this identical person owned a home since 1954 on this particular stretch of land. The suppliant testified to these facts; his wife adding that "on or about May 1, 1960, they moved from their former house on Montée de Liesse Road to their present residence at number 1585 Montée St. François, a short distance away"; "some 3,000 feet from the airport and somewhat more remote from Runway 24-R", particularizes another witness, Ronald Uloth, one of two tenants living in the bungalow vacated by the Shepherd family. Apparently the petitioner objects more in law than in fact to the airport's vicinity as his residential persistence in the neighbourhood would indicate. True, Mr. Shepherd stressed this area's proximity to his office, an advantage, but insufficient to offset the severe inconvenience alleged in the Petition of Right.

In point of fact this procedure sets forward a twofold claim, the first of which is not devoid of some originality to wit: that the statutory enactments constituting the Canada *Expropriation Act,* 1952 R.S.C., Chapter 106 ". . . are *ultra vires* and contrary to the constitutional provisions of the *British North America Act* with respect to the Province of Quebec's jurisdiction in matters of property and civil rights as well as contrary to the Canadian *Bill of Rights Act*" (Petition, section 9). Section 12 renews this attack against the constitutionality of the Act on the score:

> 12. That it is ultra vires of the Parliament of Canada to impose building restrictions or prohibitions, on immoveable property, which is not Crown land as same is solely within the jurisdiction of the Provinces pursuant to the British North America Act.

The notion that the Crown could impose building restrictions or any other kind of servitudes on its own property only appears somewhat startling, but it also seems rather purposeless. At all events the respondent denied the preceding propositions and all others as formulated in the Petition of Right.

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The second ground of grievance urges that damages of many sorts threaten suppliant's land and bungalow "... as a result of low-flying jet aircraft" entailing a loss of tenants and being "a source of inherent danger to potential new occupants ..."; also prejudice to the landscape—a somewhat bleak one at best (cf. photos Exhibits 15 and B), brought about by the felling of "a fifty-six-foot stately tree".

Damages in a sum of $36,000 are sought plus a permanent injunction "... ordering the Minister of Transport and/or his Deputy, officers of the Crown, or any party and/or parties and representatives:

(a). To immediately quit and vacate the suppliant's property;

(b). to cease felling and interfering with the suppliant's enjoyment and possession of the trees incorporated and annexed to his immoveable property".

Paragraphs (c) and (d) pray for an order prohibiting aircraft (no particular indication of the airlines to be enjoined and none were called in the case) "from violating aeronautical height regulations in the City of St. Laurent ...", and "to cease trespassing and/or violating the suppliant's air-rights and air-space extending over his aforesaid immoveable property".

The petitioner manifestly misapprehended the true nature of his recourse and in denying the legality of our Expropriation Law jeopardized the sole relief he might expect, namely, compensation for depreciation of his property. Nevertheless, I would be reluctant indeed to allow a technical flaw to defeat a substantive right.

Moreover, the respondent in paragraphs 2, 11 and 12 of its Statement of Defence clearly obviates this defect and cannot complain about any procedural surprise. Paragraph 11, for instance, reads as follows:

> 11. The expropriation of the servitude alleged in paragraph 2 above was authorized under the provisions, validly enacted, of the Expropriation Act, R.S.C. 1952, c. 106.

Insofar as law permits, a liberal view of procedure should be adopted, I believe, in matters opposing Crown and subject. Therefore, the undersigned proposes to deal with the instant suit in its exact light that of an ordinary expropriation.

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Reverting here to the moot question initially raised: invalidity of the *Expropriation Act*, the fundamental answer is that a Government shorn of such a power would lack one of the essential attributes of sovereignty, one pertaining to the furtherance of Peace, Order, and generally speaking, to the good Government of the country (cf. *B.N.A. Act*, 1867, s. 91), and to its Defence. This obvious principle does not call for more ample elaboration. Basic legislation governing the taking of property and other rights is found in s. 3, s-s. (*b*), sec. 2(*g*) of the *Expropriation Act*, and also in the *Aeronautics Act* (R.S.C. 1952, chapter 2, s. 3, s-s. (*c*)).

In the first mentioned statute we see that:

> 3. The Minister may by himself, his engineers, superintendents, agents, workmen and servants
>
> (*b*) enter upon and take possession of any land, real property . . . the appropriation of which is, in his judgment, necessary for the use, construction, maintenance or repair of the public work, or for obtaining better access thereto;

"Public work" as defined by section 2(*g*) means and includes:

> 2(*g*) . . . other works of defence, and all other property, which now belong to Canada, and also the works and properties acquired, constructed, extended, enlarged, *repaired or improved at the expense of Canada* (emphasis mine throughout), *or for the acquisition, construction, repairing, extending, enlarging or improving of which any public moneys are voted and appropriated by Parliament* . . .

The *Aeronautics Act* specifies that:

> 3. It is the duty of the Minister
>
> (*c*) to construct and maintain all government aerodromes (Dorval Montreal Airport is in this category) and air stations, including all plant, machinery and buildings necessary for their efficient equipment and upkeep.

As for the method prescribed to effect the actual taking of land or of a limited estate or interest therein and the legal consequences thereof, section 9(1) and s-s. (2) outline it plainly:

> 9(1) . . . a plan and description of such land (appropriated for a public work) signed by the Minister, the deputy of the Minister or the secretary of the department, or by the superintendent of the public work, or by an engineer of the department, or by a land surveyor duly licensed . . . shall be deposited of record in the office of the registrar of deeds for the county of registration division in

which the land is situate, *and such land, by such deposit, shall thereupon become and remain vested in Her Majesty.*

(2) When any land taken is required for a limited time only, or only a limited estate or interest therein is required, the plan and description so deposited may indicate, by appropriate words written or printed thereon, that the land is taken for such limited time only, or that only such limited estate or interest therein is taken, *and by the deposit in such case, the right of possession for such limited time, or such limited estate or interest, shall become and be vested in Her Majesty.*

Exhibit A evidences due compliance with these mandatory formalities. Therefore the servitude imposed for the public needs of Canada, legally authorized and executed, has vested the possession thereof in Her Majesty the Queen since January 9, 1963.

In principle a just indemnity is due for any damages proved and according to section 23:

23. . . . any claim to or encumbrance upon such land or property shall, as respects Her Majesty, be converted into a claim to such compensation money or to a proportionate amount thereof . . .

Coming now to the matter of damages alleged by the suppliant, a differentiation must be made between those supposedly resulting from the operation of the adjoining airport: low flying of jet aircraft, glaring runway lights, loss of tenants, and the just indemnity for depreciation in value of the property affected to the servitude.

The petitioner seems to confuse two different facts: the activities of the airfield and the limited estate or interest taken in his land. No connection whatever exists between the two, a distinction neatly commented upon in the written argument submitted by the respondent's counsel (Notes soumises par Sa Majesté la Reine, intimée, au droit du Canada, page 4). I quote:

Ensuite, il importe de souligner que les deux chefs de dommage dont se plaint le pétitionnaire sont tout à fait indépendants l'un de l'autre. En effect, ce n'est pas à cause de la servitude expropriée sur le terrain du pétitionnaire que les avions passent au-dessus de sa propriété. Même en l'absence d'une telle servitude, les avions continueraient quand même de passer au-dessus de la propriété de M. Shepherd. D'ailleurs, avant l'expropriation, les avions circulaient au-dessus de la propriété du pétitionnaire.

Ronald Uloth, William Crabtree, occupants at a monthly rental of $95 of the Shepherd bungalow, and Mrs. Robert Shepherd, reported two or three instances of jet flying at an altitude of some 150 or 200 feet, thereby creating the

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unescapable inconveniences of noise and alarm. Fortunately no material prejudice ensued, and even though some had occurred, redress could not be obtained merely on the strength of the conditions depicted in paragraphs 14, 15 and 16 of the actual petition.

Mr. Shepherd, in 1954, thirteen years after the completion of the Dorval or Metropolitan airfield, erected his bungalow at a slight distance from the limits of that public work.

Five years later, on December 30, 1958 (cf. Ex. 1) with full personal knowledge of the expanding airport and of the runway's imminent extension from 7,000 to 11,000 feet, he was satisfied to buy the soil on which his house stood.

I already observed that clause 3 of the deed of sale (Ex. 1) expressly submitted the property then sold "to the Montreal Airport Zoning Regulations".

Possibly matters, from the petitioner's viewpoint, worsened around mid-December 1962, when the first jet liners began using the extended R-24 runway, yet all of this loomed in the offing since 1954, and had become a certainty by the end of 1958, to any person living in the airport's vicinity. Such is the factual situation, affording the respondent some ground on which to base a plea of *volenti non fit injuria.*

A legal proposition of far more weight, however, removes all doubts should any still persist. The exploitation of the government built Montreal airport under government control is a perfectly normal enterprise, offending against no law, and therefore its activities are governed by appropriately attuned rules of objective responsibility, the law of torts. The Court, on this point, fully agrees with respondent's comments at page 12 of its Memorandum hereunder cited:

> Nous prétendons, nous prévalant de la décision du Conseil Privé dans la cause de C P R v. Roy précitée (1902 A.C. p. 220), que aucune action en dommages-intérêts ne peut être maintenue contre Sa Majesté la Reine au droit du Canada résultant de l'opération d'un aéroport à moins que la personne en question ne puisse prouver négligence de la part des officiers de la Couronne, dans l'exécution de leurs fonctions . . .

> Nous prétendons donc que l'autorisation du Parlement donnée au Ministre de maintenir et opérer l'aéroport de Dorval constitue en quelque sorte une fin de non-recevoir à une action en dommages-intérêts, sauf le cas où il y aurait preuve de négligence, ce qui n'a pas été fait dans le cas présent.

Just as one may expect a hospital to create a silent zone, it is as natural for an airfield's regular trade to be carried on in an atmosphere of perpetual noise. Alone the transgression of the unavoidable measure of annoyances fosters a case of delictual liability.

I seldom reproduce at great length jurisprudence, but aeronautics open relatively new vistas of thought to doctrinal authors, amongst whom the French jurist, Aubert, holds a distinguished rank. In his treatise, Les Aérodromes et leur régime juridique (Paris, 1941, pages 272-273), the entire problem of responsibility in connection with aerial navigation is most lucidly resolved, as we may conclude from the undergoing excerpts:

> A notre sens, la responsabilité de l'exploitant de l'aéronef pour le survol doit être appréciée, comme en cas de dommages directs causés aux tiers à la surface, suivant les principes de la responsabilité objective.
>
> Toutefois, il est à craindre que l'application brutale de tels principes n'ait pour conséquence de soumettre les aviateurs à un régime de responsabilité du seul fait du préjudice, sans qu'il y ait lieu de rechercher si ce survol gênant n'est pas dû à des raisons autres que la volonté ou la faute de l'aviateur.
>
> Ceci est particulièrement probant en ce qui concerne le survol des propriétés situées dans le voisinage des aérodromes. Ce survol, en effet, s'effectue forcément à très basse altitude, les avions n'atterrissant et ne s'envolant pas à la verticale, mais suivant un certain angle d'incidence.
>
> Par suite les propriétés voisines seront soumises à un survol exceptionnellement gênant Dans ces conditions chaque survol pourra-t-il donner lieu à une action de la part des propriétaires troublés?
>
> On voit à quelles conséquences extrêmes conduirait l'application pure et simple de la responsabilité objective.
>
> Aussi croyons-nous, comme le propose M^{lle} Brunswick, qu'il convient de la nuancer en faisant appel à la théorie de la normalité de l'acte.
>
> Dans ces rapports nouveaux de voisinage, l'aviateur ne sera tenu pour responsable que s'il n'a pas agi suivant les circonstances normales de son époque et de son milieu.
>
> C'est ainsi qu'un survol à basse altitude, lors des envols et des atterrissages, étant interdit à la technique même de l'aviation, ne saurait constituer actuellement un acte anormal: ni pour l'époque, l'aviation étant suffisamment entrée dans les mœurs, ni pour le milieu, ces propriétés se trouvant à proximité de terrains spécialement réservés aux aéronefs.

A last grievance mentioned in paragraph 11 of the Petition states that:

> 11. . . . the suppliant is the proprietor of the air space and air rights to the upper-most tip of the bungalow or television antenna or tower or pole or fence or tree whichever may in the case be the highest elevation.

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Appropriately, the suppliant in the "Notes, Arguments and Jurisprudence" filed of record appears reconciled with a more realistic interpretation when he writes that:

> . . . in other words, as the owner of the land, he (i e. Shepherd) has a limited right in the air-space over his property to the extent that he can or will possess or occupy for the use and the enjoyment of his land (cf. page 1, 1st paragraph).

The late Mr. Justice Fournier, in a 1954 decision: *Lacroix v. The Queen*[1] very aptly expressed a similar criterion, saying:

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

This "limited ownership" of the overhead air strip, reserved to the owner of the land, vindicates a legalized forcible taking, a synonym for expropriation, whenever the public interest so demands.

The servitude registered on lot 184-4 is one of *non altius tollendi* prohibiting building beyond a certain altitude, in the instant occurrence a maximum height of 38 feet, interdicting also the maintenance of any obstruction, tree or construction of a greater vertical elevation. The final question lies in the determination of the prejudice thereby inflicted to a 24 feet high bungalow and a semi-rectangular plot of land 12,050 square feet in surface (*vide* Robert Eklove's report, Ex. 15, p. 3).

Mr. Robert Eklove, a Montreal real estate Broker and Appraiser, gave expert evidence in support of the petition. He believes that, previous to January 9, 1963, the Shepherd property, if put to its best possible use, viz: industrial purposes, which was not the case, could have sold for a price of $17,600, apportioned thus: 12,050 sq. feet of land, 55 cts per sq. ft., $6,600; estimated value of building in 1954: $11,000 (cf. Ex. 15, p. 3).

On page 2 of his written report, this witness expresses the opinion that:

> 5. . . . The value of the land as if it were vacant without the present building on it, will reduce in value from 55 cts per sq. foot to 45 cts per sq. foot due to the building height restriction of 140 A.S.L. (Above Sea Level).

[1] [1954] Ex. C.R. 69.

Eklove mentions the existence nearby of an important industrial development, specifying that the constructional limitation of 57 feet, originally imposed, would not be detrimental since industrial concerns might consider building at 57 feet, but it is quite doubtful they would at a top height of 38.

If sound enough the appraisal above provides a clue for an equitable solution. According to Mr. Eklove, the restricted altitude of 57 ft. would nowise hamper the highest and best use of the lot, at 55 cts a foot, on condition that Shepherd tore down his cottage, not on account of the servitude, but to suit the exigencies of an industrial purchaser. So far then no damages are attributable to the government's initiative. At 38 feet, the highest and best utilization becomes problematical to a degree assessed by the expert in terms of a shrinkage in value of 10 cts per foot. And here again the petitioner's bungalow would have to disappear to suit the needs of industry. On the other hand, should Mr. Shepherd maintain the residential character of his property, the existing house of 24 feet remains undisturbed and ample clearance is afforded, should the occasion occur, for a substituted residence of some 38 feet. The real exponent of the prejudice caused centers on the price decline from 55 cts to 45 cts a square foot.

No ascertainable depreciation affects the 1954 bungalow, only 24 feet high. Its intrinsic worth, to all intents and purposes, persists as undamaged by the restricted 38 feet altitude as admittedly would have been the case (Robert Eklove *dixit*) with a 57 feet margin.

Another point to settle consists in the claim for a loss in the rental yield of Mr. Shepherd's bungalow occasioned by the jet planes' utilization of runway 06L-24 R and the resulting ". . . noise, gasoline odors and risk hazards . . . such that no other tenants (except the present occupants: Uloth and Crabtree) will rent or dwell in subject house thereby creating a total loss of revenue". I can only refer the suppliant to the exhaustive analysis previously made of those consequences attaching to an airport's normal exploitation, sequels annoying in fact but blameless in law, save in the event of negligence. Furthermore, I am not convinced that the outcome of this latest development: runway R-24, will be so pecuniarly harmful as anticipated.

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The first compensatory assessment must then be limited to the depreciated value of those 12,050 ft. of land subjected to the servitude, a depreciation set at 10 cts a foot by petitioner's expert (cf. Ex. 15, p. 2) who, by the way, thinks that the loss of fair market value suffered by "said property, as of this date (May 24, 1963), is: $11,600".

I will grant slightly more, *ex majore cautela,* than did Mr. Eklove and allow petitioner an indemnity of 12 cts per square foot, or $1,446 for 12,050 feet, in round figures $1,500.

A last item outstanding: trees felled on the property, something unmentioned in Eklove's appraisement (Ex. 15), but valued by Shepherd at $5,000, received scant proof at the hearing. A 56-foot elm and some shrub trees were cut down on January 31 last. A second and taller elm is marked for removal. One Bernard Ciccione, the sub-contractor attending to this job for Highway Paving Company, the respondent's agent, merely says that "several trees were chopped off and burned", but cannot identify the cadastral lots on which those operations took place.

It goes without saying that a $5,000 figure is as preposterous under the circumstances (cf. photos Ex. 15 and B) as that of $1,600 for replacement per elm suggested by William Ed. Kelly, an arborist. An allotment of $150 a piece for the two elms, $300, plus $200 for the unspecified shrubs and "scorched earth", in all $500, does seem fully sufficient.

Since the suppliant adopted an unorthodox procedure, and because the respondent, in spite of this non-fatal defect, should have offered indemnity, no costs will be granted to either party. I need not trouble about the injunction fantasy for reasons already stated.

There will, therefore, be judgment declaring that the servitudes and easements described in Exhibits A and E of the record, are vested in Her Majesty the Queen as from January 9, 1963; that the total amount of compensation to which the petitioner is entitled, subject to the usual conditions as to all necessary releases and discharges of claims, is $2,000, with interest thereon at the rate of 5 per cent per annum from January 9, 1963, to this date. No costs.

Judgment accordingly.

1962
Dec. 5
1963
Jul 15

BETWEEN:

LE ROUET LIMITEE .... APPELLANT;

AND

LE ROI HOSIERY CO. INC. AND THE REGISTRAR OF TRADE MARKS .... RESPONDENTS.

Trade Marks—Trade Marks Act R.S.C. 1952-53, c. 49, ss. 2(b)(u), 5, 6(4)(5), 14(1)(a), 16(1)(c)(2)(c)—"Le Roi"—"Le Rouet"—Degree of resemblance in sound—Appeal from decision of Registrar of Trade Marks allowed.

Respondent applied to the Registrar of Trade Marks for registration of the trade mark "Le Roi" used in association with hose for infants and children. The appellant opposed the application. It was the owner of trade mark "Le Rouet" used in association with woollen blankets, scarves, socks, shawls, hosiery, linens, babies' wear, dresses and woollen sweaters. The Registrar rejected appellant's opposition and from that decision appellant appealed to this Court.

The main or in fact real and only issue is the pronunciation of the French words "Le Rouet" and "Le Roi" particularly in the case of English speaking hearers.

It was admitted that the two trade marks had been used in Canada simultaneously, the appellant's regularly since 1945, the respondent's since 1947.

Held: That the appeal be allowed.

2. That in compliance with s. 6 of the Act the degree of resemblance in sound between the two trade marks is deceptively similar and the margin of phonetic differentiation in articulate French between the two commercial names is narrow, even for those attuned to the idiom.

3. That although a professor of French literature testified that with correct pronunciation among the "cultured classes" there would be no confusion, habitual correction in speech was not of this world.

4. That faulty articulation permeates the current speech of too many Quebecers whose regular idiom is French, and people untrained in French would be more prone to frequent auricular deception.

5. That anteriority militates in favour of appellant.

APPEAL from a decision of the Registrar of Trade Marks.

The appeal was heard before the Honourable Mr. Justice Dumoulin at Ottawa.

André Forget, Q.C. for appellant.

David W. Scott for respondents.

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

DUMOULIN J. now (July 15, 1963) delivered the following judgment:

This appeal from a decision of the Registrar of Trade Marks, dated March 31, 1959, rejecting an opposition by the appellant to the application of the respondent, Le Roi Hosiery Co. Inc., for registration of the trade mark "Le Roi", Serial number 239,583, was heard, initially at Ottawa, October 7, 1960, before the late Mr. Justice Fournier, who died some months later, leaving this case undecided.

Both parties concurring, the President of this Court, on November 22, 1962, ordered *inter alia*:

1. That both appellant and the respondent Le Roi Hosiery Co. Inc., shall be at liberty to introduce oral evidence at the hearing (or rather re-hearing) of this Appeal in respect of the issue of pronunciation in the French language of the words "Le Rouet" and "Le Roi".

The matter was referred to me and re-argued *in toto* along the lines of discussion reproduced in the Transcription of Evidence, or more accurately of the respective pleas of counsel delivered at the first trial, October 7, 1960.

In point of fact, the real and only basis for the appeal is, as just said, the issue of pronunciation of the French words "Le Rouet" and "Le Roi", particularly in the case of English speaking hearers.

The controversy arose when:

> The Applicant (id est the instant Respondent Le Roi Hosiery Co. Inc.) applied, pursuant to the provisions of Section 16(1) of the Trade Marks Act for registration of the trade mark "Le Roi" and claimed use of it since March 12th, 1947, in association with hose for infants and children.
>
> The Applicant claimed the benefit of Section 14 of the Trade Marks Act by virtue of United States registration No. 148,109, dated November 8, 1921. The opponent's predecessor in title, The Quebec Import and Trade Company Limited, made application under the provisions of the Unfair Competition Act, for registration of the trade mark "Le Rouet", being Serial No. 189,641, for use in association with woollen blankets, scarfs, socks, shawls, hosiery, linens, babies' ware, dresses and woollen sweaters. This application was refused due to the existence of registered trade *marks* (emphasis throughout these notes is mine) consisting of the representation of a spinning wheel.

The lines above reproduced are from a true copy on record of the Canadian Registrar of Trade Marks' decision. I note the plural gender qualifying "trade marks consisting of spinning wheels", which would indicate the granting of several such trade marks. If so, why then refuse another similar request? This said purely for duty's sake, as I do not intend to attach further significance to it.

The opposition of Le Rouet Limitée to Le Roi Hosiery's application was rejected "pursuant", wrote the Registrar, "to Section 37 of *Trade Marks Act*".

On February 9, 1946, (cf. Notice of Appeal, 6), appellant's original name, Quebec Import and Trade Company Limited, was changed to Le Rouet Limitée, but it is admitted by all concerned (cf. Transcription of Evidence, p. 29, respondent's acknowledgement) that ". . . the two trade marks have been used in Canada simultaneously. The appellant's regularly since 1945, the respondent's regularly since 1947 . . .". And the former, at paragraph 6 of its Notice of Appeal, asserts that ". . . first use of Le Rouet is alleged as of 1st May 1945". Therefore, no weight can derive from certain assertions in paragraphs 5 and 8 of an affidavit signed by Mr. Irving King, Vice-President of Le Roi Hosiery Co., that his firm ". . . has been advertising its hosiery under its trade name Le Roi in the periodical 'Parent's Magazine' which, *I believe,* is circulated in Canada, so that this trade mark Le Roi has been known in Canada since on or about February 1939".

In paragraph 8 this deponent says: "That although . . . sales in Canada were not renewed until March 12, 1947, (exhibit B-2), the first use of the trade mark Le Roi in Canada was on March 7, 1940, when Le Roi Hosiery Co. Inc. introduced its products into the Canadian Market *on an experimental basis* (exhibit B-1)" More and better evidence than a gratuitous "belief" or an "experimental" test, severed by a hiatus of seven years before resumption of business in Canada are required to comply with Section 5 of the Act, hereunder recited in part:

5. A trade mark is deemed to be made known in Canada by a person only if it is used by such person in a country of the Union, other than Canada, in association with wares or services, and

(*a*) such wares are distributed in association with it in Canada, or

(*b*) such wares or services are advertised in association with it in

(i) any printed publication circulated in Canada in the ordinary course of commerce among potential dealers in or users of such wares or services, 1963 LE ROUET LIMITÉE v. LE ROI HOSIERY CO. INC. *et al.* — Dumoulin J. —

(ii) . . .
and it has become well known in Canada by reason of such distribution or advertising.

Prior to 1947 then, it seems sufficiently shown that the respondent's foreign trade mark had not as yet "become well known in Canada".

Counsel for Le Roi Hosiery Co. raised initially the technical point that Le Rouet Limitée's lack of a registered trade mark deprived it of all essential status to contest the application (cf. Transcription of Evidence, middle of page 37), the statutory section relied upon being 14(1)(*a*), viz:

14. (1) Notwithstanding section 12, *a trade mark* that the applicant or his predecessor in title has caused to be duly registered in his country of origin is registrable if, in Canada,

(*a*) it is not confusing with a registered *trade mark.*

Trade mark is one thing but *trade name* is another clearly within the purview of the Act as one of two main factors considered, *inter alia,* in section 16(1), s-s. (*c*) and (2)(*c*) next quoted:

16. (1) Any applicant who has filed an application in accordance with section 29 for registration of a trade mark that is registrable and that he or his predecessor in title has used in Canada or made known in Canada in association with wares or services is entitled, subject to section 37, to secure its registration in respect of such wares or services, unless at the date on which he or his predecessor in title first so used it or made it known it was confusing with

(*c*) a *trade name* that had been previously used in Canada by any other person.

Sub-section (2) is still more in line with the instant facts:

(2) Any applicant who has filed an application in accordance with section 29 for registration of a trade mark that is registrable and that he or his predecessor in title has duly registered *in his country of origin* and has used in association with wares or services is entitled, subject to section 37, to secure its registration in respect of the wares or services in association with which it is registered in such country and has been used, unless at the date of filing of the application in accordance with section 29 it was confusing with

(*c*) *a trade name* that had been previously used in Canada by any other person.

Possibly the recitals above might have been dispensed with by the mere inclusion of section 2(*u*), the interpretation schedule, reading thus:

(2) . . .
(*u*) *trade name* means the name under which any business is carried on, whether or not it is the name of a corporation, a partnership or an individual.

For all useful intents *trade names* and *trade marks* are equally encompassed by our *Trade Marks Act.*

The one and only problem at stake now that preliminary objections are disposed of, consists in a likelihood of phonetic confusion, auricular and verbal, between both commercial styles used, especially among English speaking customers, and such is the grievance uttered in paragraph 3 of appellant's Notice of Appeal, hereafter cited:

(3) On the basis that phonetically "Le Rouet" and "Le Roi" are pronounced in French very similarly, particularly in the Province of Quebec . . . it is submitted that the Registrar of Trade Marks erred in not maintaining the opposition (by Appellant) and not rejecting the application (by Respondent).

On the topic of verbal and auricular confusion, Professor René de Chantal, who describes himself as Head of the Department of French Literature, a section of the Faculty of Letters, University of Montreal, heard by Le Roi Hosiery, exemplified the correct pronunciation of Le Rouet and Le Roi prevalent, contends the witness, among the "cultured classes" of French speaking Canada, adding that he would not be confused whenever that dual designation was spoken in proper form. So far, I quite agree with the learned gentleman, but habitual correction is not of this world; faulty articulation permeates the current speech of too many Quebecers whose regular idiom is French. It goes without saying that people untrained to French, the English Canadians of Quebec and of the other Provinces must, of needs, be more prone to frequent auricular deception.

The margin of phonetic differentiation in articulate French between these two commercial names is narrow, even for those attuned to the idiom. I may say, in all fairness, that my opinion in this matter does not transcend the domain of common knowledge.

Sections 2(*b*) and more so 6(4)(5), subparagraphs (*a*)(*b*)(*c*)(*d*)(*e*) outline with sufficient accuracy the species of confusion that vitiate a competitive trade mark and trade name, Section 2 s-s. (*b*) reads:

2. (*b*) "Confusing", when applied as an adjective to a trade mark or trade name, means a trade mark or trade name the use of which would cause confusion in the manner and circumstances described in section 6.

6. (4) The use of a *trade name* causes confusion with a *trade mark* if the use of both the trade name and the trade mark in the same area would be likely to lead to the inference that the wares or services associated with the business carried on under such trade name and those associated

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with such trade mark are manufactured, sold, leased, hired or performed by the same person, whether or not such wares or services are of the same general class.

(5) In determining whether trade marks or trade names are confusing, the court or the Registrar, as the case may be, shall have regard to all the surrounding circumstances including

(*a*) the inherent distinctiveness of the trade marks or trade names and the extent to which they have become known;

(*b*) the length of time the trade marks or trade names have been in use;

(*c*) the nature of the wares, services or business;

(*d*) the nature of the trade; and

(*e*) *the degree of resemblance between the trade marks or trade names in appearance or sound* or in the ideas suggested by them.

This similarity of sound tends to increase, one may infer from the evidence, in the case of purchase orders imparted over the telephone, a medium which often blurs somewhat voice and pronunciation.

The lasting danger of mistaken identity between both styles di dnot escape the respondent company's vigilance and was duly stressed by it before Mr. A. D. Bailey, the American Examiner of Interferences, on September 29, 1953.

There was filed to serve as evidence in this case by respondent's counsel, and this dispels, I think, the customary objection of *res acta coram foro alieno,* the statutory declaration of Mr. Irving King, Vice-President of Le Roi Hosiery Co. Inc., dated "this 7 day of July, 1958", paragraph 12 of which declares:

12. That referring to the reliance by Claude Vézina (Le Rouet's Managing Director and Treasurer) on the fact that the application by Le Rouet Limitée to register Le Rouet in the United States was successfully opposed by Le Roi Hosiery Co. Inc., it is respectfully submitted that the examiner of interferences in the United States Patent Office who decided this proceeding in favour of Le Roi Hosiery Co. Inc., emphasized that persons in the United States are not sufficiently familiar with the French language, a situation which does not obtain in Canada. The said examiner of Interferences stated at page 3 (should read 4) of his decision:

> Insofar as persons sufficiently familiar with the French language are concerned it may be, for reasons suggested by the applicant, that the marks of the parties would be readily distinguishable in every particular, but it is deemed to be otherwise with respect to the much larger class of uninformed purchasers to whom it is believed these marks "Le Rouet" and "Le Roi" would have no significance other than as trade marks of French origin and uncertain pronunciations.

This affidavit was recorded voluntarily although Mr. King had, at the time, the benefit of counsel, who apparently entertained no objection to this evidence.

Next, this same paragraph 12 concludes in the argumentative vein hereunder:

> In other words, it is respectfully submitted that, while the arguments made by Le Rouet Limitée in the United States Proceeding were not accepted by the Examiner of Interferences because they were predicated on the premise that the purchasers of the products of the respective parties are familiar with the French language, such premise is applicable to Canadian purchasers.
>
> Consequently the arguments made by Le Rouet Limitée in the United States attempting to establish that the respective marks are distinguishable and their contemporaneous use would not lead to the likelihood of confusion are convincing when applied to purchasers in Canada. In this connection, reference is respectfully made to the bottom of page 2 of exhibit C attached to the affidavit of Claude Vézina.

Respondent's Vice-President adequately appraised the situation as it obtained across the border, but the identical deponent takes a lot for granted, as the saying goes, in proclaiming, *proprio motu,* the existence of widespread bilingualism throughout our country, outside of Quebec Province. If Mr. King possessed a truer awareness of the state of affairs in Canada he would share the prevalent notion that, Quebec excepted, a working knowledge of French and English remains a rarity.

In consequence of Irving King's declaration, the arguments proffered to the United States Trade Mark officer on respondent's behalf are no less admissible before this Court. A probable condition of deceptiveness occasioned *there* also persists *here* and for similar reasons, namely the predominantly English speaking clientele of the contending parties, conclusively revealed by Le Roi Hosiery's exhibit A and Le Rouet's own exhibit A.

Thirty-five wholesale customers appear on the respondent's list, exhibit A, sixteen of which only operate in Quebec Province and, of the latter, five bear English trade names.

In turn, appellant's exhibit A lists twenty important customers of which five operate in Quebec, fourteen in the sister provinces and one, of no concern to us, in the United States. Among the five Province of Quebec stores, two cater mostly to English Canadians and three to French Canadians.

It is trite but true to note the practical results aimed at by any Trade Marks legislation. Peculiarities good or indifferent must be taken as they exist, a truism allowing

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me to re-assert my considered opinion that, however regrettable, hasty and defective articulation of the spoken word in French communities, can hardly be denied, hence, the danger of phonetically confusing these business styles which, even in normal conditions of speech, sound fairly alike.

Obviously, such a risk becomes all the greater with English speaking patrons interested in the purchase of textile and woollen goods offered for sale by both Le Rouet Limitée and Le Roi Hosiery Co. Incorporated.

Finally, the Court, complying with the directions given throughout section 6 and especially in its subsections (5) and 5(*e*), reaches the conclusion that the degree of resemblance in sound between the trade mark of the respondent and the trade name of the appellant is deceptively similar.

Le Roi Hosiery Incorporated filed its application for registration in Canada of its trade mark (American) on February 22, 1957, and the date of first use here is given as of March 12, 1947 (cf. Irving King's Statutory Declaration, sec. 8).

Le Rouet Limitée first affixed the trade name on similar goods on May 1, 1945, and, on February 9, 1946, obtained supplementary Letters Patent of the Secretary of State for Canada changing its corporate name from Quebec Import Co. to Le Rouet Ltée (cf. Notice of Appeal, s. 6, and respondent's admission, transcript p. 29). Anteriority, therefore, militates in favour of the appellant.

For the above reasons, this appeal is allowed; the decision of the Registrar of Trade Marks, dated March 31, 1959, rejecting an opposition by the appellant to the application of the respondent Le Roi Hosiery Co. Inc. for the registration of the trade mark "Le Roi", Serial No. 239,583, is annulled and set aside.

The appellant is entitled to recover from respondent Le Roi Hosiery Co. Incorporated, all its taxable costs.

Judgment accordingly.

BETWEEN:

1963
May 22
Aug. 6

MONTREAL TRUST COMPANY, DAME ORIAN HAYS HICKSON AND RALPH DOUGAL YUILE .. } APPELLANTS;

AND

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

Revenue—Succession duty—Succession—Will—When usufruct in share of estate gives to donee such general power to appoint, appropriate or dispose of property as is deemed to make him, immediately prior to his death, competent to dispose of the property—Estate Tax Act, S. of C. 1958, c. 29, ss. 3(1)(a), 3(2)(a) and 58(1)(i)—Testamentary substitution—Lapse of substitution and reversion of substituted property to institute—Civil Code, Arts. 900, 901, 925, 928, 930, 933 and 957.

By articles VIII and IX of her will dated April 22, 1931, Catherine Dow Hickson bequeathed one-fifth of the residue of her estate to her son, Robert Newmarch Hickson, directing that one-half of the said share, less $40,000 previously given to him be given to him absolutely and the usufruct of the other one-half of his share be given to him during his lifetime, the ownership of the said one-half of his share being bequeathed to his children, "and if he leaves no children to his heirs, legal or testamentary".

The said Robert Newmarch Hickson died without issue on June 19, 1960, leaving a will by the terms of which he bequeathed his estate, less certain specific legacies, to his wife. On his death the Minister of National Revenue assessed estate duty tax against the said one-half of his share in his mother's estate, the usufruct of which had been bequeathed to him for life, claiming that it was part of his estate by virtue of the *Estate Tax Act* ss. 3(1)(*a*), 3(2)(*a*) and 58(1)(*i*).

Held: That whenever the substitute is incapable of inheriting, the substituted property reverts to the institute in full ownership. Here, on the death of the institute, Robert Newmarch Hickson, the substitution failed because he died without issue, and he, the institute, accordingly profited by the lapse of the substitution, the substituted property reverting to his estate in full ownership.

2. That the lapse of the substitution conferred upon the said Robert Newmarch Hickson a general power "to appoint, appropriate or dispose of (this) property as he sees fit . . . by will . . .".

3. That the property in question was properly included in the estate of the late Robert Newmarch Hickson for the purpose of computing its aggregate net value under the *Estate Tax Act*.

APPEAL under the provisions of the *Estate Tax Act*.

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

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MONTREAL TRUST CO. *et al.* *v.* MINISTER OF NATIONAL REVENUE

John Marler, Q.C. and *T. O'Connor* for appellants.

Paul Boivin, Q.C. and *Paul Ollivier* for respondent.

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

DUMOULIN J. now (August 6, 1963) delivered the following judgment:

This is an appeal from the confirmation by respondent, on October 31, 1962, of a Succession Duty assessment, dated June 16, 1961, wherein a tax in the sum of $226,841.69 was levied on the estate of Robert Newmarch Hickson, late of Montreal, Province of Quebec.

The chronological sequence of facts out of which the instant difficulty arises are the following:

Lady Catherine Dow Hickson, mother of Robert Newmarch Hickson, made, in Montreal, an authentic will on April 22, 1931, articles VIII and IX whereof enact that:

> VIII. . . . I bequeath the rest residue and remainder of my Estate, real and personal, moveable and immoveable of every kind, nature and description, to my five children (the heirs are then mentioned among which is R. N. Hickson) . . . to be divided between them in equal shares, . . . but the share of my son, Robert Newmarch Hickson, and the share of my daughters to be subject to the conditions hereinafter expressed.
>
> IX. I direct that one-half of the share of my son, Robert Newmarch Hickson, in the residue of my Estate, less the sum of Forty Thousand Dollars which I have given him some years ago, shall belong to him in absolute ownership, and the other half of his share I give and bequeath the usufruct thereof during his lifetime to my said son, Robert Newmarch Hickson, and the ownership to the children of my said son, *and if he leaves no children to his heirs, legal or testamentary.*

The italicized words constitute the vexed question, but of this, more later.

Lady Hickson deceased many years ago; then on June 19, 1960, Robert Newmarch Hickson died, domiciled in Montreal, leaving a Last Will and Testament, dated October 27, 1959, executed before H. B. McLean and colleague, Notaries.

Robert Newmarch Hickson left no issue. By his will he appointed the appellants as his executors and, after numerous particular legacies, bequeathed the remainder of his property to Mrs. Orian Hays Hickson, his wife, one of the appellants.

At the death of R. N. Hickson, June 19, 1960, his mother's executors, pursuant to article IX of her will, held property of a value of $363,702.19 against which respondent proceeded to assess an Estate Duty Tax, on the ground submitted in paragraph 6 of its Reply to Notice of Appeal:

6. . . . that by reason of *the general power of* appointment which Robert Newmarch Hickson had upon the capital of the Estate of Lady Catherine D. Hickson, according to the provisions of the Estate Tax Act and more particularly according to paragraph (*a*) of subsection (1) and paragraph (*a*) of subsection (2) of section 3, and paragraph (i) of subsection (1) of section 58 of the Act, said capital amounting to $363,702.19 was included in the net value of the Estate of the deceased.

To this interpretation of the Act, the appellants take categorical exception, arguing in paragraphs 10, 11 and 12 of the Notice of Appeal that:

10. The deceased (i e. Robert Newmarch Hickson) could not and did not have a *general power,* as defined in said Section 58(1)(i) or otherwise, over the property in question.

11. The deceased was not competent to dispose of the property in question within the meaning of the said Sections above quoted or otherwise.

12. In particular, the deceased was not competent to dispose of said property immediately prior to his death.

Thus circumscribed by the concise assertion of a taxing right and its flat denial, the litigations' solution must be looked for in the provisions aforesaid of our *Estate Tax Act,* thus worded:

3(1)(*a*).

(1) There shall be included in computing the aggregate net value of the property passing on the death of the person the value of all property, wherever situated, passing on the death of such person, including without restricting the generality of the foregoing,

(*a*) all property of which the deceased was, immediately prior to his death, competent to dispose;

3(2)

(2) For the purposes of this section,

(*a*) a person shall be deemed to have been competent to dispose of any property if he had such an estate or interest therein *or such general power as would,* if he were sui juris, *have enabled him* to dispose of that property.

58.

(1) In this Act,

(i) *GENERAL POWER*—"general power" includes any power or authority enabling the *donee or other holder thereof* to appoint, appropriate or dispose of property *as he sees fit, whether exercisable* by instrument inter vivos *or by will,* or both, but does not

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include any power exercisable in a fiduciary capacity under a disposition not made by him, or exercisable as a mortgagee.

Let us now examine how these legal prescriptions compare with appellants' standpoint in the case, summarized as follows at page 6 of their Notes and Authorities:

> . . . Appellants thus submit that Hickson was not at any time *competent to dispose* of the property; alternatively, that, if he was, he was not so competent immediately prior to his death; or if he was so competent immediately prior to his death or even at the time of his death, *he could not appoint or dispose of the property as he saw fit;* and that for each of these reasons no Estate Tax is exigible on or in respect of the property.

The difficulty, it would appear, narrows down to the donee's testamentary power of disposal should he die childless.

In other words was Hickson's right to dispose by will of the property, affected to his lifelong usufruct, limited by article IX; was he, when inditing his testamentary legacies, a mere fiduciary or an absolute owner in full exercise of his untrammelled liberty? What is the specific qualification attaching to article IX of Lady Hickson's Testament: simple usufruct of a fiduciary substitution?

Article 925 of the Civil Code mentions two kinds of substitution, the vulgar and the fiduciary, this latter being:

> 925. . . . that in which the person receiving the thing is charged to deliver it over to another either at his death or at some other time.

Article 928 elaborates the matter in these words:

> 928. A substitution may exist although the term "usufruct" be used to express the right of the institute. In general the whole tenor of the act and the intention which it sufficiently expresses are considered, rather than the ordinary acceptation of particular words, in order to determine whether there is substitution or not.

In a typical affair: *Lussier v. Tremblay*[1], a substitution created by act *inter vivos,* conveyed lands donated by husband and wife, common as to property, to their two sons and daughter as institutes, the donors stipulating that: "*Les donateurs n'entendent pas par là créer une vraie substitution . . .*". Despite this subjective expression of intent Mr. Justice Taschereau, as he then was, speaking for the

[1] [1952] 1 S.C.R. 389 at 404, 406.

majority of the Supreme Court, imparted to that clause an objective meaning quite different; I quote:

> Je crois qu'il ne fait pas de doute que, malgré les termes employés dans l'acte de donation, *"Les donateurs n'entendent pas par là créer une vraie substitution", il s'agit bien tout de même d'une vraie substitution.* Les parties l'admettent, et si l'on s'est servi de ces termes, c'est probablement parce que les appelés à la substitution n'étaient pas individuellement désignés.

This omission of individually designating the substitutes (les appelés) in the *Lussier* case, whatever its cause, was, for Lady Hickson, a physical impossibility since her son—the deceased—never had any children.

Ancestral solicitude for the welfare of unborn descendants prompted the testatrix to reserve for their future benefit one-half of the estate bequeathed in usufruct to their eventual father (*pater in potentia*).

Such a hypothetical legacy bears the characteristic traits of a fiduciary substitution, according to the text of the Civil Code, to doctrine and jurisprudence. It is natural that Lady Hickson's parental care did not extend beyond the direct line of parenthood, the more so since her other children were amply provided for.

Concerning the ownership of half of the legacy made to her son, the donor preferred her grandchildren to be born of the latter's marriage, but should he die childless, she then would prefer him to any other.

In default of this mandatory condition at R. N. Hickson's death how does the pertinent law deal with the lapsed substitution? The applicable texts suffer no ambiguity and the consensus of doctrinal opinion summarized in P. B. Mignaults' treatise "Le Droit civil canadien", is clearer still. Whenever the substitute is incapable of inheriting, the substituted property reverts to the institute in full ownership. A correlation of five articles in the Quebec Civil Code allows of no other conclusion; those articles read as hereunder:

> 933. The rules concerning legacies in general (substitutions fall in this category) also govern in matters of substitution, in so far as they are applicable, save in excepted cases. Substitutions by gift inter vivos, like those created by will, are subject to the same rules as legacies, as to their opening and after they have opened. . . .

Those rules prescribe that:

> 900. Every testamentary disposition (such as clause IX of the testatrix's will) lapses if the person in whose favor it is made do not survive the testator.

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901. Every testamentary disposition made under a condition which depends on an uncertain event lapses if the legatee die before the fulfilment of the condition.

In the case at bar the condition foresaw the survival of issue at the time of R. N. Hickson's demise. And, here, a melancholy paraphrase of Milton may be in point: "As no children had seen the light of day, none were blinded by the darkness of death". Two final dispositions in chapter (IV) on Substitutions will close this review.

930 (partim). The revocation of a substitution, (including the substitute's inability to avail himself of the disposition) when it is allowed, cannot prejudice the institute or his heirs *by depriving them of the possible benefit of the lapse of the substitution* or otherwise. On the contrary, and although the substitute might have received but for the revocation, *such revocation goes to the profit of the institute and not of the grantor,* unless the latter has made a reservation to that effect in the act creating the substitution.

Article IX of the Testament contains no reservation of any reversionary right.

957. The substitute who dies before the opening of the substitution in his favor, *or whose right to it has otherwise lapsed,* does not transmit such right to his heirs, any more than in the case of any other unaccrued legacy.

To whom this right reverts, the late Mr. Justice Mignault indicates in these limpid terms: (P. B. Mignault, Droit civil canadien, Tome 5, p. 121.)

Des effets de la Caducité:— Je viens d'indiquer les effets de la caducité lorsqu'elle provient de la personne du grevé. *Lors, au contraire, qu'elle vient de la personne de l'appelé, elle efface la charge de rendre. Donc le grevé demeurera propriétaire incommutable des biens substitués,* et les droits qu'il a consentis sur ces biens seront definitifs. *L'appelé,* sauf le cas où la représentation est admise exceptionnellement, *ne transmettra aucun droit à ses héritiers, car son droit s'évanouit avec lui.*

It not infrequently happens in substitutions to unborn infants that the institute, usually of course the father to be, is invested with a right of designating by a will the particular substitutes, whose class, however, is specified in the deed of substitution. In such event the legatee or institute becomes a simple trustee prevented from transgressing the directions imported by the grantor. The *Lussier v. Tremblay* case, above, especially at pages 406 and 407, instances an occurrence of this nature. But, again, it does seem impossible to read even a shade of a restriction in the plain words of clause IX. "... I give and bequeath ... the ownership to the children of my said son, and if he leaves no children, *to his heirs*, legal or *testamentary*".

I must therefore reach the conclusion that the substitution in favour of grandchildren, unborn at its opening, has lapsed, thereby investing Robert Newmarch Hickson with full proprietorship of the second half of his share in his mother's estate, and conferring upon him a general power *"to appoint, appropriate or dispose of (this) property as he sees fit ... by will ..."*.

R. N. Hickson was empowered by his mother, Lady Hickson, to make a perfectly valid will, provided that, at his death, his matrimonial union had proved childless as it did.

For the reasons outlined the appeal is dismissed and the Estate Duty assessed by respondent, on June 16, 1961, in respect of Robert Newmarch Hickson's succession was levied in accordance with the law. The respondent is entitled to recover all costs after taxation.

Judgment accordingly.

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Oct. 17
1963
Aug. 6

BETWEEN:

SAMUEL FABI .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income tax—Income or capital gain—Business or adventure in nature of trade—Subdivision and sale of land purchased several years previously allegedly for its supply of sand and gravel—Income Tax Act, R.S.C. 1952, c. 148, s. 139(1)(e)—Statutes of Quebec, s. 1415, c. 75, Geo. VI, 1950—Quebec Civil Code, Art. 910.

Appellant was engaged in the general contracting business in the City of Sherbrooke, P.Q. and its vicinity through his management and control of two companies, Fabi et Fils Ltée and Les Produits de Ciment de Sherbrooke Limitée. From 1933 until about 1946 he purchased his supplies of sand and gravel from one William Brault and after his death, from his estate, the sand and gravel being supplied from pits on lots 4 and 5, Township of Orford.

In 1946, 1947 and 1948, the appellant purchased the whole of lots 4 and 5, containing 200 acres, in 3 parcels by 3 separate transactions, ostensibly to secure a source of supply of sand and gravel for his companies.

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Appellant's mother joined him in these transactions apparently only because he did not have enough money to complete them alone. In 1949, the supply of sand and gravel from these lands became exhausted and, after attempting to sell the said lands without success, appellant subdivided them and sold the lots during the period 1952 to 1958.

In 1948, the appellant had purchased part of lot 899-80 known as the Vincent Street lots adjoining said lots 4 and 5, which he subdivided in 1950 into 13 lots, which were sold by 1955. In addition, there was evidence that, during the period from 1944 to 1958, the appellant had engaged in many real estate transactions, consisting of purchases, sales and borrowings and that his wife had entered into similar transactions with monies partly furnished by the appellant.

Held: That the appellant's purchase of said lots 4 and 5 in 3 instalments spread over 3 years negatives his claim that in order to secure the supply of sand and gravel he had to purchase the whole of the two lots.

2. That the evidence that William Brault, before he purchased said lots 4 and 5 in 1916, had soundings taken which indicated the gravel bank should contain at least 1,000,000 cu. yds. of gravel; that at least 1,000,000 cu. yds of gravel had been removed from the bank by 1946; that the appellant made no effort to verify or measure the quantity of gravel remaining in the gravel bank before he purchased said lots 4 and 5; and that there was little gravel on the 67 acres parcel of lot 4 purchased by the appellant in 1946, adjoining the Sherbrooke city limits, all would indicate that the appellant was aware of the virtual depletion of the supply of gravel on lots 4 and 5 and that he was also aware of the adaptability of these lands for subdivision purposes. Furthermore, the unconvincing reason given by Alfred Brault, the executor of the William Brault estate, for deciding to get out of the gravel business and offering to sell lots 4 and 5 to the appellant, i e. that as executor of the said estate he would be compelled by law to manage and operate the said gravel business without compensation when in fact he could have declined the office of executor, should have put the appellant on his guard if he attributed much importance to the quantity of gravel that remained.

3. That at about the time the appellant purchased said lots 4 and 5, he also acquired an adjoining parcel of land known as the Vincent Street lots for the purpose of subdivision and sale; this is conclusive evidence that the appellant, from 1955 to 1958, and for many years prior thereto, was engaged in the business of buying, selling and speculating in real estate within the meaning of s. 139(1)(*e*) of the *Income Tax Act*.

APPEAL under the *Income Tax Act*.

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

Albert L. Bissonnette for appellant.

Paul Boivin, Q.C. and *R. Boudreau* for respondent.

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

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KEARNEY J. now (August 6, 1963) delivered the following judgment:

The present case concerns an appeal from assessments to tax whereby the Minister added certain amounts (later mentioned) to the appellant's taxable income for each of the years 1955 to 1958 inclusive, on the grounds that the said amounts constituted profits which were realized from real estate transactions carried out by the appellant as a business or adventure in the nature of trade.

The appellant contends that when his mother and himself acquired the real estate in question, which consisted of about 200 acres, known as lots Nos. 4 and 5, in the Township of Orford, near the City of Sherbrooke, Province of Quebec, it was not with the intention of resale but for retention as a fixed asset, particularly for the purpose of selling gravel and sand from pits or banks which were located thereon. The said pits having unexpectedly petered out, after vainly attempting to sell the property en bloc the appellant subdivided parts of it and sold the resulting lots piecemeal in order to realize on a capital asset, but at no time did his real estate transactions constitute a business within the meaning of s. 139(1)(e) of the *Income Tax Act*.

The plaintiff's mother, the late Adolorata Fabi died on February 18, 1957 and by testamentary disposition the appellant became entitled to one eighth ($\frac{1}{8}$) of her estate, including the two aforesaid lots.

By notice of assessment dated July 20, 1959, the Minister, for reasons later more fully described, added to the taxpayer's declared income the following amounts representing profits from the sale of part of the lands in question:

	1955	1956	1957	1958
Samuel Fabi (personally)	$18,618 45	$6,272 86	$8,155.79	$8,043.61
One-eighth ($\frac{1}{8}$) interest in the Estate of the late A. Fabi	....	....	$1,019.47	$1,002.98

The assessment of $18,618.45 included a disposal in 1951 by the appellant of part of lot 5 to Les Produits de Ciment de Sherbrooke Ltée, which he owned and controlled, but the deed to the property was not executed until 1955.

On October 15, 1959, a notice of objection was filed by the appellant in respect of the aforementioned assessments. On

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reconsideration, the Minister, by notice of reassessment dated April 13, 1960, agreed to amend the assessment for the taxation year 1955 by reducing the amount thereof from $18,618.45 to $2,545.82, but not otherwise.

I shall first deal with the case for the appellant.

Apart from testifying on his own behalf, the appellant called one witness, Mr. Alfred Brault. The latter's evidence was short and as it dealt mainly with the history of lots 4 and 5 (hereinafter called "the lots") prior to their acquisition by the appellant I will review his testimony first.

The witness stated that his father, the late William Brault, acquired "the lots" in 1916 for the sum of $30,000 and his reason for doing so was because of the gravel banks which consisted of a small area lying along the side of the lots which abutted on Brompton Road. The owner, a Mr. Ross, would only sell the gravel bank provided the purchaser acquired the entire lots. His father, before buying, caused soundings of the bank to be made, and it was estimated that it should contain at least one million cubic yards of gravel. To the witness' knowledge, his father had, through the years prior to his death in 1942, sold gravel, among others, to Antonio Fabi, father of the appellant, and later to Fabi et Fils Ltée and Dominion Textile at 10¢ a cubic yard. His father had realized over $90,000 from sales to Dominion Textile alone.

The witness said that following his father's death he and his brothers did not continue in the gravel business because he was named as one of the three executors in his father's will and since under the Civil Code of Quebec, unless his father had so provided, he could not receive remuneration, as executor, from the estate, he was not interested in exploiting this business solely for the benefit of his brothers, so it was decided, soon after William Brault's death, to dispose of the said lots.

Shortly after the death of Antonio Fabi, the appellant and his brothers incorporated Les Produits de Ciment de Sherbrooke Limitée, in which the witness acquired a small interest. The Estate Brault first rented to the above company for about three years a part of lot 5 on which there was a well finished stable about 100 feet long. The witness was of the opinion that about 10 acres of gravel bank remained and he did not wish to sell this separately, particularly as the balance of the property was not suitable for cultivation. He ended up, as later described, by selling the entire two lots to the appellant and to his mother.

When the appellant was called, he testified that at all material time he owned a controlling interest in a cement company known as Les Produits de Ciment de Sherbrooke Ltée and that he also owned about a one-third interest in Fabi & Fils Limitée, of which he was vice-president and general manager and which carried on a general contracting business, including the building of roads, in the city of Sherbrooke, province of Quebec. Both the above-mentioned companies required sand and gravel and they were in the habit of purchasing these supplies from William Brault and later from his estate.

The appellant and his mother Adolorata Fabi, on March 13, 1946, purchased part of lot 4, consisting of about 67 acres, in the county of Orford, for $6,000 (Ex. A-1). When asked what was the purpose of the purchase, he stated it was because the land contained a sand and gravel bank and from which William Brault and his estate had supplied the Fabis with their sand and gravel needs from as far back as 1933. At a given moment, Alfred Brault, for reasons already mentioned, desirous to sell their farm, suggested to the appellant that he should buy it. After some negotiation, the sale for the aforesaid 67 acres was concluded by the appellant and his mother, whom he asked to join him because he had not sufficient money to acquire it alone.

On June 18, 1947, he and his mother bought an additional part of lot 4 and part of lot 5 for $20,000 (Ex. A-2). They were spurred into buying because of the existence on lot 5 of a large horse stable which could be used by Les Produits de Ciment and also because lot 5 contained the best gravel and sand pits: in 1946 and 1947, they took gravel from both lots which, combined, consisted of about 200 acres, and sold gravel both to Les Produits de Ciment de Sherbrooke Ltée and to Fabi & Fils, and to strangers as well, at going prices of 10¢ a cubic yard.

He said Brault Estate did not want to sell the gravel pits unless the whole farm was purchased.

A year later, the Estate offered to sell him, at an attractive price ($1,000), a strip of land forming the remainder of

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lots 4 and 5, which had been purchased by a Mr. Benoit who defaulted on his payments, and the appellant said that another reason which prompted him to buy the strip was because, by doing so, he avoided the necessity of building a fence. Although purchased in 1948 the deed was not executed until 1953 (Ex. A-3).

He continued to exploit the gravel pits until some time in 1949 when the gravel was exhausted.

From 1946 to 1950 the only other use he put the land to was for pasturage. He made a faint effort at cultivating, which never got beyond the ploughing stage. He did not make any attempt at harrowing or seeding and gave it up because, for the most part, the land was rocky, hilly and unfit for cultivation.

The witness also mentioned that the community dump of the city of Sherbrooke was located close to the two lots. He stated that about 1950, or perhaps 1951, this property, together with others, was annexed to the city of Sherbrooke. See Statutes of Quebec, s. 1415, c. 75, Geo. VI, 1950, sanctioned March 14, 1951.

When he realized that the gravel pits had become exhausted and since the farm was unfit for cultivation and that there was still $15,000 or $16,000 owing on the purchase price, he tried to get rid of it but he did not receive a single offer. Asked by his counsel what effort he made to sell, the witness replied that, among other things, he gave copy of the plan of the farm to Mr. René Hébert, a real estate broker in Sherbrooke, but that the latter never received any offer.

Soon after annexation had taken place, the city of Sherbrooke asked him to sell a 16-foot strip the whole length of his farm to make a boulevard along the Brompton Road. Instead of selling the strip to the city of Sherbrooke the appellant made a deal whereby he gave title to the municipality on condition that it installed a drainage and water system. Before selling any lots he disposed of a site on lot No. 5 to Les Produits de Ciment de Sherbrooke Ltée, as previously mentioned, for $18,000. He then had some hope of selling his property and started to subdivide as per surveyor's plan Exhibit A-4 dated July 30, 1951. This subdivision was followed by others in the following order of dates:

Ex. A- 5—January 20, 1952
Ex. A- 6—May 21, 1952
Ex. A-12—January 26, 1953
Ex. A-16—May 1, 1954
Ex. A-13—January 4, 1957
Ex. A-14—June 12, 1958
Ex. A-15—April 17, 1961.

The appellant testified that to begin with he did not seek purchasers—they approached him. He owned a tractor and a bulldozer which he used to open up access roads. He did not resort to advertising or publicity during the years 1952, 1953 or 1954. He sold seven lots in 1952, eleven in 1953 (the respondent claims 12) and four in 1954. Beginning in 1955, he erected sale signs and started advertising and continued to do so in subsequent years. He sold ten lots in 1955, five in 1956, two in 1957 and four in 1958.

At the conclusion of his examination in chief, it appeared as if the appellant had made out at least an arguable case. On cross-examination however, after testifying that he never bought other properties than lots 4 and 5 which he resold, the witness, when confronted with many such transactions, was nonplussed and asked to be allowed to consult his accountant. On returning to the witness box he recalled a few of the least damaging purchases and sales but as to others he repeatedly replied, "I don't remember." I will again refer to these other numerous sales later. Counsel for the respondent had the witness file, as Exhibit R-1, a detailed plan of lots 4 and 5, which, *inter alia,* clearly delineates the boundaries of each of the three purchases in 1946, 1947 and 1948 made by the appellant. Mr. Fabi also marked in red pencil the location of the gravel and sand pits. He said that the best gravel bank was on the part of lot 5 which he purchased in 1947 and that this was his reasons for purchasing it. He stated that he had been in the contracting business since 1933 and it was usual for any contractor who was looking for gravel to take soundings in order to determine the quantity available. He did not do so because, judging by appearances, he had no doubt that the unopened part of the bank contained sand and gravel. An

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additional reason for his 1947 purchase was that, apart from the gravel, there was a stable erected on a small part of it, which portion of land he had rented from the Brault Estate and had an option to purchase it for $10,000 and that this was why he paid $20,000 for the whole parcel (over one hundred acres) which he acquired in 1947.

He admitted that when he bought the last strip in 1948 he knew that it did not contain any gravel. When asked if he did not spend at least $40,000 on subdividing his property, he replied that up to date such expenditure would not amount to more than $2,500. He then admitted that the opening of roads on his subdivision costs $5,294.80 and that the salary of the man who operated the bulldozer amounted to $5,000. When asked if the cost of the bulldozer was not $12,650, he replied, "If you have those figures from my accountant, they must be right." In respect of the cost of maintenance of the bulldozer amounting to $7,088.49, he said it should be divided because it was also used for gravel removal. It was possible, he said, that he had leased some machinery such as compressors at a cost of $4,491.89.

The respondent's only witness was Gérard Thivierge, controller of the Income Tax Bureau located at Sherbrooke, and it was he who had examined the appellants' income tax file Exhibit R-2. The same witness produced an extensive statement of real estate transactions, excluding lots 4 and 5, and consisting of purchases, sales and borrowings made by the appellant, the earliest of which dated back to 1944, the most recent to 1958. He also produced as Exhibit R-3 a short list of similar transactions entered into by Claire Fabi, wife of the appellant, with monies which were partly her own and partly furnished by the appellant. A further list was produced as Exhibit 4, which discloses that the appellant and his mother purchased in 1948 a tract of land being part of lot 899-80, called the Vincent Street lots, which adjoins the Brault property, subdivided it in 1950 into thirteen lots which, except for those used for streets, were sold by 1955. In 1958 a new subdivision was made of the balance of lot 899-80, a sale of one of these lots was recorded in 1958.

A glance at Exhibit R-1 shows that the southern extremity of the 67 acres, which constituted the appellant's first purchase in 1946 from the Brault estate, abuts what was the dividing line marking the city limits of Sherbrooke.

Admittedly there was little gravel on it and it is probable I think that the appellant bought it because of an anticipated postwar growth which led him to expect that it would not be long before his purchase would become part of the city and would be the first to feel the benefits of annexation. As appears by Exhibit "R", subdivision was greatest on the said acreage, which would indicate that the appellant was aware of its adaptability for such purpose. Insofar as his second purchase is concerned, I find it difficult to understand how a man with the appellant's business experience could attach the importance he claimed to an abundant supply of gravel and at the same time fail to verify whether or not it existed. Alfred Brault had quoted his father as saying, when he took the original soundings, that he was convinced that the property contained a million cubic yards of gravel. If, as the evidence of the same witness indicated, more than $100,000 worth of gravel had been removed at a sale price of 10¢ a cubic yard, it became obvious that the bank was near the point of depletion.

The same witness said that the reason why he wanted to sell the property instead of continuing the business of selling sand and gravel was that he had been named as an executor without remuneration under his father's will and if he continued to run the business gratuitously he would be doing so mainly for the benefit of his brothers who were coheirs. The above reason is far from convincing and should, I think, have put the appellant on his guard if he attributed much importance to the quantity of gravel that remained. It is true that Art. 910 of the Quebec Civil Code stipulates that the task of executorship is gratuitous unless the testator decides that it should be remunerative. But the same article also provides that nobody can be compelled to accept the office of testamentary executor, and the witness was free to decline. I find it difficult to credit that the appellant, under the circumstances, was oblivious to extensive gravel depletion which had occurred.

The fact that the appellant bought lots 4 and 5 in three instalments negatives his statement that, in order to secure the gravel that was left, he had to buy both lots.

Exhibits R-2, R-3 and particularly R-4 show that at about the same time as the appellant was making his three purchases from the Brault Estate he acquired a neighbouring property, called the Vincent Street lots, for the purpose

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of subdividing and selling. In my opinion, this is conclusive evidence that the appellant, from 1955 to 1958, and for many years prior thereto, was engaged in the business of buying, selling and speculating in real estate within the meaning of s. 139(1)(*e*) of the *Income Tax Act*.

For the above reasons, I would affirm the assessments appealed from and refer the record back to the Minister to be dealt with accordingly. The present appeal is consequently dismissed with taxable costs in favour of the respondent.

Judgment accordingly.

1962 Oct. 17

1963 Aug. 6

BETWEEN:

ESTATE OF DAME ADOLORATA FABI .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income tax—Income or capital gain—Business .or adventure in nature of trade—Passive role of deceased in business—Subdivision and sale of land purchased several years previously allegedly for its supply of sand and gravel—Income Tax Act, R.S.C. 1952, c. 148, s. 139(1)(e).

The late Dame Adolorata Fabi, who died on February 18, 1957, was the mother of Samuel Fabi, the appellant in *Samuel Fabi vs. M.N.R. ante* p 299; by consent, all the evidence adduced in that case was accepted as evidence in this appeal, with the exception of evidence concerning purchases and sales of property by Samuel Fabi or his wife Claire Fabi.

In 1946, 1947 and 1948, the Brault farm consisting of lots 4 and 5, Township of Orford near Sherbrooke, P Q. was purchased in 3 separate transactions by Samuel Fabi and his mother, the late Adolorata Fabi. The said lands were subdivided and the lots sold during the period from 1952 to 1958 This appeal concerned the sale of lots from the Brault farm subdivision in 1955 and 1956.

Held: That although the role played by the late Adolorata Fabi in the purchase and subdivision of the Brault Farm and the sale of lots therefrom in 1955 and 1956 was a passive one, it must be presumed, in the absence of proof to the contrary, that she, as a half owner, was well aware of what was going on, saw the subdivision being made and was party to the many deeds of sale which were executed.

2. That the late Adolorata Fabi was a knowing and willing party to and engaged in an adventure in the nature of trade within the meaning of s. 139(1)(*e*) of the *Income Tax Act*.

APPEAL under the *Income Tax Act*.

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

Albert Bissonnette for appellant.

Paul Boivin, Q.C. and *R. Boudreau* for respondent.

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

KEARNEY J. now (August 6, 1963) delivered the following judgment:

The late Dame Adolorata Fabi died on February 18, 1957 and this appeal concerns two assessments to tax against her estate on profits arising from the sale of lands described as Part of Lots 4 and 5 in the Township of Orford near the City of Sherbrooke, in the Province of Quebec, during the years 1955 and 1956, whereby the sums of $441.11 and $6,272.84 respectively were added to the appellant's previously declared income for the said years.

Counsel for the parties in this case are the same as those who acted for *Samuel Fabi* and *The Minister of National Revenue* respectively in case No. 162232. (*ante* p. 299)

By written consent filed on October 26, 1962 the said attorneys agreed that all the evidence adduced in the Samuel Fabi case be accepted as evidence in this case, with the exception of any evidence concerning purchases and sales of property by Samuel Fabi or his wife Claire Fabi.

Attached to the said consent was a schedule of purchases and sales of land made by the late Adolorata Fabi and entitled "Mrs. Adolorata Fabi". Also a second schedule, marked "Appendix 1", of purchases and sales covering four pages which were made jointly by Samuel Fabi and his mother in connection with lots 4 and 5 (Brault Farm).

Counsel for the appellant under date of July 20, 1959, filed objection to the two aforesaid assessments. The respondent having reconsidered the said assessments confirmed them as per notification dated May 14, 1960. No evidence was offered as to the extent to which the late Adolorata Fabi participated with her son in the real estate activities in connection with the acquisition, subdivision and subsequent sale of lots in 1955 and 1956 as described in

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Appendix 1. It is not unlikely that her role was a passive one and that it was her son, with her approval, who was master of the situation at all times. On the other hand, in the absence of proof to the contrary, it must, I think, be presumed that Mrs. Adolorata Fabi, as a half owner, was well aware of what was going on, saw the subdivision being made and was party to the many deeds of sale which were executed.

On the proof before me I consider that the late Adolorata Fabi, while she may not have carried on a real estate business in the ordinary sense of the term, nevertheless was a knowing and willing party to and engaged in an adventure in the nature of trade within the meaning of s. 139(1)(*e*) of the *Income Tax Act* and that her estate must bear the consequences.

For the above and other reasons given in case No. 162232 (*supra*) I consider that the present appeal must be dismissed. The respondent will be entitled to costs as taxed.

Judgment accordingly.

BETWEEN:

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Jan. 28, 29, 30, 31

Oct. 26

HER MAJESTY THE QUEEN ....PLAINTIFF;

AND

SKUTTLE MFG. CO. OF CANADA LTD., B. D. WAIT CO. LIMITED, carrying on business under the firm name and style of WAIT-SKUTTLE COMPANY and the said WAIT-SKUTTLE COMPANY ..DEFENDANTS.

Revenue—Sales tax—Excise Tax Act, R.S.C. 1952, c. 100, as amended, ss. 29(1)(b) and (d), 30(1) and (2), 32(1) and 48(4) and Schedule III—Old Age Security Act, R.S.C. 1952, c. 200, s. 10(1) and (2)—Excise Tax Act Regulations—"Partly Manufactured Goods"—Exemption from sales tax—Sales by licensed manufacturer—Estoppel against Crown—Abatement of claim.

The Crown brought action to recover sales tax and penalties under the *Excise Tax Act* and the *Old Age Security Act*, in respect of the sale of humidifiers by the defendants between August 1, 1956 and December 31, 1958, on which no sales tax had been paid. The humidifiers were designed for use in conjunction with modern hot air furnaces.

The defendants raised the following defences: (1) the humidifiers were furnace fittings or fittings for furnaces and were exempt under s. 32(1) and the first paragraph under the heading "Building Materials" in Schedule III to the Act; (2) the humidifiers were articles to be used exclusively in the manufacture or production of furnaces for the heating of buildings and as such were exempt under s. 32(1) and the second paragraph under the heading "Building Materials" in Schedule III; (3) the humidifiers were exempt from sales tax under s. 30(2) of the *Excise Tax Act* as being goods sold by a licensed manufacturer to another licensed manufacturer as partly manufactured goods, the defendants alleging that, although under the Act the Minister is the sole judge of what are "partly manufactured goods" and no such decision had been made by him in this case, the Crown is estopped from denying that the Minister had made an adjudication that the humidifiers were "partly manufactured goods" and from denying that the humidifiers were "partly manufactured goods" in view of the conduct of the departmental officials and the advice received from them by the defendants over a long period of time; (4) in some cases, the defendants' customers paid sales tax on the humidifiers purchased from the defendants on their resale and the defendants were entitled to credit on the Crown's claim for all sums so paid.

Held: That the sales in question were not sales of furnaces but were sales of humidifiers which are not listed in the first paragraph under the heading "Building Materials" in Schedule III to the Act and so were not thereby exempted from tax.

2. That even if the humidifiers were in fact used in the manufacture or production of furnaces after their sale by the defendants this would not of itself be sufficient to entitle the defendants to exemption under s. 32(1) of the Act and the second paragraph under the heading "Building Materials" in Schedule III and that, when the defendants have parted with both possession of and title to the humidifiers without pay-

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ing the tax, the least that is required of them in seeking such exemption is that they establish that the humidifiers were sold under contractual arrangements requiring the purchaser to use them exclusively in the manufacture or production of furnaces for the heating of buildings, and that the defendants saw to it that the humidifiers were so used. The defendants have not done this and their claim for exemption under s. 32(1) accordingly fails.

3. That the *Excise Tax Act* makes the Minister of National Revenue the sole judge of what are "partly manufactured goods" and the Court has no jurisdiction to make such a decision for him when, as in this case, no such decision has been made.

4. That no case of estoppel against the Crown has been made out by the defendants, for it is the responsibility of the manufacturer under the *Excise Tax Act* to decide which sales he will report as taxable and which he will treat as exempt, and the Minister owes no duty to the taxpayer to audit his records to assure him that what he has treated as exempt sales were in fact exempt. When the departmental auditor assured the defendants that their records were in order and that the reporting procedure was correct he in no way purported to pass on the taxability or otherwise of the sales which the defendants had treated and reported as exempt. This and the additional fact that no tax was claimed for a long time raises no implication that the Minister had decided that the humidifiers in question were "partly manufactured goods" and therefore exempt under s. 30(2).

5. That since there is no evidence that any purchaser paid sales tax on behalf of the defendant or at all on the resale of the defendants' humidifiers as replacements, the defendants can obtain no abatement of the Crown's claim.

INFORMATION exhibited by the Deputy Attorney General of Canada to recover sales tax.

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

C. R. O. Munro and *L. R. Olsson* for plaintiff.

P. B. C. Pepper, Q.C. and *W. R. Herridge* for defendants.

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

THURLOW J. now (October 26, 1963) delivered the following judgment:

In this action the Crown seeks to recover $42,292.51 for sales tax payable under the provisions of the *Excise Tax Act*, R.S.C. 1952, c. 100, as amended, and the *Old Age Security Act*, R.S.C. 1952, c. 200, in respect of sales of humidifiers made by the defendants between August 1, 1956 and December 31, 1958, together with penalties incurred by the defendants on failure to pay the taxes from time to time as they became due.

The applicable portion of s. 30(1) of the *Excise Tax Act* by which the first of the taxes in question is imposed reads as follows:

> 30(1) There shall be imposed, levied and collected a consumption or sales tax of eight per cent on the sale price of all goods
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> (*a*) produced or manufactured in Canada
>
> (1) payable . . . 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 other tax is imposed by s. 10 of the *Old Age Security Act* s-ss. (1) and (2) of which provide:

> 10(1) There shall be imposed, levied and collected an Old Age Security tax of two per cent on the sale price of all goods in respect of which tax is payable under section 30 of the *Excise Tax Act* at the same time, by the same persons and subject to the same conditions as the tax payable under that section.
>
> (2) Subsection (1) shall be read and construed as though the tax imposed thereby were imposed by section 30 of the *Excise Tax Act*; and all the provisions of the *Excise Tax Act* shall be read and construed as though the tax imposed by subsection (1) were an addition to the tax imposed by the provisions of the said section 30.

By s. 48 of the *Excise Tax Act* every person required by or pursuant to Part VI to pay taxes is required to file a monthly return of his taxable sales and to pay the taxes not later than the last day of the first month succeeding that in which the sales were made and s-s. (4) of the same section provides that

> 48(4) . . . upon default in payment of the tax or any portion thereof payable under Part IV, V or VI within the time prescribed by subsection (3), there shall be paid in addition to the amount of the default a penalty of two-thirds of one per cent of the amount in default in respect of each month or fraction of a month during which the default continues.

The sales in question were made by the defendant Wait-Skuttle Company which is a firm name under which the corporate defendants, Skuttle Manufacturing Company of Canada Limited and B. D. Wait Company Limited carry on business in partnership. The partnership business is carried on at Oakville, Ontario and is concerned with the manufacture and sale of various types of humidifiers. It is admitted that during the period in question Wait-Skuttle Company sold to various customers 71,107 humidifiers

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which it had manufactured in Canada, that the total selling price of these humidifiers was $422,925.05 and that no sales tax was paid by the defendants on any of these sales. Sales tax was, however, paid by the defendants on other sales of humidifiers which accounted for 7 per cent or 8 per cent of the total sales made by Wait-Skuttle Company during the material period. As to these no question arises in these proceedings.

It is not disputed that on the facts which I have thus far outlined and the statutory provisions to which I have referred, the Crown makes out a *prima facie* case for the taxes which it claims but by way of defence the defendants maintain that the sales in question were exempt from tax under one or the other of two provisions of the *Excise Tax Act* to which reference will be made, that in the circumstances to be related the Crown is estopped from asserting its claim for taxes in respect of the sales in question and that in any event in some instances the taxes in respect of the humidifiers were paid by the purchasers upon subsequent re-sale thereof. These defences will be outlined in greater detail later in these reasons.

The first of the two exempting provisions of which the defendants seek the benefit is s. 30(2) of the *Excise Tax Act* which provides that

> 30(2) Notwithstanding anything in subsection (1), the consumption or sales tax shall not be payable on goods
>
> (*a*) sold by a licensed manufacturer to another licensed manufacturer if the goods are partly manufactured goods;

The expression "licensed manufacturer" is defined in s. 29(1)(*b*) as meaning: "any manufacturer or producer licenced under Part VI of the Act" and it is not disputed that at all material times both the defendants and the customers who purchased the humidifiers in question were manufacturers and licensed as such under the statute. The expression "partly manufactured goods" is also defined by s. 29(1)(*d*) as meaning

> only goods that are to be incorporated into and form a constituent or component part of an article that is subject to the consumption or sales tax; the Minister is the sole judge as to whether or not goods are "partly manufactured goods" within the meaning of this section;

It is I think desirable at this point to emphasize that the expression "partly manufactured goods" and the exemption provided by s. 30(2) are strictly limited to goods to be used in the production of taxable goods, and have no relevance to sales of goods to be used in the production of goods which are exempt from tax under other provisions of the statute.

The other provision relied on by the defendants is s. 32(1) which provides that

> The tax imposed by section 30 does not apply to the sale or importation of the articles mentioned in Schedule III.

Schedule III consists of a number of lists of articles or products grouped under headings such as "Building Materials", "Charitable, Health, etc.", "Coverings", "Diplomatic", "Engines", "Farm and Forest", "Foodstuffs" and "Machinery and Apparatus to be used in manufacture or production". In some cases the articles are named without restriction, but in others they are listed in conjunction with wording which limits the exemption to occasions when they are for use by particular purchasers such as diplomatic representatives or hospitals or when they are for use for some defined purpose. In the latter type of restriction the expression "to be used exclusively" appears in many items but sometimes it is expressed by the words "for use exclusively" and sometimes simply by the word "used". In the present case issues arise under two of the items listed under the heading "Building Materials", these two items being as follows:

> Furnaces, stokers, oil or gas burners, hot water and steam radiators not including fittings, for the heating of buildings
>
> Articles and materials to be used exclusively in the manufacture or production of the foregoing building materials, except hardware for doors and sash;

Before outlining the facts of the present case reference should also be made to certain regulations established pursuant to s. 38 of the *Excise Tax Act* by which the Minister of National Revenue is authorized to make such regulations as he deems necessary or desirable for carrying out the provisions of the Act, the same to be enforced in the same manner as all other provisions of the Act. The regulations in question are entitled "Regulations Pertaining to Excise and Sales Taxes" and they deal with a number of topics, the first of which is entitled "Certificates of Exemption". This topic is in turn dealt with under several subtitles including Licensed Manufacturers, Licensed Wholesalers,

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Hospitals, Provincial Governments and General. Under the subtitle "Licensed Manufacturers" it is prescribed that

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

The certificate to be given by a licensed manufacturer is to be in the following general form:

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

Licence Number ....
(Name of Purchaser)

(b) A licensed manufacturer shall not quote his licence number nor give the certificate as above when purchasing or importing goods to be used in, wrought into, or attached to articles specified as exempt from the Consumption or Sales Tax. (Note.—Except in respect of goods conditionally exempted according to use.)

On the wording of these regulations it would seem to follow that a licensed manufacturer when purchasing goods conditionally exempted from tax according to use is required, when the goods can be used in, wrought into or attached to taxable goods for sale to certify that they are to be so used whether he purchases them for such a purpose or not.

I turn now to the facts developed in support of the defence.

The humidifiers in question were all of types designed for use in conjunction with modern hot air furnaces. Some of them can also be used in conjunction with space heaters but in practice very few are so used. They consist of an open water tray fitted with an automatic valve to regulate the level in the tray of water from a piped supply line, a number of glass wool evaporating plates so shaped as to permit one part to be in the water and a much larger surface of the plate to be above the water and to overhang the tray, and a metal rack to hold the plates vertically in place. The plates absorb the water by capillary action and the current of air passing between the plates removes the moisture from their surfaces. For maximum effectiveness these devices must be mounted within two to eight inches of the heat exchanger of a hot air furnace or space heater and in a position where the circulating air when warmed by the heat exchanger will pass along the surfaces of the plates. But they or some models of them are also advertised as capable of being used effectively in the cold air return stream of a hot air furnace or near the furnace in the main warm air duct. The places where they are mounted depend on the model or design of the particular furnace. In some cases they are mounted in an opening specially made for them in the exterior metal work of the furnace either at the base or half way up from the base or near the top and in other cases they may be mounted in an opening in the sheet metal work forming the plenum or bonnet installed above the furnace from which the heated air is circulated by ducts to various parts of the building.

The evidence also discloses that in early and now obsolete types of hot air furnaces restoration of humidity in the warmed air was secured by simple evaporation from the surface of water in a jacket forming part of the inner castings of the furnace and that with the development of furnaces equipped with forced circulating devices, the older method was replaced by the use in connection with hot air furnaces of humidifiers of the type here in question.

It also appears that furnace manufacturers purchase these humidifiers from manufacturers and supply them to customers with their furnaces which are themselves usually not entirely assembled as units when packed for shipment and in some cases are shipped disassembled to a very considerable extent. When the humidifier is to be installed in the furnace casing the opening for it is ordinarily made by the furnace manufacturer but the humidifier is not necessarily mounted in the opening prior to installation of the furnace. In other cases the opening for the humidifier may be made in the plenum by the manufacturer of the furnace if he also supplies the plenum or if he does not supply the plenum by a heating contractor engaged in installing the furnace and constructing the plenum for it. In some cases the price quoted for the furnace includes the humidifier supplied for it, in others the price of the humidifier is quoted separately but they are supplied as a matter of course in practically all cases of sales of hot air furnaces.

Humidifiers of these types besides being used in conjunction with furnaces are, as already stated, sometimes installed in space heaters which are not included in the list of exempted building material in Schedule III and they are also at times sold for use as replacements in which cases as well there is no exemption from sales taxes.

The defendants' business in manufacturing and selling humidifiers has been carried on at Oakville, Ontario since 1947. Most of the humidifiers which they manufacture are sold to manufacturers of furnaces who hold licences under the *Excise Tax Act* and when selling to them the defendants took care to ensure that in every case the order bore the sales tax licence number of the purchaser and a certificate. They did not pay tax on these sales but reported them as not taxable and from time to time over the years prior to 1956 their records were examined by auditors of the Department of National Revenue and no question was raised as to the propriety of their procedure nor was any claim ever made for tax. Such an examination was made in July 1956 and when early in 1957 following the death of B. D. Wait, the principal shareholder of B. D. Wait Company Limited, a request was made for a further examination to verify the company's position with respect to sales tax liability that defendant was informed by someone employed by the department that the company's procedure was in order and that no examination was necessary. The sales here in question were made following the audit of July 1956 and there is no evidence of any further audit having been made from August 1, 1956 to December 31, 1958. However, in July 1958 a letter was received stating that the Department had received information suggesting that sales tax was not being paid in connection with sales of humidifiers and that in the view of the Department humidifiers were taxable "for the reason that they are placed in the plenum, which is considered to be part of the duct work." Correspondence followed in which the defendants first said that their practice was to sell to furnace manufacturers "who show their sales tax licence in their purchase orders and who collect the sales tax at their sale level" and that when sales were made to others the sales tax was collected and reported and remitted to the Department at the end of each month. Later on receiving a further letter from the Department dated August 18, 1958 suggesting that manufacturers of tax exempt furnaces should furnish a certificate that the "humidifiers were to be incorporated into tax exempt furnaces in order to qualify for exemption", the defendants replied that "this is the way we have always operated and will continue to do so." Still later on December 5, 1958 the Department wrote another letter stating that humidifiers are held to be taxable at the time of sale and that "a manufacturer's sales tax licence number should not be accepted."

With respect to the sales here in question made between August 1, 1956 and December 31, 1958, I am satisfied that each order bore the sales tax licence number of the purchaser and a certificate of one kind or another. In at least one case the certificate simply stated that the goods ordered were "to be used in, wrought into, or attached to articles for resale" but most of the certificates stated either that the goods ordered were "to be used in, wrought into, or attached to taxable goods for sale" or words to that effect or that the goods were "to be used in, wrought into, attached to or consumed in the manufacture of goods exempted from tax under Schedule III of the Act" or wording to that effect and in at least one instance the certificate stated that the goods ordered were "to be used in, wrought into, or attached to exempted furnaces for sale."

The evidence does not make clear to what extent the form which stated that the goods were to be used in making exempt goods was used but a comparison of the number and dates of purchase orders bearing this type of certificate which were available on a search for them being made with the number found bearing the other type of certificate suggests that the latter type was probably used in the majority of cases prior to August 1958 when the defendants circulated to their customers copies of the Department's letter of August 18, 1958 suggesting that the other type of certificate be furnished. Mrs. Wait the president of B. D. Wait Company Limited stated in evidence that both forms were in use prior to as well as after receipt of the Department's letter but while I accept her evidence as showing that the second type of certificate was used in some cases before the Department's letter was received, it is noteworthy that no purchase order dated prior to the letter and bearing such a certificate could be found or produced. In any event it is clear that whether the certificate received was of the one kind or the other the ordinary course of the defendant's business on receiving an order with such a certificate and a sales tax licence number thereon was to sell and deliver the goods and to report the sale as not taxable, without taking any further action to ensure that the humidifiers were in

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fact used in the manufacture or production of tax exempt furnaces or in the manufacture of taxable goods such as space heaters. The effect of the evidence on this point is I think that the defendants regarded their customers as reliable and trusted them to see to it that the goods were used for a purpose which would render them exempt and that they regarded it as being the responsibility of the purchaser to either use the goods for such a purpose or to pay the tax on making any other disposition of them such as a sale for replacement purposes. The statute, however, it may be noted, imposes no tax on a sale by a licensed manufacturer other than the sale made by the manufacturer of the goods and while as a result of the giving of the certificate the purchasers may have incurred liability to indemnify the defendants for tax in respect of goods disposed of otherwise than as stated in the certificates no liability on the part of the purchasers to the Crown for the tax would thereby arise.

It will be convenient to deal first with the defence that the sales in question were exempt under s. 32(1) and Schedule III of the Act. The defendants' first point on these provisions was that the humidifiers were furnace fittings or fittings for furnaces and were exempt under the first of the items which I have quoted. It was said that the words "not including fittings" in that item apply only to "hot water and steam radiators" and that accordingly in the case of furnaces, fittings should be regarded as included. The short answer to this in my opinion is that even assuming that the humidifiers were fittings for furnaces and would be exempted on sale of a furnace to which they were fitted the sales in question were not sales of furnaces but were sales of humidifiers which are not listed in the item.

The defendants' other contention which, to my mind, raises the most substantial issues in the action was that these humidifiers were articles to be used exclusively in the manufacture or production of furnaces for the heating of buildings within the meaning of the second of the items which I have quoted from Schedule III and that the sales were therefore exempt.

With respect to this submission, counsel for the Crown contended that the exempting section ought to be read with the taxing section and that when so read, the exemption should be interpreted as meaning "articles and materials produced and manufactured in Canada and sold to be used exclusively in the manufacture or production of the foregoing building materials". In this connection reference was made to the judgment of the Privy Council in *The King v. Carling Export Brewery and Malting Co. Ltd.*[1] and it was submitted that anyone seeking the benefit of the exemption must be in a position to show that the goods were sold pursuant to an arrangement that they were to be used in the exempted manner, that the goods have in fact been used in that manner and that the seller has seen to it that they were so used. Counsel went on to submit that instead of establishing the facts which would entitle the defendants to the exemption the evidence indicates that some of the humidifiers were to be used in space heaters and some as replacement parts and that some would be installed in the plenum or duct work where they would form part of the warm air heating system rather than part of the furnace which was itself but a part of the heating system, that even when attaching a humidifier to a furnace in his factory a furnace manufacturer is merely attaching one part of a warm air heating system to another and in so doing he cannot be said to be manufacturing a furnace and that if any of the humidifiers were sold to be used exclusively in the manufacture of tax exempt furnaces there is no evidence of how many (with the exception of 66 humidifiers referred to in two orders of which evidence was given whereon the certificate given by the purchaser stated that the goods ordered were to be used in the manufacture of tax exempt goods) and that apart from what was stated in the certificates there was no evidence of the use to which any of the humidifiers was put.

In the *Carling Export Brewery* case the wording on which exemption from one of the taxes in question was claimed was "Provided that the consumption or sales tax specified in this section shall not be payable on goods exported" and in this Court[2] Audette J. held that entitlement to the exemption turned simply on whether or not the goods were in fact exported. In the Supreme Court[3] a somewhat narrower view was adopted, the Court holding that since the tax was payable at the time of sale the exemption applied only when the goods were exported by the manufacturer

[1] [1931] A.C. 435.
[2] [1929] Ex. C.R. 130.
[3] [1930] S.C.R. 361.

himself pursuant to contractual arrangements therefor between him and the purchaser and prior to his parting with ownership and control of the goods. In the Privy Council reference was made to the provision for a refund of tax in cases where goods were in fact exported after their sale by the manufacturer, as indicating that the mere fact of exportation was insufficient to entitle the manufacturer to exemption but it was held that the manufacturer could succeed in his claim for exemption by establishing (a) that the goods were sold under arrangements that they were to be exported; and (b) that he saw to it that they were so exported. On the facts the Privy Council then held that the onus had been discharged.

While I do not regard the judgment in the *Carling Export Brewery* case as affording an exhaustive interpretation of the exempting provision which was under consideration, the case appears to me to lend support for the view that the fact (if it were established to be the fact) that following their sale the humidifiers here in question were used in the manufacture or production of furnaces would not by itself be sufficient to entitle the defendants to exemption and that in a case of this kind where the defendants have parted with both possession and title to the humidifiers without paying the tax, which under the statute becomes payable when the property passes or when the goods are delivered to the purchaser whichever is earlier, the least that is required of them in seeking the benefit of the exemption provided by s. 32(1) is that they establish that the humidifiers were sold under contractual arrangements requiring the purchaser to use them exclusively in the manufacture or production of the exempted building materials that is to say furnaces for the heating of buildings, and that they, the defendants, saw to it that the humidifiers were so used. There may be cases, such as those referred to in s. 31(1) in which no actual sale takes place, wherein the subsequent use to which the goods are put may be the only material fact upon which exemption depends, but in the case of an actual sale whereby the manufacturer parts with both title and possession of his goods, there would be, at the time when according to the terms of the statute the tax becomes payable, nothing to distinguish a taxable sale from an exempt sale if the right to exemption depended entirely on what later became of the goods and no one could ever know whether tax was payable or not even on the simplest sale until the ultimate destiny of the goods was known. This leads me to conclude that whenever the manufacturer parts with title or possession of his goods by any type of actual sale save one by the terms of which the goods are to be used exclusively for a purpose which would render them exempt, liability for the tax arises at the time mentioned in the statute and that it is only in cases where under the contractual arrangements for the sale the goods are to be used by the purchaser for a purpose which will render them exempt and where the manufacturer on whom the tax is imposed sees to it that the arrangements are in fact carried out, that the exemption can apply. The kinds of arrangements with purchasers which may be appropriate to achieve this result may vary considerably according to the nature of the goods but this interpretation of the statute appears to me to make it necessary for a manufacturer who relies on the exemption and parts with his goods without paying the tax, to maintain himself in readiness to prove both that the goods were sold under such contractual arrangements for their use in accordance with the exempting provision and that he has seen to it that the arrangements were in fact carried out.

Turning now to the facts of the present case in so far as they relate to the exemption provided by s. 32(1) there was first no evidence of any contractual arrangements of a general character between the defendants and any of their customers that the humidifiers were to be used exclusively in the manufacture or production of furnaces for the heating of buildings and the only evidence there is on the question is that of the various certificates which appeared on the orders. With respect to these I am of the opinion that a certificate on an order stating that the goods ordered are to be used, wrought into or attached to articles for resale, as occurred in at least one case, can by no means be regarded as evidence of a contract by the purchaser to use the humidifiers so ordered exclusively in the manufacture of furnaces for heating buildings nor do I think that a certificate that the goods ordered are to be used in, wrought into or attached to taxable goods for sale or wording to the like effect can be regarded as evidence of a contract to use the goods exclusively in the manufacture of furnaces which would be exempt from tax. The fact that the regulations which I have quoted required that there be a certificate in

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the prescribed form may serve to explain why certificates of that type appeared on the purchase orders, but I do not think that they lend any aid to the defendants in their efforts to establish that under the contract for their sale, the goods were to be used exclusively in the production of furnaces for the heating of buildings. It must I think be borne in mind that the purpose of the regulations is to carry out the provisions of the statute, that is to say, to collect the taxes thereby imposed. They are not designed to afford protection from the liability which may arise or the consequences which may ensue if when selling his goods a manufacturer assumes that he is entitled to exemption and does not pay the tax nor are they designed to waive the right of the Crown to taxes or the right or duty of the Minister to collect them or to afford exemptions beyond those expressly provided by the statute. Unfortunately for persons engaged in business there appears to be nothing in the statute or in the regulations to afford assurance either that a claim will not some day be asserted for taxes in respect of goods exempted by reference to the use to which they are to be put or that a manufacturer will not one day be called upon to pay the tax if he is unable to prove that the goods which he sold and upon which he did not pay the tax were in fact exempt. In reading the regulations it is noticeable that they prescribe only the procedure which a purchaser is to follow in ordering goods the sale of which to him may for one reason or another be exempt from tax. Nothing is prescribed as to what the vendor, who is the party to be exempted, if anyone is entitled to exemption, is to do, and there is nothing in them to afford the vendor any assurance that he can rely on the certificate as proof that the sale is exempt. Rather they appear to me to be designed entirely to ensure that records of sales represented as exempt from tax will be available if and when the Minister requires them for the purpose of checking on the liability of either party for tax.

On the other hand, the certificate which quoted a sales tax licence number and stated that the goods ordered were to be wrought into exempted furnaces may I think be regarded as evidence of a contract to use the goods in such a way that they would be exempted from tax and having regard to the fact that the nature of the humidifiers ordered was such that they could be used only in conjunction with furnaces or space heaters I think that the certificate which stated that the goods ordered were to be used in, wrought into, attached to or consumed in the manufacture of goods exempted from tax under Schedule III of the Act may in the circumstances properly be construed as meaning that the humidifiers ordered were to be used in the manufacture of tax exempt furnaces and thus as evidence of a contract to use the goods in such a way that they would be exempted from tax. It is thus only in cases where the latter two types of certificates were given that the contractual arrangement required for exemption existed and while I regard Mrs. Wait's evidence as establishing that there were other cases in which such certificates were given, I am unable to ascertain on the evidence in which or in how many cases such certificates were given beyond the two as to which details were established and which represented sales of 66 humidifiers in September and October, 1958 for a total sum of $415.80.

I turn now to the question of whether it has been established that the defendants saw to it that the humidifiers were used exclusively in the manufacture or production of tax exempt furnaces. On this point the evidence does not show what became of the humidifiers sold in any of the transactions and the most that, in my opinion, can be said of it is that it indicates that these humidifiers were useful only in conjunction with warm air furnaces or with space heaters and that when it was certified on the order that the humidifiers were to be used in the manufacture of tax exempt furnaces as well as in many instances where it was certified that they were to be used in, wrought into, or attached to taxable goods, the probability is that they were in fact used in conjunction with warm air furnaces. There is no evidence that the customers who purchased the humidifiers were constitued as representatives of the defendants in dealing with the humidifiers or that the defendants retained any other form of control over the use to which the humidifiers were put or even that they so much as required their customers to keep or that the customers actually kept any records of the use to which the humidifiers were in fact put. Moreover, it is clear that the defendants made no efforts to police or otherwise supervise their customers' use of the humidifiers. This may be understandable since most of the purchasers were customers of long standing

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whose reliability in honouring their contracts the defendants had no occasion to doubt, but in my opinion it fell far short of what is required by the statute of a manufacturer who parts with his goods without paying the tax and then seeks the benefit of an exemption the right to which depends on the use of the goods exclusively for a particular purpose. I am accordingly of the opinion that it has not been established with respect to any of the sales in question that the defendants saw to it that the humidifiers sold were used exclusively in the manufacture or production of furnaces and the defendants' claim to exemption under s. 32(1) therefore fails.

I come now to the defence that the humidifiers were "partly manufactured goods" within the meaning of the definition of s. 29(1)(*d*) and thus exempt under s. 30(2)(*a*). The Crown joined issue on this plea and added that the defendants have never applied for and the Minister has never made an adjudication in respect of the humidifiers and to this the defendants have rejoined that relying on the certificates of exemption which they received from their customers, on the fact that at divers times their books had been audited by officers of the Department of National Revenue and found to be in good order and that they had been advised both that their books had been found to be in good order and that they had been following proper procedure in the payment of sales tax and relying also on the Department's letter of August 18, 1958 to which reference has already been made, the defendants did not collect sales tax on the sales of the humidifiers in question and cannot now do so and that the Crown is estopped from denying that the Minister had made an adjudication that the humidifiers were "partly manufactured goods" and from denying that the humidifiers were "partly manufactured goods" and therefore exempt from tax. Alternatively, it was pleaded and argued that if the Minister has not made an adjudication this Court has jurisdiction to make it.

Apart from the alleged estoppel it is, I think, clear that on the issue of whether in fact the humidifiers were "partly manufactured goods" within the meaning of s. 30(2)(*a*) in the absence of evidence of a decision to that effect by the Minister (and there is no evidence of such a decision in the present case) the defence cannot succeed for the statute makes the Minister the sole judge of what are "partly manu-

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factured goods" and the Court has in my opinion no authority to enter upon the enquiry. While the Minister might readily conclude that these humidifiers are "partly manufactured goods" when they are to be incorporated into space heaters, I do not see on what basis he could reach the conclusion that they were goods to be incorporated into taxable goods, and thus "partly manufactured goods" within the meaning of the definition, when they were to be used in the manufacture or production of tax exempt furnaces unless he were also to decide that the right to exemption under s. 30(2) depends entirely on the terms of the contract of sale, and not at all upon the use to which the goods may subsequently be put. But these are matters which are committed by the statute to his judgment alone and as I see it the Court is not given authority to review his decision or to make a decision for him. *Vide Central Electricity Generating Board v. Halifax Corporation*[1]. The utmost which the Court might do, where the matter is undecided, is to stay the action for recovery of the taxes until a decision is made but that course appears to me to be unwarranted in the present case because no application for such a stay has been made at any stage of these proceedings and because it was not shown that any application has ever been made to the Minister for a decision.

What was mainly relied on to establish the plea that the humidifiers were "partly manufactured goods" was the alleged estoppel. It was argued that since 1941 the defendants had been taking certificates from their customers and until the letter of August 18, 1958 there had been no suggestion from the Department that they were wrong in so doing or that they should not have been taking certificates, that on receiving the certificates they collected no sales tax and there was never any complaint about this from the Department and that they, the defendants, cannot now recover the sales tax from their customers, that the conduct of the Department in not requiring payment of the tax can be jusified on the ground that in its view the humidifiers were "partly manufactured goods" and that the Minister must be regarded as having made a determintaion that these goods were "partly manufactured goods" and that in the circumstances the Crown is estopped from claiming that the Minis-

[1] [1962] 3 All E.R. 915.

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ter has not judged these goods to be "partly manufactured goods".

In my opinion, even apart from the legal question as to whether an estoppel can bar the right of the Crown to collect the tax (*vide Woon v. M.N.R.*[1]), no case for an estoppel of the kind mentioned has been made out. It must, I think, be remembered that the statute imposes the tax and creates a legal duty on the manufacturer not only to pay it but to file a monthly return of his taxable sales. Upon him thus is cast the responsibility of deciding which sales he will report as taxable and which he will treat as exempt. Upon the Minister is put the responsibility to collect the tax and to decide, when a dispute arises, whether or not goods are "partly manufactured goods" within the meaning of the definition, but he owes no duty to the taxpayers to audit their records for the purpose of assuring them that what they have treated as exempt sales were in fact exempt and I see no reason to think that his audits are made with any such object in mind. In the present case the substance of what I think has occurred is that the defendants have accepted certificates from their customers, which, it is perhaps unnecessary to say, were not representations by the Minister, and thinking that they could rely on these certificates have regarded the sales as exempt and reported them as non-taxable. In this situation it is I think readily conceivable that an officer of the Department on making an audit or check and seeing that in the case of each sale the order bore the sales tax licence number of the purchaser and a certificate would find nothing in the records of the defendants' business to suggest that the defendants' reporting was incorrect. But it seems to me that he would have nothing to indicate what had in fact become of the humidifiers after the defendants had parted with them. He would not be able to tell from the orders whether the goods were used in the manufacture of space heaters which would be taxable goods or in the manufacture of furnaces, which would not be taxable, or as replacements. Assuming then that he were asked by the defendants, who were anxious to know where they stood, since they had been treating sales as not taxable, whether they were operating as the Department wished, for him to reply that the defendants' records were in order or that the procedure in reporting was correct appears to me

[1] [1951] Ex C.R. 18.

to import nothing with respect to the taxability or otherwise of the sales which the defendants had treated and reported as exempt from tax and to my mind neither such a statement alone nor such a statement coupled with the fact that for a long time no tax was claimed raises any necessary or even probable implication that the Minister had decided that the humidifiers in question were either in whole or in part "partly manufactured goods". It signifies, if anything, merely that on the information received there was nothing which indicated that the sales reported as non-taxable were in fact taxable. There is in this situation, in my opinion, no basis for inferring a representation that the Minister had decided that the humidifiers sold by the defendants were "partly manufactured goods" nor is there evidence either in the letter of August 18, 1958 or elsewhere in the case, of any express representation by anyone to that effect or of anyone having been authorized to make any such representation. Moreover, even if it were to be inferred, from the fact that no complaint was made and no tax was claimed following an audit of records of sale transactions up to a particular date in many of which the orders bore a certificate that the goods were to be used in manufacturing taxable goods, that the Minister had decided that the goods sold pursuant to such orders were "partly manufactured goods" there would still, in my opinion, be no basis for drawing such an inference with respect to the goods involved in subsequent transactions the records of which had not been audited by anyone on behalf of the Minister, even though the orders may have borne the same kind of certificate as had appeared on the orders in transactions which had occurred earlier and had been examined. As the definition of "partly manufactured goods" refers to the use to which the goods are to be put it must, I think, necessarily be open to the Minister to decide the question in relation to particular sales, especially where the goods are of a kind that can be used in making non-taxable goods as well as taxable goods and a decision that the goods involved in one sale or in a number of sales were "partly manufactured goods" within the definition would not in my opinion imply that a similar decision had also been made or would be made with respect to the goods involved in subsequent transactions in respect of which there had not even been an examination of the records by anyone acting on the Minister's behalf. It will be recalled

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that an audit took place in July 1956 but that there was no evidence of any subsequent audit and that the claim relates only to sales made after the beginning of August 1956. And while the defendant, B. D. Wait Company Limited may have felt reassured by what it was told early in 1957 as to its procedure being in order and an audit at that time being unnecessary there is no evidence that the person who made the statement was authorized to exercise the function of the Minister to make a decision under s. 29(1)(*d*) or to represent that the Minister had made such a decision and such a statement would not in my view afford a basis for inferring that the Minister had even considered, let alone decided, the question with respect to the goods involved in sales made following the audit of July 1956. There was accordingly in my opinion nothing to estop the Crown from denying in this action that the humidifiers in question were "partly manufactured goods" or from denying that the Minister had decided that the humidifiers were "partly manufactured goods". The defence that the sales were exempt from tax under s. 30(2)(*a*) therefore fails.

It was also pleaded generally that the Minister was for the same reasons estopped from collecting the tax but as no argument was put forward on this point, I do not propose to discuss it further than to say that for the like reasons the plea in my opinion is not maintainable.

Finally, it was argued that when after obtaining humidifiers on which tax had not been paid a customer sold one of them as a replacement, he would report the sale and pay the tax to the Department, that the defendants were entitled to credit on the Crown's claim for all sums so paid and that a reference should be directed to ascertain the amount of the credit to which the defendants were so entitled. There is, however, no proof that any such payment was made on behalf of the defendants or indeed that any such payment was made and the defendants can therefore obtain no abatement of the claim on this ground.

In the result, therefore, the Crown is entitled to succeed in its claim for taxes amounting to $42,292.51 and for the penalties payable under s. 48(4) of the Act in respect of the failure of the defendants to pay the tax when due and if the parties are unable to agree on the amount of such penalties there will be a reference to inquire and report thereon. The Crown is also entitled to costs.

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Judgment accordingly.

1962 — Oct. 15, 16, 17, 18, 22 — 1963 — Oct. 23

BETWEEN:

BARBARA B. DEFREES AND BETTS MACHINE COMPANY, PLAINTIFFS;

AND

DOMINION AUTO ACCESSORIES LIMITED, ... DEFENDANT.

Patents—Patent Act, R.S.C. 1952, c. 203, ss. 2(d), 24, 28(1)(b), 36(1), 46 and 80—Patent Act, S. of C. 1935, c. 32, s. 47—Invention to be defined in claim—Anticipation—What to be included in prior art when considering anticipation—What necessary to constitute invention—Combination of things—Statutory presumption of validity—Onus of showing lack of inventive ingenuity on person attacking patent—Requirement to have patented articles marked with year of date of patent.

The plaintiffs sued for infringement of a patent for a removeable sealing device for vehicle marking lights, the patent being owned by the plaintiff, Barbara DeFrees and licensed exclusively to the plaintiff Betts Machine Company. The validity of the patent was attacked for anticipation, lack of invention or subject matter and for failure of the patentee to have the patented articles marked in accordance with s. 24 of the *Patent Act*. The defendant alleged that since the patentee related his invention in the specification not to vehicle marking lamps but rather to a static seal and it was only in the claim of the patent that the invention was related to the auomobile lamp field, all patents covering closures or means of sealing enclosures and static seals for housing any unit chambered containers or hollow bodies were brought into the prior art to be reviewed by the skilled workman.

Held: That since it is clear from the title of the patent in suit that the art to be referred to is the vehicle marking light art and the claim relates to the art of vehicle lamps, this is the main art to be looked at by the Court or a skilled workman in order to determine whether or not the patent was anticipated or was obvious. However, the skilled workman or the Court may look at anything that may be of assistance in this regard, the reference in a patent dealing in one art (vehicle lamps) to another art (enclosures), as in this case, being one element to be considered in determining whether from such a directed use in the patent (use in vapour-proof containers) the patentee in effect invented something that was new or that was obvious.

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2. That whether the statutory presumption of validity of a patent is a heavy or easy one to displace is a question of fact in each case. However, the alleged infringer has the burden of not only attacking the validity of the patent in issue but of also placing the Court in the position of one skilled in the prior art.

3. That in order to establish anticipation, the defendant must show that whatever is essential to the invention or necessary or material for its practical working and real utility appears in the prior publication. He must establish that the whole invention has been published with all the directions necessary to instruct the public how to put it into practice. When documents are produced as anticipations they must be read singly and must in no way be combined together to form a mosaic of extracts. In none of the prior art patents or publications produced in this case can an answer be found to the problem solved by the patent in issue, and the attack on the patent on the basis of anticipation or lack of novelty accordingly fails.

4. That although the patent itself does not restrict the inventor to a construction where the O-ring is permanently seated in the housing or where the lens is inserted by a cocking action, the former is indicated by a reasonable reading of the patent and an examination of the drawings and the latter is clearly inferred from the disclosure, so both advantages should be considered in determining the validity of the patent.

5. That the definition of invention in s. 2(*d*) of the *Patent Act* requires not only novelty and utility but also the attribute of inventiveness.

6. That in order to determine whether or not there is inventiveness the prior art should be reviewed and its cumulative effect considered.

7. That the patent in suit is a new combination, for it is a combination of a particular sealing method not entirely similar to that found in the prior art transferred to the sealing together of two well known parts, a slightly cupped lens and a cupped housing, but in a different manner and with an entirely different purpose or object than it accomplished when sealing a jar or an enclosure. Most patents are combinations of elements which are well known and old, the patent being for the combining of them for a new purpose and inventive ingenuity being used in combining and adjusting existing devices and thereby achieving new and valuable results. In the present case, there is this ingenious combining but in addition there is a completely different disposition of the component parts and these parts themselves are different.

8. That the fact that all the prior art patents cited are very old and that many years elapsed before someone thought of applying the well known things contained therein to the vehicle lamp field, as well as the widespread acceptance of the invention in the fuel tank industry despite a higher price and that the plaintiffs' lamp displaced previous types in that industry to a significant extent are secondary considerations indicating the existence of inventive ingenuity in the patent in suit and that it was far from obvious.

9. That the provision of Sec. 24 of the *Patent Act* requiring the patented articles to be marked with the year of the date of the patent is merely directory, the marking being required only when possible, and the failure to so mark the patented articles might involve at the most a liability to penalty as provided by Sec. 80 of the Act.

10. That the conditions referred to in Sec. 46 of the *Patent Act* do not include the marking provision which is dealt with in Secs. 24 and 80 of the Act.
11. That the defendants' marking light infringes the plaintiffs' patent.

ACTION for infringement of a patent.

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

W. L. Hayhurst and *David Rogers* for plaintiffs.

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

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

Noël J. now (October 23, 1963) delivered the following judgment:

This is an action for infringement of patent No. 522093 issued February 28, 1956, to Joseph H. DeFrees, the inventor, now owned by plaintiff Barbara B. DeFrees, and licensed exclusively to Betts Machine Company, the other plaintiff, a United States corporation having its head office and chief places of business at Warren, Pennsylvania. The defendant is a Canadian corporation and has its head office and chief place of business at Toronto, Ontario.

A large number of defences were raised in the statement of defence and in the particulars of objections, but at the trial counsel narrowed his case to three specific matters: (1) lack of invention or subject matter; (2) that the claim is not new but was anticipated by prior inventions; (3) failure by the patentee to have marked the patented articles in accordance with s. 24 of the *Patent Act.*

He conceded that the defendant's lamp V. P. 236T, Ex. 6, infringes the patent in suit if this patent is valid and that the device therein was useful, his entire defence being limited to the question of validity.

The invention defined by the claim in suit relates to a "Removable sealing device for vehicle marking light". The invention date on which the plaintiffs rely goes back to 1951. This is not in dispute.

Vehicle marking lights are used on tanker trucks that travel on the highway and indicate at night the bounds of the truck, its edges and corners, so as to indicate to other

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drivers the limits of the vehicle for the purpose of avoiding accidents; some of these lights are also used to show the height of the vehicle. The lights on the side of the trucks are termed coloured lights, whereas those at the front and the rear are called clearance lights.

The patent in suit, No. 522093 of the Canadian Patent Office, relates to an alleged new and useful improvement in vehicle marker lights and more specifically to a simple means of sealing the lamp and of removing it when needed.

The application for the Canadian patent was filed on November 9, 1951, and the patent was issued on February 28, 1956.

The specification states *inter alia* that:

> The present invention relates to a novel and improved vapor-proof and leak-proof enclosure, and to a static seal especially adapted for use as a low pressure sealing element in combination with a chambered container or hollow body and a closure therefore.
>
> An object of the invention is to provide a seal which permits ready attachment and removal of the closure, using only a simple tool such as a screwdriver or stout knife blade. The sealing element is quite inexpensive and immediately replaceable if it becomes unserviceable after extended use. A number of adaptations where such seal can be advantageously used will immediately occur to those skilled in the art.
>
> It can be used, for example, in a blow out cap for low pressure safety-valve type operation in conjunction with containers where it is desirable that the pressure in the space be maintained below a predetermined figure. In the meantime, the chamber is effectively sealed against dust, dirt, or moisture contamination, as will appear herein below.
>
> A further object of the invention is to provide a vapor-proof enclosure adapted to receive a static seal as herein defined.

As an illustration of the structure and an advantageous use of his static seal, the inventor then refers to one of the many possible useful embodiments of his invention, that of a vehicle marker or clearance light attached to a vehicle.

Then there is a description by way of reference to drawings of this vehicle marker or clearance light as follows:

> In the drawings there is shown a portion of a panel 11 forming the side, front, or rear wall of a vehicle, the wall being usually of sheet metal. The wall is provided with an opening 12 of suitable shape and size to receive a cupped lamp housing 13.
>
> If desirable, and as is usual, the inner wall of the lamp housing may have a polished reflecting surface 13a.
>
> The housing wall is provided with a socket 14 which can be fixed in the wall, and is here shown as having a screw-thread engagement therein. The socket carries a lamp 15 which is fixed at the focal point of the housing. A lens 16 is retained in the housing as will presently be more fully described.

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As is well known, plated surfaces of the reflector type when exposed to air and moisture, progressively deteriorate or become covered by a coating of dirt and dust, so that the housing must occasionally be removed for replating, repolishing, or even replacement. In addition, moisture and dirt have a detrimental effect on electrical connections, so that current flow may be interrupted or short circuited . . .

I have provided a simple and effective sealing means which is vapor-proof and leak-proof and which permits practically instantaneous removal of the lens whenever desirable, such as for bulb replacement. The lens 16 has an axially inwardly extending annular shoulder 17. The circumferential edge of the lens extends radially outwardly beyond the shoulder, at 16a, to provide a flange which overlaps the edge flange 13b of the housing. When in assembled relationship, the shoulder portion 17 nests within the annular, peripheral edge part of the housing in telescoped relationship, but with adequate working clearance. The outer periphery of the shoulder tapers radially inwardly, converging away from the inner wall 13a of the housing. When in such assembled relationship the inner wall of the housing is provided with a peripheral groove 18 which is in planar registry with a complementary groove 19 on the outer wall of shoulder 17. The grooves are preferably of arcuate character in cross section.

Seatable in both grooves is a static seal member 20 of the type known to those skilled in the mechanical arts as an "O" ring. It is preferably circular in cross-section, when unstressed, but may be elliptical, or otherwise of rounded peripheral contour, and is of relatively resilient rubber-like material so that it can be deformed sufficiently to permit the co-operating parts to be subjected to a mildly forced fit to the assembled position shown in Fig. 4 wherein the ring 20 nests simultaneously in both grooves 18 and 19.

. . . In such position the lens is tightly retained, and the seal is so effective that there is no evidence of leakage of moisture, or other corrosive or stain-inducing medium, to the interior of the lamp housing. A screwdriver or a heavy knife blade can be inserted beneath it whereupon the lens can be removed without undue effort . . .

A replacement ring can be readily procured, if eventually desirable, and there are no clamping rings, screws, etc. to deteriorate and cause assembly and disassembly troubles.

. . . The art has previously disclosed the use of an "O" ring in what I may term "dynamic" sealing adaptations wherein such a ring is seated in a groove in one element of a relatively movable pair, the other element having a smooth wall surface.

. . . in the present application the seal is strictly a "static" one wherein there is no relative movement of the parts during service . . .

The specification ends with one claim which reads as follows:

A vapor-proof vehicle lamp comprising in combination, a housing of cup-like shape having at its open periphery an annular flange extending transversely to the axis of the housing, a discoidal slightly-cupped lens having a generally tubular flange of a diameter smaller than the housing periphery so as to be telescopingly movable thereinto and having an annular shoulder extending transversely outwardly whereby to be abuttable against said annular flange when said tubular flange is telescopingly inserted within said housing as aforesaid, the inner surface of said housing within said annular flange and the outer surface of said tubular flange

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being provided with peripheral grooves of arcuate cross section which are in mated alignment when said annular shoulder abuts said annular flange as aforesaid, the portion of said tubular flange inwardly beyond said arcuate groove being inwardly convergent conically whereby to provide a clearance between said conical portion and the inner wall of said housing, and a ring of resilient material of rounded cross section seatable partially in each said groove, the spacing between the complementary walls of said arcuate grooves, and the thickness of said ring being such that the ring is subjected to leak-proof compression when the lens is telescopingly assembled into the housing when said annular shoulder is moved into abutment with said annular flange.

In short, the claim covers a vapour-proof vehicle lamp consisting of a cup-shaped housing, a slightly cupped lens and a means of securing the two together; the lens goes into the housing telescopically and the housing is shaped to accept that telescope. The sealing of both parts is effected by means of O-rings and two mating grooves, one on the housing and the other on the lens so that when they come together in the proper relationship they snap into position. When the grooves are in alignment and the O-ring is seated between them to effect a seal the flange on the outside of the lens abuts against the flange on the housing which is the snap seal effect.

Evidence for the plaintiffs was given by Joseph H. DeFrees, president and chief engineer of the Alleghany Valve Company and the Alleghany Coupling Company in Warren, Pennsylvania, and the inventor of the patent in suit; by Richard Betts who graduated in 1953 from Grover City College with a degree in commerce, president of the Betts Machine Company, one of the plaintiffs herein which is engaged in the manufacture and sales of valves to the tank truck industry as well as vehicle lamps; by Mahlon Burgett of Touowanda, New York, safety director for Williams P. Crosset Inc., a common carrier of petroleum products and Harold Johnson, of Warren, Pennsylvania, sales and engineering manager and secretary-treasurer for the Pennsylvania Furnace and Iron Company which manufactures liquid and dry bulk trailer equipment as well as heating equipment.

The defence produced no witnesses but submitted a book of prior art containing copies of patents in the United States and photostats of British patents and a number of photostats of catalogues.

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Evidence of the state of the vehicle marking light art prior to 1948 was given by the inventor of the patent in issue in the present case, Mr. J. H. DeFrees.

One of the problems in the early development of vehicle marking lights was to overcome the tendency of the lamps to untighten. Another problem and possibly the most serious one, was corrosion from the inside and outside due to this condition of untightness and also corrosion that interfered with the flow of electricity; the fact that these lights had to be screwed in created also a problem in that when replacing a burnt out lamp on the highway, the screws were difficult to insert and to screw in as the bolt holes had to line up and many were dropped and lost in the process and in many cases became rusted; the sealing qualities of these lights were very questionable and the latter consisted of so many parts that they were hard to put together and had a tendency to get away from one in the assembling process.

There was, prior to 1948, a second type of lamp where the lens is attached on by a metal snap ring illustrated by Ex. 10. However, the greatest drawback here was that the ring did not create enough pressure on the lens to adequately seal it. Sometimes the ring was hard to dislodge and at other times it was hard to assemble. This lamp in addition was made of very thin material which rusted easily, and the attaching of the lens depended a lot on the skill of the man and the care with which it was put back together; this lamp also admitted corrosion and dirt. Rusting would occur on both sides of the metal stamping, moisture would corrode the electrical contacts and the oxides would insulate it; in some instances, corrosion would lock the lamp in the socket which was objectionable, the removeability of the lamp would then become most unsatisfactory because of the number of parts involved, the complexity of the assembly, and the skill and time needed to reassemble it. These lights had repeated lamp failures which involved cost and time in replacing them and, of course, the operation on the road with lamps out was dangerous. According to Mr. DeFrees they did not do the job as a trouble-free, long life piece of equipment.

Lamp Ex. 11 was not satisfactory either as it did not do the sealing job the trade required. The lens could be removed more easily than Ex. 10, but it also gave trouble to assemble and disassemble because of its numerous parts.

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J. H. DeFrees then attempted to make an improved vehicle lamp and he thought he had one in Ex. 12. This is a lamp with clear lens and a brass body. It has a threaded body and lens with a gasket made of synthetic rubber and is rugged. However, in low temperature work, below zero, it was found that the lens shrunk so much more rapidly than the body that it became loose. This whole concept was therefore put aside because it would fall out and would not stay tight.

As a new approach to the vehicle lamp field, J. H. DeFrees then made drawing 45022 dated September 6, 1948, produced as Ex. 14 and drawing 45027A, Ex. 15, both of which are related to Ex. 13, a marker lamp with red lens. He states that he personally conceived the design and made drawing 45022 on September 6, 1948, and drawing 45027A (Ex. 15) on October 24, 1948.

Exhibit 13 is essentially a housing and a body with quite a high upstanding lug into which was inserted a gasket and a lens and this in turn was mechanically spun together thus making a permanent joint.

The method of spinning the flange and have it clamp the gasket and lens as shown on the above drawings proved to form a very efficient joint according to J. H. DeFrees. Indeed, it was tight and there was no moving of the lens. However, this design had such serious objections that it had to be abandoned. Indeed, if the lens were broken, the entire body had to be thrown away and the permanent anchorage of the lamp was objectionable. There was also a further objection in that the bulb had to be replaced from the rear side. In view of this, DeFrees states that it was decided that a vehicle lamp of this design could not be mechanized.

DeFrees kept working on a further design and on May 15, 1951, he personally made drawing No. 45079, dated May 15, 1951, (Ex. 16) which was his first approach to the use of a resilient ring for not only sealing the lens but also for anchoring it in place. On July 23, 1951, he made drawing No. 4506-7 (Ex. 18) which was used for the production of Ex. 8, an illustration of the patent in suit. The former drawing had the general principles but was not as specific as Ex. 18.

The lamp described in Ex. 16 went into production in the latter part of 1951 but not as shown in Ex. 16. Indeed, some minor changes in the shape of the housing came in a later refinement but essentially this is the invention.

DeFrees states that the lamp described in Ex. 16, which is Ex. 8, the lamp put forward as an exemplification of the patent in issue in the present case, varies greatly from Exs. 10 and 11. These lamps are all clearance lamps but the method in which the lens is attached and sealed varies greatly. In Ex. 10 the lens is held in place with three screws, an annular clamping ring and a separate gasket. In Ex. 11 there is a separate gasket with a metal snap spring which holds the lens in place. This lamp has no O-ring nor two grooves opposite each other.

Exhibit 8, which represents the patent in suit here, has, according to Mr. DeFrees, a positive seal; it is bubble tight and no moisture can get in or out of it. It is more easily removed than the other lamps in that there is only one part which is removeable and which is replaced whereas in Ex. 10 there are five parts which become disengaged from the vehicle and in Ex. 11 there are three.

The advantage of simplicity is that fewer parts can be lost and a man can remove and replace it more quickly and accurately.

The first sale of lamps, Ex. 8, which is a representation of the patent in issue here, was made, according to J. H. DeFrees, in the latter part of 1951 and originally packaged and shipped in a container produced as Ex. 17.

Asked as to whether in zero and sub-zero temperatures the lens would contract more than the housing and the effect of the resilient ring would be less effective than at higher temperatures, he admitted that the pressure exerted on the sealing rings would be less in cold weather than hot weather adding however that it would be of sufficient magnitude to do the job.

Mr. Richard Betts, of the Betts Machine Company, one of the plaintiffs, was then heard. One of his main responsibilities with the company became the vehicle lamp part of the business. The company began manufacturing and selling vehicle lamps in December of 1951. The lamp manufactured was made, according to this witness, in accordance with the patent in suit and was designed and developed by Mr. DeFrees. The manufacturing of these lamps was continued until 1956 when a separate company, Warren Manufacturing, was formed which manufactured

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lamps for the plaintiff company. Due to a prior agreement with a manufacturer, vehicle lamps of the plaintiff company's design are being assembled in Canada by Faucher & Fils. The first sale of the DeFrees design lamp in the United States took place on December 7, 1951, and was sold under the trade mark "Snap Seal" in a carton marked Ex. 17.

The total sales in the United States in the year 1952 through and including the year 1962 (for the first half of 1962) appear on Ex. 19 which is a tabulation of the sales. It appears that 13,196 lamps of a value of $31,246.64 were sold in 1952 compared to 182,476 of a value of $513,791 in 1961 and 106,903 lamps of a value of $393,096 for the first half of 1962.

The plaintiff company's lamp is more expensive than that of its competitors.

As far as the total market for safety lamps in vehicles is concerned, the portion of the trade the plaintiff company has is relatively small. But with respect to the highway tank industry, the company's lamps are on the majority of the tank trucks.

The company's first sale in Canada was made to Dominion Auto Accessories, the defendant herein, in response to its order of June 17, 1952, when it ordered 700 of the company's lamps, 600 for Model B-60 and a hundred for Model B-50.

The company in addition sold lamps in Canada directly to manufacturers and users of vehicle lamps and also through their outlets in Canada such as distributors or jobbers. Exhibit 21 shows total Canadian sales of snap seal lamps by Betts Machine from the year 1952 to 1961 as follows:

Canadian Sales of Snap Seal Lamps by Betts Machine Company

Year	*No. of Lamps*	*Value of Lamps & Parts*
1952	2,350	$4,731 36
1953	4,764	9,116 56
1954	975	1,936.75
1955	438	914 38
1956	1,055	2,151.05
1957	2,072	4,144 36
1958	4,939	9,879 09
1959	3,425	6,851.52
1960	2,773	5,547 24
1961	2,984	5,418.00

Mr. R. Betts stated at p. 115 of the transcript that sales in Canada could be compared to those in the United States.

Mr. Rogers:

Q. How did the Canadian sales compare with those in the United States?

A. Having respect to the smaller market in Canada versus that in the United States in the years 1952 and 1953, the sales are comparable. However, in the year 1954-1955, our sales dropped off substantially and haven't risen substantially since.

The witness attributes this drop to the entry of Dominion Auto Accessories, the defendant, into the Canadian market, as he states at p. 115 of the transcript "with a lamp copying our design".

The plaintiff company first became aware of the defendant's lamps, Ex. 6, in 1956 and a letter was written by Mr. R. Bett's father to Mr. Durand, a United States attorney, inquiring as to what action should be taken in the matter and a letter dated October 16, 1956, was sent by Mr. Durand to the defendant company telling them of the plaintiff company's claim and asking them to stop manufacturing.

All lamps sold in Canada according to Betts have been marked to indicate they are patented but with no year indicated as required by s. 24 of the *Patent Act*. In other words, they have not been marked "patented 1956". The plaintiff company also sold in Canada a number of lamps marked with the U.S. patent number and not the Canadian patent number.

A series of dies were made for lenses with the Canadian number on and some of the lamps were sold in Canada with the Canadian patent number but Mr. Betts admits that his company has taken no steps to insure that only lenses so marked with the Canadian number have been sold to the Canadian market. Indeed, if an order was received it was filled with whatever lamps were available.

He also states that in his opinion the portion of the tank truck field the company lamps enjoy would be the majority of the United States market.

According to Mr. Betts the plaintiff company has sold to manufacturers in Canada and to freight operators primarily and also through the company's distributor outlets.

He also attributes to the entry of Dominion Auto Accessories Ltd. the reduction in sales for 1954 and 1955 although

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it is only in 1957 that he received a sample lamp V.P. 236T, which was made by the defendant company.

Mr. Mahlon Burgett of Touowanda, New York, a safety director for William P. Crossett Inc., a common carrier of petroleumn products with an experience of 25 years in the tank truck industry stated that during the years from 1938 to 1951 several types of lamps were used on tank trucks operated by the companies for whom he worked; some were similar to Exs. 10 and 11 and there were a couple of other styles which were not produced as exhibits; there was also a larger lamp than any exhibited in the present case, probably seven inches across the base of the lens, and the latter was attached to the body by a channel-type lock ring which folded over the lens and a protrusion from the body and went around out to hold the lens to the body.

Similar types of lamps were used by the competitors of the companies for whom he worked prior to 1951. A lamp similar to Ex. C was also used and the lens was held to the body in a manner similar to Ex. C, i.e., by means of two screws. However, the lens did not have a lip on the outside, it fitted more or less flush with the body and the screws went through the lens itself.

Mr. Burgett stated that prior to 1951, Ex. 10 as a vehicle lamp did the job it was supposed to do but that however after 1951 there was a better lamp on the market, as he put it at p. 143 of the transcript:

> . . . And we considered these lamps as shown here in Exhibits 10 and 11 and C, and the other ones I have mentioned, as not good enough to do the job we wanted them to do.

According to this witness, Ex. 10 was not good enough in that it was not a tight seal light and not having a tight seal it had a corrosion problem that made it difficult to change bulbs and maintain. The rust problem was both on the outside of the lamp as well as on the inside. The screws would rust so badly that they could not be taken out in the normal manner with a screwdriver or a wrench but had to be drilled out and on the highway it was almost impossible to have a driver change one. The corrosion on the inside was a problem because it corroded the bulk socket and the bulb could not be removed in this condition without ruining the bulb socket and the whole lamp then had to be replaced. The corrosion on the inside was caused by water and moisture getting inside and mixing with the air due to the fact that there was not a tight seal on the lens.

According to Mr. Burgett, in a vehicle lamp lens ease of removal is important especially on a highway so that the driver can replace a burnt out light as soon as it needs it and the vehicle will not run without its lamps lit. They must also be easily removeable in the shop so as not to run into an expensive maintenance programme.

As to the usefulness of Ex. 11, this witness is of the opinion that it is an improvement over Ex. 10 due to the fact that the lens is easier to remove as there is a clamp over the lens instead of screws. However, the seal on this lamp would not be tight enough to make it waterproof or vapour-proof and they ran into the same problems with this lamp as far as rust and corrosion were concerned.

Back as far as 1952, Oil Marketers for whom this witness worked changed the lamps on their equipment from lamps such as Exs. 10, 11 and C and the other ones he mentioned to lamps such as Ex. 8 for clearance identification and marker lamps. When the witness left Oil Marketers, in 1956, apart from the headlights, the cab lights and the cab interior lights, they would all be Betts type lamps and the same applied to the Crossett Company for whom, as we have seen, he worked also. On the equipment purchased by the above company, lamps such as Ex. 8 were written into the specifications.

Oil Marketers in the year 1952 came to use the lamp of the type of Ex. 8, the patent in suit, after several phone calls between the above company and the Betts Machine Company. According to this witness also, lamp Ex. 8 is quite a bit more expensive than the other lamps, however, due to the increased length of service and the less maintenance required, the initial additional cost is soon recovered and will in the long run cost less money.

Its lighting qualities are a little better than the other lamps, it has a tight seal, it has less maintenance, it is easier to change the bulb and it is vapour-proof and this witness adds at p. 149 of the transcript:

> . . . In fact, we haven't found a lamp on the market yet that will give us all the qualities we like to see in a lamp as this one has done.

The importance of lamps such as this, of being vapour-proof, is that it eliminates corrosion and also in the tank

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truck industry where inflammable liquids are being handled, some very volatile, it becomes an important safety feature.

In cross-examination this witness, although stating that some of their competitors used Ex. 8 lamps, admitted that others used also types of lamps similar to Exs. 10 and 11 and C.

Mr. Harold Johnson was then heard on behalf of the plaintiffs. He is sales and engineering manager for Pennsylvania Furnace and Iron Company as well as its secretary-treasurer. This company manufactures liquid and dry bulk trailer equipment such as truck tanks, trailer tanks, cement tanks, chemical tanks, milk tanks, as well as heating equipment and is a medium sized tank trailer manufacturer. Mr. Johnson has a degree in mechanical engineering from the Pennsylvania State University.

The tank trailers or trucks manufactured by the above company are equipped with vehicle lamps. Prior to 1951 this witness had a lot to do with the vehicle lamps used on the tank trucks manufactured by his company; he was in charge of the drawing room and was, since 1951, responsible for the choice of lights on the company's vehicles.

Prior to 1951, according to this witness, the type of vehicle lamps used were similar to Exs. 10 and 11. With respect to the type of lamp illustrated by Ex. 10, he stated that numerous complaints were received due to the fact that it was not waterproof or vapour-proof and because of the number of pieces involved and the difficulty in replacing lenses and/or bulbs.

He also asserted that the importance of the lights being moisture proof is that there would be less corrosion, less danger of lighting shorting out, of screws and parts rusting tight so they could not be removed.

As for its vapour-proof aspect, this witness is of the opinion that the tank truck segment of the trucking industry has always ranked high in safety and because this industry is handling dangerous commodities, they will do everything they can to ensure safety.

With respect to Ex. 11 this witness states that he personally never liked it. This is the lamp with a clamp ring. It is quite a job to assemble and put in place and he does not think it has a tight seal nor that it is easy to replace a bulb.

The type of lamps used on the tank trucks manufactured by his company at the present time is, unless specified otherwise, of the type of Ex. 8 which exemplifies the patent in suit.

It was early in 1952 that his company started using the Ex. 8 type of lamp because it had been specified by a customer.

Their competitors at the present time are also using the Ex. 8 type of lamps.

According to this witness also the Ex. 8 type of lamp has a better seal than the other lamps, it is easier to remove the lens and replace the bulb, fewer parts are involved and there is less corrosion.

The term "explosion proof" is not used too much in the tank truck industry as it is generally understood to mean a light which, if vapours were admitted, could withstand an explosion and, of course, that is not what the plaintiffs' lamp is. This explains why the words "explosion proof" were deleted from Ex. 9.

This witness admitted that in order to make a lamp such as Ex. 8 vapour-proof, some means would have to be taken for insuring that vapour does not enter the housing from the back so that the effectiveness of the lamp depends not only on the effectiveness of the seal between the housing and the lens, but also the effectiveness of the fittings at the back of the lamp where the wires enter. However, he added that steps are taken in a lamp such as Ex. 8 to insure that no vapours enter from the back in that the socket is threaded into the light body and the wires are run in a conduit which in turn is threaded into the socket. This, however, is not mentioned in Ex. 8, the patent in suit, nor is the rubber grommet through which the pigtail enters. He admitted in cross-examination that the signal stat lamp also has the same type of conduit as Ex. 8 as well as a similar rubber gasket.

Counsel for the defendant filed a number of patents as part of the prior art on the basis that all of these references are available as citations against the patent in suit because they were published more than two years before the date of filing of the application in suit under the provisions of s. 28(1)(b) of the *Patent Act* which reads as follows:

28. (1) Subject to the subsequent provisions of this section, any inventor or legal representative of an inventor of an invention that was

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(a) . . .

(b) *not described in any patent or in any publication printed in Canada or in any other country more than two years before presentation of the petition hereunder mentioned,*

* * *

may, on presentation to the Commissioner of a petition setting forth the facts (in this Act termed the filing of the application) and on compliance with all other requirements of this Act, obtain a patent granting to him an exclusive property in such invention.

With the exception of those, counsel for the defendant stated he did not rely on, I shall now enumerate these prior art citations as follows, giving in each case the name of the inventor and the number and date of the patent with the title of the invention, namely Ex. D. Horace Resley, U.S. Patent No. 379,127, dated March 6, 1888, a pavement-light; Ex. E, Williams E. Brown, U.S. Patent No. 723,645, March 24, 1903, a jar-closure; Ex. F, William H. Jones, U.S. Patent No. 785,106, March 21, 1905, a jar or bottle closure; Ex. H, B. F. Savery, U.S. Patent No. 861,552, June 3, 1930, a jar and closure therefor: Ex. J., B. S. Floraday, U.S. Patent No. 2,106,144, August 8, 1935, a dome light assembly; Ex. L., T. R. Smith, U.S. Patent No. 2,404,409, October 3, 1942, a container; Ex. N, U.S. Patent No. 28,113, May 22, 1860, an improvement in preserve cans; Ex. O, W. H. Jones, U.S. Patent No. 769,866, December 5, 1903, a jar or bottle closure; Ex. P., Dorothea C. Hull, U.S. Patent No. 770,751, September 27, 1904, a closure for bottles, jars or other receptacles; Ex. T, Robert Edwin Ashworth, British Patent No. 11,953, January 23, 1908, improvements in and relating to stoppers for bottles, jars and the like; Ex. U, Charles Lewis Bush, British Patent No. 21,443, May 2, 1896, improvements in or relating to stoppers, lids or caps for bottles, jars, cans or boxes.

The jars or stoppers for jars and the like patents were brought into the case by the defendant on the basis that the patentee in the specification related his invention not only to the vehicle marking lamps but rather to a static seal and thereby brought into the prior art to be reviewed by the skilled workman all the patents covering closures or means of sealing enclosures and static seals for housing any unit chambered containers or hollow bodies.

Indeed, it is only in the one claim of the patent that it relates the invention to the automobile lamp field.

Counsel for the defendant indeed argues that the patentee himself here has set the stage for his invention by claiming in the specification that it relates to a static seal that has the advantage of being quickly removed and replaced and being vapour-proof, which would involve the Court in examining the jar and enclosure art in addition to the vehicle marking lamp art. The matter of deciding whether those jar or enclosure documents are relevant here must be decided now. Indeed, if they are not relevant there is no necessity for this Court to examine them at all.

The defendant contends that the patentee by relating his invention not to vehicle marking lamps but rather to a static seal has brought into the area to be reviewed, or charged the person reading this patent, with the responsibility of being aware of all the patents covering closures or means of sealing enclosures and static seals for housing any unit, chambered containers or hollow bodies and that by so doing he has also in effect defined the person to whom the patent is addressed as the skilled workman in the field of closures.

On this point, defendant relies on the first paragraph of the patent which reads as follows:

> The present invention relates to a novel and improved vapor-proof and leak-proof enclosure, and to a static seal especially adapted for use as a low pressure sealing element in combination with a chambered container or hollow body and a closure therefor.
>
> An object of the invention is to provide a seal which permits ready attachment and removal of the closure, using only a simple tool such as a screwdriver or stout knife blade. The sealing element is quite inexpensive, and immediately replaceable if it becomes unserviceable after extended use. A number of adaptations where such seal can be advantageously used will immediately occur to *those skilled in the art.*

The defendant claims that the art referred to above would be the enclosure art rather than the vehicle light art.

I cannot accept defendant's proposition here for several reasons. It is very clear from the title of the patent in suit here that the art is the vehicle marking light art. Indeed, the title reads as follows: "Removable sealing device for vehicle marking light".

The above quoted first passage from the patent is nothing more than a full statement of what the inventor, Mr. DeFrees, contemplated might be done with the thing he allegedly invented in compliance with s. 36, s-s. (1) of the *Patent Act*. This section indeed deals with the necessity

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of disclosing "the invention and its operation or use as contemplated . . . so as to enable any person skilled in the art or science to which it appertains, or with which it is most closely connected to make, construct, compound or use it . . . ".

From this it appears that the adaptations of the seal which the patentee declares can be advantageously used will immediately occur to those skilled in the art, which here is the vehicle art field which is to paraphrase the above section "the art or science to which the invention appertains or with which it is most closely connected" and not the jar or enclosure field with which it is not closely related.

There is however a more conclusive way to determine the art to which an invention relates and that is by looking at the claim or claims of the patent. It is indeed in the claim or claims that the monopoly is defined and not in the specification as stated by the Supreme Court in *Noranda Mines Ltd. v. Minerals Separation North American, Corporation*[1] "the forbidden field must be found in the language of the claims and not elsewhere."

And as put in the same case[2] in this Court by Thorson P.:

> Two things must be described in the disclosures of a specification, one being the invention, and the other the operation or use of the invention as contemplated by the inventor and with respect to each, the description must be correct and full. The purpose underlying this requirement is that when the period of monopoly has expired the public will be able, having only the specification, to make the same successful use of the invention as the inventor could at the time of his application.

and at p. 317:

> When it is said that a specification should be so written that after the period of monopoly has expired the public will be able with only the specification, to put the invention to the same successful use as the inventor himself could do, it must be remembered that the public means *persons skilled in the art to which the invention relates for a patent specification is addressed to such persons.*

As the claim here deals exclusively with a vapour-proof lamp for vehicles, ordinarily the art to which it relates should be that of vehicle lamps.

It is therefore in that field mainly that the ordinary skilled man may look here in order to find out whether the

[1] [1950] S.C.R. 34 at 56. [2] [1947] Ex. C.R. 306 at 316.

patent in suit has been anticipated or not, or the prior art in that field may be used to indicate the state of the art at the time that the patentee made his alleged invention and as a means of ascertaining whether what the patentee did was so slight a contribution to existing knowledge as to lack the essential element of invention and to be merely obvious.

However, here, the vehicle lamp art, although the main one is not the only art that the skilled workman or this Court can look at in order to determine whether the patent in suit was anticipated or whether it was obvious or not. Indeed, it would seem to me that he may look at anything that may assist him in this regard, the reference in a patent dealing in one art (the vehicle lamp art) to another art (the enclosure art) such as we have here, being one element to be taken into consideration in determining whether from such a directed use in the patent (the use in vapour-proof containers) the patentee in effect invented something that was new or that was obvious. With this in mind, I therefore intend to examine all the prior art patents cited by the defendant.

However, before examining the prior art, in view of the attack made by the defendant on the validity of the patent in suit, it would be in order here to deal with defendant's onus in this regard. Indeed, the showing of the invalidity of a Canadian patent rests on the person attacking it and in the present instance on the defendant in view of the statutory presumption of validity of a Canadian patent under s. 47 of the *Patent Act*, S. of C. 1935, c. 32, which states that:

> 47. Every patent granted under this Act shall be issued under the signature of the Commissioner and the seal of the Patent Office. The patent shall bear on its face the date on which it is granted and issued and it shall thereafter be *prima facie* valid and avail the grantee and his legal representatives for the term mentioned therein . . .

In *Unipak* v. *Crown Zellerback*[1] Thorson P. stated at p. 39:

> . . . the statutory presumption is not confined to the attribute of inventiveness but extends to the other attributes that an invention must have if it is to be patentable under the Act, such as novelty and utility. The three attributes of patentability, namely novelty, utility and inventiveness are all presumed to be present in an invention for which a patent has been granted under the Act until the contrary is clearly shown.

[1] 33 C.P.R. 1.

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However in the case of *McPhar Co. v. Sharpe Instruments*[1] he added at p. 28:

> On further consideration I am of the opinion that this statement is not as wide as the terms of the Act warrant. It must follow from the provision of the Act that a patent granted under it "shall thereafter be *prima facie* valid" and avail its grantee and his legal representatives for the term of the patent, that the onus of showing that it is invalid lies on the person attacking it, no matter what the ground of attack may be, and that until it has been shown to be invalid the statutory presumption of its validity remains.
>
> This does not mean that the patent is immune from attack or that the patentee is free from the obligations that are incumbent on him by way of consideration for the grant of the patent monopoly to him but it seems clear that, since Parliament has deliberately endowed a patent granted under the Act with a presumption of validity, the onus of showing that such a patent is invalid is not an easy one to discharge. That being so, the English decisions indicating that a patentee must prove the existence of the essential attributes of the patentability of the invention covered by his patent before he can succeed in an action for damages for infringement of his rights under his patent are no longer applicable in Canada. He need not prove the existence of these attributes for he starts with a statutory presumption of their existence in his favour and the onus of showing their non-existence lies on the alleged infringer of the patent. The enactment of the statutory presumption of validity effected an important change in Canadian patent law and marked a substantial advance in the protection of a patentee's rights.

Counsel for the defendant recognized at the hearing that the onus of establishing that the patent in suit is invalid rested on him. He argued however that the President of this Court had gone further than the words *prima facie* would warrant one to go in stating that "the onus of showing that such a patent is invalid is not an easy one to discharge" and that the ordinary plain meaning of *prima facie* is that if no evidence is adduced tending to show invalidity and no argument is advanced then of course the patent is valid and the patentee or any one claiming under him has no duty to prove that there was novelty, utility and inventive ingenuity. However, if sufficient evidence is adduced, then the *prima facie* presumption may be rebutted and the Court is left to determine the matter not on the basis of a heavy or difficult onus to discharge but merely on the weight of the evidence.

In *Land Registering Act* v. *Shaw*[2] Mr. Justice Martin stated that:

> . . . a *prima facie* title can only mean a good title till there is evidence to displace it.

[1] 21 Fox Pat. Cas. 1.

[2] [1915] 24 D.L.R. 429.

I do believe that whether the presumption of validity is a heavy or easy one to displace remains a question of fact in each case although I must say that in patent matters it would seem that as the alleged infringer has the burden of not only attacking the validity of the patent in issue, but of also placing the judge in the position of a man skilled in the prior art it is not too surprising that the President of this Court has stated on numerous occasions that the onus is not an easy one to discharge.

Although the defence of anticipation was advanced by the defendant in this case, counsel did not seem to rely too strongly on this argument and in view of the requirements of anticipation, this is not too surprising.

These requirements were set out clearly by Thorson P. in *The King* v. *Uhlemann Optical Company*[1]:

> . . . The information as to the elleged 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 being 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 in *Pope Appliance Corporation* v. *Spanish River Pulp and Paper Mills Ltd.*[2] Lord Dunedin described the method to find out whether there was anticipation or not 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 hands, have said, "That gives me what I wish?"

and at p. 56:

> Does the man attacking the problem find what he wants as a solution in the prior so-called anticipations.

Furthermore, as set down by Lord Dunedin in *Pope Appliance Corporation* v. *Spanish River Pulp and Paper*

[1] [1950] Ex. C.R. 142 at 157. [2] [1929] A.C. 269; 46 R.P.C. 23 at 52.

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Mills Ltd. (*supra*) when documents are brought forward as anticipations, they must be read singly and must in no way be combined together to form a mosaic of extracts.

These requirements, as we can see, are difficult to meet and have not been met in the present case. Indeed, in none of the prior art patents or publications produced by the defendant, and I include here not only those relevant to the lamp field but also those relevant to the field of enclosures or jars, can we find an answer to the problem solved by the patent in issue.

The first patent produced by the defendant as prior art is Ex. D, U.S. Patent No. 379,127, dated March 6, 1888, a pavement light for the purpose of illuminating compartments below the surface of the ground. It deals with a light, mating grooves in both the glass block and the housing, the former fitting telescopingly into the latter and the housing is sealed when the groves are in alignment and the O-ring made of a resilient material secures the two mated channels together.

The abutting flange here, however, is on the outside of the lens instead of on the inside as in the patent in suit. Furthermore, it is not a construction where one could, working from above, pry out the transparent portion. Indeed, there is nothing that one can use from that position to do so. It would here be necessary to go underneath and push from there. Now this transparent part is not easily lifted as stated in column 2, lines 73 to 74 "and can be removed more easily, when necessary, by a twisting or turning motion" which of course is entirely different from the manner in which the lenses are removed in the patent in suit. Furthermore, there is no clearance between the transparent portion and the housing portion and no taper on the transparent portion. In the patent in suit it is difficult to push in the lens into the housing without cocking the lens to some extent relative to the housing. Indeed, one does not push the whole lens in a straight axial direction; to telescope it in, one part goes in first and the remaining part after, so that the clearance referred to in the claim is significant in order to obtain a tight seal.

Furthermore, in Ex. D the ring E is seated in a recess, which is not arcuated but V-shaped with a certain amount of room given to allow it to be pushed into and this might affect the sealing quality of the light.

Finally, in this exhibit there is no housing or a slightly cupped lens in the sense of the patent, although, as we have seen, both of these are admittedly old.

Exhibit E, U.S. Patent No. 723,645, dated March 24, 1903, is a jar closure and refers to the fitting of a seal by the alignment of two groves, one on the inside of the housing and the other on the outside of the part telescopingly fitting inside the housing. The O-ring here is said to be a rubber or other flexible gasket. This patent has a flange on the outside of the part closing the jar which abuts a corresponding transverse flange on the jar itself. There is not here, however, the inwardly tapered front portion of the part going in that we have in the patent in suit nor is it possible to cant the stopper when it goes into the bottle or container. Indeed, here the stopper must be pushed straight down into the bottle.

Furthermore, a little recess is provided in the stopper groove No. 5 and when the stopper is pressed down, the whole ring deforms into that recess which, of course, is entirely different from the ring in the patent in suit, and would as far as the latter is concerned, create a number of problems. Indeed, the material of the O-ring that would have to be used for that purpose would have to be soft and might not be adequate for a vapour-proof lamp and because of it being constantly deformed, might not resist too long.

The manner in which the stopper in Ex. E is entered into the container is entirely different from that in the patent in suit, the patentee, at p. 1, column 2, lines 63 and 64, therein stating that "the stopper is inserted by a twisting or screw like motion."

In the patent in suit the deforming of the O-ring is done differently. Indeed, because of the clearance between the tubular flange on the lens and the adjacent wall of the housing and the cocking action, the ring is deformed a bit at a time gradually along that part of its periphery where the pressure is being applied.

Exhibit F, U.S. Patent No. 785,106, dated March 21, 1905, is also a jar or bottle closure and here the jar or container fits inside the cup and an O-ring seals the two parts together by the alignment of mating grooves.

According to counsel for the defendant, if the drawings are here reversed and the cap becomes the housing and the

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closure becomes the sealing element, this patent would have everything described in the patent in suit. It would have an abutting flange on the closure and the housing and a knife or other thin instrument inserted between the abutting flanges would break the seal and remove the cap from its aligned position in the same manner as in the patent. It has also a resilient sealing O-ring that fills the grooves when they are sealed. The part that goes in telescopingly is even tapered.

Exhibit F, according to the patent at line 89 of p. 1, column 2, deals with the closing up of these jars in a vacuum by removing the air from the chamber in which the jar is located. A plunger is then applied to the cap and pushes it down. This of course is pretty far afield from vehicle lamps and no vehicle lamp could be filled in this manner in the field.

Now in so far as the structure is concerned, the manner in which the ring in Ex. F operates is entirely different from that in the patent in suit. Indeed, this ring starts in the arcuate groove on the container but as the cap is pushed down with the plunger, the O-ring has to come downwardly to a position where it is compressed into a rectangular groove and in so doing, the ring rides over an edge between the grooves and it is therefore subject to some manipulation and wear. The ring in the patent in suit for a vehicle lamp might not stand much of this manipulation.

In Ex. H, U.S. Patent 1,861,552, dated June 7, 1932, the parts must also be reversed as in Ex. F. The top of the jar is to be considered as the housing and the jar body as the part to be inserted into the housing with a resilient O-ring sealing the space between the two parts when in the sealed position. This exhibit has abutting flanges which can easily be removed by inserting a thin bladed instrument between them. The part that is inserted into the cap is tapered inwardly, the inside diameter of that part being significantly less than the outside diameter of the part into which it is inserted.

However, there appears to be no clearance here corresponding to the part situated in the location between the conical portion of the lens of the patent in suit and the conical portion of the head of the housing. Indeed, in Ex. H. there is uniform space between the cap of the bottle and its cross-hatching. However, that space, according to column 2, line 2 of the said patent, is filled with a sealing material, paraffin, and then the corner is shoved down over the neck, so that the ring itself does not act as a seal here and the patentee himself refers to the ring simply as a packing ring at column 2, line 64, p. 1. The ring here would therefore be more of a gasket than a holding or sealing means of the kind with which the patent in suit is concerned.

Here again if one tried to pry off the jar body from the top, it would have to be done by means of a straight pull and therefore a tight seal could not be obtained. As there is not sufficient clearance between the inside of the cap and the jar body, it is not possible to pry them open by tilting or by means of a cocking action. With this patent it is not possible to press gradually all along the periphery of the O-ring and if an attempt was made to tilt, the glass would probably break.

I may add that Ex. H clearly shows that we are dealing here with a permanent closure as indicated at p. 1, column 2, line 99 "when the paraffin hardens a permanent closure is provided."

Finally, the O-ring in this exhibit is seated on the outside of the jar when the cap is off. This would be a problem if an attempt was made to transfer this to the vehicle marking lamp. Indeed, by putting the O-ring on the outside of the housing or the container, the whole of the lens or the light would protrude to a considerable extent from the side of the truck whereas when the ring is in the inside of the container, such as in the patent in suit, the lens protrudes much less, which is a considerable advantage. Now when withdrawing the body from the cap in Ex. H., the O-ring cannot remain in the housing but comes out with the lens and thereby creates a problem of manipulation.

Exhibit J, U.S. Patent No. 2,106,144, dated January 18, 1938, is a light with a press fit between the housing and the lens, the housing is cup-shaped and the lens is slightly cupped. The two are merely pressed together and held in that position by frictional engagement. They do have abutting flanges in the closed position.

This patent, however, has no O-ring and mating grooves and no taper on the part fitting in. As it is a dome light in an automobile, it need not be sealed as inside automobiles one does not worry about vapour, nor about differ-

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ential rules of expansion between the housing and the lens.

Counsel for the defendant stated that Ex. K. is not really relevant as it is another art. It does, however, show a rubber O-ring and an abutting flange. However, he stated that he does not rely heavily on this exhibit.

Exhibit L, U.S. Patent 2,404,409, dated July 23, 1946, also a container, shows a tapered part being inserted into a housing and a groove on the tapered part, a resilient sealing O-ring and abutting flanges when the jar is in the sealed position. However, this patent has not a corresponding groove on the housing. It has but one groove and effects its seal by merely bearing against the flat surface of the housing. The holding of the cap to the receptacle is accomplished by friction between the ring of the wall and the interior wall of the receptacle or the jar. It is not necessary to deform the rubber of the O-ring in order to remove the cap from the receptacle. The O-ring simply slides in with the cap but does not change its shape in so sliding which, of course, is entirely different from the situation one has if an O-ring is seated in grooves in both of the parts that come together because the O-ring must be deformed before the lens can be released.

If the construction in Ex. L was applied to a marker light and came in contact accidentally with something such as a branch for instance, the cap might very well be pulled right out of the container and there would be no vapour-proof seal because the ring did not seat itself firmly between two parts in the manner the O-ring is embedded in the patent in suit. Furthermore, the ring here also is carried on the outside of the cap with the difficulties we have seen in the former exhibit.

Exhibit N, U.S. Patent 28,413, dated May 22, 1860, has, as a fruit jar, to be turned inside out or upside down, the cap being considered as the housing and the jar as the lens. If that is done, it appears that there is a resilient O-ring that fills the space between the two mating grooves and effects a seal. The part inserted into the housing is tapered. There are, however, no abutting flanges between the two parts when in a sealed relationship. Here also the O-ring is on the outside of the container and travels as the parts are assembled from one location to another from the groove near the top of the bottle down to a lower groove also on the bottle.

In Ex. O, U.S. Patent 769,866, dated September 13, 1904, another jar or bottle closure, we have two mating grooves. Here again it is necessary to reverse the parts and consider the cap as the housing and the jar as the closure part. A resilient ring seals the space between the mating grooves and there are flanges abutting against each other in the closed position. Mention is made here in the specification of a tight joint which would prevent not only "the ingress of air when the contents of the vessel are packed in a vacuum, but also to prevent the escape of contained gases which may be in or produced by fermentation or otherwise."

However, here again there is a substantial difference with the patent in suit. Indeed, the O-ring again must move with the cap as the parts are put together from a groove A to a groove C and over a relatively sharp edge and these grooves being angular formed instead of arcuated they would considerably affect the life of the ring.

Exhibit P, U.S. Patent No. 770,751, dated September 27, 1904, is also a closure for bottles, jars or other receptacles. It seals by means of mating grooves and a resilient ring but here the grooves themselves change their shape to place the stopper in the bottle which, of course, is entirely different from the patent in suit.

Exhibit T, British Patent No. 11,953, dated January 23, 1908, relates to a stopper for bottles, jars and the like. This patent shows a housing with a flange, a tapered closure being inserted into that housing which would allow the application of a gradual pressure to the O-ring which seals the space between the two parts. In the specification of this patent, the tapered construction of the closure is mentioned and it is pointed out that this tapering not only facilitates entry of the closure but also enables the application of gradual pressure on the O-ring when the grooves are in alignment and the O-ring fills the space between them and effects the seal and the flange on the stopper abuts against the top of the housing.

Although this patent appears to be constructed in the same manner as called for in the patent in suit, the clearance feature between the stopper and the container such as that between the tubular flange on the lens and the wall of the housing is not provided. Here also this is not something that one can pry open easily as it must travel axially.

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Indeed, such is the teaching of this patent at p. 2, lines 3 to 33:

> . . . The vertical surfaces form a guide for the cover and enable it easily to be inserted in a level manner, compressing the ring equally as it enters and thus preventing distortion.

And, of course, as we have seen, one with such an arrangement cannot obtain as tight a seal as one where it is necessary to employ a cocking or tilting action.

Furthermore, on figure 3 of the drawings it appears that on the stopper shown there, the groove is not arcuated, but has a little recess below the O-ring in which the ring must contract and move into when the stopper is pushed downward which, of course, is again different from the patent in suit.

Exhibit U, British Patent No. 21,443, dated May 2, 1896, deals with improvements in or relating to stoppers, lids or caps for bottles, jars, cans or boxes. We have here the closure telescopingly fitting into the housing, a groove on the inside of the housing and one on the outside of the closure. When the O-ring seals the spaces between the two grooves, it seals. There is also an abutment between the stopper and the housing. The construction here is different from the patent in suit in that when the stopper is inserted into the bottle, the rubber ring passes from the groove at the end of the stopper into the groove at the head of the stopper and also enters the internal groove at the neck of the bottle. Furthermore, the O-ring is on the outside once the stopper is pulled out. A construction such as this would not be of much use in solving the problem the patent in suit solved.

Exhibit V, British Patent No. 647,374, dated July 9, 1949, published December 13, 1950, i.e., being less than two years before the date of the application of the patent in suit, although relating to improvements to vehicle and other lamps, is not available as a record under s. 28 of the *Patent Act* and therefore cannot be considered.

Exhibits G, I, M as well as Exs. Y, Z, Z1 and Z2 were all presented by the defendant to show that a cup-shaped lens and housing were old. However, as Mr. DeFrees in his evidence admitted that they were old or in common usage, counsel for the defendant did not deal with them in detail.

Counsel for the plaintiff in considering the prior art produced by the defendant stressed a number of differences between them and the patent in suit and laid particular stress on the cocking action found in the patent in suit and not in the prior art due to the fact that the inward part of the lens was tapered; he also mentioned the fact that the O-ring in the patented article in suit is seated in the housing and not on the outside and, therefore, does not come out with the enclosure nor does it roll from one position to another, as in the prior art documents. This can be seen in Ex. T on which the defendant relies mostly.

Counsel for the defendant, however, submits that although the above are advantages of Ex. 8, the patent itself does not restrict the inventor to a construction where the O-ring is seated permanently in the housing, nor is mention made therein of the lens being cocked to one side and then snapped in at an angle so as to effect the gradual compression of the O-ring. The only mention of a clearance can be found in column 2, line 33, where it is stated: "When in simple relationship the shoulder portion rests within the annular peripheral edge part of the housing in telescoped relationship, but with adequate working clearance." This, of course, does not go as far as to describe a cocking action as the sufficient clearance mentioned here is that which will allow the engaging of only one portion of the circumference of the O-ring and gradually compress it and then push it into position on the other rather than moving the parts vertically into registration with each other. Indeed, the patent does not say tapering inwardly with sufficient clearance to permit this cocking action.

On the basis that it is to the invention as claimed that one must look for inventive ingenuity, counsel for the defendant submits that the two advantages of the patented article in suit, i.e., the cocking action and the O-ring being seated permanently in the housing cannot be considered.

I am afraid that I cannot agree with this submission. Indeed, although the patent does not expressly mention this cocking action, it does permit its inference from the manner in which it describes the prying off of the lens at column 3, line 4: "a screwdriver or a heavy knife blade can be inserted beneath it, whereupon the lens can be removed without undue effort". Now if this is done, one can see that the decompression is gradual along the periphery of the O-ring and we therefore have this cocking action in reverse.

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In *The King* v. *American Optical Company*[1] Thorson P. dealing with the suggestion made in that case that a vertical operation was not claimed in the patent said:

> Nor is it any objection to the sufficiency of the disclosures that the advantages of the invention as enumerated by Professor Price were not set out in the specification. As Fletcher Moulton L.J. said in *Clay v. Alcock & Co. Ltd.* (1906) 23 R.P.C. 745 at 750 it is a "well known principle in Patent law that a man need not state the effect or the advantage of his invention if he describes his invention so as to produce it". That is not so where the inventor has to rely on the presence or absence of such effect or advantage as a part of the necessary delimitation but we are not concerned with that here. If an inventor has adequately defined his invention he is entitled to its benefit even if he does not fully appreciate or realize the advantages that flow from it or cannot give the scientific reasons for them.

It appears clearly to me here that although the patentee in suit has not specifically described this cocking action, the operational advantage can be clearly inferred from the disclosure and should be considered in determining the validity of the patent.

Now with respect to the permanency of the O-ring in the groove of the housing, although the defendant maintains that the patent has not taught this, it appears to me that the patent does mention the removing of the lens without due effort by inserting a heavy knife blade beneath it and if a knife is applied to Ex. 8 or even Ex. 6, the defendant's lamp, the lens alone is removed and the O-ring remains in the groove of the housing. In view of this I believe that a reasonable reading of the patent and an examination of the drawings, and particularly figure 3, would indicate here that the ring is seated in the housing.

This exhaustive review of all the prior art enables me to say without any hesitation that in none of the patents cited would the patentee in suit have found the solution that he solved by his patent and, consequently, the attack on the patent in suit on the basis of anticipation or lack of novelty must fail.

Now before going into the matter of inventiveness or inventive ingenuity, I would like to deal with a submission made by plaintiff that the definition of invention in s. 2(d) of the *Patent Act* does not require this inventiveness or inventive ingenuity as it mentions only the attributes of novelty and utility. A decision of Thorson P. in

[1] [1950] Ex. C.R. 344 at 366.

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the *Farbwerke Hoechst* v. *The Commissioner of Patents*[1] case was then referred to in which the President stated:

Before I set it out I should, as a matter of duty, comment on a matter that has been a cause of concern since the decision of the Supreme Court of Canada in the *Ciba Ltd.* case [1959] S.C.R. 378. I refer to the definition of "invention", which I have already cited, and the statement of Martland J. in the said case, at p. 383, where he said:

"To constitute an invention within the definition in our Act the process must be new and useful."

The statement is in strict accord with the definition from which it follows, of necessity, that, if the words "new" and "useful" in the definition are given their plain and ordinary meaning, the definition clearly lends itself, as does the statement, to the construction that novelty and utility are the only attributes of patentability that need to be present in order to constitute an invention . . .

* * *

It appears that in the *Ciba Ltd.* case Martland J. so construed the definition. This inference may, I think, be fairly drawn from the fact that after making the statement to which I have referred he addressed himself to only two questions, the first being whether the process before him was useful and the second whether it was new, and that when he had found these two attributes of patentability, namely, novelty and utility, present in the process he dismissed the appeal.

* * *

The fact that the definition lends itself to the construction to which I have referred with the consequence that necessarily follows from it to which I have also referred demonstrates that it is defective for it runs counter to the whole current of patent law jurisprudence. Prior to the decision in the *Ciba Ltd.* case it was never considered that an art, process, machine, manufacture or composition of matter, or an improvement therein, was an invention merely because it was new and useful. The attributes of novelty and utility were, and are, of course, essential to its being an invention but their presence was never considered sufficient to constitute it an invention. It was always assumed that a further attribute of patentability was essential.

It appears to me after reading the judgment of Martland J. in the *Ciba Limited* case[2] that although he does mention only the attributes of utility and usefulness, he may well have taken for granted in that case that the requirement of inventiveness had been fulfilled. Indeed, in no part of this decision does he say that this last attribute is not required. I might also add that the word "invention" itself or the verb "to invent" aside from the definition of the statute carries within it this attribute of inventiveness and, therefore, it may not have been necessary to specifically provide for it in the definition. Indeed, invention, and I am not here talking of the object invented but of the action of

[1] [1963] 39 C.P.R. 105 at 122. [2] [1959] S.C.R. 378.

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invention, which is the quality of mental production required to bring the thing invented into being, if one goes to the Larousse Dictionary under the French verb "inventer" we find that it means "imaginer le premier quelque chose de nouveau—créer par la force de son imagination" and in the Shorter Oxford English Dictionary, Vol. 1, p. 1039, the verb "invent" means to find out or produce by mental activity—to devise, to contrive.

I might also add that in view of the uncertainty of the *Ciba* decision with respect to the requirement or not of inventiveness and the long line of decisions handed down by the Supreme Court and this Court, confirming inventiveness as a requirement of an invention, I must hold that such an attribute is still required today. Indeed, it would seem to me that an important change in the law as this must be done unequivocally and without drawing inferences. I will therefore take it that the attribute of inventiveness is required and consider whether such an attribute exists in the patent in suit.

The attack on the patent on the ground that it is invalid because of lack of invention or of inventive ingenuity is based on the assertion 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.

Although on the matter of anticipation or novelty it was necessary to go into the prior art in great detail to find out the differences and distinctions between the prior art documents individually and the patent in suit, on the matter of inventive ingenuity or inventiveness or lack of obviousness, the test with respect to how the prior art should be examined is somewhat different. Indeed, in determining whether there is inventiveness or not, the prior art should be reviewed and its cumulative effect considered. This is what I have attempted to do in examining whether there was any inventive ingenuity involved in conceiving or constructing the patent in suit.

On this matter of inventiveness, the defendant submits, as we have seen, that the patentee here has delved into the prior art in a field which comes within the scope of his invention as defined by himself (the jar and enclosure field) to take in all its parts and transfer them to the well known elements such as a cup-shaped housing and a cup-shaped lens, adding that the patent in suit is not a new

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combination but the use of a well known sealing method, described in a number of prior art patents transferred to the sealing together of two well known parts and with the same object that it accomplished when it was sealing a jar, in the same manner and with all the advantages and disadvantages that existed in that field. Indeed, that the sealing of two parts together in a vapour-proof relationship by means of two mating grooves and an O-ring between them and flanges abutting when they are sealed together with the tapered portion to gradually compress the O-ring and to facilitate entry, had been known in the field of sealing jars or containers and, in fact, is the same thing as shown in the lamp field and particularly in the pavement light (Ex. D). The defendant finally contends that having placed the Court in the position of the skilled workman with all the prior art before it, there was no problem to be solved and that any competent workman could have produced what is covered by the patent in suit without the exercise of invention but merely by skill, discrimination and ability as it was only necessary to apply the sealing construction that is shown to be old by the prior patents to old parts of the automobile, i.e., a cup-shaped housing and a slightly cupped lens.

Now Thorson P. speaking of the statutory presumption of the validity created by s. 47 of the *Patent Act* in the case of *O'Cedar of Canada Ltd.* v. *Mallory Hardware Products Ltd.*[1] stated:

> 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 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.

It may be useful here to refer to a statement made by Lord Russell of Killowen in *Non-drip Measure Co. Ltd.* v. *Stranger's Ltd. 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

[1] [1956] Ex. C.R. 299 at 316-17. [2] [1943] 60 R.P.C. 135 at 142.

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simple idea which ought to or might have occurred to anyone, is often a 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 added at p. 143 of the same case:

> . . . 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.

And as Lord Moulton said in *British Westinghouse Electric and Manufacturing Company Ltd.* v. *Braulik*[1]:

> . . . I confess that I view with suspicion arguments to the effect that a new combination bringing with it new and important consequences in the shape of practical machines is not an invention, because, when it has once been established, it is easy to show how it might be arrived at by starting from something known and taking a series of apparently easy steps. This *ex post facto* analysis of invention is unfair to the inventors, and in my opinion, it is not countenanced by English Patent Law.

In *Hayword* v. *Hamilton*[2] Lord Justice Bramwell, at p. 117, speaking of a simple directing pavement light said:

> . . . it is not the less an invention because it required but small inventive powers to enable him to do it.

And a little lower:

> . . . nor is it open to any objection in regard to the constituent parts of it being old No doubt the prism, as the plaintiff used it, is old, it is as old as the world that a prism used as the plaintiff uses it will direct light in the way his prism does, and the other part of his invention is not new; that is to say, the particular mode in which he makes his pavement light, but the combination is a novelty. The thing was never practised before, and undoubtedly a combination of two old things may be made the subject of a patent

Now a high standard of invention has not been set by our courts and it is well settled in patent law that a scintilla of invention is sufficient to sustain a patent.

In *O'Cedar of Canada Ltd.* v. *Mallory Hardware Products Ltd.*, referred to above, Thorson P. at p. 318 stated:

> 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 it is clear that the plaintiffs' clearance light showed a marked advance over the prior art that was not an obvious workshop improvement. Indeed, Mr.

[1] (1910) 27 R P C. 209 at 230

[2] [1884-1886] Griffin's Patent Cases 115 (C A)

DeFrees's account of the various phases he went through before hitting upon his patent indicates clearly that this was far from obvious.

Even with the jar or enclosure or other prior art documents before him and even if he was thinking about lamps, I do not think that one can say that it would have been a simple matter for the skilled workman in 1951 to have transferred them into the construction of the patent in suit.

It is clear from the evidence and from the jar or enclosure documents themselves that none of the latter meet the terms of the claim and significant alterations of the parts were required to fit into the construction described by the claim.

Indeed, the idea of removing the cup-shaped lens by lifting one side first so as to have a tighter seal, rather than having to pull it straight out, or the arranging of the seal so that only the lens comes off, or of the parts so that a durable rubber O-ring in two grooves could be used, and yet permit the assembly and removal of the lens or arranging the parts so that a difference in the rates of expansion of the housing and lens does not spoil the seal, or the providing of a clearance so that the seal can be deformed gradually and without damage, yet allowing it to snap into position when assembled and allowing it to pull out of the grooves in the lens on the removal of the latter, all establish that it took a considerable amount of inventive ingenuity to conceive and effect the construction of the patent in suit.

Indeed, all these improvements are so important and show such a difference between what has gone before and what the patent shows that it necessarily must have involved a substantial exercise of the inventive process.

Now although the defendant, as we have seen, asserts that the patent in suit is not a new combination, such is not the case. Indeed, it is a combination of a particular sealing method not entirely similar to those found in the prior art, whether that be the vehicle light or the enclosure art, transferred to the sealing together of two well known parts, a slightly cupped lens and cupped housing, but in a different manner and with an entirely different purpose or object that it accomplished when sealing a jar or an

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enclosure. This, in my opinion, definitely makes it a new combination.

Now the combination of old and commonly known items is regularly held to be patentable and, in fact, virtually most patents are combinations of elements which are well known and old, the patent being for the combining of them for a new purpose and inventive ingenuity being used in combining and adjusting existing devices and thereby achieving new and valuable results. However, in the present case, we have this ingenious combining, but we have also something more, i.e., a completely different disposition of the component parts and these parts themselves are different.

There is indeed invention in the idea of using an O-ring to hold the two parts together and to provide at the same time an effective seal between them, but even the mere seating of the O-ring as in the patent in suit so that it holds the two parts together by means of a groove in the housing as well as in the lens, apart from the sealing result, is a structure different from anything before it and is not obvious. There is also invention in conceiving a simple construction providing a tight seal, which is vapour-proof, consisting of few parts capable of being taken apart and reassembled in the dark and under adverse weather conditions without being lost.

Now a number of secondary considerations have also convinced me of the existence of inventive ingenuity in the patent in suit or that it was far from obvious, such as the fact that all the prior art patents cited by the defendant are very old and that many years elapsed before someone thought of applying the well known things contained therein to the vehicle lamp field as well as the widespread acceptance of the invention in the fuel tank industry, which is the industry for which it was made, despite a higher price and the fact that it displaced previous types in that industry to a significant extent.

Under these circumstances, I would say that it is impossible not to find here the amount of inventiveness necessary to sustain the patent in suit and I might very well repeat here what Mr. Justice Tomlin said in *Samuel Parkes & Coy. Ltd.* v. *Cocker Bros., Ltd.*[1] at p. 248:

> Nobody, however, has told me and I do not suppose anybody ever will tell me, what is the precise characteristic or quality, the presence of which distinguishes invention from a workshop improvement. . . . The truth is that when once it had been found, as I find here, that the problem had waited solution for many years and that the device is in fact novel and superior to what had gone before, and has been widely used, and used in preference to alternative devices, it is, I think, practically impossible to say that there is not present that scintilla of invention necessary to support the Patent.

There is, therefore, here, in my opinion, impressive evidence of inventiveness and of a want in the fuel tanker trade that remained unfulfilled until the DeFrees patent came along and, consequently, the defendant's attack on the patent in this respect must fail.

The defendant's final attack on the validity of the patent is based on the fact that the plaintiffs' patented articles sold in Canada were not marked in accordance with s. 24 of the *Patent Act* which reads as follows:

> 24 (1) Every patentee under this Act shall, if possible, stamp or engrave on each patented article sold or offered for sale by him notice of the year of the date of the patent applying to such article, thus—Patented, 1935, or as the case may be.

The purpose of this requirement appears to be to enable one to add 17 to the year and thus obtain the year of expiry of the patent without going to any expense or trouble to find out when the patent expires.

The evidence discloses that in some cases the patented articles contained the word "patented" and the American patent number and in others, the word "patented" and the Canadian patent number, which, of course, is not in accordance with the above section which, as we have seen, requires the word "patented" and the year.

Now what are the consequences of the failure of the plaintiffs to mark their patented articles as required? Would the only consequence of a breach of s. 24 be a penalty under s. 80 of the *Patent Act*, as submitted by the plaintiffs, or would it go to the substance of the patent itself and invalidate the latter as asserted by the defendant. Section 80 of the Act reads as follows:

> 80. Any patentee under this Act or any one claiming under him who, in contravention of any requirement of section 24, sells or offers for sale

[1] 46 R.P.C. 241 at 248.

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any articles patented under this Act, is liable to a fine not exceeding one hundred dollars, and in default of the payment of such fine, to imprisonment for a term not exceeding two months.

In the case of *Overend* v. *Burrow Stewart and Milne Co.*[1] "it was held that the only consequence of a failure properly to mark the articles, as required by s. 55 of the Act is a penalty imposed by s. 64."

Counsel for the defendant, however, urges that the above decision no longer stands in view of the difference in the wording of s. 45 of the 1935 *Patent Act,* now Sec. 46 of C. 203, RSC (1952) and its predecessor, s. 21 of the 1908 Act, under which latter section the decision was rendered.

Section 46 of the *Patent Act* now reads as follows:

46. Every patent granted under this Act shall contain the title or name of the invention, with a reference to the specification, and shall, *subject to the conditions in this Act prescribed,* grant to the patentee and his legal representatives for the term therein mentioned, from the granting of the same, the exclusive right, privilege and liberty of making, constructing, using and vending to others to be used the said invention, subject to adjudication in respect thereof before any court of competent jurisdiction.

I have emphasized the above words "subject to the conditions in this Act prescribed" because the defendant argues that because of these words the grant of the patent is now one "subject to the conditions in this Act prescribed" including the marking requirements whereas those words not being present in the former s. 21, the grant of the patent in 1906 was an absolute grant.

He therefore suggests that now, because of this change in the law, one of the conditions in the present Act prescribed is the imperative direction that the patentee shall mark all articles on the basis that when the words in a statute or law constitute a change, some change in the statute or law was intended to be made or must be assumed to be made and that the marking s. 24 now stands by itself completely removed and divorced from s. 80, the penalty section, and becomes a "condition in this Act prescribed". This failure to mark, he then urges, must therefore be held under the present Act to be non-compliance with the conditions and, therefore, by the very provisions of s. 46, this would render the patent invalid.

He then suggests that as s. 80 of the Act, the penalty section, does not state that the only penalty for not mark-

[1] 19 O.L.R. 642.

ing shall be a fine or in default imprisonment, and having regard to the difference made by the existing law, the *Overend* v. *Burrow Stewart and Milne Co.* decision, referred to above, which says that the only consequence of failure to mark is the penalty, no longer applies and that in addition to being subject to imprisonment and fine, the patent is now invalid because it no longer conforms with all the conditions in this Act.

I am afraid that I cannot agree with the defendant's interpretation of the sections involved for the following reasons.

The words "subject to the conditions in this Act prescribed" of the present s. 46 are in a section which is not grouped with s. 24 and in no way relates to it.

Furthermore, as urged by counsel for the plaintiffs, the history of this legislation confirms the view that the conditions mentioned in s. 46 do not comprise the marking provision which is dealt with in ss. 24 and 80 of the Act.

In c. 69 of the 1908 Revised Statutes of Canada, s. 21, which was the predecessor of s. 46 of the present statute, did not have this provision "subject to the conditions in this Act prescribed" but ss. 38 to 45 of the 1908 statutes which were grouped under the heading "Conditions and Extensions" had *inter alia* the following:

> Every patent shall . . . be subject to the following conditions.

Now these conditions referred to what is termed the abuse provisions, such as for instance, a patentee rendering his patent bad if he failed to manufacture in Canada after the patent had been in effect for two years.

By c. 23 of the Statutes of Canada, 1923, a new Patent Act was created and s. 23 of this Act was the successor of the former s. 21. It was at this time that there was inserted into that section the words "subject to the conditions hereinafter mentioned" which, in fact, included the section on marking which appeared in this Act in s. 51. There was also in this Act a group of sections, 40 to 41, which dealt with conditions, and s. 40 provided *inter alia* that:

> Every patent . . . shall be subject to the following conditions.

In 1935, another Patent Act was enacted and it gave us the wording of today s. 21 being the marking section, s. 45 the granting section and s. 78 the penalty section.

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Now in the present abuse provisions, ss. 66 to 73, apart from the heading which contains the word "conditions" it is no longer stated that the patent will be subject to the following conditions.

We therefore have a situation where, although originally in 1908 no mention was made of the "subject to conditions" in the grant section (s. 21) it is now contained in the present Act in s. 46, the progeny of s. 21 and although the "subject to conditions" was originally in the conditions section of the 1908 Act, it no longer is in the conditions section of the present Act although this section still carries the heading conditions.

Does such a change involve, as suggested by the defendant an amendment to the Act which would now include the marking requirements as a condition to the validity of the Patent. I do not believe that it is possible to conclude that Parliament by merely transferring the "subject to conditions" from one section to another and by changing "subject to the conditions hereinafter mentioned" to "subject to the conditions in this Act prescribed" effected a change in the Act rendering non-compliance with the marking requirements a condition of invalidity in addition to the penalty already provided under s. 80 of the Act. Indeed, had it intended to do so, it could and would have surely, for such an important change, expressed itself more clearly, which, of course, it did not do.

Furthermore, in a matter such as this where the consequence of non-compliance with a statutory requirement is not clearly set out, the intention of Parliament in this regard may be found by inference. An examination of the conditions section, and other pertinent sections of the *Patent Act,* indicates in my opinion that non-compliance with the marking section of the Act would in no way defeat the whole aim and purpose of Parliament. Its purpose is merely, as we have seen, informatory and such a requirement is not always called for but only when possible. This, in my opinion, clearly establishes that the marking prescriptions are not essential to the Act and their omission cannot, therefore, be held fatal to the validity of the patent. Indeed, I believe that such prescriptions are merely directory and their omission might involve, in this case at least, at the most a liability to a penalty as provided by s. 80 of the Act.

In view of this I must also find that defendant's attack on the patent in suit on the basis of the deficiency in markings must also fail.

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There will therefore be judgment for the plaintiffs for the relief sought by them except as to damages. If the parties are unable to agree on the amount of the damages or the amount of profits, if the plaintiffs elect the latter, there will be a reference to the Registrar or a Deputy Registrar and judgment for such amount of damages or profits as found in the reference. If there are any difficulties in settling the minutes of judgment the matter may be spoken to. The plaintiffs are entitled to their costs to be taxed in the usual manner.

Judgment accordingly.

1963 — Oct. 3 — Oct. 16

Between:

OTHELIA TUKE .... Appellant;

AND

THE MINISTER OF NATIONAL REVENUE .... Respondent.

Revenue—Income—Income Tax—Theft of taxpayer's money and jewellery—Whether deductible from taxable income—Business loss—Expenditure for preservation of capital asset—Income Tax Act, R.S.C. 1952, c. 148, s. 12 (1)(a), (b) and (h).

Appellant taught school in Brampton, Ontario and owned and operated a boarding house in Toronto, which was supervised by one of her tenants in her absence. She maintained two bank accounts, the one in Toronto being used exclusively in connection with the operation of the boarding house. This property was encumbered with three mortgages and when she defaulted in payment of the third mortgage, the holder thereof commenced foreclosure proceedings. In an attempt to raise the funds to pay the arrears owing on the mortgage, appellant borrowed $1,000 from the supervisor of her boarding house and gave him jewellery and heirlooms valued by him at $250 as partial security. He gave her the $1,000 in the form of a certified cheque. The appellant also withdrew $500 from her Toronto bank account. She then gave the certified cheque and the $500 in cash to the supervisor with instructions to negotiate a settlement with the third mortgagee. He was unsuccessful in this and placed the cash, certified cheque and the jewellery in a box which he locked and placed in the appellant's rooms in the boarding house, the door to which he also locked.

Shortly thereafter sheriff's officers removed all appellant's goods from the boarding house, including those used by the tenants and piled them

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on the street. The supervisor found the abovementioned box when he arrived on the scene but it had been rifled and the $500 cash and the jewellery were missing. Appellant forthwith settled the claim of the 3rd mortgagee by payment of $1,850. Subsequently, in completing her income tax returns, appellant claimed as deductions as outlays and expenses laid out to earn her reported rental income, the value of the stolen jewellery and cash, the amount by which the money required to be paid to the third mortgagee exceeded the amount by which the mortgage was in default and the cost of moving her belongings back into the boarding house.

Held: That the sum of $500 which was stolen was income already earned from the operation of the boarding house and that the theft thereof had nothing whatever to do with the income earning activities of the appellant, nor was it a loss in the normal course of the business conducted by her.

2. The same considerations apply to the theft of the jewellery. In addition, the jewellery was her personal property pledged to obtain funds, the expenditure of which was a capital outlay.
3. The payment made to restore the third mortgage to good standing was an expenditure of a capital nature for the preservation of a capital asset.
4. Appeal dismissed.

APPEAL under the *Income Tax Act.*

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

Othelia Tuke on her own behalf.

T. Z. Boles and *E. E. Campbell* for respondent.

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

CATTANACH J. now (October 16, 1963) delivered the following judgment:

This is an appeal against the appellant's income tax assessment for the taxation year ending December 31, 1960.

The appellant was employed during part of the taxation year as a teacher at Brampton, Ontario and also derived income from a property known as 591 Dovercourt Road, in the City of Toronto, Ontario by letting furnished portions of the premises, while retaining a part for her own occupancy.

Her employment at Brampton necessitated prolonged absences from the house in Toronto and accordingly she appointed one of her tenants and a fellow countryman of

Czechoslovakian origin to act as a supervisor of the premises.

The house had been bought by the appellant for $18,500. The property was subject to four mortgages, the principal due thereon in the 1960 taxation year being the respective amounts of $7,500, $4,500, $1,450 and $1,000 with interest at the respective rates of 6 percent, 6½ percent, 6 percent and 10 percent.

The appellant had difficulty in making the payments. During the taxation year the holder of the third mortgage began proceedings for foreclosure and recovery of the outstanding principal of $1,450. Previously, the holder of the third mortgage had obtained a judgment for debt in the First Division Court of the County of York in the amount of $412.59 inclusive of costs and obtained a Writ of Execution dated August 19, 1959.

The action for foreclosure and recovery on the covenant was tried and judgment given against the appellant herein, a reference being made to the Local Master to compute and determine the amount owing.

The appellant arranged to borrow $1,000 from the supervisor of her house giving him, as partial security for the loan, personal jewellery and heirlooms which were valued by him at $250. The supervisor then gave the appellant a certified cheque for the amount of $1,000 payable to her.

The appellant had two bank accounts, one in Brampton in which she deposited her earnings as a teacher and another in the City of Toronto which she used exclusively in connection with the operation of the house. In this Toronto bank account she deposited all receipts for rent and from this account she drew cheques for the payment of obligations incurred in operating the premises. Accordingly the appellant withdrew $500 from this bank account which, together with the loan she had obtained from the supervisor (a total of $1500), she placed in the hands of the supervisor with instructions to negotiate a settlement of the judgments against her with the solicitor for the holder of the third mortgage on the appellant's property.

The supervisor approached the solicitor for this purpose and testified that he was informed since the determination of the precise amount owing had been referred to the Local Master, the matter should be left in abeyance pending the

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Master's determination. In any event the solicitor did not accept a lesser amount and was insistent upon payment of the full amount of the judgments.

The supervisor accordingly returned to 591 Dovercourt Road and placed the $500 in cash, the certified cheque for $1,000 and the jewellery in a box which he locked and placed the box in the rooms occupied by the appellant, the door to which he also locked securely. The appellant was absent during this time being engaged in her duties at Brampton.

What happened next was not clearly described in evidence but I can only conclude that satisfactory arrangements were not made to pay the judgments because shortly thereafter the sheriff's officers removed all of the appellant's household goods from the premises, including those used by the tenants, and piled them in the street.

The supervisor, on arriving at the scene, began an immediate search for the box which he found rifled of the $500 cash and jewellery. The certified cheque was not taken.

The appellant, on being notified by the supervisor of her eviction from the premises, forthwith settled the claim on the Writ of Foreclosure and the Writ of Execution on the Division Court judgment by paying an amount of $1850.

In completing her income tax return for the taxation year ending December 31, 1960, the appellant claimed as a deduction, outlays and expenses laid out to earn her reported rental income, in the total amount of $1190 made up of the following items:

1. Stolen business money prepared for payment of the mortgage	$500
2. Jewellery and valuables stolen	250
3. The difference between the principal amount of the third mortgage ($1,450) and the amount of $1,850 the appellant was obliged to pay in settlement of the judgements against her	400
4. The cost of moving her furnishings into the premises following her eviction	40

These four items were set forth by the appellant in her return under the heading of "Loss Incurred by Eviction of the House."

By notice of re-assessment mailed January 31, 1962 the Minister disallowed the "loss of eviction" as an unallowable deduction. The appellant filed a Notice of Objection dated March 1, 1962. By notification dated July 27, 1962 the Minister confirmed the assessment on the ground that the "loss incurred by eviction of the house" claimed as a deduction from income by the appellant was a capital loss within the meaning of s. 12(1)(b) of the *Income Tax Act*, 1952, Revised Statutes of Canada, c. 148.

It is from this assessment that an appeal is brought to this Court.

The appellant, who appeared on her own behalf without benefit of counsel, strenuously insisted that the deduction claimed was a proper one as being outlays or expenses made or incurred by her for the purpose of gaining or providing income from the business conducted by her. In support of this contention the appellant emphasized that the $500 in cash which was lost by theft came from the funds deposited in her Toronto bank account, the source of which was receipts for rents from the house and that all expenditures required in connection with the operation of that business were made from this same bank account. The stolen jewellery, valued at $250, had been pledged to raise part of the money with which she had hoped to compromise the judgments against her. The difference of $400 between the principal amount of the third mortgage and the amount the appellant was eventually obliged to pay to satisfy the judgments against her, she maintained was a management cost.

However much one may sympathize with the appellant in her loss by theft and other difficulties, I cannot agree with her contentions.

In my view none of the losses and expenditures claimed by the appellant as a deduction under s. 12(1)(*a*) satisfy the test expressed by Lord Davey in *Strong & Co. Ltd. v. Woodifield*[1], as follows:

> 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 profit of the trade. It must be made for the purpose of earning the profits.

The cash in the amount of $500 which was the subject of theft was income already earned. The action of the

[1] [1906] A.C. 448 at 453.

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unknown thief had nothing whatsoever to do with the income earning activities of the appellant and the loss so sustained by the appellant was not a loss in the normal course of the business conducted by her.

The foregoing comments are equally applicable to the loss sustained by the appellant in the theft of her jewellery and in addition such wares were her personal possessions pledged to obtain funds, the expenditure of which I consider to have been a capital outlay.

Neither was the amount of $400 paid in satisfaction of the judgments against her and claimed by the appellant as a deduction, an expenditure made for the purpose of earning profits, but rather such was an expense of a capital nature for the preservation of a capital asset since the appellant would otherwise have been dispossessed of the house without which she could not carry on her trade.

The sum of $40 paid by the appellant to move the furnishings back into the premises was not a deductible expense. The cost of moving that portion of the furnishings which were used by the appellant personally is clearly precluded as a deduction by s. 12(1)(*h*) of the Act, being personal or living expenses. The remaining furnishings which were supplied for use of tenants were assets essential to the conduct of the appellant's business of renting furnished premises and as such that portion of the cost of $40 to move these furnishings back was an outlay on account of capital within the provisions of s. 12(1)(*b*) of the Act, to enable her to continue that business.

For the reasons outlined, I have no hesitation in finding that the Minister was right in assessing the appellant as he did and the appeal must be dismissed. The Minister is also entitled to costs to be taxed in the usual way.

Judgment accordingly.

BETWEEN:

1962
Oct. 1, 2, 3, 5, 9
1963
Nov. 15

JAMB SETS LIMITED ....PLAINTIFF;

AND

WILLIAM H. CARLTON ....DEFENDANT.

Patents—The Patent Act, R S C. 1952, c. 203, as amended, ss. 36(2), 48, and 62(2)—Validity—Infringement—Anticipation—Obviousness—Declaration of non-infringement—Admission in pleading and effect of subsequent amendment thereof—Precision of directions in patent—Workshop improvement—Doctrine of "Pith and Marrow"—Onus of proving invalidity—Statutory presumption of validity.

The plaintiff brought this action for a declaration that the prefabricated frames for doors, windows and the like manufactured by it did not infringe the defendant's Leters Patent No. 604,140, the defence being that such manufacture constituted infringement of the said patent and by way of counterclaim the defendant asked for a declaration that the said patent was valid and infringed. The plaintiff in its defence to the counterclaim denied infringement and stated that it did not dispute the validity of the claims in the defendant's patent. Later, before trial, the plaintiff, by leave, amended its statement of defence to the counterclaim to include an allegation that the said patent was invalid for obviousness and lack of invention.

Held: That the amendment of the defence to the counterclaim put the validity of the defendant's patent in issue and evidence was properly admissible with respect thereto, notwithstanding that the original defence to the counterclaim contained an admission of the validity of the said patent.

2. That since the products manufactured by the plaintiff did not incorporate essential elements of the defendant's patent as claimed in claims No. 4, 5, 6, 7, 8 and 9, these claims were not infringed.

3. That since the door frames as described in the defendant's patent were made in accordance with the directions contained therein, it follows that the directions were sufficiently precise and were not ambiguous and obscure.

4. That the evidence of the commercial success of the invention rebutted the allegation that it was not workable or useful.

5. That the new method of joining the top jamb to the side jambs of the frames to prevent cupping of the top jamb, as suggested by an employee of the exclusive licencee of the defendant and adopted by the licencee was well known in the industry and was no more than a workshop improvement, since the method of joining described in the patent worked effectively.

6. That the onus of showing invalidity rests on the party attacking the patent, and more particularly so by reason of the statutory presumption of validity.

7. That if a prior publication would give a person skilled in the art in the light of the common knowledge prior to the invention the same information for practical purposes as the patent under attack, then it is in anticipation of the invention covered by it.

8. That documents put forward as anticipations must be read singly and independently and must not be made into a mosaic by taking bits out of various documents and putting them together.
9. That in order to constitute anticipation, every element specified in the claims of the patent attacked must be present in the prior art device.
10. That the mere simplicity of a device is not proof that it was obvious and that inventive ingenuity was not required to produce it.
11. That the defendant took a number of well known elements, fastened them together by well known means and produced a result that was new and inventive and which fulfilled a commercial need which had not been previously supplied.
12. That the testimony of the inventor himself as to what his invention was would be inadmissible to contradict the clear and unambiguous wording of the patent claims.
13. That the defendant having deliberately chosen to make the toeing-in of the casing numbers an essential feature of claims 1, 2 and 3, it was open to the plaintiff to fashion its door frames in any manner it chose provided the way it chose did not include this feature.
14. That the plaintiff is entitled to a declaration that its doors do not infringe the defendant's patent and the defendant is entitled to a declaration that, as between the parties, the said patent is valid.

ACTION for a declaration that plaintiff does not infringe defendant's letters patent.

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

R. H. Saffrey for plaintiff.

D. F. Sim, Q.C. for defendant.

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

CATTANACH J. now (November 15, 1963) delivered the following judgment:

This is an action under section 62, subsection (2) of the *Patent Act,* R.S.C. 1952, c. 203 as amended, for a declaration that prefabricated frames for doors manufactured by the plaintiff do not constitute an infringement of the exclusive property or privilege granted to the defendant under Letters Patent, No. 604,140 dated August 30, 1960.

The plaintiff is a corporation in the business of manufacturing prefabricated frames for doors, windows and the like and having its principal place of business at 131A Oakdale Road, Downsview, in Ontario.

By way of defence to the action, the defendant alleges the said Letters Patent have been infringed by the plaintiff and by counter-claim requests a declaration that Letters Patent, No. 604,140 are valid and have been infringed.

The plaintiff by a statement of defence to the counter-claim denies infringement and repeats the allegations in its Statement of Claim and states that it does not dispute the validity of the claims of the defendant's patent.

By leave the plaintiff filed an amended Statement of Defence to the counter-claim alleging that Letters Patent, No. 604,140 are invalid by reason of the claims being obvious and disclosing no invention having regard to the prior art.

The defendant in reply to the amended defence to the counter-claim denies that the said Letters Patent are invalid and states that the previous admission by the plaintiff that such Letters Patent were valid, constitutes a binding admission and accordingly the plaintiff is not entitled to dispute the validity of the said Letters Patent. I am unable to agree with this contention. While it is the fact that the plaintiff in its Statement of Defence to the defendant's counter-claim, did admit the validity of the defendant's patent, nevertheless, the plaintiff obtained leave to amend its pleadings and in its amended pleadings specifically raised the issue of validity. In my opinion the question of validity of the Letters Patent is in issue and evidence was properly admissible with respect thereto.

The patent was granted on August 30, 1960 for an invention entitled "Prefabricated Frame for Doors, Windows and the Like" to William H. Carlton, the defendant herein, as inventor pursuant to an application therefor dated July 25, 1959 and comprises nine claims.

The basic objects of the invention according to the specifications are to provide prefabricated frames for doors in parts which may be readily and quickly assembled on the construction site thereby overcoming inherent disadvantages of the conventional and known methods of the fabrication of frames and doors.

Evidence was given by the defendant, the inventor, on his own behalf outlining the inherent difficulties in the conventional and known methods of fabricating frames for doors, windows and the like on the construction site and he described how the patented device which he evolved overcame these difficulties.

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The defendant had been engaged in the building industry continuously from 1934 to 1962 in a number of capacities such as designer and sales representative, for a wide variety of building products and specifically those building products relating to doors and fittings.

By means of a model simulating the rough wall opening for a door he demonstrated the method used by carpenters to frame such an opening and the difficulties encountered, which method for the purposes of convenience I shall refer to as the "conventional" method. The first step is to affix the jamb member, normally a piece of lumber 1 inch in thickness, 5 inches in width and 6 feet, 8 inches in length, to the internal side of the door opening. An identical jamb is also required to be affixed to the opposite side of the opening. Because of the rough nature of the carpentry work in the opening, it is not true and plumb, which necessitates the use of shingle shims to ensure that the jamb will be inserted in a perfectly erect position which in turn requires nailing and several adjustments to ensure a truly perpendicular result. When both perpendicular jambs have been adjusted and fitted to the two sides of the door opening, the top section is inserted at the correct height and joined to the side members in one of a number of acceptable ways. After the three jamb members are fixed in place the opening is then dressed by the application of decorative trim lumber, which are called casings. This application also requires measuring and cutting to ensure a correct fit. Next the door is hung. Recesses are required to be cut into the jamb and door edge so the hinge will be flush therewith. The weight of the door determines the number of hinges which will be required, normally two, but sometimes three. There is also required to be cut in the opposite jamb a recess to receive a latch and bolt emanating from the door itself and over which a striker plate is installed. The door-knob hardware must also be installed in the door. It frequently happens that the door itself must be trimmed to fit. Then a door stop is affixed to the jamb members to act as a bumper.

The lumber, which comprises the three jambs, six casing members and door stop is obtained from a lumber mill and may be delivered to the construction site in a variety of degrees of dressing.

The disadvantages of the conventional method of framing a door opening are obvious. Highly skilled carpenters are required to do the work. The installation is time consuming. There may be differences in the trim supplied by the lumber yard and distortion may occur at a subsequent time by reason of the shingle shims being dislodged or broken.

The defendant sought to overcome these disadvantages by precutting and fitting the frames and incorporating locks, hinges, striker plates and like hardware at a factory under ideal working conditions.

The defendant did not deny or suggest that prefabricated frames were not available to the construction industry, but he did contend that those available were unsuitable for their intended purpose, due to complete and final assembly of the units at the factory, thereby resulting in cumbersome and unwieldy structures which were fragile and susceptible to damage in shipping. If the prefabricated units were slightly oversized or undersized, which was frequently the case, extensive modifications were then required on the construction site because of the rough carpentry of the door opening.

The defendant then described and demonstrated the construction and installation of a prefabricated door frame known as the split jamb. A split jamb is, in reality, a completely assembled door frame which is divided in half or "split" through the centre of the side jamb members and the top jamb member.

The split jamb is constructed of the same material which composes the frame installed by the conventional method previously described and is normally shipped from the factory to the construction site as a pre-hung door unit. At the site the two halves of the split jamb are separated (having been fastened together for shipping) and one half is installed on the door opening and it is made plumb or level at the sides by the use of shingle shims, the top jamb is put in place and squared and the one half of the split jamb is fastened in place by nailing both through the jamb and casing. When the first half is firmly in place, the other half of the frame is fitted from the opposite side of the opening to the half first installed and is fastened in place by nailing. The split or division through the centre of the frame is then covered by the lumber described as the door stop so that the divided unit has become a whole.

The defendant described the split jamb method of framing a door opening as an advance on the conventional

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method previously described by him, but subject to certain disadvantages the principal of which he considered to be that the structure was not basically strong enough, a weakness being caused by the split, there is time consumed in installing, it is shipped as a completely assembled structure and its bulk increases shipping costs and renders it more susceptible to damage in transit and the tendency to become distorted is greater than in the conventional method of framing because there are twice as many parts to become warped.

To contend with these disadvantages the defendant designed frames to be partially assembled at the factory to allow for quick and ready assembly at the construction site. The knocked down feature of the frames provided for shipment as a compact package. Features were added to the sections of the frame to allow for flexibility considered by him to be necessary for installation and to allow for variations in the wall dimensions of the rough door opening. The interlocking and self-supporting features of the component parts of the frame were designed by him to allow for ease in the accurate squaring and adjusting of the assembly prior to permanent fastening in place. Figures 2 and 3 of the drawings attached to Letters Patent, No. 604,140, show the interlocking nature of the top and side assemblies.

The frame designed by the defendant consists of three basic parts, two vertical side members and a horizontal top member. These three component parts are in turn composed of three parts, the jamb portion (being that portion which frames the internal door opening) to which two casing members (being the trim on the wall surface) are affixed along a precut rabbet joint by an adhesive or nails, screws or staples or a combination of both. Longitudinal slots are cut into the jamb members to provide flexibility to the integrated unit for ease in installation.

To effect a tight fit with the wall, the casing members are "toed in" at an angle of between 1 to 5 degrees.

To further facilitate installation the inside leading edges of the side and top casings bearing on the wall are rounded.

These two features of the casing members, that is, the toeing-in and the rounded edges, are considered by the defendant to afford a hugging and self-guiding action respectively, thereby permitting quick installation of the frames on the wall and provide self-support while the frames are being squared and adjusted, a difficulty in the conventional and known methods of installation above described and which was sought to be overcome.

In addition to the conventional method of framing doors and the split jamb there has been in existence a prefabricated wooden frame used by the manufacturers of factory built cottages, garages and like structures, which is made from a solid piece of lumber of the appropriate size required from which a slot the required size is cut out by machine so as to form a "U". The frame is comprised of two side members and one top member which are fitted over the edges of the door opening.

There have also been on the market prefabricated metal door frames falling into two general categories, the first of which is those used in commercial and apartment buildings and second is those used in domestic buildings. In commercial buildings and apartments, where fireproofing is of paramount importance, these metal frames are usually completely prefabricated and the wall is built into the frame after the frame has been put in place. However, a further type of metal door frame was developed which could be installed after the partitions were built. This particular type of metal door framing has been used primarily in private homes and smaller apartment buildings for which reason they have been characterized as being installed in domestic buildings. Contrary to the metal door frames installed in commercial buildings which become part of the wall, the domestic type of metal door frame is not welded together, but is comprised of three separate parts, the two side members and a top member. Each such member is formed from a single piece of cold rolled prime grade steel about .031 inches in thickness which has been shaped in such a way as to perform the desired purpose, that is to form a metal channel. The metal frame is made slightly smaller than the width of the wall. The metal frame is spread to fit over the wall so that it is held in place by tension. This frame is kept true and in place by the use of toggle bolts, compression lugs or similar devices. The jambs are punched and recessed to receive the normal door hardware. When the frame has been installed over the door opening and adjusted to be true and perpendicular by means of the toggle bolts, lugs or similar device depending on the manufacturer, the

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metal door frame is then fixed in place by nailing to the wall through strap anchors normally placed at the bottom of both side members.

The principal disadvantage of the metal door frame is that the metal is capable of receiving only one type of decorative finishing which is paint. Again metal is a more difficult material to handle than is wood. Because of the limitation of the decorative finish which may be applied to metal door jambs they have not been widely accepted by the public or builders for use in domestic buildings. The method of fixing to the wall opening is also limited by the number of strap anchors which are attached, whereas a wooden door frame may be nailed at any place.

The embodiments of the invention in which an exclusive property is claimed by the defendant are set out in nine claims reading as follows:

1. A prefabricated frame comprising vertical side members and a horizontal top member for use in buildings, each member comprising an elongated jamb member, rabbets formed in the longitudinal edges of said jamb member, a pair of casing members, an edge of each of said casing members being adapted to mate with a rabbet in a longitudinal edge of said jamb member, said casing members being inwardly inclined from a plane perpendicular to the plane of the wide axis of the jamb member, and means for securing said casing and jamb members together along the opposing, rabbeted, marginal edges thereof, said members designed for flexing to embrace the edges of an opening in a wall structure.

2. A prefabricated frame as described in claim 1 in which the casing members are inwardly inclined from a plane perpendicular to the plane of the wide axis of the elongated jamb member not less than about 1° and not more than about 5°.

3. A prefabricated frame as described in claim 1, in which the casing members are inwardly inclined about 1° from a plane perpendicular to the plane of the wide axis of the elongated jamb member.

4. A prefabricated frame as described in claim 1, claim 2 or claim 3 in which a plurality of longitudinal slots are formed in the said elongated jamb member and a longitudinal slot is formed in each of the casing members.

5. A prefabricated frame comprising vertical side members and a horizontal top member for use in buildings, each member comprising an elongated jamb member, rabbets formed in the longitudinal edges of said jamb member, a pair of casing members, an edge of each of said casing members being adapted to mate with a rabbet in a longitudinal edge of said jamb member, an edge of each of said casing members being rounded, said casing members being inwardly inclined from a plane perpendicular to the plane of the wide axis of the jamb member, and means for securing said casing members and jamb member together along the opposing, rabbeted, marginal edges thereof, said members designed for flexing to embrace the edges of an opening in a wall structure.

6. A prefabricated frame as described in claim 5 in which the casing members are inwardly inclined from a plane perpendicular to the plane of the wide axis of the elongated jamb member not less than about 1° and not more than about 5°.

7. A prefabricated frame as described in claim 5 in which the casing members are inwardly inclined about 1° from a plane perepndicular to the plane of the wide axis of the elongated jamb member.

8. A prefabriacted frame as described in claim 5, claim 6, or claim 7 in which a plurality of longitudinal slots are formed in the elongated jamb member and a longitudinal slot is formed in each of the casing members.

9. A prefabricated frame comprising vertical side members and horizontal top and bottom members, for use in buildings, each member comprising an elongated jamb member, rabbets formed in the longitudinal edges of said jamb member, a pair of casing members, an edge of each of said casing members being adapted to mate with a rabbet in a longitudinl edge of said jamb member, an edge of each of said casing members being rounded, said casing members being inwardly inclined from a plane perpendicular to the plane of the wide axis of the jamb member, and means for securing said casing members and jamb member together along the opposing, rabbeted, marginal edges thereof, said members designed for flexing to embrace the edges of an opening in a wall structure.

Claim 4 differs from claims 1, 2 and 3 in that it contains an additional element being a plurality of longitudinal slots cut into the jamb members. Since claim 4 differs from claims 1, 2 and 3 by the addition of this element, it follows that this is an essential element.

The evidence was conclusive that the plaintiff did not incorporate longitudinal slots in the jamb members manufactured by it from which it follows that claim 4 was not infringed.

Claims 5, 6 and 7 incorporate the additional element of the leading edges of each of the casing members being rounded. I find as a fact, on the evidence, that the edges of the casings included in the door frames manufactured by the plaintiff were not so rounded from which it follows that claims 5, 6 and 7 were not infringed.

Claim 8 embodies both the features of longitudinal slots in the jamb members and the rounding of the edges of the casing members and accordingly claim 8 has not been infringed by the plaintiff for the combination of the reasons that claims 4, 5, 6, and 7 were not infringed.

Claim 9 includes, in addition, a reference to bottom members for the purpose of covering four sided frames such as those for windows, milk boxes and like openings. The plaintiff did not manufacture frames of this kind and accordingly claim 9 was not infringed by it.

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Therefore only claims 1, 2 and 3 remain in issue.

The plaintiff's defence to the counter-claim consists of attacks on the validity of the claims and a denial of the charge of infringement.

The attacks on the validity of the claims were outlined in the amended Statement of Defence to the counter-claim and in the particulars thereto as follows,

(1) that the subject matter of the claims was obvious and discloses no invention having regard to the common knowledge of the art, existing patents and publications;

(2) that the invention was not new having been known and used by others prior to the date of the invention;

(3) that the claims fail to state in distinct and explicit terms the things or combinations which the defendant regards as new and in which he claims exclusive property or privilege;

(4) that the invention is neither operable or useful in that the joint between the head joints and the side joints is unworkable as is the "toed in" feature of the casings;

(5) that the Letters Patent claim more than was invented;

(6) that the claims are a mere aggregation or juxtaposition of well known components of similar articles used in the art prior to the date of the invention;

(7) that the defendant, William H. Carlton was not the inventor, but that William Jarvis, an officer and shareholder the plaintiff was;

(8) and that the claims in the Letters Patent are ambiguous and avoidably obscure in their use of the term "wide axis" of the jamb member.

At the trial, however, counsel for the plaintiff placed particular emphasis on the first two enumerated attacks on the validity of the claims, namely, the obviousness thereof and anticipation.

The attack on the validity of the claims that the invention defined in them is wider than the invention described in the specification and that the claims are, therefore, invalid and the attack that the claims are ambiguous and obscure were not strenuously argued by counsel for the plaintiff. In my opinion these two attacks cannot be substantiated. On construing the Letters Patent of invention herein and bearing in mind that the addressee is a person ordinary skilled in the art, I conclude that there were clear and unmistakable directions from which such a skilled workman could fashion the device. I am confirmed in this conclusion by the fact that the door frames as described in the Letters Patent were so made from which it follows that the directions contained in the Letters Patent were sufficiently precise.

It is also alleged that the claims are a mere aggregation or juxtaposition of well known components of similar articles used in the art prior to the date of the invention and that the claims fail to state the things or combinations which the defendant regards as new. There was abundant evidence that all the component parts of the door frames devised by the defendant were stock lumber obtainable at any lumber mill but the invention defined in the claims is a combination. Consequently, the fact that the elements in it are old and well known does not invalidate the claims for it is the combination, and not its elements that is claimed. The stock materials were fastened together by means which were well known, but as stated above, it is not the old elements nor the accepted and well known methods of fastening those stock materials together that is claimed, but rather the resultant combination. Further, it is my view that the specification and claims were drafted in compliance with the requirements of section 36(2) of the *Patent Act*.

It was also disputed that the invention was workable or useful. This contention has been convincingly rebutted by the evidence of the commercial success of the invention of which there is no doubt. In the space of two years some 60,000 units were produced by a licensee of the defendant in an industry which was acknowledged by all witnesses to be an ultra conservative one.

However, the commercial success of the defendant's device was not immediate. At the outset a company known as Ellesmere Door Products Limited was incorporated for the specific purpose of marketing the door frames designed by the defendant. The door frames were manufactured for Ellesmere Door Products Limited by Ontario Lumber Company Limited. There were problems encountered relating to manufacturing but not to any basic defect of the door unit as claimed in the patent. Ellesmere Door Products Limited failed and went into liquidation. The defendant then granted an exclusive licence to manufacture and market the door frame designed by him to a company known as Prividor Limited on a royalty basis.

Mr. Jarvis was employed by Prividor Limited to supervise plant procedure and manufacturing techniques. Mr. Jarvis was of the opinion that the joint described by the defendant in the patent obtained was not sufficient to hold the side jambs and the top jamb in exact register. It was

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suggested by him that the top jamb, instead of resting on top of the side jambs, should be inserted into a slot cut into the side jambs. This method of joining was standard and well known in the industry and had the advantage of restraining a tendency of the jamb of the top member from cupping. This suggestion was adopted and incorporated in the units manufactured by Prividor Limited.

It is this variation of the defendant's invention as claimed in the patent which inspired the attacks on the validity of the patent on the grounds that the joint between the head jamb and the side jambs as described in the defendant's claim was unworkable and that the defendant was not the inventor but that William Jarvis was in fact the inventor.

In my view neither of such objections to the validity of the patent can prevail. The join described by the defendant in his claims did work effectively and accomplished the purpose it was designed to achieve, although the alternative method of joining suggested by Mr. Jarvis and implemented by Prividor Limited was an improvement. What was done was to substitute one well known and accepted method of joining for another. Therefore, such substitution amounted to nothing more than a workshop improvement.

At this point I should mention that Mr. Jarvis and Mr. Taub, who had been employed as a salesman by Prividor Limited, left the employ of Prividor Limited and were instrumental in incorporating Jamb Sets Limited, the plaintiff herein, of which company they became officers and shareholders.

There, therefore, remains to be considered those attacks on the validity of the Letters Patent of invention more emphatically argued and relied on by counsel for the plaintiff, namely, anticipation or lack of novelty and obviousness or lack of invention.

Before considering the immediately foregoing attacks by the plaintiff on the validity of the patent in suit, the onus in this regard should be borne in mind. The onus of showing invalidity of a Canadian patent rests on the party attacking it, in the present instance the plaintiff, and more particularly so by reason of the statutory presumption of validity of a Canadian patent under section 48 of the *Patent Act*, 1952, R.S.C., c. 203 reading as follows:

> Every patent granted under this Act shall be issued under the signature of the Commissioner and the seal of the Patent Office; the patent shall

bear on its face the date on which it is granted and issued and it shall thereafter be *prima facie* valid and avail the grantee and his legal representatives for the term mentioned therein, which term shall be as provided in and by section 49.

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The first reference to such statutory presumption was in *The King v. Uhlemann Optical Company*[1], where the President of this Court said at page 161:

There is a presumption of validity in favour 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.

Later in *Unipak Cartons Ltd. v. Crown Zellerbach Canada Limited*[2], the President stated at page 39,

. . . I add only the comment that the statutory presumption is not confined to the attribute of inventiveness but extends to all other attributes that an invention must have if it is to be patentable under the Act, such as novelty and utility. The three attributes of patentability, namely, novelty, utility and inventiveness are all presumed to be present in an invention for which a patent has been granted under the Act until the contrary is clearly shown.

Still later in commenting on the above quoted statement from *Unipak Cartons Ltd. v. Crown Zellerbach Canada Limited*, (*supra*) the President had this further to say in *McPhar Engineering Company of Canada Ltd. v. Sharpe Instruments Limited*[3], at page 28,

On further consideration I am of the opinion that this statement is not as wide as the terms of the Act warrant. It must follow from the provision of the Act that a patent granted under it "shall thereafter be *prima facie* valid" and avail its grantee and his legal representatives for the term of the patent, that the onus of showing that it is invalid lies on the person attacking it, no matter what the ground of attack may be, and that until it has been shown to be invalid the statutory presumption of its validity remains.

This does not mean that the patent is immune from attack or that the patentee is free from the obligations that are incumbent on him by way of consideration for the grant of the patent monopoly to him, but it seems clear that, since Parliament has deliberately endowed a patent granted under the Act with a presumption of validity, the onus of showing that such a patent is invalid is not an easy one to discharge. That being so, the English decisions indicating that a patentee must prove the existence of the essential attributes of the patentability of the invention covered by his patent before he can succeed in an action for damages for infringement of his rights under his patent are no longer applicable in Canada. He need not prove the existence of these attributes, for he starts with a statutory presumption of their existence in his favour and the onus of showing their non-existence lies on the alleged infringer of the patent. The enactment of

[1] [1950] Ex. C.R. 142. [2] (1960) 33 C.P.C. 1.
[3] 21 Fox P.C. 1.

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the statutory presumption of validity effected an important change in Canadian patent law and marked a substantial advance in the protection of a patentee's rights.

The defence that claims in suit should be held to have been anticipated by reason of prior publications and patents and the common knowledge of the art before the date of the defendant's patent was advanced on behalf of the plaintiff.

The requirements that must be met to justify the defence of anticipation were summarized by the President in *The King v. Uhlemann Optical Company* (*supra*) at page 157 in the following language:

> . . . 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 being 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. . . .

In *Pope Appliance Corporation v. Spanish River Pulp and Paper Mills Ltd.*[1], Viscount Dunedin put the test in these words:

> 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"?

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 follows, therefore, if a prior publication would give a person skilled in the art in the light of the common knowledge prior to an alleged invention, the same information for practical purposes as the patent under attack, then it is in anticipation of the invention covered by it. It should also be kept in mind that in considering a defence of anticipation it has been said in *Von Heyden v. Neustadt*[2], that you can-

[1] (1929) 46 R.P.C. 23 at 52. [2] (1880) 14 C.D. 230.

not make a mosaic in the sense that you take bits out of various documents and put them together. Documents put forward as anticipations must be read singly and independently although in the case of the defence of obviousness all documents may be looked at.

In support of his contention that the defendant's invention had been anticipated, counsel for the plaintiff relied primarily on U.S. Patent No. 2,753,602 (C.S. Ringle) Exhibit G and U.S. Patent No. 2,706,837 (E. T. Jackson) Exhibit H.

In my view the two foregoing patents cited as being anticipatory do not meet the stringent tests outlined above which a prior patent must comply with before it can be considered as an anticipation.

The principal object of the Ringle Patent is to provide a door frame with adequate wedges for quickly and easily backing up solidly between the side jamb members and the buck of the rough door opening in the wall. The back-up wedges are pre-positioned and releasable in readiness for driving. The use of shingle shims described in the conventional method of building door frames and the use of which is also required in the split jamb method, also previously described, was what the defendant sought to avoid in designing the door frame described in the patent in suit. The defendant's theory was that the jamb members should be free standing without the necessity of fastening through the jamb to the buck, but that the only fastening required is by nailing to the wall through the casings and that the jamb members were adjustable to be plumb and perpendicular without the use of shims or wedges.

The Jackson patent was for an adjustable door casing substantially preassembled at a factory for rapid erection in the rough wall openings. The device so described parallels the split jamb method of construction with an attachment for fastening one portion of the jamb to the door buck and a further device in the other portion of the frame to receive a part of the attachment fastened to the door buck to permit of variation to suit the different widths of the wall. The Jackson patent differs from the defendant's patent in that the Jackson patent is similar to the split jamb method of installation, there is a fastening to the door buck not present in the defendant's patent and the adjustable feature in the Jackson patent is achieved by the attachment by which one

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portion of the jamb is fastened to the door buck operating in an attachment on the other portion of the jamb which is designed specifically to receive the other portion of the attachment fastened to the door buck.

Counsel for the plaintiff also placed reliance for his contention of anticipation on two other documents, one being a brochure describing the Kewanee "Kwick-fit" steel door frame, Exhibit F, published in 1954 and another publication entitled, "Keepright Universal Kwick-fit Steel Door Frames" published by Keepright Products Limited of Brantford, Canada before July 25, 1957, i.e. more than two years before the application by the defendant for Letters Patent of invention.

In this instance I am also of the opinion that the metal frames so described cannot be construed as being in anticipation of the defendant's patent for in order that there may be anticipation every element specified in the claims must be present in the prior art device. There is ample structure recited in the defendant's claims to differentiate the metal construction. The metal frames described in the above publications are one piece of metal wrought to present different planes, whereas the wooden channel frame devised by the defendant, must of necessity, because of the different characteristics of wood and metal, be comprised of several separate pieces of wood. Still further, the metal frames described in the publications are adjusted to the plumb and perpendicular by the use of compression lugs operating as a screw through the jamb of the metal against the door buck which is not the case in the defendant's patent, his jamb being designed to be free standing without the necessity of contact with or fixing to the door buck.

One further instance of prior use was put forward by the plaintiff being a moulding introduced in evidence as Exhibit B. This moulding was formed from a solid piece of wood by cutting a groove in it into which the wall opening would fit. The usefulness of this device is severely limited by reason of its size and it is manifestly not the equivalent of a jamb member with two side casings.

As I have previously intimated, these attacks on the validity of the defendant's claims have not been established by reason of their having been in anticipation or for lack of novelty. A claim is novel unless there is a prior document from which an addressee could make the device and in my opinion none of the instances of prior publication or use cited by the plaintiff do this.

It was next contended on behalf of the plaintiff that the device described in the defendant's claims in suit was obvious and required no application of inventive ingenuity on the part of the defendant.

The question for decision, therefore, is whether the prior art before outlined made it obvious to adopt the method claimed in claims 1 to 3. I do not think it did. It has been frequently pointed out that what may seem obvious when you see the result, may not have been at all obvious at the beginning and it has always been held to be a good reason for rejecting a plea of obviousness that others failed to reach the solution discovered and set forth in a patent and adopted some other and different method.

It is well settled in patent law that a mere scintilla of inventiveness is sufficient to sustain a patent and as expressly stated by Thorson P. in commenting on the statutory presumption of validity created by s. 48 of the *Patent Act* in *O'Cedar of Canada Ltd. v. Mallory Hardware Products Ltd.*[1],

> 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 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.

In the present instance it is my view that the plaintiff has failed to rebut the statutory presumption of validity which includes the presumption that the attributes of patentability, namely, novelty or lack of anticipation, utility, and inventiveness or lack of obviousness, are present.

The mere simplicity of the device is not proof that it was obvious and that inventive ingenuity was not required to produce it.

In my opinion the defendant took a number of well known elements, fastened them together by well known means and produced a result that was new and inventive and which fulfilled a commercial need which was not previously supplied.

[1] [1956] Ex. C.R. 299 at 316-17.

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I, therefore, find that all attacks on the validity of the claims in suit fail.

It follows, of course, that I find as between the parties the claims in suit are valid and that the defendant is entitled to a declaration to that effect as requested by him.

There remains for determination the issue whether the plaintiff infringed the defendant's rights under claims 1 to 3 of the patent in suit. Infringement is a question of fact. If the alleged infringement falls within the express terms of the claims that concludes the matter and the plaintiff is clearly guilty of infringement, but if not, the question for determination is whether the plaintiff has taken the substance of the invention and if that is so the plaintiff is likewise guilty of infringement.

The plaintiff's submission is that a principal feature of the patent is not found in the plaintiff's construction, namely, that the toeing-in of the casing, which is alleged by the plaintiff to be an essential element of the invention as defined in claims 1 to 3, is not present in the plaintiff's device within the meaning of those claims.

In *Smith Incubator Company v. Seiling*[1], Duff, C.J. had this to say:

> It is now settled law that, for the purpose of ascertaining the meaning of the claims, the language in which they are expressed must be read in light of the specification as a whole, but it is by the effect of the language employed in the claims themselves, interpreted with such aid as may properly be derived from the other parts of the specification, that the scope of the monopoly is to be determined.

The toeing-in feature of the casing member is included in each of the claims in issue.

In claim 1 it is defined in these terms:

> . . said casing members being inwardly inclined from a plane perpendicular to the plane of the wide axis of the jamb member, . . .

Claims 2 and 3 reads as follows:

> 2. A prefabricated frame as described in claim 1 in which the casing members are inwardly inclined from a plane perpendicular to the plane of the wide axis of the elongated jamb member not less than about 1° and not more than about 5°.

> 3. A prefabricated frame as described in claim 1, in which the casing members are inwardly inclined about 1° from a plane perpendicular to the plane of the wide axis of the elongated jamb member.

[1] [1937] S.C.R. 251 at 255.

To determine the intention of the defendant in so inserting this limitation reference is made to that portion of the specification reading as follows:

> A further important object of this invention is the interlocking and self-supporting features of the component parts of the frame which permits and allows for final accurate squaring and adjusting of the assembly during installation and prior to permanent fastening.

and to the additional language of the specification:

> To effect a tight fit with the wall 16-16a, a right-angle rabbet joint 9 is cut so that the included angle 17 is not less than about 91° and not more than about 95° and included angle 18 is correspondingly not more than about 89° and not less than about 85°, the preferred embodiment being about 91° and about 89° respectively as shown. This feature, referred to as "toeing-in", imparts a springiness to the jamb and casing units.
>
> To facilitate installation, the inside leading edges of the side and top casings bearing on the wall 16-16a are rounded. This feature, together with the "toeing-in" of the casing are the primary factors permitting considerable variation in wall thickness as well as local wall irregularities. Furthermore, the hugging action afforded by the flexible "toed-in" casing, together with the self-guiding action of the rounded leading edges 16, interact to permit rapid and ready installation of the frames on the wall and allow self-support while the frames are being squared and adjusted to meet irregularities. Normally, the head member is stationed in place and the side members flexed and sprung into place, embracing the edges of the opposing wall.

From the foregoing language of the specification, it is, I think, fair to say that the patentee states the toeing-in feature of the casing members, in combination with the rounded leading edges thereof, is a primary factor permitting considerable variation in wall thickness as well as local wall irregularities.

A further object, as gleaned from the specification, present in the mind of the defendant, is the self-supporting feature of his frames permitting of final accurate squaring and adjustment during installation and prior to permanent fastening to the wall.

The defendant states that the hugging action that is achieved by the toed-in casing members permits of self-support of the sections of the frame members while they are being adjusted.

It is readily apparent that the defendant sought to achieve a structure that could be adjusted prior to permanent fastening. He then describes the toeing-in feature of the casing members and makes the statement that the desired self-support is accomplished by the toeing-in of the casing

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members. This toeing-in feature is related to one of the defendant's expressed objectives and in claims 1 to 3 the toeing-in feature is claimed.

In his testimony the defendant sought to minimize the necessity of this toeing-in feature. His evidence was as follows:

> Q. The angle formed by the jamb member and the trim member?
>
> A. Yes, the enclosed angle formed by the joining of the jamb to the casing. That is a little less than a right angle.
>
> Q. What is the importance of that feature?
>
> A. The importance is to give us more room at the bottom and still give us a tightly fitting joint between the wall itself and the casing after the frame is installed. We were trying to minimize the gap between the wall and the casing.
>
> Q. In what way does that provide an advantage, in what phase of the operation does that provide an advantage?
>
> A. It had to be done eventually and we felt that by doing it in the plant we were helping the job along a little bit. It does make it a little easier for the installer when the toeing-in is done at the plant, but it could be done without it.

I particularly refer to the decision of the House of Lords in *Electric and Musical Industries, Ltd. v. Lissen, Ltd., et al.*[1], which may be fairly described as the leading case on the principles to be applied in construing the claims of a patent. There Lord Russell of Killowen, after first stating that the question of construction is of primary importance, described the function of the claims in a patent specification as follows:

> The function of the claims is to define clearly and with precision the monopoly claimed, so that others may know the exact boundaries of the area within which they will be trespassers. Their primary object is to limit and not to extend the monopoly. What is not claimed is disclaimed The claims must undoubtedly be read as part of the entire document, and not as a separate document; but the forbidden field must be found in the language of the claims and not elsewhere. It is not permissible, in my opinion, by reference to some language used in the earlier part of the specification to change a claim which by its own language is a claim for one subject-matter into a claim for another and a different subject-matter which is what you do when you alter the boundaries of the forbidden territory. A patentee who describes an invention in the body of a specification obtains no monopoly unless it is claimed in the claims. As Lord Cairns said, there is no such thing as infringement of the equity of a patent (*Dudgeon v. Thomson*, L.R. 3 App. Cas. 34).

At page 41 Lord Russell makes this important statement:

> . . . But I know of no canon or principle which will justify one in departing from the unambiguous and grammatical meaning of a claim and

[1] (1939) 56 R.P.C. 23.

narrowing or extending its scope by reading into it words which are not in it; or which will justify one in using stray phrases in the body of a Specification for the purpose of narrowing or widening the boundaries of the monopoly fixed by the plain words of a claim.

He then makes this further comment on the function of a claim:

A claim is a portion of the specification which fulfils a separate and distinct function. It and it alone defines the monopoly; and the patentee is under a statutory obligation to state in the claims clearly and distinctly what is the invention which he desires to protect. As Lord Chelmsford said in this House many years ago: "The office of a claim is to define and limit with precision what it is which is claimed to have been invented and therefore patented" (*Harrison v. Anderston Foundry Co., L.R. 1 App. Cas. 574*). If the patentee has done this in a claim the language of which is plain and unambiguous, it is not open to your Lordships to restrict or expand or qualify its scope by reference to the body of the specification. Lord Loreburn emphasised this when he said: "The idea of allowing a patentee to use perfectly general language in the claim and subsequently to restrict or expand or qualify what is therein expressed by borrowing this or that gloss from other parts of the specification is wholly inadmissible". (*Ingersoll Sergeant Drill Co. v. Consolidated Pneumatic Tool Co.*, 25 Reports of Patent Cases, page 61, at page 83). Sir Mark Romer expressed the same view in the following felicitous language:— "One may and one ought to refer to the body of the specification for the purpose of ascertaining the meaning of words and phrases used in the claims, or for the purpose of resolving difficulties of construction occasioned by the claims when read by themselves. But where the construction of a claim when read by itself is plain, it is not, in my opinion, legitimate to diminish the ambit of the monopoly claimed merely because in the body of the specification the patentee has described his invention in more restricted terms than in the claim itself." (*British Hartford-Fairmont Syndicate, Ld. v. Jackson Bros. (Knottingley), Ld*, 49 Reports of Patent Cases, page 495, at page 556).

From the foregoing statements of Lord Russell it follows that even the testimony of the inventor himself as to what his invention was would be inadmissable to contradict the clear and unambiguous wording the claims.

As a matter of construction it seems clear to me that the defendant deliberately chose to make it an essential feature of claims 1 to 3 that the casing members should be toed-in even though he subsequently testified that it was not absolutely necessary that they should be. Why he so drafted these claims is not for me to speculate, but my function is to state that he did so.

The plaintiffs in their construction did not incorporate this toed-in feature of the casing members and accordingly I find, as a fact, that there has been no textual infringement of claims 1 to 3. The plaintiffs exercised particular care by use of jigs to ensure that the angle formed between the jamb

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member and the casing member of the door frame manufactured by it was a right angle.

The defendant invokes the doctrine of "pith and marrow" in order to maintain his contention that his patent has been infringed by the plaintiff for he says that the substance of his invention has been taken under cover of an unessential change in that the casing members were not toed-in.

I cannot, however, agree that this is a proper case for the application of that doctrine. Each case must be considered on its own facts. In the present case, whatever the reason, the defendant deliberately drafted claims 1 to 3 so as to include the use of the toed-in feature and this, in my view, left it open to the plaintiff to fashion its door frames in any manner it chose provided the way it chose did not include the toed-in feature which had been deliberately included in the defendant's claims.

In my opinion claims 1 to 3 have not been infringed by the plaintiff.

Therefore, the plaintiff is entitled to a declaration that the prefabricated doors manufacured by it do not constitute infringement of the exclusive property or privilege granted to the defendant in Canadian Patent No. 604,140 as was originally sought by the plaintiff.

On the other hand the defendant is entitled to a declaration that, as between the parties hereto, the said Letters Patent are valid, but it follows that the defendant's request in his counter-claim for a declaration of infringement and for consequent relief must be dismissed.

Since the success on the counter-claim is divided, I award the defendant one half of his costs on the counter-claim.

In view of the fact that the plaintiff was successful in its request for a declaration of non-infringement, but was unsuccessful in contesting the validity of the said Letters Patent which question was not originally in issue but was brought in issue by way of the plaintiff's amended defence to the counter-claim, I award the plaintiff one half of the costs ordinarily taxable in respect of the action, the respective awards to be set off against each other.

Judgment accordingly.

BETWEEN:

1961 Jan. 26, 27, 30, 31

PARKE, DAVIS & CO., LTD. ....PLAINTIFF;

1962 May 7

AND

1963 Apr 5

EMPIRE LABORATORIES LIMITED ..DEFENDANT.

Trade Marks—Infringement—Passing off—Coloured band encircling middle of capsule—Whether confusing when defendant used band of same colour in same location on capsule—Design mark—Distinguishing guise—Trade mark on distinctive form of functional part—When trade-mark has acquired a secondary meaning—"Distinctiveness"—Trade Marks Act, S of C. 1952-53, c. 49, ss. 2(f), (t), 6(1), 7(b), 18(1), 19, 20—The Unfair Competition Act, S. of C. 1931-32, c. 38, ss. 2(c)(d), 27(a)(b)(c)—Patent Act, R.S.C. 1927, c. 150, s. 8(2).

The plaintiff distributes a large portion of its pharmaceutical preparations in capsule form, about half of which are sealed by a coloured gelatin band of the same substance as the capsules, extending around the middle thereof along the line where the two halves of the capsules telescope one into the other. In 1950, the plaintiff registered 10 trade-marks, the principal features of each of which was a coloured band applied around the middle of a capsule and encircling it, the band being of a different colour in each of the 10 trade-marks. The plaintiff has been using coloured bands on its capsules since 1932, and since 1950 it has continuously used the ten registered trade marks, each in association with a different pharmaceutical preparation. All the capsulated products of the plaintiff are designated by a generic name rather than the scientific name. In addition, the drugs are designated by names different from the generic names and registered as trade marks by the plaintiff. The plaintiff has also registered the trade mark "Kapseals" which, according to the plaintiff, designates "the sealed (banded) capsules manufactured by Parke, Davis & Co.".

The capsulated products of the plaintiff are packed in bottles which are packed in carton boxes. Printed on the labels on the bottles and on the cartons is the word "Kapseals" and, underneath it, the generic name of the particular drug, followed by the plaintiff's registered trade mark name therefor. The coloured bottles do not permit of a clear view of the colour of the capsules and bands contained therein. From 1932 to 1959 the plaintiff was the only one to use colour banded capsules for pharmaceutical products and no one has ever used a colourless band in this connection. Some of the plaintiff's advertising bore inscriptions referring to the coloured bands and mentioned specifically that the products so advertised were thereby identified as products of the plaintiff or its related Canadian company. The various colour banded and capsulated pharmaceutical products of the plaintiff are always referred to and ordered in the trade by the word trade marks associated with each and they reach the ultimate consumer, when supplied on prescription, with no identification other than the coloured bands.

The defendant entered the pharmaceutical field about eight years ago and sells only to wholesalers, hospitals, physicians, the provincial and federal governments and pharmacists. It sold chloramphenicol in Canada in capsules bearing a grey band substantially indistinguishable from that

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used by the plaintiff which also was grey for that particular drug. The defendant bought supplies of the drug in capsule form from a European supplier and bottled and labelled the drug. When the first interlocutory injunction was granted against the defendant restraining it from selling grey banded capsules, it began selling the same drug in green banded capsules The plaintiff claims the defendant has infringed its trade marks for grey and green bands; has directed public attention to its pharmaceutical preparations in such a way as to be likely to cause confusion in Canada between the pharmaceutical preparations of the defendant and those of the plaintiff, and has passed off its pharmaceutical preparations as and for those of the plaintiff. The plaintiff also asks for an injunction restraining the defendant from selling, distributing and advertising any pharmaceutical preparation in association with any of the plaintiff's ten registered trade marks.

The defendant claims the plaintiff's trade marks are invalid and are not distinctive on their face or capable of distinguishing one preparation from another, and that they are distinguishing guises incapable of constituting trade marks in that the gelatin band encircling the middle of each capsule performs the function of sealing the capsule, which function is described in a U.S.A. patent granted in 1932 and owned by the plaintiff prior to its expiry and the plaintiff is estopped from denying that the gelatin band encircling each capsule performs the said function. The defendant further claims that the plaintiff is attempting to monopolize the process of sealing a capsule with a gelatin band and to prevent others from using this process by registering the said trade marks.

Held: That the plaintiff's trade marks are not in the capsules themselves but in the coloured bands encircling the middle of the capsules. If the trade marks resided in colour alone they could not be the proper subject of a trade mark, and one must distinguish between colour as a trade mark and, as in this case, the colour of a trade mark.

2. That, whether the colour banded capsules of the plaintiff are distinguishing guises or not, these trade marks, if otherwise valid, would still be valid trade marks. Under the *Unfair Competition Act*, a design mark (and all of the plaintiff's trade marks were registered as design marks) "includes any distinguishing guise capable of constituting a trade mark".

3. That the gelatin capsules herein are not merely wrappers or containers or get-ups for pharmaceutical products but they may also be part and parcel of the pharmaceutical product as they are used in some cases not only to contain and wrap but also to ensure that the medicine absorbed by the patient becomes effective only after it reaches his stomach.

4. That a trader can obtain a valid trade mark on a distinctive form of the functional part or parts, providing that by so doing he does not hold a monopoly of all the forms of the functional part or parts.

5. That although the plaintiff's ten trade marks more than cover the spectrum and give it a monopoly on the colour of the bands in not only the ten colours mentioned in the registration but also in a multitude of different hues and shades of the ten colours, this right to colour its bands in such a fashion, although extensive, would not prevent someone else from colouring his capsules elsewhere than on the band encircling the middle of the capsule, nor would it prevent the use of contrasting colours on the body of the capsules. The plaintiff has not monopolized

colour. However the plaintiff's trade marks are invalid because the extensive coverage of the various colours and shades together with the utilitarian use of the coloured bands around the middle of the capsules (particularly the sealing and the use of coloured bands or strips to detect breakage of the bands) which happens to be the best place the bands can be placed in order to seal both halves, monopolizes all the forms of the functional parts of the colour banded sealed capsules except their use as simple containers.

6. That although the plaintiff held a U.S.A. patent on sealed capsules which expired in 1949, since patents have no extraterritorial rights, the U.S.A. patent rights in this case are irrelevant to any question regarding Canadian trade marks; nevertheless, it is impossible to set aside the admitted functional advantages of the colour banded sealing process contained in the U.S.A. patent issued to the plaintiff in 1932 and to decide now that it is not functional, notwithstanding the plaintiff's assertion that whatever functions the colour sealed bands may have, they are without any practical significance.

7. That with respect to the allegation of passing off, the plaintiff must prove that the defendant's course of conduct caused or was likely to cause confusion; and bearing in mind the similarity of the grey and green banded capsules of the defendant and those of the plaintiff, there is no question that this onus has been successfully met. Indeed, the grey and green banded capsules of the defendant are not only confusing with but are practically identical to the grey and green banded capsules of the plaintiff.

8. That to establish a cause of action in a passing off action the plaintiff must prove two things: that the mark in question, when used in the market, is understood by the public to mean the wares manufactured and sold by him; and that by what the defendant did he passed off his wares or services as and for those of the plaintiff to his injury, that the coloured bands of the plaintiff have by use become distinctive and since the coloured bands *per se* are without distinctive character, this can be accomplished only by their being used by the plaintiff for so many years and over such a substantial part of Canada that they have come in fact to distinguish the plaintiff's wares from all others of the same kind—the marks are then said to have acquired a secondary meaning which in this sense means that the marks indicate to purchasers that the wares sold in association therewith are those of the plaintiff and nobody else or indicate a common origin.

9. That the matter of the acquisition of a secondary meaning of a trade mark is a question of fact and the onus of proof on the user of the mark is a heavy one where the mark in question is a descriptive word, and a similar position could be taken with regard to a trade mark involving numerals or colour which are in the public domain.

10. That to satisfy the test of distinctiveness the plaintiff is required to establish that the trade mark is distinctive not only to certain classes of people in the trade, such as wholesalers and manufacturers, but to all probable purchasers including the ultimate consumer and the plaintiff in this case has failed to prove that its coloured bands indicate to the

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ultimate consumer that they originated from the plaintiff or that they had a common origin; indeed the evidence reveals that neither pharmacists, nor physicians nor manufacturers rely on the colour of the capsules, and the colour band is several times removed from the ultimate consumer—between the capsule and the patient there is a carton, then a bottle, and on the bottle is a label containing the plaintiff's registered trade marks including its trade mark "Kapseals". In short, the plaintiff has not established that the manner in which its goods or wares are done up has become associated in the mind of the consumer or purchaser with its goods or wares and the evidence does not show that these marks have been relied upon by pharmacists, physicians or the public who consumes its goods as distinguishing them from all others.

11. That the plaintiff's ten registered trade marks were registered without sufficient cause and should be expunged.

12. That there is no legal basis for an action based on passing off and, consequently, any injunction restraining the defendant shall be dissolved and the plaintiff's action dismissed with costs.

ACTION for infringement of a trade mark.

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

Christopher Robinson, Q.C. for plaintiff.

Morris M. Kertzer for defendant.

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

NOËL J. now (April 5, 1963) delivered the following judgment:

This is an action for damages and consequential relief in which the plaintiff claims that the defendant has infringed two of its registered trade marks which consist of a differently coloured band encircling a capsule in respect of a pharmaceutical preparation called "chloramphenicol", with a grey band, and one called "digitalis" with a green band and an injunction restraining the defendant from selling, distributing or advertising any pharmaceutical preparation in association with any of the plaintiff's ten trade marks consisting in a different coloured band for each of them and including the grey and green banded ones. The ten registrations are dated September 19, 1950, but the date of first use in Canada varies from one registered trade mark to the other as appears from the following:

Band Colour	*Date of First use in Canada*	*Registration No.*	*Exhibit No. of Reg'n Certificate*
Green	July 12, 1938	N S. 148/37803	9
Black	October 16, 1935	N S. 148/37802	8
Brown	August 14, 1936	N.S. 148/37800	6
Orange	July 23, 1938	N.S. 148/37799	5
Pink	April 28, 1939	N S. 148/37798	4
Yellow	March 11, 1940	N.S. 148/37795	1
White	November 1, 1941	N.S. 148/37796	2
Blue	October 27, 1942	N.S. 148/37801	7
Red	November 14, 1947	N.S. 148/37797	3
Grey	April 18, 1949	N.S. 148/37804	10

The plaintiff corporation, organized under the laws of Michigan, one of the United States of America, has its principal place of business in the City of Detroit and the defendant company, organized under the laws of Ontario, Canada, has its principal place of business in the City of Toronto.

The plaintiff started using coloured bands on its capsules as early as 1932 and has continued to use them to date for its major specialties, over 50 per cent of its total volume being in such capsules. However, out of seventy-one capsules put out by the plaintiff, thirty-four are banded and thirty-seven are not.

Plaintiff's ten trade marks are all described in the same manner on the certificate of registration and Ex. 2 can serve as an illustration for the others by merely changing the colour white thereon to the colours green, black, brown, orange, pink, yellow, blue, red and grey. The second paragraph of the certificate of registration of Ex. 2 reads as follows:

> The mark of which registration is requested is a design mark, of which five accurate and complete representations are furnished herewith, its principal features requiring to be indexed being in the applicant's opinion, *a white band applied approximately around the middle of a capsule and encircling the same.*

May I point out here that in the case of all the plaintiff's capsulated preparations produced as exhibits in the present case, the band or strip in colour is always placed around the centre of the capsule at a point reached when the two halves of the capsule are entered one into the other and at the most practical place for banding. This band is a coloured gelatin band or strip of the same substance as the capsule itself, 1963 PARKE, DAVIS & Co. LTD. v. EMPIRE LABORATORIES LTD. Noël J.

which, when applied creates a small bulge around the capsule and seals it.

In no case did the plaintiff merely colour the end of one-half of the capsule and part of the other end so to obtain a coloured strip when one half is fully entered into the other as it might have done under the description contained in the trade mark registrations referred to above and, therefore, the latter must be dealt with here in the manner in which the plaintiff has effectively used them on its wares or goods (i.e. a coloured gelatin band encircling the middle of the capsule and sealing it) and not as it might have used them. The various coloured trade marks of the plaintiff are used in association with its pharmaceutical products interchangeably with no relationship to the substance they contain or whether they should be prescribed or not and the body of the capsules is also of varied colours. The coloured body and cap of the plaintiff's capsules, however are not registered as trade marks. The contrasting colour of the plaintiff's capsule body and its band are in a multitude of coloured patterns and shades. Its primary classification for its pharmaceutical products sold in capsule form is, in some cases, by means of the colour of the body of the capsule and in others by the colour of the band. For instance, in the case of Taka-combex, Ex. 20, and in the case of Thera-combex, Ex. 27, the body of the capsules in both cases is brown, the bands, however, in the first case being yellow and in the latter case, red. However, in the case of chloramphenicol, Ex. 15, the body is white and the band is grey and Chlorostrep, which contains chloramphenicol, the body is orange and the band is grey. In the case of the three different types of a product called digitalis, Exs. 18 and 19, the plaintiff's capsules are grey bodied with a green band of different shades for each type.

From the year 1950, the year in which the plaintiff's ten above mentioned trade marks were registered, to date, the plaintiff has continuously used in Canada each of the above trade marks in association with a different pharmaceutical preparation.

Although all of the ten trade marks of the plaintiff mentioned above are to be dealt with in the present case, the only two allegedly infringed by the defendant company are the trade marks registered under number N.S. 148/37804 (grey band) used by the plaintiff in Canada from the year

1949 to date in association with capsules of a pharmaceutical preparation known as chloramphenicol and a trade mark registered under number N.S. 148/37803 (green band) used also by the plaintiff in Canada from the year 1932 to date in association with capsules of a pharmaceutical preparation known as digitalis. From 1949 to 1958, the chloramphenicol preparation in association with which the plaintiff used the said trade mark in Canada was manufactured by the plaintiff and distributed in Canada through Parke, Davis Co., Ltd., a related company to the plaintiff and in and since the year 1958 by the Canadian company itself, Parke, Davis & Co., Ltd., which on June 23, 1955, was registered as a registered user of the said trade mark.

From 1932 until the year 1936, digitalis, the preparation in association with which the plaintiff used the other trade mark in Canada, was manufactured by the plaintiff and also distributed through the Canadian Parke, Davis & Co., Ltd., and in and since the year 1936 the said preparation was manufactured in Canada by the Canadian company which was, on June 23, 1955, registered as a registered user of the said trade mark.

All and every one of the contents of the plaintiff's colour banded capsules are designated by the generic name of the drug which is available to all manufacturers, the scientific name being seldom used as it is most of the time unpronounceable. The drugs are, however, also designated by names which are different from the generic name and which have all been registered by the plaintiff in Canada as trade marks. For instance, the plaintiff's registered trade mark name for the generic name of chloramphenicol is Chloromycetin, its registered trade mark name for the generic name of digitalis is Digifortis and its registered trade mark name for the generic name of geriatric is Geriplex. This applies to all the capsulated products of the plaintiff. The plaintiff has also caused the trade mark "Kapseals" to be registered in Canada in association with all of its colour banded capsules and it is referred to in Ex. "H", p. 96, and subsequently filed as Ex. "Q", where underneath the word "Kapseals" appears the following:

> "Kapseals" designate the seal (banded) capsules manufactured by Parke, Davis & Co. Kapseals *represent an important development in pharmaceutical protection of medicinal substances.*

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If one takes at random a product of the plaintiff such as chloramphenicol, Ex. 15, or Geriatric Vitamin-Mineral Formula, Ex. 22, it appears that the first word to be found in both cases on the label of the bottles is "Kapseals", a registered trade mark of the plaintiff and underneath chloramphenicol is Chloromycetin and underneath geriatric is Geriplex, both of which, as we have seen, are also registered trade marks of the plaintiff. The bottles or vials in several cases are packed in individual carton boxes which also contain the same inscriptions. The plaintiff's bottles which contain these coloured capsules are all of a brownish colour which do not permit a clear view of the capsules inside and particularly of the colour of the bands. May I also say here that chloramphenicol is sold only on prescription and although digitalis is not a prescription item, it is always sold on prescription.

From the years 1953 to mid-1959, i.e. six and a half years, the plaintiff, or its Canadian related company, Parke, Davis & Co., Ltd., a registered user of each of its trade marks since June 23, 1955, sold over 300,000,000 colour banded capsules of various pharmaceutical preparations and the evidence discloses that from 1932 to 1959 it was the only one who used colour banded capsules with pharmaceutical products although it did cost 20 per cent more to band than not to band. The evidence also discloses that no one ever used a colourless band. Sales of the plaintiff's grey banded capsules (chloramphenicol) from 1949 to 1959 amounted to over 34,000,000 and from 1932 to the commencement of the present action, the plaintiff had sold 23,500,000 of the green banded capsules.

The plaintiff's advertisements in its 1958 edition of "Therapeutic News" does not describe nor mention the colour band but merely uses the word "Kapseals" which, as we have seen, is another registered trade mark of the plaintiff together with the word mark of five of its capsulated products. On the other hand Exs. 50-50A and 48-48A, which are all advertisements put out by the plaintiff, bear inscriptions referring to its colour bands and mention specifically that they are thereby identified as products of the plaintiff or of its related Canadian company. There appears to be no evidence as to when Exs. 48 or 48A were put out. Ex. 53, "The Medical News Magazine", of March 1959, and the "Ontario Medical Review", of November

1959, carry an ad which refers to the plaintiff's unique colour bands as identifying its products. Now, although the various colour banded and capsulated pharmaceutical products of the plaintiff are always referred to and ordered in the trade by the word trade marks associated with each, nevertheless, they reach the ultimate consumer whenever supplied on prescription, with no identification other than the coloured bands.

The defendant company entered the pharmaceutical field about eight years ago. It has no retail outlets to sell to the public and sells to wholesalers, hospitals, physicians, provincial and federal governments and pharmacists.

It sold chloramphenicol in Canada in capsules bearing a grey band substantially indistinguishable from the plaintiff's of which it had imported about 10,000 from the Danish Powder and Tableting Co. of Scanpharm, Copenhagen. These capsules arrived in Canada in January 1960. Mr. Winters, the defendant's president, states that he first became acquainted with the Danish chloramphenicol grey banded capsules on a trip to Bermuda where he saw some of them.

The parties before the trial of this case produced as Ex. 11 an admission which reads as follows:

ADMISSION

For the purposes of this action only, the parties hereto admit the following facts:

1. Before February 18, 1960, the defendant sold in Canada a pharmaceutical preparation identified by it as chloramphenicol in bottles of 100 capsules of which the bottle and its contents marked Exhibit A to the affidavit herein of Thomas V. Grubb, dated February 15, 1960, is a typical sample.

2. The capsules of chloramphenicol referred to in paragraph 1 sold by the defendant were not manufactured by the defendant but were bought by it from a European supplier in the state in which they are found in the said Exhibit A and were then bottled and labelled by the defendant.

3. After February 18, 1960, the defendant sold in Canada a pharmaceutical preparation identified by it as chloramphenicol in bottles of 100 capsules of which the bottle and their contents identified as Exhibits I and II to this admission are typical samples.

4. The capsules of chloramphenicol referred to in paragraph 3 sold by the defendant were not manufactured by the defendant but were bought by it from a European supplier in the state in which they are found in the said Exhibits I and II and were then bottled and labelled by the defendant.

By an interim injunction made on February 18, 1960, the date of the commencement of the present action, and by subsequent interlocutory injunctions dated February 23, 1960, March 8, 1960, April 14, 1960 and May 17, 1960, the defendant company was restrained until the trial or other disposition of the action from further sale of any pharmaceutical preparations in association with the plaintiff's grey banded or green banded trade marks or any trade mark confusing with them.

After the first of the interlocutory orders, the defendant company, subsequent to February 18, 1960, changed over to a green band around its chloramphenicol capsules. Mr. Winters, president of the defendant company, states that a saleswoman from the Joint Marsing Co. came in to see him and showed him some samples of green banded capsules of chloramphenicol. As he put it at p. 143 of the transcript:

> When we were ordered to stop selling the grey banded capsules, we said: "Fine, we are not interested in the colour, we will sell green banded capsules and gave her an order for the green banded chloramphenicol capsules".

The plaintiff, therefore, claims that the defendant, by its actions, has infringed its rights in the trade marks registered under number N.S. 148/37803 (green) and N.S. 148/37804 (grey), has directed public attention to its pharmaceutical preparations in such a way as to be likely to cause confusion in Canada between the pharmaceutical preparations of the defendant and theirs and has passed off, and enabled others to pass off, its pharmaceutical preparations as and for theirs. It also states that it is apprehensive that if the defendant is restrained from using the green bands it will then begin to use, in association with the sale of its pharmaceutical preparations, one of the other of its registered colour banded marks and, therefore, requests an injunction restraining the defendant from selling, distributing and advertising any pharmaceutical preparations in association with any of the plaintiff's ten registered trade marks, an order directing the defendant to deliver on oath to the plaintiff all such pharmaceutical preparations as may be in the possession or power of the defendant bearing the plaintiff's said trade marks registered under number N.S. 148/37803 and N.S. 148/37804 or any trade mark confusing with either of the said trade marks, or alternatively, for the destruction on oath of such pharmaceutical preparations, damages or an account of the profits made by the defendant as the plaintiff may elect, such further and other relief as the justice of the case requires and, finally, costs. The defendant, on the other hand, denies the plaintiff's allegations made in its statement of claim and adds that the plaintiff is not entitled to the exclusive use of the pharmaceutical preparation known as chloramphenicol and that it is, therefore, entitled to sell in Canada this pharmaceutical preparation.

An amended counterclaim granted on January 12, 1961, produced by the defendant, attacks the validity of the plaintiff's ten trade marks in that they would not be distinctive on their face nor capable of distinguishing one preparation from another. The defendant further alleges that the plaintiff's trade marks are distinguishing guises incapable of constituting a trade mark in that the gelatin band encircling the middle of each capsule performs the function of sealing the capsule; that this function is described in U.S.A. patent number 1861047, granted on May 31, 1932, and owned by the plaintiff prior to its expiry and that the plaintiff is thereby estopped from denying that the gelatin band encircling each capsule performs the said function. The defendant adds that bands of coloured gelatin around a gelatin capsule containing a pharmaceutical preparation were incapable of constituting a trade mark and that such bands are incapable of distinguishing particular pharmaceutical preparations. The defendant further states that the plaintiff is attempting to monopolize the process of using a gelatin band to seal capsules and to prevent others from using this process by registering the said trade marks. He finally urges that it is unlawful or contrary to good practice within the trade to distribute capsules containing chloramphenicol identified solely by a grey band encircling each. It then claims that the ten above mentioned registered trade marks be expunged and finally that it be allowed costs and such further and other relief as this Court may order.

The plaintiff never claimed, nor does it now, that it is entitled to the exclusive use of chloramphenicol nor that the defendant cannot sell this product in Canada. What it does say, however, is that defendant cannot sell any of its pharmaceutical products, be it chloramphenicol or any other, under the plaintiff's registered trade marks. This, I believe, disposes of the defendant's first point.

The assertion made by the defendant that plaintiff's trade marks are invalid because they are incapable of distinguish-

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ing one pharmaceutical preparation from another can be dealt with shortly by stating that it is a well-known principal of trade mark law that the object of a trade mark is not to distinguish a particular ware or service but to distinguish wares or services of a particular trader.

The remainder of the defendant's contestation resides in an attack on the validity of the plaintiff's trade marks on four points which can be summarized as follows: the plaintiff's trade marks (1) are distinguishing guises incapable of constituting a trade mark and reside in colour alone; (2) perform functions and so cannot distinguish; (3) are really the subject matter of an expired United States patent and (4) that the registration of ten different colours constitutes a monopoly.

However, before dealing with each of the points raised by the defence herein, a brief summary of the relevant sections of both the *Unfair Competition Act*, 22-23 George V, c. 38, and the new Act, the *Trade Marks Act*, 1-2 Elizabeth II, c. 49, would, I believe be of some assistance.

As we are dealing with registered trade marks, the registration under s. 19 of the *Trade Marks Act*, in respect to any wares unless shown to be invalid, gives to the owner the exclusive right to the use throughout Canada of such trade marks in respect of such wares. The trade marks involved in the present instance are, therefore, *prima facie* valid and the burden to show invalidity rests on the defendant.

Section 20 of the *Trade Marks Act* sets down the circumstances in which this exclusive right of the registered owner of a trade mark is infringed and the relevant parts thereof read as follows:

> 20. The right of the owner of a registered trade mark to its exclusive use shall be deemed to be infringed by a person not entitled to its use under this Act who sells, distributes or advertises wares or services in association with a confusing trade mark or trade name . . .

A "confusing trade mark" is defined in s. 6(1) of the *Trade Marks Act* as follows:

> 6. (1) For the purposes of this Act a trade mark or trade name is confusing with another trade mark or trade name if the use of such first mentioned trade mark or trade name would cause confusion with such last mentioned trade mark or trade name in the manner and circumstances described in this section.

I may dispose of the matter of confusion here rapidly by saying that looking at Ex. 12, the grey banded capsule of the defendant, in relation to Ex. 15, the grey banded capsule of the plaintiff, and Ex. 14, the green banded capsule of the defendant, in relation to Ex. 18, the green banded capsule of the plaintiff, and bearing in mind the definition of a confusing trade mark, *supra,* one can see without any hesitation whatsoever that in both cases the capsulated coloured bands are not only confusing but practically identical.

I shall now consider first the question of validity of the plaintiff's registered trade marks for if it be found that these registrations are invalid, there can be no infringement thereof.

Section 18 of the *Trade Marks Act* sets down the cases when the registration of a trade mark is invalid:

18. (1) The registration of a trade mark is invalid if

(*a*) the trade mark was not registrable at the date of registration;

(*b*) the trade mark is not distinctive at the time proceedings bringing the validity of the registration into question are commenced; or

(*c*) the trade mark has been abandoned;

With respect to s. 18(1)(*a*), if the date of registration, such as in the present case, was at a time when the old Act, the *Unfair Competition Act,* 22-23 George V, c. 38, was in operation, then the question of registration must be examined by reference to the old Act.

As we are dealing here with design marks, it would appear that under the *Unfair Competition Act,* the question of distinctiveness at the time of registration was not a ground of objection to registration. Indeed, if a design mark applied for under the provisions of the *Unfair Competition Act* did not offend under s-ss. 27(*a*), (*b*), (*c*) of the Act, then it was registered. These subsections state that a design mark may be registered if (*a*) it is not identical with or similar to any design marks already registered; (*b*) is not such as to be likely to mislead dealers or users of the wares as to the character or quality of the wares; (*c*) by reason of one of its principal characteristics being a representation of something which obviously suggests a word mark already registered for use in connection with similar wares, it is likely that such word mark or some word resembling the same would be used to define or describe the wares in connection with which the design mark is used. The plaintiff's design marks fall in neither of these cases.

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On the other hand, however, s. 18(1)(*b*) "distinctiveness" would be covered by the new Act, the *Trade Marks Act*, 1-2 Elizabeth II, c. 49, as at the time the proceedings bringing the validity of the registration into question were commenced, (i.e. the counterclaim of the defendant was filed on March 17, 1960), this new Act was in operation and we are not dealing here with a trade mark consisting of the name of an individual or of a geographical or of a descriptive trade mark.

I may add here that the new Act has changed considerably the concept of distinctiveness as applied to trade marks that do not consist of the name of an individual or of a geographical or of a descriptive trade mark. Indeed, under the new Act the question of distinctiveness is not to be examined, as we have seen, as of the date of registration but at the time proceedings bringing the validity of registration into question are commenced and the trade mark may have acquired distinctiveness between the period of registration and the taking of the proceedings. The matter of distinctiveness here must, therefore, be examined under the new law and particularly in relation to the definitions of "distinctive" and " trade mark" in this Act which read as follows:

> 2. . . .
>
> (*f*) "distinctive" in relation to a trade mark means a trade mark that actually distinguishes the wares or services in association with which it is used by its owner from the wares or services of others or is adapted so to distinguish them;
>
> * * *
>
> (*t*) "trade mark" means
>
> (i) a mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others.

The new Act has eliminated the words "adapted to distinguish" from the definition of a trade mark and has, therefore, done away with the necessity which existed under the *Unfair Competition Act* of inquiring into the innate character of a mark, leaving now the matter only of distinctiveness to be determined whether it has that innate character of a mark or not.

The defendant's first attack on the validity of the plaintiff's trade marks is that they are merely distinguishing guises incapable of constituting a trade mark; that capsules which have an existence independent of any particular pharmaceutical product were patented in France in 1834 and 1848 and that they are therefore now in the public domain. A capsule, according to the defendant, is nothing more than a package for pharmaceutical preparations and the adoption by the plaintiff on such a package of colour alone is not sufficient to constitute a trade mark and the case of *Hanson's Trade Mark*[1] is referred to where Kay J. in refusing a trade mark said at p. 132:

> You may register a mark which is otherwise distinctive in colour and that gives you the right to use it in any colour you like; but you cannot register a mark of which the only distinction is the use of a colour.

And on p. 133 he adds:

> . . . the distinctive device must be something which is distinctive independently of the colour.

In the *Henry K. Wampole & Co. Limited v. Hervay Chemical Co. of Canada, Ltd.*[2] Audette J. at p. 80 stated:

> The trend of the law is strongly towards the proposition that in ordinary circumstances the adoption of packages of peculiar form or colour alone, unaccompanied by any distinguishing symbol, letter, sign or seal, is not sufficient to constitute a trade mark.

And at p. 81 he queries:

> Can a wrapping be made the subject of a trade mark by only being coloured, without any other distinguishing features?

A distinguishing guise, under the *Unfair Competition Act*, s. 2(*d*), "is a mode of shaping, moulding, wrapping or packing wares entering into trade or commerce which by reason only of the sensory impression thereby given and independently of any element of utility or convenience it may have is adapted to distinguish the wares so treated from other similar wares . . .". The defendant submits that this definition fits the trade marks of the plaintiff as they are modes of wrapping or packing and that the sensory impression of the trade marks are the various colours of the bands which happen to be also their sole features.

Now, whether the colour banded capsules of the plaintiff are distinguishing guises or not, these trade marks, if otherwise valid, would still be valid trade marks. Indeed, a mark on goods or on a package of goods makes no difference whatsoever, it could still be a trade mark even under the

[1] (1888) 5 R.P.C. 130.
[2] [1929] Ex. C.R. 78.

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Unfair Competition Act as according to s. 2(*c*) of this Act "design mark" (and all of the trade marks of the plaintiff are registered as design marks) "includes any distinguishing guise capable of constituting a trade mark."

On the other hand I am of the opinion that the gelatin capsules here are not merely wrappers or containers or get-ups for pharmaceutical products but they may be also part and parcel of the pharmaceutical product as they are used in some cases, if not in most, not only to contain and wrap but also to insure that the medicine absorbed by the patient becomes effective in the stomach and not in the mouth or other intermediary parts. Indeed, in many cases the medicine is unpalatable and a patient can only swallow and absorb it in capsule form.

Finally, the plaintiff's trade marks are not in the capsule themselves but on the colour bands surrounding the middle of the capsules. It therefore follows that whether the capsules are a means of packaging or not, or even a get-up, we are in either case dealing with the placing of a mark, the coloured bands, on goods or wares, or on the package of goods or wares, which, according to the plaintiff, identifies and distinguishes those goods of the plaintiff from the goods of others.

Should the plaintiff's trade marks reside in colour alone, I believe there is no doubt that they could not be the proper subject matter of a trade mark. However, as I mentioned above, they are not only colour but they are in each and every case a coloured band or strip which, however unmeaning these bands may be in themselves, may come by use to be recognized in the trade as the marks of the goods or wares of the plaintiff. Authority for this may be found in the case of *Wrights Ropes Ltd. v. Broderick & Bascom Rope Co.*[1] where the trade mark consisted of a yellow strand in wire rope. The plaintiff petitioned to expunge the trade mark registration and the defendant counterclaimed for infringement. Maclean J. held the yellow strand to be a mark and in so doing found at p. 145:

> Assistance is to be had from the cases decided in England before there was any statutory definition of a trade mark. These cases would distinguish between colour as the whole subject of the trade mark—such as a coloured label—and colour applied to one particular feature or element in a manufactured article.

[1] [1931] Ex. C.R. 143.

He held the trade mark valid and enjoined its infringement.

As submitted by the plaintiff's counsel, one must indeed distinguish between colour as a trade mark and colour of a trade mark. We would have the latter in the present instance with the different coloured bands or strips. This is not a case where colour is the whole subject of the trade mark such as the pink coloured label in the *Wampole* case referred to above.

Nor can the *Hanson* case cited above apply to the present instance as under the *British Trade Marks Act* of 1875, colour could not be registered. That is not, as we have seen, the situation in Canada and has not been the situation in England since 1905.

The defendant's second point is that the plaintiff's trade marks perform functions and are, therefore, incapable of constituting valid trade marks.

Authority for this proposition can be found in the case of *Imperial Tobacco Co. of Canada, Limited v. The Registrar of Trade Marks*[1] which is really a converse situation to the present one. In the *Imperial Tobacco* case the Registrar of Trade Marks refused to register an alleged trade mark consisting of a sheet of cellophane to be used as an outer wrapper with a red coloured band of the same material extending around it. One of the ends of the red coloured band was outside the wrapper so that it could be grasped and used to tear it away, thus permitting the easy removal of the cellophane wrapper. This trade mark was refused by the Registrar on the ground that the coloured band performed the function of indicating where the tear strip was located.

An appeal to the then President of the Exchequer Court was dismissed, Maclean J. stating at p. 145:

> In my opinion any combination of elements which are primarily designed to perform a function, here, a transparent wrapper, which is moisture proof, and a band to open the wrapper is not fit subject matter for a trade mark, and if permitted would lead to grave abuses.

The functionality in the above case as well as in the one we are dealing with here are indeed very similar. In the *Imperial Tobacco* case the outer wrapper is composed of cellophane; in this case the outer wrapper is a gelatin cap-

[1] [1939] Ex. C.R. 141.

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sule; in the *Imperial Tobacco* case the coloured cellophane band is used to open the outer wrapper; in this case the coloured gelatin band is used to close the gelatin capsule.

There is no question but that the gelatin band performs the function of sealing as admitted by the plaintiff's Canadian Manager, Mr. Speed, at p. 212 of the transcript:

> Q. 4 Forget for the moment any advantages or disadvantages of banding and forget for the moment colouring. Can we agree on one thing and that what a gelatin band does when it is put around a capsule is that it performs the function of sealing the capsule. Is that correct?
>
> A. It performs the function of sealing the cap to the body.

And at p. 213:

> Q. 1 And in view of the fact that the band is also composed of gelatin it sort of combines with the gelatin cap and body and makes it one whole capsule without any joints in it. Is that correct?
>
> A. Yes.

This indeed is as far as the plaintiff's witness would go with respect to the functionality of the banded capsules. On this subject the plaintiff took the position that the sealing of a capsule is an operation essentially without practical significance and could, moreover, be achieved substantially as effectively with a colourless band as with a coloured band and that its trade mark registrations in no way prevent any use which the defendant may wish to make of colourless bands on its capsules which appears to be the only manner the plaintiff will allow the defendant to seal band its capsules. The plaintiff indeed contended that it earlier used the sealing idea of its capsules as a sales pitch but dropped it when it found out that it was not "holding water" because the doctors and pharmacists were perfectly well aware that all sorts of people were putting out capsules that were unbanded.

The plaintiff stated that it first used a coloured band in Canada in 1932 and that nobody else appears to have used one until late 1959 adding that the fact that there has apparently never been any use by anyone of a colourless band around a capsule, though a colourless band would seal just as effectively as a coloured one, carries in itself a very strong suggestion that the alleged sealing functions of a coloured band are wholly without practical significance.

On the other hand, the defendant, through its president, Mr. Winters, and a Nyscoseal Inc. advertisement in an issue of the Drug Trade News (Ex. "K") published in New York, established that the capsule colour banding process has many advantages in addition to sealing such as preventing separation of capsule halves, eliminating seepage of powder and loss of contents, preventing unpleasant odours due to leakage, resulting in longer shelf life (keeps product looking factory fresh), facilitating identification by different colour combinations, improving appearance of capsule and preventing pilfering.

Mr. Winters also added, and this is important, that the use of a coloured band would be of considerable assistance in detecting a break in the bands which, with a colourless band, would remain undetected, as he stated at p. 124 of the transcript:

> A. Yes; I think there is one more important fact and that is with coloured band, My Lord, one could tell on inspection quite easily and readily if a fracture was present on the band.

Now in cross-examination Mr. Winters, although maintaining that the above advantages existed, admitted that they are not of paramount importance and I may add here that whether they be of paramount or of great practical importance or not would not, in my opinion, make these advantages less functional if they are so, the question being merely a matter of degree and should I have any hesitancy, which I have not, in deciding that they are functional my conviction in this respect would be strengthened by Ex. "H", p. 96, which is an advertisement of the plaintiff to which I have already referred and which contains a statement to the effect that "Kapseals" (the colour banded capsules of the plaintiff), "represents an important development in pharmaceutical protection of medicinal substances" as well as by Ex. I which is an American patent owned by the plaintiff, bearing number 1861047, dated May 31, 1932, and is related to sealed capsules which contains the following:

> The present invention relates to capsules for containing measured quantities of materials such as drugs or other medicaments, including liquids, such as oils.
>
> Heretofore, in enclosing dry materials in the ordinary two-part capsule, there has always been present the possibility and often the probability that the two parts, i e., *the cap and body, may become disengaged and the contents lost.* Also, the many attempts to retain liquid material in the ordinary two-part capsule have been without success due to several causes. *If the liquid be placed in the capsule without sealing in some manner, the liquid may creep between the two parts and be lost.*

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Many attempts at sealing have been resorted to, one such being the moistening of the body before applying the cap. This method is unsuccessful due to the shrinkage of the body away from the cap.

Among the objects of the present invention is to obviate all of these difficulties and provide the ordinary hardened gelatin capsule with *an effective seal and thereby prevent losses of contents whether liquid or solid.*

Another object is to provide *a means of identification* of the sealed in contents of such capsules.

And further down:

It is also proposed to use *different colours of sealing material* so as to furnish a visible indication of the identity or general character of the contents and this is believed to be a novel feature in itself.

This indeed is a patent which the plaintiff used for a period of seventeen years, from the year 1932 to the year 1949, date upon which the present trade marks were registered in Canada. It indeed has banded its wares in accordance with this patent since 1932 and also because of that I find it impossible to set aside the admitted functional advantages of the colour banded sealing process contained in the patent and decide now that it is not functional notwithstanding plaintiff's assertion that whatever functions the colour sealed bands may have, they are without any practical significance. It appears from the evidence that many drugs are imported into Canada mostly from the United States and the reason why, as pointed out by the plaintiff, no one used banded capsules in Canada until 1959 may well be that up until 1949 the importation of such banded capsules from the United States could be done through the plaintiff only under its patent and as soon as the patent expired in the United States, i.e. 1949, the ten trade mark registrations, as well as its "Kapseals" trade mark registration, were obtained in Canada.

Now a functional part *per se* is open to the world apart from the protection of the patent law. A trader can, however, obtain a valid trade mark on a distinctive form of the functional part or parts such as in the *Haig* case providing that by so doing he does not hold a monopoly of all the forms of the functional part or parts. cf. *John Haig Co. Limited v. Forth Blending Co. Ltd.*[1] and *Edge & Son Ltd. v. William Niccolls & Son Ltd.*[2]

We have seen that the colour banded capsules of the plaintiff have many utilitarian functions and that even the

[1] (1935) 70 R P C. 259

[2] [1911] 1 Ch 5; [1911] A C 693; (1911) 28 R.P.C. 53.

presence of colour on the bands is useful in enabling the easy detection of a break on the band. The plaintiff has registered as trade marks ten different coloured bands. These ten colours more than cover the spectrum and the fact that the plaintiff in some colours, such as in association with the product digitalis, is using various shades of green for instance, may give it a monopoly on the colour of the bands in not only the ten colours mentioned in the registration but also in a multitude of different hues and shades of the ten colours. Although extensive, this right to colour its bands in such a fashion would not prevent someone else from colouring its capsules elsewhere than on the band encircling the middle of the capsule nor would it prevent the use of contrasting colours on the body of the capsules. In this sense I would be reluctant to say that the plaintiff would have by its trade marks monopolized colour, which disposes of the defendant's fourth attack on the validity of the trade marks.

However, this extensive coverage of the various colours and shades together with the utilitarian use of the coloured bands around the middle of the capsules (particularly the sealing and the use of coloured bands or strips to detect breakage of the bands) which, as we have seen, happens to be the best place the bands can be placed in order to seal both halves, brings me to the conclusion that the plaintiff by using its trade marks as it does, because it could have merely painted a strip or a band around the capsule, undoubtedly monopolizes, with the exception however of their utility as simple containers, all the forms of the functional parts of the colour banded sealed capsules and because of this I cannot but find that the plaintiff's trade marks are invalid.

Having found the plaintiff's trade marks invalid under s. 18(1)(*a*) of the *Trade Marks Act* there is, therefore, no need to deal with the matter of distinctiveness under s. 18(1)(*b*) at this stage.

This brings me now to the defendant's third point that the plaintiff's trade marks are really the subject matter of a United States expired patent and cannot be perpetuated by being disguised as a trade mark.

We have seen that the plaintiff at one time held a United States patent on sealed capsules, the relevant sections of which were cited above and that from 1932, the year when

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the patent was issued until September 19, 1950, when the Canadian trade marks were applied for, the plaintiff used coloured bands on its capsules. The defendant suggests that this long delay between the years 1932 and 1949 occurred during the period in which the plaintiff had the benefit of the protection of the United States patent. However, no corresponding Canadian patent was issued, as an application even for the holder of the American patent could only be made under s. 8(2) of the Canadian *Patent Act*, R.S.C. 1927, c. 150, within two years from the issue of the United States patent and no such application was ever made. The defendant urges that the protection period under the *Patent Act* is seventeen years and as the plaintiff waited exactly seventeen years from the date of the issue of the United States patent to apply for registration of its ten trade marks, he suggests that this is more than a curious coincidence and that upon the expiry of the patent protection period, the plaintiff sought to devise a scheme whereby it could perpetuate its monopoly of the patent and did so by applying for the registration of its ten marks, as a trade mark. A trade mark, under our law, if regularly renewed, may become perpetuated whereas, of course, as mentioned above, a patent is valid only for seventeen years.

He further submits that having elected in the United States to treat its colour banded capsules as being the proper subject matter of a patent, the plaintiff cannot now say that this is incorrect and that the colour band is properly now the subject matter of a trade mark, to the extent that, according to the defendant, the plainiff would be estopped from now denying that its process of sealing a capsule with a coloured band is properly the subject matter of a patent.

On this point the defendant cited the case of *Canadian Shredded Wheat Co. v. Kellogg Co. et al.*[1] in which the plaintiff sued the defendant for an injunction to restrain an alleged infringement of registered trade marks, passing off of goods and damages. The trial judge dismissed the action, the Court of Appeal for Ontario dismissed the plaintiff's appeal and the Judicial Committee of the Privy Council recommended the dismissal of the plaintiff's further appeal.

The shredded biscuit involved in this case was produced by an apparatus protected by a Canadian patent which

[1] [1936] O R. 281 and 613 (C.A.); [1938] 2 D L R. 145 (P.C).

expired in 1919. For some years thereafter the plaintiff continued in fact to enjoy the monopoly in Canada as no rival manufacturers appeared upon the scene. In 1928 the words "shredded wheat" were registered as the plaintiff's trade mark to be applied to the sale of biscuits and crackers and in 1929 the same words were registered with respect to cereal foods.

Lord Russell at p. 150 stated:

> . . . There can be little doubt that had the plaintiff, when the patent expired, attempted to register the words "Shredded Wheat" as a trade mark for the sale of biscuits and crackers, the application would have met with short shrift. It would be attempting by registering the name of the patented product to prolong the patent monopoly; and this may not be done.

And Lord Russell goes on to approve the dictum of Lindley, L.J. in *Re Palmer's Trade Mark*[1]:

> I do not mean to say that a manufacturer of a patented article cannot have a trade-mark not descriptive of the patented article so as to be entitled to the exclusive use of that mark after the patent has expired; for instance, if he impressed on the patented articles a griffin, or some other device; but if his only trade-mark is a word or set of words descriptive of the patented article of which he is the only maker, it appears to me to be impossible for him ever to make out as a matter of fact that this mark denotes him as the maker as distinguished from other makers.

Had the plaintiff held a Canadian patent in the present instance, I would have been quite prepared, bearing in mind the fact that the plaintiff in all of its trade marks used the colour banded sealed capsules, to consider that by registering its trade marks it was attempting to perpetuate its patent. However, we are concerned here with an American patent and as patents have no extraterritorial rights the American patent rights here are irrelevant to any question regarding Canadian trade mark rights.

Consequently, the plaintiff's rights in Canada in relation to coloured bands would reside only in its use of its bands for many years to distinguish (if they so distinguish) its pharmaceutical preparations from those of the others and its subsequent registration of such bands as trade marks on the basis of this use.

Although my finding that the plaintiff's trade marks are invalid because of their monopolistic functional characteristics does away with the possibility of infringement there

[1] (1883) 24 Ch. D. 504, 521.

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still remains the passing off action with which I will now deal.

The claim for passing off is made under s. 7(*b*) of the *Trade Marks Act*, 1953, which provides as follows:

> 7. No person shall
>
> (*a*) . . .
>
> (*b*) direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business and the wares, services or business of another.

The onus on the plaintiff in this action is different from that required under the *Unfair Competition Act*, 1932, and similar to the onus he would have in an infringement action. Indeed, he must prove that the defendant's course of conduct caused or was likely to cause confusion.

Bearing in mind the similarity of the grey and green banded capsules of the defendant and those of the plaintiff, there is no question that this onus has been successfully met here.

Lord Justice James in the case of *Singer v. Loog*[1] explained the action of passing off as follows:

> . . . No man is entitled to represent his goods as being the goods of another man and no man is permitted to use any mark, sign or symbol, device or other means, whereby, without making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate consumer.

Plaintiff's colour banded capsules, as we have seen, reach the ultimate consumer whenever supplied on prescription with no identification other than the coloured bands. It would, therefore, be possible for a dishonest pharmacist, for instance, to pass off defendant's capsules for those of plaintiff providing, however, as we shall now see, that these colour banded capsules do in fact distinguish plaintiff's capsules from those of others or indicate their common origin.

In *J. B. Williams Co. v. H. Brownley & Co.*[2] Cozens-Hardy M.R. said:

> What is it necessary for a trader who is plaintiff in a passing off action to establish? It seems to me that in the first place, he must, in order to succeed, establish that he has selected a peculiar—a novel—design as a

[1] (1879) 18 Ch. D. 395 at 412. [2] (1909) 26 R.P.C. 765 at 771.

distinguishing feature of his goods and that his goods are known in the market, and have acquired a reputation in the market by reason of that distinguishing feature, and that unless he establishes that, the very foundation of his case fails.

What the plaintiff must, therefore, do to establish a cause of action is to prove two things: first, that the mark in question, when used in the market, is understood by the public as meaning wares manufactured or sold by it; and secondly, that by what the defendant does he passed off his wares or services as and for those of the plaintiff to his injury.

The only question, therefore, that remains to be decided is whether the coloured bands of the plaintiff have by use become distinctive and are recognized in the trade as identifying its goods or wares or as identifying the origin of such goods or wares. The coloured bands *per se* are without distinctive character but it may be that they have been used by the plaintiff for so many years and over a substantial part of Canada so that they have come, in fact, to distinguish their wares from all others of the same kind. The acquisition of distinctiveness in this sense is usually expressed by saying that the marks have acquired a secondary meaning.

Now to acquire a secondary meaning in this sense means such marks must have acquired it over a substantial area and must mean to purchasers that the wares sold in association with the trade marks are those of the plaintiff and nobody else or indicate a common origin.

This is a question of fact to be decided on the evidence and as stated by Warrington J. in *H. E. Randall Ltd. v. E. Bradley & Son*[1] the onus of proving the acquisition of secondary meaning which is on the user of the trade mark, is a heavy one when the mark in question is a descriptive word. I would think that a similar position could be taken with regard to a trade mark involving numerals or colours, which are in the public domain. Now to satisfy the test of distinctiveness it is not sufficient that a trade mark be merely distinctive in channels of trade as, for example, to the manufacturer or wholesaler, but it must be to all who are probable purchasers including the ultimate consumer.

In *Wood v. Butler*[2] "it ought", said Lopes L.J. "to be a special distinctive mark not only recognisable by the trade

[1] (1907) 24 R.P.C. 657 at 663. [2] (1886) 3 R.P.C. 81.

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but also recognisable by the consumer and connecting the goods with the manufacturer."

Now looking at all the plaintiff's coloured capsules, and particularly the grey and green banded ones, which are alone involved in the passing off action, and at the capsules produced as exhibits from other pharmaceutical companies, I find that all these companies use one colour or another either with coloured bands or bandless with coloured bodies and it has not been proven to my satisfaction that to the ultimate consumer the plaintiff's coloured bands would indicate that they originated from the plaintiff or that they had a common origin.

Defendant's counsel produced a vial with eleven banded capsules in it and asked the plaintiff's manager, Mr. Speed, to identify the companies producing each of them. Mr. Speed was able to identify two of them only and only because they both bore inscriptions, one having the monogram "B.C." (Bell & Craig) on it and the other the words "Parke Davis".

The plaintiff's advertisements previous to the year 1959, which of course was immediately before the taking of the present action, did not mention nor describe any of its bands whether yellow, blue, black, brown, pink, white or grey.

In no case did the plaintiff's salesmen sell the capsules using the description of colour banded features as they are not taught to sell that way. They always used, and still use, the plaintiff's word marks in each and every case as well as plaintiff's trade mark "Kapseals" which, of course, as we have seen applies to all of its colour banded capsules. The same applies to its advertisements, as admitted by Mr. Speed, at p. 100 of the transcript:

> Q. 6 And yesterday when you were looking through all the copies of your own Therapeutic Notes published by your own company instead of depicting or mentioning which colour band is around each capsule in each case your company used the word "Kapseals". Isn't that correct?
>
> A. I think you are right.

And at p. 101:

> Q. 3 Let us look now at the April 1959 volume at page 210. There is an advertisement dealing with the trade product Carbital.
>
> A. Yes.

Q. 4 Now that is one of the products sold by your firm in a capsule with a coloured band about it. Is that right?
A. Yes.
Q 5 Do you know which colour it is?
A. Blue.
Q 6 On this page ad it doesn't refer to the blue band at all but only to the word Kapseals. Isn't that correct?
A. Yes

* * *

Q 1 And on page 10 of the April 1959 volume the capsule itself isn't even depicted.
A. No

The plaintiff's labels, although containing certain inscriptions required under the *Food and Drugs Act and Regulations* similar to what appears on the defendant's labels, are however of a different colour and all carry the plaintiff's other trade names such as "Chloromycetin" and "Kapseals" and the containers with their labels can in no way be confused.

After counsel for the plaintiff had showed the defendant's president, Mr. Winters, a bottle of Coca-Cola, which the witness recognized as a bottle of Coca-Cola merely by looking at its shape, Fournier J. who was then presiding, asked him the following question at page 193:

Q 10 What I would like to know is if the grey band on these capsules was used in such a way that people looking at that capsule will say that is a Parke Davis product.
A. Not without looking at the label.

I am also of the opinion that the evidence submitted in the present instance does not establish that by merely looking at the grey band of the plaintiff's capsule one would say it is a Parke Davis product nor is the evidence sufficient to establish that it would indicate common origin.

I am also of the opinion that their lack of distinctiveness was such that plaintiff produced on the Canadian market grey banded capsules with the name Parke Davis inscribed thereon. Exhibit "P", which is a vial, contains a number of grey banded capsules with Parke Davis inscribed thereon and they were purchased on January 24, 1961, during the trial of the present case, from Starkman Chemists, in Toronto. Mr. Speed, the plaintiff's Canadian manager had previously denied that his company sold grey banded capsules containing chloramphenicol in Canada with the name

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Parke Davis on them. When told that the grey banded capsules with the plaintiff's name on them had been bought in Toronto a few days before, he admitted that they could be from a lot distributed in Canada from its Brockville laboratories. This would tend to indicate that the plaintiff was able to make known the origin of its wares only when it showed its name on the capsule as many other pharmaceutical companies do.

Now in addition to this, the plaintiff's capsules are banded in thirty-four cases out of seventy-one which, of course, indicates that less than one-half of its capsules are colour banded. In short, the evidence reveals that in the pharmaceutical products in issue in this case, no one relies upon the colour of capsules either from the physician's point of view to prescribe them or the pharmacist's point of view to purchase them or even from the manufacturer's point of view. As for the ultimate consumer, the colour band around the capsules is several times removed from him. In most of the products, such as Ex. 17, which is a chloramphenicol product, between the capsule and the patient there is a carton, and then a bottle and on the bottle, a label containing the plaintiff's registered trade marks as well as its trade mark "Kapseals".

In the case of chloramphenicol there also is a physician's prescription as it is a prescription item and although digitalis does not have to be prescribed under the Regulations, the evidence is to the effect that it is however always prescribed, so that in both cases involved in the passing off action there is, in addition to the labels, the bottle and the other trade words of the plaintiff, the presence of a doctor. May I here repeat that I cannot, in addition to the above, and in view of the multi-coloured capsules produced as exhibits and put out by the plaintiff as well as by several drug manufacturers in colour banded and unbanded capsules, see how anyone can by merely looking at the plaintiff's colour banded capsules say that they identify the plaintiff's wares and distinguish them from all others or even that they indicate common origin.

I have reached the conclusion that the plaintiff has not successfully discharged the burden of establishing that these trade marks distinguish its wares nor indicate their common origin. I am also of the opinion that the plaintiff has not established that the manner in which its goods or wares

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were done up has become associated in the mind of the consumer or purchaser with its goods or wares and the evidence does not show that these marks have been relied upon by the pharmacists, physicians nor the public who consumes its goods as distinguishing them from all others.

I have found that all of the plaintiff's ten registered trade marks as used by the plaintiff in its trade and as illustrated by the plaintiff's products produced as exhibits are not, properly speaking, trade marks within the contemplation of the Statute and they were not such at the time of registration.

They were, therefore, registered without sufficient cause and should be expunged.

I also find that there is no legal basis for an action based on passing off and, consequently, any injunction restraining the defendant shall be dissolved and the plaintiff's action will, therefore, be dismissed with costs.

Judgment accordingly.

1962 Sept. 17
1963 Dec. 23

BETWEEN:

MOIRS LIMITED .... APPELLANT;

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE AND NATIONAL COUNCIL OF THE BAKING INDUSTRY RESPONDENTS.

Revenue—Sales tax—The Excise Tax Act, R S C. 1952, c. 100, as amended, ss. 29(1)(e)(v), 30 and 32(1); Schedule III to said Act—Jurisdiction of Court on appeal from the Tariff Board—Goods claimed to be exempt from tax—Meaning of onus on taxpayer seeking exemption—Foodstuffs—"Bakers' cakes and pies, including biscuits, cookies or other similar articles"—Meaning of "similar", "other similar articles", "bar goods", "confectionery", "candy bars", "candy or a substitute for candy".

The *Excise Tax Act,* R S C 1952, c 100, s. 30, imposes a sales tax on goods produced or manufactured in Canada subject to an exemption therefrom as provided for by s 32(1) in favour of the articles listed in Schedule III to the said Act, which includes under the heading "Foodstuffs" articles described as "Bakers' cakes and pies including biscuits, cookies or other similar articles".

The appellant, which manufactures chocolate and other candies, carries on its candy and confectionery business on a national scale. It also markets bread and some other bakery products on a local basis but does not manufacture biscuits However, Marvens Ltd, a biscuit manufacturer supplied the appellant in bulk with a graham sandwich which consisted of two graham biscuits with a malted cream filling, made to the appellant's specification. The appellant coated the graham sandwich with chocolate using the same equipment and kind of chocolate as it used to make its candy products. The chocolate coating constituted 30% of the weight of the finished product Appellant then packaged the graham sandwiches, two in a package, and sold them to the trade for resale to the public No article corresponding to the appellant's Graham Sandwich is manufactured by any other firm in Canada. The article in question appears to have been known in the trade as a graham sandwich and was sometimes referred to as a biscuit bar. It was marketed by the same people and in the same manner as appellant's chocolate bars and other confectionery, and it was advertised as part of its candy bar line.

The issue before the Tariff Board was whether or not the appellant's graham sandwich was a biscuit or a "similar article" within the meaning of Schedule III All three members of the Board agreed that the appellant had failed to establish that the said graham sandwich was a biscuit and two of the members thereof further held that appellant had failed to establish that the said graham sandwich fell within the meaning of the words "other similar articles" and dismissed the appeal. The third member of the Board held that the said graham sandwich was a biscuit bar and was similar to a biscuit because it contained a baked

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biscuit that accounted for the larger part of its weight and he would have allowed the appeal.

The question before the Court was limited to determining whether the Board erred in law in finding that the goods in question were subject to sales tax under s 30 of the *Excise Tax Act*. The three submissions made by the appellant were—That the majority of the Board misdirected themselves through a misuse of the word "onus" and completely misunderstood the difference between the significance of the word when used in connection with the construction of a statute and its significance when employed in relation to evidence; that there was no evidence to support the finding of all three Board members that the graham sandwich was not a biscuit and the same was true of the majority finding that it was not a similar article to a biscuit and therefore not exempt from tax; and that in the alternative the Court should accept the finding of the dissenting member that the graham sandwich was a similar article to a biscuit and allow the appeal because the majority of the Board expressly declined to make a finding upon or deal with the meaning of the words "other similar articles".

Held: That the extent to which the character of the Marvens Ltd product was altered through the addition by the appellant of 30% by weight of chocolate was the pivotal fact which all members of the Board rightly considered in arriving at their conclusion.

2. That it was plain that the majority of the Board had in mind when making use of the word "onus" the strictness of statutory interpretation and the disadvantage which a taxpayer suffers when he is forced to rely on an exemption as compared to when he is free to invoke a taxing provision. There is long standing authority for describing this disadvantage as an onus. By their repeated reference to onus, the majority did not misdirect themselves by misunderstanding the significance of that word. Even if the language used indicated that the majority had a misconception as to the law, this Court should not assume that it was responsible for the determination reached unless there was no evidence to support their finding, or that nobody, if properly instructed in the law, could have reached such conclusion. The majority of the Board did not act without any evidence in determining that the Moirs graham sandwich was neither a biscuit nor an article similar to a biscuit within the meaning of the Act, nor could it be said that a person properly instructed in the law could not have reached such a conclusion.

3. That the fact that one article in a combination of articles may exceed the others in weight was insufficient *per se* to establish that the resulting product was the same in nature as the heaviest one; and furthermore there was no justification in law or in fact for saying that the nature of an edible article was to be classified according to the weight of its main ingredient

4. That in determining the nature and, *a fortiori,* the similarity of one or more edible articles, their effect on the senses could well be regarded as one of the factors meriting consideration. Judging by the Graham Sandwich filed as an exhibit, it seemed almost self-evident that the appearance, smell and taste of the original biscuit underwent a striking change; and the appellant has failed to establish that the Marvens Ltd. product remained a biscuit and that it did not become a chocolate or confectionery bar, containing a biscuit and malt cream filling.

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5. That as to whether the article in issue was of a kind or class similar to a biscuit, it was impossible to determine any satisfactory line of demarcation as to the degree of likeness necessary in order to constitute similarity. The question was essentially one of fact and there was some evidence to justify the majority finding that the article in issue was not an article similar to a biscuit.

6. That the evidence supported the view that the Moirs Graham Sandwich was a confectionery that might be classed as candy or a substitute for candy and that it was therefore a taxable article under Sec. 29(1)(*e*)(*v*) of the *Excise Tax Act.*

7. That the legislature did not intend to attribute to the words "other similar articles" in Schedule III to the said Act an interpretation so wide as to negative the effect of said Sec. 29(1)(*e*)(*v*). The majority of the Board made a finding with respect to the meaning and application of the words "other similar articles".

8. That since the ordinary meaning of the word "similar" was being considered rather than a question of legal interpretation, a mixed question of fact and law arose rather than a pure question of law. The majority did not "err as a matter of law" in finding that the Moirs Graham Sandwich was subject to sales tax.

APPEAL from a decision of the Tariff Board.

The appeal was heard before the Honourable Mr. Justice Kearney at Ottawa.

K. E. Eaton for appellant.

N. A. Chalmers for respondent, Deputy Minister of National Revenue for Customs and Excise.

No one for respondent National Council of the Baking Industry.

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

KEARNEY J. now (December 23, 1963) delivered the following judgment:

This appeal is from the declaration of the Tariff Board dated February 2, 1962, pursuant to leave to appeal granted by Dumoulin J. on February 27, 1962 in virtue of s. 58(1) of the *Excise Tax Act,* R.S.C. 1952, c. 100, and amendments, including S. of C. 1960, c. 30, upon the following question of law:

> Did the Tariff Board err as a matter of law in holding that an article known as "Moirs Graham Sandwich" is not exempt from sales tax under section 32 and Schedule III of the *Excise Tax Act* as a biscuit or other similar article?

The relevant portions of the aforesaid provisions of the Act read as follows:

30. (1) There shall be imposed, levied and collected a consumption or sales tax of * eight per cent on the sale price of all goods

(a) produced or manufactured in Canada

(i) payable, in any case other than a case mentioned in subparagraph (ii), by the producer or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier,

* * *

32. (1) The tax imposed by section 30 does not apply to the sale or importation of the articles hereunder mentioned in Schedule III. 1931, c. 54, s. 15; 1945, c. 30, s. 6.

SCHEDULE III

(Repealed and New. 1960, c. 30, s. 2)

FOODSTUFFS

* * *

Bakers' cakes and pies including biscuits, cookies or other similar articles;

This appeal for a declaration of exemption from tax was brought by the appellant company, located at Halifax, N.S., with respect to the company's product, which it described as "Moirs Graham Sandwich—With melted cream filling."

The only witnesses heard were Mr. Kenneth F. Gaby, Superintendent of Marvens Ltd. at Moncton, N.B., and Mr. Jacques Desrosiers, General Sales Manager of Moirs Ltd., in Halifax, both of whom were called on behalf of the appellant.

I should perhaps here mention that counsel for the appellant declared that the National Council of the Baking Industry was joined as a respondent herein only because its name was entered as an interested party at the proceeding before the Tariff Board. The parties agreed that the said Council having declared that it had no interest in the present proceedings and having filed no appearance, no further reference to it need be made.

The exhibits consisted of the following:

A copy of a letter (Ex. A-1), written by the appellant to the Deputy Minister of National Revenue, requesting a refund of sales taxes, and the appellant's letter of refusal

* In addition to the sales tax, there is a 3 per cent Old Age Security tax collected with it, making a combined tax of 11 per cent. See R.S.C. 1952, c. 200, s. 10; 1959, c. 14, s. 1(1).

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(Ex. A-2). Further correspondence, which apparently was numbered Exhibits A-3 to A-7 inclusive, had been placed before the Board but, by consent, were withdrawn.

Two product samples of the Moirs Graham Sandwich which were filed in Court retained the same numbering as they had before the Board; a wooden sample of the said graham sandwich was produced as Exhibit A-8 and another general sample thereof, uncovered and sliced, was produced as Exhibit 11. Imported samples of competing articles, made, *inter alia*, by Rowntrees and Joseph Terry and Sons, were produced as Exhibits A-9 and A-10.

The appellant company, a well and favourably known manufacturer of chocolate and other candies, carries on its candy or confectionery business on a national scale. It also markets, on a local basis, bread and some bakery products, such as Christmas or fruit cakes, which have a long shelf life. It does not manufacture biscuits. A company known as Marvens Ltd., of Moncton, N.B., manufactures and sells under its own name a full line of plain and fancy biscuits, including a chocolate mallow and potato chips, but it is said that they do not manufacture confectionery. Marvens Ltd. manufactured a graham sandwich, consisting of the two graham biscuits and malted cream filling, to the specifications of Moirs Ltd., packaged them in bulk and shipped the product to Moirs Ltd. at Halifax. Moirs enrobed the graham sandwich in the same chocolate-enrobing-machine used by them for many of their candy products, and using the same chocolate formula. The evidence indicates that, after enrobement, 30 per cent of the article, by weight, was composed of chocolate. Later, Moirs packaged the chocolate-coated graham sandwiches, placing two of them in a single wrapper, for sale to the trade, which, in turn, sold them to the public at 10¢ a package. No article corresponding to the Moirs Graham Sandwich in issue is manufactured by any other firm in Canada.

There is evidence that the Moirs Graham Sandwich is known in the trade as a graham sandwich; that it was sometimes referred to as a biscuit bar; that it was marketed by the same people and in the same manner as the appellant's various types of chocolate bars and other confectionery; and that it was advertised by the appellant as part of its candy bar line. The enrobing process and the manner in which the graham sandwich was packaged and sold was also dealt with by the appellant's two witnesses.

There is no dispute as to the amount of the tax claimed and counsel are in agreement that the Board properly stated the issues which were before it, as appears by paragraph 2 of the declaration:

> By their pleadings the applicant and the Department narrowed the points in issue to a determination of the question of whether the goods in issue are or are not biscuits or, as submitted by the applicant in the alternative, other similar articles within the meaning of the following words of Schedule III of the Excise Tax Act.
>
> > Bakers' cakes and pies including biscuits, cookies or other similar articles;

Counsel for the parties also recognized that the issues before me are narrower than those before the Board and that the jurisdiction of this Court is limited to determining whether the Board committed an error in law in finding that the goods in question are subject to and not exempt from sales tax under s. 30 of the *Excise Tax Act*.

While all three members were in agreement that the appellant had failed to establish that the Moirs Graham Sandwich was a biscuit within the meaning of the Act, as appears by the declaration, nevertheless the finding of the Board resulted in a majority decision. Two of its members, however, declared that, in their opinion, the weight of the evidence adduced on behalf of the applicant tends to show that the Moirs graham sandwiches were bar goods or confectionery, rather than biscuits or other similar articles, and dismissed the appeal. The dissenting member stated:

> My opinion is that the weight of evidence establishes that the Moirs Graham Sandwich is packaged in such a way that it is a biscuit bar rather than a biscuit, and it is generally sold as a biscuit bar. While in my opinion the applicant failed to establish that the Moirs Graham Sandwich is without question a biscuit, on the other hand the evidence regarding packaging and merchandising of the article failed to establish that the article is by its nature a chocolate bar or candy or something which would be outside the scope of Schedule III.

After observing that if the graham sandwich is a biscuit bar it remains to be decided whether it falls within the category of "other similar articles", the dissenting member, in the penultimate paragraph of his declaration, continued, in part, as follows:

> The Moirs Graham Sandwich is similar to a biscuit because it contains a baked biscuit that accounts for the larger part of its weight. . . .

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The dissenting member was accordingly in favour of maintaining the appeal.

In dealing with the unanimous finding of the Board in respect of the nature of the article in issue counsel for the appellant limited himself to simply declaring that he disagreed with the conclusions reached by the third member, who, later, dissented on the question of similarity but attacked the declaration of the other two members on the ground that they misdirected themselves and committed an error in law, because, as appears by their repeated reference to "onus", they completely misunderstood the difference between the significance of the word "onus" when used in connection with the construction of a statute and when employed in relation to evidence.

The appellant also contended that evidence was lacking to justify the finding by the three members of the Board that the Moirs Graham Sandwich, having lost its original character by reason of the addition of the chocolate to it, was no longer a biscuit and that *a fortiori* the same was true with respect to the majority finding that it was not a similar article to a biscuit and therefore not exempt from tax.

In the event of failing on the above-mentioned submissions, counsel for the appellant urged, as an alternative argument, that this Court should accept the dissenting member's declaration that the graham sandwich was a similar article to a biscuit and maintain the appeal because the majority expressly declined to make a finding upon or deal with the meaning of the words "other similar articles".

To revert to the first question of law, namely, "Did the majority misdirect itself through its alleged misuse of the word 'onus'?"—the first reference thereto appears in the fourth paragraph at page 1 of the majority declaration and reads as follows:

> The graham sandwich had been declared subject to the tax imposed by Section 30(1) of the *Excise Tax Act*. The onus rests upon the applicant to bring itself within the exemptions provided for by Section 32(1) of the said Act.

Counsel for the appellant conceded that little fault could be found with the above-mentioned reference to onus but stated that it was acceptable only as a general statement.

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The next reference to onus is found in paragraph 4 at page 2 of the declaration; leaving out non-essentials, it states:

Counsel for the applicant relied heavily on the judgment of Cartwright J. in *Universal Fur Dressers and Dyers Ltd. v. The Queen,* [1956] S.C.R. 632 in his submission that the applicant had discharged its onus. He argued by analogy that the applicant had established that the graham sandwich, as produced by Marven's, remained throughout a biscuit and, therefore, fell within the provisions of Schedule III.

Counsel for the appellant respectfully suggested that the above declaration indicated that the Board was under a misapprehension as to the point in his submission, which, he considered, was supported by the *Universal* case and which he described as follows:

> If the product in question was a biscuit, its character as such would not be altered by any treatment given it in advertising literature or in the manner in which it was marketed.

I do not think the Board was misled, as indicated above, because, disregarding any evidence in respect of advertising and literature, I am of opinion that the extent to which the character of the Marvens product was altered through the addition by Moirs of 30 per cent, by weight, of chocolate was the pivotal fact which all members of the Board rightly took into consideration in arriving at their conclusion.

A third reference to the word in issue is found in the last paragraph at page 2 of the majority declaration and in the first paragraph of the following page, which paragraphs read as follows:

In *Universal Fur Dressers & Dyers Ltd. v. The Queen* the appeal was argued with respect to the application of Section 80A of the *Excise Tax Act.* The onus was clearly upon the respondent in that appeal and that appeal is distinguishable from the present appeal where the onus lies upon the applicant. The principle of law is clear. It was enunciated by Lord Cairns in *Partington v. Attorney General,* L.R. 4 H.L. 100 at page 122, and was adopted by Angers J. in *The King v. Biltrite Tire Company,* [1937] C.L.R. Exchequer Court 1 at page 11, following the statement by Duff J. (later Sir Lyman Duff) in *Versailles Sweets Limited v. The Attorney General of Canada,* [1924] C.L.R. Supreme Court 466 at 468:

> The rule for the construction of a taxing statute is most satisfactorily stated, I think, by Lord Cairns in *Partington v. Attorney General.*
>
> "I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hard-

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ship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute".

In respect of the above excerpt counsel for the appellant claimed that it was inappropriate for the majority to refer to the *Universal* and *Versailles* cases and that they misdirected themselves in so doing since neither of these two cases made any mention of "onus". The said counsel did concede, however, that the majority was right in saying that the defendant in the *Universal* case was contesting the applicability of a charging section contained in the *Excise Tax Act,* while, in the present case, the appellant is invoking an exception clause contained in the said Act.

The last reference to onus is contained in the second paragraph at page 3 of the declaration, which paragraph reads thus:

The evidence adduced on behalf of the applicant tends to show that the Moirs graham sandwich was bar goods or confectionery rather than biscuits or other similar articles Consequently, the Board finds, on the weight of the evidence, that the applicant has failed to discharge its onus and bring itself within the terms of the exemption in conformity with the clear principle of law that a taxpayer seeking to enjoy the benefits of an exemption in a taxing statute must bring himself squarely within the terms of the exempting provision in the statute.

In my opinion, from a study of the four above-mentioned references made to the word "onus", and particularly the last one, it becomes increasingly plain that what the majority had in mind and what they were referring to was the strictness of statutory interpretation and the disadvantage which a taxpayer suffers when he is forced to rely on an exemption compared to when he is free to invoke a taxing provision. Moreover, there is long-standing authority for describing the above-mentioned disadvantage as an onus. See the following observations of Cameron J. and the authorities referred to by him in *The Credit Protectors (Alberta) Limited v. The Minister of National Revenue*[1]:

Again the appellant urges that the said section should be interpreted in as generous a fashion as possible in order to give the benefit of the exempting section to the appellant. With this contention, I cannot agree. The onus is on the appellant to prove that it clearly comes within the provisions of

[1] [1947] Ex C R. 44 at 47

the exempting section 7(*a*). It seeks the benefit of an exceptional provision in the act and must comply with its context. . . .

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In the unreported case of *The Dentists' Supply Co. of New York v. The Deputy Minister of National Revenue*, dated June 16, 1960, Thorson P. stated at page 6:

There is also the fact that on an appeal to the Tariff Board the onus of proof necessary to establish the appellant's appeal so far as it is based on matters of fact lies on the appellant and it would be within the competence of the Board to dismiss an appeal on the ground that such onus has not been discharged.

See also the recent case of *Consolidated Denison Mines Ltd. et al. v. Deputy Minister of National Revenue*[1]. The case was one in which leave to appeal had been granted under the *Customs Act* from a majority declaration of the Tariff Board that certain imported articles called "rock bolts" are not exempt under Section 32 of the *Excise Tax Act* and are therefore properly subject to sales tax under s. 32 of the Act. The case is distinguishable, in many respects, from the instant one, but in reversing the said declaration the learned judge stated at page 310:

I have, therefore, come to the conclusion that the appellants have discharged the onus lying on them to establish that there is an error in law in the decision under appeal.

I am accordingly of the opinion that by their repeated reference to onus the majority did not misdirect themselves by misunderstanding the significance of the said word, as claimed by counsel for the appellant. Furthermore, even if the language used by the majority in the paragraphs in question discloses that they had a misconception as to the law, this Court should not assume that such misconception was responsible for the determination reached, unless there was no evidence to support their finding, or that nobody, if properly instructed in law, could have reached such conclusion.

Kellock J., in rendering judgment for the Court in *Canadian Lift Truck Co. Ltd. v. The Minister of National Revenue (Customs & Excise)*[2], which concerned an appeal on the Customs' side wherein leave to appeal on a question of law under the *Customs Act* was still required, stated:

The question of law above propounded involves at least two questions, namely, the question as to whether or not the Tariff Board was properly

[1] [1963] C.T.C. 290. [2] [1956] 1 D.L.R. (2nd) 497, 498.

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instructed in law as to the construction of the statutory items, and the further question as to whether or not there was evidence which enabled the Board, thus instructed, to reach the conclusion it did.

While the construction of a statutory enactment is a question of law, and the question as to whether a particular matter or thing is of such a nature or kind as to fall within the legal definition is a question of fact, nevertheless if it appears to the appellate Court that the tribunal of fact had acted either without any evidence or that no person, properly instructed as to the law and acting judicially, could have reached the particular determination, the Court may proceed on the assumption that a misconception of the law has been responsible for the determination: *Edwards v. Bairstow,* [1955] 3 All E R. 48.

For reasons which appear in my treatment of the next topic I think it cannot be said that the majority acted without any evidence in determining that the Moirs Graham Sandwich was neither a biscuit nor an article similar to a biscuit within the meaning of the Act, nor that a person properly instructed in law could not have reached such a conclusion.

As stated by Kellock J., (*supra*), "The nature and kind of thing is a question of fact."

Dealing first with the evidence concerning the nature of the article in issue, it is important to recall that we are not here concerned with the original Marvens product but with the product which emerged after passing through the manufacturing plant of the appellant, and, in my opinion, it behooved the appellant to have recourse to other and more convincing tests than simply the one which established the presence of 30 per cent, by weight, of chocolate in the Moirs product, since little of some commodities, when mixed with others, sometimes goes a long way in determining the nature of the resulting combination, and I think it can reasonably be said that chocolate is such a commodity—particularly in the absence of any evidence to the contrary.

Although the appellant, as already mentioned, furnished evidence of the percentage of chocolate content, by weight, of the Moirs Graham Sandwich, no evidence was produced as to how the remaining 70 per cent was divided, by weight or otherwise, between the graham wafer and the malt cream respectively. Furthermore, the fact that one article in a combination of articles may exceed the others in weight is, in my opinion, insufficient *per se* to establish that the resulting product is the same, in nature, as the heaviest one.

Cameron J. in *W. T. Hawkins Ltd. v. The Deputy Minister of National Revenue*[1], (Affirmed in the Supreme Court of Canada, May 7, 1959, but not reported.) in considering a product described as "Magic-Pop", consisting of popping corn and a small quantity of salt placed in a solidified block of shortening, stated:

In my opinion, the appellant was producing an entirely new article—an article which contained within itself all the ingredients necessary for a householder to use in the preparation of popcorn—in effect a "ready-mix" article. The mere fact that it was named "Magic-Pop" did not by itself result in the making of the new product for any such fancy name could be given to any article without changing its nature. Whether it be named "Magic-Pop" or something else, the new product is not mentioned or included in any of the articles specified in Schedule III.

It is submitted, also, that as popping corn is the main ingredient of "Magic-Pop", the article produced by the appellant should be classified as popping corn. There is no general authority in the taxing section or in the schedule for classifying an article according to its main ingredient. I find in the schedule one instance only in which the exemption from tax is based on the main content of the article, namely, "fruit juices which consist of at least 95 per cent. of pure juice of the fruit". If Parliament had intended that articles generally should be classified according to their main ingredient, it would have made provision accordingly.

I consequently consider that there is no justification in law or in fact for saying that the nature of an edible article is to be classified according to the weight of its main ingredient.

I think that, in the determination of the nature—and, *a fortiori*, the similarity—of one or more edible articles, their effect on the senses could well be regarded as one of the factors meriting consideration. No sample of the sandwich biscuit, as delivered by Marvens to the appellant, was filed; but the members, having been invited to taste samples of the Moirs Graham Sandwich, one such sample was filed as Exhibit A-11 and a part of it has been broken open so as to reveal its contents. Judging by the said exhibit, it seems almost self-evident that the appearance, smell and taste of the original biscuit underwent a striking change, and I consider that the appellant has failed to establish that the Marvens product remained a biscuit and that it did not become a chocolate or confectionery bar, containing biscuit and malt cream filling.

Was the article in issue of a kind or class similar to a biscuit?

[1] [1958] Ex. C.R. 152 at 157, 158.

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In my opinion, it is impossible to determine any satisfactory line of demarcation as to the degree of likeness necessary in order to constitute similarity. The question is essentially one of fact concerning which varied opinions may be justifiably expressed.

According to the Shorter Oxford Dictionary, 3rd ed., "similar" is defined as follows:

> Of the same substance or structure throughout; homogenous. Having a marked resemblance or likeness; of a like nature or kind.

In Webster's New International Dictionary it is defined as "having characteristics in common; very much alike."

For reasons which I mentioned, in connection with the nature of the Moirs Graham Sandwich it was a very different article from that which the appellant purchased from Marvens. I think it could be said that the enrobement which it underwent served to successfully disguise the original product and made it almost unrecognizable.

Was it similar to other biscuits?

The dissenting member attached a great deal of importance to "chocolate grahams" or "chocolate mallows" made, packaged and sold on its own account by Marvens and which, he stated, were generally recognized as biscuits. No samples of the aforesaid chocolate mallows were filed but they were described as consisting of a single graham wafer on which marshmallow was superimposed and then the whole was coated with chocolate of a different texture to that of the Moirs sandwich.

Without knowing to what extent marshmallow with chocolate-coating characterized the article, it is impossible to determine whether such product should be regarded as confection that may be classed as a candy or a substitute for candy, or whether it is a biscuit properly so called, as the evidence is insufficient for the purpose. Nothing was said with regard to its shape, and, as the dissenting member declared, the majority of the Board obviously were not impressed by its alleged similarity to a biscuit.

As to whether the dissenting member's view that the Moirs Graham Sandwich is similar to a biscuit, because it contains a baked biscuit that accounts for the larger part of its weight, would constitute some evidence of similarity, I express no opinion. On the other hand, if one of the majority were of the same opinion as that of the dissenting member, I would not disturb the finding, since I think it would amount to what is commonly called "a jury verdict", with which, I consider, this Court has no jurisdiction to interfere. I consequently find there was some evidence to justify the majority finding that the article in issue was not an article similar to a biscuit.

Counsel for the appellant further argued that, even if it were conceded that the product in question is neither a biscuit nor similar to a biscuit, as it consists of bar goods or confectionery, it would still be exempt, because bar goods and confectionery are in the same category as biscuits and are not mutually exclusive.

"Bar goods" appears by the evidence to be a trade name which is now known to many outside of those in that trade, but, in any event, I found no dictionary definition of it. The word "confectionery" is defined in Webster's Third International Dictionary (Unabridged) as follows:

> *Confectionery:* 1. sweet edibles (as candy, cake, pastry, candied fruits, ice cream). things prepared and sold by a confectioner. 2. the confectioner's art or business. 3. a shop where confectionery is made, sold or served.

The Encyclopaedia Britannica apparently regards "confectionery" as synonymous with "candy", and we find under the title: "CONFECTIONERY MANUFACTURE" in Volume 6, p. 224, a lengthy description in these terms:

> *Confectionery Manufacture:* For centuries man has devoted time and effort to perfecting the skills of confectionery manufacture, the art of properly blending various agricultural products into an attractive, palatable food known as candy

Further on, after a description of various classifications of candy, including marshmallow-coated candies, under the title "Candy Bars" one reads:

> Because of their tremendous popularity, candy bars require a separate classification and can be defined as individually wrapped candies usually selling in the U.S for 5 and 10 cents, many of them having catchy names unrelated to the nature of the confection. The three most popular types are (1) plain chocolate with or without nuts: (2) chocolate-coated simple and compound centres such as nut rolls (fudge centre rolled in caramel and nuts, then chocolate-coated), nougat-caramel combination and hard candy-peanut butter combination and (3) nonchocolate-coated (solid nut bars, caramel, toffee, fudges, etc.). The possible combinations for candy bars are practically endless.

Counsel for the parties agreed that the taxation period involved in the present case ran from March 15, 1957 to

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August 10, 1960 and that the significance of the word "confectionery" was the subject-matter of some correspondence which has been exchanged between the parties.

As appears by Exhibit A-1, the treasurer of the appellant wrote to the Deputy Minister of National Revenue in the following terms:

Dear Sir:

On March 15th, 1957, the excise tax on candy, chocolate and confectionery was repealed. In repealing the excise tax, the following wording was deleted from the taxing schedule of the statute:

> Candy, chocolate, chewing gum and confectionery may be classed as candy or a substitute for candy.

We are advised that in deleting the above wording from the statute, it was no longer possible to tax a substitute for candy and therefore it was necessary to cancel Circular No. 46, dated March 1st, 1956.

On the basis of the above we have paid sales tax in error on our Graham Sandwich and propose to deduct the amount so paid from our current payment.

Yours very truly,

(sgd.) C. H. IVEY, Treasurer.

As appears by Exhibit A-2, the Minister's reply was as follows (leaving out non-essentials):

Gentlemen:

This will acknowledge your letter, May 9, 1960 concerning your "Graham Sandwich" product.

It is confirmed that effective March 15, 1957, the *excise tax* applicable to "Candy, chocolate, chewing gum and confectionery that may be classed as candy or a substitue for candy" was repealed.

In the matter of *sales tax*, however, Section 29(1)(*e*) of the Excise Tax Act was amended, effective March 15, 1957, to read as follows:

29 (1)

(*e*) "producer or manufacturer" includes (v) any person who wraps, packages, puts up in boxes or otherwise prepares for sale candy, chocolate, chewing gum or confectionery that may be classed as candy or a substitute for candy, otherwise than in a retail store for the purpose of sale in such store.

Seeing that, in virtue of s. 29(1)(*e*)(*v*), the product of any person who wraps up in boxes or otherwise prepares for sale candy or confectionery that may be classed as a substitute for candy is subject to sales tax, it seems to me that *a fortiori* a manufacturer of candy who purchases articles, such as cherries or biscuits, which are exempt from sales tax and who, apart from preparing them for sale in the manner indicated, immerses one in a clear hard candy mixture and the other in one consisting of chocolate, cannot expect to escape the incidence of sales tax.

I consider that, in addition to Exhibit A-1, other evidence in the record serves to support the view that the Moirs Graham Sandwich is a confectionery that may be classed as candy or a substitute for candy and that it is therefore a taxable article.

In respect of the last remaining issue I will begin by saying that, if I came to the conclusion, as suggested by counsel for the appellant, that the majority, unlike the dissenting member, disqualified themselves by declining or neglecting to deal with the meaning of or making a finding with respect to "other similar articles", I would refer the record back to the Board with a direction that such a finding should be made.

The majority declared:

> By reason of the imprecise wording of the exemption in issue, it is extremely difficult to determine with precision the meaning of the words used; in particular the words "or other similar articles". The intention of the legislature is not made clear since the words used are not precise and unambiguous. Broad dictionary definitions are given for the meaning of the words "pies" and "cakes". A narrower definition is given for "baker". However, it is far from clear that the exemption is to be interpreted with the extended and very general wording, "including biscuits, cookies or other similar articles", modified by the word "bakers".

The dissenting member's statement is as follows:

> As my colleagues have pointed out, it is difficult to interpret the exact meaning of the exemption in Schedule III because the words "or other similar articles" broaden it to an imprecise degree. Nevertheless, when "Bakers' cakes and pies" are extended to include "biscuits" and "cookies", and further extended to include "other similar articles", it is clear that a wide interpretation of this exempting provision was intended by the legislature.

The above indicated difficulty is not uncommon in cases of this kind. As Kerwin J. (as he then was) observed in *Rogers Majestic Corporation Ltd. v. The Corporation of the City of Toronto*[1], which was an appeal on a stated case,

> Whether there is a question of law or the construction of a statute upon which an appeal lies to the Court of Appeal is not always free from difficulty. Probably no satisfactory definition can be framed so as to cover all the circumstances.

I do not think the legislature intended to attribute to "other similar articles" an interpretation so wide as to nega-

[1] [1943] S.C.R. 440 at 446.

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tive the effect of s. 29(1)(e)(v). The majority, as suggested by counsel for the appellant, did not "wrestle" with the meaning of the above-mentioned words as did the minority. But they did consult dictionary definitions, and, after examining the wording of the exemption and weighing the evidence before them, came to a conclusion contrary to that of the dissenting member.

As has been previously noted, the majority found that

> The evidence adduced on behalf of the applicant tends to show that the Moirs graham sandwich was bar goods or confectionery rather than biscuits or other similar articles.

Consequently, I do not think it can be said with justification that the majority failed to consider or make a finding with respect to meaning and application of the phrase in question.

In my opinion, no pure question of law arises in respect of the phrase "other similar articles", and we are more concerned with the ordinary meaning to be attributed to the word "similar" than with a question of legal interpretation. I think at most this issue gives rise to a mixed question of fact and law and in either event I consider that the majority did not "err as a matter of law" in finding that the Moirs Graham Sandwich was subject to and not exempt from sales tax.

For the foregoing reasons I would dismiss the appeal with costs.

Judgment accordingly.

1962 Apr 25, 26 — 1963 Dec. 6

BETWEEN:

ALEXANDER BRUCE ROBERTSON ... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income Tax—Income Tax Act, 1948, S. of C. 1948, c. 52, s. 127(1)(e)—Income or capital gain—Profit on sale of shares.

The appellant was at all material times vice-president and general counsel of the British Columbia Electric Company Limited. During the early months of 1949, negotiations took place between the appellant, another vice-president of B C Electric, an oil and gas lands acquisition expert,

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a geologist and a Victoria businessman with a view to the formation of an oil and gas company. The five men acted in the role of promoters and the company, Britalta Petroleums Ltd., was incorporated under the British Columbia *Companies Act* on April 12, 1949, the appellant being one of the subscribers to the Memorandum of Association and to the Articles of Association. The Articles of Association provided for, *inter alia,* the allotment of shares and the giving of options to subscribe for further shares to the five promoters in terms set out in an already executed agreement. The appellant purchased in all about 146,000 shares of the company, 125,000 of them in 1949 at the nominal price of ½ cent per share and the remainder in 1951 at 60 cents per share. During 1951 and 1952, the appellant disposed of 100,000 shares, and ten years later he still retained 46,000 shares. The gains realized by the appellant on the sale of shares were $85,389.70 in 1951 and $50,385.00 in 1952, both of which amounts were added to the appellant's taxable income previously assessed for 1951 and 1952.

The evidence established that the appellant had seldom bought stocks and that the Britalta undertaking was the first one of its kind in which he had been engaged.

Held: That the appellant took part in a collective venture in the form of a selective and compact group of men possessing qualities and knowledge which were calculated to render more likely the success of an inherently speculative venture.

2. That the purchase and sale of the shares in issue by the appellant constituted a scheme for profit making which was essentially a trading adventure and this is borne out by the facts that he, as a member of the original group, helped to develop, promote and organize the maturing and disposal of the greater portion of his shares, that he contributed his time and ability without reward other than what he could derive from the sale of his shares, and that the group, including the appellant, paid only a nominal price of ½ cent per share for the original issue of 250,000 shares and the second issue of 500,000 shares, both of which transactions were sanctioned by the directors of the company for the benefit of the promoters thereof, who were none other than themselves.

3. That the appeal is dismissed.

APPEAL under the *Income Tax Act.*

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

J. L. Farris, Q.C. and *P. W. Butler* for appellant.

W. J. Wallace and *T. E. Jackson* for respondent.

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

KEARNEY J. now (December 6, 1963) delivered the following judgment:

The issue requiring determination in the present case is whether, in the light of the particular circumstances later

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described, gains realized by the appellant from sales of shares in Britalta Petroleums Ltd. in the years 1951 and 1952 represent taxable income or capital gains.

Briefly, the facts reveal that in May 1949 the appellant together with Messrs. Cloakey, Slipper, Ker and Mainwaring as associates (hereinafter sometimes referred to as the Canadian group) subscribed, severally but in a single agreement, at a price of $\frac{1}{2}$ cent per share, for common stock of Britalta Petroleums Ltd. (hereinafter sometimes called Britalta or the Company) aggregating 250,000 shares, out of which the appellant's allotment, as well as that of Messrs. Ker and Mainwaring, amounted to $\frac{1}{6}$, or 41,160 shares, and Messrs. Cloakey and Slipper were each entitled to $\frac{1}{4}$ interest and received 62,600 shares respectively.

I will omit reference, for the moment, to any further shares of the Company which the appellant's associates acquired and deal solely with the appellant's added interest therein. In consideration of the payment by the appellant of $208 for the aforesaid 41,160 shares, he became entitled, at his option, to subscribe for an additional 83,333 at the same price per share, totalling $416, which sum he duly paid in November 1949.

In March 1951, under circumstances later described, the appellant acquired an additional 20,833 shares of company stock from one Jas. C. Ralston at the price of 60¢ per share. As a result, speaking in round figures, the appellant's total holdings amounted to 145,000 shares, and during the taxation years 1951 and 1952 he disposed of 50,000 of them at the same price as he paid for them, namely, $\frac{1}{2}$-cent per share, but realized the undermentioned gains claimed by the Minister on another 50,000 which he disposed of at prices ranging from $1 to $4 per share.

The appellant did not dispose of the balance of his shares, consisting of approximately 43,000 $\frac{1}{2}$-cent shares and 3,000 sixty cents shares, and still retained ownership thereof at the date of trial.

As appears by the relevant documents transmitted to this Court by the Minister, pursuant to s. 100(2) of the *Income Tax Act* which was filed by the appellant as Exhibit 1, the Minister, by reason of the aforesaid gains, added $85,389.70 to the appellant's taxable income previously assessed for the year 1951, which amount represented the difference between the cost of the aforesaid shares and the amount realized by the sale thereof, and for similar reasons a sum of $50,385 was added to the appellant's taxable income previously assessed in respect of the taxation year 1952. The Minister made the above two reassessments on the ground that the appellant together with Messrs. Cloakey, Slipper, Ker and Mainwaring, as owner or jointly as a syndicate or partnership, acquired the said shares with a view to profit by turning them to account or trading in them and that the gains in question constituted profit from a business or adventure in the nature of trade within the meaning of s. 127(1)(*e*) of the *Income Tax Act* (1948).

In due course the appellant objected to the said reassessments but the Minister confirmed them. The appellant, by notice filed on December 28, 1960, appealed from the said reassessments, and apart from denying that the amounts realized on the aforesaid sale of shares are income and affirming that they constitute capital gains, the said notice contains the following as additional reasons in support of the appeal.

The purchase of the shares by the appellant was for investment purposes only and the sale by him of some of the shares was the realization of an investment; the appellant was not in the business of trading in shares; the appellant did not undertake an adventure or concern in the nature of trade; the appellant at no time was a promoter or a speculator and his conduct was that of a prudent investor.

Apart from denying the aforesaid allegations, the respondent adopted the position that the circumstances reveal a joint venture where a group, of which the appellant was a member, conceived the idea of pooling their ability, knowledge, training and reputation to promote and develop oil or gas companies in a similar manner to those engaged in the promotional business, with a view to making a profit from the sale of shares which they had acquired at prices and in proportions which they themselves determined.

The only witness heard was the appellant. Forty-seven documentary exhibits were produced by him without objection on his examination in chief and a further sixty-five on cross-examination. Counsel for the appellant, during cross-examination, took exception to the filing of Exhibit B and it was admitted under reserve of the said objection—which I will comment upon later. Except as to the admissibility of

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the evidence above referred to, the facts in the case are not in dispute and may be conveniently divided into those leading up to the incorporation, on April 12, 1949, of Britalta Petroleums Ltd. and those which occurred in the three succeeding years. By consent, copies of the above-mentioned documentary exhibits, with the exception of the Minister's record (Ex. 1), were inserted in a folder each page of which was numbered consecutively (hereinafter referred to as the Documents) for the convenience and use of the court and counsel.

In reciting the details of the facts I propose to begin with the period prior and leading up to the incorporation of Britalta on April 12, 1949.

The appellant is by profession a barrister and solicitor and one of Her Majesty's counsel. He was admitted to the Bar of British Columbia in 1928 where he was engaged for nearly twenty years in private practice, after which he joined the head office in Vancouver of British Columbia Electric Company Limited (hereinafter called B.C. Electric), of which he became a vice-president and general counsel on a full-time basis and so remained at all material times. The said Company was interested in importing natural gas from the province of Alberta to replace its manufactured gas and, in the early days of January 1949, the appellant together with Mr. W. C. Mainwaring, who was also in the exclusive employ of B.C. Electric and was likewise one of its vice-presidents, with a view to obtaining the required natural gas, were designated to make representations before a Royal Commission which was then sitting in Calgary and conducting an inquiry concerning Alberta gas exportation. On their return journey, Mr. Mainwaring informed the appellant that he had become acquainted with a Mr. George H. Cloakey who was an oil-and-gas lands acquisition expert and a Mr. Stanley E. Slipper who was a geologist of high repute, both of Calgary—I might here add that while in Calgary the appellant also met Mr. Cloakey but only in a casual way. Mr. Mainwaring also informed the appellant that Messrs. Cloakey and Slipper had asked him to join them in forming an oil-and-gas company in which they themselves wanted to retain a substantial interest, as they were tired of working and finding profitable properties for the benefit of others. Mr. Mainwaring also stated that Messrs. Cloakey and Slipper desired his help because they thought that he might have better access to capital than they did and that he had agreed to join them. Mr. Mainwaring then asked the appellant to likewise join the group, and he agreed to do so. Mr. Mainwaring then remarked that he intended to ask Mr. Robert H. B. Ker, whom the appellant knew and who was a well-known businessman in Victoria, to take an interest in the project. Mr. Ker (as it appears later) became the fifth member of the group of original shareholders and the first president of Britalta. Apparently, no detailed discussion as to the respective interest or responsibility of the parties had been discussed on the Calgary visit; but during the next few months Messrs. Cloakey and Slipper made several trips to Vancouver, where they met Mr. Mainwaring and the appellant.

The evidence of the appellant on cross-examination shows that, as a result of the aforesaid discussions, by April 4 he was in a position to place before the group several draft proposals of ways and means for carrying out the instant undertaking (see Ex. A dated March 29, 1949, entitled "Cloak and Dagger Ltd. Preliminary Outline"; Ex. D, "Draft Outline of Proposal" dated March 30, 1949; Ex. E dated March 31, 1949, entitled "Outline of Proposal"; Ex. F, a draft of Articles of Association dated April 4, 1949). Exhibits A, D, E and F, which were prepared by the appellant, indicate, *inter alia,* that the appellant and his four associates were acting in the role of promoters; that, at least initially, Britalta was destined to be a private company with an authorized capital of $1,000,000 no par value shares, the issued price whereof not to exceed $1 per share; that the company would be authorized by its Articles of Association to enter into an agreement with its five promoters under which they would agree to subscribe forthwith for 250,000 shares at ½-cent per share and the Company would agree that whenever it proposes to issue shares beyond the first 500,000 it would give to the promoters an option to subscribe for a corresponding number of shares at a price of ½-cent each; also that it was contemplated that the Company would acquire permits or reservations on certain oil-and-gas lands in British Columbia and in Alberta; that the fees payable thereon would be $10,000 and $26,000 respectively; that the estimated total cost for the first year, including the drilling of one well in British Columbia and another in Alberta, would be about $500,000.

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On finalization of the foregoing draft proposals, the appellant and Mr. Mainwaring became the subscribers to Memorandum of Association Exhibit 2 and to Articles of Association Exhibit 3, both dated April 12, 1949, whereby Britalta became incorporated as a private company under the provisions of *The Companies Act,* R.S.B.C., c. 68. The concluding paragraph 21, entitled "First Business", of the said Articles of Association (Documents, p. 11) reads as follows:

> 21. The Company shall forthwith enter into, adapt and give effect to an agreement already prepared and for the purpose of identification signed by W. H. Q. Cameron, a solicitor of the Supreme Court of British Columbia, expressed to be made between George H. Cloakey, Stanley E. Slipper, William C. Mainwaring, R. H. B. Ker and A. Bruce Robertson of the one part and this Company of the other part, with full power to agree from time to time to any modification of the terms thereof and either before or after the execution thereof. The basis on which the Company is established is that the Company shall allot shares and give an option to subscribe from time to time for further shares on the terms set forth in the said agreement subject to any such modification and accordingly *it shall be no objection to the said agreement that all or some of the individual parties to the said agreement are or may be promoters of the Company* or that in the circumstances the Directors of the Company do not constitute an independent Board and every member of the Company both present and future is to be deemed to join the Company on this basis. [Emphasis supplied]

Before leaving the evidence dealing with the events prior to the incorporation of Britalta, I wish to revert to the objection first raised by counsel for the appellant in respect of the filing of Exhibit B on the ground of its inadmissibility. The exhibit consisted of a photostat of a letter written by Mr. Mainwaring to Mr. Ker dated March 31, 1949 (Documents, p. 87), a copy of which had been concurrently sent to the appellant. It begins by reviewing the events that occurred during the Mainwaring-Robertson visit to Calgary in January 1949 and which could serve to attract venture capital to the group undertaking in issue; it ends by informing Mr. Ker that the writer, before approaching some of his own friends in California, wanted to give Mr. Ker the opportunity to approach some of the latter's friends in eastern Canada who might wish to provide all of the capital required and thus keep the development in question entirely Canadian.

As appears at page 136 of the transcript, the ground of objection was that writings emanating from Mr. Mainwaring cannot constitute evidence of the purpose or intent the appellant had in mind when he agreed to join the original group and that it was, moreover, improper to put questions to the appellant, by way of cross-examination, on correspondence between two other people.

I consider, as counsel for the respondent readily agreed, that what Mr. Mainwaring wrote could not be and was not offered as evidence of the appellant's intent in embarking on the undertaking in question; but I think that it constitutes some evidence of the formation of a group and of the collective efforts and various roles played by the members of this original group, and that, since Exhibit B dealt with matters concerning which the appellant had testified on his examination in chief, it was proper subject matter on cross-examination.

Furthermore, I might add that the Court record discloses that on February 6, 1962 the appellant filed an affidavit wherein he declared, *inter alia,* that he had in his possession a large number of documents relating to the case at bar and to the production of which he had no objection, as more fully appears by Schedule A of the affidavit (see Court record) and in which Exhibit B appears as second on the list.

Since I am presently dealing with this question of admissibility of Exhibit B, which had been written prior to the incorporation of Britalta, I may as well pause in order to dispose of a general objection (Transcript p. 159) raised by counsel for the appellant in respect of all similar documents dealing with the period subsequent to the incorporation of Britalta.

I consider that counsel for the respondent was entitled to file any documents relevant to the case which the appellant admitted having in his possession and to ask the appellant for his comments thereon. In the absence of the writer being called by the respondent in rebuttal, the comments or qualifications made by the appellant in respect of any such letter should be accepted.

Without dealing individually with documents similar to Exhibit B, I find (Transcript pp. 182-183) that I allowed, subject to objection, Exhibit P to be filed, being a copy of a letter dated October 28, 1949, from Mr. Mainwaring to Mr. Cloakey. It emanated from the Mainwaring file and the appellant had never seen it prior to trial. I consequently sustain the objection which was made to it.

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In my deliberations I have only taken into account copies of so-called similar letters which are to be found in Schedule A of the appellant's affidavit. I might here add that the effort and time-saving device of concurrently sending copies to one or more of the group, when the original was addressed only to a particular member, was employed, as the evidence indicates, by the appellant himself (Exhibits I, W, X, Z-16-31-38).

Now, dealing with the period subsequent to the date of incorporation, the following is a sequence of the main events which are clearly established by the evidence and which are not contested by the parties.

Effect was given to paragraph 21 of the Articles of Association (*supra*) by an agreement dated May 5, 1949 (Ex. 4—Documents p. 13; Transcript, pp. 16-18). The five members of the group accordingly agreed to subscribe for 250,000 shares of the company stock at an allotted price of $\frac{1}{2}$-cent per share, payable forthwith in cash, and in consideration for doing so were granted the right to subscribe for 500,000 additional shares at the same price whenever the Company proposes to allot shares beyond the first 500,000 shares allotted by it.

As appears by Exhibit H dated May 12 (Documents, p. 112), by resolution of the Board of directors, Mr. Ker was appointed a director and president, Mr. Robertson a director and secretary, Mr. Mainwaring director and treasurer of the Company and Messrs. Cloakey and Slipper directors, and the 250,000 shares were allotted in the following proportions: $\frac{1}{4}$ each to Messrs. Cloakey and Slipper and $\frac{1}{6}$ to each of the other three members of the group.

The said resolution also discloses that immediately after the incorporation of the Company the subscribers to the Memorandum of Association borrowed on behalf of the Company the aggregate sum of $12,000, one quarter of which ($3,000) was loaned by Messrs. Cloakey and Slipper respectively and one sixth ($2,000) each by Messrs. Ker, Mainwaring and Robertson; that notes of the Company, payable on demand, were signed in favour of the aforesaid lenders; that the said borrowings were ratified and approved.

As appears also by Exhibit H (*supra*), the Company acquired a permit to prospect for petroleum products on the Queen Charlotte Islands and subscribers to the Memorandum of Association were authorized to reimburse the appellant the sum of $413.50 paid on behalf of the Company to the Registrar of Companies as incorporation fees and $10,250 to the Deputy Minister of Lands for rental and permit fees under the *Natural Gas Act* of British Columbia in respect of oil-and-gas lands on Graham Island.

During the month of July, Britalta, through a man named Newburn, negotiated a farm-out to Royalite Oil Co. Ltd. whereby it would drill a well in consideration of Britalta giving it a checkerboard half-interest in the permit and by August the agreement was signed. See Exhibit J, a letter from Cloakey to the appellant dated July 23, 1949—Documents, p. 116; also Transcript, p. 49.

The above agreement also anticipated that the money loaned by the shareholders would be repaid to them because the Company would be entitled to obtain refunds from the Provincial Government, up to the full extent of the rental and permit fee, as the work performed by Royalite progressed.

Early in September, G. H. Cloakey was in touch with Robert L. Reed, of New York, who represented American financial interests, with a view to obtaining the necessary financing to procure a permit and carry out drilling operations on the Alberta oil-and-gas properties. As appears by Exhibit 5, dated September 8, 1949 (Documents, p. 16), the appellant, at the request of Mr. Cloakey, addressed a letter to Mr. Robert L. Reed containing an up-to-date summary of the main activities of the Company since the date of its incorporation.

The Canadian group carried on negotiations with the American interests, who were represented in New York by Attorney Robert L. Reed and in British Columbia by Jas. C. Ralston, another legal counsel, which negotiations continued over a few months. In November 1949, in anticipation of an agreement being reached whereby the American group would purchase shares of the Company to an extent which would net its treasury $500,000, the Canadian group were allotted a further 500,000 shares at ½-cent per share. The negotiations between the two parties culminated in two agreements dated December 23, 1949, in both of which Jas. C. Ralston as nominee for the American group is described as the purchaser (Ex. 7, Documents p. 29; Ex. 8, Documents p. 24). The terms "American group and Jas. C.

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Ralston" are later used synonymously. Counsel for the parties have agreed that a satisfactory summary of Exhibits 7 and 8 are contained in the following letter dated December 15, 1949, signed by the appellant and addressed to R. H. B. Ker (Ex. Y, Documents p. 145), which reads as follows:

15th December, 1949

R. H. B. Ker, Esq.,
909 Government Street,
Victoria, B.C.

Dear Robbie:

Answering the first paragraph of your letter of 13th December, the following is a brief outline of the agreements in which Ralston (who is called the purchaser) is named as a party, he being the representative of Reed and associates.

There are two agreements. The first is made between Britalta, Ralston and our five selves, who are called the shareholders. By it the Company grants an option (to the purchaser) on 1,250,000 shares as follows:

250,000 shares at 20¢ per share on or before 30 days following the effective date as hereinafter defined;

All or any part of 250,000 shares at 30¢ per share on or before 4 months following the said effective date;

All or any part of 250,000 shares at 40¢ per share on or before 12 months following the said effective date;

All or any part of 250,000 shares at 50¢ per share on or before 18 months following the said effective date;

All or any part of 250,000 shares at 60¢ per share on or before 24 months following the said effective date.

The effective date is the date after the Company has increased its capital to 3,000,000 shares and on which it can deliver a permit under the Securities Act for the sale of the 1,250,000 shares.

The second agreement is between the shareholders and Ralston. Under it the shareholders grant Ralston an option to purchase 300,000 shares at ½¢ per share. The option is exercisable in four installments of 75,000 shares each, exercisable after Ralston has taken up each of the four respective blocks of shares from the Company. All of the 750,000 shares held by the shareholders are to be put in escrow with the Royal Trust Company. The shareholders' remaining 450,000 shares remain in escrow until Ralston has paid the Company $350,000, or the first agreement has terminated. Ralston grants the shareholders an option to purchase at 60¢ per share all or any part of 125,000 of the last block of shares upon which Ralston has an option from the Company.

George telephoned me last evening and said that Reed now had $90,000 in hand and was practically ready to go ahead on the first two blocks of shares at 30¢ per share, he to receive a commission of $25,000 and the Company to net $125,000.

I commented on this in my letter to George yesterday. I enclose a letter which I have written him this morning, which refers further to the matter.

I am writing in great haste.

Yours truly,
A. BRUCE ROBERTSON

Before June 1950, the drilling carried out by Royalite on the Queen Charlotte Island, under its farm-out agreement with the Company, turned out to be a dry hole. Nevertheless, as anticipated the permit fees and charges which Britalta had paid to the Government of British Columbia were rebated to the Company, which in turn paid the promissory notes it had given to the five original shareholders (See the appellant's letter to R. H. B. Ker dated September 19, 1950, Ex. 10—Documents, p. 33).

In October 1950, the Company, jointly with Deep Rock Oil Corporation, acquired a permit on oil-and-gas lands in the Many Island Lake Field in Alberta, which lands were later developed with success.

The Americans had taken up, and paid for, all of the 250,000 forty cents shares and 200,000 of the 250,000 fifty cents shares ahead of the scheduled date of January 1951. They had still to take up 50,000 of the 50¢ shares and 250,000 of the 60¢ shares.

As we have seen, when Jas. C. Ralston had paid for the 300,000 remaining shares the Canadian group were entitled to exercise their option on 125,000 out of the 250,000 sixty cents block of shares, and if they exercised their right, the Canadian group could throw them on the market.

The same thing could occur for the same reasons on the release of 450,000 ½-cent out of the 750,000 shares which the Canadian group had placed in escrow with The Royal Trust Company (Ex. 8, paragraphs 4 and 5—Documents, p. 24).

The brokerage firm of James, Copithorne & Birch Ltd. (hereinafter sometimes referred to as the brokers) mentioned in paragraph 6 of Exhibit 8, through market operations, had been providing Jas. C. Ralston with the finances necessary to acquire the 1,250,000 shares referred to in Exhibit Y (*supra*). The said brokers became concerned that the Canadian group, when free to do so, might throw a considerable number of their 575,000 shares on the market and cause it to get out of control unless something was done to prevent it.

As a result, the appellant, on January 29, 1951 (Ex. Z-53—Documents, p. 183) enclosed two undertakings, concerning the ½-cent shares and 60¢ shares respectively, addressed to the brokers, both dated January 22, 1951 (Exhibits 13 and 14—Documents, pp. 37 and 38), which had been signed by or on behalf of the Canadian group.

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As appears by Exhibit 13, the Canadian group, in consideration of the brokers continuing their financing of the Company, undertook that on release of the 450,000 half-cent shares they would not put any of them on the market, except with the brokers' approval.

Exhibit 14 makes reference to 135,000 sixty cents shares. This is explained by the fact that Jas. C. Ralston personally had obtained an option from his principal on 10,000 sixty cents shares and he joined the Canadian group in appointing the brokers as selling agents for his shares.

I will now deal with the disposition which the appellant made first of his 60¢ shares and later of his ½-cent shares.

The record thereof and the sums realized by the appellant, subject to minor adjustments, are set out in paragraph 16 of the notice of appeal. As therein indicated, in respect of the 60¢ shares, the brokers, in March 1951, sold 13,548 shares out of 20,833 held by the appellant at nearly $1 a share, which netted him $13,118.50. The amount thus realized was a little more than sufficient to pay the cost of his acquisition of the said 20,833 shares, which amounted to $12,499.80. The effect of this was to leave the appellant holding 7,235 of the said shares at no cost to him.

The appellant declared (Transcript, p. 70) that he stopped selling his 60¢ shares when he had sold enough to permit him to pay the cost thereof.

As appears by a memo of a telephone communication, dated November 7, 1950 (Documents p. 179—Ex. Z-20), which the appellant had with Messrs. Cloakey and Ker, the latter was of the opinion that the group should not sell any more of their 60¢ stock than would pay for the cost thereof, for fear of income tax.

The very next month, the appellant, who was in England at the time, received word that a natural gas well strike had been made in the Many Island Medicine Hat area which was being operated jointly by Britalta and Deep Rock Many Island Company and that, by test, it was esimated that the volume of the gas resulting from the strike would exceed 3-million cu. ft. daily (Transcript, pp. 72, 76; Exhibits 17 and Z-27—Documents, p. 187).

By the end of April the stock of the Company was selling at close to $2 a share. James, Copithorne & Birch Ltd. found themselves facing a short market position, and far from making use of their right to prevent the appellant and other members of the Canadian group from selling their shares, they were requesting them to sell, and some of them did. The appellant was asked to sell 5,000 shares but he declined (Exhibits 19 and 20, pp. 44 and 45 of the Documents; pp. 74 and 75 of the Transcript).

The appellant returned from England in the summer of 1951 (Transcript, p. 76). On July 13 Britalta was listed on the Toronto Stock Exchange.

The evidence shows that the appellant sold 3,000 shares in July and a further 1,000 in September at approximately $4 per share, thereby realizing $4,000 more on 4,000 shares than he had received by selling 13,548 shares at $1 per share in the previous month.

In respect of the appellant's 75,000 ½-cent shares which he then had, he procured the release thereof from escrow on October 5, 1951 (Ex. Z-34—Documents, p. 199) and within ten days thereof, through Mr. R. L. Reed, he disposed of 20,000 of them by private sale at $3.50 a share, which was 10 percent below the market price (Transcript, pp. 79 and following of the Documents). Starting at p. 79, the appellant gave the following explanations concerning the abovementioned sale:

> Well my Lord, at that time I had 79,285 shares and with a market 10%, or of which $3.50 represented 10%, those shares were worth over $300,000. That was an astronomical sum for me, I had never thought I would have that much money The shares had gone up very fast, I was afraid they might go down equally fast, and I thought the prudent thing to do was not to leave everything in one place but to realize some of it. I still however wanted to stick to my original resolve which was to have a substantial interest in the company, and I did not want to sell as many as 25,000 shares which I had the chance to sell, and so I told Mainwaring I would be prepared to sell 15,000 shares but that if, in order to satisfy whoever it was who wanted to buy the shares it was necessary for me to sell more, I would go as high as 20,000 shares, and on the 16th of September Mainwaring wired me to that effect.

The last sale with which we are concerned occurred in February 1952 when the appellant sold 12,000 shares for approximately $50,000. In reply to an inquiry about the reasons which prompted him to sell this further 12,000 at $4.10 a share, he said at p. 92:

> I still held 58,285 shares worth at the market over $200,000. And I thought it was the wise thing to do to spread my risk by diversifying and so I said I would sell 12,000 shares.

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At page 177, during cross-examination he was asked about the services rendered by him to the Company and he answered as follows:

Q. No charge was made for those services?

A. No.

Q. This effort and time you put in was to advance the interests of the company?

A. Yes.

Q And thus enhance the value of the stock you held?

A. Whenever you do something as a director for a company you hope it will enhance the value of the stock.

Q And this, of course, was in your case the only commercial return that you could get from your efforts?

A. I think that is fair. Whenever you go into a company you hope that its shares will be worth more later on than they are when you put your money in . . . .
Excuse me, getting back to the last thing you put to me, another thing that one hopes for when you invest in a company is that you will get dividends on your shares, you don't only look to the possibility of selling the shares.

Q That is true. Did you have that thought in mind at that time?

A. Yes, I went into this thing with one idea of getting an interest in a company which would give me some return.

Q Well now, let's put it clearly Mr. Robertson. Did you go into purchase these shares at half a cent with a view to getting dividends on these shares?

A. I went in with the idea that you have investing in any company, you hope that you will get dividends and you hope that you will increase your substance by appreciation in the value of the shares.

Q. You are an experienced businessman What chance did you think that this company, its ability to pay dividends on these shares?

A. That is what you . . . .

Q. When you went in, when you were putting in this investment of $200

A. I wouldn't have put in a nickle if I hadn't thought the company would ever . . if I thought the company would never be in a dividend paying basis.

Q Let's be frank. You really didn't put in a nickle, you got these shares on the hope or for the efforts that the promoters were going to make in the hope you would develop a company that was really worthwhile and enhance the value of these shares, isn't that right?

A I hoped that the company would develop into a paying proposition.

The following exchange of letters occurred between the appellant and Mr. R. L. Reed. The appellant's letter

(Ex. 36—Documents, p. 65) is dated February 18, 1952 and reads as follows:

18 February 1952

AIR MAIL

Mr. Robert L Reed
Reed, Crane & McGovern
570 Lexington Avenue
New York 22, N Y., U.S.A.

Dear Bob:

Very many thanks for your telegraph of Thursday last and your confirming letter of the same day. It was indeed very kind of you to arrange the sale of my 12,000 shares.

I feel that I did the right thing in selling, but for the sake of all of us I hope that in the result it will turn out to have been a frightful mistake!

With kind regards,

Yours sincerely,
A. BRUCE ROBERTSON

ABR/MB

The reply of Mr. Reed (Ex. Z-37—Documents, p. 207) is dated February 29, 1952 and reads as follows:

February 29, 1952

A Bruce Robertson, Esq., Q.C.,
425 Carrall Street,
Vancouver, B.C.
Canada.

Dear Bruce:

Just a line to acknowledge receipt of your letter of the 18th with respect to the sale of your stock. I am glad that I could be of assistance to you and the others, but I hope, as you say, that you made a frightful mistake in selling.

As I wrote Robbie Ker, I am hopeful that now that you three have disposed of the shares you wished to, that at least for the time being you will not sell further shares. Without laboring the point, it is rather difficult to explain to some people why your respective shareholdings become less each time a report to shareholders is put out. Considering the profits that have been made, I am sure all of you will be content to "rest on your oars" at least until the market has become a bit more stabilized. I very sincerely feel that we can build a substantial Company out of Britalta, and I look forward to the time in the not too distant future when I hope I can say "I told you so".

With all the best.

Sincerely yours,
B O B

Before proceeding to deal with the case on its merits, I should mention that the record discloses that the appellant had seldom bought stocks and the Britalta undertaking was the first one of its kind in which he had been engaged.

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At no time did the Company pay a dividend and, starting in July 1951, when Britalta stock was first traded in on the Toronto Stock Exchange, the high and low stock market quotations thereof were as follows:

1951	$ 6.30	to	$ 3 00
1952	9.85	to	4 50
1953	10.25	to	2.75
—	—	—	—
1961	3 05	to	2.00

I should also add that Mr. Reed had become the president of the Company on June 27, 1951 (Ex. Z-30—Documents, p. 190).

Considerable argument was directed to the purpose or intent which the appellant had in embarking on the Britalta venture. I use that term because its appropriateness was not questioned.

The present case is somewhat unique because, unlike in *Regal Heights v. The Minister of National Revenue*[1], I consider we are not here concerned with a case of frustration and alternative intentions. In effect it was held in the above-mentioned case that actions speak louder than words and that, unless there is evidence to support the taxpayer's *post facto* declaration of intent, such declaration has little if any probative value. As I read the appellant's evidence, although he may not have said so in so many words, his declared purpose in acquiring the shares in issue, should they increase in value, was twofold: First, to dispose of most of them to best advantage whenever, in his opinion, an opportune moment presented itself, and secondly, to retain indefinitely a substantial number of the remainder to fulfill a long-standing desire to possess a substantial interest in an oil or gas company.

The evidence clearly shows that the appellant disposed of approximately 100,000 shares in 1951 and 1952, that ten years later he still retained ownership of about 46,000 shares, and such retention, in my opinion, is not inconsistent with an original dual-declaration of intent but tends to confirm it.

We are here concerned, however, only with the appellant's first intent or objective and it becomes necessary, I think, to inquire whether in acquiring and disposing of his 100,000

[1] [1960] S.C.R. 902.

Britalta shares he did so in a manner characteristic of a capital investment or of an adventure in the nature of trade.

Although the *Income Tax Act* does not define what constitutes a capital investment or gain, in my opinion one aspect of the evidence affords a classical example of such a transaction. It occurred when the appellant, in October 1951, after realizing gains of approximately $70,000, reinvested over $50,000 of it in various high grade listed securities of well-known companies on the advice of Ames & Company. No one, I think, could gainsay but that if in due course he realized on these securities and if in doing so he made a profit or a loss it would constitute a non-taxable gain or non-deductible loss.

In respect of what constitutes a capital gain, I will here confine myself to simply observing that I think it is self-evident that the manner and means adopted by the appellant in obtaining the aforesaid high grade securities were greatly different from those employed by him in the acquisition and disposal of his Britalta shares—which made the above-mentioned $50,000 investment possible.

I pass on to the consideration of a more positive test and one concerning which our jurisprudence provides more guidance in determining whether or not a transaction constitutes an adventure in the nature of trade.

In the case of *Irrigation Industries Ltd. v. The Minister of National Revenue*[1], in which a long list of authorities was reviewed, Martland J. observed at p. 351:

> In my opinion, a person who puts money into a business enterprise by the purchase of the shares of a company on an isolated occasion, and not as a part of his regular business, cannot be said to have engaged in an adventure in the nature of trade merely because the purchase was speculative in that, at that time, he did not intend to hold the shares indefinitely, but intended, if possible, to sell them at a profit as soon as he reasonably could. I think that there must be clearer indications of "trade" than this before it can be said that there has been an adventure in the nature of trade.

In examining this aspect of the case I think it is also helpful to recall the recommendations of Rowlatt J., in a similar case, when he referred it back to the Commissioners of Taxation for reconsideration and which was cited with approval by Martland J. in the *Irrigation* case *supra* at page 356:

> . . . but I commend the Commissioners to consider what took place in the nature of organizing the speculation, maturing the property, and

[1] [1962] S.C.R. 346.

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disposing of the property, and when they have considered all that, to say whether they think it was an adventure in the nature of trade or not.

Another suggested guidepost is to ascertain whether the appellant's disposal of the shares sold can be regarded as a deal or deals or trades in shares of the Company. Cartwright J. (dissenting) in the *Irrigation* case *supra* quoted Lord Radcliffe in *Edwards v. Bairstow*[1] to the following effect (p. 361):

> Dealing is, I think, essentially a trading adventure, and the respondents' operations were nothing but a deal or deals in plant and machinery.

In my opinion, the following factors are weighty elements tending to establish that the appellant, in effecting the previously mentioned purchases and sales by a series of deals, organized a scheme for profit-making which was essentially a trading adventure.

As appears by Exhibits A, B, D, E, F and I, the appellant as a member of the original group, by devoting much effort and little money, helped to develop, promote and organize the maturing and disposal of the greater portion of his shares.

Leaving aside any evidence to which counsel for the appellant took exception, I think the proof clearly shows that, beginning in January 1949 with the meeting between Messrs. Cloakey and Mainwaring, the seed of a collective venture was planted and it grew and took shape in the form of a selective and compact group possessing qualities and knowledge which were calculated to render more likely the success of an inherently speculative venture. Whether the five members of the original group were bound to each other by a syndicate or partnership agreement which was legally enforceable, or by a verbal understanding or gentleman's agreement, is in my opinion of little importance. At all material times the appellant and those associated with him fulfilled the various functions expected of them as fully and effectively as if they had been evidenced by a signed and enforceable contract.

Among the other significant features pointing in the same direction is the nominal price of $\frac{1}{2}$-cent each which the group paid for the original issue of 250,000 shares, of which the appellant was entitled to 41,667. The same is true of the second lot of 83,333 shares acquired by the appellant

[1] [1955] 3 All E.R 48

out of 500,000 shares which were issued to the group at one half cent each. These two transactions were sanctioned by the directors of the Company for the benefit of the promoters thereof, who were none other than themselves.

It was the intention of the original group to interest outsiders in putting up the capital necessary for development of oil properties. The inconsequential amount of $1,875 realized by the Company on the two above-mentioned transactions, as well as the subsequent loan, repayable on demand, made by the sole shareholders of the Company to the Company itself, represented preliminary contributions of a promotional nature, since, as appears at page 3 of Exhibits D and E, the group estimated that the capital required during the first year of operations would amount to about $500,000.

I think the promotional and trading activities of the appellant, as a member of the Canadian group, were much the same as those practised by one who is engaged in the promotion business and they continued after the Company was incorporated, because he was personally a party to a contract (Ex. 8) wherein, *inter alia,* the appellant and his associates, called the vendors, traded or exchanged option rights with Jas C. Ralston, called the purchaser, whereby the latter acquired a conditional option in the appellant's $\frac{1}{6}$ interest (50,000 shares) in 300,000 shares out of the 750,000 owned by the Canadian group, in consideration of his granting the appellant an option to purchase a $\frac{1}{6}$ interest in 125,000 shares (20,388 shares) which the purchaser had agreed to acquire from the Company.

Counsel for the appellant submitted that the delay of $2\frac{1}{2}$ years between the date of acquisition by the appellant of his first block of 41,667 $\frac{1}{2}$-cent shares and October 1951, when he began selling them, was such as to negative the intention of making a short term realization on them, and the fact that he did not sell as many shares as he could at the first opportunity was a further indication of a capital investment. In this latter connection the evidence shows that on a few occasions the appellant declined to sell as many shares as he could and in other instances he was asked to refrain from selling. Whatever decision the appellant took was not in my opinion indicative of a capital investment transaction but the exercise of his own judgment in

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deciding whether or not the occasion was sufficiently opportune.

Insofar as the above-mentioned delay is concerned, it is to be noted that the appellant exercised his option to acquire from Jas. C. Ralston 20,833 shares at 60¢ each in March 1951 and at the first opportunity sold 13,548 of them during the same month; and following the gas discovery he disposed of an additional 4,000 between July and September 1951.

As far as the ½-cent shares are concerned, he sold 20,000 in October 1951 and 12,000 in February 1952. I do not think that the date of acquisition is important, and, as appears by the foregoing, all the sales made by the appellant were effected within less than a year from the date at which it was first possible to sell them.

Counsel for the appellant submitted that the *Irrigation* case was very much in point since it concerned an isolated purchase of shares by a taxpayer which were disposed of *in toto*.

It should be noted that in the above case the appellant, with money borrowed from the Bank for another purpose, purchased 4,000 common shares out of a public offering of 5,000 shares of treasury stock of Brunswick Mining and Smelting Corporation Limited at a price of $10 a share, thus benefiting the treasury of the said Corporation to the extent of $40,000. Shortly thereafter, the Bank having demanded repayment of the loan within 30 days, the *Irrigation* Company disposed—presumably on the public market—of the greater portion of its Brunswick shares, the value of which, in the meantime, having risen within three weeks of their acquisition. The remainder of the said shares were sold four months later at a sufficiently large profit to discharge its bank overdraft. The Brunswick transaction as between the parties concerned was an at arm's length transaction and the taxpayer in making the purchase had taken no hand in the promotion of the said company and had acted in an individual capacity unconnected with any group or association.

At the risk of redundancy, I mention the following additional facts, which I consider to be indicia of trade present in the case at bar and not to be found in the *Irrigation* case.

The appellant joined with other members of the Canadian group for the purpose of promoting the Company (Bri-

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talta), whose shares are in issue; he contributed his time and ability without reward other than what he could derive from the sale of his shares. He acquired his shares as a result of not one but three transactions; namely, the purchase in March 1949 of 41,667 shares at the nominal price of ½-cent per share; the second purchase, in November 1949, of 83,333 shares was also at ½-cent per share; the acquisition in March 1951, at 60¢ each, of the 20,833 shares which the appellant had under option from Jas. C. Ralston and in consideration of agreeing to sell 50,000 of his ½-cent shares which were under option to the said Ralston at ½-cent per share; and finally, the two undertakings whereby he and the Canadian group placed all their shares in escrow with The Royal Trust Company and, in order to control the market, undertook not to dispose of any of them except through and with the consent of James, Copithorne & Birch Ltd.

I cannot accept the submission of counsel for the appellant that, even if the sales of stock made by the appellant in March 1951 constituted an adventure in the nature of trade, the discovery of the gas well in April 1951 with its beneficial result on the value of his shares had the effect of converting their subsequent sales into the category of capital gains realized by the appellant from an investment. I am accordingly of the opinion that the Minister was justified in regarding the transactions in issue as a scheme for profit-making.

For the foregoing reasons I consider that the appeal should be dismissed, with taxable costs in favour of the respondent.

Judgment accordingly.

1962 Oct. 19 — 1963 Dec. 31

BETWEEN:

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

VALCLAIR INVESTMENT COMPANY LIMITED .... RESPONDENT.

Revenue—Income tax—Income Tax Act, R S C. 1952, c. 148, ss. 3, 4 and 139(1)(e)—Investment Company—Sale of real estate—Income or capital gain—Trading transaction—Meaning of "Investment", "Undertaking", "Enterprise", and "Adventure"—Capital accretion on an investment.

The respondent, an investment company incorporated by Dominion Letters Patent in 1939, had about $2,000,000 invested in Canadian revenue producing shares, when, in 1951, allegedly to create some diversification of investment, it purchased a farm property in Côte St-Luc, Parish of Notre Dame de Grâce, near Montreal for $135,000, this being the sole purchase of real estate in its 20 years of operation. When the land was purchased it was completely surrounded by other farms and no development in the area had taken place except for a small one near the City Hall of Côte St-Luc A few months after the purchase, the company leased the property for one year to the man who had been operating it as a farm for over ten years, at a rental of $250 per annum, the lessee to pay the taxes. The lease was terminable by the lessor on short notice in the event of a sale. The tenant continued to occupy the property under lease until it was sold in March, 1954. No effort to sell the property had been made by the company by way of listing or advertising it and the offer to purchase it accepted by the company was unsolicited It resulted in the sale of the property for $300,500. The appellant added the profit of $169,533 50 realized on the sale to the company's declared income for the 1954 taxation year.

Held: That in order for a purchase to qualify as an investment, the object purchased must at least be susceptible of yielding an annual return such as rental, dividends or interest, but the amount of the return is not important.

2. That whether the transaction falls within the meaning of the words "undertaking" or "adventure" depends on the degree of risk and speculation which it entails, and what could amount to a great risk for one person might be, depending on the circumstances, negligible to another.

3. That this was not an undertaking or an adventure in the nature of trade since the elements of speculation and risk were negligible, the only risk facing the company being the duration of the waiting period before development reached the locality of its property, and its financial position was such that it could easily afford to bide its time.

4. That even if the transaction could be called "an adventure" it would not attract income tax unless it also bears the badges of trade.

5. That in the present case there is an absence of evidence of "commercial animus" and it cannot be said that the company carried out the trans-

action in issue in a manner characteristic of those who are trading in real estate.

6. That the gain in question was the realization by the company of a capital accretion on an investment which is not subject to tax.
7. That the appeal is dismissed.

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APPEAL from a decision of the Tax Appeal Board.

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

Paul Boivin, Q.C. and *Paul Ollivier* for appellant.

P. N. Thorsteinsson and *Philippe Guay* for respondent.

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

KEARNEY J. now (December 31, 1963) delivered the following judgment:

This is an appeal from a decision of the Tax Appeal Board dated November 28, 1961[1], wherein an appeal by the respondent from a reassessment made by the Minister, which added $169,533.50 to the taxpayer's previously declared income for its taxation year 1954, was maintained.

The appellant submits that the said decision was unfounded in fact and in law and that the aforesaid sum was not a capital gain on an investment but a profit made by the respondent on a sale of real estate under circumstances later described which stamped it as a trading transaction subject to tax within the meaning of ss. 3, 4 and 139(1)(*e*). The provisions of these sections 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;

[1] 28 Tax A.B C. 193.

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The respondent, *per contra,* contends that the proceeds from the sale in question did not constitute taxable income but was a capital gain realized on an investment and it adopted as its own the reasons given in the said decision.

Another similar appeal, *post* p. 478 *The Minister of National Revenue v. Cosmos Inc.,* was the next case on the roll for hearing and was one in which the respective parties were represented by the same counsel engaged in the present case. Counsel agreed that the evidence to be placed before this Court would be identical to that filed before the Board, consisting in each case of a transcript of the evidence, all exhibits, the documents furnished to the said Appeal Board by the Minister, as required by s. 89(4), all of which were duly filed.

Counsel furthermore declared that they proposed to make only one argument which would apply to both cases, since the legal principles involved were the same although factually the cases are quite separate and distinct and the shareholders were not the same in both instances.

The main facts of the case are as follows.

The respondent (hereinafter sometimes referred to as "the Company" or "the taxpayer") was incorporated by Dominion Letters Patent in 1939 and has been admittedly an investment company and treated as such by the Department of National Revenue, except in respect of the one transaction in issue.

The Company is and has been, at all material times, owned and controlled by La Société des Aéroplanes H. Potez, which was incorporated under the laws of France, where its head office is located.

The authorized capital of the Company consists of 12,000 common shares having a par value of $100 each, all of which were issued for cash shortly after its incorporation. Thus, as appears by its 1939 financial statement (which is the earliest of the financial statements filed as Exhibit A-1), the Company began business with cash available for investment amounting to $1,200,000.

When the land in question was purchased in 1951 the Company had a net equity of about 2-million dollars invested almost exclusively in Canadian revenue producing shares and a cash balance of over $130,000, as appears by its annual financial statement for the year ending December 31, 1951. Mr. Joseph Blain, Q.C., had been retained to incorporate the Company but a Mr. Archibald was organizer and manager of it until 1949 when Mr. Blain, whose only stock interest in the Company was one qualifying share, replaced him and became its president and general manager.

According to the evidence of Mr. Blain, who was the only witness called, he considered that a better diversification of investments was required so that, in the event of a stock market crisis, the Company would have an interest in another sphere of investment, such as real estate. When it came to Mr. Blain's knowledge that a farm property, owned by Le Trust Général du Canada, which was located in the Municipality of the Parish of Montreal, was for sale, he engaged a surveyor engineer named J. A. Papineau to examine and report on the property. He also consulted The Sun Trust Company and after due consideration came to the conclusion that the property would make a sound long-term investment and recommended its purchase to the Administrative Committee of the Company. His recommendation was accepted, but, because the Company was incorporated by Dominion Letters Patent, in order to hold lands in the province of Quebec it became necessary for it to obtain a provincial licence in mortmain. The Company did not procure a general licence but one for a single acquisition in a single year.

The Company took title to the property on December 21, 1951, which, as more fully appears by Exhibit A-2, consisted of farmland situated in Côte St-Luc, Parish of Notre-Dame de Grâce, measuring 2½ arpents in width by 20 arpents deep, more or less, together with a stone house, a barn and other buildings erected thereon. The purchase price amounted to $135,000, payable in cash.

On March 31, 1952 the Company leased the property for a period of one year commencing November 1, 1952, to Ange-Emile Jasmin, who had been operating it as a farm for over ten years. The rental was $250 per annum and the lessee assumed liability for all municipal, ordinary and special taxes, as well as any school taxes which he might be required to pay. In the event that the lessor wished to sell the whole or part of the said property it could terminate the lease on giving the lessee prior notice of 30 or 60 days, depending upon the season in which the said notice was

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given, the whole as more fully appears on reference to Exhibit A-6.

The evidence shows that the above-mentioned lease was extended in 1953 for another year and that the tenant continued to occupy the property until it was sold on March 25, 1954.

Mr. Blain's evidence discloses that the Company had no intention of subdividing the property or otherwise developing it in order to make it marketable or to secure additional revenue from it. It was not listed for sale with any real estate broker or elsewhere. No sale sign was placed on it nor did any of the Company's officers make any effort to bring about its sale.

On November 19, 1953, the Company received an unsolicited offer to purchase the property from Messrs. Dubrovsky and Chaimberg for the price of $300,000 payable $50,000 down and the balance upon the signing of the deed of sale, which was to take place not later than March 31, 1954. A second offer was subsequently received from Notary I. R. Hart, of whose existence Mr. Blain was unaware. Except that the second offer was $500 higher, namely, $300,500, it was in the same terms as the previous one.

As appears by the minutes of a meeting of the directors of the Company, held on November 25, 1953 (Ex. A-4), the last-mentioned offer was accepted and on March 25, 1954 the president was authorized to sign the deed (Ex. 5).

Why the respondent purchased the property and why it disposed of it were subjects to which considerable evidence was devoted.

In respect of the purpose or intent of the Company in purchasing the property, Mr. Blain stated that the Company had a superabundance of cash surplus and they were looking to diversify their investments, which were almost entirely in stocks and bonds, "pour que, advenant une crise sur le marché ou quelque chose, nous puissions avoir des mises solides dans d'autres secteurs de l'économie". After making a study of the property, he thought it was a reasonable and sound investment and was of the opinion that, if held for a long period, it would yield a capital appreciation (Transcript, pp. 10, 12, 13).

On cross-examination the witness confirmed the above testimony (Transcript, p. 25 and particularly p. 27), where, being pressed on the question of re-sale, he stated:

Q Lorsque vous dites que vous vouliez obtenir une appréciation du capital, de quelle façon vouliez-vous obtenir cette appréciation au moment de l'achat de la terre?

R. Une revente éventuelle. Je ne peux pas concevoir autrement.

Q. Comme cela, quand vous avez acheté vous aviez l'intention de revendre?

R. Je ne peux pas acheter une chose pour la garder perpétuellement.

Q Au point de vue placement, on peut garder pour cultiver ou autre chose?

R Ce n'était pas pour cultiver, ni pour lotir non plus. On n'avait jamais eu cette intention-là. On n'y a jamais pensé un seul instant.

In answer to the undermentioned question as to why the Company sold the property, the president replied as follows (Transcript, p. 16):

Q Maintenant, pourquoi, en votre fonction de président de cette compagnie, pourquoi est-ce que la compagnie a vendu le terrain?

R Parce que à ce moment-là nous étions entourés de spéculateurs qui faisaient des lotissements tout autour de nous autres. Et, cela provoquait des travaux publics considérables, cela amenait évidemment une augmentation de taxes. Et, en plus de cela, le statut provincial qui avait, depuis un très grand nombre d'années, constitué la base d'imposition pour les terrains en culture alentour de Montréal, qui limitait la valeur imposable à $300, cessait d'être en vigueur Alors, on ne pouvait plus juger la situation comme charge fixe à apporter en rapport avec le placement Et, en plus de cela, il y avait des tentatives de changement de zonage dans tout le coin.
Alors, quand l'offre nous est venue, nous avons vendu parce que nous n'avions pas l'intention de lotir ou de subdiviser et de nous laisser entraîner dans un mouvement de spéculation qui se faisait autour de chez nous à ce moment-là. Et qui s'est développé brusquement dans l'espace de quelques mois.

Further, at page 25 of the Transcript, the witness in cross-examination testified as follows:

Q Lorsque vous avez acheté le terrain en question, votre intention était de faire le plus de profit que vous pouviez faire. Advienne que pourra, en prévoyant l'avenir un petit peu?

R Ce n'était pas là notre intention. Notre intention c'était de diversifier nos placements et d'escompter une appréciation sur un placement immobilier.

Q Mais, vous aviez le but, lors de l'achat, vous aviez l'intention de revendre dans une période de temps?

R. Lors de l'achat, nous avions l'intention de faire un placement immobilier, et nous n'avions pas l'espoir de perdre. Cela aurait été ridicule n'est-ce pas? Et je peux avoir la prétention de viser à

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d'autres choses qu'à poser des actes qui n'auraient pas de sens. Je n'ai pas acheté dans le dessein de perdre.

Speaking of the risk in effecting the said purchase, the witness testified that, although one expert whom he consulted thought that the price which the Company was ready to pay was too high, nevertheless, after careful consideration, he felt at ease in recommending its purchase (Transcript, pp. 26 and 29).

The taxpayer procured its working capital from the cash subscriptions made by the original subscribers amounting to $1,200,000. The Company never paid any dividend and any surplus which it accumulated was undistributed and used to increase the Company's investments.

At the time of the purchase no development in the area had taken place but for a small one near the City Hall of Côte St-Luc, and the land in question was completely surrounded by other farms (Transcript, p. 29).

It is proved beyond peradventure that the transaction in question was an isolated one and that in the twenty years of the Company's activities it was the only instance in which the Company had purchased and sold real estate.

Counsel for the Minister conceded that the taxpayer functioned as an investment company during the period of 1939 to 1959, except with respect to its purchase in 1951 for $135,951 of the farmland in question and its subsequent sale thereof in 1954 for $300,500, and that the issue in the case is restricted to this operation alone and the gain of $170,000 (approximately) which resulted therefrom.

As a consequence, the issues in this case can be reduced to very narrow dimensions. First, was the purchase of the instant land a transaction of such a nature that it could be properly termed an investment? Secondly, if, as submitted by counsel for the appellant, even assuming that the aforementioned query is answered in the affirmative, was the transaction in issue carried out in such a manner as to constitute an undertaking or an adventure in the nature of trade, as set out in s. 139(1)(*e*).

With respect to the first query, in the absence in the Act of any definition of "investment" I think recourse must be had to dictionaries and jurisprudence; the following definition of the word "investment" is found in The Shorter Oxford English Dictionary, 3rd ed., p. 1040:

5. Comm. The investing of money or capital; an amount of money invested in some species of property. b A form of property viewed as a vehicle in which money may be invested.

In respect of jurisprudence I think it indicates that when a purchase is made—such as in the instant case—in order for it to qualify as an investment, the object purchased must be at least susceptible of yielding an annual return such as rental, dividends or interest.

In the case of *Commissioners of Inland Revenue v. Reinhold*[1], Lord Carmont at page 392, referring to the observations of Lord Dunedin in the case of *Leeming v. Jones*[2], sets out, in the following terms, the requirements necessary to constitute an investment:

... Lord Dunedin says, in the case I have already cited, at page 423:

... The fact that a man does not mean to hold an investment may be an item of evidence tending to show whether he is carrying on a trade or concern in the nature of trade in respect of his investments, but *per se* it leads to no conclusion whatever. (15 T.C. 360)

* * *

I draw attention to Lord Dunedin's language being used with reference to "an investment", meaning thereby, as I think, the purchase of something normally used to produce an annual return such as lands, houses, or stocks and shares. The language would, of course, cover the purchase of houses as in the present case, but would not cover a situation in which a purchaser bought a commodity which from its nature can give no annual return. ...

Shares sometimes called growth stocks which, at the date of their purchase, are not on a dividend-paying basis, often form part of an investment company's portfolio and are considered, for tax purposes, as investments, since they are susceptible not only of capital growth but also of producing income. I think the same can be said of the purchase of the instant property.

Counsel for the appellant contended that because the taxpayer was concerned with the gain to be derived from the long-term prospect of selling the property rather than the meagre return which it yielded, the money expended in acquiring it was not an investment.

I do not think that the amount of return is important; it may vary with the circumstances. Thus, a vacant prop-

[1] 34 T.C. 389. [2] [1930] A.C. 415, 420, 423.

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erty in the centre of the city, when used for automobile parking space, sometimes commands high rentals. True, the return was a very modest sum; nevertheless, I think the farmland in issue falls well within the definition previously described.

Now, with respect to the second question, admitting it would otherwise rank as an investment, did the transaction, due to the manner in which it was carried out, constitute an undertaking or adventure in the nature of trade?

Counsel for the appellant relied upon and directed his argument to the words "undertaking" and "adventure in the nature of trade", which was a less onerous task than the attempting to establish that the Company was engaged in a trade or the real estate business.

I do not think that the instant transaction warrants the appellation "undertaking". The Shorter Oxford English Dictionary, 3rd ed., p. 2294, defines "undertaking" as

1. Energy, enterprise.
2. Something undertaken or attempted; an enterprise.

The same dictionary at p. 616 defines "enterprise" thus:

1. A design of which the execution is attempted; a piece of work taken in hand; *now only*, a bold, arduous, or dangerous undertaking.
2. Disposition to engage in undertakings of difficulty, risk, or danger; daring spirit.

I believe I might as well here also consider the word "adventure", which, in my opinion, is akin to "undertaking". At pages 27 and 28 of the above-mentioned Oxford dictionary the following definitions are given:

1. That which happens without design; chance, hap, luck.
2. A chance occurrence.
3. A trial of one's chance; a venture, or experiment.
4. Chance of danger or loss; risk, jeopardy.
5. A hazardous enterprise or performance; hence, a novel or exciting incident.
6. A pecuniary venture, a speculation.
7. Adventurous activity, enterprise.

The element of uncertainty attends innumerable transactions in everyday life, but whether, for taxation purposes, the instant transaction falls within the aforesaid meaning of the words "undertaking" or "adventure" depends, I think, on the degree of risk and speculation which it entails.

Counsel for the appellant placed great reliance on Mr. Blain's statement that a superintendent of the real estate department of The Sun Trust Co., whom he consulted, was of the opinion that it was risky for the Company to pay as high a price as $135,000 for the property, which, according to my calculations, amounts to 7¢ per square foot. In my opinion, what could amount to a great risk for one person might be, depending on the circumstances, negligible to another—it has sometimes been observed that there is one law for the rich and another for the poor. The respondent was in the privileged position of having an abundance of liquid assets in the form of cash and it could afford to (figuratively) fold its arms and adopt a safe and passive attitude in respect of the instant property while allowing the impact of an expanding city population to make its presence felt. In the instant case, development, because of a sudden rise in real estate values near the city limits of Montreal, was more rapid than anticipated, but the waiting period was more than two years and there is no suggestion in the evidence that the retention of the property during the interval adversely affected the financial position of the Company or that it ran any perceptible risk in doing so. I am not surprised that Mr. Blain's judgment was not affected by the adverse comments of one of the persons whom he consulted, because judging the state of the market is a matter of opinion—and whether a stock (or stocks) is selling too high is a very open question and the same may be said of real estate.

In the present instance the purchaser anticipated that it would be some years before development would take place in the locality of the property and its financial position was such that it could easily afford to bide its time.

The purchase of land is one of the oldest types of long-term investment, and, since diversification of investments was one of the Company's main objects insofar as the facts are concerned, in my opinion practically the only risk that it ran was the duration of such waiting period. I am of the opinion that the elements of speculation and risk were negligible in the transaction in issue and did not amount to nor can it be regarded as an undertaking or an adventure in the nature of trade within the meaning of the Act.

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Even if the transaction in question may be appropriately called "an adventure", this does not mean that it will attract income tax—unless it is also established that it bears the badges of trade. I think that it is particularly in this latter respect that the weakness of the appellant's case is revealed.

It has been consistently held that each case should be judged on its own facts. However, there has been a wealth of jurisprudence dealing with the question of what constitutes an adventure *in the nature of trade,* but by no means are all of them pertinent to the instant case and they should be carefully distinguished.

Counsel for the appellant cited as clearly applicable to the case at bar *Rutledge v. The Commissioners of Inland Revenue*[1], wherein profits realized on the sale of a quantity of toilet paper was held to be a deal in the nature of trade.

I think that those cases which concern the sale of commodities, such as toilet paper or the like, which are consumed by use and by their nature not susceptible of producing income are distinguishable from and inapplicable in the instant case, where the farm was not only susceptible of producing income but actually did so at all material times.

Much more apposite is the case of *Irrigation Industries v. The Minister of National Revenue*[2] which was invoked by counsel for the respondent together with many of the authorities therein referred to. This well-known case concerned a purchase by the Irrigation Co. of 4,000 common shares of a public offering of 500,000 shares of treasury stock of Brunswick Mining and Smelting Co. Ltd. with money borrowed from the Bank for another purpose. The shares were of a highly speculative character and although the purchaser was forced to sell practically all of them within a few months after their purchase, in order to repay the Bank, it was, nevertheless, able to realize a considerable profit in doing so.

The Brunswick Company did not own an operating mine but was trying to revive one which was defunct and the likelihood of it paying a dividend was remote. It was under circumstances as above described that Martland J., who rendered the judgment for the majority of the Court, found

[1] (1929) 14 T.C. 419. [2] [1962] S.C.R. 346.

that the transaction was not subject to tax and at page 350 he stated:

> However, assuming that the conclusion was correct that this purchase was speculative in that it was made, not with the intention of holding the securities indefinitely, with a view to dividends, but made with the intention of disposing of the shares at a profit as soon as reasonably possible, does this, in itself, lead to the conclusion that it was an adventure in the nature of trade?
>
> It is difficult to conceive of any case, in which securities are purchased, in which the purchaser does not have at least some intention of disposing of them if their value appreciates to the point where their sale appears to be financially desirable.
>
> * * *

Again, at page 355, the learned Judge said:

> The only test which was applied in the present case was whether the appellant entered into the transaction with the intention of disposing of the shares at a profit so soon as there was a reasonable opportunity of so doing Is that a sufficient test for determining whether or not this transaction constitutes an adventure in the nature of trade? I do not think that, standing alone, it is sufficient.

I think that in the present case there is a marked absence of evidence of what Fournier J., in *Sterling Paper Mills Inc. v. The Minister of National Revenue*[1] called *commercial animus*, and it cannot be said that in the present case the respondent carried out the transaction in issue in a manner characteristic of those who are trading in real estate. Indeed the passive role played by the respondent was the antithesis of what one would expect from a trader under like circumstances.

In my view the evidence establishes that the gain in question was the realization by the respondent of a capital accretion on an investment which is not subject to tax.

For the foregoing reasons, I am of the opinion that the appeal must fail.

The respondent will be entitled to its taxable costs.

Judgment accordingly.

[1] [1960] Ex. C.R. 401.

1962 Oct. 19 — 1963 Dec. 31

BETWEEN:

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

COSMOS INC. .... RESPONDENT.

Revenue—Income tax—Income Tax Act, R S C. 1952, c. 148, ss. 3, 4 and 139(1)(e)—Investment company—Sale of real estate—Income or capital gain—Trading transaction.

The respondent, an investment company incorporated under the laws of the province of Quebec, purchased in 1949, the year of its incorporation, part of lots Nos. 100 and 101 in the official plan and book of reference of the Incorporated Village of Côte des Neiges for $235,960 08, which land was in the same general area as the land in issue in *The Minister of National Revenue v. Valclair Investment Company Limited, ante, p. 466* This was farm property and was rented for $500 per annum to the man who had operated it as a farm for many years and who continued to do so until part of it was sold in 1954. The company did no advertising, subdividing or promotion of the land, nor was it listed for sale prior to receipt of an unsolicited offer to purchase lot No 100 for $470,000. The offer was accepted and the deed of sale was executed in the company's 1954 taxation year. The company retained the balance of the land and still owned it at the date of trial.

The company's balance sheet indicated that in 1950 it had total funds of $710,000, of which over $450,000 were invested in stocks, bonds and loans, and $235,000 in the lands in issue, leaving a balance in cash of about $7,000.

Held: That the purchase of the land was an isolated transaction and a conscious attempt by the directors of the company to diversify its investments and acquire a long-term investment.

2 That the facts in this case are not essentially different from those in the *Valclair* case and the arguments raised by counsel were the same in both cases.

3 That the appeal is dismissed.

APPEAL from a decision of the Tax Appeal Board.

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

Paul Boivin, Q.C. and *Paul Ollivier* for appellant.

P. N. Thorsteinsson and *Philippe Guay* for respondent.

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

KEARNEY J. now (December 31, 1963) delivered the following judgment:

This is an appeal from a decision of the Tax Appeal Board dated November 28, 1961[1], wherein it was held that an assessment made by the appellant, which added $335,477.22 to the respondent's previously declared income for its taxation year 1954, was annulled and the latter's appeal therefrom was maintained.

In its income tax return for the year 1954 the respondent claimed as a capital gain the amount of $335,477.22 which it realized on the sale of a farm which it had acquired on October 5, 1949.

I have had occasion to make reference to the instant case in *Minister of National Revenue v. Valclair Investment Co. Ltd. ante* p. 466 in which I rendered judgment earlier today. The facts and principals involved are, *mutatis mutandis,* substantially the same in both cases. The properties in the *Cosmos* and *Valclair* cases, though not contiguous, were in the same general area behind Mount Royal.

The respondent, admittedly a Canadian investment company duly incorporated in 1949 under the laws of the province of Quebec, in the same year purchased the property in question, which was known and described as part of Lots 100 and 101 in the official plan and book of reference of the Incorporated Village of Côte des Neiges, measuring 1,224,546 and 138,083 sq. ft. respectively, for $235,960.08 (Ex. A-1), or approximately 17¢ per square foot.

In 1953 the respondent received an unsolicited offer of $470,000 for lot No. 100, which it accepted, and the deed of sale was executed in the respondent's taxation year 1954. There was a farm house and accessory buildings located on the farm, both of which were rented for some $500 per annum to a tenant farmer who had operated the farm for many years prior to its acquisition by the respondent and who continued to do so until it was sold in 1954. The financial statements of the Company for the years 1950 to 1959, inclusive, were filed as a single exhibit (A-2).

As appears by its statement for 1950, the Company's authorized capital-stock consisted of 10,000 four percent (4%) cumulative preferred shares of $100 each, 7,000 of

[1] 28 Tax A B C. 193.

which were fully paid up, and 10,000 common shares, 5,003 of which were issued for $2 per share.

As appears by its balance sheet for 1950, with its available funds, amounting to $710,000, the Company invested over $450,000 in stocks, bonds and loans, and, after investing $235,000 in the aforesaid lands, had a cash balance of about $7,000.

The Company never paid any dividend. It retained possession of that part of Lot 101 which it had acquired and was still in possession of it at the date of trial. The gains realized on the sale of Lot 100 in 1954 were reinvested in well-recognized stocks and bonds and which in 1959 amounted to approximately $900,000.

Fifty percent of the Company's capital stock was held by Canadian interests and the other half by French interests, but who were not the same parties as those interested in Valclair Investment. At the time of acquisition and sale of the property, Mr. Joseph Blain, Q.C., who was the main witness to testify, was a director of the Company and a member of its Administrative Committee; Mr. Marius Doye was its president. Mr. Blain held one qualifying share in his own right and 50% of the issued capital in trust for the owners thereof.

The evidence discloses that the purchase of the land was an isolated transaction and a conscious attempt by the directors of the Company to diversify its investments and acquire a long-term investment. The property was sold exactly as it was bought—for cash. There was no advertising, no subdivision, no promotion of the land for sale, neither was it listed with a real estate agent. Following a marked rise in land values in 1953 the Company accepted the aforesaid unsolicited offer for the property in 1954 or about five years after its acquisition.

The facts in this case are not essentially different from those in the *Valclair* case and the arguments raised by the respective counsel for the parties were the same in both cases.

I consider, for the reasons given in the case of *Minister of National Revenue v. Valclair Investment Co. Ltd., ante* p. 466, that the present appeal should be dismissed with costs.

Judgment accordingly.

BETWEEN: 1962 Oct. 18

RIVERSHORE INVESTMENTS LIMITED .... APPELLANT; 1964 Feb. 27

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, s. 137(1)—Artificial transaction—Sale and repurchase of land—Intention of company deemed to be that of its directors—Directors profiting personally from transaction.

Leslie Farkas and Andrew Gaty, who were active as individuals in the real estate business, owned all the shares of Crosstown Realties (Mtl) Inc and ⅗ of the shares of the appellant company, and between them, held the positions of president and secretary of both companies. In April 1955, the two men offered to purchase a parcel of land in the County of Laprairie, Quebec, for $32,500, the deal being completed on June 30, 1955 with the property being conveyed to the appellant at their direction On July 6, 1955, one Leslie Benko made an offer through Crosstown Realties (Mtl) Inc to purchase the said land for $35,000 On September 14, 1955, before obtaining title to the said land, Benko offered to sell it through Crosstown Realties (Mtl) Inc. to its nominee for $61,000. On September 30, 1955, Benko secured title to the said land and on the same date he reconveyed it to the appellant. On the next day, October 1, 1955, Benko received a cheque for $26,000 issued by the appellant and signed by Gaty as president, ostensibly in payment of the difference between the price Benko had agreed to pay for the land and the price for which the appellant had agreed to repurchase it from him. The appellant resold the said land to River Construction Limited on October 30, 1955 for $65,000. There was no evidence that either Benko's offer of July 6 to purchase the said land from the appellant, or his offer of September 14 to sell it back to the appellant had ever been accepted or that the deposits stipulated for in both offers had ever been paid. In addition, Crosstown Realties (Mtl) Inc. did not charge a commission in respect of either transaction.

Subsequent to October 1, 1955, Benko endorsed the cheque for $26,000 and gave it to Farkas and Gaty as payment for 2,600 non-cumulative, 4% non-participating, non-voting preference shares in Crosstown Realties (Mtl) Inc. with a par value of $10 per share, which were owned by Farkas and Gaty and which were not transferable without their consent. The evidence established that the shares had only a nuisance value of about $1.00 per share in the hands of Benko.

Held: That the repurchase of the land by the appellant for $26,000 more than it had sold it to Benko for, constituted a clever but artificial scheme whereby Farkas and Gaty succeeded in realizing a handsome profit personally on the sale of the 2,600 preference shares in Crosstown Realties (Mtl) Inc., and this with money provided by the appellant and but for which the said $26,000 would have been included in the appellant's taxable income.

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2. That the intentions of the appellant are deemed to be those of its directors and it is bound by the artificiality of the transactions carried out by its directors.
3. Appeal dismissed.

APPEAL under the *Income Tax Act*.

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

R. E. Parsons for appellant.

Paul Boivin, Q.C. and *Sydney Phillips* for respondent.

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

KEARNEY J. now (February 27, 1964) delivered the following judgment:

This is an appeal from a notice of reassessment whereby the Minister added to the appellant's taxable income otherwise payable for its taxation year ended June 30, 1956 an amount of $26,000, which the Minister declared was a disbursement or expense made or incurred by the taxpayer which was designed to artificially reduce its taxable income for the said year, as contemplated in s. 137(1) of the *Income Tax Act*, R.S.C. 1952, c. 148 (as amended), and which reads as follows:

> In computing income for the purpose of this Act, no deduction may be made in respect of a disbursement or expense made or incurred in respect of a transaction or operation that, if allowed, would unduly or artificially reduce the income

The evidence in the case consisted of the testimony of four witnesses, Messrs. Leslie Farkas and Andrew Gaty, who were called at the instance of the appellant, and Mr. Leslie Benko and Mr. P. Gould, C.A., who were heard on behalf of the respondent, together with various exhibits filed by them, as well as the documents transmitted by the Minister pursuant to s. 100(2) of the Act.

Apart from Mr. Gould, who gave expert evidence as to the value of certain shares of stock—later described—, the other three witnesses were personally interested in the transactions in issue.

It is common ground that the aforesaid reassessment arises out of certain transactions nearly all of which are in documentary form and which were all concerned with the same piece of real estate, composed of about twenty arpents, situated in the County of Laprairie, in the Province of Quebec (hereinafter sometimes referred to as "the property").

I propose to summarize the documentary evidence supplemented by reference to some verbal evidence which has not been disputed and which may serve to make the documents more readily understandable.

Messrs. Farkas and Gaty were engaged in the real estate business in Montreal and operated through three media, namely, by acting in their personal capacity, through the appellant company, of which they were secretary and president respectively and owned between them two-thirds of its capital-stock, and the third medium was Crosstown Realties (Mtl) Inc. which was engaged in a real estate agency business and its entire issued stock was owned by Messrs. Farkas and Gaty (or members of their families); they were its president and secretary respectively. Mr. Benko was in no way related to them nor did he hold any stock in either of the above companies prior to October 1, 1955.

The following is a brief summary of the documentary evidence of the foregoing transactions, some of which I will comment upon more fully later.

In April 1955 Messrs. Farkas and Gaty made an offer to purchase the property from its then owner J. P. Martin for the sum of $32,500 and the deed of sale completing the transactions was to be finalized by June 30, 1955. Messrs. Farkas and Gaty hoped to sell the property prior to the aforesaid date but no buyer could be found. See notice of objection dated October 3, 1958, signed by Andrew Gaty, contained in the documents transmitted by the Minister.

On June 30, as alleged in the statement of facts and admitted in the respondent's reply, Farkas and Gaty caused the appellant company to acquire the property in their stead by a notarial deed dated June 30, 1955 (Ex. P-1), as alleged in paragraph 1 of the statement of facts, which is admitted.

As appears by Exhibit P-2, on July 6, 1955 Leslie Benko made an offer through Crosstown Realties (Mtl) Inc. to pur-

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chase the property for a price of $35,000. The main provisions of the offer are as follows:

6th July, 1955

To CROSSTOWN REALTIES (MTL) INC.
630 Dorchester West
Montreal, P.Q.

Dear Sirs:

I the undersigned hereby offer to Purchase through your agency for myself or for my nominee(s) a piece of land known as P 1-4 in the Parish of Lapraire, having a total surface area of 20.57 arpents english measure and more or less, all as shown on the surveyor's plan prepared by Mr. Lapointe, surveyor, dated 24th May, 1955; The total purchase price to be $35,000 (THIRTY-FIVE THOUSAND DOLLARS) payable as follows and under the following terms and conditions:

1.) $18,750 in cash upon signing of the deed of sale.

2.) $16,250 by assuming the existing first mortgage, bearing interest at the rate of 5% per annum, repayable within five years, all in accordance with the terms and conditions stipulated in the deed creating said mortgage.

* * *

5.) This offer is open for acceptance until the 10th day of July 1955 6 P.M. after which date it becomes nil and void. Herewith my cheque of $2,000 as a deposit on account of the purchase price. This offer can be accepted directly to your company as agents.

—L. BENKO

On September 14, 1955, prior to obtaining title to it, Mr. Benko offered to sell the property through Crosstown Realties to its nominee for $61,000 (Exhibit P-3); the main provisions of the offer are as follows:

14th Sept. 1955

To Crosstown Realties (Mtl) Inc.
630 Dorchester West
Montreal, P.Q.

Dear Sirs:

I the undersigned hereby offer to sell through your agency to your nominee(s) a piece of land known as P 1-4 in the Parish of Lapraire, measuring 20 57 arpents english measure and more or less, all as shown on the surveyor's plan prepared by Mr. Pierre Lapointe surveyor, dated 24th May, 1955. The total sales price to be $61,000 payable as follows and under the following terms and conditions:

1.) $44,750 in cash upon signing of the deed of sale.

2.) $16,250 by assuming the existing first mortgage bearing interest at the rate of 5% per annum, becoming due within 5 years (1960), all in accordance with the terms and conditions stipulated in the deed of sale creating said mortgage.

* * *

5.) This Offer to Sell is open for acceptance until the 18th day of (month missing, should be September) 1955 12 P.M. after which date it becomes nil and void. If accepted it must be accompanied by a cheque of $2,000 made to my order as a deposit on account of the purchase price.

—L. BENKO

On September 30, 1955 Mr. Benko secured title to the property from the appellant for $35,000 (Ex. P-4) and on the same date he sold it back to the appellant for $61,000 (Ex. P-5), whereupon the appellant acquired immediate title and possession.

On the day following the sale, namely, October 1, 1955, the appellant issued a cheque amounting to $26,000, signed by Andrew Gaty as president of the appellant and payable to the order of Leslie Benko. As appears by the said cheque, it was endorsed by L. Benko and L. Farkas and was cleared for payment on November 3, 1955. The significance of the said cheque endorsement is not explained by any documentary evidence but will be presently disclosed in a review of the testimony of the main witnesses.

As appears by paragraph 4 of the appellant's statement of facts, on October 31 the appellant sold the property to River Construction Limited for $65,000. The deed was not produced, as the said paragraph 4 was admitted in the respondent's reply.

The dispute concerns the artificiality or otherwise of all or any of the transactions described in Exhibits P-3 to P-6 inclusive.

Now, with respect to the testimony of witnesses, apart from his evidence previously referred to and which is non-controversial, Mr. Farkas testified that some time prior to the Benko offer of September 14 (Ex. P-3) he and the latter after discussion agreed that the resale price would be $61,000. In describing what took place when Exhibits P-4 and P-5 were executed Mr. Farkas said that the $61,000 mentioned in the deed was paid to Mr. Benko, and when asked how it was paid he said, "It was an accounting, because, on the same day, Mr. Benko had purchased from the same Corporation the same piece of property for $35,000 and for the difference of $26,000 the appellant company issued a cheque to Mr. Benko", who used it to purchase $26,000 worth of shares from Mr. Gaty and himself.

In cross-examination the witness testified that some time prior to the signing of the Benko offer of September 14 (Ex. P-3) the latter had agreed to accept 2,600 preferred

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shares of Crosstown Realties stock in full settlement of the balance owing him of $26,000. Mr. Farkas also testified that the endorsement of the cheque and the delivery of the shares took place the day after Exhibits P-4 and P-5 had been executed. The witness stated that he eventually cashed the cheque.

Mr. Farkas could not remember when the possibility of Mr. Benko acquiring Crosstown Realties' shares arose or whether the latter inquired into the financial status of the said company.

The witness stated that Mr. Benko, some time before he gave the nominee of Crosstown Realties, which was the appellant, the option to repurchase the property, reminded him and Mr. Gaty that the property was worth much more than the $35,000 which he was paying for it, that he wanted a good price for it and that if Mr. Benko had asked him to release him from his offer he would have been glad to do so. It was Mr. Benko, he said also, who suggested the figure of 26,000 (should read "2,600") Crosstown Realties shares and informed the witness that he wished later on to buy some more shares of the said stock.

Mr. Gaty, apart from giving testimony on facts which are not disputed or which were already referred to in Mr. Farkas' testimony, made some further statements which I think are noteworthy.

Crosstown Realties, he thought, drew up the Benko offer to buy the property for $35,000 (Ex. P-2), and, in respect thereof, Crosstown Realties was acting as agent for the appellant. The above-mentioned company also drew up the offer by Mr. Benko to sell the property to the nominee of Crosstown Realties for $61,000 (Ex. P-3) and, in the latter instance, it was acting both for the appellant and Mr. Benko. Asked if Crosstown Realties received any commission in respect of the $61,000 transaction, the witness stated:

> Because river investment was a company which was two-thirds (⅔) controlled by us, we did not deem it necessary to charge commission to ourselves when it came to resale for Mr. Benko. . . . the price agreed was fixed. We probably could have charged—we could have quoted a few thousand dollars more and charged commission but we did not deem it necessary.

Later, in his evidence, when reminded that Crosstown Realties and the appellant were separate companies, and on again being asked if a commission had been paid, the witness said, "I mean I don't know, I don't remember that. I don't remember that it was not."

The witness, when questioned about one of the by-laws of Crosstown Realties called "By-law No. 12", which, *inter alia,* stipulated that no transfer of shares could be made without the consent of its directors, agreed that it had not, to his knowledge, ever been repealed.

Mr. Gaty also confirmed that the minutes of a meeting of the directors of Crosstown Realties, dated October 1, record that he and Mr. Farkas sold and transferred to Leslie Benko the 2,600 shares previously referred to.

The witness stated that the reason "we"—meaning, I presume, the appellant—"repurchased the property was because we had a chance to resell it later."

He later stated: "When we made the sale to Benko, which was effected on June 30, there were only hopes that houses would be built in the area, but by the end of the summer they had become facts due to the construction which had been carried out in the immediate neighbourhood during the later summer months . . . ", which accounted for the sudden increase in value of the instant property.

Mr. Benko, during his testimony, filed a letter, signed by himself, addressed to the Inspector of Income Tax in Montreal (Ex. R-1) dated June 12, 1958, which together with his testimony set out his version of his dealings with Messrs. Farkas and Gaty.

As appears from the letter, he controls Benmar Realty Investment Corporation which had acquired two income-bearing properties from which he derives his living. He had, in two separate years, by influencing others to follow his example, received what amounted to commissions, which he reported as taxable income, but stated he did not deal on a business level with immovable property, either as a buyer or seller or brokerage agent.

Mr. Benko, in the aforesaid letter, gave the following account of what prompted him to make the offer of July 6 (Ex. P-2). His family, he stated, consists of an only daughter whose husband was working in Montreal for Dominion Engineering Company Limited. Harbouring some doubts early in 1955 about the permanency of his son-in-law's employment and fearing that he might move to Cali-

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fornia, in order to prevent this occurrence, after much thought and visiting many sites, he decided to acquire the instant property for his son-in-law who was fond of sports, with the intention of developing it into a sports centre, including golf driving range, a miniature golf course, tennis and archery courts and such additional like features. He instructed an architect to prepare drawings of the proposed sports centre who made a sketch dated July 15, 1955. He had rented for part of the summer season a cottage at Donnelly Lake. During the latter part of July, the manager (since deceased) of Dominion Engineering Co. Ltd. and his wife visited him and assured him that he need have no concern about the permanency of his son-in-law's employment and that he should give up all thought of establishing an alternative business for him. The witness abandoned his plans for the centre. The letter goes on to say (p. 2, last para.):

> Upon my return from the summer home to Montreal I notified Messrs. Gaty and Farkas that due to altered circumstances I would not be requiring the property and asked if they could locate a buyer to take it off my hands. I myself tried to find a buyer, but without experience in the handling of land, and with no connections in that business, I was unsuccessful. Subsequently Messrs. Gaty and Farkas indicated to me that they were interested to buy the property, and I agreed that for the difference between my buying and selling price I would obtain and accept 2,600 Preferred Shares of Crosstown Realties Limited, having a par value of $10 each.

The witness testified that he first spoke to Messrs. Farkas and Gaty about selling the property for him when he returned from the country, which, he thought, was at the end of July or some time in August.

Asked if at the above time he also discussed the question of acquiring preferred shares in Crosstown Realties, he answered:

> We spoke for this question when I sell this piece of land and we have plus—I buy for this plus, the shares, I take the shares.

Q. When did you discuss this question of taking the shares?

A. I tell you, I want to sell this piece. First alone, I don't find a buyer for this. I don't find a buyer alone and so, I go back to Mr. Farkas and Gaty and tell them: "Look, I am squeezed, now my house is not sold and I have to pay maybe in a short time and I don't have this money free. Sell me this property for me".

At pages 80 and 81 of the transcript, on being cross-examined by counsel for the appellant, Mr. Benko replied:

Me R. E. PARSONS:

Q. You accepted an offer to purchase this property on July 6th or 7th, 1955?

A. Yes.

Q. And then, you went away for the summer?

A. Yes.

Q. When you came back, you said that you no longer had use for this property?

A. No.

Q. Why was that?

A. Because the Manager for Dominion Engineering working with my son-in-law and he invited us and we spoke about it and I told him I had trouble with my son-in-law, two or three friends of his want to go to the States and I have only one son and daughter and I don't want him to go, what kind of a future he has. So, he told me: "There is a very nice future, he has a very good future in engineering. Why don't you want him to go?" I stopped him, he has a future in the factory, he has today, he has a very nice position. I told him: "Look, you cannot go from here, I will sell the property, I am not interested for that."

* * *

Q. Then, if I understood correctly, you went to see Mr. Farkas and Mr. Gaty?

A. Yes.

Q. And then you also agreed with Mr. Farkas and Mr. Gaty, if I understood you correctly, that with the plus or profit, the difference between your purchase price and what they would get for it, you would buy shares of Crosstown Realties from Mr. Farkas and Mr. Gaty, is that correct?

A. Yes.

M[e] S. PHILLIPS: The testimony is that he would accept shares, not buy shares. That is the testimony by the letter in evidence.

M[e] R. E. PARSONS:

Q. At the time the deeds were signed, did you receive payment by River Shore Investments? Did you receive a cheque or cash for the difference?

A. I had a cheque, but I endorsed it and I gave it to Mr. Farkas and Mr. Gaty.

There remains the evidence of Pierce Gould, a chartered accountant who testified that in his opinion the fair market value in 1955 of the 2,600 preferred shares in issue in the hands of anybody who, like Leslie Benko, was not a common-shareholder, was not in excess of $1 per share. The witness arrived at this valuation for the following reasons. The shares in question were non-cumulative-4%-non-participating-non-voting shares and formed part of a block of 4,500 shares which had been issued in 1955 to Messrs. Farkas and Gaty in consideration of the transfer from a company called Crosstown Realties of its goodwill to Crosstown

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Realties (Mtl) Inc. The significant part of the above-mentioned goodwill was made up of a contract which existed between the Town of Préville and Crosstown Realties. The balance sheets of Crosstown Realties Inc. for 1955 to 1961, inclusive, showed that the 4,500 preferred shares originally issued to Messrs. Farkas and Gaty were still outstanding, that they were redeemable at par at the option of the directors and on voluntary winding up the holder would be entitled to nothing more than $1 per share; that no dividend had ever been paid on them and that Leslie Benko had never received from the said company any payment of any kind and that, at the date of trial, he still retained possession of them. Mr. Gould also stated that since no evidence to the contrary was presented to him, he assumed that the commission earnings of the company between 1955 and 1959 were such that in the hands of common-shareholders could be worth par. The profit and loss account for 1961 indicated that the company had current assets of $231,000, almost all of which represented loans receivable the character of which the witness had not examined and it had current liabilities of $227,000.

After comparing the quoted market value of preferred shares which were in a comparable status to the instant shares, the witness was of the opinion that, marketwise, they had only a nuisance value, which he placed at $1 per share.

Counsel for the appellant submitted that the respondent had failed to produce any evidence that the original offer to purchase the property signed by Leslie Benko on July 6, 1955 (Ex. P-2), which contained a requirement that a deed of sale be executed on or before October 1 of the current year, was in any way artificial or a transaction not at arm's length or in the ordinary course of business; that the same was true with respect to the subsequent transactions in issue and, consequently, that the appeal should not be maintained.

Moreover, insofar as the 2,600 shares which Mr. Benko received are concerned, since they were not shares of the appellant company this Court was not entitled to inquire into their value.

Similarly, that while it may well be said in another court on another appeal that Messrs. Farkas and Gaty enjoyed a profit on which they may well have to pay tax, this is not pertinent to the instant case, since we are here dealing with an appeal from a reassessment against the appellant company and there is no evidence that the foregoing transactions were not made at arm's length and in good faith.

In further support of the non-artificiality of the two transactions described in Exhibits P-4 and P-5, counsel for the appellant submitted that as a result of them the appellant realized a profit of $2,500 when it sold the property to Mr. Benko on September 30 and a further sum of $4,000 when it sold it to River Construction Ltd.; that the above-mentioned profits amounting to $6,250 were reported as taxable income and were the only profits made by the appellant on its real estate transactions; that the payment of $26,000 made by the appellant constitutes an amount which it was required to disburse in order to repurchase the property and that its taxable income for the year amounted to $250, as stated in its income tax report, and not $26,250, as claimed in the Minister's reassessment.

It is submitted on behalf of the respondent that Messrs. Farkas and Gaty, with or without the knowledge of Mr. Benko, used him as a vehicle to cause the appellant to pay an unnecessary and artificial price of $26,000 in repurchasing the property, and but for which the said sum would have been added to the appellant's otherwise taxable income for the year; that since there is abundant proof that Mr. Benko was in financial difficulties and unable to make good his offer to purchase it for $35,000 and anxious to have it "taken off his hands" it is unrealistic to regard his offer to sell the property to the appellant at nearly double such amount, the said offer being an apparent artificial transaction. Moreover, it should be disregarded for taxation purposes, as it was used to conceal the fact that the cheque for $26,000 and the proceeds therefrom, signed on behalf of the appellant by Mr. L. Gaty, payable to Leslie Benko, was to be received on the following day by Messrs. Farkas and Gaty and that what Mr. Benko was to receive was 2,600 worthless shares which belonged to the said Farkas and Gaty. Furthermore, that the appellant had acquired the property for $32,500 and ultimately sold it for $65,000 and that its taxable income derived therefrom was $32,500, not $6,250 as reported by the appellant, and that the difference of $26,000 was taxable income instead of a disbursement or expense which if allowed would artificially reduce its income.

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I cannot accept without reservation the submission of counsel for the appellant that the evidence clearly shows that Mr. Benko's original offer to purchase the property dated July 6, 1955 (Ex. P-2) was made in the ordinary course of business—and this is doubly true of a like submission in respect of the subsequent transactions in issue. Neither can I agree with his submission that this Court is not entitled to inquire into the value of the 2,600 shares of Crosstown Realties stock which Mr. Benko received, because they were not owned by the appellant company.

In my opinion, the value of the shares is very relevant to determine the nature of the transactions with which we are concerned, although I agree with counsel for the appellant that the taxability or non-taxability of the profit which Messrs. Farkas and Gaty enjoyed on the sale of the shares is not before this Court. Nevertheless, I consider that the relationship which had been proven to exist between Messrs. Farkas and Gaty and the company indicates that in making a personal profit they were not dealing with the company at arm's length.

Now, with respect to the submission of counsel for the respondent, I am in agreement that, if it is established that Messrs. Farkas and Gaty made use of Mr. Benko as a vehicle to cause the appellant to pay an unnecessary artificial price of $26,000 in repurchasing the property, it is immaterial whether Mr. Benko was aware or unaware of their interest and purpose in doing so.

I will first comment on Mr. Gould's evidence, as it can be dealt with in a few words.

I am satisfied that while the nominal value of the instant 2,600 preferred shares was $26,000 they had, marketwise, only a nuisance value. Mr. Gould, in coming to this conclusion, did not even take into account the restriction on the transferability of the said shares, which, in my opinion, is the most detrimental element affecting their value.

Now, in respect of the three interested witnesses, I find that I can give little credence to some of the testimony given by Messrs. Farkas and Gaty and certain statements made by Mr. Benko leave the latter's evidence open to suspicion and it is difficult to determine the extent to which it can be relied upon.

I cannot credit Mr. Farkas' testimony wherein he stated that Mr. Benko declared that he wanted later on to buy more than the 2,600 Crosstown Realties shares which he received. Mr. Benko, in his testimony, made no reference to such a statement and since he knew or could easily have ascertained that the said shares had little value, it is unlikely that he would be disposed to place his own money in such a bad investment.

It seems apparent from Mr. Gaty's evidence, wherein he was dealing with commissions, that he would have no compunction about adding a few thousands dollars to the repurchase price of the property, without regard for the consequences insofar as income tax was concerned.

The above-mentioned three witnesses were unable or failed to produce any written evidence of the acceptance of the Benko offer (Ex. P-2) to purchase the property for $35,000 or of the $2,000 which he allegedly paid on account of the purchase price thereof. The same is true with respect to his offer to sell the property for $61,000 and the $2,000 which he supposedly received on account thereof and I consider that such a situation would not have occurred in transactions which are carried out at arm's length.

Counsel for the appellant appeared to base his whole case on the reliability of the testimony of Mr. Benko and I will deal with it in some detail.

I think that Mr. Benko's recital of events which occurred even before July 1955, when he first came in contact with Messrs. Farkas and Gaty, which are uncorroborated, is, to say the least, rather strange. As we have seen by his long explanatory letter Exhibit R-1, he began to have fears, early in 1955, about the permanency of his son-in-law's position with Dominion Engineering Co. Ltd. and because he was contemplating, on that account, going to California. One would expect that his first thought would be to ascertain from the boy's manager how he was faring—I might here remark that, according to Mr. Benko's letter (Ex. R-1), it appears that the manager of Dominion Engineering Co. and his wife came during the latter part of July to visit him at his country cottage, while in his testimony he stated that he and his son-in-law had been invited to visit the manager; in any event, the manager was accessible. Instead, he began searching for a sports centre site which, if and when developed, would only provide his son-in-law with employment for less than six months per annum. Having found the present property, for which Messrs. Farkas and Gaty

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as late as June 30 were unable to find a purchaser, on July 6 he signed an offer (Ex. P-2) to buy it, and, towards the end of the same month, in order to allay his fears, contacted the latter's manager and learned—apparently for the first time—that he was doing exceedingly well and had a bright future with the company, whereupon Mr. Benko promptly decided to get rid of his commitment to purchase the property. It has been said that sometimes "truth is stranger than fiction" and perhaps it may be applicable to his aforesaid early evidence.

Some aspects of his later actions I think, are more open to suspicion. By putting a most favourable construction on such subsequent actions, however, I think, it could be argued that Mr. Benko found himself in the position of being unable to raise the necessary money to make good his offer to purchase the property and I believe it is obvious that his first concern was to obtain a release from his obligation to pay $35,000 for the property. This is borne out by Exhibit P-4 in which there is an acknowledgment that he had discharged his obligation, as appears by Exhibit P-4, which, in part, states:

> THE PRESENT SALE is thus made for and in consideration of the price and sum of THIRTY-FIVE THOUSAND DOLLARS ($35,000), on account and in deduction whereof the Vendor acknowledges to have well and truly received of and from the Purchaser herein, the sum of eighteen thousand seven hundred and fifty dollars ($18,750), and whereof quit for so much

The balance was taken care of by his assumption of the existing mortgage amounting to $16,250. Secondarily, if he were able, without risk, to obtain anything in addition, so much the better. This, in my opinion, explains why, without any writing to evidence it, he agreed to accept, by prearrangement, the aforementioned 2,600 shares without taking the ordinary precautions of inquiring or having someone inquire on his behalf into the financial status and corporate setup and by-laws of Crosstown Realties. If he had done so, he would have perceived how valueless they were, particularly since, due to their non-transferability without the consent of Messrs. Farkas and Gaty, they would be the only prospective buyers of the shares.

In order to attribute the above-mentioned motives to Mr. Benko, I think one must assume that, unlike Messrs. Farkas and Gaty, he was not aware of the construction development which by the end of the summer had tremendously increased the value of the property. If he were aware of it, then I cannot believe he would have parted with the $26,000 cheque which he received the next day in exchange for the relatively worthless shares of Crosstown Realties, unless he were serving as an accommodation party under Messrs. Farkas and Gaty. A further indication of the artificiality of the cheque, insofar as Mr. Benko was concerned, is the fact that, in his long explanatory letter Exhibit R-1, he made no reference to it nor what he did with it and it was only long afterwards, in the concluding lines of his testimony, that he stated that he received a cheque, endorsed it and gave it to Messrs. Farkas and Gaty. In any event, as earlier mentioned, insofar as Mr. Benko's evidence is concerned, I agree with the submission of counsel for the respondent that, if it can be established that Messrs. Farkas and Gaty caused the appellant to pay an artificial price amounting to $26,000 in repurchasing the property, it is immaterial whether this was done with or without the knowledge or connivance of Mr. Benko, since it was not he but themselves who obtained the $26,000 paid by the company.

In my opinion an analysis of the evidence of this case clearly discloses that, in respect of the transactions of September 14 (Ex. P-3) and the two transactions which occurred on September 30 (Exhibits P-4 and P-5) and the verbal transaction which took place the day following, the appellant company was not a free agent because its president and secretary, acting in their own personal interests, required the latter company to expend $26,000 more than was necessary to repurchase the property from Mr. Leslie Benko; that the money used to effect the said repurchase constituted a clever but artificial scheme whereby Messrs. Farkas and Gaty succeeded in realizing a handsome profit personally on the sale of the previously mentioned 2,600 preferred shares, and this, with money provided by the appellant and but for which the said $26,000 would have been included in the appellant's taxable income when it sold the property for $65,000 on October 1, 1955.

Dealing with Exhibit P-3, it is clear that quite some time before September 14 Messrs. Farkas and Gaty had procured the consent of Mr. Benko that, for the difference between the purchase price to be fixed for the property and the $35,000 which Mr. Benko was required to pay for it, the

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latter would accept 2,600 shares of preferred stock which he knew (or should have known) had but a nuisance value. I am convinced, notwithstanding any evidence to the contrary, that the so-called discussion between Messrs. Farkas and Gaty and Mr. Benko, as to the fixing of the amount of the repurchase price, was a one-sided affair, that it was determined by Messrs. Farkas and Gaty and agreed to by Mr. Benko, and but for the aforesaid verbal understanding the repurchase price mentioned in Exhibit P-5 would never have been fixed at $61,000.

As we have seen, the evidence establishes that Messrs. Farkas and Gaty desired to repurchase the property because they knew that they had a good chance of disposing of it. As a matter of fact, they did dispose of it within thirty days of repurchase for $65,000.

I think it may be reasonably inferred from the evidence that Messrs. Farkas and Gaty, if they were not fully aware that they would be able to shortly realize $65,000 for the property, they were confident that it would bring at least $61,000, and this explains why they inserted the last-mentioned figure in Exhibit P-5.

The advantage to Messrs. Farkas and Gaty personally of having the purchase price in Exhibit P-5 fixed at $61,000 is obvious, because when the property was later sold for $65,000 the company could deduct $61,000 and report a taxable gain of $4,000. In absence of any proof that they made a business of buying or selling shares, to all appearances they would make a non-taxable capital gain of about $26,000. *Per contra,* the appellant company—which they controlled—would be required to pay practically no income tax at all, since after reporting the $2,500 difference between the $32,500 they originally paid for the property and the $35,000 Mr. Benko allegedly paid for it and the $4,000 of taxable gain realized on the ultimate sale of the property for $65,000, the only taxable income which remained, according to the appellant's income tax return, amounted to $250, whereon the tax payable amounted to $32.50, instead of $26,250 and $5,100 respectively as assessed by the Minister.

A further indication of the artificiality of Exhibit P-5 is, I consider, the fact that it was the day after the said exhibit had been signed that Mr. Gaty caused the appellant to issue the cheque for $26,000 payable to Mr. L. Benko, dated October 1, 1955 (Ex. P-6), although Mr. Benko had agreed to wipe out $26,000, the difference between $35,000 and $61,000, as set forth in Exhibit P-5:

POSSESSION

By virtue of these presents, the Purchaser shall become the absolute owner of the immoveable hereby sold, with immediate possession thereof.

PRICE

THE PRESENT SALE is thus made for and in consideration of the price and sum of SIXTY-ONE THOUSAND DOLLARS ($61,000), on account and in deduction whereof the Vendor acknowledges to have well and truly received, of and from the Purchaser herein, the sum of forty-four thousand seven hundred and fifty dollars ($44,750), and whereof quit for so much.

AND as to the balance remaining, namely, the sum of sixteen thousand two hundred and fifty dollars ($16,250), the Purchaser hereby binds and obliges itself to pay the same, to the entire exoneration and acquittal of the Vendor, . . .

I do not think that it can be said that the appellant freely consented to pay $26,000 to repurchase a property which Leslie Benko, the vendor, was willing to part with for shares that had little or no market value, particularly when the recipients of the cheque for the said amount were two of its own directors.

I consider, however, that the intentions of the appellant are deemed to be those of its directors and it is bound by the artificiality of the transactions carried out by the said directors. *Vide:* Kerwin J., as he then was, in *Atlantic Sugar Refineries Limited v. Minister of National Revenue*[1] and Judson J. in *Regal Heights v. Minister of National Revenue*[2].

For the foregoing reasons I would dismiss the present appeal with costs.

Judgment accordingly.

[1] [1949] S.C.R. 706 at 707. [2] [1960] S.C.R. 902 at 905.

1963
Oct. 4
Dec. 16

ONTARIO ADMIRALTY DISTRICT

BETWEEN:

THE TORONTO HARBOUR COMMISSIONERS PLAINTIFF;

AND

THE SHIP *ROBERT C. NORTON* and the cargo and freight ex the said Ship, WAREHOUSE METALS LTD. and INDUSTRIAL IRON & MACHINERY CO., LIMITED ....DEFENDANTS;

AND

OGELBAY NORTON COMPANY, owner of the said Ship *ROBERT C. NORTON* ......CROSS-CLAIMANT;

AND

WAREHOUSE METALS LTD. and INDUSTRIAL IRON & MACHINERY CO., LIMITED CROSS-RESPONDENTS.

Shipping—Practice—Jurisdiction of the Court of Admiralty—The Admiralty Act, R S C. 1952, c. 1, s. 18(2), (3) and Schedule "A"—Damage done by a Ship.

On August 22, 1962, the ship *Robert C. Norton* discharged some 7,000 tons of scrap iron on to Pier 50 owned by the plaintiff Commissioners, and as a result of the loading put on it, a portion of the pier collapsed. The plaintiff sued the ship for damages for negligence and the ship successfully moved to add Warehouse Metals Ltd. and Industrial Iron & Machinery Co. Limited, as parties defendant. The defendant ship then cross-claimed against the two added defendants alleging that the responsibility for placing the cargo where it was put lay on them. The plaintiff brought this motion asking that the added defendants be struck out on the ground that the Court had no jurisdiction to deal with the issues raised between the defendant ship and the added defendants. The ship, as defendant in the original action, also moved for a declaration that the Court was without jurisdiction to hear and determine the matters raised in that action.

Held: That the jurisdiction of the Court over any claim for "damage done by a ship" under s. 18(2) of the *Admiralty Act*, is limited to those cases where the damage was done in the navigation or operation of the vessel as a ship and this does not include damage caused by a tort committed in the handling of the cargo after its unloading.

2. That the jurisdiction of the Court over any claim "relating to the carriage of goods in a ship" under s. 18(3) of the *Admiralty Act*, is not broad enough to include the present case because it would appear to relate to goods landed from rather than carried in a ship.

3 That the jurisdiction of the Court over any claim "in tort in respect of goods carried in a ship" under s 18(3) of the *Admiralty Act,* is likewise not broad enough to include the present case because it is intended to cover damage received by the goods while they are in the ship resulting from some tortious act of those operating the vessel.

4. That both motions succeed, the cross-respondents are struck out and the main action is dismissed.

MOTIONS for a declaration of the Court with respect to jurisdiction and to strike out added defendants.

The motions were heard by the Honourable Mr. Justice Wells, District Judge in Admiralty for the Ontario Admiralty District at Toronto.

Arthur J. Stone for plaintiff.

James J. Mahoney and *Leo E. Schacter, Q.C.* for defendant.

James A. Bradshaw and *John Elder* for The Ship and its Owners.

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

WELLS D.J.A. now (December 16, 1963) delivered the following judgment:

In this matter there are two motions. The first in point of time is brought by counsel for the ship sued as a defendant in the original action asking for a declaration that the Court is without jurisdiction to hear and determine the questions and claims raised. Slightly later in point of time the plaintiff brought a cross-motion asking that the defendants added by the Surrogate Judge, namely, Warehouse Metals Ltd. and Industrial Iron & Machinery Co., Limited, be struck out on the ground that the Court had no jurisdiction to deal with the issues raised between the defendant ship and these parties. It will be convenient, I think, to deal with the plaintiff's motion first.

The plaintiff's claim in this matter is against the ship alleging that it improperly discharged a cargo of some 7972 tons of billet bloom crops on Pier 50 owned by the plaintiff Commissioners; and that on August 22, 1962, when some 7,000 tons of cargo had been discharged, a portion of the pier collapsed, owing to the load put on it by reason of

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the landing of the scrap iron. It is alleged that the collapse was caused entirely by the negligence of the defendant ship and that it did not take sufficient or any care in its method of unloading the cargo but knew or ought to have known that Pier 50 would not support the weight placed upon it. It is also pleaded that this was done in defiance of a by-law of the plaintiff relative to the landing of the metal in the form of ingots or pigs. Subsequently, the ship moved to add the cross-respondents as parties defendant and they were duly added by an order of the Surrogate Judge. No appeal was taken from that order.

The defendant ship then cross-claimed under the rules of Court against the two added defendants on the basis that the responsibility for placing the cargo where it was put lay on the two added defendants and that it was placed there on their instructions. The plaintiff now moved to strike them out on the ground, as I have already stated, that there is no jurisdiction in the Court to deal with these issues. The jurisdiction of the Court of Admiralty is contained in section 18 of *The Admiralty Act,* R.S.C., 1952, c. 1. By subsection (2) thereof there is imported into the section, section 22 of 49 George V, U.K., being the *Supreme Court of Judicature (Consolidation) Act, 1925.* Section 22 of that statute is to be read into section 18 of *The Admiralty Act, 1934,* pursuant to subsection (2) thereof and the section is set out as Schedule A to *The Admiralty Act, 1934.* Subsection (1)(*a*)(iv) provides for jurisdiction over any claim for "Damage done by a Ship". It is on the basis that the issues between the defendant ship and the added defendants do not come within this head of jurisdiction that the plaintiff brings its motion.

If it can be demonstrated that the issues between the cross-claimant and the cross-respondents are not within the jurisdiction of the Court, it is wrongful to proceed further in the cause and the action against them should be dismissed. In a case in the Quebec Admiralty District, *Mulvey v. The Barge Neosho*[1], the matter was considered by Maclennan J. In that case the action was brought *in rem* against the Barge *Neosho* for bodily injuries sustained by the plaintiff who tripped upon the deck of the barge by reason of ropes negligently left there. The only heading of jurisdiction which might justify the case continuing, was

[1] (1919) 19 Can. Ex. C.R. 1.

the head of jurisdiction expressed in the words "Damage done by a Ship." In the *Mulvey v. Neosho* case Maclennan J. reviewed a number of authorities beginning at page three. And at page four he quoted Halsbury L.C., in the case of *Currie v. McKnight*[1] as follows:

The phrase that it must be the fault of the ship itself is not a mere figurative expression, but it imports, in my opinion, that the ship against which a maritime lien for damages is claimed is the instrument of mischief, and that in order to establish the liability of the ship itself to the maritime lien claimed some act of navigation of the ship itself should either mediately or immediately be the cause of the damage.

It was argued by the plaintiff that the motion came too late, the defendant having appeared and given bail, it was said, had submitted to the jurisdiction of the Court. The learned Judge pointed out that the defendant had appeared under protest and at page six he dealt with the matter as follows:

The Court cannot get jurisdiction by consent of the parties, as jurisdiction must arise from the subject matter of the claim. Dr. Lushington, in the *Mary Anne,* (1865), Br. and L. 334, said p. 335: "If at any time the Court discover it has no jurisdiction, and the facts show that the Court has no jurisdiction, it cannot proceed further in the cause; the delay of one or both parties cannot confer jurisdiction." The objection raised by defendant is not a mere technical objection which could be waived by appearance and giving bail, if under the statute there is absolute absence of jurisdiction; the *Louisa,* (1863), Br. and L. 59, the *Eleonore,* (1863), Br. and L. 185, *Richet v. The Barbara Boscowitz,* (1894), 3 B.C.R. 445.

The application to dismiss by motion is in accordance with the practice in Admiralty matters. I am unable to distinguish this case from the *Theta* and the *Nederland.* The barge here was not the active cause or the noxious instrument of plaintiff's injuries. Damage done not "by" the barge, but "on" the barge is not such damage as gives plaintiff's remedy *in rem* such as he is seeking to exercise in this action. Plaintiff's action therefore fails for want of jurisdiction, and defendant's motion is granted, and the action is dismissed with costs.

Later in the year 1924 the same Judge dealt with the same problems in the case of *The St. Lawrence Transportation Company, Limited v. The Schooner Amedee T.*[2] At page 206 he again referred to the case of *Currie v. McKnight,* to which I have already referred, and at page 206 he quoted a portion of the judgment of Lord Watson at page 106, where he said:

I think it is of the essence of the rule that the damage in respect of which a maritime lien is admitted must be either the direct result or the natural consequence of a wrongful act or manoeuvre of the ship to which

[1] [1897] App. Cas. 97 at 101. [2] [1924] Ex. C.R. 204.

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it attaches. Such an act or manoeuvre is necessarily due to the want of skill or negligence of the persons by whom the vessel is navigated; but it is, in the language of maritime law, attributed to the ship because the ship in their negligent or unskilful hands is the instrument which causes the damage.

And later, on the same page, Maclennan, L.J.A., summed the matter up as follows:

The damage here sought to be recovered did not arise from any wrongful act of navigation of the schooner, and, as the schooner was not the instrument which caused the damage, the present action must fail. See also *Mulvey v. The Barge Neosho* (1919) 19 Ex. C.R. 1, where I dealt with a claim for damage alleged to have been done by a ship.

There will therefore be judgment for the defendant dismissing the writ of summons *in rem* and the warrant, setting aside the arrest and ordering the release of the bail furnished by defendant, with costs against the plaintiff.

In the case of *The Minerva*[1], Bateson J. dealt with the same problem. The facts stated in the headnote made the issue plain.

The plaintiffs' grain elevator barge was damaged by a portion of the elevator falling on to the deck owing to the breaking of a wire on the derrick of the defendants' steamship from which the barge had been discharging cargo.

By s. 22, sub-s 1(*a*), of the *Judicature (Consolidation) Act, 1925,* the High Court in relation to Admiralty matters has jurisdiction to determine "(iii) any claim for damage received by a ship . . ." and by sub-s. 1(*a*)(iv) to determine "any claim for damage done by a ship."

By s 33, sub-s. 2, the jurisdiction may be exercised either in proceedings in rem or in personam.

It was held that there was jurisdiction under section 22, s-s. 1(*a*)(iii) in relation to "(iii) any claim for damage received by a ship . . ." and also by subsection 1(*a*)(iv) to determine "any claim for damage done by a ship."

In respect of the latter Bateson J. said at page 229:

Further, I think the claim can be put under sub-s. 4, as damage done by a ship I think the damage here may be said to be done by the derrick and its load falling on the *New Perserverance*. That is damage done by the defendants' ship. If part of the ship does the damage I think that is enough—e g , if it were done by an anchor or by a propeller. It is common enough in this Division in its Admiralty Jurisdiction—and, indeed, in the old Admiralty Court—for such cases to be tried and for a vessel to be arrested I quite agree with Mr. Willmer in saying that "done by the ship" connotes the ship as the active cause of damage, if he means the ship or part of it. It will not do, I think, to say that sub-s. 3 only applies if the damage is done by a ship, otherwise there would be no need of sub-s. 3 at all.

[1] [1933] P. 224.

In 1932 Bateson J. again considered the problem in the case *The Chr. Knudsen*[1]. This case it is argued supports the plaintiff's claim. Bateson J. summed the problem up at p. 155:

It is now contended for the defendants that there is no right in rem by the plaintiffs against the *Chr. Knudsen*, a contention based on the ground that what the plaintiffs claim is not "damage done by a ship." The argument put forward by Mr. Noad, for the defendants, as I understand it, is that a right to arrest the ship and proceed in rem is only given in Admiralty to the party who has the ownership of the chattel damaged, and that therefore, as the railway company have no title or interest in the chattel damaged, which he says is the barge, at the time of the accident or at any other time, they have no remedy in rem.

Mr. Hutchinson, for the railway company, relies upon the *Supreme Court of Judicature (Consolidation) Act, 1925*, which by s. 22, sub-s. 1(*a*)(iv), repeats the words of s. 7 of the *Admiralty Court Act, 1861*, and gives jurisdiction, which under s. 33 is exercisable in rem over "any claim for damage done by a ship." The question, therefore, which I have to determine is whether the claim of the plaintiffs is for damage done by a ship. I have not the least doubt that it is. The plaintiffs are the owners of the Stallbridge Dock, and the *Chr. Knudsen* did damage to that dock by sinking the barge and causing an obstruction in the dock. Whether they were negligent in so doing can only be ascertained when the case comes to be tried, but the allegation of the plaintiffs is that the defendants have been negligent, and I must assume that that is true for the purposes of this motion and that they have suffered damage to their property by reason of the alleged negligence of the *Chr. Knudsen*. In these circumstances it seems to me, without any doubt, that they are covered by the words of s. 22.

Finally, I am referred to the decision of Demers L.J.A., in the Quebec case of *Delma C. Outhouse et al. and Ernest H. Himmelman v. Steamer Thorshavn*[2]. Demers L.J.A., said:

It seems that damage by a ship means damage done by those in charge of a ship, with the ship as the noxious instrument. *The Vera Cruz* (1884), 9 P.D. 96 at 101.

These words do not mean that the ship must come in contact with the thing damaged; a ship may be responsible for its excessive waves.

I am of opinion also that when we speak of damages by a thing, we do not mean necessarily a damage caused by the whole body. We include damage by a part of that body.

Therefore, damages caused by the fires of a ship or by her pumps are damages by the ship.

For these reasons the motion is dismissed with costs.

It is to be observed that in all these cases it is some use or action of the ship in the course of its operation and navigation as a ship which must be the cause of the damage. In the case in question the derricks of the ship were un-

[1] [1932] P. 153. [2] [1935] Ex. C.R. 120 at 122.

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doubtedly used to deposit the scrap iron on the plaintiff's pier, and the allegation against the cross-claimants is that they were liable in part at least, for depositing it in a dangerous place where its weight caused the collapse. Their liability is based on a tort committed in the handling of the cargo after its unloading. I am quite unable to view these actions as constituting even in a remote way "damage done by a ship." It is true that the damage was caused by those handling the unloading. But it was not in the navigation or operation of the vessel as a ship.

The only other heading under which jurisdiction might be claimed is found in section 22 of the *Supreme Court of Judicature (Consolidation) Act, 1925*,—in s-s. 1(*a*)(xii) any claim, (2) relating to the carriage of goods in a ship or (3) in tort in respect of goods carried in a ship.

With respect to the problem before me it would appear to relate to goods landed from rather than carried in a ship. As to the tort in respect of goods carried in a ship, this would be intended to cover, as it appears to me, any damage received by the goods while they are in the ship, resulting from some tortious act of those operating the vessel. I would not deem it wide enough to cover the discharge of goods from the ship to the land where no tortious act against the goods occurred in the handling in such a way as to found a claim within the jurisdiction of the Court. Here of course none such is alleged. The tort was committed against the plaintiffs not the owners of the cargo.

Mr. Stone argues that his claim is covered by these sections. In my opinion he may have a perfectly good claim against those responsible for the placing of the cargo, if he can prove their negligence, but if so it does not lie within the jurisdiction of this Court. Accordingly, his motion will succeed, and the cross-respondents will be struck out with costs against the defendant ship in any event of the cause. The motion brought on behalf of the ship will also succeed, and the action will be dismissed against the defendant with costs. As to any costs of the cross-respondents who also appeared before me, application may be made to me as to the form which this order, if proper to be made, should take.

Order accordingly.

THE ONTARIO ADMIRALTY DISTRICT

1963
Mar. 25, 26, 27, 28, 29
1964
Jan. 31

BETWEEN:

THE ALGOMA CENTRAL AND HUDSON BAY RAILWAY COMPANY and PARRISH & HEIMBECKER LIMITED .... PLAINTIFFS;

AND

MANITOBA POOL ELEVATORS LIMITED and LAKEHEAD HARBOUR COMMISSIONERS ...... DEFENDANTS.

Shipping—Action for damages—Ship colliding with boulder embedded in bottom of Harbour at Dock—Negligence—Contributory negligence—Lakehead Harbour Commission Act, S. of C. 1958, c. 34, s. 10—British North America Act 1867, s. 108, Schedule III—Public Works Act, R.S.C. 1952, c. 228, s. 9—Public Authorities Protection Act, R.S.O. 1960, c. 318, s. 11—Agent of Crown in Right of Canada.

The plaintiff, The Algoma Central and Hudson Bay Railway Company, was the owner of the ship *Algoway* and the plaintiff, Parrish & Heimbecker Limited, was the owner and consignee of wheat being loaded on the *Algoway* on November 29, 1961 at the dock of the defendant, Manitoba Pool Elevators Limited, in the Lakehead Harbour in the City of Port Arthur, Ontario, when, as the ship was being winched forward to permit loading through the after hatches, it ran aground and was holed near the bow resulting in water damage to some of the wheat and necessitating the unloading of the wheat in order to permit the ship to go into drydock for repairs. The damage to the ship was caused by collision with a small boulder embedded in hard clay. At the time the mate, who was in charge of the loading, determined to pull the ship forward so that the after hatches could be filled up the ship was drawing 19 ft. 8 in. forward. A chart of the harbour, No. 2314 of the Canadian Hydrographic Services, which was in the wheelhouse of the *Algoway* indicated a depth alongside the dock in question of 18 or 19 ft. which when corrected for present datum at the season of the accident became 17½ to 18½ ft. The ship also carried a document entitled "By-laws and General Information of the Lakehead Harbour Commissioners, Port Arthur, Ontario" in which the depth at the said dock was given as "M.W.D. 21.2′.". Immediately before he had the ship winched forward, the mate asked a man on the dock if there was lots of water and he was told there was and that they had loaded ships to 21½ ft. The man who gave the mate this information was the foreman in charge of the loading operation for the defendant elevator company, although the mate was not aware of his identity at the time.

Held: That the defendants, the Lakehead Harbour Commissioners, administer and manage the harbour for the Crown in the right of Canada as represented by the Minister of Transport but they are neither the owners nor the occupants of the harbour, the fee in the land being vested in Her Majesty in the right of Canada quite apart from any

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functions of the said defendants, and the action as against them must accordingly fail.

2. That the defendants, the Lakehead Harbour Commissioners, operate as agents of the Crown in the right of Canada and, as such, are entitled to take advantage of s. 11 of the *Public Authorities Protection Act* of Ontario under which this action is barred since the writ was issued more than 6 months after the happening of the Act, neglect or default complained of.
3. That the decision as to whether this was a safe berth for the purpose of loading wheat rested squarely on the master of the ship and it was recklessness of a high degree to depend on the information shown on the sketch of the harbour contained in the Lakehead Harbour Proceedings Booklet which was only a rough guide to various installations and elevators in the harbour for the berthing of a ship which was going to take on a very heavy cargo of wheat, rather than to rely on the Canadian Hydrographic Services chart which indicated that it was quite unsafe to load to the depth contemplated but which both the captain and the mate chose to ignore.
4. That although the information regarding depth alongside the dock given by the defendant elevator company's foreman was inaccurate, the real and proximate cause of the accident was the disregard of any precaution by the master of the ship and his first mate to ascertain the depth alongside the dock at which they were loading.
5. That even if the defendant, Manitoba Pool Elevators Limited, was negligent, the *Ontario Negligence Act* has no application and negligence cannot be apportioned between the ship's officers and the said defendant and accordingly the plaintiffs are not entitled to recover because of the contributory negligence of the ship's master and mate.
6. That the *Canada Shipping Act* incorporating the *Maritime Conventions Act* of 1911 has no application to a collision between a ship and a structure on land, in this case a small boulder on the floor of the harbour.
7. That the Lakehead Harbour is located in one of the roughest and rockiest parts of Canada and there is nothing in what the divers and sweepers discovered on the harbour bottom which could be described as a hidden risk to which it was the duty of the defendant, Manitoba Pool Elevators Limited, as proprietors of the dock, to draw attention.

ACTION for damages to a ship grounding in Lakehead Harbour.

The action was tried by the Honourable Mr. Justice Wells, District Judge in Admiralty for the Ontario Admiralty District at Toronto.

F. O. Gerity, Q.C. and *S. G. Fisher* for plaintiff, Algoma Central & Hudson Bay Ry. Co.

C. I. Mason for plaintiff, Parrish & Heimbecker Ltd.

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A. S. Hyndman for defendant Manitoba Pool Elevators Ltd.

B. J. Thomson, Q.C. and *V. K. McEwan* for defendant Lakehead Harbour Commissioners.

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

WELLS D.J.A. now (January 31, 1964) delivered the following judgment:

This action arises out of a grounding in the Lakehead Harbour of the ship *Algoway* which was transporting wheat for the co-plaintiff Parrish & Heimbecker Limited the owner and consignee of wheat being loaded on the *Algoway*. The ship was owned by the plaintiff The Algoma Central and Hudson Bay Railway Company and the accident occurred on November 29, 1961 at the dock of the defendant Manitoba Pool Elevators Limited at a berth alongside a wheat elevator known as Manitoba Pool No. 2 in the City of Port Arthur. The Lakehead Harbour Commissioners are also sued as defendants. The Commissioners are a corporation created by a statute of the Parliament of Canada being chap. 34, 7 Eliz. II. It will be convenient to deal with the claims against the Lakehead Harbour Commissioners first as their defence is chiefly of a technical nature apart from the merits of the case.

The accident in question occurred after the ship had loaded a very substantial amount of grain and was being pulled further in towards shore to permit the spouts of the elevator from which she was loading to pour wheat into her afterholds. The ship was pulled inward by winches, ran aground and was holed in its forward parts apparently by a small boulder lying on the bottom of the harbour. Claims for the damage which ensued were made against both defendants and in its pleading in paragraph 12 of its statement of claim the plaintiff Algoma Central and Hudson Bay Railway Company alleged as to the defendant Commission:

12. . . ., as to the second defendant Lakehead Harbour Commissioners, that the said corporation

(a) failed in its duty to the plaintiff, in publishing the document mentioned in paragraph 4 hereof for the information and use of those having charge of the navigation and management of ships entering into the harbour and using the several berths situate therein, to ascertain the actual depths of water available in the

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said berths and more particularly in the berth to be used and in fact used by the ship *Algoway* as hereinbefore alleged;

(b) was in breach of its duty to the plaintiff to take reasonable steps to discover from time to time the existence of any obstructions in the said berth or of the depths of water available therein and to discover the condition of the bottom if it was expected that the ships might lie on the bottom during the course of loading;

(c) failed in its duty to the plaintiff to warn those having charge of the navigation and management of its ship *Algoway* of the actual conditions of the berth to be used and in fact used as hereinbefore alleged and of the depths of water to be expected therein.

The allegation referred to in paragraph 4 of the statement of claim is set out as follows:

The said ship was fully manned with a proper complement of officers and men and (in addition to the usual charts and other navigational publications) had on board a copy of a document dated January 14, 1960, entitled "By-laws and General Information of the Lakehead Harbour Commissioners, Port Arthur, Ontario." Amongst other things set forth in the said document and publication was to be found descriptive material indicating the various berths within the said Lakehead Harbour, numbering the same and indicating the location of the said numbered berths on a Plan annexed, and the berth numbered 22 showed, amongst other things, the following information:

"Name of Elevator—Manitoba Pool No. 2

Depth of Water at dock—M.W.D. 21.2'".

The plaintiffs Parrish & Heimbecker raised a substantially similar plea against the defendant Lakehead Harbour Commissioners and in reply to these claims the Lakehead Harbour Commissioners admitted publishing the booklet referred to but pleaded that the booklet was one for general distribution to the public and was not intended for those operating ships in the Harbour and pleaded the depth shown in Chart 2314 published by the Canadian Hydrographic Services. In paragraphs 6 and 7 the Lakehead Harbour Commissioners also plead that the land on which the berth was situated was partly owned by the Manitoba Pool Elevators Limited, its co-defendant, or if not so owned was the property of Her Majesty the Queen in right of Canada and that the defendant had no power, jurisdiction, authority or control over the land in question and pleaded section 10 of the *Lakehead Harbour Commissioners Act* to which I have already referred. This section is as follows:

10. Subject to this Act, the Corporation has jurisdiction within the limits of the harbour, but nothing in this Act gives the Corporation the right to enter upon or deal with any property of Her Majesty, except when authorized to do so by order of the Governor in Council, or gives the

Corporation jurisdiction or control over private property or rights within the limits of the harbour, except as provided in this Act.

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It is I think, not disputed that what now comprises the Lakehead Harbour was a public harbour which by virtue of section 108 of the *British North America Act* of 1867 became vested in Her Majesty the Queen in the right of Canada. Section 108 provides that public works and property of each province enumerated in the Third Schedule to this Act shall be the property of Canada. Item 2 of the Third Schedule is "Public Harbours." By reason of section 9 of the *Public Works Act,* being chap. 228, R.S.C. 1952 which provides in subsection (*a*) as follows:

9. The Minister has the management, charge and direction of the following properties belonging to Canada, and of the services in this section enumerated namely:

(*a*) the dams, the hydraulic works, the construction and repair of harbours, piers and works for improving the navigation of any water, and the vessels, dredges, skows, tools, implements and machinery for the improvement of navigation.

the Lakehead Harbour Commissioners plead this statute and say that the area in question which was not owned by the Manitoba Pool Elevators Limited was the property of Her Majesty the Queen as represented by the Minister of Public Works for Canada or was under his charge and control. The Lakehead Harbour Commissioners also pleaded that it is a public authority within the *Public Authorities Protection Act* as passed by the Legislature of the Province of Ontario, being R.S.O. 1960, chap. 318.

The grounding as I have already said, is alleged to have occurred on November 29, 1961. The writ was not issued until July 9, 1962 and this defendant pleads that by virtue of the provisions of section 11 of the Ontario statute that the action brought is prohibited unless it is commenced within six months next after the act, neglect or default complained of. This defence, as I understand it, is based on the conception that the Lakehead Harbour Commissioners are an agent of the Crown and that under the prerogative rights of the Crown they are entitled to claim the benefit of a provincial statute. I will have more to say about this later.

An examination of the statute of incorporation of the Lakehead Harbour Commissioners would appear to indicate that they were set up to manage and operate the Lakehead Harbour which compirses the waters of the former harbours

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of Port Arthur and Fort William and Thunder Bay within the boundaries set out in the statute itself. It is quite apparent from an examination of the statute that the Corporation has very little independent power apart from what the Minister of Transport who is the Minister referred to in the statute gives it by means of orders of the Governor in Council. They have certain rights of employing harbour masters and other officers necessary to carry out their duties. They have jurisdiction within the harbour but as section 10 provides, they have no right to enter upon or deal with any property of Her Majesty except when authorized to do so by order of the Governor in Council. They have powers of purchase and expropriation and they may sell and dispose of such lands and other property, real or personal within the harbour as they deem necessary and they may develop and administer on behalf of Her Majesty in the right of Canada and on behalf of the municipalities of Port Arthur and Fort William any property owned by Her Majesty or by the said municipalities at any time the control thereof is transferred to the Corporation. There is no evidence before me to suggest that any of the land either under the harbour water or elsewhere concerned in this action was ever transferred to the Corporation. If the land was acquired from Her Majesty in the right of Canada they have not the power to mortgage or sell it or manage it in any way without the consent of the Governor in Council. They have quite wide powers for dealing with the land that is transferred to them apart from the restrictions I have indicated and they have very wide powers for regulating and controlling navigation and the use of the harbour by the vessels including their mooring, berthing, discharging and loading, but no by-laws passed in respect of any of these matters have any effect until they have been confirmed by the Governor in Council and published by the Canada Gazette. This over-all control seems to run like a thread through the whole statute. In my view the statute examined by Duff C.J. in the case of the *City of Halifax v. Halifax Harbour Commissioners*[1] and the Act incorporating the Lakehead Harbour Commissioners bear striking resemblances. After analyzing the statute governing the Harbour Commissioners of Halifax, that learned

[1] [1935] S.C.R. 215.

Judge at p. 226 summed up the powers and duties of the Commissioners of Halifax Harbour in the following words:

Their occupation is for the purpose of managing and administering the public harbour of Halifax and the properties belonging thereto which are the property of the Crown; their powers are derived from a statute of the Parliament of Canada; but they are subject at every turn in executing those powers to the control of the Governor representing His Majesty and acting on the advice of His Majesty's Privy Council for Canada.

and after some further examination of those Commissioners' powers at p. 227 he summed the matter up as follows:

I cannot doubt that the services contemplated by this legislation are, not only public services in the broad sense, but also, in the strictest sense, Government services; or that the occupation of the Government property with which we are concerned is, in the meaning with which Lord Cairns used the words in the passage cited (and in the sense in which those words were interpreted by Lord Blackburn and Lord Watson), an occupation by persons "using" that property "exclusively in and for the service of the Crown."

It is not without importance to observe that, since Confederation, except in special cases where it has been found convenient to make provision for the administration of harbours by the appointment of harbour commissioners, the control, management and regulation of the matters committed to the charge of the respondents have been treated in this country as belonging to the services of the Crown.

With respect these words seem just as applicable to the defendant Commissioners in the present action. In my opinion from a careful reading of the statute it is quite patent that these defendants operate as agents of the Crown in the right of Canada. The rights of the Crown or servants of the Crown in a case such as this were discussed in the Supreme Court of Canada in the case of *Toronto Transportation Commission v. The King*[1]. Kellock J. in describing the rights and obligations of the Crown in such an action said:

As stated in Chitty on *Prerogatives of the Crown,* page 245, the King "may maintain the usual common law actions . . . And though the King chuse a common law action, he may, by virtue of the prerogative we have just noticed, commence it in any court". In a common law action based on the negligence of the defendant, the plaintiff may not recover if the injury has been contributed to by the negligence of his own servant; *William v. Holland* (1883) 6 C. & P. 23. Where, therefore, the Crown brings such an action I think that by analogy to the rule applied in the case of a proceeding in Admiralty, the action is subject to the common law rule, and it is clear, by reason of section 50A of the Exchequer Court Act, that the members of the Air Force here in question are to be considered

[1] [1949] S.C.R. 510 at 521.

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as servants of the Crown for the purpose of this proceeding. While the section does not create any direct or specific right in the Crown, it places the Crown in recognized common law relationship and its rights are those arising from that relation under the rules of that law; *Attorney-General v. Jackson* [1946] S.C.R. 489, per Rand J. at 493.

On this basis the result in the case at bar, in view of the finding of negligence on the part of servants of the respondent would be that the Crown's claim would be dismissed. It is well settled, however, that the Crown may take the benefit of a statute and, applying the provisions of the Ontario *Negligence Act*, the Crown should recover one moiety of its claim. As to the quantum, I think the trial judge has correctly dealt with the Crown's claim.

In that case the Provincial statute which the servants of the Crown chose to take advantage of was the *Ontario Negligence Act*. The matter was again discussed in the Supreme Court in the case of *Gartland Steamship Company v. The Queen*[1]. Judson J. who gave the judgment of the majority of the Court said at p. 326:

I would apportion the fault two-thirds to the bridge-master and one-third to the ship. The next question is whether the plaintiff can recover anything in these circumstances. Apart from statute this action would be dismissed. With a plea of contributory negligence established as in this case, the plaintiff fails because he does not prove that the defendant caused the damage: *T.T.C. v. The King* [1949] S.C.R. 510, 515, 3 D.L.R. 161, 63 C.R.T.C. 289. *The Canada Shipping Act,* incorporating the *Maritime Conventions Act* 1911, has no application to a collision between a ship and a structure on land. The choice is between no recovery at all and a recovery under the Ontario *Negligence Act.* This is a common law action for damages within s. 29(*d*) of the *Exchequer Court Act,* R.S.C. 1952, c. 98, and in my opinion the Crown, as plaintiff, is entitled to the advantage of the Ontario Act: *T.T.C. v. The King, supra.* It should have judgment for one-third of its loss.

With respect, it would seem to me that the same principle applies to the *Public Authorities Protection Act* on which these defendants as agents of the Crown have elected to rely. By reason of section 11 thereof to which I have already alluded, it would seem to me that this action is barred by reason of the provisions of that section of the statute and that the Lakehead Harbour Commissioners are entitled to take advantage of it as being agents of the Crown in the carrying out of their duties in respect of the harbour in question. It would also appear to me to be quite clear that the fee in the land in the harbour has never been vested in the Harbour Commissioners nor can I think it be said that the Commissioners are occupants of the land in question. It is quite true they administer the harbour and they manage it

[1] [1960] S.C.R. 315.

but they manage it for the Crown in the right of Canada as represented by the Minister of Transport. The fee in the land is vested in Her Majesty in the right of Canada quite apart from any functions of the defendant Lakehead Harbour Commissioners. They are not in any way responsible for the dredging of the Harbour—that is the duty of the Minister of Public Works.

It would appear to me that a number of the decisions in England which have been cited to me relate to an entirely different situation. There in the cases which I have read, the land would appear to be vested in the Harbour Commissioners and they are the owners and occupiers of the harbour. Such is not the case here. If these plaintiffs had wished to obtain relief it should have been by petition of right against Her Majesty and not against the defendant Corporation. On either of these grounds that is under the provisions of the *Public Authorities Protection Act* or because the defendant Corporation is not the owner or occupant of the lands under the Harbour, the action must fail in so far as the defendant Corporation is concerned. It will accordingly be dismissed as against it with costs.

In respect of the pamphlet which the plaintiff The Algoma Central and Hudson Bay Railway said it relied on, I have examined it. It is obviously a pamphlet for the information of anyone having business with the Lakehead Harbour Commissioners. It consists of the Act itself, of the by-laws of the Commissioners which had been approved by the Governor in Council and then a very informal map which quite obviously was not intended for any marine use but was simply to act as a sort of guide to where various elevator and harbour installations were located. To have relied on it for depths of water would have been a very negligent procedure in my opinion on the part of those operating the ship and there is no believable evidence in my opinion which would tend to show that they did believe or act on it.

Before discussing the rights of the plaintiffs and the defendant Manitoba Pool Elevators Limited it might be salutary to briefly outline the facts as I see them.

This involves the merits of the case and the actions of both parties in relation to negligence. As a preliminary I am taking the liberty of quoting certain opinions expressed to me by my assessor. These are of a general nature but I think

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put the matter of duty owed in the navigation of a ship by the master and officers in charge quite clearly:

> The duty of commanding a ship primarily consists of operating it in a safe manner. This is for the protection of the shipowner, the crew and any cargo it may carry.
>
> To this end the master is charged with navigating safely at all times, including those occasions when the vessel is directed to and berthed at a port installation, for the purpose of loading or discharging cargo. Between shipowners and charterers this bounden duty is recognized by inserting in charter parties the clause for charterer to provide a safe berth. A safe berth necessarily need not be one where the vessel always remains safely afloat during cargo operations. There are some ports in the world where it is the custom or practice to lie aground at low water. However, at all other ports the requirement is that the berth shall always allow the vessel to lie safely afloat.

On the morning in question the ship had been loading grain at Thunder Bay and was then instructed to go to Manitoba Pool No. 2 Elevator for the balance of her cargo. It was the intention according to the first mate who testified in this respect, to load her down to what he called "her winter marks". This apparently involved a depth of some 19 feet 9½ inches forward. Neither the Captain of the ship nor Mr. White the first mate, save as seamen, had been at this elevator before. They had in the wheel-house a chart of the harbour, No. 2314 of the Canadian Hydrographic Services, and this indicated a depth alongside the Manitoba Pool No. 2 Elevator dock of some 18 to 19 feet at the northerly portion of it and with a much shallower depth directly to the west of the dock. As my assessor points out, when these depths of 18 feet to 19 feet were corrected for present datum at the season of the accident they become 17 feet 6 inches to 18 feet 6 inches. This information was available to those navigating the *Algoway*.

In coming in to the berth draught was apparently not a matter of importance for despite the wheat taken on at Thunder Bay elevator the *Algoway* was not drawing very much water when she approached Manitoba Pool Elevator No. 2. At that time she is described as drawing 8 or 9 feet forward and 15 feet aft.

Apparently no effort was made by either the master or his first mate to obtain any other information as to the depths available for the ship at the Manitoba Pool No. 2 Elevator berth at which she was to load and in the result the forward holds of the ship were loaded with a very heavy weight of grain to a point where the *Algoway* was drawing about 19 feet 8 inches forward. At this point the mate who was in charge of the loading apparently determined to pull the ship forward so that the after hatches could be filled up and as he expressed it, by this additional loading in the stern he would bring up the ship's head and balance the whole cargo better. He said he asked the foreman if there was lots of water at the dock. The man whom he asked, whose name he did not know at the time but whom he later identified as Mr. Stansfield, and who was standing on the dock at the time, told him there was plenty of water and that they had loaded ships to 21 feet 6 inches. At the time this question was asked in my opinion it is clear from the evidence that White did not know whom he was asking or what his function was with Manitoba Pool Elevators Limited. It was suggested to him that he might have asked the foreman of the grain trimmers, but he denied this and said it was Mr. Stansfield who was in point of fact the man in charge of the loading operation for the elevator company.

He had the ship pulled forward on winches so that the spouts could play on the after hatches when suddenly the ship stopped and as he put it, there was a rubbing on the bottom forward. At that point he examined the ship and she showed a draught of 19 feet 9 inches forward. The bow of the ship was about 8 feet off the dock at the leads in the winches and shortly afterwards it became apparent that she was taking in water in one of her tanks. It was suggested to the mate that the ship had been in other minor groundings and accidents and that these might have affected the situation but I must say that I cannot so find on the evidence. There is no evidence that the incidents in the previous October and earlier in November had created any leaks or any damage which rendered the ship liable to take in water or made her unseaworthy. Stansfield has no memory of giving Mr. White the depths it is suggested he did, or that he gave any assurances. It is also clear, I think, that White did not know who Stansfield was and did not take the trouble at that time to find out. However there was in Stansfield's office an older chart showing the area around the dock at No. 2 elevator at greater depths than shown in chart No. 2314 and this would have justified his assurances that there were safe depths up to 21 feet 6 inches. I have given the matter the best attention I can and from

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what I observed of the two men, I have come to the opinion that I should rely on White's positive evidence in preference to Stansfield's somewhat negative way of denying the incident ever took place.

After the ship had gone aground White the mate, took soundings around the ship and they are, I think, worthy of setting out:

Starboard Side	*Port Side*
#1 hold—19′	20′ 6″
#2 " —18′ 4″	20′
#3 " —18′ 2″	20′ 8″
#4 " —19′	20′ 5″
#5 " —19′ 6″	20′ 4″
#6 " —20′ 6″	20′ 6″
#7 " —20′ 6″	20′ 7″
#8 " —20′ 8″	20′ 9″
#9 " —21′	21′ 3″

While the ship was securely aground according to the mate at this time she was free save in the bow area. I have not heard any evidence in this case nor am I aware of any view that it is a safe procedure to run ships aground in the Great Lakes. It is quite apparent from the soundings which Mr. White took after the event, that at no time was it safe to load the ship to the depth of 21 feet 6 inches or thereabouts.

In the result water finally came up through a ventilation pipe connected with the tank on the side where the bottom had been punctured apparently by a small boulder on the bed of the harbour and a certain amount of the wheat was damaged and deteriorated and the balance while not injured, had to be removed from the ship before she could be refloated and taken to a drydock for repairs.

With respect to the ship's officers, it would appear to me and in accordance with the advice that I have received from my very experienced assessor, the decision on whether this was a safe berth for the purpose of loading wheat as contemplated, still rested squarely on the master of the ship. As has been pointed out to me, it would be unreasonable to expect that the owners or operators of an installation can say whether a berth is safe for every ship which loads at their facilities. This would involve knowing such characteristics as trimming constants, inch trim moments, tons per inch immersion at various draughts, capacity and deadweight scales for seasonal freeboards. Such information is only found in the possession of those on board. Therefore, only the master can give an authoritative opinion on how much water the vessel needs to load in. The mere fact that he has been directed to a certain berth to load does not entail blind obedience. As appeared from the Canadian Hydrographic Services chart No. 2314, it was quite unsafe to load to the depths contemplated. Apparently this did not for a moment deter those in charge of the *Algoway*. It has been suggested that they were correct in the proceedings they followed because in the Lakehead Harbour Proceedings Booklet containing the by-laws and information, on a sketch of the Harbour showing where various installations are located, a depth of 21 feet 2 inches M.W.D. is shown. This sketch as I have said earlier in these reasons, in my opinion was not for the information of mariners save as to a rough guide to various installations and elevators along the northerly reaches of the Harbour. What the letters M.W.D. really mean I am not sure. I was told during the trial that they signified the mean water depth which I would think indicate an average depth taken over the whole season. I already have expressed my opinion of the authority of this booklet and it seems to me to be recklessness of a high degree to depend upon such a piece of information for the berthing of a ship which was going to take on a very heavy cargo of wheat. The term M.W.D. is entirely nebulous in my opinion. The only proper source of information was the charts of the Canadian Hydrographic Services or possibly those of a similar service from the United States. Although the information contained in chart No. 2314 was available and was apparently seen by the master and the first mate, for some reason they chose to ignore it and substituted for it the casual remarks of a workman on the dock and the rough sketch in the Harbour Commissioner's booklet. To proceed in this fashion in my opinion, was negligence of a very high order.

It is argued on behalf of the plaintiffs that they were entitled to rely on the assurances that the first mate received from Mr. Stansfield the foreman in charge of the loading and that they were misled thereby and that as a result of the misinformation which he gave, the ship was run aground. To begin with I would question very seriously the authority Mr. Stansfield had to give any assurances about depth alongside the dock. His work was simply connected with the loading of the wheat but even if the information

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he gave (and which) was, as the event proved, not accurate, nevertheless in my opinion, the real direct and proximate cause of the accident was the disregard of any precaution by the master of the ship and his first mate to ascertain the depths alongside the berth on which they were loading. It is true that the assurances received from Mr. Stansfield may have misled the first mate but at the time he asked this information he was in charge of the ship and it was his duty to satisfy himself how it was and possibly for him to take soundings from the dock and from the bow of the ship. This would immediately have revealed to him the danger into which he was pulling the *Algoway*. The receipt of this piece of misinformation from Stansfield was not the direct and proximate cause of the grounding although it may have contributed to it. The real and proximate cause was the failure to ascertain the depth the *Algoway* had at No. 2 Pool Dock. They were warned by the figures in chart 2314 but they paid no attention, and they took no precautions or made any real investigation whatever. Stansfield's information although it may have been given negligently was by no means an act of ultimate negligence. If the provisions of the *Ontario Negligence Act* were applicable it might enable me to apportion damage in accordance with responsibility of the Manitoba Pool on one hand and the ship's officers on the other. Under the authorities, however, it would seem to me to be quite clear I am not entitled as between the ship, the owners of the *Algoway* and the elevator company to apportion negligence. The *Ontario Negligence Act* has no application to such a situation. The matter was discussed in the Supreme Court of Canada in the case of *Sparrows Point v. Greater Vancouver Water District et al.*[1] At p. 411 Rand J. said in respect of another aspect of the *Contributory Negligence Act* of British Columbia:

It seems to have been assumed by counsel that the provincial *Contributory Negligence Act* applied as between the respondents, but I am unable to agree that it does. There is here a special situation. By the *National Harbours Act* the Commission is declared for all purposes of its administration of this harbour to be the agent of the Crown. Although that *Act* creates a duty on the Commission, by its commitment, in such a case, to the Admiralty Court, the law of that Court becomes applicable; and from the judgment of the House of Lords in *The Devonshire* [1912] A.C. 634 the maritime law, in this respect, is seen to be the same as the com-

[1] [1951] S.C.R. 396.

mon law. It follows that there can be no contribution between the defendants.

And it seems equally clear to me that apart from statute there is no relief from the results of contributory negligence.

Likewise in the decision to which I have already referred, that of *Gartland Steamship Company v. The Queen*, at p. 326 in a paragraph already quoted, Judson J. in delivering the judgment of himself and Taschereau and Cartwright JJ., made the observation dealing with the case, in which he held that contributory negligence had been established, that in this event "apart from statute this action would be dismissed." With a plea of contributory negligence established as in this case the plaintiff fails because he does not prove that the defendant caused the damage: *T.T.C. v. The King*[1], and as Judson J. went on to observe, the *Canada Shipping Act* incorporating *The Maritime Conventions Act* of 1911 has no application to a collision between a ship and a structure on land, in this case a small boulder on the floor of the harbour.

In the *Gartland* case the action was between the Queen on one part and the Steamship Company on the other and happily, it was held that the Crown as plaintiff was entitled to claim the advantage of the Ontario *Negligence Act*. Under the circumstances operating here, however, and as between three parties, none of whom represent the Crown in any way, there is in my opinion, no right to resort to the provisions of that statute, useful and just as such a resort would be. Up to the present time Parliament has not seen fit to enlarge the ambit of the provisions in the *Canada Shipping Act* relating to collisions between ships to other maritime mishaps. It would, therefore, seem to me that because of the plaintiff's contributory negligence in this case by which, in my opinion, the plaintiffs Parrish & Heimbecker Limited are also bound, in so far as the defendants are concerned, these plaintiffs are not entitled to any recovery against the defendant elevator company.

In saying this I am not unconscious of the rules which derive from cases such as *Mersey Docks v. Gibbs and Mersey Docks v. Pierce*[2]. There one of the defences brought to the claims against the Trustees of the Mersey Docks was that they were trustees for the benefit of the public and I

[1] [1949] S.C.R. 510, 515. [2] 11 H.L.C. 686.

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think it will be sufficient if I quote from the judgment of the Lord Chancellor at p. 727:

> It is impossible to argue, after the decision of this House in the case of *The Mersey Docks and Harbour Board v. Cameron, Ante* 443, that the appellants are not in the occupation of the docks. They are as much the occupiers of them, as if they received the tolls and dues for their own use and benefit. The principle of that decision, coupled with that of *Parnaby v. The Lancaster Canal Company,* 11 A. & E. 230, must govern this case. The appellants are the occupiers of the docks entitled to levy tolls from those who use the docks; and so are liable to the same responsibilities as would attach on them if they were the absolute owners occupying and using them for their own profit.
>
> It cannot be denied that there have been dicta, and perhaps decisions, not capable of being reconciled with the result at which I have arrived. But all these authorities have been so fully brought under review, in the very able and elaborate opinion of the learned Judges delivered by Mr. Justice Blackburn in answer to the questions put to them by your Lordships, that I do not feel myself called on to do more than to express my concurrence in that opinion.

As I understand the result of this and other cases, if there is a danger which is not apparent at a dock operated by anyone commercially or otherwise, there is a duty to warn ships choosing to berth there of such danger.

In the case before me, after the grounding, divers were sent down who examined the surrounding area and after the *Algoway* had been moved the same company swept the area and the results of these activities are embodied in Exhibits Nos. 9, 10A, 10B and 11 filed before me in this action. No rocks of any substantial size were found but certain things were found sticking out of the clay which apparently formed the harbour bottom in this area. Very little of anything protruded more than 10 to 18 inches and it is significant I think, that when the diving company commenced sweeping at 20 feet it uncovered so many obstructions that they had to lower the sweeping depth to 19 feet. A number of small boulders, the majority not more than 12 to 15 inches in diameter, were found and at areas which could not possibly have had anything to do with the damage received by the *Algoway,* a ladder and an acetylene metal container were found. It is quite obvious from the evidence of the men who did this work, that the Lakehead Harbour which is situated in one of the rockiest and wildest parts of Canada, had a bottom which was like the country behind it. In Exhibit 10A for example, the report states that after the *Algoway* had pulled out the sweeping was commenced. The report goes on to describe how an object was hit at an 18 foot depth and on investigation by the diver it proved to be an area of hard clay imbedded with small stones. No large rocks were found in this location. Some pulpwood sticks were found sticking upright but there were no rocks or boulders or any obstructions which could I think, reasonably be said in view of the countryside in which the Lakehead Harbour is situated, to constitute a hidden danger to navigation. It was unquestionably the combination of a small boulder imbedded in the hard clay and the running aground of the *Algoway* that caused a small boulder in the hard clay to puncture the hull. The weight in the foreward parts of the *Algoway* at the time of the accident must have been very great indeed, from the quantity of wheat which was taken on and apparently the clay was so hard that the weight did not press the boulder in and in the result the steel hull gave way and not the clay underneath the ship. In my opinion the same strict standards which have been maintained in the soft mud harbours of Great Britain cannot be maintained in an area such as that in which the Lakehead Harbour is situated. It is one of the roughest and rockiest portions of Canada and there is nothing in what the divers and sweepers discovered which could in my opinion, be described as a hidden risk to which it was the duty of Manitoba Pool Elevators Limited as proprietors of the dock to draw attention.

I have already dealt with the situation in respect of the Lakehead Harbour Commissioners and in the result both actions will be dismissed with costs.

Judgment accordingly.

BETWEEN:

1961
Jun. 23, 26
1963
Dec. 24

RONALD K. FRASER ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ....RESPONDENT.

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 8(1)(c) and 139(1)(e)—Transfer of real property to Company in consideration of allotment of non-voting shares—Consideration conceded by taxpayer to be income—Consideration to be evaluated on date of transfer of property.

In October, 1952, the appellant and one Grisenthwaite, as equal partners, purchased a 32 6 acre tract of land in the Township of Grantham, on

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the outskirts of the City of St. Catharines, Ontario, fronting on the Queen Elizabeth Way. The price paid was $97,800, of which $45,000 was paid in cash, the remainder being secured by a mortgage to the vendors. The purpose of the purchase was to acquire a site for a Dominion Stores Supermarket and to develop the remainder of the land as a shopping centre. In February, 1953, the partners sold a 4.427 acre parcel of the land to Dominion Stores Limited for $50,000. The supermarket was built but the partners eventually abandoned the shopping centre project.

In June, 1953, Geneva Investments Limited, a private company, was incorporated under the *Ontario Companies Act,* with an authorized capital of 30,000 redeemable, non-voting preference shares with a par value of $10 each, and 40,000 common shares of no par value. All of the common shares but three were allotted to one Mitchell, a Grisenthwaite Construction Company superintendent, for a consideration of 5 cents per share, and on the same date, June 10, 1953, the 28 173 acres of land still owned by the appellant and Grisenthwaite was conveyed to the company in consideration of the allotment and issue of 8,172 fully paid preference shares to the appellant and an equal number to Grisenthwaite, and of the assumption by the company of the mortgage on the said lands on which the balance then remaining was $41,550. Both the appellant and Grisenthwaite held all the preference shares issued to them at the date of hearing of the appeal. The only assets of the company in June, 1953, were the $2,000 paid for the common shares and the 28 173 acres of land. Neither the appellant nor Grisenthwaite ever owned any of the common shares of the company or ever had any right to acquire any interest in any of the common shares. At the time of the conveyance of the said land to the company, it retained the appellant to represent the company in negotiations with various governmental agencies concerning registration of a subdivision plan. Seven weeks after the company acquired the said 28.173 acres of land, Principal Investments Ltd. agreed to purchase 11.98 acres thereof for $150,000, provided the company installed certain services and had an amended subdivision plan registered.

In 1958, the respondent reassessed the appellant's income for the 1953 taxation year by adding to his reported income the sum of $60,240 51, and in calculating this amount, he took the value of the preference shares owned by the appellant to be their par value. On appeal, the Tax Appeal Board held that the preference shares should be valued at the end of 1953, and that they were then worth the then true value of the equity in the land transferred plus the net gain on a portion of the land sold in July, 1953.

Held: That the sole question to be determined was the market value of the 28.173 acres of land on June 10, 1953, this amount, less the balance outstanding on the mortgage on the said land, being the value of the preference shares issued by Geneva Investments Limited to the appellant and Grisenthwaite on that date.

2. That the market value of the said land on June 10, 1953, as established by the acceptable valuations, was $59,163 and the value of the 16,345 preference shares on that date was accordingly $59,163 less the mortgage liability of $41,550, or $17,613.

3. That the appeal is allowed and the cross appeal is dismissed.

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APPEAL from a decision of the Tax Appeal Board.

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

E. D. Hickey, P. N. Thorsteinsson and *D. J. Johnston* for appellant.

Max Bruce, Q.C. and *M. A. Mogan* for respondent.

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

RITCHIE D.J. now (December 24, 1963) delivered the following judgment:

This appeal is from a decision of the Tax Appeal Board allowing in part an appeal from a May 14, 1958 re-assessment of income tax by the Minister of National Revenue adding $60,240.51 to the income reported by the appellant for the 1953 taxation period. The transactions on which the re-assessment is based relate to the purchase of 32.6 acres of farm land and the subsequent sale of 28.173 acres of it to Geneva Investments Limited. For convenience of reference that company sometimes hereinafter shall be referred to as "Geneva". The $60,240.51 additional income was computed as follows:

Total cost of land purchased (32.6 acres)	$ 97,800 00
Cost of land sold to Dominion Stores Limited (4 427 acres)	13,281.00
	$ 84,519.00
Sale of land to Geneva (28 173 acres)	$205,000.00
Cost of land sold to Geneva	84,519.00
Net profit	$120,481.00

50% of $120,481.00—$60,240.51

In making the re-assessment the Minister took the par value of the preference shares to be their value in the hands of the appellant. The Tax Appeal Board, however, held the preference shares should be valued as of the end of 1953; that, as of then, the preference shares were worth the then true value of the equity in the land transferred plus the net gain on a portion of the land sold in July 1953; that the realizable value of the equity in the land as at the end of 1953 was nearly $82,000; that $5 per share was a fair and

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proper valuation for the preference shares; and that the nominal value of the preference shares was of no significance. The Board deducted the sum of $30,120.25 from the appellant's taxable income for the 1953 taxation year, as determined by the re-assessment, vacated the assessment for that year and referred the matter back to the Minister for a further re-assessment giving effect to the $30,120.25 deduction. The deduction is one-half the amount which the re-assessment added to the appellant's taxable income.

The appellant now appeals from the decision of the Tax Appeal Board. He concedes the consideration received on the sale to Geneva is income and should be brought into account for the purpose of computing 1953 taxable income. A plea that any gain realized was a capital gain was abandoned.

The Minister, by way of a cross-appeal, appeals from so much of the decision of the Tax Appeal Board as directs the $30,120.25 deduction from the appellant's taxable year for the 1953 taxation year.

In support of the re-assessment, the Minister invokes sections 3, 4, 8(1)(c) and 139(1)(e) of the *Income Tax Act*. They are:

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.

8. (1) Where, in a taxation year,

(c) a benefit or advantage has been conferred on a shareholder by a corporation,

otherwise than

(i) on the reduction of capital, the redemption of shares or the winding-up, discontinuance or reorganization of its business,

(ii) by payment of a stock dividend, or

(iii) by conferring on all holders of common shares in the capital of the corporation a right to buy additional common shares therein,

the amount or value thereof shall be included in computing the income of the shareholder 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 appellant describes his occupation as the general manager and the secretary of both Grisenthwaite Construction Company Limited and Grisenthwaite Holdings Company Limited. He owns 49% of the issued shares in the capital stock of the latter company. The remaining 51% is owned by William H. Grisenthwaite. Both the appellant and Mr. Grisenthwaite also own shares in the capital stock of Grisenthwaite Construction Company Limited but the extent of their holdings in that company is not stated. The record discloses no information respecting the field of activity in which Grisenthwaite Holdings Company Limited is engaged.

In October 1952 the appellant and William H. Grisenthwaite, as equal partners, purchased 32.6 acres of land from the beneficiaries under the will of the late Thomas Nihan. The land, then known as the Nihan Estate property, was situate on the outskirts of St. Catharines and formed part of Lot 17 in the Fourth Concession of the Township of Grantham. It had a southern frontage of about 1,364.1 feet on the Queen Elizabeth Way, an eastern frontage of about 1,084.8 feet on Geneva Street and was bounded on the west by railway tracks and on the north by the old Welland Canal property. The price paid for the land was $97,800, equivalent to $3,000 per acre. Forty-five thousand dollars of the purchase price was paid in cash and the land mortgaged to the vendors to secure payment of the unpaid balance of $52,800. In order not to identify the real purchasers, title to the land was taken in the name of Edwin D. Hickey, their solicitor. His status was that of a trustee for his two clients.

The primary purpose of the purchase of the 32.6 acres was the acquisition of a site for a Dominion Stores Supermarket and development of the remaining land as a shopping centre. The evidence is obscure but it is suggested that, prior to committing themselves to the purchase of the Nihan land, the appellant and Grisenthwaite had an agreement or assurance of some nature from Dominion Stores Limited to the effect it would purchase from them for the price of $50,000 a corner lot at the southeast corner of the property. In any event, a corner lot having an area of 4.427 acres was conveyed by the partners to Dominion Stores Limited on February 2, 1953 for a consideration of $50,000. This corner lot

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had frontages of 442.1 feet on the Queen Elizabeth Way and 561.7 feet on Geneva Street. A Dominion Supermarket now is situate thereon but there is no evidence as to when construction of the supermarket commenced or the date on which it opened for business.

The appellant and his partner did not proceed immediately with the development of the remaining 28.173 acres and they, eventually, abandoned the shopping centre project. The appellant says a great many more zoning problems than anticipated were encountered in respect of such development. One difficulty was a requirement that sanitary sewage must flow through an already overloaded trunk sewer in the City of St. Catharines while storm water had to flow in the opposite direction through a strip of land owned by the City of St. Catharines and the Township of Grantham. Opposition from the St. Catharines "down town merchants" developed. Mr. Grisenthwaite was then quite active in the Hamilton area and became willing to sell the land en bloc. William Mitchell, a Grisenthwaite Construction Company superintendent, who had built an apartment building and some houses in the St. Catharines district for his own account and was anxious to establish a business of his own, displayed interest. Several discussions between the appellant, Grisenthwaite and Mitchell resulted in the negotiation of an agreement under which the land would be sold to a company to be incorporated for a consideration consisting of the allotment and issue to the appellant and his partner of 16,345 preference shares in its capital stock and the assumption by it of liability for the mortgage debt covering the balance owing on the purchase price which, as of then, had been reduced to $41,550.

The appellant testified that the discussions with Mitchell covered possible methods of developing the land; that they guessed as to how it might be developed and what the ultimate net realization might be over a period of ten years; and that they tried to peer into the future. As he put it, the Geneva agreement gave Mitchell an opportunity to acquire land for building purposes at a minimum investment, and gave the vendors preference shares then practically worthless, but with some hope of acquiring value over a ten year period. My understanding of the appellant's evidence is he and Grisenthwaite estimated that by the end of the ten years the eventual net realization from the land could give the preference shares a break up value equivalent to their par value. On cross-examination he said that on June 10, 1953 he considered the value of the equity in the 28.173 acres to be about $8,000.

On Mitchell's instructions, Geneva was incorporated on June 9, 1953 as a private company under the provisions of the *Ontario Companies Act*. No shares in the capital stock can be transferred without the express consent of a majority of the board of directors, to be signified by resolution of the board. The authorized capital consists of 30,000 preference shares having a par value of $10 each and 40,000 common shares of no par value, the aggregate consideration for the issue of which must not exceed in amount or value the sum of $40,000. The preference shares are non-voting and carry a non-cumulative preferential dividend of 3% per annum. They are redeemable by the company on payment for each share to be redeemed of the amount paid up thereon.

On June 10, 1953 the Geneva board of directors allotted 39,997 common shares in its capital stock to William Mitchell for a consideration of five cents per share, an aggregate consideration of $1,999.85. As the $1,999.85 was paid and the applicants for incorporation had paid the same consideration for the three common shares they had subscribed for, the total amount paid up on the issued common shares of Geneva was $2,000. On the same date the board accepted an offer from Edwin D. Hickey, as trustee for the appellant and Grisenthwaite, to sell the 28.173 acres to Geneva for the consideration determined through their discussions with Mitchell. The board then enacted by-law #4 providing for the purchase by the company of the 28.173 acres for a consideration to consist of the allotment and issue of 16,345 fully paid preference shares in the capital stock of Geneva and the assumption by the company of a $41,550 balance of original purchase price liability, secured by a mortgage on the land. After approval of by-law #4 by the shareholders and pursuant thereto, the directors, also on June 10, 1953, allotted 8,173 fully paid preference shares to William H. Grisenthwaite and 8,172 fully paid preference shares to the appellant. On the same date the 28.173 acres of land were conveyed to Geneva. As of the date of the hearing of the appeal, the appellant and Mr. Grisenthwaite still held all the preference shares so allotted and issued to them respectively.

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At the time of completing the transfer of the 28.173 acres to Geneva, the appellant and Grisenthwaite were aware it, apart from the $2,000 paid up on the 40,000 issued common shares in its capital stock, had no asset other than the 28.173 acres of Nihan land. They also were aware that immediately after the sale it had no other asset.

Neither the appellant nor Mr. Grisenthwaite have, at any time, owned any of the common shares in the capital stock of Geneva and neither of them bears any blood, marriage or adoption relationship to any of the common shareholders of the company. Neither has any right to acquire any direct or indirect interest in the common shares. During the 1953 taxation year, the appellant engaged in the purchase of corporate shares or bonds only to a minor extent, not in excess of $1,500.

Pursuant to the provisions of the *Land Transfer Act,* there was submitted to the Comptroller of Revenue of the Treasury Department of the Province of Ontario an affidavit by Edwin D. Hickey who had held title to the 28.173 acres as trustee for the appellant and Grisenthwaite. In this affidavit he deposed the true amount of the monies in cash and the value of any property or security included in the consideration for the conveyance of the 28.173 acres to Geneva was:

Monies paid in cash	nil
Securities transferred to the value of	$ 163,450
Balances of existing encumbrances	41,550
Total consideration	$ 205,000

The land transfer tax payable to the Province of Ontario in respect of the sale to Geneva was computed on the "total consideration" of $205,000 set out in this affidavit. Mr. Hickey, who throughout the transaction which culminated in the conveyance to Geneva acted as solicitor for the appellant, Mr. Grisenthwaite, Mr. Mitchell and Geneva, says that, in drafting the affidavit, he set the value of the preference shares at $163,450 because he knew departmental practice required any shares forming part of the consideration for a land transfer and having a par value to be valued at such par value. Unfortunately, departmental practices rigidly adhered to often result in compliance with requirements for which there may be no justification. Whether the requirement in respect of the Ontario land transfer tax is justified does not concern us. Mr. Hickey accepted it. He, apparently, did not argue.

The *Land Transfer Act* affidavit was regarded by the income tax assessing officers as supplying a foundation on which to rest the "Sale to Geneva $205,000" item in the re-assessment.

Following the sale to Geneva, the appellant did not lose all connection with the property. On the same day that the Geneva directors authorized the purchase of the 28.173 acres, they retained him to represent the company in negotiations with the Township of Grantham, the City of St. Catharines and the Department of Planning and Development of the Province of Ontario for the obtaining of all necessary consents to, and approval of, the registration of a plan of survey of the land. The fee for these services was fixed at $1,000 payable on the sub-division plan being accepted for registration.

Under date of July 29, 1953, only seven weeks after Geneva had acquired the 28.173 acres, one Mervin D. Hallman of Toronto agreed to purchase, for the sum of $150,000, an 11.98 acres tract near the northern boundary of the land and extending to its western limit. That price works out to about $12,252 per acre for serviced land. The offer was accepted. It later developed Mr. Hallman was an agent for Principal Investments Limited, a well known developer of shopping centres. The terms of offer provided that:

(*a*) Geneva should obtain approval from all relevant municipal and provincial authorities of a proposed plan of subdivision, amended to show the land as one parcel for commercial purposes, and cause the plan so amended, consented to and approved to be registered in the proper Registry Office by, or before, November 30, 1953;

(*b*) Geneva, at its own expense, would install water lines and sanitary sewers under the full length of the roadway adjoining the northerly limit of the land and complete same on or before the closing date;

(*c*) Geneva would install storm sewers under the land along the approximate route indicated on the sketch attached to the offer and grant the purchaser an easement to make connections with same; and

(*d*) the sale should be completed on or before September 1, 1953 or upon registration of the plan of subdivision whichever should be the later.

The subdivision plan was not registered until February 5, 1954 under the name of "The Nihan Park Plan". It was not until February 26, 1954 that the 11.98 acres were conveyed to Principal Investments Limited. Notwithstanding the identity of the purchaser, the Nihan Park Plan provided for development of the property as a housing subdivision.

While, in my opinion, it has no relation to the value of the 28.173 acres as of June 1953, it is interesting to note that on January 31, 1957, almost four years later, Geneva sold to Principal Investments Limited whatever part of 28.173 acres it still owned as of that date. Immediately before this sale was completed a county court judge had ordered amendments to the Nihan Park Plan. The expressed consideration for this sale to Principal Investments Limited was $210,000, of which $5,000 was paid in cash and the balance of $205,000 was secured by a mortgage. The significance I find in this second sale to Principal Investments Limited is that the shopping centre project conceived by the appellant and his partner in 1952 was still very much in the promotion stage in 1957.

On July 9, 1957, Mitchell sold all his Geneva common shares to Howard Clifton Poole, a professional accountant employed by both Grisenthwaite Construction Company Limited and Grisenthwaite Holdings Limited. Mr. Poole was subpoenaed to give evidence on behalf of the Minister. He testified he was a director of Geneva and, apart from two shares to qualify directors, held all the issued common shares in the capital stock of the company; that he acquired the Geneva common shares from William Mitchell for the price of $5,000; that he owned such common shares outright; that he had not entered into any agreements either as to the conduct of Geneva's affairs or in respect of the common shares in its capital stock; that his common share certificates had not been endorsed for transfer; and that no Geneva preference shares had been redeemed.

Clare Edward Amy, the manager of the main office of the Royal Bank of Canada in Hamilton, testified he had had some experience in realizing on shares in the capital stock of private companies held as collateral security for loans. He said his usual practice when endeavouring to effect such a realization was to seek someone in an allied line who might be interested in acquiring the company. As to the value of the Geneva preference shares, he expressed the opinion they would be practically worthless as collateral security for a loan but qualified his opinion by saying that if the same owners also held the common shares he might place a higher value on the preference shares. Mr. Amy's evidence satisfies me that, as of June 10, 1953, there was no ready market for the Geneva preference shares. Their only value was a break up value.

George X. Walker testified as an expert witness on behalf of the appellant. He is a licensed real estate broker, has been engaged in that line of endeavour since 1946 and is the president and managing director of H. E. Rose & Co., Limited which has been making real estate appraisals in St. Catharines since 1910. His own appraisal experience dates from 1950 when he commenced making appraisals in the Niagara Peninsula. On March 1, 1957 he was instructed by the appellant's solicitors to make valuations of the 28.173 acres as of October 21, 1952, the date on which the appellant and Grisenthwaite obligated themselves to purchase the 32.6 acres then owned by the Nihan Estate, and also as of June 10, 1953, the date on which the 28.173 acres were sold to Geneva. The instructions addressed to Mr. Walker stressed he should endeavour to make his valuations as though they were being made in 1952 and 1953 and without the certain knowledge of what had happened in subsequent years. The market values estimated by Mr. Walker were $1,600 per acre, or a total value of $45,076, as of October 21, 1952 and $2,000 per acre, or a total of $56,346 as of June 10, 1953. In his opinion the value of the land increased by $11,270 during the intervening eight months. The appraisal report states the definition of market value he applied was:

> The highest price estimated in the terms of money which a property will bring when exposed for sale in the open market, allowing a reasonable time to find a purchaser who buys with knowledge of all the uses to which the property is adapted and for which it is capable of being used.

Prior to 1953 there was little or no development in the general area of Grantham Township. The Nihan land was flat, poorly drained and adjacent to what was formerly the old Welland Ship Canal, since refilled and reclaimed. Proper sewers and drainage were available only if installed by a developer. The condition of Geneva Street was poor and almost impassable in the winter months.

Mr. Walker's report states thirty serviced lots in the Township of Grantham had been sold through his office in 1952 at an average price of $1,475 per acre; that subdividers in the Township were paying up to $1,500 per acre for

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unserviced land in 1952 while the City of St. Catharines was receiving $2,500 per acre for serviced land within the city limits; and that enquiries for vacant land for shopping centre purposes, industrial use and housing developments began to increase in 1952.

In March 1947, when Mr. Walker made his appraisal, there was no service road on the south side of the property. As the Queen Elizabeth Way was a limited access highway, the only access to the Nihan land was from Geneva Street.

The second expert witness called by the appellant was Louis B. Tripp, a retired real estate broker and appraiser with at least twenty-five years appraising experience in St. Catharines. He still makes mortgage appraisals for the Imperial Life Assurance Company. Mr. Tripp, who had known the property for twenty-five years, also was instructed by the appellant's solicitors on March 1, 1957, in the same terms as the instructions given Mr. Walker, to make valuations of the 28.173 acres as of October 21, 1952 and June 10, 1953. The Tripp appraisal report, dated March 8, 1957, ascribes a value to the land of $1,800 per acre or $50,711, as of October 21, 1952 and $2,100 per acre, or $59,163, as of June 10, 1953. In Mr. Tripp's opinion, the valuation increased $8,452 during the intervening eight months.

For the most part Mr. Tripp's report was based on information obtained respecting sales of comparable properties. It states that as of October 1952 the highest and best use of the land was as a housing subdivision. As of June 1953 a large area to the north, extending nearly to Lake Ontario, had been subdivided and many homes constructed thereon. That was the principal reason for Mr. Tripp concluding the land value had increased by $300 per acre. He refers to 1948 and 1953 aerial photographs appended to his report as evidencing no great physical changes had occurred in the area during that five year period. Factors in favour of the property are listed as proximity to the city limits; proximity to the Queen Elizabeth Way; the proximity, immediately to the east, of a good class of newer type residential properties; rapid development of numerous subdivisions towards the north to Lake Ontario; and improved transportation facilities. Unfavourable factors listed are rather low lying ground with no drainage facilities; several poor class buildings and properties facing the land on Geneva Street; an old established piggery about 1,000 feet north of the property; railway tracks parallel to and a short distance from the western boundary; doubtful use of old abandoned Welland Canal grounds immediately to the north of the property; dangerous intersection of the Queen Elizabeth Way and Geneva Street where many fatal automobile accidents had occurred during last few years; and the lack of a service road from the Queen Elizabeth Way.

There is no explanation of the reasons which motivated the appellant's solicitors, on March 1, 1957, to request valuations of the 28.173 acres as of October 21, 1952 and June 10, 1953.

Frederick John Shankland was called as an expert witness on behalf of the Minister. He is an accredited appraiser of The Appraisal Institute of Canada, a member of the American Institute of Real Estate Appraisers and holds membership in an imposing list of Appraisal Institutes and Real Estate Boards. His initial training was in England and Scotland. It was not until September 1954, more than a year after the sale of the subject land to Geneva, that Mr. Shankland came to Canada in order to accept employment as an appraiser with Central Mortgage and Housing Corporation. One year later he joined the appraisal staff of Credit Foncier Corporation where he remained for three years. His next employer was J. A. Willoughby & Sons Limited, engaged in the business of realtors since 1900. He was with the Toronto office of that company in 1961 when he made his appraisal of the 28.173 acres. At the time of the hearing, Mr. Shankland was the manager of the appraisal department of British Canadian and American Real Estate Consultants, a company he became associated with on May 1, 1961. The instructions for Mr. Shankland to appraise the value of the 28.173 acres were addressed to him by counsel for the Minister under date of March 9, 1961. The Shankland valuations for the acreage are $47,800, or $1,697 an acre, as of October 21, 1952 and $197,000, or about $7,000 per acre, as of June 10, 1953, for then unserviced land. The definition of market value he applied was:

> The price which the property will bring in a competitive market under all conditions requisite to a fair sale, which would result from negotiations between a buyer and a seller, each acting prudently, with knowledge, and without undue stimulus.

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Before embarking on his appraisal, Mr. Shankland was furnished with the transcript of the proceedings before the Tax Appeal Board, the appraisals made by Mr. Walker and departmental memoranda giving factual information about the property and the financial statements of Geneva. He was aware the Minister had ruled the land had been sold to Geneva for a total consideration of $205,000.

Following the title page of the Shankland report is an aerial photograph showing a view of the property facing northwest as of September 1960, more than seven years after the sale to Geneva. This photograph shows the Dominion Supermarket at the southeast corner of the property and shopping centre buildings near and parallel to the western boundary.

In his area analysis, Mr. Shankland states the rate of growth in Grantham Township tended to increase until 1952 and thereafter steadily declined. He also states:

> At present the $3,000,000 Fairview Shopping Centre is being erected on the subject property.

I take "at present" to mean as of the date of Mr. Shankland's report, which is June 23, 1961. It would seem the shopping centre buildings shown in the September 1960 photograph were then under construction.

In his neighborhood analysis, Mr. Shankland states the property adjoins what was formerly the Welland Ship Canal, since refilled and reclaimed; that north of the property there is a piggery consisting of a group of very poor buildings; that the site is mainly level but in 1952-53 was poorly drained; that there were no sewers north of the Queen Elizabeth Way in 1952-53; that in 1952-53 there was no by-law to control land use in Grantham Township; that, despite the considerable amount of residential development in the Township of Grantham as a whole, little development had occurred in the immediate neighborhood of the property by 1953; and that, while as of the date of the report the Queen Elizabeth Way was carried over Geneva Street by means of an overpass, there was a grade level intersection there in 1952-53.

In respect of his October 21, 1952 valuation, Mr. Shankland's report states he "tried to visualize what was in the minds of the vendors and the purchasers on October 21, 1952". Such visualization enabled him to form the opinion that the 4,427 acres corner lot sold to Dominion Stores was the most desirable part of the Nihan land and, because he "was unable to find any evidence to the contrary", he accepted $50,000 as its value. The simple process of subtraction determined $47,800 to be the value of the 28.173 acres as of October 21, 1952.

Included in that portion of the report dealing with the history of the property reference is made to the following four items:

1. On December 7, 1953, more than four months subsequent to the date of the Hallman agreement, Geneva conveyed to Dominion Stores Limited a strip of land about 0.43 acre in area at a price representing about $2,300 per acre.
2. On the same date, December 7, 1953, Geneva, on a land exchange, conveyed 1.795 acres to the City of St. Catharines. Mr. Shankland estimates the consideration received by Geneva was equivalent to $3,000 per acre.
3. On December 14, 1953 Dominion Stores Limited reconveyed to Geneva a portion of the strip above mentioned. The reconveyance covered 0.34 acre. Mr. Shankland works out the consideration as about $6,000 per acre.
4. On February 2, 1954 Geneva registered a plan to be known as "The Nihan Park Plan". This plan divided the remaining property owned by Geneva into 101 building lots.

All four items are related to the Hallman agreement.

In that section of his report which deals with the methods followed in determining his June 10, 1953 valuation, Mr. Shankland states that, in order to obtain an indication of the value of the property as of that date, he investigated details of four sales relating to three other shopping centre sites north of the Queen Elizabeth Way and west of the Welland Ship Canal and also endeavoured to find transactions involving comparable land. The shopping centre site sales examined were one of 7.85 acres on April 19, 1956 for $20,000 ($2,535 per acre), a second of 8 acres on April 10, 1958 for $36,000 ($4,500 per acre), a third of 2.19 acres on May 28, 1958 for $5,476 ($2,500 per acre) and a fourth of 4 acres on November 2, 1959 for $36,000 ($9,000 per acre). All four transactions were rejected because of the length of time which had elapsed after the sale to Geneva. Having found no transactions relating to what he considered comparable land and because he was valuing a shopping centre site, Mr. Shankland decided to concentrate on transactions

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relating to the subject property. In the course of his testimony he said:

> I have relied wholly on a sale which occurred only one month after the conveyance to Geneva. This is the sale of 11.98 acres of serviced land, all shown on the Nihan Park Plan at lot 10 which sold to a nominee of Principal Investments Limited for $150,000 in July 1953.

In explaining how the valuation as of June 10, 1953 was computed, the Shankland report says:

> In October 1952, the subject property was raw land with a potential as a future shopping centre site. By June 10, 1953 contractual arrangements had been made with Dominion Stores Limited and thus the nucleus of a shopping centre had been formed. Thus, in my opinion, the status of the subject property changed between October 1952 and June 1953. In order to obtain an indication of the value of the subject property in June 1953, I have relied on the sale of 11.98 acres of serviced land to a nominee of Principal Investments for $150,000 in July 1953. I have deducted from this amount the cost of the roads, sewers et cetera attributable to this land, leaving a residual value to unserviced land.

The amount which Mr. Shankland took as the total cost of installing services was $85,640. He apportioned 70% of that amount, $59,948, to the 11.98 acres and 30%, $25,692 to the remaining 16.193 acres. On the basis of the sale price of the 11.98 acres as serviced land, he computed the value of the tract as unserviced land to be $7,516 per acre. As the 28.173 acres contained land less desirable than the 11.98 acres, Mr. Shankland scaled down his per acre value to $7,000 and decided the total value for the 28.173 acres as of June 10, 1953 to be $197,000.

Firstly because he felt it might not be a transaction at arm's length, secondly because it was the subject of this appeal and thirdly because it was not a good indication of market value, Mr. Shankland, in preparing his June 10, 1953 valuation, gave no consideration to the transaction by which Geneva acquired title to the property.

On cross-examination Mr. Shankland testified the shopping centre was developed by Fairview Investments, not by Principal Investments Limited; that, in March 1961 when he inspected the property, the shopping centre was still under construction; that the Nihan Park Plan for subdivision housing was abandoned in January 1957; that had he visited the site between 1953 and 1957 he would have found it prepared for residential development; that he had included the 1960 photograph in his report because it showed the ultimate use of the property and Principal

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Investments, as a sophisticated buyer, would have the ultimate use in mind when purchasing it; that because of the railroad preventing access to the land from the west, the old Welland Canal preventing access from the north and the controlled access provisions applicable to the Queen Elizabeth Way preventing access from the south, the only entrance to the property was from Geneva Street; that as one must give regard to the fact a shopping centre can be easily seen from a much travelled highway and as he could see no difficulty attributable to any lack of access, his valuations did not reflect any access handicap; that the proximity of the piggery would not have any great influence on the value of the land; that the Nihan land could be regarded as a shopping centre property in June 1953; that in making his valuations he had disregarded sales of land made for shopping centre use in 1956, 1958 and 1959; that although he was valuing a shopping centre site as of 1953 he gave no weight to the fact that in 1956 and 1958 lands were being acquired for shopping centre use at $2,500 per acre because that was the normal acreage price and the vendors, although fully aware of the use the lands were to be put, were content to sell at that price; that the normal acreage price in 1953 was from $1,600 to $1,800 per acre but as the appellant and Grisenthwaite were aware of the future use to which the land was to be put the price on the sale to Geneva should have been $7,000 per acre; that as an involved agreement, such as Geneva entered into with Hallman, does not happen over night, there must have been a prior period of negotiation; that he looked at the land, noted it had excellent shopping centre site potential and, knowing the Hallman agreement was made in July 1953, assumed negotiations had been going on which culminated in that agreement; that Principal Investments Limited normally have protracted negotiations before entering into any agreement to purchase land; that he would expect such negotiations would take "perhaps two months, something like that"; that in making his June 10, 1953 valuation he took into account the knowledge which *probably* was in the minds of the vendors at that time; that information obtained from counsel for the Minister was the foundation on which he included in his report the statement that the appellant and Grisenthwaite had negotiated the sale to Dominion Stores on the understanding they would repurchase the 4.427 acres at the same price

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when financing had been arranged for the shopping centre; that without the figures used as the cost of installing services, including one 1957 figure, he could not have made his valuation of $197,000 as of June 10, 1953; that he made his appraisal solely on the basis of value as a potential shopping centre site; that, while in July 1953 it was planned to use only 11.98 acres for shopping centre purposes, all of the 28.173 acres were being used as a shopping centre in June 1961 and he felt such use would be in the minds of prudent vendors in 1953; that he ignored the housing subdivision plan, filed in 1953 and abandoned in 1957, because of the subsequent use of the land and what he saw in 1961; and that he knew of no shopping centre site in the St. Catharines area that had been acquired in 1953 at a cost of $7,000 per acre.

In support of the re-assessment the Minister makes six submissions, all alternatively:

(1) the purchase of the land by the appellant and Grisenthwaite and the subsequent sale of a parcel thereof to Geneva at a profit of $120,481 is income from a business within the meaning of that word as defined by the Income Tax Act;

(2) that if the preference shares are to be regarded as fully paid up, the market value of the land must be the equivalent of $10 per share;

(3) that if the market value of the land is such as to give a value of zero to the preference shares it means the preference shares are wholly unpaid;

(4) that if the market value of the land gives the preference shares a value somewhere between zero and $10, the preference shares are partly paid up;

(5) that to the extent the fair market value of the land, as of June 10, 1953, was less than $205,000 the 16,345 preference shares were issued at a discount and such discount was a benefit or advantage conferred upon the appellant and Grisenthwaite, as shareholders of Geneva, and the amount or value thereof should be included in computing the appellant's 1953 income; and

(6) that issuing the preference shares to the appellant for a consideration less than their par value conferred on the appellant, as a shareholder of Geneva, a benefit or advantage equivalent to the amount of payment for the shares which he was not required to make.

In support of the first submission it was contended shares in the capital stock of an Ontario company can be allotted only

(*a*) for a cash consideration at least equal to the product of the number of shares allotted and issued multiplied by the par value thereof; or

(b) for a consideration payable in property or past services which the directors, in good faith and by express resolution, determine to be, in all the circumstances of the transaction, the fair equivalent of a specified cash consideration.

No such resolution in respect of the property forming the consideration for the allotment of the preference shares to the appellant was adopted by the Geneva directors.

There can be no doubt that, as of the date of the allotment, the appellant regarded the Geneva preference shares as being worth much less than their par value. There also is no doubt he had the possibility of future appreciation in value very much in mind.

If the allotment and issue of the preference shares to the appellant is invalid under the provisions of the *Ontario Companies Act* or if, by reason of the preference shares not being fully paid, the appellant is indebted to Geneva for any unpaid balance, a disadvantage not an advantage was conferred upon him by the Geneva directors. Any such disadvantage, if one does exist, detracts from the extent of any advantage the appellant has derived from the preference shares having been allotted to him as part consideration for the land the company was purchasing.

I attach no importance to the par value of the Geneva preference shares or to the manner in which the outstanding capital of the company is dealt with in its books of account or on its balance sheets or in the annual returns filed with the Provincial Secretary. A bookkeeping entry is not conclusive evidence of the existence of a profit. See *Doughty v. C.I.R.*[1] In my view, it is not necessary to determine whether the allotment of the preference shares to the appellant is valid or invalid or whether the preference shares are or are not fully paid. Those are questions between Geneva and the appellant. The company is not a party to this appeal.

I can understand why the officers charged with responsibility for the administration of the *Income Tax Act* would subject the transaction between the appellant, Grisenthwaite and Geneva to close and prolonged scrutiny. Five aspects of the transaction justifying suspicion are:

(1) the 28.173 acres were sold to Geneva, a company in which all the common shares were owned by a senior employee of a company of which the appellant is the general manager and which bears the name of his partner in acquiring the acreage;

[1] (1927) 96 L.J. (P.C.) 45.

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(2) the preference shares issued to the appellant were obviously accepted with the hope they would increase in value over a period of time and so confer on him a capital gain;

(3) the first increase in the value of the preference shares came on July 29, 1953, only seven weeks after the sale to Geneva, when that company agreed to sell 11 98 acres of the land to Hallman for a price of $150,000, about $12,500 per acre;

(4) on January 31, 1957 the remaining acreage then owned by Geneva was conveyed to Principal Investments Limited for an expressed consideration of $205,000;

(5) on July 9, 1957, less than six months after the last sale to Principal Investments Limited, all the Geneva common shares were, for a consideration of only $5,000, sold by Mitchell to Poole, an employee of a company of which the appellant is the general manager; and

(6) the same solicitor acted for the appellant, Grisenthwaite, Mitchell and Geneva.

There must, however, be something more than suspicion to support the re-assessment made by the Minister. While not devoid of sophistication in respect of methods adopted to evade or reduce income tax, I also am aware the day is not yet past when friends deal with each other in good faith, particularly in those cases where an employer is making it possible for an employee to set himself up in business.

Nothing in the record establishes the agreement negotiated between the appellant and Grisenthwaite on the one part and Mitchell on the other part was not an arm's length transaction. The appellant testified he, on June 10, 1953, was not aware of any possibility of any part of the 28.173 acres being sold by Mitchell or by Geneva. He denied Mitchell was, and Poole is, either his trustee or agent. Both the appellant and Poole, a witness called by the Minister, denied the existence of any agreement relating to the common shares of Geneva or the management of the company. The following question and answer were included in the appellant's examination in chief:

Q. Mr. Fraser, did you have any knowledge before June 10, 1953 of any specific possibility of resale of any part of this land by Mr. Mitchell or Geneva Investments Limited?

A. None whatever.

In the face of such uncontradicted testimony, I am not prepared to draw any inference leading to the conclusion the sale to Geneva was a colourable transaction.

The sole question for my determination is the market value of the 28.173 acres as of June 10, 1953. The potential market value of the land at some future date is not relevant.

Conveyance of the 28.173 acres of land to it was the actual consideration Geneva received for the allotment and issue of the preference shares and the assumption by it of liability for the mortgage debt. The net value of the land as of June 10, 1953 was no more and no less than the value of the preference shares as of the same date. (*Falconer v. M.N.R.*[1]) The value of the preference shares or of the land as of the end of the 1953 taxation year does not affect the profit, if any, realized by the appellant on June 10, 1953. The appellant accepted his preference shares with all the advantages and disadvantages pertaining to them, including the disadvantage of the non-voting provision.

Mr. Shankland conceded his valuations were based not on market values but on arithmetical computations plus his personal knowledge of shopping centre site valuations made in recent years. He made full use of the certain knowledge of what had occurred in the 1953-61 period. On the other hand, Messrs. Walker and Tripp were instructed to ignore that certain knowledge.

To justify his June 10, 1953 valuation, Mr. Shankland asserts positively:

> By June 10, 1953 contractual ararngements had been made with Dominion Stores Limited and thus the nucleus of a shopping centre had been formed.

No such contract was produced. No other witness referred to such a contract. Support also is lacking for the very definite assertion contained in the Shankland analysis of the subject property:

> The evidence shows that prior to this date the purchasers had concluded negotiations for the sale to Dominion Stores Limited of 4.427 acres of land (forming part of the 32 6 acres referred to above) for a cash consideration of $50,000 (or about $11,300 per acre) on the understanding that they would repurchase this portion of the land at the same price when financing had been arranged for the development of the shopping centre. The $50,000 paid by Dominion Stores Limited was to be used for temporary financing and, when permanent financing was available, the repurchase was to be completed and a store erected and leased to Dominion Stores Limited.

Under cross-examination, Mr. Shankland admitted he based that assertion on information he had obtained from counsel for the Minister. No other witness referred to any understanding respecting the appellant and Grisenthwaite repur-

[1] [1962] S.C.R. 664 at 672.

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chasing the corner lot from Dominion Stores Limited nor to any plans for financing the shopping centre project which the appellant and his partner were thinking of in 1952. It is only right I should mention that counsel for the Minister stated he furnished Mr. Shankland with no information that was not contained in the proceedings before the Tax Appeal Board.

An assumption on which Mr. Shankland relied heavily in making his June 10, 1953 valuation was that the sale of the 11.98 acres to Hallman, on behalf of Principal Investments Limited, was in the minds of the appellant, Grisenthwaite and Mitchell on that date. He based that assumption on what he said was his knowledge that Principal Investments Limited acquired shopping centre sites only after the most thorough investigation and prolonged negotiation. His estimate of the time that would be consumed by such investigation and negotiation was two months. The time lapse between the date of the agreement under which Geneva agreed to purchase the 28.173 acres and the date of the agreement under which it agreed to sell the acreage to Principal Investments Limited was seven weeks.

I cannot accord any weight to the Shankland valuation. It is based on what he saw in 1961, what he was told had occurred between 1953 and 1963 and assumptions for which there is no firm foundation. The appraisal reports, as of 1953, made by Messrs. Walker and Tripp were compiled on a far more realistic viewpoint. The Tripp appraisal is concise and to the point.

There is a difference of only $2,817 between the Walker valuation of $56,346 as of June 10, 1953 and the Tripp valuation of $59,163 as of the same date. I accept the latter figure. Deducting the mortgage liability of $41,550 leaves $17,613 as the net value of the equity of redemption in the 28.173 acres as of the date of the conveyance to Geneva. That was the worth in money of the 16,345 preference shares in the capital stock of Geneva which formed part of the consideration for the sale of the land to that company. On a per share basis the worth was $1.08 per preference share. The 8,172 preference shares which the appellant received on June 10, 1953 had, as of that date, a value of $8,825.76. On that basis of computation the total consideration which the appellant and Grisenthwaite received on the June 10, 1953 sale to Geneva was $59,163 made up of:

Value of 16,345 preference shares	$ 17,613.00
Assumption of mortgage liability	41,550.00
	$ 59,163.00

Counsel have agreed it will be sufficient for me to determine the amount of the consideration received on the sale to Geneva. It is not necessary for me to determine what portion of the cost of the 32.6 acres should be ascribed to the 28.173 acres sold to Geneva.

The appeal is allowed and the cross-appeal dismissed. The re-assessment will be remitted to the Minister for further consideration.

The appellant is entitled to his costs, to be taxed, on both the appeal and the cross-appeal.

Judgment accordingly.

1961
Jun. 20
1964
Mar. 4

BETWEEN:

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

STEEN REALTY LIMITED .... RESPONDENT.

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 11(1)(a), 20(6)(g) and 144(1); Income Tax Regulations, Schedule B—Sale of real estate—Capital cost allowance in year of sale—Whether sale price paid for land and buildings or land alone.

When the respondent company purchased certain lands and buildings in the City of Toronto in 1946 at a cost of $132,000, it allocated $32,112 of the purchase price to the land and the balance thereof to the buildings, an allocation which the appellant accepted at that time. The said lands and buildings were sold by the respondent during the 1955 taxation year for $395,000. The appellant accepted the respondent's calculation of the net capital cost value of the buildings on January 1, 1955 in the amount of $91,403.35 but deducted therefrom the sum of $89,309.77 as having been realized by the appellant during the taxation year by the sale of the buildings, and he calculated the allowable capital cost allowance on the difference whereas the respondent had claimed a capital cost allowance of 5% of the whole $91,403 35.

Held: That the evidence established that at the time of the sale in 1955, the buildings in question had no value and that the purchaser paid

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the price of $395,000 for the land alone, so that it is not reasonable to regard any part of the $395,000 sale price as being the consideration for the disposition of the buildings.

2. Appeal dismissed.

APPEAL from a decision of the Tax Appeal Board.

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

G. D. Watson, Q.C. and *T. E. Jackson* for appellant.

W. D. Goodman for respondent.

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

RITCHIE D. J. now (March 4, 1964) delivered the following judgment:

The Minister of National Revenue has appealed from the allowance by the Tax Appeal Board of an appeal of Steen Realty Limited in respect of a re-assessment dated April 24, 1957 by which $4,465.49 was added to its 1955 taxable income. For convenience of reference, the Minister of National Revenue and Steen Realty Limited hereinafter sometimes shall be referred to respectively as "the Minister" and "the company".

As of January 1, 1955, the company owned land with three buildings thereon situate in the King Street and University Avenue area of Toronto. One building was known as 25 Emily Street and the other is 177 King Street West. Emily Street, which is one block west of University Avenue, runs north and south.

The land on which the three buildings stood had street frontages of 217 feet on University Avenue, 56.4 feet on King Street and 76.10 feet on Emily Street. It had been acquired by the company in 1946 at a cost of $132,000. At the time of acquisition the company allocated $32,112 of the purchase price to the land, the remainder of the purchase price was allocated to the buildings. The Minister accepted those allocations.

The entire property, land and buildings, was sold during the 1955 taxation year for a price of $395,000. The issue between the parties is what, if any, portion of the sale price should, reasonably, be attributed to the depreciated value of the buildings standing on the land as of the date of the sale.

Section 11(1)(*a*) of the *Income Tax Act* permits deduction from gross income of such part of the capital cost of property as is allowed by regulation. Under schedule B of the Income Tax Regulations the buildings involved herein were classified in 1955 as class 3 and so, under regulation (1), an allowance of 5% of their depreciated capital cost might be deducted by the owner in computing taxable income. Other land with class 3 buildings thereon was owned by the company.

In its income tax return for the 1955 taxation year, the company deducted from its gross income a cost allowance of $4,570.17, being five percent of the amount of $91,403.35 shown on the return as the net capital cost value, for income tax purposes, of class 3 schedule B property owned by it as of December 31, 1955. The Minister accepted $91,403.35 as the value of that class of property owned by the company as of January 1, 1955 but, for the purpose of determining value as of December 31, 1955, deducted therefrom the sum of $89,309.77 which he ruled had been realized during the taxation year by the sale of the three buildings. The balance of $2,093.58 is the capital cost value on which, in making the re-assessment, the Minister computed $104.68 as the proper capital cost allowance.

Counsel for the Minister explained that $89,309.77 was the undepreciated value of the buildings in 1949, the year in which the present system of capital cost recovery became effective. As justification for the adoption of that value, he relied on the formula contained in section 144(1) of the Act.

The computation of 1955 taxable income of the company as determined by the re-assessment is:

Taxable income declared by company		$ 789.76
Capital cost allowance claimed by company	$4,570.17	
Capital cost allowance as determined by the Minister	104.68	
Add to income as declared		4,465 49
Taxable income as revised and as assessed		$5,255 25

Benjamin Richard Steen, the president of the company, testified respecting the 1946 acquisition of the property. The oldest building, 177 King Street, was four stories in height,

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had a basement and was 130 feet in depth, and was then reputed to have been standing for sixty, perhaps seventy-five years. At the rear of this building was an addition thereto, two stories in height. This addition, which was the second of the three buildings standing on the land at the time of the sale, had been built twenty-five or thirty years before the company acquired the property. The second building connected with another four storey and basement building which fronted on Emily Street. The main purpose in acquiring the property was to provide a home for Zenith Electric Supplies, a wholesale merchandising company, which Mr. Steen controlled. The space not required by Zenith was rented to other tenants. At the time of the sale the rentals being derived from the buildings were:

Zenith Electric Supply	$2,000.00	per month
Herbert A. Watts Limited	855 00	" "
Stephen Sales Limited	541.66	" "
Trevelyan Manufacturing Co.	225 00	" "
	$3,621 66	

The annual gross income approximated $44,000.00 and the annual net income, before administration expense, was in the vicinity of $22,000. Fire insurance in the amount of $250,000 was carried on the buildings.

On October 4, 1955 one Rudolf Peter offered to purchase the property for the price of $395,000. The offer was conditional on:

(*a*) permission being obtained for the erection of a building, at least twelve stories in height, to house wholesale and commercial outlets and offices;

(*b*) the proposed building being permitted to occupy the total area of the land; and

(*c*) the issue of building permits for the contemplated building.

The Peter offer, which was accepted by the company on October 6, 1955, called for vacant possession not later than May 15, 1956. To secure vacant possession the company paid $3,000 to Stephen Sales and $4,500 to Herbert A. Watts Limited in consideration of their leases being surrendered. The transaction was closed on November 15, 1955. The morning after vacant possession was delivered demolition of the buildings commenced. Erection of the new office building commenced immediately.

Irwin Armstrong, an employee of The Chartered Trust Company, gave evidence on behalf of the company as an expert on real estate values. He has been dealing with commercial and industrial properties for twenty-five years and had been appraising that type of property for ten years. Mr. Armstrong testified the value of the property sold by the company to Peter was in the land rather than in the buildings; that there was not sufficient income from the buildings to make the property attractive as an investment proposition; that in the 1955-57 period the University Avenue area was becoming active, land values were rising; that office buildings then were either in course of construction or being planned and at least one hotel was looking for a site in that area; that the price for which the company sold its property was the equivalent of $21.24 per square foot; that he knew of twelve other properties in the immediate area which in the same period had sold respectively for prices equivalent to $32.04, $22.17, $23.26, $27.04, $39.31, $45.35, $42.80, $32.95, $22.16, $18.11, $29.12 and $13.93 per square foot; that because of the value inherent in the land and the conditions under which the company was using the property, he did not attribute any value to the buildings; that the property would have sold for as much without the buildings as it did with them; and that, because of the cost of demolishing the buildings, the land would have been more desirable if vacant.

No witnesses were called on behalf of the Minister.

A section of the Act which, in my opinion, has particular application to the issue is section 20 which applies where depreciable property of a taxpayer has, in a taxation year, been disposed of. Subsection 6 clause (*g*) of that section is:

For the purpose of this section and regulations made under paragraph (*a*) of subsection (1) of section 11, the following rules apply:

(*g*) where an amount can reasonably be regarded as being in part the consideration for disposition of depreciable property of a taxpayer of a prescribed class and as being in part consideration for something else, the part of the amount that can reasonably be regarded as being the consideration for such disposition shall be deemed to be the proceeds of disposition of depreciable property of that class irrespective of the form or legal effect of the contract or agreement; and the person to whom the depreciable property was disposed of shall be deemed to have acquired the property at a capital cost to him equal to the same part of that amount.

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The company contends that in 1955, the market value of the property (land and buildings) was confined to what could be realized for the land as the buildings had no market value. It, however, does concede the buildings had some value to it as Zenith Electric, a related company, was the major tenant. I use the term "related company" loosely. The parking problem had caused wholesalers to move from the King Street-University Avenue area. The value of the location as a home for Zenith Electric in 1955 had, in my view, decreased to a point where it no longer justified retention of the property by the company. The parking problem was bound to become progressively worse.

The buildings were old. They had no attraction to an investor seeking income. According to Mr. Armstrong anyone desirous of acquiring the property as an investment would not have paid more than $210,500 for it. I am satisfied the company, in fixing the price at which it was willing to sell, had regard only to the land value. I also am satisfied Mr. Peter regarded the buildings on the land as of no value to him and that his offer of $395,000 was based solely on the value of the land as a site for the modern twelve story office building he had in mind. The cost of demolition increased his acquisition cost.

In the circumstances surrounding the sale of the property to Peter, it is not reasonable to regard any part of the $395,000 sale price as being the consideration for the disposition of the buildings. See *Ben's Limited v. The Minister of National Revenue*[1].

The appeal is dismissed, with costs.

Judgment accordingly.

[1] [1955] Ex. C.R. 289.

BETWEEN:

1963
May 27, 28
Nov. 14

PERCY VERNON SMITH ....APPELLANT;

AND

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

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 46(4), and 139(1)(e)—Income or capital gain—Business or adventure in nature of trade—Sales of land over period of many years—Investment or speculation.

In 1930 and 1931, the appellant, while living in Listowel, Ontario, and teaching school, purchased, in several separate transactions, a total of about 6,000 ft. of frontage on Lake Huron in Huron Township, County of Bruce and 105 lots in the town plot of Alma, the purpose of his initial purchase being to establish a summer home. In 1931, he began selling parcels of this property, allegedly to raise capital with which to purchase other more desirable property. In 1935, the appellant moved to Waterdown, Ontario and a year later he moved to Grimsby, Ontario, where, in 1947, he retired from teaching because of ill health. In that year, he purchased a real estate agency in Grimsby which he and his son operated until 1952, when he sold it and retired to his summer home on Lake Huron. The appellant purchased additional real property in the vicinity of his summer home in 1953, 1954, 1956, 1957 and 1959.

From 1931 on, the appellant had one and usually several signs displayed on or near his property advertising lots for sale. In 1953 or 1954 he advertised lots for sale on one weekend in two newspapers. He succeeded in selling lots in the years 1931 to 1934 inclusive, 1944, 1945, 1947 to 1951 inclusive and 1954 to 1958 inclusive. During the period from 1930 to 1958, he sold 172 lots and between 1959 to 1962 he sold 47 more. His principal source of income from 1952 to 1958 was the proceeds from the sale of lots.

Held: That the appellant's whole course of conduct from 1930 to 1960, including the nearly continuous sales of lots taken from property in excess of what he needed as a summer home or retirement property, the erection of "for sale" signs, the newspaper advertising, the evidence that he was the man everyone in the vicinity turned to when they wanted to buy, sell or even exchange lots and the fact that his main source of income between 1952 and 1958 was derived from the sale of lots, indicate that the appellant was carrying on a business in a scheme of profit making rather than carrying out a policy of investment and that the lots were his stock in trade.

2. Appeal dismissed.

APPEAL from a decision of the Tax Appeal Board.

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

C. H. Mahoney for appellant.

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F. J. Dubrule and *M. Barkin* for respondent.

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

NOËL J. now (November 14, 1963) delivered the following judgment:

This is an appeal from a decision of the Tax Appeal Board[1], dated March 3, 1961 dismissing appellant's appeals from reassessments dated September 30, 1959, and made upon him for the years 1954 to 1958 inclusive.

In reassessing the appellant, however, the Minister took into consideration that expenses had been incurred of \$1,982.50 for 1954; \$1,013.00 for 1955; \$986.86 for 1956; \$1,236.93 for 1957 and \$778.80 for 1958 and the sole question in the appeal is whether certain profits made by the appellant in the sale of a number of lots situated on Lake Huron, Township of Huron, in the County of Bruce, are taxable profits or whether, as the appellant contends, they are capital appreciations as it was agreed that the following amounts added by the Minister's assessments to the appellant's revenue for the following years had been properly computed:

Year	
1954	\$ 4,351.43
1955	\$ 8,194.99
1956	\$ 10,356.50
1957	\$ 11,473.37
1958	\$ 10,475.16

At the hearing, counsel for the respondent admitted that the appeal for the year 1954 should be admitted, the reassessment of September 30, 1959, being made beyond the four-year limit of s. 46(4) of the *Income Tax Act,* as the original assessment for the year 1954 was made in May 1955.

We will therefore deal here only with the reassessments for the years 1955 to 1958 inclusive.

[1] 26 Tax A.B.C. 146.

The appellant stated that from the year 1921 to 1935 he taught school in the town of Listowel, Ontario, and was principal of the high school for ten years out of the thirteen that he was there. In addition to his teaching and administrative duties, he had taken on a lot of extra-curricular duties in connection with the community.

In the year 1935 he went to the town of Waterdown, Ontario, situated not too far from the city of Hamilton, where he was the principal of the local school for one year. He then became principal of the school of Grimsby, Ontario, situated in the Niagara Peninsula and remained there from the year 1936 to 1947. In the latter year, he retired from teaching because of illness but was not eligible for a pension although he had taught school for twenty-seven years, as at that time the pension plan did not allow a pension for ill-health and he therefore had to find some means of subsistence. He explained that at that time he was suffering from a nervous disorder, inflammation of the nerve ganglia, and his doctor had told him to change his occupation.

He therefore in the spring of 1947 purchased a real estate agency in the town of Grimsby which he operated with his son for a period of five years. This real estate agency consisted in listing farms and homes for sale and in selling insurance and buying and selling property for others. The only property he purchased for himself during that period was a small building in which he kept his office on the ground floor with an apartment which he rented on the second floor.

While in Grimsby, he was mayor of the town from 1950 to 1951, deputy governor and district governor of the Lions Club and one year attended 125 meetings outside of town.

In 1952 he sold this agency business as he and his son were not satisfied with it and retired to a summer home situated on Lake Huron, Ontario, which he had purchased in 1930.

Since 1952, when he retired, the appellant states that he has been living on some revenue from investments derived from his office building until he sold it in 1956 for

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$17,000 and also from the sale of land in the township of Huron, Ontario, the subject matter of the present appeals from which he however admits deriving his principal source of revenue during this period.

He added that he required a great deal of the profits from the sale of land to live on as he had an expensive set-up as far as his and his wife's medical outlays were concerned; both, indeed, had to go to a warmer climate in the winter time, his wife suffering from heart and other internal troubles.

The appellant first bought land on Lake Huron, in the township of Huron, in 1930, at a time when he was living and teaching in the town of Listowel. In the summer of that year he had been invited to visit with his wife's cousin at her summer cottage on the ocean at a place called Wildwood, on the New Jersey coast. After a dip in the ocean, he got lumps all over his legs, arms and body and the doctor told him that being allergic to iodine poisoning he would have to leave the district. He and his wife, therefore, returned home immediately and a Miss Clayton, of Listowel, who had a summer home on Lake Huron at a place called Point Clarke, near the Point Clarke lighthouse, suggested that the appellant and his wife should rent her cottage and complete their vacation there, which they did. A Mr. Coulson, from Detroit, who was living in the cottage next door came to the appellant and told him that he had been out to see a farmer about some property on the lakeshore and wanted to buy a piece of land from him to build a summer cottage. This farmer, however, would not sell him an individual piece of land unless he took the whole frontage and he had more or less made a deal with the farmer to purchase this frontage. He told the appellant that he would buy a portion of it if the appellant would take the whole frontage and the latter and his wife thought that it would be nice if they would not go any other place to have a cottage there as it was close to the town where they lived at that time.

The deed was therefore made out to the appellant, then the latter made one out to Mr. Coulson for the portion he wanted and kept the remainder for himself.

In the years 1930 and 1931 the appellant made eight purchases in this area, as evidenced by Ex. 2, which is hereafter reproduced:

ORIGINAL LAND ACQUISITION OF APPELLANT

VENDOR AND YEAR	PROPERTY	CONSIDERATION
1. Smeltzer 1930	Part of Lot 11 Concession A Township of Huron 600 ft. × 132 ft.	$450.00 and legal expenses
2. James Henderson 1930	Lot 12 Concession A 44 ft. × 132 ft.	$200 00 and legal
3. Wm. Henderson 1931	Part of Lot 13 Concession A 330 ft. × 132 ft. 20 rods	$125.00 and legal
4. Henry Nesbitt 1931	Part of Lot 13 270 ft. more or less	($175 00) $275 00
5. Courtenay Estate 1932 Deed (1931)	Part of Lots 14 & 15 10 acres	$1,600 00
6. Palmer Estate 1931	Part of Lots 16 & 17 Concession 1 45 acres more or less	$1,200.00
7. Town Plot of Alma, December 8, 1931	93 lots, 35 acres more or less South of Pine River and North of Pine River	($666.00) ($740.00)
8. Town Plot of Alma 1931	6 acres 12 Lots	$144.00

The lots in the town plot of Alma were purchased from the Department of Lands and Forests of Ontario. This town plot of Alma was the frontage of lots 18, 19, 20, 21 and 22 and had been originally surveyed as a town. However, this did not materialize and it remained dormant for one hundred years before the appellant bought it. The appellant here bought ninety-three lots fronting on Lake Huron above Raglan Street as well as on both sides of Victoria and Albert Streets in the year 1931 at a price of $740. This was supposed to be a cash deal but the appellant did not have the money and asked for time to pay, which was granted, and the patent was granted on March 19, 1939, upon completion of payment of the purchase price. Another patent deed was issued in the year 1941 for twelve lots in the town plot of Alma which, however, were purchased also in the years 1930-1931.

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The appellant states that he purchased all that land in the years 1930 and 1931 for the following reasons.

The first property, part of lot 11, was purchased for the purpose of providing a location for a summer home. As for lots 12, 13 and 14 from the Henderson brothers and Sam Nesbitt, the appellant contends they were purchased as an investment, adding that he and his wife had had trouble with other types of investment and they thought this would be a safe investment for their money.

He states that lots 15 and 16 were purchased to provide for a summer home when he would retire. This, according to the appellant, was a beautiful piece of property. It was nicer than lots 11, 12 and 13 as the rear parts of these lots were a little swampy. There was an old orchard on lots 15 and 16 and it was like a park and the appellant states that he and his wife thought that this would be a wonderful thing to buy for a summer home in his retirement years adding that it was bought for aesthetic value. As for lots 16 and 17 bought from Mrs. Palmer, the appellant states that she came to him and asked if he would purchase everything she owned there. As the frontage was very nice and she had a wonderful wooded lot there and as the appellant put it "I didn't know too much about what I was doing, I was very inexperienced, but it looked as if it had a valuable bush so I bought it."

The appellant then purchased the township property of Alma in the following circumstances. On a trip to Toronto to see a Mr. Rock who was the surveyor at the Department of Lands and Forests about some squatters who had established themselves on the road allowance close to his land, he was told by a Mr. Draper, secretary of the Department of Lands and Forests, that the Department had some property in the township of Alma that it wanted to get rid of and he came up and showed the property to the appellant. The appellant states that as the property south of the river looked very good to tie in with the Palmer property with nice trees on it and good soil he was interested. He was not interested in the property north of the river which was not so good. He could not, however, have the southern part without also purchasing the northern part and having tendered for both, the purchase was awarded to him. Although the appellant had purchased these properties in

1930 and 1931, other transactions were made at a later date as appears from Ex. 5 which is hereafter reproduced:

ADDITIONAL DEEDS TO APPELLANT

GRANTOR AND YEAR	PROPERTY	CONSIDERATION
1. Sam Nesbitt 1954	5 acres in North ½ of Westerly Part of Lot 13 "immediately East of Nesbitt farm."	$2,000.00 Deed #17144 (1954)
2. MacKay to Minister 1953	Part of Lots 14 & 15	$1,600 00 Sold and repurchased
3. Herb Emerton 1956	Mill Site Reserve Alma Town Site	$300.00 Deed #17821 (1956)
4. Ross Miller (1957)	Part of Lot 16 Concession A (1957)	$400.00 Sold and repurchased Deed #18017
5. Margaret May (1959)	North ½ Lot 21 East side Lake Street	$1,250.00 Refund of Cost original Lot (1955)

With reference to the deeds mentioned on Ex. 5, the appellant had this to say about them individually. With respect to his purchase of part of lot 13 from Sam Nesbitt, in 1954, the frontage of this lot was at the time occupied by cottages one of which belonged to a Mr. Marr. Someone came along and appeared to be building a cottage behind Marr's who was located on the extreme north section of lot 13. The latter went to see the owner of this land who was a friend of his and he bought the land from him and the latter moved away. His neighbours Mr. Burda and Mr. Preston thought the same thing might happen to them, that someone might come along and occupy the land behind them and with children who would bother them by going over their lots to get to the lake. A Miss Melvin, who was the appellant's first public school teacher, had bought a lot from him and she was worried about the situation also. They all wondered what they could do about this situation and the appellant suggested that they do the same thing as Mr. Marr had done and they all asked the appellant if he would go to see Mr. Nesbitt and make a deal with him. It was then arranged that the appellant would buy the whole thing from Nesbitt. He therefore took the deed from Mr. Nesbitt and

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transferred a portion to Mr. Burda and Mr. Preston at what he considered was the actual cost and sold the frontage lot to Mr. Zurbrig at a small profit. The appellant states here that he was merely trying to help these people whom he knew well for some time and insure that he would have congenial people around him.

The appellant bought part of lots 14 and 15, listed as No. 2 on Ex. 5, for $1,600 in the year 1953 in the following circumstances. A Mr. Lewis who had purchased a lot formerly the property of the appellant came to the latter and told him that he had changed his mind about building a cottage and that if he wanted the lot he would sell it to him. At that time a Dr. Wood from Detroit had purchased a piece of land on lot 14 adjacent to the appellant's cottage and as he wanted additional frontage he asked the appellant if he would get the property from Mr. Lewis and include it in his deed to him which he did at cost price. This, according to the appellant, was done to assist one of his neighbours. With respect to No. 3, purchased in 1956 from Herb Emerton and situated on Mill Site reserve of the Alma town site, the appellant contends that he acquired this land following some difficulties he had with a Mr. Emerton, the owner of this property as a result of some gravel which was taken therefrom on the mistaken assumption that it was in the river bed. Rather than quarrel with the owner who was going to make trouble for him, and under threat of litigation, the appellant purchased the land.

With respect to the Ross Miller deed in 1957, the appellant states that Miller had purchased this particular lot 16 and his brother had bought a lot from the appellant on 17 and wanted to buy a lot beside it. So the appellant purchased the lot in front of lot 17 for $400 and sold the other lot for $400. There was no profit here and no actual acquisition of land.

As for No. 5, a purchase of one half of lot 21 East side of Lake Street from Margaret May in 1959, the appellant states that Mr. May, whom he knew in Grimsby, and his sister came to him and said they would like to buy some property in the township of Alma and he sold them two lots alongside each other. Mr. May made a deposit of $200 on his lot and his sister paid for her lot outright. The price was $1,200. A year or so later Mr. May wrote the appellant and told him he could not go ahead with the purchase and he would like him to cancel it so the appellant returned his money; as for Miss May she also could not keep the property and the appellant took it back also and gave her $50 for her costs.

The appellant had three cottages as appears from Ex. 6. He built his first one in 1931 on lot 11, his second a year later, in 1932, on lot 14 which he kept for twenty years, and his third one in 1952 right beside the second one on lot 14 and moved the second cottage to the east side of Victoria Street on the town plot of Alma and sold it.

The appellant at p. 42 of the transcript explains how he managed to pay for his land acquisition of property:

> A. Yes. When I purchased the property from Mr. Smeltzer I had enough money to complete the cottage and to buy the land from William Henderson and Henry Nesbitt. Those deals were made rather quickly . . . But when it came to lots 14 and 15 where I was paying $1,600 for the property, I didn't have enough money and we didn't seem to be able to get anybody to lend money to us so I decided I would have to liquidate some of these properties that I had bought along the shore and get money to pay for this, and likewise to pay for the Palmer property and the other one, so we did sell some of those lots along there. We found people who were very anxious to purchase them and we let them have them almost by liquidating at the cost price. It took a long time to clear the deed and I think eventually I paid the Department of Highways for lots 14 and 15 and by the time it was cleared I had enough money to pay for the Courtney property. But Mr. Palmer took back a mortgage of around somewhere around $880, and that was paid over a period of years. She gave me the deed of the mortgage registered against it and about 1939 I was able to pay off that mortgage and it was clear. Then other lots, properties, were liquidated to assist in paying for the townsite lots so eventually in a period of 10 years I had raised enough money to pay for the property.

Exhibit B admitted by the appellant establishes that the latter sold 172 lots from the year 1930 to the year 1958 inclusive to which must be added 47 sales from 1959 to 1962, thus forming a grand total of 219.

Exhibit A indicates that in the year 1955 the appellant sold fifteen properties and made a profit thereon of $9,207.99 after deduction of a capital gain of $910.13 on the Wood property. In the year 1956 he sold fourteen properties at a profit of $11,343.36; in 1957 he sold twenty-eight at a profit of $12,710.30 and in 1958 he sold twenty at a profit of $11,253.96.

The appellant claims that the ten and twelve sales made respectively in 1931 and 1932 were made by him "with the

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view of getting the return of my capital on what I considered more desirable property that I wanted to keep for my retirement". The sales made, one in 1933 and one in 1934, were effected according to the appellant as "there was always somebody who would think I should give them a piece of this property and there would be a sale or two made to my friends or business acquaintances" . . . adding "I would like his Lordship and the Court to understand that I never made any attempt to sell property seriously but I had a lot of people come to buy it". The sales of eight lots each for the years 1944 to 1945, the appellant cannot recall. In 1947, one sale took place, in 1948 two sales, in 1949 two sales, in 1950 four sales and in 1951 two sales. This was when the appellant was operating a sales agency in Grimsby. In the year 1954 the appellant's sales started to mount, until the year 1958, as follows: in 1954, thirteen sales; 1955 fifteen sales; 1956 fourteen sales; 1957 twenty-eight sales and 1958 twenty sales. The above sales were of lots situated mostly in the town plot of Alma, north of the river, and some on the Palmer property.

There was no office expenses in the expenses allowed by the Minister and which appear in Ex. C. As a matter of fact the appellant never had an office as he stated at p. 58 of the transcript: "People would come and want to buy a piece of land and if they did not understand it I would show them where it was and we would make up sort of a contract until the deed was issued. Then they would give me a cheque and I would give them a receipt and go and give them a deed for it." The appellant never put a subdivision plan on his properties. He explains this by saying that when he went back to the cottage property in 1952 he and his wife had taken serious account of their assets and not having a pension, he felt that he would have to try to liquidate his property and to recover, as he puts it at p. 48 of the transcript, "the capital and the capital gain from it". He adds that when he purchased the property south of Pine River, he had no access for twenty years to the property north of Pine River and he did not think there was any value to this property except for reforestation which he attempted in 1940 by planting 5,000 pines on it but this was not too successful. Access was given him to the property north of Pine River in the year 1953 only as a result of an agreement with a Mr. Bell to extend a country road through his property to Victoria Street and then people became interested in purchasing the appellant's lots. The appellant also states that he had great plans for the Palmer property when he purchased it because there were certain aspects that he thought were very interesting, such as selling the bush lot to recover something worthwhile and to run something like an agricultural project on the back end of the lot. He also thought that he could set up a golf driving range on this property as there was a beautiful fifteen acre field in there. He and his son felt it would be nice for a boys camp; however with the exception of a small sale of wood, none of these plans materialized. A Mr. Stevenson who had a summer home at Lake Huron and who was one of the appellant's school board members together with the latter agreed to lay plans to establish a turkey farm on the property and before they got it working Mr. Stevenson died and the plans here fell through also. This would have occurred sometime in the nineteen forties.

Although there was some interest on the part of possible purchasers for small pieces of the property, the appellant maintains that he never received an offer to purchase for a large block of lands in his holdings except on one occasion and this did not materialize. As for the timber on the property, the trees being too small, the only deal possible was to sell some birch, cut them into bolts and sell them to the bobbin factory at Walkertown, which the appellant did in 1962, but it was not a very profitable transaction. The appellant did very little for roadways on his property. The only road construction he took part in was one marked "Farmers road to lakefront" east and west on Ex. 1 and the roads in the town plot of Alma which he tried to extend onto the streets when he decided to liquidate the town plot of Alma. "The little road that comes up from lot 17 and crosses the town plot was turned there to go into Victoria Street and then the farmer's road was turned at St. Arnaud Street and went back for about 300 ft. and then turned back onto the farmer's bush road so that is all that was done there."

As to how the appellant established a price for his lots, he stated that for the Smeltzer, Henderson and Nesbitt properties he did not price the lots much beyond the cost and the cost of surveying and the legal work on it. He did charge a little more for the Courtney property. As for the Palmer property he set a price of $400 for a 132 × 132 lot north of the river; this was true of most of the town site lots which were set at about $400 to $500 although some of them were sold for much less than that.

He contends that when he started to liquidate his property the lots were sold cheaply, adding at p. 59 of the transcript: "I wasn't really in the business of selling lots so I was just more or less trying to find locations for them. But north of the river I set a price of $1,000 on a frontage lot and those that were longer from north of Cathcart Street were $1,200. The second row of lots were $500 and the third or fourth now were $200."

He maintains that he never listed his property for sale, never had an agreement with any real estate agent whereby he would pay him a price for it, nor has he ever paid any commission on sales. The only newspaper advertising he had was in 1953 or 1954 which was carried for one week-end and only one or two people came as a response to those adds and they were never repeated.

He admitted, however, that he started putting up signs on his property in 1930 when he bought the Courtney property and as he states at p. 61 of the transcript "and knew I didn't have enough money to pay for it." These signs read as follows: "Lots for sale, apply to P. V. Smith." If he needed to sell a lot between 1930 and 1952, he would put up an occasional sign on the property. In 1952, and particularly after the road went in on Larkin Beach in the north part of the town plot of Alma, he put a sign there indicating that the lots were for sale and the location of his cottage; he also put a sign up on the south side of the river and probably a sign on the Palmer property and he had a sign at his gate saying "Lots for sale" or just "Lots", and he put a sign down at the booth near the lighthouse which referred to frontage lots and cottages for sale. The reference to the cottages for sale were not those built by the appellant. The latter comprised, as we have seen, one which was rented for a year or two and then sold to the man who had been renting it and of course when he built his permanent home he moved the second cottage he had built and sold it. It referred indeed to prefab cottages which had been the subject of an arrangement with the Wrights Lumber Company of Waterloo. The principal of this company came to the appellant and said he knew the latter had been selling some lots (this was in 1953) and wondered if he would help to advertise his prefab cottages. The appellant told him that he was not able to sell cottages for him on a commission basis because he had no licence so he left brochures of his prefab cottages and when anyone wanted to buy a cottage, the appellant would show them this literature and tell them where to get in touch with the manager. This, according to the appellant, did not however work too well and there was no financial arrangement, commission or benefit for him in the event he sold any cottages.

He states that he did nothing to develop the property by way of water services or sewers.

According to the appellant, there were many contributing factors for the increase in value of his property in which he personally had no part whatsoever, one of which was the improvement of the beach due to the fact that the water level came up and left more sand on the beach and made it more attractive. Another factor was when the beach association brought in the hydro line and garbage collection and arrangements were made for roads and telephone booths and beach patrol during the winter months while the cottagers were away. Highway 86 was then completed in the early fifties from Kitchener to Amberley which is close to the beach and this brought in people from Guelph, Kitchener, Waterloo and intermediary towns. Highway 21 from Port Huron, a lead in from Detroit and Birmingham and the southern points, was improved. Good water in abundance by means of artesian wells was supplied and this by making it a good place to locate a cottage attracted people and interest in his properties.

The appellant, as we have seen, submits that the sales of his properties in 1955, 1956, 1957 and 1958 were the sales of capital assets purchased with a view of realizing a long term investment profit by means of a resale at a profit of whatever parts he did not need for his own use, whereas the submission on the part of the Minister is that they were income within the meaning of ss. 3 and 4 of the *Income Tax Act*, R.S.C. 1952, c. 148 including, of course, the definition of "business" in s. 139(1)(*e*) as including "an adventure or concern in the nature of trade."

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It may be of some use here to repeat what Lord Justice Clerk had to say in *Californian Copper Syndicate Limited 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 a 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 therefore seeking to make profits. There are many companies which in their very inception are powered 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.

And then the Lord Justice Clerk laid down the test to be applied as follows:

> 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 determination of the present issue depends also on its facts and surrounding circumstances for as put by Thorson P. in *Spencer v. M.N.R.*[2]:

> For it is no more possible to lay down a single criterion for deciding that the transactions were investments than it would be for deciding that they were adventures in the nature of trade. The true nature of the transactions must be determined.

In the present instance there is one fact which strikes me and that is the large amount of property bought by the appellant in 1930 and 1931 which was way beyond what he needed as a summer home or as a place where he and his wife could eventually retire to, although admittedly, nothing would prevent him from buying more than needed and this excess could well be the proper subject matter of a long term investment.

Indeed, if we go over these purchases of the appellant in the years 1930-1931 and examine Ex. 1 we find that he had acquired at that time, without however having entirely paid for it and making allowances for the Bower property

[1] (1904) 5 T.C. 159 at 165. [2] [1961] C.T.C. 119 at 121.

approximately 6,000 ft. of frontage on Lake Huron and 105 lots in the town plot of Alma. This, of course, was way beyond what the appellant needed for his own use and he admitted at p. 93 of the transcript that at this time his intention was to sell whatever lots he did not need himself:

Q. ... When you bought this property in 1930—and I am talking about when you, in your terminology, when you had an enforceable right to buy the property, Mr. Smith—what did you intend to do with it?
A. Just as a safe investment. At the time I bought it I had no definite plans in regard to it at all.
Q. When you did buy it at that time it was not producing revenue in the condition it was?
A. That is true.
Q. And unless you did something it would produce nothing to you?
A. It might later on if somebody wanted to buy it. I felt I bought it at the lowest possible price and that the value might increase.
Q. Then it could only produce something to you when you sold the lots?
A. That is right, on the first purchases. I bought it as a safe investment.

Now, effectively, this is what the appellant did. Indeed, he started to sell parcels of this property in 1931 practically from the time of his purchases and although he states that these sales were made for the purpose of obtaining capital to purchase more desirable property he wanted to keep for his retirement and for which he needed funds, this lack of funds in itself would indicate, it seems, that he was much more in the situation of a trader than an investor. These nearly continuous sales of land by the appellant from their date of acquisition in 1930-1931 to 1960 coupled with the fact that during the period under review his greatest source of revenue was from the sale of these lots are, in my opinion, more consistent with the idea of an operation of a business in a scheme of profit making than with that of a policy of investment.

The fact also that virtually from the beginning of his purchases in 1931 he had a sign offering lots for sale and that since that time there were other signs erected by him and as we approach the period under review, there were more frequent signs as well as advertising one week-end in two newspapers, all tend to indicate that this was a venture of speculation in land; that the appellant may not, as suggested by counsel for the appellant, have organized these sales in the best possible way by not going at it in a business like manner by subdividing and advertising extensively at large, does not necessarily indicate, in my opinion, that he was not carrying out such a speculation. Indeed, his experience in the real estate field for several years where he surely must have acquired some skill may well have shown him that as far as his properties in the Lake Huron township were concerned, and in view of his limited finances, the best profitable manner to deal with them at the relevant times was the very way he did deal with them, without spending uselessly on extensive advertising, or going to the trouble and expense of subdividing, bearing in mind at all times his admitted intention to sell as much as possible to old friends, acquaintances and congenial people with whom he wished to surround himself and fully alert as he was to the fact that better highways being constructed, the beach improving, these summer locations for properties were rising in value.

May I also add that appellant's assertion that he did not make an attempt to sell property seriously is not too convincing when confronted with the 219 sales made by him over the period extending from 1931 to 1960. The above number of transactions, as well as the additional deeds to the appellant, as evidenced by Ex. 5 in the years 1953, 1954, 1956, 1957 and 1958, although the latter were not all profitable to him, all indicate in my opinion that the appellant here in addition to being quite active in real estate dealings was the man to whom everyone in the vicinity turned to when they wanted to purchase, sell or even exchange lots. This, of course, is also more consistent with a business than with an investment.

Now appellant's attempt to establish that in some of his purchases he had in mind the intention of setting up some income producing establishment, such as reforestation, a turkey farm, the sale of timber or wood, the establishment of a Boy Scouts' camp or of a golf range, was not too successful. An attempt was made to reforest one section of his property but the evidence does not show how serious this endeavour was and it turned out to be unsuccessful. As for the turkey farm, the appellant's alleged partner died and this was abandoned; the wood sold from some of the lots in one instance only, and that was in 1962, amounted to only $200. As for the other intended plans, they were never implemented.

The best test in matters such as this is the objective one. Indeed, it is not what the appellant could or might have done, it is what he in fact did do as disclosed by the whole course of his conduct from 1930 to 1960 and this reveals such a long and sustained history of sales of parcels of land taken from property in excess of what he needed as a retirement property for himself and his wife, that it could be said that these lots were really his stock in trade in the business he was carrying on.

All this has driven me to the conclusion that at the time of acquisition of the land the appellant did have the intention of turning it to account by profitable resale as soon as he could which, in effect, he did from practically the year of purchase to 1960.

I do indeed regard the present situation as one in which I must infer that the appellant purchased the property he did not need for himself and his wife as a summer home or a retirement home, as a prolonged speculation looking to resale, and that as far as this property was concerned, it was always his intention to turn it to account whenever possible or desirable which, as we have just seen, he effectively did.

The cumulative effect of the foregoing has convinced me that the appellant was engaged in an adventure or concern in the nature of trade and that the profit realized by him in the sale of property he did not need constitutes a gain made in the operation of a business in the carrying out of a scheme for profit making.

It therefore follows that on the facts and circumstances of this case, I must and do find that the profits realized by the appellant in 1955, 1956, 1957 and 1958 from the sales of land were not enhancements of the value of investments made by him. The true nature of these transactions were not investments. These profits were made by the appellant in the operation of a speculative business scheme for profit making within the meaning of the expression used in the *Californian Copper Syndicate case (supra)*. They resulted from speculative transactions that were adventures in the nature of trade. They are, therefore, because of the definition of "business" in s. 139(1)(*e*) income from a business within the meaning of ss. 3 and 4.

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With the exception of the year 1954, the appeal for which should be allowed as admitted by counsel for the Minister it follows that the Minister was therefore right in assessing the appellant as he did for the taxation years 1955 to 1958 inclusive with the result that the appeal herein for these years is dismissed.

The Minister is also entitled to costs to be taxed in the usual way.

Judgment accordingly.

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June 4

Nov. 28

BETWEEN:

CLARA M. LLOYD .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 6(b), 24(1) and 139(1)(e)—Mortgage bonuses and discounts—Adventure or concern in the nature of trade—Scheme of profit making—Investment or speculation—Taxpayer's principal business.

This is an appeal by the administratrix of the Estate of Dr. William J. Lloyd, deceased, who carried on the practice of dentistry in Toronto from 1923 to the date of his death in 1960, from the income tax assessments for the taxation years 1958, 1959 and 1960. The evidence disclosed that the deceased had bought and sold large amounts of mining and industrial stock from time to time during the years 1923 to 1960. He had purchased some country property from which he derived no income, and between 1930 and 1944 he had purchased and rented a number of small houses. The deceased, in his later years, had also invested in bonds. During the years of his practice, the deceased had bought a large number of mortgages, most of which he had purchased between 1950 and 1960. All of these mortgages were held to maturity, a few of them being paid before maturity and many of them being renewed. Most of the mortgages acquired by the deceased between 1950 and 1960 were discount or bonus mortgages, and the effective rates of interest thereon ranged from about $5\frac{3}{4}$ per cent to as high as 26 per cent. Many of the mortgages, most of which were first mortgages, involved a considerable degree of risk. The evidence indicated that for the years 1952 to 1960 the vast bulk of the deceased's income was derived from mortgage interest and bonuses, his professional income being consistently well below the average for his profession. The deceased had borrowed substantial amounts of money from the bank during the years 1950 to 1960, most of which was used to purchase mortgages.

The deceased had foreclosed on one property on which he had held a mortgage which had fallen in arrears, and, subsequently, in January 1959, he sold the property, the purchaser thereof, giving him a mortgage to secure a large part of the purchase price. The amount of the discount allowed the deceased on the original mortgage which subsequently went into default was included by the respondent in the assessment of the deceased's income for 1959.

Held: That the effective interest rates on the mortgages held by the deceased were so far above the conventional interest rate that, having regard to the true nature of the discounts in the light of the terms of the loans rates of interest, the nature of the capital risk, the extent to which the parties may be supposed to have taken the capital risk into account in fixing the terms of the mortgages, the discounts and bonuses are not in the nature of interest and are not taxable as such.

2. That the mortgage transactions under review constituted a business operation as must be inferred from the long and consistent history of mortgage discount transactions involving a considerable degree of risk in that in some cases the face value of the mortgage was too high and in others the mortgages were substandard or second mortgages indicating a speculation scheme for profits rather than a policy of investment. The inference is strengthened by the evidence of the deceased's experience in mortgages and real estate, the success of his dealings and of the fact that he borrowed money from the bank with which he purchased discounted mortgages. The deceased's profits from his mortgage discounts or bonuses constitute a gain made in the operation of a business in the carrying out of a scheme for profit making.

3. That the fact that the mortgages were held to maturity is not in itself sufficient to enable one to determine that these mortgage discounts were investments because the very essence of making a profit on these discounts involves the holding of the mortgages to maturity.

4. That the fact that the deceased's estate at the time of his death was composed almost entirely of holdings of discount mortgages so that they could not be said to be a mere incident in his investment program, leads to the inescapable inference that this was not a mere investing to get a good return but rather indicates that he was interested in the speculative aspect of profit making, and the reinvesting of the funds he had borrowed from the bank into other discount mortgages confirms this.

5. That the evidence given with regard to the deceased's net professional income and of his net mortgage interest and profits on bonuses or discounts conclusively show that his real occupation or activity was his dealings in the discounted or bonus mortgages.

6. That under the circumstances existing in this case the fact that most of the mortgages in question were first mortgages does not indicate that they were investments by the deceased.

7. That the amount of the discount on the foreclosed mortgage was properly included in the assessment for 1959 since the value of the new mortgage held by the deceased was sufficient to cover the full amount of the discount and he had therefore received as income the amount of the discount at the time he sold the foreclosed property and took back a mortgage from the purchaser. This result also follows from the application of s. 24(1) of the *Income Tax Act* since the mortgage assumed by the purchaser, including the amount of the discount on the foreclosed mortgage, was given in lieu of payment to which the deceased was

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entitled, which payment he voluntarily consented to postpone by accepting the new mortgage.

8. That the appeal is therefore dismissed.

APPEAL under the *Income Tax Act*.

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

Newton J. Powell, Q.C. and *F. E. LaBrie* for appellant.

D. Guthrie, Q.C. and *M. Barkin* for respondent.

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

NOËL J. now (November 28, 1963) delivered the following judgment:

This is an appeal by the estate of the late Dr. William J. Lloyd, of whom the appellant, his wife, is the administratrix from the doctor's income tax assessments for the 1958, 1959 and 1960 taxation years.

The Minister in reassessing for the taxation years 1958 to 1960 inclusive, added to the amounts of taxable income respectively reported by the late Dr. William J. Lloyd in income tax returns for the years in question, the following sums:

1958	$26,227.34
1959	$19,636.90
1960	$ 7,595.59

The above amounts, however, are subject to a number of deductions with which I will deal later.

In each of the above years, the respondent, in assessing the appellant, added to his declared income (which had included the interest received on the mortgages owned by the appellant) amounts corresponding to the discounts, namely the difference between the amounts paid for the said mortgages and the amounts received for principal upon payment of the mortgages. The main question to be determined is the liability of the appellant to pay income tax on the discount profits realized in those years on the mortgages purchased.

The Minister in his pleadings states that these discounts are income as interest on money advanced or/and as income from a source without naming any source, and that they are income from carrying on a business in its broadest sense, i.e., as a venture or concern in the nature of trade or a scheme of profit making within ss. 3 and 4 and the extended meaning of business in s. 139(1)(*e*) of the *Income Tax Act* 1952.

The only witness heard was Mrs. Clara M. Lloyd, the widow of the late Dr. William J. Lloyd, a dentist of the City of Toronto, Canada, and the administratrix of his estate. She stated that her husband practised as a dentist from the year 1923 till 1960 the year of his death. According to this witness, when her husband started out as a young man, he often worked at his office from eight o'clock in the morning right through until eleven at night and remained busy right up until the time of his death.

Mrs. Lloyd, who had obtained her junior matriculation at high school, had had some training at business college in bookkeeping and had worked as a secretary prior to her marriage to Dr. Lloyd in 1934. She started in 1938 to keep her husband's property book at home. In this book she made entries of anything that her husband wanted to put in, such as his property or his income from his bonds or his stocks.

From some old papers which she located in her husband's files she was able to prepare a list of his share transactions for the years 1927, 1928, 1929, 1930, 1942, 1949 up until 1950 and from the property book mentioned above, she managed to do the same for the years 1955, 1956, 1957, 1959 and 1960, which information produced as Ex. 1, indicates that Dr. Lloyd had purchased and sold substantial amounts of stock during those years in a variety of mining and industrial corporations. His investments, however, cease from the year 1930 to 1942 and the witness explains that during that period her husband began to buy some small houses with the intention of renting them, which he did for some time. He however found that there was too much work involved and sold them. The witness also produced as Ex. 2 a list of stock certificates of no value held by her husband, which shows that some were purchased in the year 1926, some in 1927, 1928, 1929 and 1930.

A further document, Ex. 3, was produced listing a number of stocks which the estate sold to pay death duties and indicating the gain or the loss on the shares bought or sold. Mrs. Lloyd also prepared from the property book, and pro-

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duced as Ex. 4, a document entitled "Transactions in Country Property" showing the country property of 100 acres her husband had and held through the years, starting from the year 1931 and going right down through the years 1933, 1952, 1955, 1957 and 1958 and on which he planted trees, with the purchase price and the time it was held thereon indicated. All these properties were merely held, her husband having never realized any income of any sort from them.

A further document, prepared and produced by the witness, Ex. 5, entitled "Houses bought by Dr. Lloyd" lists the houses her husband bought through the years and rented from 1937 through to 1944 inclusive. Dr. Lloyd, according to this witness, started buying these properties in the year 1937, when after purchasing second mortgages on No. 301-3-5-7-9-11 on Roselawn Avenue, in Toronto, the first foreclosed on him and having funds to redeem one second mortgage only, he lost the others because he did not have money to put into it.

The doctor and his father went in on shares on the Dundas Street West transactions 2281 to 2283 in 1938 and then rented them. The rest of the properties were all entered into by her husband alone and on his own behalf and they were all rented for the period shown.

A further document, Ex. 6, entitled "Bond Investments" prepared by the witness from the property book lists her husband's bond investments for the years 1952, 1959 and 1960.

A series of documents entitled "Mortgage Investments", prepared by the witness from the entries in the property book, was then produced as Ex. 7, showing all the mortgages her husband had bought in each particular year and had put money into starting in 1950 and going through 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959 and 1960. This exhibit shows the name of the mortgagor, the location of the mortgaged properties, their face value, their cost price when known, the date acquired, the date of maturity, the type of mortgage (first or second) and, finally, the date paid off.

A substantial number of mortgages was held by her husband prior to 1950.

She stated that mortgages were brought to the attention of her husband by a mortgage broker or one or two lawyers who would call him over the telephone. They would describe the nature of the property and if he felt he was interested, he would go out and visit the property. He would then, shortly after his return, tell them whether or not he was interested in the particular property he had seen. Cards found in her husband's file showed that as the latter viewed a property, he would take down the details such as whether the house was in good condition, if there was a full basement and how many rooms there were, and the type of heating system, i.e., a general report as to the house and its location.

Mrs. Lloyd admitted that in some cases her husband would bargain for a better deal.

Her husband also received calls from real estate brokers and stockbrokers as well as literature through the mail regarding stocks and bonds.

Asked by the Court where her husband got the money for his purchases, she replied at p. 22 of the transcript:

> A. Quite often when he had a mortgage coming back he would be getting something lined up to make that investment.
>
> Q. If he didn't, what?
>
> A. He would get the loan from the bank.

She added, however, that sometimes he did turn down mortgages because he didn't have any money.

A statement of loans, (Ex. 9), from the bank covering the period 1950 to 1960 was made up by the witness from the property sheets, and shows all the money borrowed by Dr. Lloyd in that ten year period of which she had a record as her husband had but one bank account in which were deposited his professional earnings, his interest, dividends and bond interest, so that the fact there was a loan in this exhibit does not necessarily mean it was borrowed for the purpose of a mortgage.

Exhibit 9 shows that borrowing from the bank was very frequent during the years 1950 to 1960, and in some cases in substantial amounts, and although she pointed out that some of these were used for dental supplies, household and living expenses, and others may have been used by her husband for the purpose of purchasing a car or some dental equipment, or even country properties, including paying for the crew employed thereon, she had to finally admit that

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the major part of these bank loans were used to purchase mortgages.

At the date of his death, Dr. Lloyd owned his own home, his office building, his dental equipment and all his bonds and investments were paid for.

In his mortgage transactions, the witness states that she believes her husband had no partners, consulting no one for expert advice but relying on his own judgment.

Her husband retained all his mortgages until maturity, never selling one and in a good many cases, they were renewed and carried on for a further time without, however, a further bonus. In a few exceptional cases only some were paid before maturity.

The conventional interest rate at the relevant times for mortgages was as low as 5½ and as high as 7 per cent.

Her husband always used his dental office letterhead and never had any special letterhead for his mortgage transactions, nor did he advertise in any manner. He had no special business telephone outside of his office telephone for his dental practice.

In an affidavit obtained from Dr. Lloyd in 1958, he states that the practice of the profession of dentistry for thirty-five years has been a full time occupation for him and it is the only business he conducted during that period. That he never displayed any sign at his place of business indicating he loaned money nor that he was in any way dealing in mortgages; that the mortgages he purchased were for the purpose of investing his own personal funds and any mortgages purchased by him were held until maturity.

Although Mrs. Lloyd affirmed that her husband was actively engaged in the practice of dentistry right up until the time of his death, she had to admit in cross-examination that in the later years to the time of his death, he was utilizing the greater part of the monies he had available in mortgage transactions and as he grew older there was a gradual increase in the amount of his mortgage holdings. As a matter of fact the notice of appeal, second paragraph, reads as follows:

> As he grew older and wealthier, he increased his investment in such mortgages until at the time of his death, he held fifty-one mortgages having a face value of about $425,000 which comprised nearly his entire estate . . .

Counsel for the appellant at the hearing stated that the above figure of $425,000 had been mentioned in error and requested it be replaced by the figure of $356,370.52 as established by Ex. 15, his estate tax return. This request was granted.

She also admitted that most of the mortgages from 1950 to 1960 acquired by Dr. Lloyd were bonus or discount mortgages. As a matter of fact, paragraph 5 of the appellant's notice of appeal confirms this as it reads as follows:

> In recent inflationary years the deceased almost invariably demanded a discount or bonus when purchasing mortgages or lending on mortgage security and all of the mortgages held by him at death had been acquired or arranged in this way.

The parties agreed that the prevailing rates of interest for the years 1958, 1959 and 1960, where the amount of the loan did not exceed 60 per cent of the valuation of the mortgaged premises, were as follows: from August 1957 to February 1958, 7 per cent; from February 1958 to August 1959, 6½ per cent; from August 1959 to April 1960, 7 per cent; from April 1960 to September 1960, 7½ percent and thereafter, 7 per cent.

Mrs. Lloyd added, however, that on one or two occasions on renewals the rates of interest were higher than the above rates; indeed, in one instance it went up to 7½ per cent and in another to 8 per cent.

A computation of interest rates (Ex. 13) made by a chartered accountant, Mr. J. Gordon, of the mortgages here in dispute covering the years 1958, 1959 and down to Dr. Lloyd's death in 1960, as well as those held at his death, was produced as Ex. 13. This computation was arrived at algebraically, i.e., by taking into consideration the fact that the mortgages are purchased at a discount although the interest is calculated the first year on its face value, the second year the interest is on the balance, i.e., the face value less whatever amount paid and so on. On the above basis, it does appear from this exhibit that the interest rate for the various mortgages varied, to take only a few, from 5.78 per cent, 6.45 per cent, 7.37 per cent, 8.1 per cent, 9.05 per cent, 10.9 per cent, 11.2 per cent, 12.6 per cent, 13.9 per cent, 16.6 per cent, 17.3 per cent, 18.3 per cent, up to in one case 26 per cent.

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The witness admitted that the mortgages taken by her husband from 1950 to 1960 involved in some cases a considerable degree of risk as he experienced foreclosures on some of them and she agreed in cross-examination that they were also risky because the face value of the mortgage was too high with reference to the true value of the property or, in some cases, the properties were not in a very attractive district or the houses were not in a good state of repair and in a small number of cases they were second mortgages.

She was not able to say, however, how exactly the amount of the discount or bonus on these mortgages was arrived at.

She maintained that although her husband was engaged in his mortgage activities right up to the time of his death, this would not have taken up too much of his active time which was devoted to the practice of his profession, although admitting that during the years 1958, 1959 and 1960 her husband was getting older and was not booking his appointments as he used to when he was a younger man.

Exhibit A, which is a comparison of professional and mortgage income of the late Dr. William J. M. Lloyd, reproduced hereunder, indicates however that his income from professional fees compared to his mortgage interest and bonuses realized is of a minor nature and the same applies to his investments in stocks and bonds.

WILLIAM J. M. LLOYD

Comparison of Professional and Mortgage Income

Year	*Professional Fees (net)*	*Mortgage Interest*	*Bonuses Realized*
1952	$ 6,455 91	$ 11,118.60	$ 785 00
1953	2,723 17	13,578 83	1,254.28
1954	2,755 01	16,955 86	7,307.30
1955	2,757.24	19,327 09	6,831 50
1956	2,285.68	20,902.03	7,767.00
1957	3.390 55	21,517.88	13,680 30
1958	2,500 62	20,496.28	25,309 94
1959	5,389.97	23,725.73	18,533 60
1960 (to June 12)	3,836.80	13,384 94	7,895 59
Totals	$ 32,094.95	$161,007 24	$ 89,364.51
Average 8½ years	$ 3 775.87	$ 18,942.03	$ 10,513.47

Mrs. Lloyd tried to explain her husband's professional income being low during the years 1953 to 1960 by saying that when he moved from his former location to a new one, in 1948, he had to start all over again and very few patients from his old location came to see him, although this would seem to be somewhat contradicted by Ex. A which indicates that his professional income for 1952, after the date he moved, was nearly double what he earned for the years 1953, 1954, 1955, 1956, 1957 and 1958.

Mrs. Lloyd could not say how it became known that her husband was in the market to purchase such mortgages. To her knowledge, her husband never called up real estate men to request mortgages. All she could say is that real estate men and lawyers would go to him when they had mortgages to dispose of.

She admitted that as mortgages were paid off and the bonuses realized, the proceeds were reinvested in the same type of securities and that it was a gradually building up process.

Counsel for the appellant argues that although there is a regularity about these bonuses coming in, that may make them look like income, they are not so, and that, furthermore, this is not the approach to income established by the courts. That in a case such as here where there is a capital loss through non-payment or inflation which are non deductible items in computing income, these mortgage discounts should be accepted as capital gains. I think I can dispose of this statement by merely saying that as far as inflation is concerned, the appellant is in no different position than any other taxpayer and that the losses in the event the discount mortgage transactions are taken to be the conducting of a business or an adventure or several adventures in the nature of trade, should be dealt with as allowable expenses as governed by the relevant sections of the Act.

With regard to respondent's contention that appellant's bonuses or discounts here should be regarded as interest and taxable therefore under s. 6(*b*) of the Act, I cannot agree. Indeed, it is now settled (cf. *Lomax v. Peter Dickson Co. Ltd.*)[1] that where a loan is made at or above a reasonable commercial rate of interest as is applicable to a reasonable sound security, there is no presumption that a "discount" at which the loan is made or a premium at which it is payable is in the nature of interest.

Now the interest rate in the present instance, as we have seen in most of the mortgage discounts of the appellant is far above the conventional rate to a point where one can

[1] [1943] 2 All E.R. 255 at 262.

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say in determining the true nature of these discounts by looking at all the relevant circumstances such as the term of the loan, the rate of interest, the nature of the capital risk, the extent to which, if at all, the parties expressly took, or may reasonably be supposed to have taken the capital risk into account in fixing the terms of the mortgage, that such discounts are not in the nature of interest and therefore not taxable under the above section.

The only matter now remaining to be dealt with is whether appellant's discount mortgage operations or transactions during the period under review were mere enhancements of value in the realization of securities or as contended by the respondent, gains made in an operation of business in carrying out a scheme for profit making, including the definition of "business" in s. 139(1)(*e*) as including "an adventure or concern in the nature of trade" within the well known statement of Lord Justice Clerk in *Californian Copper Syndicate Limited 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.

And then the Lord Justice Clerk laid down the test to be applied as follows:

> 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 determination of the present issue depends also on its facts and surrounding circumstances for as put by Thorson P. in *Minister of National Revenue v. Spencer*[2]:

> . . . it is not possible to lay down any single criterion for deciding whether a particular transaction was an adventure in the nature of trade

[1] (1904) 5 T.C. 159 at 165. [2] [1961] C.T.C. 109 at 121.

for the answer in each case must depend on the facts and surrounding circumstances. In every case the true nature of the transaction must be determined.

The appellant submits there was no evidence of a scheme or pattern nor that the taxpayer's intention was to use discounts for the making of money, and that here he had merely miscalculated the loss.

Now, the appellant had the burden of establishing this as set down in *Anderson Logging Company v. The King*[1] by Duff J.:

> He must shew that the impeached assessment is an assessment which ought not to have been made.

I must say that he has failed in this regard. It would indeed appear to me, and this is something I must infer from the large number of transactions, the taxpayer's experience in mortgages as well as real estate transactions and the tremendous success of his dealings, that we do have here on the part of Dr. Lloyd in purchasing the mortgages and in some cases their renewals, the application of skill, a selection by him involving a correct appraisal of the discounts and of the market and finally the use of all that towards making a gain and this on the large scale we have seen. Indeed, he surely must have done something more than merely receive a phone call and then visit a property as Mrs. Lloyd would wish us to believe. This would, in the absence of proof to the contrary, in my opinion, be an indication that these were business transactions and that the taxpayer who well knew what he was doing intended to obtain the discount profits he so successfully earned.

There have been of late many decisions on this matter of mortgage discounts such as in the *Cohen v. Minister of National Revenue*[2], *Minister of National Revenue v. Beatrice Minden*[3], *Scott v. Minister of National Revenue*[4], *Minister of National Revenue v. Mandelbaum*[5], *Minister of National Revenue v. Rosenberg*[6], *Minister of National Revenue v. Associated Investors of Canada Ltd.*[7] cases.

The facts in all of these cases are somewhat dissimilar but from a consideration of all of them, a number of factors

[1] [1925] S.C.R. 45 at 50.
[2] [1957] Ex. C.R. 236.
[3] [1962] C.T.C. 79.
[4] [1963] C.T.C. 176.
[5] [1962] C.T.C. 165.
[6] [1962] C.T.C. 372.
[7] [1963] Ex. C.R. 6; [1962] C.T.C. 510.

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can be taken, no one of which will establish the carrying on of a business, perhaps even no two of which will but when taken with other factors, create a strong almost irresistible inference that we have in essence a business operation.

First of all, as in the *Spencer* case, we have here a long and consistent history of mortgage discount transactions involving a considerable degree of risk as some were foreclosed; they were also risky because the face value of the mortgages was too high with reference to the true value of the property and in some cases they were not in a very attractive district and/or in a good state of repair and finally in a number of cases they were substandard or second mortgages and Thorson P. in the *Spencer* case stated that this is more indicative of a speculation scheme for profits than a policy of investment to secure a fair return on the monies invested.

Mrs. Lloyd has supplied information relative to these mortgage discounts from 1950 to 1960 which discloses that there were 145 transactions during that period and stated that her husband was interested in similar transactions long before the above period. He was also interested and proficient in the allied field of real estate, dealing in houses as well as in land, and from this and his successful dealings this Court must infer that Dr. Lloyd was an extremely astute and consistent business man who carried on a systematic course of conduct in his mortgage dealings.

The multiplicity of the transactions, although this alone would not indicate that we are faced here with the conduct of a business or several adventures in the nature of trade, together with the other relevant circumstances would also, however, be a significant fact.

The number of transactions was so considered by Kerwin J., as he then was, in the *Noak v. Minister of National Revenue*[1] case.

In all of the above cases, as well as in the present one, it was emphasized on behalf of the taxpayer that the mortgages were held to maturity. This, in itself, as pointed out in a number of decisions of this Court and the Supreme Court of Canada, is not sufficient to enable one to determine that these mortgage discounts are investments because the very essence of making a profit on these discounts involves the holding of the mortgages to maturity.

[1] [1953] 2 S.C.R. 136.

Judson J. in the *Scott v. Minister of National Revenue*[1] case at p. 180 confirmed this when he said:

> . . . that these facts establish that the appellant was in the highly speculative business of purchasing these obligations at a discount and holding them to maturity in order to realize the maximum amount of profit out of the transactions, and that the profits are taxable income and not a capital gain.

Indeed, if one is going to dispose of the mortgages as soon after he buys them, he will lose most if not all of the very advantages of the discount so that the holding to maturity would not be of much assistance in determining whether we are faced here with an investment or not.

However, the main argument raised by counsel for the appellant was that the acquisition of these bonus or discount mortgages had been a mere incident in an overall investment programme, that he had invested in stocks, houses, bonds and finally in mortgage discounts. In the *Cohen* case (*supra*), Cameron J. decided in favour of the taxpayer when the latter had devoted a substantial amount to mortgage discounts although it was not the greater part of his assets. In the *Rosenberg* case (*supra*) the taxpayer stated he had set aside 25 per cent of his available capital for this type of risky investments and Thorson P. stated that that was one of the factors which favoured the taxpayer although on the whole he found against him.

There is, however, nothing of that nature here. Indeed, Dr. Lloyd upon his death in 1960 left an estate of approximately $460,831.95 which was nearly all invested in these bonus or discount mortgages. His stock holdings amounted to $41,165.77, he held $4,116 in Government of Canada bonds, his cash on hand in the bank was $1,829.66 and his timber properties were valued at $44,550.

His mortgage holdings were therefore not a mere incident in his investment programme, they comprised nearly the totality of his estate.

Under these circumstances, the inference seems to become more and more inescapable that this was not a mere investing to get a good return on the part of the taxpayer but rather indicates that he was interested in the speculative aspect of profit making. And, of course, the reinvesting of the funds he had borrowed from the bank into other discount mortgages in my opinion confirms this.

[1] [1963] C.T.C. 176.

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This very borrowing from the bank, as disclosed by the evidence, and the use of such funds for the purchase of mortgage discounts by the taxpayer, although a small part of it may have been used by the taxpayer for other items becomes also, in my estimation, a factor and tends to indicate that we have here a veritable business, as I had occasion to point out in *Minister of National Revenue v. Associated Investors of Canada Ltd.* (*supra*).

Counsel for the appellant submitted that appellant's main occupation was the practice of dentistry which kept him busy up until his death. I am afraid, however, that the evidence, and particularly the figures of his net professional earnings compared with his net mortgage interest and profits on these bonuses or discounts (as evidenced by Ex. A) conclusively show that his real occupation or activities were his dealings in these discounts or bonuses.

Indeed, merely as an example of this, in the year 1957, and this can be taken as fairly indicative of the years 1952 to 1960, Dr. Lloyd earned $3,390.55 in professional fees, which of course is way below the average earnings of a dentist, $21,517.88 in mortgage interest and $13,680.30 in bonuses or discounts. For the year 1958, he earned $2,500.62 in professional fees, $20,496.28 in mortgage interest and $25,309.94 in bonuses or discounts. Although there are some variations for the other years between 1952 and 1960, the total amount for this period of professional fees, mortgage interest and bonuses realized, respectively reads as follows: $32,094.95; $161,007.24 and $89,364.51. His average professional earnings for these eight and a half years is $3,775.87 as compared to $18,942.03 for his average mortgage interest earnings and $10,513.47 for his bonus earnings.

There therefore can be no question that his main activities as reflected by his income were in these mortgage discount ventures in which he was so successful.

Now the fact that a majority of these mortgages were first mortgages would not, in my opinion, under the present circumstances, indicate that they were as far as this taxpayer is concerned, investments. Indeed, in the *MacInnes*[1] or *Scott*[2] cases they were all first mortgages but the discounts or bonuses thereon were still held to be taxable profits. The main question in examining the nature of mortgages such as we have here is not whether they are first or second

[1] [1963] C.T.C. 311. [2] [1963] C.T.C. 176.

mortgages, but whether they were good mortgages that could readily be disposed of at their face value. In the present instance there were discounts and bonuses because these mortgages were second class securities, i.e., there was some defect in them that had to be compensated by the discounts or bonuses. This is confirmed by Mrs. Lloyd herself who, in her evidence, admitted that they were all of a risky nature and, of course, the few second mortgages held by Mr. Lloyd were clearly inferior securities.

I might add that on the facts as reviewed, I cannot distinguish this case from the *Minister of National Revenue v. MacInnes*[1] case in which the Supreme Court of Canada in a unanimous decision found that the taxpayer in his mortgage discount transactions had engaged in the highly speculative business of purchasing mortgages at a discount and holding them to maturity in order to realize the maximum amount of profit out of his transactions and that the discounts realized were taxable income since they were profits or gains from a trade or business within the meaning of ss. 3 and 4 of the *Income Tax Act,* R.S.C. 1952, c. 148.

The cumulative effect of the foregoing, together with the whole course of conduct of the taxpayer, in my opinion, rejects what might under other circumstances be considered as investments and irresistibly drives me to the conclusion that the appellant's profits from his mortgage discounts or bonuses constitute a gain made in the operation of a business in the carrying out of a scheme for profit making.

It therefore follows that on the facts and circumstances of this case, I must and do find that the discounts or bonuses realized on the mortgages held by the appellant in the years 1958, 1959 and 1960 were not enhancements of the value of investments made by him. The true nature of these transactions was not investments. These profits were made by the appellant in the operation of a speculative business scheme for profit making within the meaning of the expression used in the *Californian Copper Syndicate* case (*supra*). They resulted from speculative transactions that were adventures in the nature of trade. They are, therefore, because of the definition of "business" in s. 139(1)(*e*) income from a business within the meaning of ss. 3 and 4.

Before concluding, however, I must deal with Ex. 10 filed by Mrs. Lloyd and purporting to be a number of amounts

[1] [1963] S.C.R. 299

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which she claimed had been improperly included for the 1958, 1959 and 1960 taxation years under review here.

At the hearing, counsel for the Minister and the appellant agreed that the 1958 assessment was satisfactory subject to the reduction of the profit on the sale of the 127 Cameron Avenue property from $917.40 down to $461.10; as for the 1959 assessment, an amount of $36.82 for taxes paid was accepted as an expense by counsel for the Minister.

The Minister included in the same year a mortgage discount of $1,103.30 on the basis that the sale of the 184 Lambton property took place on January 22, 1959. The appellant contends, however, that this amount should not be included in the year 1959, as a large part of the purchase price was again secured by mortgage which has not yet been paid. This was the case of a mortgagor who had got into arrears and the mortgage had to be foreclosed. The property was then sold but not entirely for cash and a substantial part of the purchase price was secured by a mortgage in favour of Dr. Lloyd. The appellant maintains that the taking of a mortgage by him from the purchaser was not the receipt of income by him at the time that the mortgage was signed and delivered by the purchaser.

The respondent on the other hand maintains that the profit in this case was made when the property was sold and the fact that the purchase price was not paid in cash at the time of the sale does not prevent the profit being taken into account in the year of the sale.

Such indeed was the position taken by Cameron J. in *Ken Steeves Sales Limited v. Minister of National Revenue*[1] which dealt with the sales of hearing aids on credit when he said "that when trading stocks are sold and delivered the full price should be brought into account in the year in which the delivery is made irrespective of the time of payment."

The House of Lords also decided along the same lines in the case of *Absalom v. Talbot*[2] which dealt with a builder selling houses:

> . . . When a trader in the course of his trade makes a sale to a purchaser, whether the subject-matter of the sale be a house or any other asset in which he deals, his accounts for the year in which the transaction takes place should, for Income Tax purposes, normally include on the one side the cost of providing the asset with which he has parted to the pur-

[1] [1955] Ex. C.R. 108. [2] (1944) 26 T.C. 188.

chaser and, on the other side, the price for the asset which the purchaser has paid or bound himself to pay.

Although the above two cases can be distinguished from the present one in that the stock in trade is not the same and that in this case we are dealing with mortgage discounts which are secured claims and not moveables or immoveables as in the above two cases, it would seem from the evidence before me that upon the foreclosure proceedings the appellant became the owner of the property and therefore at that point he no longer held a claim against the property. Indeed, at that stage he had realized his security which might have been or might not have been sufficient to cover both his claim for the amount he had loaned the first mortgagor as well as for the mortgage discount of $1,103.30.

It might have been possible to establish that the real value of the security recovered did not cover all of the amount of the discount and with proper evidence this might have been done. However, the evidence before me does not enable me to establish whether such is the case or not and the fact that the appellant agreed to accept a new mortgage from the purchaser for apparently the amount outstanding, presumably comprising the full amount of the discount, (although even this is not clear as the evidence discloses that some cash was received by the appellant upon the sale of the property) would indicate, I believe, that the value of the security recovered was sufficient to cover the full amount of the discount and that, therefore, he had received the income of $1,103.30 at this point.

It therefore appears to me that the amount of $1,103.30 was properly included by the Minister in the taxpayer's 1959 assessment.

I am also inclined to hold this true on the basis of s. 24(1) of the *Income Tax Act*, R.S.C. 1952, c. 148, which although it was not referred to by the parties appears to apply to the present case. This section reads as follows:

24(1) Where a person has received a security or other right or a certificate of indebtedness or other evidence of indebtedness wholly or partially as or in lieu of payment of or in satisfaction of an interest, dividend or other debt that was then payable and the amount of which would be included in computing his income if it had been paid, the value of the security, right or indebtedness or the applicable portion thereof shall, notwithstanding the form or legal effect of the transaction, be included in computing his income for the taxation year in which it was received; and a payment in redemption of the security, satisfaction of the right or discharge of the indebtedness shall not be included in computing the recipient's income.

The security (the mortgage including the discount assumed by the purchaser) was given here in lieu of the payment which the taxpayer was entitled to upon the foreclosure proceedings, which payment he voluntarily consented to postpone by the acceptance of a new mortgage.

With respect to the 1960 taxation year, counsel for the respondent agreed that $197.61 should be deducted on the 21 Sackville Street property as interest. He also agreed that the price paid for the mortgage was $5,450 instead of $4,519.59 thus making a difference of $930.59 and finally he admitted a deduction of $1,100 on the 269 Greenwood Avenue property as this was not paid off up to Dr. Lloyd's death.

Subject to the above minor deductions, it therefore follows that the Minister was right in assessing the appellant as he did for the taxation years 1958 to 1960 inclusive with the result that the appeal herein for these years is dismissed.

The Minister is also entitled to costs to be taxed in the usual way.

Judgment accordingly.

1963
Mar. 18
1964
Jan. 30

BETWEEN:

RUSSEL W. FYKE ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income Tax—Income Tax Act R S C. 1952, c. 148, ss. 3, 4 and 139(1)(e)—Income or capital gain—Purchase and sale of real estate—Series of real estate transactions—Adventure in the nature of trade.

The appellant was a farmer who, in 1950, sold part of his farm near Regina, Saskatchewan, and moved into Regina but continued to farm actively until 1960, when he sold the balance of his farm. In 1951, the appellant bought a house in Regina in which he resided with his family for about one year when he sold it because it was too small and was otherwise unsatisfactory. He then bought a lot and had a house built thereon in which he lived from July 1952 to 1954, when he sold it at a profit, allegedly because the basement flooded and it was generally unsatisfactory. He had another house built in which he resided from July 1954 until April 1957 when he sold it at a substantial profit because, he said, the traffic had increased and the area had been rezoned. He took possession of another house he had built for himself in August 1957, in which he resided until March 1960 when he sold it at a profit, allegedly because of poor bus service and the distance from schools. From 1960 until 1963 appellant lived in a house he had had constructed for himself and which he sold when he moved to Calgary in 1963. The appellant had also purchased another house in Regina in 1953 as an investment, which was rented until it was sold in 1955 to enable the appellant to finance the construction of an apartment house. In 1956 construction was completed on an apartment house owned by the appellant in Regina, which he sold at a substantial profit in 1958. In that year he acquired four lots in Regina and had an apartment building erected thereon upon which he gave an option to purchase before it was completed, the sale being completed in 1959. He built two more apartment buildings in 1959, one of which he sold in 1962 or 1963 when he moved to Calgary.

The respondent reassessed the appellant's income for the taxation years 1957 and 1958 by adding to the 1957 income the profit realized by the appellant when he sold his residence in April 1957, and to his 1958 income the profit he made on the sale of his first apartment house in that year.

Held: That each of the five houses purchased and occupied by the appellant was acquired solely as a home for himself and his family, and there is no evidence to suggest that there was an alternative intention at the time of acquisition to dispose of the properties at a profit or that there was anything speculative about the transactions or anything which could be described as a business or even as an adventure in the nature of trade.

2. That when in 1955 the appellant had constructed the first of a series of apartment houses he was entering upon an adventure in the nature of trade and that the profit from the sale of the first of such apartment houses in 1958 was properly assessed as income of the appellant.

3. That the appeal of the taxpayer with respect to his reassessment for the taxation year 1957 is allowed but the appeal for 1958 is dismissed.

APPEAL under the *Income Tax Act.*

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

M. Neuman for appellant.

J. G. Sheppard for respondent.

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

CAMERON J. now (January 30, 1964) delivered the following judgment:

From re-assessments dated May 23, 1961, for the taxation years 1957 and 1958, the appellant has appealed to this

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Court and by consent the appeals were heard together. The appeals relate to the profits realized by the appellant on a sale of his house (3312 Portnall Avenue, Regina, Saskatchewan) in 1957, and on the sale of an apartment house (3801 Princess Drive, Regina) in 1958. Both items of profit were added to the declared income of the appellant and while the Notice of Appeal for the year 1957 puts in question the amount of the profit realized on the sale of the residence, it was admitted at the trial that the profit actually realized was that added by the Minister, namely, $5,100.

The Minister, for that year, had also added a further item of $200 in respect of another matter, but the appeal in relation thereto was abandoned at the trial. The profit realized on the sale of the apartment house in 1958 was admitted to be $34,163.42.

The appellant had for many years farmed in the vicinity of Regina. In 1950 he sold part of his farm and decided to move with his wife, young son and daughter (aged 10 and 11 years) to Regina so as to obtain better educational facilities for his children. While he remained in Regina until the spring of 1963, when he moved to Calgary, he continued farming actively until 1960 when the balance of his farm was sold.

The circumstances under which the residence and the apartment house were acquired and sold will be discussed later. For the moment it is sufficient to say that the evidence of the appellant, corroborated by that of his wife (these were the only two witnesses called by the appellant and none were called by the respondent), establishes to my satisfaction that when considered alone there is nothing to suggest other than that the two properties were acquired solely as investments, the residence as a home for the appellant and his family and the apartment house as an investment from which he expected to and did receive rental income. Were there no further evidence, I think that the Minister in all likelihood would not have added the profits so realized to the declared income, and in any event I would have had no hesitation in allowing the appellant's appeals as regards the profits so added.

But in the period 1951 to 1963 there were a number of other real estate purchases and sales by the appellant, and for the Minister it is submitted that, taking into consideration the whole course of conduct of the taxpayer in the light of all the circumstances (*Cragg v. Minister of National Revenue*[1]), the only proper deduction to be drawn is that the profits so realized were profits from a business. He relied on ss. 3 and 4 of the *Income Tax Act*, as well as on s. 139(1)(*e*) thereof, which defines business as follows:

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;

It seems to be now well settled law that in income tax matters the transactions of purchase and sale of a taxpayer, subsequent to the taxation years in question as well as prior thereto, may be put in evidence in order to ascertain the taxpayer's whole course of conduct (*vide Osler, Hammond and Nanton Ltd. v. Minister of National Revenue*[2]—a decision of the Supreme Court of Canada).

It becomes necessary, therefore, to set out briefly the evidence relating not only to the two properties in question, but also to the other purchases and sales of real property by the appellant. All the properties referred to are in Regina, Saskatchewan, and they will be referred to by their street numbers. It is significant to note that counsel for the Minister did not attempt to challenge the evidence of the appellant or his wife (except on one matter which I shall refer to later), but was content to rely entirely on the fact that the appellant, between the years 1951 and 1963, had acquired and sold a number of properties, mostly at a profit.

It is important to note at the outset that the appellant at all relevant times was actively engaged in farming. He was not a builder nor a real estate agent and his evidence that in every case the properties acquired, and later sold, were acquired as investments, was not challenged by any oral evidence on behalf of the Minister. In fact, counsel for the Minister seemed to accept all the evidence of the appellant and his wife as true except on one point which I shall now refer to briefly.

The title to all five residences in which the appellant and his family resided between 1951 and 1963 was taken in the names of the appellant and his wife as joint tenants and not as tenants-in-common; and the evidence of the appel-

[1] [1952] Ex. C.R. 40 at 45.
[2] [1963] C.T.C. 164.

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lant and his wife was that they were so taken so that the survivor would become the sole owner. Each also said that the wife in each such case contributed financially to the cost of the houses so purchased, but neither was able to give any details as to when or how much the wife had contributed. In view of the conclusions which I have come to, it is not necessary to consider the alternative plea of the appellant that, if the profit so realized in 1957 was in reality a profit from a business, only one-half thereof should be added to his income, the remaining half being the property of the joint owner, namely, his wife.

I shall consider first the various residences acquired and later sold. As I have said, the appellant swears that all five residences were acquired as a home for his family without any intention whatever of selling them and all were, in fact, occupied for varying periods by the appellant and his family. I will deal with these residences in chronological order.

1. *2326 Montague Street.* This was bought for $14,000 in the spring of 1951 and occupied at once by the appellant and his family who continued in occupation until March, 1952, when it was sold for $14,900. The reasons given for selling the property were that it had only two bedrooms and was small, the appellant needing a larger home with at least three bedrooms for his growing family. It was found to be unsatisfactory, also, as water flooded the basement at times and the ground was very low.

2. *1456 York Street.* The appellant then bought a lot and had a contractor construct a residence thereon, the property being known as 1456 York Street. The appellant and his family took possession in July, 1952 when it was partially completed. It had a small suite in the basement which the appellant rented. The total cost was $12,000. The appellant used this property as his home for about two years. He disposed of it in 1954 as he found that it too was unsatisfactory, situated on low ground, with water flooding the basement and consequent damage to the cement foundation. It was also in an old and undesirable area. It was sold for $16,500—a profit of $4,500. Moreover, the appellant wanted a home without a separate suite so as to have greater privacy for his family.

3. *3312 Portnall Avenue.* This is the property in question for the year 1957. The appellant arranged for a contractor

to construct a residence, the total cost being $12,000. The appellant and his family took possession in July, 1954 and remained there until April, 1957. This was a small bungalow with three bedrooms. When the lot was acquired, the area was zoned for dwellings only, but the municipal authorities later re-zoned the area so as to permit the construction of apartments, a number of which were constructed in the immediate vicinity. As a result, the traffic increased so greatly that the appellant and his wife, desiring to live in a quieter area, disposed of the property for $17,100—a profit of $5,100.

4. *42 Lamont Crescent.* The appellant acquired a building lot, had a contractor construct a residence thereon at a total cost of $14,000. Possession was taken in August, 1957 and the appellant and his family continued to reside there until March, 1960—a period of nearly three years—when it was sold for $17,500. The reasons for selling were that there was no bus service to the downtown area, although such service had been promised, and that the appellant's son was obliged while living there to attend a school in another and distant area.

5. *3337 Queen Street.* The appellant and his wife acquired a lot in the spring of 1960 and again had a building contractor construct a home for them at a total cost of $26,800. This was an excellent home, possession being taken by the appellant and his family in 1960. They remained in possession until 1963 when it was sold for $26,500 (less real estate commission) when the appellant moved to Calgary.

It will be seen, therefore, that in each of the five residences the appellant and his family resided for very considerable periods of time. In my opinion, each of the residences was acquired solely as a home for the appellant and his family and without any intention whatever of selling them until, after several years of occupation, each was found to be unsatisfactory for the reasons stated, and which were not in any way challenged. The last property, of course, was sold only because the appellant was moving to Calgary.

I find no evidence to suggest that in any of these cases there was an alternative intention at the time of acquisition to dispose of the property at a profit or that there was anything speculative about the transactions or anything which could be described as a business or even as an adventure in the nature of trade. I accept unreservedly the evidence of

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the appellant and his wife and have come to the conclusion for these reasons that the appeal for 1957 must be allowed.

The appellant also bought another house known as 4736 Seventh Avenue in May, 1953. It was purchased as an investment in the appellant's name with the intention of renting it. It was occupied by tenants until it was sold in 1955 at about its cost in order to secure funds to assist in building the apartment house known as street number 3801 Princess Drive.

The only question remaining is whether the profit realized in 1958 on the sale of the apartment at 3801 Princess Drive was profit from a business as that term is defined in s. 139(1)(*e*).

In April, 1955 the appellant bought two lots from the City of Regina and by the terms of the agreement (Exhibit 7) covenanted to construct thereon a modern apartment to cost at least $25,000, construction to begin not later than July 31, 1955, and to be completed within one year of the purchase, namely, April 28, 1955. The appellant engaged a contractor to construct the apartment known as 3801 Princess Drive, consisting of seven suites; it was finished at the beginning of 1956 and tenants took possession. The appellant states that in constructing this apartment, as well as the others to be referred to later, he was merely investing his money, looking for a return from rentals and not by re-sale. In 1956 he added four more suites to this apartment house. The total cost was about $30,000, its construction being financed in part by the sale of his rented property on Seventh Avenue and by mortgaging his home at 3312 Portnall Avenue. The appellant sold the apartment house in April, 1958, realizing a profit of $34,163.42. He gave as his reason for selling the property that the property was never satisfactory; it had been built in two parts and was difficult to heat. He also stated that he wanted to build a better type of apartment.

In my view, this purchase and sale marked the beginning of the appellant's entry into the "business" of buying lots, having apartment houses erected thereon and then disposing of them at a profit as soon as a reasonable opportunity presented itself. In the first place, his evidence as to the reasons for the sale of 3801 Princess Drive are uncorroborated in any fashion and his explanation is rather frail. It seems to me that while he may have had the primary intention of making an investment only, he had a secondary intention of disposing of the property at a profit if a suitable opportunity arose. He stated that he wanted to construct a better type of apartment and it is clear that in order to do so, he had to sell this property.

But it is evident from what next transpired that he was quite prepared to realize profits by sale of his apartment buildings rather than by renting the property. When his first apartment house was sold at a substantial profit, he bought four lots on Retallick Street and again had a contractor construct an apartment of 12 suites thereon, known as 3837 Retallick Street, in the spring of 1958. In the same spring, before the building was completed, he gave an option to sell it and transferred title in 1959 when the construction was complete. This building cost a total of $72,000 and was sold for $94,000—a profit of $22,000. This matter is not directly before me as the profit was realized in 1959.

In the spring of 1959 he decided to have another apartment building of 12 suites constructed on these lots. He stated that this was built for his daughter and that he paid all the costs of construction. The evidence is not clear as to whether it was in fact transferred to his daughter, or whether, if title passed to her, she agreed to pay anything for the property. In the same year he constructed another apartment building on these lots, namely, 3871 Retallick Street, which he states was merely an investment; and that he was looking to the income from rentals rather than from sales. He retained ownership thereof until 1962 or 1963, when he sold it as he was about to move to Calgary. For the same reason he sold the fourth lot on Retallick Street, no building having been erected thereon.

The appellant stated that in buying the lots on Retallick Street he intended only to build apartment houses as investments—one for each member of his family; that he had no intention of selling them if a favourable opportunity for profit making arose. I am far from being satisfied on the evidence that such was the case. Within a period of five years he had had built four substantial apartment buildings, all of which have now been disposed of and in the main at substantial profits. Even omitting from consideration the

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sale of the apartment at 3871 Retallick Street, due it is said to the appellant's move to Calgary, the fact remains that one apartment house was sold shortly after completion and another was sold long before it was completed, both at very substantial profits. At to the other apartment house, said to have been built for his daughter, the appellant has not satisfied me that if it was transferred to her in 1959 (the year in which it was constructed), that the transaction was a gift rather than a sale.

In regard to the taxation year 1958, the appellant in my view has failed to displace the onus cast on him to satisfy the Court that there is error in law or in fact in the assessment (see *Johnston v. Minister of National Revenue*[1]). I am satisfied from a consideration of the evidence and the whole course of conduct of the appellant in relation to the apartment houses, that when in 1955 he had constructed the first of a series of apartment houses, he was entering upon an adventure in the nature of trade and that in 1958 the profits from the sale of the first of such transactions were realized when he sold 3801 Princess Drive.

For these reasons, the appellant's appeal from the re-assessment for the taxation year 1958 will be dismissed and the re-assessment affirmed.

The re-assessment for the year 1957 having been allowed, it will be referred back to the Minister to re-assess the appellant in accordance with my findings.

Success being divided, I direct that no costs be allowed to either party.

Judgment accordingly.

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

BETWEEN:

1959

Apr. 22, 23, 24, 27, 28

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Jan. 29

ALLOY STEEL AND METALS COMPANY .... PLAINTIFF;

AND

A-1 STEEL AND IRON FOUNDRY LTD. .... DEFENDANT.

Patents—Infringement—Validity—Patent Act, R.S.C. 1952, c. 203, ss. 48 and 63(1)—Onus of proving invalidity—Combination patent—Obviousness—Novelty—Prior user—When evidence to establish prior user to be carefully scrutinized.

This is an action for infringement of the plaintiff's rights under Canadian Letters Patent No. 536,662 of which it is the owner. The defence is a denial of infringement and an attack on the validity of the patent based on allegations of obviousness and lack of novelty. The invention in issue relates to a slushing scraper or materials handling bucket used to handle a wide range of materials generally in mines and excavations and on grading and construction work.

Held: That the onus of proving the invalidity of a Canadian Patent lies on the party attacking it and is not an easy one to discharge.

2. That the fact that many of the elements in the claims are old has no bearing on the question whether the combination is old or obvious and the fact that the development of scrapers extended over a long period and went through a process of evolution does not prove that the making of the plaintiff's slusher scraper was obvious.

3. That the question whether an alleged invention is obvious is a question of fact and exclusively a matter for the Court.

4. That the whole history of the development of the plaintiff's slusher scraper, with its visits to mines, its discussions, the drawing of models, the experiments made and the resulting achievement show skill and imagination and a large measure of inventive ingenuity, and the contention that the development could have been made by a mechanic is wholly unjustified.

5. That it is well established that the Court should carefully scrutinize evidence seeking to destroy a useful patent on the ground that there has been a prior user of the invention for which it was granted.

6 That the attack on the validity of the plaintiff's patent on the ground of prior user fails because the prior user sought to be established by the defendant was not of a public nature in the sense that it had become available to the public as is required by s. 63(1) of the *Patent Act,* and because the defendant's scraper was not a prior user in any event since it did not and could not perform the purpose which the plaintiff's slusher scraper was able to serve.

7. That the evidence is conclusive that the defendant deliberately copied the plaintiff's slusher scraper and then made changes in it and the defendant, therefore, has infringed the plaintiff's rights under the patent in suit, such changes as were made by the defendant not being such as to alter the fact of infringement.

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ACTION for infringement of a patent.

The action was tried by the Honourable Mr. Justice Cameron at Vancouver.

C. C. I. Merritt for plaintiff.

H. C. W. Saunders for defendant.

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

CAMERON J. now (January 29, 1964) delivered the following judgment:

This is an action for infringement of the plaintiff's rights under Canadian Letters Patent No. 536,662, dated February 5, 1957, issued to Paul R. Francis, the inventor of the invention claimed therein, and assigned by him to the plaintiff.

The plaintiff is a company incorporated under the laws of the State of California in the United States of America and has its head office at Los Angeles in the said state. The defendant is a corporation incorporated under the laws of the Province of British Columbia and has its head office at Vancouver in the said province.

The defendant attacks the validity of the plaintiff's patent and denies that it has infringed the plaintiff's rights under it.

The specification states that the invention has to do with a slushing scraper such as is usually operated by a line and which may be used to handle a wide range of materials under various working conditions. The specification then states:

> It is a general object of the present invention to provide a slushing scraper having simple, effective, replaceable wear taking parts that are dependable and durable, and which are so mounted as to be easily and quickly removed for repair or replacement.

and it describes slushing scrapers as follows:

> Slushing scrapers or material handling buckets are commonly operated by drag lines and are used generally where material is to be handled, as, for instance, in mines, excavations, on grading and construction work, etc. The usual slushing scraper is dragged or operated through bodies of material or in trough-like grooves or channels with the result that there is a marked tendency for the corners, that is, the lower forward portions of the scraper, to wear excessively.

The other objects of the invention are stated as follows:

> It is a general object of this invention to provide a scraper or bucket-like structure with replaceable or renewable blades at the wear taking

parts or points, which blades effectively protect the basic structure or body of the scraper at the lower forward portions, where maximum wear usually occurs.

Another object of this invention is to provide a scraper construction of the general character referred to having a simple, effective, dependable blade construction with mounting means that securely retain the blades and which can be operated easily and quickly when it is desired to replace or renew the blades.

Another object of the invention is to provide blades separate from the body so that the blades can be made of a tough, wear resistant material, while the body, not being subjected to as much wear as the blades, can be made of a softer, less wear resistant, and cheaper material.

The consistory clause of the specification describes the invention as follows:

The structure in which the invention is incorporated involves, generally, a body with a bottom, back and sides. A rear line connection is provided at the back or rear of the body and a forward line connection is provided at the front of the body. The forward line connection is in the nature of a yoke with a head at its forward end and with arms that diverge from the head and have their outer ends connected to the sides of the body. The yoke is sectional, being divided through the head, and an insert in the form of a plate is connected between the head sections, the head sections and plate being secured together by bolts. The plate has a forwardly projecting apertured part that carried a pin that holds a shackle. The rear or outer ends of the yoke arms are joined to the sides of the body where bosses occur. The bosses have channels with inwardly converging walls and extension of the arms are wedge-shaped and fit into the channels. Bolts connect the sides and the extensions of the arms and where these parts are connected inwardly projecting anchor lugs on the extensions of the arms engage in openings in the sides of the body and relieve the bolts of shearing strain.

The invention provides blades at the forward working or wear-taking parts of the body. In the preferred form I provide one or more centre blades at the leading edge portion of the bottom and corner blades continuing from the ends of the center blade or blades as the case may be. The corner blades extend up at the forward portions of the sides of the body where these parts join the bottom. The blades have forwardly converging digging parts and rear shank portions that are channeled and receive the forwardly projecting portions of the body. Each blade is held by a tongue projecting rearwardly therefrom into a recess in the body where it is held by a key, the ends of which are accessible through openings in the body. A feature of the construction is the formation of each corner blade and the manner in which it is related to the body parts so that the body is effectively protected and so that the blade affords a forwardly projecting tip or wear taking part about which the bucket may be rocked. The configuration or extent of the tip may be varied to meet various working conditions.

Evidence for the plaintiff was given by Mr. Paul R. Francis, the plaintiff's president and general manager and the inventor of the invention in suit, and Mr. John M. McKean, the plaintiff's manager of mining sales, and for the defendant by Mr. Stewart V. McDonald, a practical

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engineer in the defendant's employ and one of its directors, Mr. Charles H. Watters, a pattern maker in the defendant's employ, Mr. Lovick P. Young, a metallurgist in the defendant's employ and the supervisor of its foundry and general production, Mr. John A. C. Ross, a mining engineer, and Mr. Thomas R. I'Anson, the defendant's president.

Mr. Francis gave a detailed review of the development of the plaintiff's scrapers of various types. It had made scrapers of what is called the hoe type up to about 1945 when it abandoned their production and then began the production of what is called the bucket type. A drawing, dated February 13, 1946, showed the germ of the idea which developed into the first assembly of a cast scraper produced by the plaintiff, as shown by a drawing, dated May 20, 1956, filed as Exhibit 17. This scraper, to which further reference will be made later, was known as a drag scraper and was sold as the Pacific Drag Scraper. It was not satisfactory, as will be shown later, and Mr. Francis then designed a scraper known as the Slusher Scraper for which a patent was obtained, first in the United States and then in Canada. As stated, the plaintiff is now the owner of the Canadian patent by virtue of an assignment to it by Mr. Francis.

A photograph showing the plaintiff's slusher scraper was filed as Exhibit 3. It shows the parts of the flusher scraper, the harness, the bucket, the left and right side cutters (blades), a front support, blades, keeper pins, shackle and back-haul lugs. The front view of the scraper in its in-haul digging position shows the bottom, the side, the back and the top or lifter plate. The rear view shows the in-haul dragging position and the front view its out-haul or back-haul position.

After the plaintiff had produced its slusher scraper it had substantial commercial success. Mr. Francis stated that the plaintiff produced approximately 50 per cent of the slusher buckets used in mines, excluding coal mines and confined to hard rock mines. It had sold about 500 of its scrapers in Canada and thousands of them in the United States. It had sold its scrapers in Cyprus and in Morocco in North Africa.

There is no doubt about the utility of the plaintiff's invention. This was admitted by Mr. Ross who stated that the scraper was a considerable advance over previous designs.

As already stated the defendant's defence to the action consisted of attacks on the validity of the plaintiff's patent and denial of the charge of infringement.

In its particulars of objection to the validity of the plaintiff's patent the defendant pleaded lack of novelty in the invention, lack of what it called subject matter in it and ambiguity in the specification.

It is established by a long line of decisions by the President of this Court that the onus of proving the invalidity of a Canadian patent lies on the party attacking it. Section 48 of the *Patent Act* provides for its *prima facie* validity as follows:

> 48. Every patent granted under this Act shall be issued under the signature of the Commissioner and the Seal of the Patent Office; the patent shall bear on its face the date on which it is granted and issued and it shall thereafter be *prima facie* valid and avail the grantee and its legal representatives for the term mentioned therein . . . .

The effect of this statutory provision for validity was first referred to by the President in *The King v. Uhlemann Optical Company*[1]. Since then he has referred to it in several cases, particulars of which were given in *The McPhar Engineering Company of Canada Ltd. v. Sharpe Instruments Limited et al.*[2] His latest reference to it was in *Lovell Manufacturing Company and Maxwell Limited v. Beatty Bros. Limited*[3]. It is now established law that the onus of proving that a patent is invalid which rests on the party attacking it is not an easy one to discharge. It can be discharged only by evidence that is credible and substantial enough to satisfy the Court that the patent is invalid.

The defendant did not attempt to show that there is any ambiguity in the specification or the claims in suit. He confined his attacks to the charges that the patent is invalid for lack of subject matter and lack of novelty in the invention for which it was granted.

In support of the plea that the alleged invention did not at the date thereof constitute proper subject matter for the grant of a valid patent counsel for the defendant contended that all the changes that the plaintiff had made in its scraper could easily have been made by a mechanic. He relied on the evidence of Mr. Francis that the elements in the claims

[1] [1950] Ex C.R. 152 at 161 [2] (1960) 21 Fox Pat. C. 1 at 27.
[3] (1963) 23 Fox Pat. C. 112 at 137.

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were individually not new and that the majority of them represented old, well tried practices, and the evidence of Mr. Ross that the matter of buckets showed a long process of evolution, and the patents filed by him showing that all the buckets referred to in them were members of the same family. He submitted that anyone, who was familiar with buckets or the scrapers that were on the market prior to February, 1951, the date of the application for the plaintiff's patent could take the Ingersoll Rand publication on "Modern Methods for Scraper Mucking and Loading", filed as Exhibit 4, and find in it all the general essentials of the claims in suit. His submission, put simply, was that the scraper described in the plaintiff's patent was merely a development of the existing models that were available on the market and that any mechanic suitably trained with a knowledge of the requirements of mines could have produced the plaintiff's slusher scraper and that, consequently, as he put it, there was a lack of subject matter in the invention in suit.

There is no substance in counsel's submission. The fact that many of the elements in the claims were old has no bearing on the question whether the combination was old or whether it was obvious. And the fact that the development of scrapers extended over a long period and went through a process of evolution does not prove that the making of the plaintiff's slusher scraper was obvious. In this connection, I refer to the admonition expressed by Fletcher Moulton L.J. in *British Westinghouse Electric and Manufacturing Ld. v. Braulik*[1] where he said:

> I confess that I view with suspicion arguments to the effect that a new combination, bringing with it new and important consequences in the shape of practical machines, is not an invention, because, when it has been established, it is easy to show how it might be arrived at by starting from something known and taking a series of apparently easy steps. This *ex post facto* analysis of inventions is unfair to the inventors, and in my opinion it is not countenanced by English Patent Law.

This statement was approved by Lord Russell of Killowen in the House of Lords in *Non-Drip Measure Corp., Ld. v. Strangers, Ld., et al.*[2] And in the same case he said, also at page 142:

> Nothing is easier than to say, after the event, that the thing was obvious and involved no invention.

[1] (1910) 27 R.P.C. 209 at 230. [2] (1943) 60 R.P.C. 135 at 142.

And Lord MacMillan said, 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.

Moreover, the plea of obviousness of the invention in suit is frequently the last resort of the infringer.

The question whether an alleged invention was obvious is a question of fact and exclusively a matter for the Court.

The plaintiff's bucket type mining scraper with its cutting blades forward of the sides of the bucket and designed to pivot around the blades as the fulcrum point as it moved from its digging position to its carrying position and on its back-haul position was, although no part of it was new, a new patentable combination. It could work in any kind of ore, had digging, loading and carrying power, ensuring speedy digging into the ores, and it was designed to save wear and tear.

The contention that the designing of such a scraper was obvious should be summarily rejected. The changes in the design from the drag scraper, to which I shall later refer, to the slusher scraper covered by the patent, with its resulting change of character of the scraper was not obvious. It is not necessary, under the circumstances, to refer to the details of the changes that were made. The whole history of the development of the plaintiff's slusher scraper, with its visits to mines, its discussions, the drawing of models, the experiments made, and the resulting achievement showed skill and imagination and a large measure of inventive ingenuity. The contention that the development could all have been made by a mechanic was wholly unjustified.

The defendant has failed to prove that the plaintiff's invention was obvious. Indeed, the evidence is overwhelming that it was not obvious. Consequently, the attack on the validity of the patent for lack of inventive ingenuity fails.

The defendant's attempt to invalidate the plaintiff's patent for lack of novelty in the invention for which it was granted requires more consideration than its contention that the invention was obvious. In the course of the trial counsel for the defendant filed several patents for the purpose of showing that various elements in the invention defined in the claims in suit were old, but he did not attempt to put forward any of the patents as a prior publication of the

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invention. It was not anticipated by any of the inventions defined in the said patents.

Counsel sought to prove that there had been a prior user of the invention by the defendant and that this made the plaintiff's patent invalid for lack of novelty in the invention. He frankly admitted that this contention was the defendant's principal defence to the action.

In order to succeed in this defence the defendant had to prove that its alleged prior user came within the ambit of section 63(1) of the *Patent Act,* R.S.C. 1952, Chapter 203, which provides as follows:

> 63. (1) No patent or claim in a patent shall be declared invalid or void on the ground that, before the invention therein defined was made by the inventor by whom the patent was applied for, it had already been used by some other person, unless it is established either that,
>
> (*a*) before the date of the application for the patent such other person had disclosed or used the invention in such manner that it had become available to the public, . . .

It was admitted that the application for the plaintiff's patent was made in February, 1951. Consequently, it was incumbent on the defendant to prove that the prior user on which it relied was made by it prior to that date and made in such manner that it had become available to the public.

It is well established that the Court should carefully scrutinize evidence seeking to destroy a useful patent on the ground that there had been a prior user of the invention for which it was granted. This salutary caution was expressed by Ashbury J. in *Boyce v. Morris Motors Ld.*[1] in the following terms:

> When a patent, especially one of a simple character has proved a commercial success, evidence of alleged prior user requires and ought to receive very careful scrutiny.

Counsel for the defendant contended that early in 1948 the defendant had produced in its shop a scraper, or bucket, that amounted to a prior user of the plaintiff's invention and that in 1948 and 1949 it had produced in its foundry and sold between six and a dozen of such scrapers.

In support of this contention counsel relied on a drawing or tracing made by Mr. McDonald, filed as Exhibit A. This was made in January, 1951, but Mr. McDonald put the date

[1] (1927) 44 R.P.C. 105 at 135.

of May 15, 1946, on it. I summarize his evidence relating to this drawing or tracing. It was of the first type of slusher buckets made by the defendant. He took it from one of the first type of buckets "we have in the shop". He made the drawing "off the old bucket itself" to show the type of bucket that the defendant started with. It was a drawing of the first bucket that the defendant produced. Mr. McDonald explained his reason for putting the date of May 15, 1946, on the drawing, although he had made it in January, 1951, by saying that Mr. I'Anson, the defendant's president, had asked him to get out a drawing of the first bucket made by the defendant for his use on his forthcoming examination for discovery in this action, which took place on March 6, 1959, and that when he made the drawing he put the date of May 15, 1946, on it as the date on which, according to his memory, the defendant first commenced to make the pattern for the bucket of the type referred to. He admitted that anyone looking at Exhibit A would think that the drawing had been made on the date it bore and was in existence then. On his cross-examination, he admitted that there was no record of any buckets having been produced by the defendant in 1946 or 1947. He also stated that an old sample of the plaintiff's Pacific Scraper had been sent in to the defendant from the Gardiner-Denver Company "in about 1947 I think, or '46 or '47, it was early", and that the defendant used it and "made a pattern off that bucket with certain modifications". It is clear from this evidence that Mr. McDonald's date of May 15, 1946, was wrong and it would be a fair inference that the "old bucket" from which he said he made Exhibit A was made after the defendant had received the "old sample" of the plaintiff's Pacific Scraper. On his cross-examination, Mr. McDonald was shown photographs, subsequently filed as Exhibits 28A, 28B and 28C, showing two of the defendant's scrapers and said that Exhibit A represented the smaller one. Exhibit 28A shows front views of the defendant's two scrapers, the larger one representing the scraper said to infringe the patent and the smaller one representing the scraper alleged to be the prior user of the invention, and Exhibit 28B shows rear views of the two scrapers.

Counsel also relied, as he said, above all, on the admission of the plaintiff. He had in mind the statement of Mr. Francis on his examination for discovery, which he read

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into the record. When Mr. Francis was shown Exhibit A he stated that the drawing was of a previous model made by the defendant, but "not the one we are making presently" and not the same as the one described in the patent. Later, on his examination for discovery, he said that the plaintiff first made scrapers similar to the design of Exhibit A somewhere about 1945. This was an approximation. At the trial he gave more precise information about the date and said that the first assembly of a cast scraper made by the plaintiff was made according to a drawing, filed as Exhibit 17 and dated May 20, 1946. This scraper went into production soon afterwards. The defendant sold the first one "along about in June of 1946". This was known as a "drag scraper". A brochure describing it was printed in January of 1947, which was filed as Exhibit 18. This scraper was known as the Pacific Drag Scraper. It would be reasonable to infer that the "old sample" of the plaintiff's Pacific Scraper to which Mr. McDonald referred was of the type produced by the plaintiff in June of 1946 and advertised in its brochure of January, 1947.

Basically on this evidence counsel for the defendant contended that the evidence disclosed that the scraper of which Exhibit A was said to be a drawing, was on the market in the United States in 1947 and in Canada in 1948, that it embodied all the essential features of the plaintiff's slushing scraper, any differences being unsubstantial. It was submitted that the defendant had in its shop an old worn out sample of a scraper of a model formerly produced by the plaintiff, that it had produced and sold scrapers of that type in Canada, that this amounted to a prior user by the defendant of the invention in suit and that, consequently, the plaintiff's patent is invalid.

In my opinion, there is no support for the attack on the validity of the plaintiff's patent on the ground taken by counsel.

There are two reasons for this conclusion. Section 63(1) of the Act clearly requires that if a prior user of an invention is to invalidate a patent it must be of a public nature in the sense that it had become available to the public. The evidence does not meet this requirement. Even if it should be conceded that the defendant's first scraper was copied from the plaintiff's scraper of the first type produced by it, according to the drawing filed as Exhibit 17 and dated

May 20, 1946, a sample of which was acquired by the defendant, as stated by Mr. McDonald, there is no credible evidence of any sales of such scraper prior to February, 1951, or of any use of it prior to such date in such manner that it had become available to the public. The evidence adduced on behalf of the defendant's contention was not of the kind that would warrant the invalidation of the plaintiff's patent.

There is a stronger reason for rejecting counsel's contention. It was established that the defendant's small scraper, of which Exhibit A was said to be a drawing and which was shown in Exhibits 28A and 28B, was not in fact a prior user of the plaintiff's invention in any sense of the term. It did not, and could not, perform the purpose which the plaintiff's slusher scraper was able to serve. Mr. Francis stated that soon after the plaintiff's drag scraper came into production complaints came in that it could not do what was intended for it. The main defect in it was that it did not gather in and move the load of broken ore. The scraper was "sledding", meaning thereby that it did not start to gather its load of ore but slid over it. In order to overcome this defect Mr. Francis rebuilt the side cutters and blades. This was an improvement but complaints continued to come in about several matters, such as the welding, bolts coming loose and difficulties in replacing the blades. Finally, the plaintiff brought out a completely revised and redesigned scraper and found that it could control the digging of the ore and taking the load and carrying it when and where desired. The new scraper was a commercial success. In February, 1951, the plaintiff applied for a patent for its new scraper and it was issued in due course. The drag scraper did not work and the plaintiff ceased producing it. Mr. McKean confirmed the evidence given by Mr. Francis. He found that it was practically impossible for the plaintiff's drag scraper to get a full load because of its gliding over the top of the ore instead of cutting into it. Mr. Francis then designed the scraper which was subsequently patented. Mr. McKean said that if the change had not been made the plaintiff would have been out of the scraper business. He was shown the photographs, filed as Exhibits 28A, 28B and 28C, and said that the small scraper shown on Exhibits 28A and 28B would run into the same trouble that the plaintiff ran into with its drag scraper. He was

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asked to compare the small scraper with the plaintiff's drag scraper and said that, while there were some differences, he found that there was no difference in principle between them. The defendant's small scraper was "our old drag design". It is significant that Mr. McKean was not cross-examined on the matters referred to.

I accept the evidence of Mr. Francis and Mr. McKean and find, without hesitation, that the defendant's small scraper was not in any sense an anticipation of the plaintiff's invention. It could not reasonably be said that its use by the defendant, if there was any, was a prior user of the invention in suit. The defendant has therefore failed in its attempt to invalidate the plaintiff's patent for failure of novelty in the invention for which it was granted.

It follows that all the factors necessary for a valid patent are present. In the terms frequently used by the President of this Court the necessary attributes of patentability, namely, novelty, utility and inventive ingenuity, are present in the invention in suit. I find, therefore, that as between the parties the claims in suit are valid.

This leaves only the issue of infringement. In my opinion, the evidence clearly established that the defendant infringed the plaintiff's rights under its patent. The large scraper which it manufactured, as shown on Exhibits 28A, 28B and 28C, was a straight copy of the plaintiff's Slusher Scraper with some differences, such as in the ribbing at the back, in thickness and material, in the mode of the attachment of the blade, in the design of the corner blade and in the design of the arms of the yoke. But these differences were not sufficient to distinguish it from the patented scraper.

There was evidence that the defendant copied the plaintiff's machine and its brochures and had access to the plaintiff's information about its machine. The Court is not concerned with what the defendant did prior to the issue of the plaintiff's patent, on February 5, 1957, but it is clear that the defendant manufactured its large scraper in 1958. A comparison between the scraper shown in Exhibit 3, the plaintiff's scraper, and the larger scraper shown in Exhibits 28A, 28B and 28C, the defendant's large scraper called Ianco, shows a striking similarity in shape. As counsel for the plaintiff put it, "To the eye they are alike as two peas. Of course they are: They are copied." Mr. Ross was unable to make any distinctions between the two scrapers except some mechanical ones. Mr. McKean said he could not see any difference in principle between the two scrapers. The only differences were differences in detail. Mr. McKean gave evidence that he had seen the defendant's large scraper on several occasions but the Court is not concerned with what he saw on any occasion prior to the date of the patent. But his evidence of what he saw early in May of 1958, in the mine of the Consolidated Dennison Mining Company at Elliott Lake is important. There he saw two large Ianco Scrapers made by the defendant. They had just arrived. Mr. McKean said that he would have taken them for the plaintiff's scrapers until he walked up close enough to see the mode of attachment of the side cutters and blades. I accept Mr. McKean's evidence. In my opinion, the evidence is conclusive that the defendant deliberately copied the plaintiff's Slusher Scraper and then made some changes in it. I find, therefore, that the defendant did infringe the plaintiff's rights under the patent in suit. The differences it made did not alter the fact of infringement.

It was agreed between the parties that if the plaintiff's action should be upheld there would be the usual reference as to damages.

There will, therefore, be judgment in favour of the plaintiff for the relief sought by it except that as to damages, if the parties are not able to reach an agreement as to its amount, there will be a reference to the Registrar or a Deputy Registrar of this Court to determine the amount of such damages or profits, as the plaintiff may elect, and judgment for the amount found on such reference. The plaintiff will, of course, be entitled to costs to be taxed in the usual way.

Judgment accordingly.

1962
juin 5
1963
avril 3

ENTRE:

FRONTENAC SHOE LTÉE ....APPELANTE;

ET

LE MINISTRE DU REVENU NATIONAL ....INTIMÉ.

Revenu—Impôt sur le revenu—Droit d'auteur—Vente d'un droit d'auteur—Somme déboursée en vue de gagner ou produire un revenu—Paiement à compte de capital—Montant raisonnable dans les circonstances—Mauvaise créance—Loi de l'impôt sur le revenu, 1948, ch. 52, arts. 12(1)(a et b) et (2), 11(1)(f)—Appel accueilli en partie.

Propriétaire d'un droit d'auteur dans un vendeur-catalogue dont l'objet est de vendre la chaussure directement par correspondance sans les services d'un agent vendeur, Gingras, qui était à la fois le président, gérant général et actionnaire majoritaire de la compagnie appelante, le lui céda pour le prix de $200,000 payable hebdomadairement ou mensuellement sur une base de 3½% des ventes directes de la compagnie et ce jusqu'au parfait paiement du prix ou au décès de Gingras. Conformément au contrat, l'appelante lui versait certains montants au cours des années 1952, 1953, 1954, 1955 et 1956 Réclamés comme dépenses d'opération par l'appelante ces versements lui furent refusés par le Ministre, pour le motif qu'ils n'avaient pas été faits en vue de gagner ou produire un revenu mais constituaient des paiements à compte de capital, et qu'au surplus ils n'étaient pas raisonnables dans les circonstances; le tout au sens de la *Loi de l'impôt sur le revenu,* 1948, ch. 52, art. 12(1)(*a*)(*b*) et (2) qui se lit comme suit:

12. (1) Dans le calcul du revenu, il n'est opéré aucune déduction à l'égard

a) d'une somme déboursée ou dépensée sauf dans la mesure où elle l'a été par le contribuable en vue de gagner ou de produire un revenu tiré de biens ou d'une entreprise du contribuable,

b) d'une somme déboursée, d'une perte ou d'un remplacement de capital, d'un paiement à compte de capital d'une allocation à l'égard de dépréciation, désuétude ou d'épuisement, sauf ce qui est expressément permis par la présente Partie,

* * *

(2) Dans le calcul du revenu, il n'est opéré aucune déduction à l'égard d'une somme déboursée ou dépensée, autrement déductible, sauf dans la mesure où cette somme était raisonnable dans les circonstances.

Par ailleurs, la compagnie appelante réclamait, à titre de mauvaises créances, certains montants payés en 1954 et 1955 à une compagnie manufacturière de cuirs, une subsidiaire, pour se procurer des cuirs à meilleur compte, et, en 1951 et 1952 mais réclamés qu'en 1956, à une société qui devait agir comme agent vendeur, déductions qui lui furent, aussi, refusées par le Ministre. Sur pourvoi en appel à la Commission d'appel de l'impôt celle-ci accueillit l'appel en ce qui concerne les montants ainsi versés par la compagnie pour l'utilisation du vendeur catalogue mais le rejeta quant à ceux réclamés à titre de mauvaises créances. D'où le présent appel à cette Cour.

Jugé: Les sommes ainsi déboursées par la compagnie appelante pour l'usage du vendeur-catalogue le furent en vue de *gagner ou de produire un* *revenu de l'entreprise* dans le sens large donné à ces termes par la Cour Suprême du Canada, *British Columbia Electric Railway Company v. M.N.R.* [1958] S.C R. 133, à la p. 137.

2°. La question de savoir si une dépense est d'une nature capitale ou d'opération dépend des circonstances de chaque cas (Cf. *British Insulated and Helsby Cables, Limited v. Atherton* [1926] A.C. 205; *British Columbia Electric Railway Company v. M.N.R.* [1958] S.C.R. 133; *W. R. Bannerman v. M.N.R.* [1959] S C.R. 562; *M.N.R. v. Haden Realty Inc.* [1962] S.C R. 109). Ici il ne s'agit pas d'un montant global versé une fois mais de montants annuels qui sont fixés suivant une proportion des ventes directes de la compagnie et ne sont dûs que si celle-ci continue à vendre directement à ses clients, à défaut de quoi l'obligation de payer cesse. Dans de telles circonstances, la transaction, quant à la compagnie, n'a aucun caractère de permanence. Il s'en suit que la dépense n'en est une que d'opération.

3°. Les cotisations du Ministre lui sont cependant déférées pour plus ample étude et en vue d'une nouvelle cotisation, celle-ci devant représenter la valeur annuelle du vendeur-catalogue compte tenu des commissions payées aux agents vendeurs de la compagnie dans les années précédant l'utilisation du catalogue, et de l'addition d'un léger supplément en prévision de la hausse probable du coût de vente du produit.

4°. Les avances faites par la compagnie à sa subsidiaire en 1954 et 1955 pour se procurer des cuirs à meilleur compte constituent un investissement de capital et ne sont pas déductibles pour établir ses profits (Cf. *English Crown Apelter Co. Ltd. v. Baker*—5 T.C. 327.)

5°. Les dépenses administratives payées en 1951 et 1952 par la compagnie à l'acquit d'un agent-vendeur mais réclamées à titre de mauvaises créances qu'en 1956, sont inadmissibles en vertu des dispositions de l'art. 11(1)(*f*) de la même loi.

APPEL d'une décision de la Commission d'appel de l'impôt.

L'appel fut entendu par l'Honorable Juge Noël à Québec.

Henri Gingras, président de l'appelante, pour celle-ci.

Paul Boivin, c.r. pour l'intimé.

Les faits et questions de droit sont exposés dans les motivés de la décision que rend maintenant (3 avril 1963) monsieur le JUGE NOËL:

La compagnie Frontenac Shoe Ltée, de Québec (P.Q.), excipe devant cette Cour d'une décision de la Commission d'appel de l'impôt, datée du 24 août 1961[1] par laquelle cette dernière admettait la déduction des sommes payées chaque année par l'appelante à son président et gérant général, M. Henri Gingras, sur une base de $3\frac{1}{2}$ pour-cent des ventes directes qu'elle a faites en utilisant un système de vente par

[1] 28 Tax A.B C. 1.

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catalogue pour lequel ledit Henri Gingras détenait un droit d'auteur mais refusait de déduire comme mauvaises créances les montants de $3,500 en 1954 et $3,433.29 en 1955 que le contribuable a payés à Tannerie Loretteville Ltée pour se procurer des cuirs à meilleur compte ainsi qu'une somme de $2,819.31 que lui devait Québec Boot & Shoe Regd. et que l'appelante avait déduite de son revenu pour l'année 1956.

Le président et gérant général de l'appelante a déclaré à l'audience qu'il s'en remettait quant à la preuve des faits à celle présentée devant la Commission d'appel de l'impôt ainsi qu'aux exhibits versés au dossier et que l'appelante plaiderait par écrit. Cette plaidoirie écrite fut versée au dossier vers la fin d'août 1962 et n'est à peu de choses près que la répétition de ce que le contribuable avait déjà présenté devant la Commission d'appel.

Comme il s'agit d'une instance *de novo,* il me faut examiner la cotisation de l'appelante non seulement quant aux montants dont la Commission d'appel a refusé la déductibilité mais aussi quant aux montants payés par l'appelante à son président et gérant général, M. Henri Gingras, pour l'utilisation de son vendeur-catalogue dont la Commission d'appel a permis la déductibilité.

L'appelante, Frontenac Shoe Ltée, manufacture des chaussures dans la ville de Québec. M. Henri Gingras en est le président et gérant général et aussi l'actionnaire majoritaire puisque sur 39,900 actions ordinaires émises en 1956 il en détient 38,900.

En 1950, nous dit M. Gingras, il conçut l'idée de remplacer les voyageurs de l'appelante par un catalogue et il y travailla à la maison en dehors de ses heures de travail le dimanche et les fêtes. Ce catalogue comprend un code des numéros de semelles, des dessus de chaussures, des talons, des prix et des illustrations qui permettent aux magasins et aux individus qui achètent de l'appelante de le faire directement par correspondance sans passer par un agent vendeur. M. A. Brown en explique l'utilité aux pages 40 et 41 des notes sténographiques:

D. Voulez-vous dire si vous jugez ce système comme un système efficace pour l'écoulement de la production d'une manufacture de chaussures?

R. C'est à peu près ce que j'ai vu de mieux. La plupart des manufacturiers ont des catalogues. Il y a une chaussure et c'est avec un numéro, tandis qu'ici un type au courant de son affaire peut bâtir sa chaussure comme il veut et il y a des voyageurs dans la chaussure qui sont vendeurs dans n'importe quoi.

D. Qui vendent autre chose?

R. Non, ils ne connaissent pas ça. Tandis qu'un type qui est au courant de son affaire peut bâtir sa chaussure.

En 1951, soit un an avant la période en cause dans cet appel, il en fit faire un essai par l'appelante de ce catalogue et le 12 février 1952 un contrat intervint entre l'appelante et son président et gérant général, M. Henri Gingras, par lequel ce dernier vendait à sa compagnie un droit d'auteur désigné «vendeur Frontenac utilisé pour la fabrication de toutes chaussures de travail dans le Canada entier».

Cette vente fut faite pour et en considération de la somme de $1,500,000 que l'appelante s'engageait à payer, hebdomadairement ou mensuellement, sur une base de $3\frac{1}{2}$ pourcent des ventes directes de l'appelante et ce jusqu'à parfait paiement de la somme totale ou de l'extinction du droit d'auteur. La validité du contrat était sujette à ce que M. Gingras, le vendeur, fasse enregistrer à ses frais le droit d'auteur ci-haut mentionné dans le plus court délai, ce qu'il fit, et il obtint, le 13 mai 1953, en vertu de la *Loi concernant les droits d'auteur,* un certificat sous le numéro 102,000.

Le 13 juin 1959, soit subséquemment aux années d'imposition, après les avis d'opposition mais avant les avis d'appel dans la présente cause, un nouveau contrat intervint entre l'appelante et ledit Henri Gingras annulant et remplaçant celui du 12 février 1952 relativement à la vente du même droit d'auteur mais comportant cette fois un prix de $200,000 au lieu de $1,500,000 et fixant la période des paiements au paiement complet du prix ou à la mort de son propriétaire, au lieu de jusqu'à l'extinction des droits d'auteur, ce qui aurait été une période s'étendant à cinquante ans après la mort de son auteur.

Le président et gérant général de l'appelante, M. Gingras, à la page 23 des notes sténographiques, explique comment ce montant de $1,500,000 fut déterminé:

D. Comment avez-vous déterminé le montant de $1,500,000 comme prix de vente?

R. Je vous ai dit tantôt que ça été mis à ce montant-là à cause que j'avais été renseigné que je pourrais faire profiter la succession avec du revenu Là j'avais été informé par un gars sur un droit d'auteur, que on pouvait continuer un certain temps après sa mort, pour continuer à retirer des montants.

D. En d'autres mots, si je comprends bien, le prix de $1,500,000 était basé sur des considérations qui n'étaient pas directement reliées avec la valeur de l'objet que vous vendiez mais c'était en considération de succession future.

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R. Oui, monsieur, ça été fait de même. Après ça j'ai eu une information que pour question de succession, c'était mieux de changer de montant parce que ça n'aurait pas été la même chose.

Et c'est là comme nous l'avons vu, qu'un nouveau contrat intervint cette fois pour un montant de $200,000. Quant à la fixation de ce prix de $200,000 pour la vente du droit d'auteur d'Henri Gingras, elle aussi semble avoir été faite à peu près sans qu'on sache trop sur quoi on se soit basé pour en arriver à ce montant.

En effet, M. Gingras, en réponse à une question du procureur de l'intimé déclare:

D. Le montant que la compagnie a payé pour les droits d'auteur se situe avec votre succession, mais elle n'a pas l'air à donner de valeur en elle-même si vous pouvez passer de $1,500,000 à $200,000 simplement parce que vous pensez aux droits de succession, ce que ça valait ou ce qui aurait été dû?

R. C'était assez difficile à déterminer et il n'y avait personne.

D. Vous avez mentionné un prix tout de même?

R. Oui.

D. Et c'était un prix de vente?

R. Oui et j'ai pensé que ce n'était pas correct. On a suggéré au gouvernement de le changer s'il ne trouvait pas ça correct, s'il trouvait le montant déraisonnable et alors on était prêt à mettre un autre montant.

Conformément au contrat intervenu entre l'appelante et son principal actionnaire, elle lui versait les montants suivants:

1952	$10,730.53
1953	$10,210.05
1954	$ 7,355.90
1955	$ 7,686.82
1956	$ 8,611.61

L'appelante chargea ces montants comme dépenses d'opérations et les déduisit du revenu découlant de ses ventes pour les années ci-haut mentionnées. L'intimé refusa d'admettre ces montants comme dépenses d'opérations pour le motif qu'il ne s'agissait pas là de somme déboursées et dépensées par le contribuable aux fins de gagner ou produire le revenu au sens de l'alinéa *a*) du paragraphe (1) de l'article 12 de la *Loi de l'impôt sur le revenu* mais bien de paiements à compte de capital au sens de l'alinéa *b*) dudit paragraphe (1) de l'article 12; que de toute façon lesdits paiements n'étaient pas raisonnables dans les circonstances au sens du paragraphe (2) de l'article 12 de la *Loi de l'impôt sur le revenu*. Cet article se lit comme suit:

12. (1) Dans le calcul du revenu, il n'est opéré aucune déduction à l'égard

a) d'une somme déboursée ou dépensée sauf dans la mesure où elle l'a été par le contribuable en vue de gagner ou de produire un revenu tiré de biens ou d'une entreprise du contribuable,

b) d'une somme déboursée, d'une perte ou d'un remplacement de capital, d'un paiement à compte de capital d'une allocation à l'égard de dépréciation, désuétude ou d'épuisement, sauf ce qui est expressément permis par la présente Partie,

* * *

(2) Dans le calcul du revenu, il n'est opéré aucune déduction à l'égard d'une somme déboursée ou dépensée, autrement déductible, sauf dans la mesure où cette somme était raisonnable dans les circonstances.

Cette question de paiements déductibles comme dépenses d'opérations ainsi que de dépenses capitales a été étudiée par la Cour Suprême dans *British Columbia Electric Railway Company Limited v. M.N.R.*[1] et plus particulièrement par le juge Abbott qui, en cette circonstance, parlait au nom de la majorité de la Cour. Après avoir noté et comparé les articles 12(1)*a*) et *b*) de l'article correspondant de la *Loi de l'impôt de guerre* il disait, à la page 137:

Since the main purpose of every business undertaking is presumably to make a profit, any expenditure made "for the purpose of gaining or producing income" comes within the terms of s. 12(1)*a*) whether it be classified as an income expense or as a capital outlay.

Once it is determined that a particular expenditure is one made for the purpose of gaining or producing income, in order to compute income tax liability it must next be ascertained whether such disbursement is an income expense or a capital outlay. The principle underlying such a distinction is, of course, that since for tax purpose income is determined on an annual basis, an income expense is one incurred to earn the income of the particular year in which it is made and should be allowed as a deduction from gross income in that year. Most capital outlays on the other hand may be amortized or written off over a period of years depending upon whether or not the asset in respect of which the outlay is made is one coming within the capital cost allowance regulations made under s. 11(1)*a*) of *The Income Tax Act*.

Si l'on s'en tient aux faits de la présente cause, il me semble bien que les montants payés par l'appelant à son président et gérant général pour l'usage de son vendeur Frontenac ont été déboursés en vue de gagner ou de produire un revenu de son entreprise dans le sens large que lui donne le juge Abbott dans la décision précitée, et l'on doit main-

[1] [1958] S.C.R. 133.

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tenant se demander si ces montants sont des paiements à compte de capital selon l'article 12(1)*b*) de la Loi.

Dans cette même décision le juge Abbott, à la page 137, disait:

> The general principles to be applied to determine whether an expenditure which would be allowable under s 12(1)*a*) is of a capital nature, are now fairly well established. As Kerwin J., as he then was, pointed out in *Montreal Light, Heat & Power Consolidated v. Minister of National Revenue*, applying the principle enunciated by Viscount Cave in *British Insulated and Helsby Cables, Limited v. Atherton*, the usual test of whether an expenditure is one made on account of capital is, was it made "with a view of bringing into existence an advantage for the enduring benefit of the appellant's business".

Une décision au même effet fut celle de *M.N.R. v. Haden Realty Inc.*[1] à la page 110.

Dans une cause de *W. R. Bannerman v. M.N.R.*[2] le Juge en Chef Kerwin, tel qu'il était à ce moment, en rendant la décision majoritaire de la Cour disait à la page 564:

> . . Under s 12(1)*a*) of the present Act it is sufficient that an outlay be made or expense incurred with the object or intention that it should earn income, but since in one sense it might be said that almost every outlay or expense was made or incurred for that purpose, a line must be drawn in the individual case depending upon the circumstances and bearing in mind the provisions of s. 12(1)*b*).

Ces principes proviennent tous d'une décision de la Chambre des Lords, soit celle de *British Insulated and Helsby Cables, Limited v. Atherton*[3] dans laquelle le Lord Chancelier Cave disait:

> When an expenditure is made, not only once and for all, but I think with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is a very good reason (*in the absence of special circumstances leading to an opposite conclusion*) for treating such an expenditure as properly attributable not to revenue but to capital

En principe, un droit d'auteur constitue un actif qui donne à son propriétaire un avantage durable. Dans le présent cas, comme le souligne M. Boisvert, de la Commission d'appel de l'impôt, l'appelante n'a pas acheté le droit d'auteur de Gingras dans le vendeur Frontenac dans le but de l'exploiter en le vendant à d'autres. Elle ne l'a en fait acheté que pour remplacer partiellement ses agents-vendeurs ou ses jobbers.

[1] [1962] S.C.R. 109. [2] [1959] S.C.R. 562.
[3] [1926] A.C. 205.

Elle devra donc payer à M. Gingras chaque année pour l'usage de son système de vendeur un certain pourcentage des ventes directes de l'appelante.

Il ne s'agit pas ici d'un montant global payé une fois mais de montants qui reviennent chaque année et qui sont fixés, comme nous l'avons vu, suivant une proportion des ventes directes de l'appelante. Enfin ces paiements ne sont dus que si l'appelante continue à vendre directement à ses clients. Si elle cesse de vendre directement, elle ne devra rien à Henri Gingras. Cette transaction ne donne, par conséquent, rien de permanent à l'appelante.

La question de savoir si une dépense est d'une nature capitale ou est une dépense d'opération dépend des circonstances de chaque cas. Dans la décision du Conseil Privé (*supra*) le Chancelier Lord Cave a en effet qualifié sa définition d'une dépense à compte de capital en tenant compte comme il le dit de «special circumstances leading to an opposite conclusion» et il faut donc dans chaque cas appliquer les principes reconnus dans le monde des affaires et de la comptabilité aux faits et circonstances de chaque cas. C'est ce que j'ai tenté de faire ici et ce faisant, il me faut décider que pour les raisons ci-haut mentionnées, ces montants constituent des paiements que la Loi permet à l'appelante de déduire de son revenu.

En effet il faut toujours examiner de quelle façon un droit acheté a été en fait utilisé par l'acheteur pour décider si le montant payé est déductible ou non comme dépenses d'opérations. Dans le présent cas il ne s'agit pas d'un montant payé une fois pour toutes mais de montants qui reviennent chaque année et qui sont fixés d'ailleurs sur un pourcentage des ventes directes de l'appelante et à condition que celle-ci continue à vendre directement à ses clients.

Je ne puis voir là dans les circonstances autre chose qu'une dépense d'opération déductible. L'on doit cependant se demander si la totalité de ces montants peut être déduite dans la présente cause vu les prescriptions de l'article 12(2) de la Loi qui exigent, comme nous l'avons vu, que ces montants soient «raisonnables dans les circonstances».

En effet, les montants payés par l'appelante durant les années en cause pour l'usage du vendeur Frontenac étaient-ils raisonnables? Ce système Frontenac avait-il une grande valeur, a-t-il en fait révolutionné le système de vente de

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l'appelante comme le déclare M. Gingras et surtout lui a-t-il permis d'éliminer les dépenses payées aux voyageurs tel qu'il le prétend.

Un examen des rapports de l'appelante, confirmé d'ailleurs par son témoignage, révèle que depuis l'acquisition du vendeur Frontenac, soit depuis 1952, les sommes payées à titre de commissions à certains vendeurs qu'elle a quand même gardés ainsi que les montants payés à M. Gingras en vertu du contrat de vente de son droit d'auteur excèdent de beaucoup ce que la compagnie payait auparavant, à tel point que, sauf pour l'année 1955, depuis l'utilisation du système Frontenac et après paiement des montants dus à M. Gingras, la compagnie est déficitaire tel qu'il appert à l'Ex. I-1 dont une partie est reproduite ci-dessous.

FRONTENAC SHOE CO. LTD.

	1952	*1953*	*1954*	*1955*	*1956*
Revenu net revisé	10,703.89	8,456.93	5,759 24	13,971.44	7,074.66
Déduire:					
Copyright	10,730 53	10,210.05	7,355 90	7,686 82	8,611.61
Achat O. Ratté	....	....	....	1,016.50	....
Dépréciation	....	....	....	211 60	....
	—26 64	—1,753.12	—1,586 66	5,056.52	—1,706 23
Mauvaises créances	....	....	....	....	750 87
	—26.64	—1,753.12	—1,586.66	5,056.52	—955.36

De plus, il appert que pour chacune des années où la compagnie s'est servie du vendeur Frontenac, il lui en a coûté plus cher en commissions et paiements qu'il ne lui en coûtait auparavant, soit avant l'acquisition dudit vendeur tel que le révèlent les chiffres qui suivent:

Avant le vendeur Frontenac

Année	*Ventes*	*Commissions*
1945	$186,140.73	$1,809.17
1946	$217,185 28	$3,434.08
1947	$195,246 05	$3,861.93
1948	$425,046.05	$2,783.75
1949	$290,643.71	$4,838 88
1950	$321,276 27	$4,565.06
1951	$299,306.61	$2,805.77

Depuis le vendeur Frontenac

Année	*Ventes brutes*	*Commissions*	*Paiements à Gingras*
1952	$357,758 99	$ 931.62	$ 10,730.53
1953	$293,190.33	....	$ 10,210.05
1954	$241,256 60	$ 955 55	$ 7,355.90
1955	$245,155 36	$ 817.62	$ 7,686 82
1956	$299,675.00	$1,796.00	$ 8,611.61

Le président de l'appelante donne cependant, quant aux commissions payées avant et après l'utilisation du vendeur Frontenac, certaines précisions qui nous permettent, je crois, de mieux apprécier la valeur de ce vendeur. En effet, il explique la différence du coût de vente de $299,000 de chaussures pour l'année 1951 avec l'année 1956 pour à peu près le même montant, en disant qu'en 1951 le vendeur Frontenac avait été mis à l'essai, sans cependant qu'il ne retire quoi que ce soit pour son utilité tandis qu'en 1956 il en recevait $8,611.61.

Quant à l'année 1948, où le chiffre d'affaires de l'appelante était de $425,046.05 et où les commissions payées n'étaient que de $2,783.75, il l'explique en disant que l'appelante avait en 1947 obtenu un contrat du Gouvernement hollandais d'environ $600,000 qui a été exécuté en 1948 sur une période de huit mois et l'appelante n'aurait pas vendu à d'autres cette année-là.

Il ne peut cependant expliquer les excédents du coût de vente des marchandises de l'appelante pour les autres années et il me semble qu'en tenant compte de ces chiffres ainsi que des circonstances mentionnées par le président de l'appelante, l'on pourrait fixer comme valeur raisonnable de l'usage du vendeur Frontenac une somme annuelle raisonnable qui serait moindre que les montants payés par l'appelante à son président et gérant général et qui seule serait déductible comme dépenses d'opérations. En effet, en tenant compte des montants payés aux agents-vendeurs de l'appelante dans les années précédant l'utilisation du vendeur Frontenac par l'appelante et en y ajoutant un léger supplément pour prévoir la hausse probable du coût de vente de ses produits, on peut en arriver à un chiffre pour chacune des années en cause qui représente la valeur annuelle réelle de ce vendeur. J'en viens donc à la conclusion que la cotisation sur ce point doit être déférée au Ministre conformément à l'article 100(5)(*c*)(iv) de la Loi pour plus ample étude et une nouvelle cotisation.

Examinons maintenant les montants de $3,500 et $3,433.29 que l'appelante a payés en 1954 et 1955 respectivement à Tannerie Loretteville Ltée (compagnie contrôlée par l'appelante et Henri Gingras) pour se procurer des cuirs à meilleur compte qu'elle a déduits du revenu de ces ventes pour les années ci-haut mentionnées comme mauvaises créances en vertu de l'article 11(1)*f*) de la Loi mais que

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l'intimé refuse d'admettre vu les dispositions de l'article 12(1)*b*) de la Loi qui se lit comme suit:

12. (1) Dans le calcul du revenu, il n'est opéré aucune déduction à l'égard

......

b) d'une somme déboursée, d'une perte ou d'un remplacement de capital, d'un paiement à compte de capital ou d'une allocation à l'égard de dépréciation, désuétude ou d'épuisement, sauf ce qui est expressément permis par la présente Partie

Les montants proviennent d'une transaction intervenue entre l'appelante et Tannerie Loretteville Ltée et relatée à l'Ex. A-1, soit le procès-verbal d'une assemblée spéciale des actionnaires de l'appelante, en date du 12 novembre 1949 et qui comporte la résolution suivante:

Il est mis à la connaissance des actionnaires présents par M. Henri Gingras que la condition financière de Tannerie Loretteville Ltée qui est le principal fournisseur de la compagnie, n'est pas des plus satisfaisantes.

M. Henri Gingras informe les actionnaires que pour protéger les intérêts de la compagnie afin de continuer la réception du cuir fourni par Tannerie Loretteville Ltée, il serait sage d'aider financièrement la compagnie Tannerie Loretteville Ltée pour une certaine période, car par ce moyen d'approvisionnement la compagnie économise en achetant de Tannerie Loretteville Ltée.

A la suite de ces remarques il est proposé par Joseph Adjutor Latulippe et secondé par Maurice Gingras que la compagnie soit autorisée sous le surveillance de M. Henri Gingras de prendre connaissance des besoins financiers de Tannerie Loretteville Ltée. Et s'il y a lieu d'aider financièrement Tannerie Loretteville Ltée, ce qui permettra à cette dernière de continuer ses opérations afin de procurer à la compagnie le cuir dont elle a besoin pour sa production.

Il est proposé par Maurice Gingras et secondé par Joseph Adjutor Latulippe que les montants qui pourraient être déboursés pour Tannerie Loretteville Ltée soient inscrits dans les livres de la compagnie et considérés comme paiement en acompte des achats qui se feront après que Tannerie Loretteville Ltée aura stabilisé sa finance.

M. Gingras relate que l'appelante acheta du cuir de Tannerie Loretteville Ltée jusqu'en 1951. A un certain moment cette compagnie eut des difficultés financières. C'est là que l'appelante aurait consenti par la résolution ci-dessus à lui venir en aide en lui faisant des avances «comme acompte sur des factures à venir». Le témoin ajoute que malgré ces avances, Tannerie Loretteville Ltée a dû quand même cesser ses opérations en 1950 et à ce moment ils étaient endettés envers l'appelante et envers des tiers. Quant aux tiers, c'est l'appelante qui a payé les montants pour le compte de la compagnie. Elle aurait déboursé comme avance à Tannerie Loretteville Ltée pour payer ses dettes une somme de $6,933.29 dont elle a déduit $3,500 en 1954 et $3,433.29 en 1955. Il s'agit ici, de l'aveu de M. Gingras, d'une créance qui ne peut être récupérée. Notons également que ces déboursés ont été faits en 1950, 1951 et 1952, mais, suivant M. Gingras, c'est soit en 1953 ou en 1954 que l'appelante s'est rendu compte qu'il n'y avait rien à faire avec cette créance et comme il le dit à la page 52 des notes sténographiques:

> Mais après ça on a gardé ça dans nos livres, excepté qu'on a décidé de fermer ça dans deux années comme mauvaises créances.

Ces montants déboursés à titre d'avances, tel que le prétend Henri Gingras, par l'appelante à Tannerie Loretteville Ltée et maintenant irrécouvrables, sont-ils déductibles ou s'agit-il d'un investissement de capital qui ne le serait pas.

Dans une cause de *English Crown Apelter Co. Ltd. v. Baker*[1] la compagnie appelante s'occupait de smeltage de zinc et à cette fin elle avait besoin de grandes quantités de «blende». Elle forma une nouvelle compagnie pour fournir ce «blende» et de temps en temps recevait des prêts de l'appelante sous forme d'avances. Cette nouvelle compagnie n'eut aucun succès et fut liquidée. Le montant qu'elle devait à l'appelante fut alors rayé par cette dernière comme mauvaise créance.

Il fut décidé que lesdites avances étaient un investissement de capital et que la perte de ces avances n'était pas déductible pour établir les profits de l'appelante sur cotisation.

Il me faut bien décider ici aussi, quant aux deux montants de $3,500 et $3,433.29 qu'il s'agit bien de dépenses imputables au capital et par conséquent ils ne peuvent être déduits dans l'établissement des profits de l'appelante.

Le troisième item est, comme nous l'avons vu, un montant de $2,219.31 que Quebec Boot & Shoe Regd. devait à l'appelante et que cette dernière a déduit de son revenu pour l'année 1956, comme étant une mauvaise créance.

Quebec Boot & Shoe Regd. est une raison sociale appartenant à un M. Paul Gingras un des frères de M. Henri Gingras et qui devait agir comme agent-vendeur ou jobber des produits de l'appelante. En l'année 1950 l'appelante a vendu à cette société des produits pour une somme de

[1] 5 T.C. 327.

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$5,187.79. Après la livraison des marchandises, le propriétaire de la société, M. Paul Gingras, tomba malade et il fallut alors que l'appelante reprenne sa marchandise. Si l'on s'en tient au témoignage de M. Henri Gingras, elle paya en 1951 et 1952 le loyer, les comptes de téléphone et d'électricité de la société ainsi que l'entreposage et l'assurance de ses marchandises et les montants ainsi payés se chiffrent à la somme de $2,819.31. Remarquons que bien que ces marchandises aient été récupérées en 1951 et que les divers comptes de la société aient été payés au cours des années 1951 et 1952, ce n'est qu'en 1956 que l'appelante réclame ces montants comme mauvaise créance. Ce montant de $2,819.31 ne peut être, par conséquent, déduit comme mauvaise créance en vertu de l'article 11(1)*f*) de la Loi en l'année 1956.

Il me faut donc conclure que la cotisation des montants de $10,730.53 pour l'année 1952, de $10,210.05 pour l'année 1953, de $7,355.90 pour l'année 1954, de $7,686.82 pour l'année 1955 et $8,611.61 pour l'année 1956 soit déférée au Ministre conformément à l'article 100(5)(*c*)(iv) de la *Loi de l'impôt sur le revenu* pour plus ample étude et une nouvelle cotisation basée sur une valeur réelle annuelle du vendeur Frontenac qui soit raisonnable et que les montants de $3,500 pour l'année 1954 et $3,433.29 pour l'année 1955 et $2,819.31 pour l'année 1956 ne sont pas déductibles du revenu de l'appelante. Le présent appel est donc maintenu en partie le tout, cependant, sans dépens étant donné que l'appelante n'était pas représentée par procureur à l'audition de cette cause et n'a fait que présenter à peu de chose près les mêmes motifs qu'elle avait soulevés devant la Commission d'appel de l'impôt.

Jugement conforme.

ENTRE: 1962 juin 5 — 1963 avril 3

HENRI GINGRAS ....APPELANT;

ET

LE MINISTRE DU REVENU NATIONAL ....INTIMÉ.

Revenu—Impôt sur le revenu—Loi de l'impôt sur le revenu, 1948, ch. 52, arts. 5(b)(v), 8(1)(a)—Droit d'auteur—Vente par catalogue—Vente d'un droit d'auteur—Manufacture de chaussures—Objet du droit d'auteur—Utilisation de l'objet du droit d'auteur—Revenu à compte de capital—Revenu à compte du revenu—Opération commerciale non authentique—Frais de voyage—Allocation raisonnable—Appel accueilli en partie.

Les faits relatifs à la vente du droit d'auteur de l'appelant dans son catalogue-vendeur, tels que relatés dans le cause de *Frontenac Shoe Ltée* vs *Le Ministre du Revenu National* (*ante* p. 606) s'appliquent ici *mutatis mutandis.*

A la cotisation imposée par le Ministre pour les montants ainsi payés à l'appelant par Frontenac Shoe Ltée au cours des années 1952, 1953, 1954, 1955 et 1956 s'en ajoutait une autre pour des montants payés par la même compagnie à raison de $15 par semaine à titre de remboursement partiel de certains déboursés encourus par l'appelant à l'acquit de cette dernière et se totalisant pour les années 1955 et 1956 à $780. Sur pourvoi en appel à la Commission d'appel de l'impôt, celle-ci rejeta l'appel en ce qui concerne les paiements faits par la compagnie pour les années susdites, mais décida que cette somme de $780 n'était pas imputable au revenu de l'appelant et, en conséquence, non imposable. D'où le présent appel à cette Cour.

Jugé: Le fait que celui qui effectuait des paiements les ait considérés comme des dépenses de capital ou des dépenses de revenu ne voulait pas nécessairement dire que pour celui qui les reçoit il s'agisse de revenu à compte de capital ou à compte de revenu (Cf. *Ross v. M.N.R.* [1950] C.T.C. 170).

2°. Les montants perçus par l'appelant ici dépendaient des aléas des ventes de l'entreprise et, même si quant à la vente de son droit d'auteur il s'agissait pour lui d'un bien capital, ces montants constituaient un revenu entre ses mains et, par conséquent, imposable (Cf. *Jones v. C.I.R.* (1920) 1 K.B. 714.)

3°. L'objet du droit d'auteur étant intimement relié aux activités de l'appelant à titre de gérant général d'une entreprise de chaussures, la vente d'icelui n'aurait été que subsidiaire à ces fonctions, savoir, rendre des services. Il s'en suit que les montants perçus par l'appelant de l'entreprise constituent un revenu imposable.

4°. Doivent être inclus dans le calcul de ses revenus «les montants reçus dans l'année par un contribuable subordonnément à l'usage de biens ou à la production en découlant qu'il s'agisse ou non de versements relatifs au prix de vente des biens», tel que l'exige l'art. 6(1)(*j*) de la *Loi de l'impôt sur le revenu.* Ici, les paiements faits à l'appelant dépendant de l'utilisation de l'objet de son droit d'auteur, savoir, le vendeur catalogue, le véritable objet de la transaction est l'utilisation de ce catalogue (Cf. *Wain-Town Gas & Oil Company Ltd. v. M.N.R.* [1952] S.C.R. 377).

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5°. Compte tenu des facteurs suivants: *a*) prix de vente initial injustifié, *b*) absence de preuve que le prix de vente subséquemment réduit représente la valeur réelle du vendeur catalogue et *c*) vente faite à une intreprise dont l'appelant était l'actionnaire majoritaire, il ne peut s'agir ici d'une opération commerciale authentique au sens de l'art. 8(1)(*a*) de la même loi.

6°. Le témoignage non contredit de l'appelant quant à ces paiements de $15 par semaine payés à titre de remboursement partiel de déboursés faits par l'appelant à l'acquit de la compagnie et le fait qu'ils sont raisonnables dans les circonstances justifient l'application de l'exception prévue à l'art. 5(*b*)(v) de la même loi qui se lit ainsi:

5. Le revenu provenant, pour une année d'imposition, d'une charge ou d'un emploi est le traitement, salaire et autre rémunération, y compris les gratifications, que le contribuable a touchés dans l'année, plus

* * *

(*b*) tous les montants qu'il a reçus dans l'année à titre d'allocation pour frais personnels ou de subsistance ou à titre d'allocation pour toutes autres fins sauf

* * *

v) les allocations raisonnables pour frais de voyage reçues de son employeur par un employé en ce qui concerne une période de temps pendant laquelle il était employé relativement à la vente de biens ou à la négociation de contrats pour son employeur.

APPEL d'une décision de la Commission d'appel de l'impôt.

L'appel fut entendu par l'Honorable Juge Noël, à Québec.

Henri Gingras en personne.

Paul Boivin, c.r. pour l'intimé.

Les faits et questions de droit sont exposés dans les motivés du jugement que rend maintenant (3 avril 1963) monsieur le JUGE NOËL:

L'appelant excipe devant cette Cour d'une décision de la Commission d'appel de l'impôt, datée du 24 août 1961[1] par laquelle cette dernière décidait que les paiements à l'appelant faits par Frontenac Shoe Ltée, dont celui-ci était le président et gérant général, pour les années 1952, 1953, 1954, 1955 et 1956 aux montants de $10,730.53, $10,210.05, $7,355.90, $7,686.82 et $8,611.61 respectivement, cotisés comme revenu par l'intimé, étaient en effet du revenu imposable entre ses mains, et où des montants payés à l'appelant par Frontenac Shoe Ltée à raison de $15 par semaine

[1] 28 Tax A.B.C. 21.

pour couvrir en partie des débours qu'il a faits pour cette compagnie et qui se totalisent pour chacune des années 1955 et 1956 à $780 ne sont pas imputables au revenu et, par conséquent, non imposables.

J'ai eu l'occasion d'étudier cette question des paiements faits à l'appelant par Frontenac Shoe Ltée, mais au point de vue de cette dernière seulement, dans une décision que j'ai rendue ce jour dans la cause portant le numéro A-428 des dossiers de la Cour de l'Échiquier et dans laquelle une partie de ces paiements fut acceptée comme dépenses d'opérations de cette compagnie. J'ai en effet décidé dans cette cause que le vendeur Frontenac de l'appelant, pour lequel il possédait un droit d'auteur, avait une certaine valeur et ayant remplacé jusqu'à un certain point les agents-vendeurs que Frontenac Shoe Ltée employait auparavant, celle-ci pouvait déduire de son revenu annuellement un montant correspondant à la valeur réelle de ce catalogue-vendeur. Ceci cependant ne règle pas la question de savoir ici si ces paiements reçus par l'appelant sont imputables à son revenu ou seraient, tel que le prétend l'appelant, des acomptes sur le prix de vente de son droit d'auteur dans son vendeur Frontenac et représenteraient le prix d'un bien capital qui ne serait pas imposable.

En effet, il fut souvent décidé que le fait que celui qui effectuait des paiements les ait considérés comme des dépenses de capital ou des dépenses de revenu ne voulait pas nécessairement dire que pour celui que les reçoit il s'agisse de revenu à compte de capital ou à compte de revenu. Dans une cause de *Ross v. M.N.R.*[1] le juge Cameron disait:

> The learned judge correctly points out that the fact that the payor may have considered its payments as capital expenditures does not affect the issue in so far as the recipient was concerned.

Et dans la cause de *Anglo-Persian Oil*[2] il fut décidé:

> (ii) that the fact that the payor may have considered its payments as capital expenditures does not by itself mean that they were capital receipts in the receiver's hands.

Les faits relatifs à la vente des droits d'auteur de l'appelant dans son vendeur Frontenac sont suffisamment détaillés dans la décision rendue ce même jour à laquelle j'ai référé plus haut, qui s'appliquent *mutatis mutandis* à la présente cause, et il me suffira de rappeler ici que l'appelant est le

[1] [1950] C.T.C. 170. [2] 16 T.C. 529.

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président et gérant général et principal actionnaire de Frontenac Shoe Ltée, et que les droits d'auteur dans son vendeur Frontenac qu'il vendit à sa compagnie était intimement reliés à son seul travail et occupation, soit la fabrication et la vente de chaussures et de souliers de travail. Il me faut aussi noter que l'appelant, actionnaire majoritaire dans Frontenac Shoe Ltée, a vendu ses droits d'auteur dans son vendeur Frontenac à cette dernière d'abord pour $1,500,000, montant qu'il a ensuite réduit à $200,000 payable hebdomadairement ou mensuellement sur une base de 3½ pour cent des ventes directes faites par l'acheteur.

L'on a vu en effet que Frontenac Shoe Ltée n'avait pas acheté le droit d'auteur de l'appelant dans le vendeur Frontenac dans le but d'exploiter ce droit d'auteur en le vendant à d'autres. Elle ne l'a en effet acheté que pour utiliser le système de vente par catalogue, que contenait le droit d'auteur de l'appelant et qui a, comme nous l'avons vu, remplacé partiellement ses agents-vendeurs ou ses jobbers. Dans les circonstances, l'on peut maintenant se demander si les montants reçus par l'appelant à l'occasion de cette vente sont imputables à son revenu ou si, tel qu'il le prétend, il s'agirait d'acomptes sur le prix de vente de son droit d'auteur dans son vendeur Frontenac et représenteraient par conséquent le prix d'un bien capital qui ne serait pas imposable.

Cette question de vente de droits afférents à un droit d'auteur a fait l'objet de nombreuses décisions en Angleterre. Il me paraît cependant extrêmement difficile d'en extraire quelques principes de base sauf que dans chaque cas toutes les circonstances doivent être prises en considération, ce qui ne nous aide guère.

Dans le présent cas, le fait qu'il s'agisse pour l'appelant de son premier effort littéraire sur un sujet faisant l'objet d'un droit d'auteur et qu'il n'exerce pas la profession ou la vocation d'écrivain est un élément qui tendrait à indiquer que les montants provenant de sa vente sont des paiements acomptes de capital, par conséquent, non imposables. Dans *Beare v. Carter*[1] et *Withers v. Nethersole*[2] il en fut ainsi décidé, bien que dans *Hobbs v. Hussey*[3] où, bien qu'il s'agissait d'un premier effort littéraire, l'on a quand même décidé que la véritable nature de la transaction était de rendre des services et par conséquent que les montants reçus étaient

[1] 23 T.C. 353.
[2] [1948] 1 All E.R. 400.
[3] 24 T.C. 153.

imposables, la vente du droit d'auteur n'étant que subsidiaire à cette fonction. Il faut ajouter, cependant, que dans le cas précité le contribuable ne s'était pas départi entièrement de son œuvre littéraire.

Dans une cause de *Housden v. Marshall*[1] l'on décida que:

> But where copyright is actually created and the taxpayer is not carrying on the profession or vocation of a novelist or dramatist, a survey of the decisions of the courts points unmistakably to the desirability of giving very careful thought to tax implications of the proposed transaction before any agreement for turning copyright to account is entered into . . .

Il y va de même aussi du fait que par ladite vente l'appelant se soit départi complètement de sa propriété (cf. *Desoutter Bros., Ltd. v. J. E. Hanger & Co., Ltd.*[2]). En effet, dans la cause de *Beare v. Carter* (*supra*) le juge Macnaghten dit à la page 356:

> That the copyright is property and that a price paid for an out-and-out purchase of copyright is capital are propositions which are not disputed by the Crown. On the other hand royalties are income, and that is not disputed by the respondent.
>
> The line to be drawn between the payments which are capital and those which are income is by no means clear and distinct; and even if it were clear and distinct there would still be border-line cases. The question in every case is a question of fact depending upon the circumstances of the particular case under consideration.

D'autre part, dans la présente cause, bien que le prix total de la vente ait été fixé, comme nous l'avons vu, arbitrairement et sans trop de relation avec sa valeur réelle, les paiements hebdomadaires ou mensuels sont basés sur un pourcentage des ventes directes de l'acheteur, c'est-à-dire proportionnellement à l'utilisation que fait l'acheteur du catalogue-vendeur de l'appelant.

Dans une cause de *Jones v. C.I.R.*[3] le juge Rowlatt disait:

> The property was sold for a certain sum and in addition the vendor took an annual sum which was dependent upon the volume of business done, that is to say, he took something which rose or fell with the chances of the business. It is in the nature of income.

Il appert que les montants perçus par l'appelant ici dépendent des aléas des ventes de Frontenac Shoe Ltée et, par conséquent, si l'on s'en tient à la décision précitée, même s'il s'agissait pour l'appelant de la vente d'un bien capital, cela serait du revenu entre ses mains et, par conséquent, imposable.

[1] [1958] 19 T.R. 337. [2] [1936] All E.R. 535.
[3] [1920] 1 K.B. 714.

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L'on pourrait également tout aussi bien considérer que la vente du droit d'auteur dans le présent cas n'aurait été que subsidiaire à la véritable fonction qu'il a jouée, soit celui de rendre des services, si l'on s'en remet au fait que l'objet de son droit d'auteur était intimement relié à son travail de gérant général d'une manufacture de chaussures et de souliers de travail et il y aurait là, je crois, une raison additionnelle pour décider que les montants qu'il a perçus de sa compagnie sont du revenu imposable.

Cependant, je crois qu'il y a plus. En effet «les montants reçus dans l'année par un contribuable subordonnément à l'usage de biens ou à la production en découlant qu'il s'agisse ou non de versements relatifs au prix de vente des biens», doivent être inclus dans le calcul de ses revenus, tel que le veut l'article 6(1)*j*) de la Loi.

Cet article est très large dans son application et bien que les décisions à ce sujet soient assez rares, la Cour Suprême dans *Wain-Town Gas & Oil Company Ltd. v. M.N.R.*[1] l'a appliqué aux faits suivants: une compagnie d'utilité publique vendit la franchise qu'elle possédait de fournir du gaz naturel à une municipalité. Le prix de vente comportait un pourcentage des ventes brutes de gaz. La Cour de l'Échiquier, ([1951] Ex. C.R. 1; 50 D.T.C. 856) décida que les montants ainsi perçus dépendaient de la production ou de l'usage du gaz qui n'était pas la propriété vendue et que, par conséquent, les montants ainsi perçus n'étaient pas du revenu. Cette décision, cependant, fut renversée par la Cour Suprême (*supra*) qui décida que les paiements ne dépendaient pas de la production du gaz naturel mais bien de l'utilisation de la franchise vendue et étaient, par conséquent, imposables.

Il me paraît clair que le même raisonnement doit s'appliquer à la présente instance, les paiements faits à l'appelant dépendant en effet de l'utilisation de l'objet du droit d'auteur de l'appelant seulement, soit son vendeur Frontenac, il faut en conclure que le véritable objet de cette transaction c'est l'utilisation de ce vendeur.

Enfin, ces paiements seraient également imposables pour les raisons données par la Commission d'appel de l'impôt, soit que ne s'agissant pas d'une opération commerciale authentique suivant l'article 8(1)*a*) de la Loi, ces montants

[1] [1952] S.C.R. 377.

doivent être inclus dans le calcul du revenu de l'appelant pour chaque année.

Nous avons en effet vu que l'appelant a vendu son droit d'auteur dans son vendeur Frontenac pour un prix qu'il ne pouvait justifier, lequel a été subséquemment réduit de $1,500,000 à $200,000, réduction d'ailleurs qui fut opérée dans le seul but d'éviter que la succession de l'appelant ne paye des droits successoraux trop élevés et il n'est pas en preuve non plus que ce montant de $200,000 représente la valeur réelle du vendeur Frontenac de l'appelant. Cette vente de plus a été faite par l'appelant à Frontenac Shoe Ltée, dont il était l'actionnaire majoritaire, et à cause de cela elle ne pouvait, sous l'article 8(1)*a*) de la Loi être considérée comme une opération commerciale authentique.

Il me faut donc conclure que pour cette raison additionnelle les montants reçus par l'appelant de la vente de son vendeur Frontenac sont imposables.

Il me reste à examiner la question de savoir si des montants payés à l'appelant par Frontenac Shoe Ltée, dont il était le président et gérant général, à raison de $15 par semaine, pour couvrir, dit-il, en partie des débours qu'il avait faits pour cette compagnie et qui se totalisent pour chacune des années 1955 et 1956 à $780, seraient imposables ou non.

C'est à la page 33 des notes sténographiques que l'appelant nous parle de ces montants:

(Me Antonio Laplante procureur de l'appelant)

D. Maintenant, pour les années 1955 et 1956, pour Henri Gingras personnellement, il y a un montant de $780 00 qui est refusé et que vous auriez reçu dans chacune de ces deux années. Voulez-vous expliquer la source de ces montants de $780 00?

R. $780 00, c'est le montant que j'ai reçu de Frontenac Shoe par année et ça représente quinze dollars par semaine. Ca c'était alloué par la compagnie pour les dépenses qui étaient occasionnées pour rencontrer les acheteurs, payer les taxis, payer des fois des repas, faire des voyages à Montréal, et qui n'ont jamais été chargées dans la compagnie Il n'y avait aucune entrée qui était faite pour les voyages que j'ai faits à Montréal. En 1955, si j'ai fait quatre voyages, ça toujours été payé à même le quinze dollars par semaine qu'elle me donnait. C'était pour me rembourser, pour les connections que j'avais avec les acheteurs.

D. Il s'agissait de dépenses de promotion?

R. Oui.

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Et à la page 34:

> D. . . . Avez-vous tenu compte des petits montants?
>
> R. Je peux avoir dépensé plus que les quinze dollars bien des fois, et je n'étais pas regardant, je laissais faire.
>
> D. Le quinze dollars a été passé d'une façon générale, ç'a été rapporté comme ça; quinze dollars par semaine?
>
> R. Oui; des semaines j'en manquais et je ne m'en occupais pas. C'est comme ce matin, ce n'est pas plaçable en machine, et j'ai monté en taxi et je vais descendre en taxi, et la compagnie n'a jamais payé un taxi pour personne.

L'appelant jure que ces montants représentent assez fidèlement ce que cela lui a coûté.

Je dois ici endosser sans hésitation la décision de la Commission d'appel le l'impôt à ce sujet. En effet, dans les circonstances, et compte tenu du chiffre d'affaires de la compagnie Frontenac Shoe Ltée, pour chacune des années 1955 et 1956, le témoignage de l'appelant non contredit doit être à mon avis accepté quant à ces montants de $15 par semaine qui, incidemment, m'apparaissent comme étant bien raisonnables. L'appelant a, en effet, établi qu'il tombe dans l'exception prévue à l'article 5(*b*)v) de la Loi qui se lit comme suit:

> 5. Le revenu provenant, pour une année d'imposition, d'une charge ou d'un emploi est le traitement, salaire et autre rémunération, y compris les gratifications, que le contribuable a touchés dans l'année, plus
>
> * * *
>
> (*b*) tous montants qu'il a reçus dans l'année à titre d'allocation pour frais personnels ou de subsistance ou à titre d'allocation pour toutes autres fins sauf
>
> * * *
>
> v) les allocations raisonnables pour frais de voyage reçues de son employeur par un employé en ce qui concerne une période de temps pendant laquelle il était employé relativement à la vente de biens ou à la négociation de contrats pour son employeur.

Il me faut donc conclure que les paiements faits à l'appelant par Frontenac Shoe Ltée pour les années 1952, 1953, 1954, 1955 et 1956 aux montants de $10,730.53, $10,210.05, $7,355.90, $7,686.82 et $8,611.61 respectivement sont des revenus imposables et que les montants de $780 pour chacune des années 1955 et 1956 ne le sont pas. Le présent appel est donc maintenu en partie, le tout, cependant sans dépens étant donné que l'appelant n'était pas représenté par procureur à l'audition et n'a fait que présenter à peu de choses près les mêmes motifs qu'il soulevait devant la Commission d'appel de l'impôt.

Jugement conforme.

ENTRE:

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LA COMPAGNIE DE PUBLICATION LA PRESSE, LIMITÉE .. } REQUÉRANTE;

ET

LE PROCUREUR GÉNÉRAL DU CANADA .... } INTIMÉ.

Couronne—Pétition de droit—Station de radiodiffusion—Licence d'exploitation—Tarif des droits de licence—Arrêté en conseil réglementant tel tarif—Loi sur la Radio S.R.C. 1952, ch. 233, arts. 3(1)(a), 4(1)(c) et (d)—Action attaquant validité d'un arrêté en conseil—Gouverneur en conseil—Ministre des Transports—Répartition des pouvoirs de ceux-ci—Autorité du Parlement—Rétroactivité d'une réglementation—Droits acquis—Action accueillie.

En plus de publier à Montréal le journal «La Presse», la pétitionnaire y exploite une station commerciale de radiodiffusion connue sous les lettres CKAC. En conformité avec la réglementation alors en vigueur elle payait, le 15 mars 1960, au Ministère des Transports, à Ottawa, le prix, $6,000, du permis réglementaire, pour la période du 1 avril 1960, au 31 mars 1961. Le 28 octobre 1960, un arrêté en conseil (1960-1488) amendait le tarif des droits exigibles pour tels permis, tarif fixé par un arrêté en conseil en date du 25 janvier 1958 sous l'empire de la *Loi sur la radio*, 1952, S.R.C., ch. 233, arts. 3(1)(*a*), 4(1)(*c*) et (*d*). Ce nouvel arrêté en conseil édicte en partie ce qui suit:

5. (1) Au présent article, l'expression

a) «recettes brutes», relativement au titulaire d'une licence, désigne les recettes brutes provenant de l'exploitation de la station, déduction faite des commissions des agences; et

b) «Année de licence», appliquée à une station commerciale privée de radiodiffusion, désigne une période de douze mois commençant le 1er avril et se terminant le 31 mars suivant, pendant laquelle la licence délivrée pour cette station est en vigueur;

(2) Sous réserve des dispositions du présent article, la taxe de licence afférente à une station commerciale privée de radiodiffusion pour chaque année de licence est exigible au début de l'année de licence ou antérieurement.

(3) Sous réserve des dispositions du présent article, la taxe de licence afférente à une station commerciale privée de radiodiffusion pour chaque année de licence aura pour base les recettes brutes du titulaire pour l'année financière terminée le ou avant le 31 décembre qui précède immédiatement le début de l'année de licence . . .

(5) Si la taxe de licence afférente à une station commerciale privée existante de radiodiffusion pour l'année de licence 1960-1961, calculée suivant les indications du paragraphe (3), excède la taxe qui était exigible conformément au tableau des taxes de licence en vigueur le 31 mars 1960, alors la taxe de licence pour l'année de licence 1960-1961 est égale à la moitié de la somme

a) de la taxe de licence qui était exigible conformément audit tableau des taxes de licence en vigueur le 31 mars 1960, et

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b) du montant calculé suivant les indications du paragraphe (3).

Comme résultat de cet amendement, une demande d'un *paiement supplémentaire,* au montant de $5,452 30, fut faite à la pétitionnaire, le 6 janvier 1961, pour la période susdite, et payé par celle-ci, sous protêt, le 10 mars 1961. Procédant par voie de Pétition de droit la pétitionnaire attaque la validité de l'arrêté en conseil du 28 octobre 1960, pour les motifs qu'il· 1) ne prescrit pas des droits de licence, mais impose une taxe sans autorité du Parlement; 2) établit des distinctions injustes entre la pétitionnaire et les autres stations commerciales privées de radiodiffusion, d'une part, et, d'autre part, entre celles-ci, la société Radio-Canada et autres catégories d'exploitants de stations de radiodiffusion; et 3) affecte les droits de la pétitionnaire et autres qui y sont sujettes, d'une façon rétroactive et non autorisée par la loi susdite; le tout accompagné d'une demande subsidiaire de remboursement de la somme ainsi payée sous protêt.

Jugé: Pour distinguer une licence d'avec une taxe il faut s'enquérir si le prix exigé par l'État pour le privilège d'exploiter une entreprise n'excède pas et a pour objet seulement de rencontrer le coût actuel de la licence ainsi que de la surveillance et du contrôle de cette entreprise, auquel cas il s'agirait d'une licence et non d'une taxe. Dans le cas contraire, ce serait l'inverse. Si donc les montants perçus ici par le Ministère des Transports ne dépassaient pas *considérablement* les déboursés requis à la police et à la surveillance des ondes radiophoniques, il n'y aurait pas dans cet excédent le trait distinctif d'une taxe (Cf. *Shannon v. Lower Mainland Dairy Products Board,* 1938, A.C. pp 708-721). Ici, sur les faits mis en preuve à ce sujet et compte tenu du peu d'importance de la radio-téléphonie en 1922 et, par contre, de son rayonnement continental en 1960, la comparaison du coût du permis d'alors avec celui exigé trente-huit ans après n'est pas exorbitante L'intimé n'a donc pas autrement excédé le pouvoir que lui confère l'art. 3 de la *Loi sur la radio* par la majoration des prix des licences

2. La réglementation attaquée n'atteint et ne pouvait atteindre que les stations commerciales privées, du genre CKAC, les seules qui fassent des affaires et touchent des revenus, les autres servant à des objectifs non lucratifs, d'intérêt public ou individuel. Aucune identité de classe n'existe ici Quant à la société Radio-Canada qui émarge aux fonds publics et dont le paiement par elle de droits de licences ne serait qu'une entrée comptable aux livres et non un paiement en espèces, elle est une création du gouvernement qui assume licitement les obligations inhérentes à cette création. Pas d'exemption ici mais simple accomplissement d'une obligation.

3. La rétroactivité d'une mesure fiscale ou autre si décrétée par une loi du Parlement du Canada doit recevoir sa pleine application. Ici, toutefois, il s'agit de l'exercice d'une autorité déléguée par la *Loi sur la radio* qui répartit de façon spécifique l'attribution des pouvoirs entre, d'une part, le Gouverneur en conseil et, d'autre part, le Ministre des Transports. Au surplus, une autorité déléguée n'est susceptible d'aucune extension L'arrêté en conseil du 28 octobre 1960, au paragraphe 5(*a*) et (*b*) de l'art 5, est entaché de nullité moins à cause de sa rétroactivité, que, parce qu'il entend statuer en une matière sur laquelle le Gouverneur en conseil n'a pas autorité, mais le Ministre des Transports seulement La majoration des tarifs en cours d'année comportait forcément comme l'une des sanctions le retrait des licences, ce qui équivaut à modifier «les périodes pendant lesquelles elles restent en vigueur». Ce

paragraphe de l'art. 5 de l'arrêté en conseil est donc irrégulier, invalide, *ultra vires* et sans effet.

PÉTITION DE DROIT concluant à l'invalidité d'un arrêté ministériel adopté sous l'empire de la *Loi sur la radio,* 1952, S.R.C. ch. 233.

L'action fut instruite par l'Honorable Juge Dumoulin à Ottawa.

Taschereau Fortier, c.r. et *Guy Favreau, c.r.* pour la pétitionnaire.

Rodrigue Bédard, c.r. et *Jean Filion, c.r.* pour l'intimé.

Les faits et questions de droit sont exposés dans les motivés que rend maintenant (12 novembre 1963) monsieur le JUGE DUMOULIN:

La requérante, qui publie à Montréal le journal La Presse, exploite en outre une station commerciale privée de radiodiffusion avec, comme sigle d'appel, les lettres C K A C. La puissance émettrice de ce poste atteint 50,000 watts sur la fréquence de 750 kilocycles.

Par cette pétition de droit, paragraphe 2, la requérante expose que:

2 Le, ou vers le, 15 mars 1960, elle a transmis à F. G. Nixon, directeur des Télécommunications et de l'Électronique du Ministère des Transports, à Ottawa, un chèque au montant de $6,000 à l'ordre du Receveur général du Canada, en paiement de la taxe de licence afférente à CKAC pour la période du 1er avril 1960, au 30 mars 1961, et exigible en vertu du Règlement général sur la radio, Partie I, édicté sous l'empire de la Loi sur la radio, et tel qu'alors en vigueur; un exemplaire dudit Règlement est produit au soutien des présentes sous la cote R-1;

Il est indispensable de joindre au paragraphe ci-dessus, les dispositions essentielles de l'article 3 de la pétition, d'où le litige actuel procède;

3. Le 28 octobre 1960, l'arrêté ministériel P C. 1960-1488, (plus exactement l'arrêté en conseil) a décrété l'abrogation de l'article 5 du susdit règlement général sur la radio, Partie I, et lui a substitué les dispositions suivantes:

5. (1) Au présent article, l'expression

a) «recettes brutes», relativement au titulaire d'une licence, désigne les recettes brutes provenant de l'exploitation de la station, déduction faite des commissions des agences; et

b) «Année de licence», appliquée à une station commerciale privée de radiodiffusion, désigne une période de douze mois commençant le

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Dumoulin J.

1[er] avril et se terminant le 31 mars suivant, pendant laquelle la licence délivrée pour cette station est en vigueur;

(2) Sous réserve des dispositions du présent article, la taxe de licence afférente à une station commerciale privée de radiodiffusion pour chaque année de licence est exigible au début de l'année de licence ou antérieurement;

(3) Sous réserve des dispositions du présent article, la taxe de licence afférente à une station commerciale privée de radiodiffusion pour chaque année de licence aura pour base les recettes brutes du titulaire pour l'année financière terminée le ou avant le 31 décembre qui précède immédiatement le début de l'année de licence . . .

Les sous-alinéas (*a*) et (*b*) et le paragraphe 4 spécifient les barèmes de la nouvelle tarification, puis l'article suivant, d'une particulière importance ici, édicte que:

(5) Si la taxe de licence afférente à une station commerciale privée existante de radiodiffusion pour l'année de licence 1960-1961, calculée suivant les indications du paragraphe (3), excède la taxe qui était exigible conformément au tableau des taxes de licence en vigueur le 31 mars 1960, alors la taxe de licence pour l'année de licence 1960-1961 est égale à la moitié de la somme

(*a*) de la taxe de licence qui était exigible conformément audit tableau des taxes de licence en vigueur le 31 mars 1960, et

(*b*) du montant calculé suivant les indications du paragraphe (3).

La conséquence de cette échelle amendée des taux du permis d'exploitation se concrétisa en une demande d'un paiement supplémentaire de $5,452.30, faite à la requérante dans une lettre de F. G. Nixon, directeur des Télécommunications et de l'Électronique, datée le 6 janvier 1961. (pièce 7).

Ce versement résiduaire de $5,452.30, qui haussait le coût de la licence alors en vigueur à un total de $11,452.30, fut acquitté le 10 mars 1961, par un chèque visé au montant requis à l'ordre du Receveur général du Canada, après que la requérante, le 10 février 1960, eut notifié dans une lettre à F. G. Nixon son refus motivé de payer ce supplément (voir les pièces 9 et 12). Ce chèque, pièce 9, porte au dos la mention: «Sous protêt; différence du montant réclamé; Re: Taxe de licence de la station commerciale privée de radiodiffusion.»

Les conclusions prises par la pétitionnaire sont que l'arrêté ministériel C.P. 1960-1488 du 28 octobre 1960, soit déclaré nul, invalide et *ultra vires* parce qu'il constituerait la phase ultime de la transformation d'un permis d'exploiter ou licence en une véritable taxe, usurpant ainsi l'autorité du Parlement; parce qu'il imposerait des charges financières plus onéreuses à la requérante qu'à certaines autres stations commerciales privées; pour cette autre raison encore que l'arrêté 1488 affecterait de façon rétroactive les droits acquis du poste CKAC. Enfin, advenant l'admissibilité de ces conclusions ou de l'une d'elles, le remboursement de la somme de $5,452.30 est postulé.

Ces motifs de plainte, qui font le nœud du débat, ont été résumés avec une lucide concision dans un mémoire du procureur de la compagnie. Il me paraît opportun de les reproduire au texte (voir aux pages 2 et 3).

1°—Le nouvel article 5 du Règlement général sur la radio ne prescrit pas *des droits de licence*, mais, en fait et en droit, *impose une taxe*, sans autorité du Parlement;

2°—Si le genre de prélèvement décrété par ce nouvel article était de la juridiction du gouverneur en conseil, ledit article 5, tel qu'édicté par l'arrêté en conseil 1960-1488, est nul, illégal et *ultra vires* parce qu'établissant des distinctions injustes (discriminatoires) entre votre requérante et les autres stations commerciales privées de radiodiffusion, comme, aussi, entre le groupe des stations commerciales privées de radiodiffusion, La Société Radio-Canada et toutes les autres catégories d'exploitants de stations de radiodiffusion;

3°—De toute façon, le nouvel article 5 du Règlement, tel qu'ainsi édicté par l'ordre en conseil 1960-1488, est nul, illégal et *ultra vires*, parce qu'affectant les droits de votre requérante et des autres personnes qui s'y trouvent sujettes, d'une façon rétroactive et non autorisée par la loi habilitante.

L'intimé repousse toutes ces allégations dans sa défense et aussi dans des Notes et Autorités très soigneusement préparées et qui font partie du dossier dans cette cause.

L'ordre des propositions contradictoires ainsi établi me trace la voie à suivre dans la recherche des solutions requises.

Le 15 mars 1960, la pétitionnaire acquittait le prix, $6,000, du permis réglementaire qui autorisait le fonctionnement, pour fins commerciales, de son poste de radiodiffusion durant la période, régulièrement fixée, s'étendant du 1er avril 1960, au 31 mars 1961. Nous avons vu que, le 28 octobre 1960, l'arrêté en conseil, numéro 1488, amendait le tarif des droits à payer pour les licences naguère établi par un précédent arrêté en conseil, numéro 146, daté le 25 janvier 1958 et qui fait partie de la pièce 5.

La reproduction littérale de la cédule des taux prescrits par l'ordonnance 146, ne faciliterait nullement l'élucidation du problème. Il suffira de citer avec approbation le commentaire du savant procureur de l'intimé au sujet des arrêtés

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en conseil, numéros 146 et 1488. A la page 2 de ses notes, M^e Bédard écrit que:

> Sous l'ancienne réglementation les droits de licence étaient fixés d'autorité dans un tableau qui montrait, en regard d'un certain chiffre de revenus bruts, la somme à payer. Avec la nouvelle méthode, les droits de licence sont essentiellement variables et se calculent, dans chaque cas, comme un pourcentage des revenus bruts. Les deux réglementations ont ceci de commun que l'assiette de l'imposition est la même, soit les revenus bruts de la station.

Il semble exact de tenir, avec le rédacteur du mémoire précité (page 2), que:

> l'effet de la modification du 28 octobre 1960, fut de changer la méthode de calcul des droits afférents à chaque licence individuelle.

Simple constatation de fait qui ne nous dispense pas d'établir l'identité juridique de cette méthode, selon les uns, une taxe, selon les autres un permis ou licence d'exploitation majoré.

Sur ce premier point, voici comme la requérante pose la question à la page 2 de ses notes:

> 1. Le nouvel article 5 du Règlement général sur la radio ne prescrit pas des *droits de licences,* mais, en fait et en droit, *impose une taxe,* sans autorité du Parlement.

Et d'abord, que dit la loi chargée de réglementer ce secteur important de l'activité commercials? Il s'agit de la *Loi sur la radio,* Statuts Refondus du Canada, 1952, chapitre 233, aux articles 3(1)(*a*) et (4)(1), alinéas (*c*) et (*d*):

> (3) (1) Le Gouverneur en conseil peut:
>
> *a*) prescrire le tarif des droits à payer pour les licences et pour l'examen relatif aux certificats de capacité détenus et émis en vertu de la présente loi;
>
> (4) Le Ministre peut établir des règlements (*c*) définissant les différentes sortes de licences qui peuvent être émises, leurs formes respectives et les diverses périodes pendant lesquelles elles restent en vigueur;
>
> *d*) prescrivant les conditions et restrictions auxquelles sont respectivement soumises les diverses licences;

Je noterai, en premier lieu, la répartition des tâches que le Parlement a décrétées, attribuant au gouverneur en conseil la fixation du tarif des droits de licence, et au ministre des Transports, la forme, les périodes de validité ou de durée de ces permis, ainsi que toutes autres conditions et restrictions jugées nécessaires par le ministre. Dans la détermination de ces tarifs pour permis d'exploitation, le gouverneur en conseil semble disposer d'une latitude complète, à l'égard des taux et de l'assiette même de cette tarification, et l'on peut en dire autant de l'autorité impartie au ministre dans les matières de sa compétence. Pareillement, il ne serait pas loisible à l'un ou à l'autre, gouverneur en conseil ou ministre, de réglementer au-delà de ce que la législature fédérale a explicitement assigné à chacun. La *Loi sur la radio* est l'un des nombreux cas d'une délégation de pouvoirs qui doit s'exercer dans les limites strictes du statut délégateur. L'intimé en convient et reconnaît volontiers «. . . que la *Loi sur la radio* n'autorise pas le gouverneur en conseil à prélever une taxe sur les stations de radiodiffusion et qu'en l'absence d'autorisation précise du Parlement, le gouvernement ne peut imposer une taxe par arrêté en conseil,» (Notes et Autorités de l'Intimé, page 4).

Il n'est pas sans intérêt de confronter les critères auxquels les parties ont recours pour différencier une licence d'avec une taxe.

Pour la requérante, «une licence constituerait»: (Page 5 du mémoire)

la permission accordée par l'État d'exercer une activité donnée, ou encore de posséder une chose déterminée, permission accordée sujet à ce que le bénéficiaire se conforme à certaines conditions exigées par l'intérêt public, et, en certains cas, acquitte des droits.

Et une taxe, d'autre part, serait:

le prélèvement de deniers par l'État aux fins de rencontrer les dépenses de tous les services publics ou de certains services publics, prélèvement effectué à l'occasion de l'accomplissement de certaines transactions (v g. ventes de propriétés quelconques), de l'exercice d'une activité donnée (v.g impôt sur le revenu), ou de l'exercice du droit de propriété (taxe foncière).

Selon l'intimé «. . . on pourrait peut-être dire que la licence présente les caractères suivants: (1) elle est un moyen de réglementer un commerce, une industrie ou une occupation; (2) elle est une permission donnée par l'autorité compétente à certains de faire quelque chose; (3) cette permission est pour ceux qui l'obtiennent un privilège; (4) il est illégal pour ceux qui n'ont pas la licence de faire la chose qui est permise aux privilégiés; (5) cette illégalité vient de la loi qui établit la licence et non de la nature de la chose prohibée;» (Notes, p. 7).

Tout ceci paraît fort juste et ne s'écarte pas du sentiment de la doctrine citée dans les deux mémoires; j'en rapporterai quelques passages: Black's Law Dictionary, fourth edition,

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1951, pp. 1628, 1629 dit ceci, entre autres choses, au vocable «Tax»:

> Tax ... An enforced contribution of money or other property, assessed in accordance with some reasonable rule or apportionment by authority of a sovereign state on persons or property within its jurisdiction for the purposes of defraying the public expenses.
>
> In a general sense, any contribution imposed by government upon individuals, for the use and service of the state.
>
> Taxes, as the term is generally used, are public burdens imposed generally upon the inhabitants of the whole state, or upon some civil division thereof, for governmental purposes, without reference to peculiar benefits to particular individuals or property.

Au mot «License», nous lisons que: (Black's Law Dictionary, fourth edition, 1951, pp. 1067, 1068.)

> License: Permission by a competent authority to do some act which without such authorization would be illegal, or would be a trespass or a tort.
>
> A permit or privilege to do what otherwise would be unlawful.
>
> A license is a permission to do something which without such permission would have been unauthorized or prohibited.

Le Corpus Juris Sub-verbo, «Taxation», sous-titre «Licenses», p. 169, n° 7 suggère une analyse assez simpliste pour distinguer une licence d'avec une taxe, je cite:

> No. 7. Amount and use of funds as determinating factors:
>
> The amount imposed for the privilege of carrying on a certain business is often an important factor in determining whether it is a license fee proper or a tax for revenue purposes. If the amount exacted does not exceed, and is intended to cover the actual expense of issuing the license and inspecting and controlling the occupation or business, it is a license fee proper and not a tax, *although the mere fact that the fee demanded is in excess of such expenses and therefore incidentally produces revenue is not sufficient to make a tax where the object of the imposition is not to raise revenue, but to regulate or control the particular business.* (Le soulignement est ajouté). When, however, the amount exacted is greatly in excess of the probable amount necessary to issue licenses and inspect and regulate the business, it is generally regarded as a tax for revenue and not a license tax.

Si donc les montants perçus par l'État ne dépassaient pas considérablement (greatly) les déboursés requis à la police et à la surveillance des ondes radiophoniques, la leçon ci-dessus ne verrait pas dans cet excédent de revenus le trait distinctif d'une taxe.

Tel était l'avis de Lord Atkin dans la cause *Shannon v. Lower Mainland Dairy Products Board*[1]:

> A licence fee, though usual, does not appear to be essential. But if licences are granted, it appears to be no objection that fees should be

[1] [1938] A.C. 708-721.

> charged in order either to defray the costs of administering local regulations or to increase the general funds of the Province, or for both purposes . . . It cannot . . . be an objection to a licence plus a fee that it is directed both to the regulation of trade and to the provision of revenue.

A ce stade, il convient de référer à quelques-uns des témoignages rendus en cette affaire:

Monsieur Ronald Fraser, depuis 1958 Vice-président de Radio-Canada, assigné comme témoin de la pétitionnaire, rapporte substantiellement ceci:

> Canadian Broadcasting Corporation operates both Radio and Television stations in Canada. We operate 18 television stations and 30 radio stations owned entirely by C B C. Our organization also has affiliated stations, 44 basic and 48 supplementary, re-broadcasting C.B C. programs. These basic re-broadcasting stations must carry at least 37 hours per week of C.B.C. programs. Gross commercial revenues of C B.C. that is both television and radio would be in the order of $33,000,000 from television and $2,000,000 from radio. A television station would possibly cost ten times more to operate than a radio station.

Un autre témoin, Monsieur Raymond Lewis, directeur du service de la statistique à Radio-Canada, nous apprend que:

> Les postes émetteurs de Radio-Canada peuvent atteindre les quatre cinquièmes de la population, (79%), et, avec l'aide de ses stations affiliées, en rejoint les neuf dixièmes (90%).

Un recoupement de l'horaire des émissions radiophoniques pour la semaine du 22 au 28 janvier 1961, démontre une programmation diffusée durant 361 heures, en provenance des postes de base (basic stations), augmentée de 118 heures sur les réseaux français. La semaine dont il s'agit permettrait d'apprécier la programmation normale de Radio-Canada.

Au chapitre du coût de l'administration du seul Bureau des Gouverneurs, l'aviseur légal, M. William Pearson, fournit quelques renseignements, visant une période de trois ans, alors que les dépenses pour l'année fiscale 1958-59 passaient de $46,892.91 au chiffre de $218,651.94, en 1959-60, puis à celui de $311,515.34 en 1960-61.

Un ingénieur, M. Edward Caffie, du ministère des Transports, préposé au service de la prévention de l'interférence inductive (Inductive Interference), nous apprend que:

> This specialized service (i e. Inductive Interference prevention) is entrusted with the elimination of radio interference, basically all interferences caused by electrical apparatus There possibly are 500 different causes of intervention. Throughout Canada, in highly populated centers, there are 30 inspection stations to dispose of any sources of interference.

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Si, maintenant, l'on recherche ce que peut représenter en personnel, en outillage, en équipement, la surveillance des ondes sonores d'une extrémité à l'autre du pays, la pièce numéro 1 est assez révélatrice à cet effet. Nous constatons d'abord, un effectif de 181 inspecteurs, disposant de 69 véhicules qui, munis d'appareils détecteurs coûtent de $2,700 à $7,300 l'unité. Cette même feuille, non numérotée de la pièce 1, ajoute, et je cite au texte anglais:

30 TV receivers at $150 ....$	4,500
15 Field Strength meters at $20,000	300,000
19 Portable Direction Finders at $1,600	30,400
7 Frequency Measuring meters at $2,000	14,000

Une autre page, enfin, récapitule, pour une période de cinq ans, soit de 1956-1957, à 1960-1961, «The total cost of administration, control, supervision, assistance, protection, licencing, etc. of all the radio transmitting stations and units under the jurisdiction of the Department of Transport». Voici les chiffres consignés dans ce tableau:

1956–1957 ....$	1,683,185
1957–1958	2,061,772
1958–1959	2,235,236
1959–1960	2,403,875
1960–1961	2,731,534

A toutes ces fins, il semble manifeste que Radio-Canada requiert des revenus substantiels afin de subvenir à la bonne expédition de ses tâches multiples, revenus qui doivent s'accroître au rythme même de l'augmentation des nécessités de l'exploitation. L'article 3(1)(*a*) du chapitre 233 a prévu ces exigences inéluctables en déléguant au gouverneur en conseil, et cela sans restrictions, la faculté «de prescrire le tarif des droits à payer pour les licences . . .»

Compte tenu du peu d'importance de la radio-téléphonie en 1922, et, par contre, de son rayonnement continental en 1960, la comparaison d'une licence de $2.50 pour cette année liminaire, avec une imposition de $6,000 ou même de $11,452.30, trente-huit ans après, ne paraîtrait pas exorbitante si, par ailleurs, et telle est l'essentielle considération, elle offrait quelque valeur légale.

Quant à ce premier reproche d'avoir mué un simple permis de licence en taxe proprement dite, la Cour ne l'estime pas fondé. L'intimé, à une réserve près dont il sera fait état plus loin, n'a pas autrement excédé le pouvoir que lui confère l'article 3 précité de la *Loi sur la radio* par la majoration des droits de licences.

Deuxièmement, l'arrêté en conseil 1960-1488 est-il nul, illégal et *ultra vires,* parce qu'il serait arbitraire et différentiel, établissant des distinctions injustes entre la requérante et certaines autres catégories de stations commerciales privées de radiodiffusion?

C'est là le second grief formulé à l'encontre de l'arrêté en conseil du 28 octobre 1960.

Le mémoire de la compagnie requérante, à la page 18, synthétise en quelque sorte, par une référence à une décision britannique, les marques distinctives d'une discrimination injuste. Il s'agit de ce que le factum qualifie de cause type, celle de *Kruse v. Johnson*[1], alors que le juge en chef, Lord Russell, mentionnant les principaux motifs de nullité des règlements, disait:

> Notwithstanding what Cockburn C.J. said in *Bailey v. Williamson,* an analogous case, I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, *they were found to be partial and unequal in their operation as between different classes;* if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as would find no justification in the minds of reasonable men, the Court might well say *"Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires."* But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded.

En regard de ces normes, demandons-nous si l'arrêté en conseil 1960-1488 semblerait entaché de partialité, d'injustice, de mauvaise foi; favoriserait certaines classes d'exploitants au détriment de quelques autres; ou constituerait une immixtion abusive dans l'exercice normal de certains droits.

Retenons d'abord que la réglementation sous étude n'atteint et ne pouvait atteindre que les stations commerciales privées, du genre de CKAC, les seules qui fassent des affaires et touchent des revenus. Les stations côtières, mobiles, de bord, les stations de réception privée, organisées dans une maison, une chambre, un véhicule, un aéronef, servent à des objectifs non lucratifs, d'intérêt public ou individuel. Cela étant, il ne pourrait être question de répartir sur des profits inexistants l'assiette de tarification des permis; je le répète,

[1] [1898] 2 Q.B. 91.

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dans tous ces cas, il n'y a ni pratiques lucratives, ni activité commerciale. Autrement dit, aucune identité de classe n'existe en l'occurrence.

Il est vrai et même admis que Radio-Canada «ne paie absolument rien comme droit de licence et ne contribue en aucune façon à défrayer les dépenses du ministère des Transports qu'on voudrait faire payer par les stations privées (mémoire de la requérante, p. 14)». Cette dérogation au principe d'égalité de traitement serait, j'en conviens, un fait de gravité indéniable si elle était réelle et non pas apparente seulement.

A la page 14 de ses notes, le savant procureur de l'intimé explique de façon convaincante cette allégation, soumettant que:

> Pour ce qui est du reproche que Radio-Canada ne paie pas de droits de licence, il est conforme aux faits, mais il n'est certes pas un motif pour déclarer l'arrêté en conseil *ultra vires*. Il n'y a rien dans l'arrêté qui exempte Radio-Canada du paiement des droits prévus et on pourrait admettre—ce que l'intimé se garde de faire—que Radio-Canada est tenu de payer les même droits que les autres stations commerciales privées de radiodiffusion. On pourrait dire, par contre, que, organisme de la Couronne, Radio-Canada n'est pas tenu au paiement de ces droits. Ce sont là questions d'interprétation de la réglementation qui n'ont rien à faire avec la validité de l'arrêté en conseil. On observera que Radio-Canada émarge aux fonds publics et que le paiement par lui de droits de licence ne serait qu'une entrée comptable aux livres et non un paiement en espèces: il semble bien inutile de l'exiger.

Je retiens surtout cette dernière explication qui dispose de l'objection en faits et en droit. En faits, parce que la filiation de Radio État est aussi légitime que notoire; elle est une création du gouvernement qui, à ce titre, et voici pour le droit, assume licitement les obligations inhérentes à sa paternité; l'entretien de sa progéniture. Il n'y a pas exemption ici mais, redisons-le, simple accomplissement d'une obligation. A quoi servirait-il dans les circonstances, de prélever pour rendre aussitôt après?

La Cour ne croit pas ce second reproche mieux fondé que le premier.

Le troisième et dernier élément du problème soulève, nous l'avons vu précédemment, un doute sérieux quant à l'admissibilité de l'effet rétroactif de l'ordre en conseil 1960-1488.

Par le paiement d'une taxe de licence au montant de $6,000, le 15 mars 1960, le poste CKAC, La Presse, Montréal, obtenait du ministère fédéral des Transports un permis d'exploitation d'une station commerciale privée de radiodiffusion valable du 1er avril 1960 au 31 mars 1961. Or, le 28 octobre 1960, un arrêté en conseil vint abroger l'article 5 du Règlement général sur la radio, Partie I, édicté le 25 janvier 1958, aussi par ordre en conseil, 1958-146. On sait que cette nouvelle réglementation, survenant alors que le permis, dûment obtenu le 1er avril précédent, demeurait en vigueur pour quatre autres mois, prescrivait une tarification amendée, effective pour l'année courante. La conséquence indéniablement rétroactive de cette intervention se traduisit en un versement supplémentaire de $5,452.30, que la pétitionnaire effectua sous protêt le 10 mars 1961 (voir pièces 13 et 9) à F. G. Nixon, directeur des Télécommunications et de l'Électronique.

Si, en principe, la rétroactivité d'une mesure fiscale ou autre, est condamnable, il ne reste pas moins que, décrétée par une loi du Parlement du Canada ou d'une Législature provinciale, elle devra recevoir sa pleine application.

Présentement, toutefois, il ne s'agit pas d'une loi mais bien de l'exercice d'une autorité déléguée, par la loi sur la radio, chapitre 233 des statuts revisés de 1952, qui répartit de façon spécifique l'attribution des pouvoirs entre, d'une part, le gouverneur en conseil, c'est l'article 3, et, d'autre part, le Ministre des Transports, c'est l'article 4.

Il a été dit qu'il appartient au gouverneur en conseil de prescrire les droits à payer pour les licences [art. 3(1)(*a*)], et au ministre d'établir des règlements «définissant les différentes sortes de licences qui peuvent être émises, leurs formes respectives *et les diverses périodes pendant lesquelles elles restent en vigueur* [art. 4(1)(*c*)]», ainsi que les conditions et restrictions auxquelles sont respectivement soumises les diverses licences [4(1)(*d*)]. La partie II de la réglementation générale sur la radio (General Radio Regulations, Part II), datée le 31 janvier 1958, débute par ce préambule: «*The Minister of Transport* (je souligne) pursuant to section 4 of the Radio Act, is pleased hereby to revoke the general Radio Regulations, Part II, made by order of the Minister of Transport of 31st December, 1954, and to make the annexed General radio Regulations, Part II, in substitu-

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tion therefor, effective 1st April, 1958.» L'article 8(2) de cette ordonnance ministérielle stipule que:

> 8 (2). Except as otherwise provided, licenses shall expire on the 31st day of March next following date of issue but may be renewed from year to year, subject to the approval of the Minister.

Ce texte me paraît faire double preuve; d'abord, qu'en cette matière, il se trouve deux séries nettement différenciées de documents, l'une réservée au gouverneur en conseil, l'autre au ministre; puis, que tout ce qui a trait à la durée des licences relève de la seule compétence ministérielle, exemplifiant ainsi la séparation des tâches précisées déjà aux articles 3 et 4 de la *Loi sur la radio.*

J'inclinerais à croire que s'il était permissible au gouverneur en conseil, selon l'article 3, de fixer un nouveau tarif des droits à payer pour les licences, nul autre que le Ministre des Transports, par ordonnance régulière, ne pouvait affecter la durée des permis ni leur validité initialement décrétée comme, à toute fin pratique, pourrait le faire l'alinéa (5) de l'article 5 de l'arrêté en conseil 1960-1488. Effectivement, l'inobservation de cette prescription, faute de paiement du supplément de $5,452.30, eut entraîné, entre autres conséquences, la déchéance à tout le moins des permis et la confiscation de l'équipement [art. 10(1)(*b*)]. La mention, de pur style, que cet ordre en conseil est apostillé de la recommandation du ministre ne satisfait certes pas à l'individualisation, si je puis ainsi dire, des tâches et des responsabilités prévue par la *Loi sur la radio.*

Au surplus, une autorité déléguée n'est susceptible d'aucune extension; de plus, l'on ne saurait contourner la loi afin d'en obtenir par voie indirecte un résultat qu'il lui est interdit de produire directement.

En bref, le paragraphe (5) de l'article 5 susdit me paraît entaché de nullité moins à cause de sa rétroactivité, que, parce qu'il entend statuer en une matière sur laquelle son auteur, le gouverneur en conseil, n'aurait pas autorité, mais le ministre des Transports seulement.

Ce tarif plus onéreux fut demeuré conforme à la *Loi sur la radio* si son application eut été reportée au 1er avril 1961, premier jour d'une autre année de permis. Par contre, je ne puis voir autre chose dans le paragraphe (5) et ses alinéas (*a*) et (*b*), de l'article 5 de l'arrêté en conseil 1960-1488 que l'exercice abusif par le gouverneur en conseil d'une autorité conférée nommément au Ministre des Transports par l'article 4(*c*) de la loi pertinente. La majoration des tarifs en cours d'année comportait forcément comme l'une des sanctions le retrait des licences, ce qui équivaut à modifier «les périodes pendant lesquelles elles restent en vigueur».

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Par tous ces motifs, la Cour déclare le paragraphe (5) et ses deux alinéas (*a*) et (*b*) de l'article 5 de l'arrêté en conseil 1960-1488, daté le 28 octobre 1960, irrégulier, invalide, *ultra vires* et sans effet; et la Cour, en conséquence, recommande à Sa Très Excellente Majesté la Reine, représentée aux fins des présentes, par le Procureur général du Canada, intimé, le remboursement à la requérante, La Compagnie de publication La Presse, Limitée, d'une somme de $5,452.30, et, à la discrétion du ministre des Finances, le paiement de l'intérêt sur ce montant, tel que prévu à l'article 53 de la Loi sur la Cour de l'Échiquier. La requérante aura droit de recouvrer tous ses frais après taxation.

Jugement conforme.

ENTRE:

1963 — mai 2, 3 — août 6

LUC LAMOUREUX .... REQUÉRANT ET DÉFENDEUR RECONVENTIONNEL;

ET

LE PROCUREUR GÉNÉRAL DU CANADA .... INTIMÉ ET DEMANDEUR RECONVENTIONNEL.

Couronne—Pétition de droit—Dommages—Collision—Véhicule moteur—Employé de la Couronne non dans l'exercice de ses fonctions—Responsabilité de la Couronne—Loi sur la responsabilité de la Couronne, S du C. 1952-1953, 1-2 Élisabeth II, ch. 30, art. 3(2)—Responsabilité du propriétaire d'une automobile dans le Québec—Loi de l'indemnisation des victimes d'accidents d'automobile, S.Q. 1960/61, 9-10 Élis. II, ch. 65, art. 3—Loi provinciale subséquente à une loi fédérale—Action rejetée.

A la suite d'une collision entre véhicules moteur dont l'un conduit par son propriétaire, le pétitionnaire, et l'autre, propriété de la Couronne, sous la conduite d'un serviteur de cette dernière, les parties en cause se sont poursuivies mutuellement en dommages, par voie de pétition de droit de demande reconventionnelle. Sur les faits relatifs à la collision, et tels que révélés par la preuve, la Cour en vint à la conclusion que seul le serviteur de la Couronne était responsable, mais qu'*il n'était pas dans l'exécution de ses fonctions au moment de l'accident.* La Cour, pour

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ces seuls motifs rejeta et la réclamation du pétitionnaire et la demande reconventionnelle La Cour, en outre, décida que la responsabilité de la Couronne est encore basée sur: 1) l'article 3(2) de la *Loi sur la responsabilité de la Couronne*, S. du C. 1952-53, 1-2 Élisabeth II, ch. 30, sanctionnée le 14 mai 1953, et qui se lit comme suit:

> «La couronne est responsable des dommages subis par qui que ce soit, sur une grande route, à cause d'un véhicule à moteur dont elle a la propriété, dommages dont la Couronne serait responsable si elle était un particulier en état de majorité et capacité».

et 2) la jurisprudence dans un tel cas sous l'article 18(1)(*c*), S R C. 1952, ch. 52, *Loi sur la Cour de l'Échiquier*, maintenant abrogé (Cf. *Curley v Latreille* (1919) 60 S C R 131; *Moreau v. Labelle* [1933] S C R 201 à la p 217; *The Governor and Company of Gentlemen Adventurers of England v Vaillancourt* [1923] S C R 414 à la p. 417.) Seulement, le pétitionnaire a soutenu que par suite d'un amendement apporté à la *Loi des véhicules moteur du Québec, S R Q.* 1941, ch. 142, en 1961, par la *Loi de l'indemnisation des victimes d'accidents d'automobile*, S Q 1960/61 9-10 Élisabeth II, ch. 65, art 3, le principe de la responsabilité du propriétaire pour son employé que *s'il est dans l'exercice de ses fonctions seulement* ne s'applique plus dans le Québec depuis 1961 Ce dernier article se lit ainsi:

> «3 Le propriétaire d'une automobile est responsable de tout dommage causé par cette automobile ou par son usage, à moins qu'il ne prouve
>
> *a*) que le dommage n'est imputable à aucune faute de sa part ou de la part d'une personne dans l'automobile ou du conducteur de celle-ci, ou
>
> *b*) que lors de l'accident l'automobile était conduite par un tiers en ayant obtenu la possession par vol, ou
>
> *c*) que lors d'un accident survenu en dehors d'un chemin public l'automobile était en la possession d'un tiers pour remisage, réparation ou transport.»

Jugé: L'article 3 de la *Loi de l'indemnisation des victimes d'accidents d'automobile*, S R Q ch 142A s'applique à toute personne autre que la Couronne aux droits du Canada.

2 Une responsabilité imposée à la Couronne fédérale par le *Parlement* du Canada, à la lumière d'une loi provinciale existante à ce moment, ne peut être modifiée par une loi provinciale subséquente. Seul, le même Parlement peut changer la nature ou l'étendue de cette responsabilité. *The King v Armstrong* (1908) 41 Can. S C.R. 229; *Gauthier v The King* (1918) 56 Can. S C.R. 176 à la p. 180; 1944 Ex. C.R. 1 à la p. 8

3 Pour engager la responsabilité de la Couronne à l'avance sous l'article 3 de la *Loi de la responsabilité de la Couronne*, le texte de cet article aurait dû l'énoncer expressément tel que par les mots suivants: «selon la loi en vigueur au moment où la cause d'action a pris naissance.»

PÉTITION DE DROIT pour dommages à la suite d'une collision entre véhicules moteur.

La cause fut instruite devant l'Honorable Juge Noël à Montréal.

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Eric Clark pour le requérant et défendeur reconventionnel.

Raymond Roger pour l'intimé et demandeur reconventionnel.

Les faits et questions de droit sont exposés dans les motivés de la décision que rend maintenant (6 août 1963) monsieur le juge Noël:

Par sa pétition de droit, le requérant cherche à recouvrer du Procureur Général du Canada des dommages pour pertes subies à la suite d'une collision entre son véhicule moteur (automobile) conduit par lui-même et un véhicule moteur (camionnette) appartenant au ministère de la Défense Nationale conduit par Ronald John Short, R.C.A.F., un serviteur de l'intimé. D'autre part, l'intimé réclame du requérant, par demande reconventionnelle, les dommages causés à son propre véhicule moteur, le coût d'hospitalisation et de frais médicaux donnés audit Ronald John Short et enfin un certain montant pour perte des services de ce dernier pendant sa période d'hospitalisation et de rétablissement.

A l'enquête les parties ont admis que les dommages au véhicule moteur du requérant s'élevaient à la somme de $1,669.04 et que ceux causés au véhicule moteur de l'intimé s'élevaient à la somme de $995; que les déboursés médicaux du requérant se chiffraient à $21.50 et que ceux de Ronald John Short à $1,004.15; les parties admettent également que le montant réclamé pour perte des services de ce dernier se chiffre à la somme de $797.52, soit la solde reçue par lui pendant son hospitalisation et la période de son rétablissement, montant cependant que le requérant conteste à l'intimé le droit de réclamer.

Le total des pertes du requérant se chiffre donc à la somme de $1,690.54 et celui de l'intimé à la somme de $2,796.67.

[Ici le savant juge fait une revue de la preuve et continue.]

Le chauffeur Short du véhicule de l'intimé étant seul responsable de cet accident, il me faut donc rejeter la demande reconventionnelle de l'intimé.

Ceci ne règle pas cependant la réclamation du requérant car même s'il n'a commis aucune faute qui ait pu contribuer à cet accident, il ne réussira que s'il tombe dans les conditions voulues pour condamner l'intimé dont la responsabilité

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est réglementée par une loi particulière soit la *Loi sur la responsabilité de la Couronne en matière d'actes préjudiciables et de sauvetage civil,* 1-2 Élisabeth II, c. 30 et particulièrement l'article 3(2) de ladite loi, sanctionnée le 14 mai 1953, et qui se lit comme suit:

> La Couronne est responsable des dommages subis par qui que ce soit, sur une grande route, à cause d'un véhicule à moteur dont elle a la propriété, dommages dont la Couronne serait responsable si elle était un particulier en état de majorité et capacité.

Le procureur du requérant soutient que par suite d'un amendement apporté à la *Loi des véhicules moteur du Québec* en 1961 par la *Loi assurant l'indemnisation des victimes d'accidents d'automobile,* S.R.O. 142A, article 3, la responsabilité du propriétaire d'une automobile dans le Québec fut changée et fixée comme suit:

> 3. Le propriétaire d'une automobile est responsable de tout dommage causé par cette automobile ou par son usage, à moins qu'il ne prouve
>
> *a*) que le dommage n'est imputable à aucune faute de sa part ou de la part d'une personne dans l'automobile ou du conducteur de celle-ci, ou
>
> *b*) que lors de l'accident l'automobile était conduite par un tiers en ayant obtenu la possession par vol, ou
>
> *c*) que lors d'un accident survenu en dehors d'un chemin public, l'automobile était en la possession d'un tiers pour remisage, réparation ou transport.

Antérieurement à cet amendement, la loi et la jurisprudence voulaient que le propriétaire d'un véhicule automobile ne soit responsable d'un accident que si celui à qui il a confié son véhicule était fautif et était son employé dans l'exercice de ses fonctions au moment de l'accident. S'il n'était pas dans l'exercice de ses fonctions, le propriétaire n'en était pas responsable à moins, évidemment, qu'il ait confié son véhicule à un conducteur qu'il savait imprudent.

Il en était de même aussi pour le Gouvernement fédéral qui, entre autres, était réglementé par le paragraphe (*c*) du sous-article (1) de l'article 18 (S.R.C. 1952, c. 98) qui voulait qu'il ne soit responsable pour un acte d'un serviteur ou préposé de la Couronne que si ce serviteur agissait alors dans l'exercice de ses devoirs ou de son emploi. Cet article 18(*c*) cependant fut abrogé dès l'entrée en vigueur des Statuts Revisés du Canada 1952 tel que déclaré à l'article 25(3) de 1-2 Élisabeth II, c. 30.

En effet, ce principe fut appliqué dans plusieurs causes, entre autres dans *Curley v. Latreille*[1] le juge Mignault déclarant à la p. 175:

> L'article 1054, C.C. «me paraît clairement exclure la responsabilité du maître pour un fait accompli par le domestique ou ouvrier à l'occasion seulement de ses fonctions si on ne peut dire que ce fait s'est produit dans l'exécution de ses fonctions.»

Dans la cause de *Moreau v. Labelle*[2] le Juge en Chef de la Cour Suprême, dans ses conclusions en parlant du préposé de l'appelant dit:

> . . ., il se trouvait à un endroit où il n'avait aucune affaire à aller pour accomplir la mission que l'appelant lui avait confiée et pour rester dans l'exécution de ses fonctions.

Pour être dans l'exercice de ses fonctions, il faut que la possession de l'automobile par le serviteur soit pour les fins des fonctions auxquelles il était employé. S'il s'en sert pour ses propres fins, il ne possède plus pour son maître et ne peut rendre ce dernier responsable de sa négligence.

Dans la cause de *The Governor and Company of Gentlemen Adventurers of England v. Vaillancourt*[3] le juge Duff, plus tard Juge en Chef, disait à la p. 417:

> . . . if the act of the servant causing the injury complained of is an act having no relation to the duties of his employment as, for example, where two servants momentarily discontinue their work to engage in some sort of a frolic, then, although it might not improperly be said that the injurious act is something done *à l'occasion* of their employment, it would appear to be an abuse of language to describe it as done *dans l'exécution des fonctions* or in the performance of the work for which they were employed.

Il semble ne faire aucun doute que Short, le préposé de l'intimé, n'était pas dans l'exercice de ses fonctions au moment de l'accident, lesquelles fonctions, comme nous l'avons vu, consistaient à transporter des membres du personnel de l'aviation de Trenton à Canadair, près de Montréal, et ensuite d'y revenir le lendemain matin. C'est en effet à la suite d'un voyage de plaisir à Montréal avec Thériault que l'accident est survenu.

S'il n'y avait que ça, je devrais rejeter la requête du requérant sans plus, mais son procureur soumet que c'est le nouveau chapitre 142A qui s'applique à la responsabilité du propriétaire d'une automobile dans le Québec depuis sa

[1] (1919) 60 S.C.R. 131. [2] [1933] S.C.R. 201 à la p. 217.
[3] [1923] SCR 414.

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sanction et l'article 3 de ce chapitre déclare maintenant que ledit propriétaire ne peut se disculper maintenant qu'en prouvant que celui à qui il a passé son véhicule n'était pas fautif ou que son véhicule a été volé et que par ce fait, le principe de la responsabilité du propriétaire pour son employé que s'il est dans l'exercice de ses fonctions seulement n'existe plus dans le Québec.

Un examen de l'article 3 de S.R.O., c. 142A, semble bien donner raison au procureur du requérant mais seulement quant à se qui a trait à toutes les personnes autres que Sa Majesté la Reine aux droits du fédéral du Canada.

En effet, quant à cette dernière, il fut maintes fois décidé, tel que le soutient le procureur de l'intimé, qu'aucune loi provinciale postérieure à une loi fédérale par laquelle la Couronne fédérale se lie d'une façon particulière ne peut lier la Couronne fédérale.

Dans *Tremblay v. His Majesty the King*[1] Thorson P. disait:

> The principles thus stated would, I think, clearly apply in an ordinary action between subject and subject, but whether they are as fully applicable in a claim against the Crown made under section 19(*c*) of the Exchequer Court Act, as amended, requires consideration. While it is in the rule that the liability of the Crown for the negligence of its officers or servants under this section is to be determined by the law of negligence in force in the province where the alleged negligence occurred, this rule is, as already stated, subject to qualification. One qualification has already been mentioned, namely, that the Provincial law is inapplicable in so far as it is repugnant to the terms of the statute by which the liability of the Crown was imposed or seeks to impose a liability different from that imposed by Parliament. There is still a further qualification, namely, that the Provincial law of negligence that is to be applied is the law that was in force at the time the liability of the Crown was first imposed This qualification of the rule was enunciated by the Supreme Court of Canada in *The King v Armstrong*[2] In that case Davies J. disposed of two questions that had been controversial; at p. 248 he said:
>
> > I think our previous decisions have settled, as far as we are concerned, the construction of the clause (*c*) of the 16th section of the Exchequer Court Act, and determined that it not only gave jurisdiction to the Exchequer Court but imposed a liability upon the Crown which did not previously exist;
>
> and went on to say
>
> > And also that such liability was to be determined by the general laws of the several provinces in force at the time such liability was imposed.

[1] [1944] Ex. C.R. 1 à la p. 8.
[2] (1908) 40 Can. S.C R. 229.

Cette déclaration fut également approuvée par Fitzpatrick C.J. dans une cause de *Gauthier v. The King*[1] lorsqu'il énonça:

> Although this was a case under section 16(*c*) of the "Exchequer Court Act" by which a particular liability was for the first time imposed upon the Crown, the same principle, as I have said, must apply to all cases and the liability in each be ascertained according to the laws in force in the Province at the time when the Crown first became liable in respect of such cause of action as is sued on. In other words *the local Legislature cannot subsequently vary the liability of the Dominion Crown, or at any rate, cannot add to its burden.*

Le principe est que lorsqu'une responsabilité fut imposée à la Couronne par le Parlement, il n'existait pas de loi qui pouvait déterminer cette responsabilité sauf celle en vigueur dans les provinces et ce fut une responsabilité conforme à la loi provinciale qui fut imposée. Cette responsabilité de la Couronne ayant été imposée par le Parlement, elle le fut à la lumière de la loi provinciale existante à ce moment et il s'ensuit que cette responsabilité ne peut être changée par une loi provinciale subséquente. En effet, le Parlement seul peut altérer la nature ou l'étendue de la responsabilité qu'il s'est ainsi imposée.

Le principe en effet est clair et Fitzpatrick C.J. dans la cause de *Gauthier v. The King (supra)*, à la p. 179, le déclare succinctement comme suit:

> That the liability is such as existed under the laws in force in the Province at the time when the Crown became liable.

Et le même juge disait dans la même cause à la p. 182:

> Provincial statutes which were in existence at the time when the Dominion accepted a liability from part of the law of the Province by reference to which the Dominion has consented that such liability shall be ascertained and regulated, but any statutory modification of such law can only be enacted by Parliament in order to bind the Dominion Government.

Toutes ces décisions cependant portent sur un texte de loi différent de celui qui règlemente présentement la responsabilité de la Couronne aux droits du fédéral qui, comme nous l'avons vu, est l'article 3 du chapitre 30 et qui déclare que:

> La Couronne est responsable des dommages subis par qui que ce soit sur une grande route à cause d'un véhicule à moteur dont elle a la propriété, dommages dont la Couronne serait responsable si elle était un particulier en état de majorité et capacité.

[1] (1918) 56 Can S C R. 176 à la p. 180

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Le texte permet-il, comme le soutient le requérant, de décider de la responsabilité de la Couronne aux droits du fédéral suivant la nouvelle loi du Québec de la responsabilité du propriétaire d'un véhicule automobile soit l'article 3 du chapitre 142A. Cette loi est subséquente à celle règlementant la responsabilité de la Couronne aux droits du fédéral et, comme nous l'avons vu, n'exige pas que celui qui conduit le véhicule d'un autre soit dans l'exercice de ses fonctions pour engager la responsabilité du propriétaire.

Peut-on en effet voir dans l'article 3 de la *Loi de la responsabilité de la Couronne* une acceptation à l'avance par cette dernière de toute règle de responsabilité qui puisse, dans l'avenir, gouverner la responsabilité d'un particulier en état de majorité et de capacité.

Il me semble que non si l'on s'en tient au texte même de l'article 3 du chapitre 30. Il aurait fallu, il me semble, pour que le Parlement impose à l'avance une responsabilité à la Couronne que cet article comporte d'après moi les mots suivants: «suivant la loi en vigueur au moment où la cause d'action a pris naissance.»

En effet, les prérogatives de la Couronne, en autant du moins que le fédéral est concerné, sont telles qu'une loi provinciale ne peut l'affecter à moins que la loi établissant la responsabilité de la Couronne aux droits du fédéral le dise ou l'accepte expressément.

Chitty dans son ouvrage intitulé «Les prérogatives de la Couronne» à la p. 283 déclare:

> But Acts of Parliament which would divest or abridge the King of his prerogatives, his interests or his remedies in the slightest degree, do not in general extend to, or bind the King, unless there be express words to that effect.

Il me faut donc conclure que le requérant doit faillir dans sa pétition de droit parce qu'il n'a pas établi comme il devait le faire que Short, le conducteur du véhicule de l'intimé, était dans l'exécution de ses fonctions au moment de l'accident. La preuve en effet est concluante à l'effet qu'il procédait à un voyage de plaisir au moment de la collision et qu'il n'était nullement autorisé à le faire.

Quant à la demande reconventionnelle telle que susdite, elle doit être également renvoyée. En effet, il est vrai comme le soutient le procureur de l'intimé que le requérant est assujetti au paragraphe 2 de l'article 3 du chapitre 142A de la

Loi assurant l'indemnité des victimes d'accidents d'automobile du Québec qui déclare que:

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> Le conducteur d'une automobile est pareillement responsable à moins qu'il ne prouve que le dommage n'est imputable à aucune faute de sa part.

Mais la preuve et la balance des probabilités établissent, et je le dis sans hésitation, que le requérant n'est pour rien dans cette collision qui est due, en plus de ce que nous avons déjà dit à ce sujet, à la vitesse, l'insouciance et la négligence de Short, le conducteur du véhicule de l'intimé, qui s'est approché d'une intersection qu'il ne connaissait pas bien à une vitesse telle qu'il ne pouvait de son propre aveu même appliquer les freins sans danger de glisser.

Si c'est là sa façon habituelle de conduire un véhicule, il n'est pas surprenant que dans l'espace de sept ans il ait eu cinq accidents, tel qu'il l'a admis au tribunal à l'enquête.

Pour ces divers motifs, la pétition de droit du requérant ainsi que la demande reconventionnelle de l'intimé sont toutes deux rejetées. L'intimé et le défendeur reconventionnel auront tous deux droit à leurs frais taxables.

Jugement en conséquence.

BETWEEN:

ERNEST SCRAGG & SONS LIMITED .....PLAINTIFF;

AND

LEESONA CORPORATION, formerly known as UNIVERSAL WINDING COMPANY, ... DEFENDANT.

1961
Nov 7-10, 13-17, 20-22, 27-30
Dec. 4-8, 11-15

1962
Jan. 9-12, 15-19, 23-25
Mar. 8-9, 12-15.

1964
Feb 26

Patents—Patent Act, R S C. 1952, c. 203, ss. 36(1), 36(2), 45, 48, 62, 63(1)—Invention defined only in claims—Claims to be construed in light of common knowledge of person skilled in relevant art at date of invention—Proof of date of invention not confined to proof of formulation of description—Evidence of commercial success of invention outside of Canada admissible—Specification assumed to be addressed to workman of ordinary skill in relevant art—Patent to be construed fairly—Specification to be read as a whole—Specification may be made dictionary for meaning of terms in claims if intention made plain—Meaning of term "thermo-plastic yarns"—Meaning of expression "such as"—Meaning of term "prescribed temperature"—Meaning of expression "to preclude substantially any ductility"—Extent of statu-

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tory provision for prima facie validity of Canadian patent—Evidence to rebut presumption of validity must be credible evidence—Onus of showing invalidity not easy to discharge—Tests for determining whether prior publication anticipatory of invention—Statements of experts relating to prior art subject to careful scrutiny—Commercial success of invention proof of usefulness—Exercise of inventive ingenuity essential attribute of patentability—Question of obviousness exclusively matter for Court—Trial judge no right to express own opinion on whether invention obvious—Mere scintilla of invention sufficient—Invention not to be considered obvious because of simplicity—Combination not to be held obvious because of obvious inclusion of certain integers—Unobvious nature of one integer may make combination unobvious—Commercial success evidence of inventive step—Specification not insufficient or ambiguous—Claims not invalid by reason of width if limits clearly defined—No independent development of invention—Patent protection not to be impaired by inept expressions or misuse of words if addressee not misled—Inferiority of alleged offending device or process not a defence to charge of infringement—Meaning of term "correlated"—Essence of process invention—Meaning of expression "control means operable automatically to regulate supply of heat energy to heated zone"—Gillette defence not available to plaintiff.

The plaintiff brought an action under section 62 of the *Patent Act* for impeachment of the defendant's patents No. 552,104 for "Thermoplastic Yarns and Methods of Processing Them" and No. 552,105 for "Apparatus for Processing Textile Yarns" seeking a declaration that certain claims in them are invalid and that its "Crimp Spin" machine and its use in the processing of textile yarns do not infringe any of the defendant's rights under them. The defendant denied the plaintiff's claims and counterclaimed for a declaration that the claims are valid and have been infringed by the plaintiff and for an injunction and damages or an account of profits.

Held: That it is the duty of the Court in a patent infringement action to construe the claims in suit according to the recognized canons of construction, for it is in the claims and only in the claims that the monopoly for which the patent was granted is defined, and that this basic principle applies with equal force in the case of an impeachment action, for what is sought to be impeached is the monopoly granted by the patent as defined in the claims.

2. That it is a cardinal principle that the claims in a patent should be construed in the light of the common knowledge which a person skilled in the art to which the invention defined in the claims relates is assumed to have had as at the date of the invention for which the patent was granted.

3. That the state of the relevant art immediately prior to the date of the invention is part of the common knowledge which the addressee of the patent is assumed to have had.

4 That the date of the conception of the idea of an invention does not determine its date and that its determination does not depend on the date of the reduction to practice in the sense of the United States decisions on the subject.

5. That if an inventor can prove that he formulated a description of his invention, either in writing or verbally, at a certain date then he must have made the invention at least as early as that date.

6. That the requirement that there must be proof of the formulation of a description of the invention, either in writing or verbally, is neither apt nor necessary in the case of an invention of an apparatus where the inventor can prove that at the asserted date he had actually made the apparatus itself.

7 That, even although the test of proof of the formulation of a description of the invention, either in writing or verbally, at a particular date might be appropriate in determining the date of an invention of a process, it cannot have been intended to exclude proof that the process was actually used at the asserted date.

8 That proof that an invention was made at an asserted date is not confined to evidence that a written or oral description of it had been formulated at such date. It may also be proved, in the case of an invention of an apparatus, that the apparatus was made at such date and, in the case of an invention of a process, that the process was used at such date. The essential fact to be proved is that at the asserted date the invention was no longer merely an idea that floated through the inventor's brain but had been reduced to a definite and practical shape

9. That, while the Court will carefully scrutinize the evidence in support of an inventor's assertion that he made his invention at a date long prior to the date of his application for a patent for it the law does not impose a heavier onus of proof on him than that which is usual in civil cases. All that is required is that the evidence should be "fairly read" and that the Court should be satisfied on the evidence so read that the invention, in the true sense of the word, was made at the asserted date. *Canadian General Electric Co. Ld. v. Fada Radio Ld.* (1930) 47 R P C. 69 at 93 applied.

10 That Mr. Seem and Mr. Stoddard made the invention of the apparatus defined in claim 3 of patent No. 552,105 at the asserted date, namely, in July, 1947, or, at the latest, early in August, 1947

11. That the fact that Mr Seem and Mr Stoddard continued to work on the first embodiment of their invention of the apparatus and make further experiments does not affect the fact that they made it at the asserted date.

12. That Mr Seem and Mr. Stoddard invented the method defined in the claims in issue of patent No 552,104 as early as November 13, 1950

13. That the inventions in issue have met with remarkable commercial success.

14. That an invention is not limited to any particular locale, that the licenses referred to in the evidence were licenses to use the inventions in issue before any patents were issued for them and that evidence of their commercial success outside of Canada was admissible.

15. That the Court must determine the state of the relevant art at the date of the invention.

16 That patent No 552,104 was addressed to throwsters with a good deal of knowledge of the arts of their customers for the yarns produced by them, namely, weavers, knitters and dyers, for they had to produce yarns that met the needs of such customers and patent No. 552,105 was addressed to manufacturers of false-twist process machines with knowledge of the needs of throwsters like the plaintiff or the defendant who would be the users of them

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17. That the nylon yarn produced by the defendant's false twist process was more uniform in appearance than that produced by the step by step or conventional method and superior to it in quality.

18. That the defendant's continuous false twist process was superior to the step by step method from an economic point of view.

19. That the superiority of the continuous false twist process over the step by step method, both as to the quality of the yarn produced and as to the cost of production, was the cause of the commercial success of the inventions in issue.

20. That there is no support in any of the prior art references for any of the attacks made on the validity of the claims in issue.

21. That a specification is addressed to the man who must use it, not to expert scientists, not to amateurs, but to those who will be responsible for putting it into practice and have the necessary skill for doing so

22. That the skilled person to whom a patent is assumed to be addressed is a workman of ordinary skill in the relevant art.

23. That, while the Golden Rule of construction of a document, namely, that its words should be given their plain and ordinary meaning applies to the claims of a patent, it is a fundamental principle of patent law that a patent should be construed fairly.

24. That the Court must not allow lack of precision in the use of the words in a patent specification or in a patent claim to defeat the claim if its meaning, notwithstanding the misuse of some of its words, would be plain to the workman of ordinary skill in the art to which the invention covered by the patent relates.

25. That the specification should not be construed astutely but should be approached with a judicial anxiety to support a really useful invention if it can be supported on a reasonable construction of the patent, that the claims should be interpreted by a mind willing to understand, not by a mind desirous of misunderstanding and that where the Court has been satisfied that there was a meritorious invention and the language of the specification, upon a reasonable view of it, can be read so 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

26 That it is essential to the fair construction of a patent claim that the specification be read as a whole.

27. That the principle of fair construction of a patent claim must be applied in such a way as to give effect to the expressed intent of the inventor as it would be understood by a workman of ordinary skill in the relevant art.

28 That the words of a patent claim may bear a "special or unusual meaning by reason of a dictionary found elsewhere in the specification or of technical knowledge possessed by persons skilled in the art".

29 That experts in the relevant art may give evidence of the meaning of technical terms and expressions in a patent claim as they would be understood by the addressee of the patent.

30. That the applicant for a patent may in the specification define the meaning of terms or expressions in the claims and thereby make the specification a dictionary for the purpose of interpreting them and that, if he has made his intention plain to the addressee of the patent that the terms or expressions are to be read with the meaning

defined in the specification, the Court, in pursuance of its duty of fair construction of the claims, must construe the said terms or expressions as having such meaning.

31. That the inventors have in the specification plainly defined the meaning of the term "thermoplastic yarns" as being thermoplastic yarns "such as nylon, vinyon, orlon, velon, dacron, saran and the like" and have made it plain to any person of ordinary skill in the relevant art who reads the patent with a mind willing to understand it that when he comes to the claims he must read the term "thermoplastic yarns" as having the meaning defined in the specification and that since cellulose acetate yarn is not one of the specified thermoplastic yarns it is not within the ambit of the term "thermoplastic yarns" as the inventors have defined it and the patents in issue do not relate to it.

32. That the expression "such as" in the specification must not be construed as meaning simply "for example". It is clearly restrictive and definitive of the term "thermoplastic yarns" and limits its meaning to the thermoplastic yarns of the kind or type specified.

33. That the inventors made it plain in the specification that the term "yarn-set", as it appears in the claims in issue means that the molecules of the yarn are to be stabilized in the helical deformation into which they were reoriented by the twisting while the yarn was in its plastic state followed by the cooling of the yarn before it was untwisted so that a spiralled helical formation is set in it.

34. That the use of the word "prescribed" in the term "prescribed temperature", as it appears in the claims in issue, is inept, but it is clear to any addressee of the patent who is willing to understand it that the term "prescribed temperature" means the temperature that is required in order to enable the yarn to be "yarn-set".

35. That the specification regards "ductile" and "plastic" as synonymous terms and thereby equates ductility with plasticity, that the specification is concerned with the commercial production of substantially permanently crimped thermoplastic yarns of the kind specified in it, that the specification is addressed to practical throwsters who would know the purposes for which the yarns are to be used and that it would be clear to them that what is meant by the use of the expression "to preclude substantially any ductility in the cooled yarn" in the requirement of the claims in issue that the tension on the heated yarn should be correlated to its prescribed temperature, or its prescribed temperature and its linear speed of travel, to maintain it under tension adequate "to preclude substantially any ductility in the cooled yarn" is that the tension on the yarn should be so related with its temperature, or its temperature and its linear speed of travel, that it will be adequate to effect a substantial offset against the tendency of the yarn to become plastic by reason of the application of the heat to it, in order that the spiralled formation of the yarn should remain in it after it has been untwisted, so that the crimp in it will be permanent in the sense that it will withstand the stresses and temperatures to which it will be subjected in the course of production and the conditions of actual commercial use to which it will be put and still retain its crimp.

36. That the statutory provision for the *prima facie* validity of a Canadian patent enacted by section 48 of the *Patent Act* extends, not only to the attributes of patentability of novelty, utility and inventive ingenuity or lack of obviousness, all of which are persumed to be present

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until the contrary is shown, but also to the obligations imposed by law on a patentee and the requirements specified in the Act and that compliance with them is presumed until the contrary is shown.

37. That the onus of showing that a patent is invalid lies on the party attacking it, no matter what the ground of attack may be.

38. That the presumption of validity enacted by section 48 cannot be rebutted merely by the introduction of some evidence tending to establish invalidity.

39. That the evidence required to rebut the presumption of validity must be "credible" evidence and substantial enough to satisfy the Court that the patent is invalid. Halsbury's Laws of England, Third Edition, Vol. 15, at 343, applied.

40. That the onus of showing that a patent is invalid is not an easy one to discharge.

41. That the provision for the validity of a Canadian patent enacted by section 48 enures to the benefit of the owner of the patent until the party attacking it shows to the satisfaction of the Court that it is invalid.

42. That a prior publication must not be held to be anticipatory of an invention unless the information as to the invention given by it is, for the purposes of practical utility, equal to that given by the patent for the invention and shows everything that is essential to it so that a workman of ordinary skill in the relevant art would at once have perceived, understood and been able practically to apply the invention without the necessity of further experiment. It is not enough to prove that the information could have been used to produce the result of the invention in issue; there must have been a clear and unmistakeable direction to use it for such purpose. Nor is it sufficient that the prior publication contained suggestions which, taken with other suggestions, might be shown to have foreshadowed the invention or important steps in it, or that it contained the nucleus of the idea of the invention which could have been regarded as the beginning of its development. If the prior publication is to be regarded as a prior publication of the invention it must be shown that it published to the world the whole invention with all the material necessary to instruct the public how to put it into practice and that it so disclosed the invention to the public that no person could subsequently claim it as his own. A prior publication is not to be regarded as an anticipation of the invention unless it can be shown that a person grappling with the problem solved by the patent and having no knowledge of it but having the prior publication in his hand would have said, "That gives me what I wish."

43. That anticipation of an invention cannot be proved by resort to alleged inventions that were not put into practice or were inoperable.

44. That the statements of expert witnesses relating to the prior art, being made with the knowledge possessed at the date of the statements, should be carefully scrutinized.

45. That there was no information, for the purposes of practical utility, in either the Finlayson United Kingdom patent No. 424,880 or the Finlayson United States patent No. 2,111,211 or the alleged use of the Finlayson machine at Spondon as to the invention defined in the claims in issue of patent No. 552,104 equal to that given by the patent.

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46. That the mere statement in the specification of United Kingdom patent No 424,880 that heat may be used to bring about the setting of the filaments which are thermoplastic or in the specification of United States patent No. 2,111,211 that hot air may be used as a setting agent, in the absence of a direction to use it, is not enough to make the patent an anticipation of the invention in issue

47. That, since the invention defined in the claims in issue of patent No. 552,104 was made as early as November 13, 1950, the Chavanoz patents cannot be regarded as anticipatory of it.

48. That the invention defined in the claims in issue of patent No 552,104 was not anticipated.

49. That the remarkable commercial success of the inventions in issue, even before any patents for them were granted, is conclusive proof that they were useful.

50. That the exercise of inventive ingenuity is an essential attribute of patentability.

51. That the question whether an alleged invention was obvious or not is exclusively a matter for the Court and it is not within the competence of a witness, whether an expert or not, to express his opinion on the subject.

52. That the trial judge has no right to determine the question whether an invention was obvious according to his own opinion on whether it was obvious or not. The issue is not whether the alleged invention would have been obvious to him but whether it would have been obvious to a person of ordinary skill in the relevant art. The judge must, as far as possible, put himself or be put in the position of such a person and determine the question accordingly.

53 That the plea that the invention was obvious is frequently the last resort of an infringer and the Court should look askance at the effort to defeat a new and useful invention by such a plea.

54 That, since it has never been possible to define with precision, apart from the statutory definition, what constitutes an invention, the provision of *prima facie* validity enacted by section 48 is of particular importance so far as the attribute of patentability of inventive ingenuity is concerned.

55. That the statement that the onus of showing that a patent is invalid is not an easy one to discharge is particularly applicable in cases where a party seeks to destroy a new and useful invention by the plea that it was obvious.

56 That a mere scintilla, meaning thereby "the slightest trace" of invention is sufficient to support a patent.

57 That an invention is not to be considered obvious because of its simplicity

58 That the fact that the inclusion of certain parts in an apparatus or certain steps in a process was obvious does not warrant the conclusion that the invention of the apparatus or process was obvious.

59. That in considering whether an invention was obvious the whole of the relevant art may be looked at. *Allmanna Svenska Electriska A/B v. The Burntisland Shipbuilding Coy. Ld.* (1952) 69 R P.C. 63 at 69 followed.

60 That a combination should not be found invalid for obviousness of the invention for which it was granted unless it is shown to the satisfaction of the Court that it was obvious that the integers of the

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combination should be combined as specified in the claim defining the invention. The issue is not whether the integers in a combination invention were obvious but whether the invention of the combination was obvious.

61. That the unobvious nature of one integer of a combination may be such as to establish the unobviousness of the combination. *Martin and Biro Swan Ld. v. H. Millwood Ltd.* (1956) R.P.C. 125 at 136 followed.

62. That when it is found that there has been a problem calling for solution and that the new device has solved it then its practical utility and commercial success in displacing alternative devices should be considered strong evidence that its production required the taking of an inventive step and that the applicant for the patent was the first to take it. *Samuel Parkes & Co. Ltd. v. Cocker Brothers Ltd.* (1929) 46 R P C. 241 at 248 followed.

63. That the plaintiff has failed to discharge the onus imposed by section 48 of showing that the inventions in issue were obvious.

64. That the great commercial success of the inventions in issue is evidence that they were not obvious.

65. That a patent specification is not insufficient by reason of the fact that a competent workman of ordinary skill in the relevant art may have to make trials or experiments in order to accomplish the result of the invention, if such trials or experiments are not themselves inventions and the competent workman can accomplish the desired result by following the teaching of the specification. It is sufficient if it enables him to put the invention into practice and sufficient directions are given to him to enable him to know what trials or experiments he may have to make and how to make them. *No-Fume Ld. v. Frank Pitchford & Co. Ld.* (1935) 52 R P.C. 231 applied.

66. That the specification, when read as a whole and fairly, teaches any competent workman of ordinary skill in the art who is willing to understand it what is necessary to the production of yarns of the superior uniformity and quality promised by the patent and how it should be accomplished.

67 That it is not necessary in a patent specification to give directions of a more minute nature than a person of ordinary skill and knowledge of the relevant art might fairly be expected to need and that by following the teachings of the specification the addressee of the patent can put the invention into practice as easily and effectively as the inventors could do themselves.

68 That, in view of the wide limits within which the invention may be operated, the general directions in the specification give more effective information on how the result of the invention is to be accomplished than if the specific examples and directions referred to in the argument of counsel for the plaintiff had been given.

69. That the specification was not insufficient.

70. That the expression "prescribed temperature" in the claims in issue is not ambiguous.

71. That the specification of patent No 552,104 does not contain any contradictory statements and is not ambiguous.

72. That a claim must be stated with such precision as to leave no doubt of the scope of the monopoly defined in it, so that an addressee of the patent will, on a fair reading of the claim, be able to determine whether what he proposes to do will infringe it or not.

73. That any addressee of the patents in issue would know, without doubt, that if what he proposes to do is tantamount to following the teaching of the specification he will produce a uniform and permanently crimped yarn and his action will be within the scope of the monopoly defined in the claims in issue and constitute an infringement by him.

74. That the fact that the claims in issue cover a wide range of inventions does not invalidate them since the limits of the claims are clearly defined.

75. That the claims in issue are not indefinite or flexible

76. That the attacks on the validity of the patents in issue on the ground that the invention defined in the claims in issue is inoperable fail.

77. That there was no independent development of the inventions in issue at the respective dates of their invention.

78. That when a meritorious invention, such as that defined in the claims in issue, has been made the owner's rights in respect of it should be protected unless it has been clearly shown that the patent granting the monopoly is invalid.

79. That the fact that there are instances in the patents in issue of inept expressions and the misuse of words, none of which would mislead any addressee of the patents who would read them fairly with a willingness to understand them, should not "impair the protection due to an inventor who has made an honest and careful disclosure of the invention and given as clear a definition of the monopoly claimed as the subject admits of". An inventor's rights are not to be measured by his capacity for precision of speech if he has fairly complied with the requirements of the law, as the inventors in the present case have done.

80. That as between the parties all the claims in issue are valid.

81. That it is not a defence to a charge of infringement that the alleged offending device or process is inferior to the patented one.

82. That all that is meant by the requirement in the claims in issue that the tension upon the heated yarn should be "correlated" to its prescribed temperature to maintain it under tension adequate to preclude substantially any ductility in the cooled yarn is that the tension on the heated yarn should be "put in relation" with its temperature so that it will be adequate for the accomplishment of the purpose specified in the claims and that this was done in the process used on the C83 machines, that the plaintiff sold to Galtex Company Limited.

83. That it is not correct to describe compliance with each requirement of the process claims in issue as a step in the process in the sense that it must be made in any particular order. The process is a unitary one calling for compliance with several of the specified requirements in combination with one another at the same time.

84. That it would be obvious to every throwster or other workman of ordinary skill in the art that the requirement that the tension on the heated yarn should be correlated to its prescribed temperature to maintain the yarn under tension adequate to preclude substantially any ductility in the cooled yarn must have been intended to be related to the purpose of producing a permanently crimped yarn and it should be construed accordingly.

85 That the validity of the process claims in issue does not depend on whether the idea of preclusion of substantially any ductility in the

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cooled yarn is novel or not. The essence of the process invention in issue is that the combination of the requirements set out in the claims results in the production of permanently crimped thermoplastic yarns of the kind specified in the patents by its continuous false twist process that are not only more uniform in character than any yarns produced by any other process but are also superior in quality and are producible at greatly less cost.

86. That the process used on the CS3 machines which the plaintiff sold to Galtex Company Limited came within the ambit of the invention defined in each of the claims in issue of patent No. 552,104 and that the plaintiff has infringed the defendant's rights under them.

87. That the temperature control system and its monitoring system in the CS3 machines which the plaintiff sold to Galtex Company Limited cooperate with one another and constitute control means operable automatically to regulate the supply of heat energy to the heated zone within the meaning of claim 3 of patent No. 552,105.

88. That the said CS3 machines came within the ambit of the invention defined in the said Claim 3 and that the plaintiff has infringed the defendant's rights under it.

89. That, since the invention defined in the claims in issue was not anticipated and the plaintiff has infringed the rights of the defendant under them, the so-called Gillette defence is not open to the plaintiff.

90. That the plaintiff's action must be dismissed and the defendant's counterclaim allowed.

ACTION for impeachment of defendant's patents and declaration of invalidity of claims and non-infringement.

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

Harold G. Fox, Q.C. and *Donald F. Sim* for plaintiff.

E. G. Gowling, Q.C. and *Gordon F. Henderson, Q.C.*, for defendant.

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

THE PRESIDENT now (February 28, 1964) delivered the following judgment:

The plaintiff is a corporation under the laws of Great Britain having its principal office and chief place of business at Macclesfield in England and the defendant is a United States corporation having its chief place of business at Cranston in Rhode Island. The defendant is the owner of three Canadian Letters Patent as assignee of Nicholas J. Stoddard and Warren A. Seem, the inventors of the inventions covered by them, the said patents being No. 552,103 for "Textile Yarns and Methods of Processing Them", No. 552,104 for "Thermoplastic Yarns and Methods of Processing Them" and No. 552,105 for "Apparatus for Processing Textile Yarns", all issued on January 21, 1958. The plaintiff manufactures and sells textile machinery in England, Canada and elsewhere throughout the world, including a textile processing machine known as the "Crimp Spin" machine and referred to in the evidence as its CS3 machine. In the action, which is brought under the authority of section 62 of the *Patent Act,* R.S.C. 1952, Chapter 203, the plaintiff impeaches the defendant's patents and seeks a declaration that they are invalid and also a declaration that its "Crimp Spin" machine and its use in the processing of textile yarns do not infringe any of the defendant's rights under the patents. The defendant denies the plaintiff's claims and counterclaims for a declaration that the patents are valid and have been infringed by the plaintiff, an injunction restraining such infringement and damages or an account of profits as it may elect.

By an agreement, dated August 28, 1961, and filed as Exhibit 9, the parties agreed, *inter alia,* that both the action and the counterclaim with respect to patent No. 552,103 be discontinued on the defendant's undertaking set out in the agreement, that both the action and the counterclaim with respect to patent No. 552,104 be discontinued, except as to claims 1, 2, 3, 5 and 8, on the defendant's undertaking set out in the agreement and that both the action and the counterclaim with respect to patent No. 552,105 be discontinued, except as to claim 3, on the defendant's undertaking set out in the agreement.

Thus the claims in issue are claims 1, 2, 3, 5 and 8 of patent No. 552,104, which are process claims, and claim 3 of patent No. 552,105, which is an apparatus claim.

The invention for which patent No. 552,104 was granted relates to thermoplastic yarns such as nylon, vinyon, orlon, velon, dacron, saran, and the like (as distinguished from silk, rayon, cotton, linen or wool, etc.) and to methods of processing them and is especially concerned with the production of substantially permanently crimped, wavy or fluffed thermoplastic yarns. The claims in issue of this patent read as follows:

1. A method of producing evenly and permanently crimped, wavy or fluffed multi-filament thermoplastic yarn having improved and uniform

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physical characteristics which comprises, continually drawing the yarn from a source of supply, continually twisting the yarn drawn from said supply, continually passing the yarn at a selected linear speed under uniform tension through a restricted thermally isolated and uniformly heated zone to uniformly heat the yarn to a prescribed temperature to reorient the molecules of the yarn to the twisted formation of the yarn and yarn-set the same, controlling the supply of heat energy to said zone to thereby maintain said heated zone uniformly at the temperature required to uniformly heat said yarn to said prescribed temperature, continually cooling the yarn to stabilize the same after passage under tension through said heated zone, continually untwisting the yarn after cooling the same, and finally continually collecting the processed yarn, the tension upon the heated yarn being correlated to said prescribed temperature of the heated yarn to maintain the yarn under tension adequate to preclude substantially any ductility in the cooled yarn.

2. A method of producing evenly and permanently crimped, wavy or fluffed multi-filament thermoplastic yarn having improved and uniform physical characteristics which comprises, continually drawing the yarn from a source of supply, continually twisting the yarn drawn from said supply, continually passing the yarn at a selected linear speed under uniform tension through a restricted thermally isolated and uniformly heated zone to uniformly heat the yarn to a prescribed temperature to reorient the molecules of the yarn to the twisted formation of the yarn and yarn-set the same, controlling the supply of heat energy to said zone to thereby maintain said heated zone uniformly at the temperature required to uniformly heat said yarn to said prescribed temperature, correlating the tension in said yarn to said prescribed temperature and linear speed of travel of the yarn to maintain the yarn at a selected uniform tension relative to the contractile force of the yarn resulting from heating and twisting the same to preclude substantially any ductility in the yarn after cooling, continually cooling the yarn to stabilize the same after passage thereof under tension through said heated zone, continually untwisting the yarn after cooling the same, and finally continually collecting the processed yarn.

3. A method of producing evenly and permanently crimped, wavy or fluffed multi-filament thermoplastic yarn having improved and uniform physical characteristics which comprises, continually drawing the yarn from a source of supply, continually twisting the yarn drawn from said supply, continually passing the yarn at a selected linear speed under uniform tension through a restricted thermally isolated and uniformly heated zone to uniformly heat the yarn to a prescribed temperature to reorient the molecules of the yarn to the twisted formation of the yarn and yarn-set the same, controlling the supply of heat energy to said zone compensatively according to the ambient temperature and rate of transfer of heat to the yarn to thereby maintain said heated zone uniformly at the temperature required to uniformly heat said yarn to said prescribed temperature, correlating the tension in said yarn to said prescribed temperature and linear speed of travel of the yarn to maintain the yarn at a selected uniform tension less than the contractile force of the yarn resulting from heating and twisting the same to preclude substantially any ductility in the yarn after cooling, continually cooling the yarn to stabilize the same after passage thereof under tension through said heated zone, continually untwisting the yarn after cooling the same, and finally continually collecting the processed yarn.

5. A method of producing evenly and permanently crimped, wavy or fluffed multi-filament thermoplastic yarn having improved and uniform

physical characteristics which comprises, continually drawing the yarn from a source of supply, continually twisting the yarn drawn from said source, continually passing the yarn at a selected linear speed under uniform tension through a restricted thermally isolated and uniformly heated zone to uniformly heat the yarn to a prescribed temperature to reorient the molecules of the yarn to the twisted formation of the yarn and yarn-set the same, controlling the supply of heat energy to said zone to thereby maintain said heated zone uniformly at the temperature required to uniformly heat said yarn to said prescribed temperature, continually cooling the yarn to stabilize the same after passage thereof under tension through said heated zone, continually untwisting the yarn after cooling the same, continually collecting the processed yarn, and controlling the tension upon the heated yarn relative to the contractile force and thermal characteristics of the yarn at said prescribed temperature to maintain the same under uniform tension adequate to preclude substantially any ductility in the cooled yarn.

8. A method of producing evenly and permanently crimped, wavy or fluffed multi-filament thermoplastic yarn having improved and uniform physical characteristics which comprises, continually drawing the yarn from a source of supply, continually twisting the yarn drawn from said supply, continually passing the yarn at a selected linear speed under uniform tension through a restricted thermally isolated and uniformly heated zone to uniformly heat the yarn to a prescribed temperature to reorient the molecules of the yarn to the twisted formation of the yarn and yarn-set the same, controlling the supply of heat energy to said zone compensatively according to the ambient temperature and rate of transfer of heat to the yarn to thereby maintain said heated zone uniformly at the temperature required to uniformly heat said yarn to said prescribed temperature, correlating the tension in said yarn to said prescribed temperature and linear speed of travel of the yarn to maintain the yarn at a uniform tension substantially in excess of the contractile force of the yarn resulting from heating and twisting the same to preclude substantially any ductility in the yarn after cooling, continually cooling the yarn to stabilize the same after passage under tension through said heated zone, continually untwisting the yarn to the exact extent to which twisted, and finally continually collecting the processed yarn.

The invention for which patent No. 552,105 was granted relates to apparatus for processing thermoplastic textile yarns and is concerned more particularly with apparatus useful in processing polyamide and other thermoplastic yarns such as nylon, vinyon, orlon, velon, dacron, saran and the like (as distinguished from yarns of cotton, linen, rayon, silk or wool and the like). Claim 3 of this patent reads as follows:

3. Apparatus for thermally processing thermoplastic yarn comprising a support for a supply of yarn, wind-up means for the processed yarn spaced from said support and operable to draw the yarn continuously at a selected linear speed from the supply to said wind-up means, an electrically energized heating device defining a restricted thermally isolated heated zone for passage of the yarn therethrough to heat the yarn to a prescribed temperature, a false-twist device operable to twist the yarn before passage

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thereof through said heated zone and to untwist the yarn after said passage through the heated zone, control means operable automatically to regulate the supply of heat energy to said zone compensatively according to the rate of transfer of heat to the yarn to maintain said zone uniformly at the temperature required to heat the yarn to said prescribed temperature, tension means operable to maintain the yarn at a uniform tension during passage thereof through said heating device and to the wind-up means, and means to regulate the tension means to control the tension of the yarn in correlation to the prescribed temperature and linear speed of travel of the yarn to maintain the latter at a selected uniform tension relative to the contractile force and thermal characteristics of the yarn.

It is the duty of the Court in a patent infringement action to construe the claims in suit according to the recognized canons of construction, for it is in the claims and only in the claims that the monopoly for which the patent was granted is defined. This basic principle applies with equal force in the case of an impeachment action, for what is sought to be impeached is the monopoly granted by the patent as defined in the claims. It is for that reason that I have set out the claims in issue at this early stage in these reasons for judgment, for it is the function of the claims to define the monopoly sought to be impeached and it is only in the claims that it is defined. This fundamental principle, which is part of the foundation on which our patent law is established, was clearly stated in the House of Lords by Lord Russell of Killowen in the leading case of *Electric and Musical Industries, Ld. et al v. Lissen, Ld. et al*[1] where he said, at page 39:

> The function of the claims is to define clearly and with precision the monopoly claimed, so that others may know the exact boundaries of the area within which they will be trespassers . . . . the forbidden field must be found in the claims and not elsewhere.

and later:

> A claim is a portion of the specification which fulfils a separate and distinct function. It and it alone defines the monopoly.

The case raises several questions of interest and importance. The actual hearing took up 44 days and voluminous written arguments have been filed. It became manifest early in the proceedings that there is fierce commercial competition between the parties and that the present litigation is only one phase of it. There has been litigation in the United States involving the defendant's United States patents cor-

[1] (1939) 56 R.P.C. 23.

responding to the ones in issue in which the plaintiff sought to intervene and in England applications for patents covering the inventions made by the English owner of them have been held up pending the disposition of opposition proceedings taken by the plaintiff.

Evidence for the plaintiff was given by Dr. Donald Finlayson, formerly the chief physicist at the works of British Celanese Limited at Spondon in England and since 1957 an industrial consultant to several industrial companies including the plaintiff, Professor John B. Speakman, the professor of textile industries at the university of Leeds in England, Mr. Timothy Nesbitt-Dufort, who came to the plaintiff in 1956 as the personal assistant to Mr. Philip Scragg, one of the plaintiff's joint managing directors, and since the middle of 1960 has been the plaintiff's commercial director, Dr. George P. Hoff, formerly the manager of the technical division and the acetate division of the E. I. Dupont de Nemours Company and now a director of the Ohio Research Foundation, Miss Jeanette Rea, an intermediate research associate with Fabric Research Laboratories Incorporated at Dedham in Massachusetts and Dr. Leslie Turl, a textile expert with the Defence Research Medical Laboratories at Toronto of the Department of National Defence. Evidence for the defendant was given by Mr. Warren A. Seem, one of the inventors of the inventions in issue, Mr. Roger Tomlin, the plant superintendent of Galtex Company Limited at Galt in Ontario, Mr. Harold P. Berger, a part owner of Marionette Mills Incorporated at Coatesville in Pennsylvania and one of the partners in the Permatwist Company of which Mr. Seem and his co-inventor Mr. Stoddard were also partners, Mr. William S. Berky, the defendant's comptroller and Dr. Chester J. Dudzik, the project engineer in charge of the development and design of the defendant's yarn processing equipment. In addition, evidence on behalf of the plaintiff was given on comimssion in England by Mr. Ernest Philip R. Scragg, the plaintiff's deputy chairman.

It is a cardinal principle that the claims in a patent should be construed in the light of the common knowledge which a person skilled in the art to which the invention defined in the claims relates is assumed to have had as at the date of the invention for which the patent was granted,

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for the specification of the patent, including the claims with which it ends, is deemed to be addressed to such a person.

The state of the relevant art immediately prior to the date of the invention is part of the common knowledge which the addressee of the patent is assumed to have had. It is important, therefore, that the date of the invention should be determined.

In the present case there is a dispute between the parties regarding the date of the inventions defined in the claims in issue of patents No. 552,104 and No. 552,105 respectively. While the said patents, which were issued on January 21, 1958, were based on applications dated September 27, 1954, and the corresponding United States patents were based on applications dated January 4, 1954, it is asserted on behalf of the defendant that the inventions in issue were in fact made in July, 1947. On the other hand, it is contended for the plaintiff that the defendant is not entitled to an invention date prior to January 4, 1954.

Evidence in support of the defendant's assertion was given by Mr. Seem. He set out the steps that he and Mr. Stoddard had taken relating to the inventions which he and Mr. Stoddard had made. A detailed review of his evidence on the subject is essential.

Mr. Seem's qualifications are of a high order. He has been in the throwing business for over 40 years ever since he was 16 years of age. Throwing is the business of processing yarns consisting of continuous filament fibres and those who are engaged in it are known as throwsters. Mr. Seem worked first under his father who was the throwing superintendent of the Julius Kaiser Company which was engaged in twisting silk fibres. In 1927 he entered the employ of the Georgetown Silk Company at Wilkes-Barre in Pennsylvania and in 1929 became its vice-president and the general manager of its throwing plant.

In 1935 he hired Mr. Stoddard as a machinist. They were both experimentally minded and worked on the twisting of silk and rayon fibres. Between 1938 and 1941 they had developed a false twist spindle and were experimenting with it. In that period they had some nylon yarn to work with. They had received such yarn for the first time in the fall of 1938. They experimented with heaters of various types. They found that the use of steam for the purpose of setting twist in the yarn was not satisfactory and they also tried other means for the purpose, including the use of certain chemicals, wetting the yarn and running it through the heater, and adding high boiling point materials to it. In the course of their experiments they found that when the nylon yarn was heated to a high temperature they were getting a very good set with the use of dry heat alone. This surprised them for the teaching in the industry had been that moisture was always used for setting the fabric or the twist in the yarn.

In 1941 their experiments came to a temporary halt. The production of silk was stopped and the Georgetown Silk Company was forced into liquidation. Mr. Stoddard then went to Durham in North Carolina to work with a government agency and Mr. Seem went to the Sauquoit Silk Company at Scranton in Pennsylvania. In 1943 he left that company and went to the Atlantic Rayon Corporation of Providence in Rhode Island which later changed its name to Textron Inc. These companies were rayon and nylon throwsters.

In 1944 Mr. Seem and Mr. Stoddard came together again. Mr. Seem was in Philadelphia with Synthetic Yarns Inc., of which he was a part owner, and Mr. Stoddard moved there in July and took a position with the Radio Corporation of America. The two men resumed their experiments, each having a laboratory in the basement of his own home. They reviewed their work on rayon fibres and then resumed their experiments with nylon fibres. Between them they made a rough bench model of a false twisting apparatus on which they conducted their experiments. In the same year they formed a partnership under the name of the Permatwist Company with Mr. Harold P. Berger and Mr. Tecce, who had agreed to finance their work.

In 1946, after further experiments, Mr. Seem and Mr. Stoddard had come to the conclusion that they could build a full scale commercial machine for false twisting yarns and decided to build a portable bench model incorporating the entire apparatus that was necessary for the purpose. In the spring of 1946 Mr. Stoddard approached the Baugher and Hirst Machine Shop Company with a view to having them make the model and on April 18, 1946, Mr. Seem wrote to the Company authorizing the work according to

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the instructions that Mr. Stoddard had given. On February 11, 1937, he wrote to the Company complaining of the slow progress that had been made. Mr. Stoddard then helped in the completion of the model himself, working in the Company's shop in the evenings and at week ends, and, finally, in July, 1947, Mr. Seem and Mr. Stoddard received the portable bench model which they had devised.

After it had been received the rough model was dismantled. Mr. Seem and Mr. Stoddard then used some additional pieces of equipment with the model, comprising a voltage regulator, a step-down transformer, a rheostat, a voltmeter calibrated to revolutions of the motor per minute and a voltmeter to test the voltage fed to the heater. The portable bench model with the rheostat and the calibrated voltmeter was filed as Exhibit Z-151 and pictures of it were filed as Exhibits Z-152 and Z-153. These show the parts, as listed on Exhibit Z-154. Mr. Seem also showed on a photograph of Exhibit Z-151, filed as Exhibit Z-174, the path taken by the yarn as it passed from the supply package through the machine to the take-up package. The yarn travelled upward from the supply package and through what was called a pigtail guide, then through the tension device and downwardly through the heating device, then through a space and another pigtail guide and around the twist trapper on top of the hollow false twist spindle, then through the spindle and the hollow motor shaft, then around a guide pulley and upward through another pigtail guide and into the take-up package.

Mr. Seem explained how the controls of temperature, tension and linear speed of the yarns operated. The voltage regulator was used to make corrections for variations in the voltage coming from the outside power source and it was able to do so within plus or minus one per cent. The step-down transformer was used to step the incoming voltage being fed to the heater down from 120 volts to safe voltages of from 24 volts downward. The output of the step-down transformer went through the rheostat and this enabled Mr. Seem to make a fine adjustment of the voltage going to the heater. This was changed as required in order to correlate changes in the temperature of the heater with tensions in the yarn. If there were changes in the temperature of the ambient atmosphere, referred to in the evidence as the ambient temperature, Mr. Seem observed the temperature as indicated on the thermometer shown as one of the parts of Exhibit Z-151 listed on Exhibit Z-154 and then made a hand adjustment of the rheostat in whatever direction was necessary in order to maintain a uniform temperature in the heater. Within a week or two after receiving the portable bench model in July, 1947, Mr. Seem used equipment with it in addition to that which I have listed. This was for the purpose of making automatic changes in the voltage fed to the heater to meet changes in the ambient temperature. He explained that Exhibit Z-151 was built as a first step in a planned commercialization of the invention and he wished to be certain that equipment that would correct the voltage in order to ensure a uniform temperature in the heater was commercially available. Mr. Stoddard assured him that it was and brought the equipment to his home. This was a small induction voltage regulator with a temperature sensitive resistor which was adjustable to the heater. The equipment referred to was commercially available but the actual temperature sensitive resistor that was used was made by Mr. Stoddard himself. The thermometer in the heater was taken out and the temperature sensitive resistor inserted in its place. Effective insulation was used and the equipment worked satisfactorily. It compensated automatically for changes in the ambient temperature. Mr. Seem and Mr. Stoddard found that with the use of this equipment they were able to control the temperature in the heater and keep it uniform within plus or minus one per cent in spite of changes in the ambient temperature. The second voltage meter to which I referred was used merely for the purpose of determining what voltage was required to produce a given temperature in the heater.

On his cross-examination Mr. Seem explained that he used tensions on the yarn extending from very low tensions down to 1 or 2 grams up to the breaking point of the yarn. He measured these tensions with a tensiometer at various points on the pathway of the yarn. He and Mr. Stoddard were experimenting with various yarns and in respect of nylon were using all the tension devices that were commercially available. The tension device appearing on Exhibit Z-151 was made by Mr. Stoddard. Mr. Seem stated that it gave a uniform tension to the yarn passing through it.

Mr. Seem also said that the false twisting device appearing on Exhibit Z-151 was made by Mr. Stoddard and Baugher and Hirst especially for their purpose.

The rate of through-put of the yarn varied from a few thousand revolutions of the false twist spindle per minute to 10,000. The knob of the rheostat was turned to control the voltage and, consequently, the speed of the motor of which the false twist spindle was the shaft, the higher the voltage the greater the speed of the motor and the larger the number of revolutions of the spindle per minute. The linear speed of travel of the yarn was controlled by changing the relation of the sprockets on Exhibit Z-151. The lower sprocket drove the higher one attached to the take-up package. There was a series of sprockets of various sizes that could easily be changed. Thus, for example, if the spindle was run at 7,500 revolutions per minute and a sprocket of the size that would result in a linear speed of the yarn at 100 inches per minute was used there would be 75 turns of twist per inch in the yarn. Conversely, if it was desired to get 75 turns of twist per inch in the yarn a sprocket of the size that would enable a linear speed of 100 inches per minute to be run was used and the knob of the rheostat was turned so that there would be 7,500 revolutions of the spindle per minute.

Mr. Seem explained that through the control mechanism step-down transformer and the rheostat he was able to bring about changes in the temperature of the heater up to the melting point of the yarn, that the tension device was adjustable by the use of an adjusting nut and that by changing the springs in it he could obtain tensions in the yarn up to its breaking point, that by changing the lower sprocket and occasionally the upper one he could obtain various linear speeds of the yarn that, consequently, he was able to operate Exhibit Z-151 in such a way as to correlate the temperature, tension and linear speed of the yarn.

Mr. Seem disclosed Exhibit Z-151 to Mr. Berger and Mr. Tecce soon after it was received in July, 1947. Between that date and December 1, 1950, Mr. Seem and Mr. Stoddard experimented with various fibres including nylon and produced very satisfactory stretch nylon yarn that was permanently crimped. This was experimentally knit at the

Mar-Ed Hosiery Mills and the Wallbridge Mills, both owned by Mr. Berger and Mr. Tecce. The knitted fabric was uniform and could stand washing and boiling and still maintain its crimp. The yarn produced was more uniform than yarns produced by the step-by-step process, to which further reference will be made. This was proved by making the yarn into fabrics or skeins and then dyeing them. There was greater uniformity in the appearance of the yarn. The step-by-step yarn with which the comparison was made was obtained from Synthetic Yarns Inc. This company was an off-shoot of the Atlantic Rayon Corporation, later Textrons Inc., to which I have referred.

I turn now to Mr. Seem's evidence of developments subsequent to 1947 and up to the end of 1950. In 1949 he sold his interest in Synthetic Yarns Inc. and decided to put his full time on the experimental work in which he and Mr. Stoddard had been engaged. In the same year Mr. Berger and Mr. Tecce sold their two hosiery mills and other mills and went into the throwing business which they operated under the name Marionette Mills Inc. They located a plant for their business at Coatesville in Pennsylvania and started their operation early in the spring of 1950. Mr. Seem and Mr. Stoddard then moved all their equipment, including Exhibit Z-151, to a space in this plant. They then decided to build a short section of a full scale false twisting machine, primarily to demonstrate to Mr. Berger and Mr. Tecce that it was practical to convert the equipment shown in Exhibit Z-151 into full scale commercial operation. With this purpose in mind they visited a textile machinery show in Atlantic City in April, 1950, and inspected various uptwisters and selected for their proposed conversion an uptwister manufactured by Fletcher Works, Philadelphia. This was a short section, about 10 feet long and having 40 spindles. The machine was sent on loan to Marionette Mills Inc. I should mention that an up-twister is a machine used by throwsters for putting a large amount of twist in a yarn. Mr. Seem and Mr. Stoddard converted ten of the 40 spindles to false twisting, that is to say, ten set-ups each having a spindle. Each of the conventional spindles was replaced with a false twist spindle of the same kind as in Exhibit Z-151. A creel was put on top of the machine and the yarn went from this creel to the tension device and through the heating device to the take up package. The path taken by the yarn was shown on a drawing made by Mr. Seem and filed as Exhibit 134B. It showed the several parts of a spindle after it had been converted.

On his cross-examination Mr. Seem explained that he and Mr. Stoddard had used tension devices of various types in the course of their experiments before they made their final decision. Indeed, they used tension devices of all the kinds that were commercially available, tested them and made modifications of them in their attempt to find a tension device that would suit their purpose. They were trying to design an apparatus that could be applied to conventional up-twisters of various kinds in order to convert them from a true twisting process to a false twisting one. What they needed was a multipoint tensioner and they finally decided on a tension device that was substantially the same as the one on Exhibit Z-151. With this tensioner they were able to provide uniform tension to the yarn within one or two grams at any point in its pathway. The heating device was electrically energized and was practically the same as that shown on Exhibit Z-151.

The conversion of the 10 spindles of the 40 spindle up-twister was completed in the latter part of July, 1950. Mr. Seem kept a notebook in which he recorded experiments in the production of nylon yarn on the converted 10 spindles which ran from July 27, 1950, to November 13, 1950. Samples of the yarn so produced were filed as exhibits. These showed that when the yarn had left the heater it had been yarn-set and that when it was taken off the take-up package it had a satisfactory crimp.

The 10-spindle converted machine was kept in a blocked-off part of a room in the Marionette Mills plant. After Mr. Seem had run off the tests which he recorded in his note-book he and Mr. Stoddard were satisfied that they could accomplish their intended purpose and decided to build eight full scale false twisting machines of 220 spindles each. Having come to that conclusion, they removed all the false twist process conversion parts from the machine, restored it to its original position and returned it to the Fletcher Works from whom it had been borrowed.

When it was decided to construct eight full length false-twisting machines of 220 spindles each, Marionette Mills Inc. also decided to excavate under their building in order to provide space where the machines could be constructed and operated secretly. The plan to build the eight machines ran into difficulty by reason of the fact that in 1950 nylon yarn was not freely available to throwsters. The Dupont Company, which was the manufacturer of the yarn, sold it only to knitters and weavers and other customers and would not allocate it to throwsters. In the hope that the nylon yarn might be made available for their purpose Mr. Seem and Mr. Stoddard and their Permatwist Company partners, Mr. Berger and Mr. Tecce, arranged a meeting on December 19, 1950, at Wilmington in Delaware with representatives of the Dupont Company and showed them yarn which had been produced on their false-twisting apparatus and fabric made from it. But their efforts failed. At a later meeting held at the Dupont Company's sales office in Philadelphia they were told that the Company had established a firm policy that no new allocation of nylon yarn should be made and that they would not be able to obtain the desired yarn for two or three years. This forced a change of plan. The partners decided to build only one full length 220-spindle false twisting machine instead of the eight machines that had been planned. The Marionette Mills Company went ahead with the excavation and Mr. Seem and Mr. Stoddard built the machine in the newly built basement. It is still there. Its construction was started early in 1951 and completed early in 1952. It was built by Mr. Seem and Mr. Stoddard and certain employees of Marionette Mills Inc.

The machine was located in the basement of the Marionette Mills plant with a partition built around it and was operated with great secrecy. Prior to its conversion to false-twisting it was a full length 220-spindle Utility Up-twister. After its conversion had been completed in 1952 the arrangement of its parts was the same as that shown in Figure 2 of patent No. 552,104 and Figure 8 of patent No. 552,105. And it was substantially similar to the defendant's Fluflon False Twisting Machine of which an exemplification was set up in the basement of the Supreme and Exchequer Court Building and filed as Exhibit Z-161. There were some differences due to changes that were made after 1952, to which further reference will be made, but there was no functional difference. A photograph of Exhibit Z-161 was filed as Exhibit Z-162 and photographs of the 220-spindle machine were filed as Exhibits Z-182 to Z-186.

Nylon yarn was processed on the machine in the spring of 1952 and knitted into fabrics which were dyed and washed and put to other tests. Swatches of fabrics knitted from low and high twist stretch yarns produced on the machine were filed as Exhibits Z-163 to Z-165. All of these fabrics had been worked, boiled and thoroughly tested and had retained a permanent crimp. The machine was a production machine and nylon yarn processed on it was sold as a commercial product in March or April of 1953. On his cross-examination, Mr. Seem explained that in the course of their work on the machine their range of throughput ran from 8,000 to 20,000 revolutions of the spindle per minute, with twists in the yarn ranging from 20 times up to about 140 per inch, that the tension used in the twist zone between the heater and the twist trapper of the false twist spindle ran from 3 grams up to the breaking point and that the temperature used was from 10° to 20° above the ambient up to the melting point. He freely admitted that the machine was used for experimental purposes as well as for commercial production.

A secret disclosure of the machine and of the processing method used was made on May 20, 1952, to four persons representing Synthetic Yarns Inc. It had been offered a license under certain French patents and Mr. Seem had told one of its representatives that he and Mr. Stoddard had developed a machine and a method for producing stretch thermoplastic yarns by a continuous process and that they might work out an arrangement whereby representatives of Synthetic Yarns Inc. could inspect the machine with a view to working out a business arrangement. The representative came to the Marionette Mills plant and signed a secret disclosure statement which was filed as Exhibit Z-166. Mr. Seem showed them yarns of various types that had been produced on the machine and fabrics made from them and also, for comparison purposes, yarns that had been produced by the conventional step-by-step process. He also showed them the machine in operation and described the parts, including the overhead creel, the tension device such as that shown in Exhibit Z-151 and the electrically energized heater as already described. In order to demonstrate how the machine would eventually run, Mr. Seem used equipment in connection with the heater which had been borrowed from the Radio Corporation of America. This consisted of an induction voltage regulator with a temperature sensitive resistor for insertion in one of the heaters which had the effect of automatic control of changes in the voltage fed to the heater and necessary compensation for changes in the ambient temperature as already described in the case of the additional equipment used with Exhibit Z-151. Mr. Seem also stated that the false twist spindle was such as that shown on a drawing made by the Hartford Machine Screw Co., dated December 5, 1951, and filed as Exhibit Z-157. Mr. Seem admitted that in respect of some of the features referred to in the secret disclosure statement the representative of Synthetic Yarns Inc. had accepted his own statements of them.

I come now to Mr. Seem's evidence relating to the events subsequent to the secret disclosure of May 20, 1952, and the issue of the United States patents corresponding to the patents in issue. After the secret disclosure arrangements were made to build six false-twisting machines for Synthetic Yarns Inc. and the Permatwist Company partners decided to build seven machines in addition to the one already described in order to make up the eight machines that had been planned. An adequate supply of nylon yarn was now available and there was space in the basement of the Marionette Mills plant for them. Mr. Seem and Mr. Stoddard were urged to get patent protection for what they had devised and documents and drawings were sent to Synnestved and Lehner, their patent attorneys, in July, 1952.

The machines were all built during 1953 and were completed in that year or very early in 1954 and they all went into production on their completion and have been in production since then.

There were some differences between the machines that were finally built and the single 220-spindle machine that was completed early in 1952. There was a change in the tension device from the interlocking coil gate tension device such as that in Exhibit Z-151 to a gate tension device. The change was made for the purpose of making the device more easily threadable and capable of more variations of

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adjustment without changing springs. Mr. Seem and Mr. Stoddard worked out the new device, which provided uniform tension, and the Hartford Machine Screw Co. made the devices for them. There was an alteration in the heating device involving wear resistant bushings and there was also a change in the location of the temperature sensitive resistor. When the single machine was built the temperature sensitive resistor was in one of the heaters but when the eight machines were installed it was put in a central position relative to them so that it could control them all. There was a slight difference in the false twist spindles in the location of the bearings and the machines were better balanced. But there was no difference in the functioning of the machines. The differences to which I have referred were made in the latter part of 1953.

One other fact remains. Mr. Seem and Mr. Stoddard applied for United States patents for their inventions on January 4, 1954. Later, in the same year, namely, on December 14, 1954, The Permatwist Company, which really owned the inventions, sold them, except as later stated, to the defendant, then Universal Winding Company and now Leesona Corporation. Mr. Seem explained that the inventions had been sold to the defendant because it was the biggest manufacturer of textile machines in the United States. On August 17, 1957, United States patents for the inventions issued to Universal Winding Company. United States patent No. 2,803,109 corresponds to Canadian patent No. 552,104 and its claims 1, 2, 3, 5 and 8 are identical with the claims in issue of patent No. 552,104. United States patent No. 2,803,105 corresponds with Canadian patent No. 552,105 and its claim 3 is identical with claim 3 of patent No. 552,105.

Mr. Seem also stated that applications for patents for the inventions had been made in England but were under opposition by the plaintiff and others.

The dispute between the parties as to the date of the inventions defined in the claims in issue is one of fact. It is settled that the date of the conception of the idea of an invention does not determine its date, for, as Viscount

Cave L.C. said in *The Permutit Company v. Borrowman*[1], at page 359:

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

This was a case where there were conflicting applications for a patent for the invention of a particular process and it was held on the evidence that the respondent Borrowman, whose application was made in 1919, had completed the invention in 1916 and was a prior inventor as against one Spencer, the assignor of the plaintiff, notwithstanding the fact that he had conceived the idea of the invention in 1912 and had made his application in 1917, on the ground that it was not proved that he had made any invention in the true sense of the word in 1912 or before the completion of the invention by Borrowman in 1916.

The Court is frequently called upon, as it was in the *Permutit v. Borrowman* case (*supra*), to determine the date of an invention prior to the date of the application for a patent for it. It does so, for example, in conflict proceedings. It is settled that in Canada the determination does not depend on the date of the reduction of the invention to practice in the sense of the United States decisions on the subject and they must, therefore, be read with caution,

Since the determination of the date depends on the facts of the case it is not surprising that there is a dearth of Canadian decisions on the subject. The matter was considered by the Supreme Court of Canada in *Christiani & Nielsen* v. *Rice*[2] where Rinfret, J., as he then was, made the following statement, at page 456:

> The holding here, therefore, is that by the date of discovery of the invention is meant the date at which the inventor can prove he has first formulated, either in writing or verbally, a description which affords the means of making that which is invented. There is no necessity of a disclosure to the public

and he went on to say:

> If the inventor wishes to get a patent, he will have to give the consideration to the public; but, if he does not and if he makes no application for the patent, while he will none the less, if he has communicated his invention to "others" be the first and true inventor in the eyes of the Canadian patent law as it now stands, so as to prevent any other person from securing a Canadian patent for the same invention.

[1] (1926) 43 R P C 356. [2] [1930] S C R. 444

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The judgment in the *Christiani* v. *Rice* case was affirmed by the Judicial Committee of the Privy Council[1] but it did not mention the statement referred to. But it was adopted by this Court in *Bohn Aluminum & Brass Corpn.* v. *Berry*[2] as a statement of the test to be applied in determining the date of an invention.

It was not intended, in my opinion, that the test laid down in the statement should be all-inclusive. It is clear, of course, that if an inventor can prove that he formulated a description of his invention, either in writing or verbally, at a certain date then he must have made the invention at least as early as that date. It is also clear that the requirement that there must be proof of the formulation of a description of the invention, either in writing or verbally, is neither apt nor necessary in the case of an invention of an apparatus where the inventor can prove that at the asserted date he had actually made the apparatus itself, although there was no formulation of a written or oral description of it. Nor was it intended that the test laid down in the statement should replace the general statement in the *Permutit v. Borrowman* case (*supra*) that before a man can be said to have invented a process he must have reduced the idea of it to a definite and practical shape. Consequently, even although the test of proof of the formulation of a description of the invention, either in writing or verbally, at a particular date might be appropriate in determining the date of an invention of a process, it cannot have been intended to exclude proof that the process was actually used at the asserted date, even although there was no formulation of a written or oral description of it at such date. Thus the statement in the *Christiani* v. *Rice* case (*supra*) to which I have referred should not be interpreted as laying down a rule that proof that an invention was made at an asserted date must be confined to evidence that a written or oral description of it had been formulated at such date. It may also be proved, in the case of an invention of an apparatus, that the apparatus was made at such date or, in the case of an invention of a process, that the process was used at such date. The essential fact to be proved is that at the asserted date the invention was no longer merely an idea that floated through the inventor's

[1] [1931] A.C. 770; (1931) 48 R.P.C. 511.
[2] [1937] Ex. C.R. 114 at 116.

brain but had been reduced to a definite and practical shape. The statement to which I have referred should be construed accordingly.

Counsel for the plaintiff contended that a special onus rested on the defendant by reason of its assertion that the invention defined in the claims in issue was made in July, 1947, and the fact that it did not apply for its patents until January 4, 1954. I do not agree. While the Court will, of course, carefully scrutinize the evidence in support of an inventor's assertion that he made his invention at a date long prior to the date of his application for a patent for it the law does not impose a heavier onus of proof on the inventor than that which is usual in civil cases. There is support for this opinion in the judgment of the Judicial Committee of the Privy Council in *Canadian General Electric Co., Ld.* v. *Fada Radio Ld.*[1] In that case the evidence showed that one Alexanderson had made his invention in the middle of January, 1913, and was therefore not hit by the assumed fact that Schloemilch and Von Bronk also discovered it in February, 1913. The fact that Alexanderson's application for a patent for his invention was not made until September 17, 1920, did not impose any special onus on him. This appears from the brief statement of Lord Warrington of Clyffe, at page 93:

> Their Lordships are therefore of opinion that, fairly read, the evidence shows that *Alexanderson* had discovered his "invention" in January, 1913, and therefore he is not hit by the fact which is assumed that *Schloemilch* and *Von Bronk* also discovered it in February, 1913, although they did not proceed to make practical use of that discovery.

All that is required is that the evidence should be "fairly read" and that the Court should be satisfied on the evidence so read that the invention, in the true sense of the word, was made at the asserted date.

Two inventions are involved in the present case, one being the invention of the method of processing the thermoplastic yarns defined in the claims in issue of patent No. 552,104 and the other that of the apparatus for processing them defined in claim 3 of patent No. 552,105.

I shall deal with the invention of the apparatus first. In my opinion, the evidence satisfactorily establishes that the apparatus filed as Exhibit Z-151, and the additional

[1] (1930) 47 R.P.C. 69.

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equipment used with it, together with the small induction voltage regulator with the temperature sensitive resistor that Mr. Stoddard made that was used with Exhibit Z-151 a week or two after the portable bench model had been received constituted apparatus within the ambit of claim 3 of patent No. 552,105 and I find, accordingly, that Mr. Seem and Mr. Stoddard made the invention defined in it at the asserted date, namely, in July, 1947, or, at the latest, early in August, 1947.

The apparatus contained all the essential elements specified in the claim. The parts are shown on Exhibits Z-152 and Z-153 and the path of the yarn is described by Exhibit Z-174. The apparatus had a support for the supply of yarn and wind-up means for the processed yarn spaced from the support and operable to draw it continuously at a selected linear speed from the supply to the wind-up means; an electrically energized heating device defining a restricted thermally isolated heated zone through which the yarn passed to heat it as required; a false-twist device, made by Mr. Stoddard, for twisting the yarn before it passed through the heated zone and untwisting it after it had passed through; control means, consisting, as Mr. Seem explained, of the voltage regulator, the step-down transformer, the rheostat, and the induction voltage regulator with the temperature sensitive resistor adjusted to the heating device, and operable automatically to regulate the supply of heat energy to the heated zone compensatively according to the rate of transfer of heat to the yarn to maintain the zone uniformly at the temperature required to heat the yarn; tension means operable to maintain the yarn at a uniform tension during its passage through the heating device and to the wind-up means; and means to regulate the tension means, as Mr. Seem explained, in order to control the tension of the yarn in correlation to the prescribed temperature and linear speed of the yarn to maintain it at a selected uniform tension relative to the contractile force and thermal characteristics of the yarn. Moreover, the evidence establishes that the apparatus invention was disclosed to "others", namely, Mr. Berger and Mr. Tecce, the Permatwist Company partners of the inventors, soon after the portable bench model had been received.

The fact that Mr. Seem and Mr. Stoddard continued to work on Exhibit Z-151 and its accompanying equipment and make further experiments does not affect the fact that they had made the invention of the apparatus defined in Claim 3 at the asserted date. They were obviously anxious to make improvements. When they had satisfied themselves, as they did, that they could use the apparatus that they had invented to produce very satisfactory stretch nylon yarn that was permanently crimped and more uniform in appearance than nylon yarn produced by the step-by-step process and that knitted fabric made from it could stand washing and boiling and still maintain its uniform crimp they proved that it was possible to put their invention into full scale commercial operation when they completed the false twist conversion of the 10 spindles of the 40-spindle-up-twister that they had borrowed from the Fletcher Works. In my opinion, the 10-spindle false twist conversion that was completed in July, 1950, was simply a full scale commercial exemplification of the invention that Mr. Seem and Mr. Stoddard had made in July, 1947 or shortly thereafter.

In this connection, counsel for the plaintiff contended that the tension device used on the 10-spindle conversion was defective and relied on the opinion of Mr. Dufort in support of his contention. The tension device referred to was similar to that shown on Exhibit Z-151 except that it had an arm extending out from the spring member with notches in it from which weights could be suspended in such a way as to apply pressure against the spring member. Mr. Seem made a drawing of this tension device, filed as Exhibit 136, and explained its working. He said that most of the tests in which this device was used were made with 200 denier yarns for which a light spring would not be satisfactory. These were heavy yarns. Mr. Seem said that he had decided that instead of putting on a heavier spring when he was dealing with the heavy yarns he would use the light one, which was very responsive, and add weights to the arm as required in order to add pressure against the spring in order to reach the necessary tension. There was a conflict of opinion regarding this device. Mr. Dufort said it was a bad tension device, indeed, a "rotten" device. But Mr. Seem said that the combination of the light spring and the weights was a good low inertia system and Dr. Dudzik

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thought that it was a very good tension device. If I had to do so I would accept the opinions of Mr. Seem and Dr. Dudzik. Mr. Seem had used it and produced satisfactory crimp nylon yarn with its use. But I need not express any opinion on the matter, for Mr. Seem made it clear that the tension device referred to was used with heavy deniers, but that he and Mr. Stoddard had finally decided on a tension device that was substantially the same as that which had been used in Exhibit Z-151.

Mr. Seem made a drawing of a single spindle of the 10-spindle conversion, showing the path of the yarn in its passage through the machine, filed as Exhibit 134b. This drawing, together with his description of the conversion, satisfactorily establishes that there was no essential difference between the 10-spindle conversion and Exhibit Z-151 with its accompanying equipment and that all the elements specified in Claim 3 were present in it.

A similar statement may properly be made with regard to the single 220-spindle false twisting machine that was constructed in the basement of the Marionette Mills Inc. plant at Coatesville and completed in the spring of 1952. When it was completed the arrangement of its parts was the same as that shown on Figure 8 of patent No. 552,105. In my opinion, it was essentially another exemplification of the 1947 invention in a full scale commercial form. There is nothing in the evidence to indicate that it was different in any essential particular from the 10-spindle conversion or Exhibit Z-151 with its accompanying equipment and it was substantially similar to the defendant's Fluflon False Twisting Machine of which an exemplification was put in as Exhibit Z-161. And it is clear that on May 20, 1952, the date of the secret disclosure, Mr. Seem showed the machine in operation to the representatives of Synthetic Yarns Inc. and described its parts. Counsel for the plaintiff contended that the inventors had not obtained an induction voltage regulator with a temperature sensitive resistor for use with the machine but Mr. Seem stated that in order to demonstrate how the machine would eventually run he had used an induction voltage regulator with a temperature sensitive resistor which he had borrowed from the Radio Corporation of America. I accept his statement. In my opinion, the evidence clearly establishes that all the elements specified in Claim 3 were present in the single 220-spindle machine.

And there cannot be any doubt that the six false twisting machines that Mr. Seem and Mr. Stoddard made for Synthetic Yarns Inc. and the seven additional machines that they constructed in the basement of the Marionette Mills Inc. plant came within the ambit of Claim 3. There were some differences between them and the single 220-spindle machine, as I have already set out, but there were no differences in the essentials and there was no difference in their functioning.

At first glance the defendant's Fluflon False Twisting Machine, of which Exhibit Z-161 was an exemplification, looks different from Exhibit Z-151 with its accompanying equipment, of which the portable bench model was a part, but an analysis of the two pieces of apparatus establishes that each was within the ambit of Claim 3 of patent No. 552,105.

While the evidence relating to the date of the invention of the method of processing the thermoplastic yarns defined in the claims in issue of patent No. 552,104 was not as specific as that relating to the date of the invention of the apparatus for processing them, I am satisfied that it sufficiently establishes that Mr. Seem and Mr. Stoddard used the method defined in the claims in their operation of Exhibit Z-151 and its accompanying equipment when they produced on it the satisfactory permanently crimped stretch nylon yarn to which I have already referred. There were no notes of the method used in producing the yarn and no samples of it or of the fabrics knitted from it and it is not possible to fix the date of the production more precisely than early in the spring of 1950 when Mr. Seem and Mr. Stoddard decided to build a short section of a full scale false twisting machine or at least as early as November 13, 1950, the date of the last test on the 10-spindle conversion recorded by Mr. Seem in his note book and I find, accordingly, that Mr. Seem and Mr. Stoddard invented the method defined in the claims in issue as early as November 13, 1950. By that date the method used by them included all the steps specified in the said claims.

Since Claim 1 appears to be the broadest claim it will be sufficient to review the evidence relating to the use of the method specified in it at the date referred to. Some of the evidence related specifically to the method used in operat-

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ing Exhibit Z-151 and its accompanying equipment but, in my opinion, it is equally applicable to the method used in operating the 10-spindle conversion, which, as I have found, was a commercial exemplification of the invention consisting of Exhibit Z-151 and its accompanying equipment.

There is no doubt that the method used in operating Exhibit Z-151 and its accompanying equipment or the 10-spindle conversion produced "evenly and permanently crimped, wavy or fluffed multifilament thermoplastic yarn having improved and uniform physical characteristics". The fact of such improved and uniform physical characteristics will be dealt with later. And Exhibit Z-174, showing the path taken by the yarn as it passed from the supply package through the machine to the take-up package, shows that it was continually (continuously) drawn from the source of supply and twisted. It is also clear from Mr. Seem's evidence that the yarn passed at "a selected linear speed under uniform tension through a restricted thermally isolated and uniformly heated zone". Counsel for the plaintiff contended that there was no means in the 1947 model for passing the yarn at a selected linear speed due to the fact that the use of the take-up reel on it would cause the speed of the yarn to vary in accordance with the amount of yarn on the reel and that, consequently, there was no means for providing a constant twist. Mr. Seem's evidence on this point was that any variation of speed would be very slight. He pointed out that the 1947 apparatus was a demonstration model and only a small amount of yarn could be put on the spool at a time, but there is no doubt that he and Mr. Stoddard appreciated the need for passing the yarn at a selected linear speed and operated the 1947 apparatus accordingly. In any event, the criticism has no application to the 10-spindle conversion. Mr. Seem explained in detail the manner in which the linear speed of the yarn could be controlled by changing the relationship of the sprockets on Exhibit Z-151 so that it was possible to run the yarn at any selected linear speed ranging from a few thousand revolutions of the false twist spindle per minute to 10,000.

And Mr. Seem made it clear that the yarn was run under uniform tension through a thermally isolated and uniformly heated zone. The use of the tension device on Exhibit Z-151 gave a uniform tension to the yarn at the various points of its passage through the machine and the tension device finally selected for the 10-spindle conversion was substantially the same. Mr. Seem and Mr. Stoddard found that with the equipment used with Exhibit Z-151 they were able to keep the temperature in the heater uniform within plus or minus one per cent in spite of changes in the ambient temperature. The purpose of keeping the temperature in the heated zone uniform was "to uniformly heat the yarn to a prescribed temperature to re-orient the molecules of the yarn to the twisted formation of the yarn and yarn-set the the same". The meaning of the expression "uniformly heat the yarn to a prescribed temperature" and of the term "yarn-set" and the relationship of the expression to the term will be dealt with in detail later. It is sufficient, for the moment, to express the opinion that the purpose was to ensure that the yarn should be heated at a temperature that was high enough to result in its becoming permanently crimped. Certainly, Mr. Seem and Mr. Stoddard had this in mind for they were able to bring about changes in the temperature of the heater up to the melting point of the yarn. While there was no direct evidence that the yarn run through the 1947 apparatus was "yarn-set", Mr. Seem gave evidence that in the course of the experiments that he and Mr. Stoddard had conducted between 1938 and 1941 they had found that when the nylon yarn was heated to a high temperature they were getting a very good set with the use of dry heat alone. This, I think, was tantamount to finding that the yarn was yarn-set. At any rate, there is no doubt that when Mr. Seem and Mr. Stoddard were operating the 10-spindle conversion the yarn was "yarn-set" when it left the heater and had a satisfactory crimp when it was taken off the take-up package. Here I might mention that counsel for the plaintiff raised the objection that there was no mention of yarn setting in the application for patent No. 552,104 and contended that this indicated that the invention had not been completed at the asserted date. I do not agree. I accept Mr. Seem's evidence relating to the operation of the 10-spindle conversion that the yarn was yarn-set when it left the heater. That also establishes that he and Mr. Stoddard used a sufficiently high temperature in the heater to heat the yarn that passed through it to the prescribed temperature, that is to say, the temperature required to heat it so that it would be yarn-set.

I have already set out Mr. Seem's explanation of how the controls of temperature operated in the case of Exhibit Z-151 and its accompanying equipment and there is no doubt that he and Mr. Stoddard controlled the supply of heat energy to the heated zone to maintain it uniformly at the temperature required to heat the yarn uniformly to the prescribed temperature, namely, the temperature required to heat it so that it would be yarn-set. Mr. Seem stated that the voltage regulator was used to make corrections for variations in the voltage coming from the outside power source and it was able to do so within plus or minus one per cent and that the use of the step-down transformer and the rheostat enabled him to make a fine adjustment of the voltage going to the heater. And his evidence was clear that by the use of the induction voltage regulator with the temperature sensitive resistor he was able to make automatic changes in the voltage fed to the heater compensating for changes in the ambient temperature. Thus Mr. Seem and Mr. Stoddard were able to control the temperature in the heater and keep it uniform within plus or minus one per cent in spite of changes in the ambient temperature and this meant, of course, that they could maintain the heated zone at the temperature required to heat the yarn to the prescribed temperature. It is obvious, of course, that the temperature in the heated zone was higher than that of the yarn that passed through it by reason of the transfer of heat from the zone to the yarn. Mr. Seem was cross-examined at length in respect of the difference of temperature resulting from this transfer. He stated that the temperature of the yarn reached the ambient temperature very quickly and that its temperature when it was in the heated zone depended on the rate of transfer of heat from the zone to it and that this rate depended on certain factors, including the linear speed of the yarn, the type of the yarn and its thermal characteristics and the difference between the temperature of the heater and that of the yarn. He explained that when the temperature of the heater and the linear speed of the yarn had been settled so that the yarn was heated to the required temperature the control means operated automatically to regulate the supply of heat energy to the heated zone compensatively according to the rate of transfer of heat to the yarn to maintain the zone uniformly at the temperature required to heat the yarn to the prescribed temperature. This was done by the use of the temperature sensitive resistor and the voltage induction regulator. Thus the control means operated automatically to compensate for changes in the temperature of the heated zone and that of the yarn due to variations in the voltage, changes in the ambient temperature and variations in the rate of transfer of heat to the yarn and to maintain the heated zone and the yarn at the uniform temperature required to yarn-set it as desired.

And Exhibit Z-174, showing the path of the yarn on Exhibit Z-151, indicates that it was continuously cooled in order to stabilize it after it had passed under tension through the heated zone and before it reached the twist trapper, that it was continuously untwisted after it had been cooled, and that the processed yarn was continuously collected in the take-up package.

Finally, there is the requirement in the claim that the tension upon the heated yarn should be correlated to the prescribed temperature of the heated yarn "to maintain the yarn under tension adequate to preclude substantially any ductility in the cooled yarn". There was much argument regarding the meaning of the expression "preclude substantially any ductility in the cooled yarn" and it will be dealt with when I come to the construction of the claims. Mr. Seem stated that he was able to operate Exhibit Z-151 and its accompanying equipment in such a way as to correlate the temperature, tension and linear speed of the yarn for the desired purpose. I accept his statement and am satisfied that the requirement of the claim to which I have referred was met. I am also satisfied from the evidence relating to the yarn that was produced on Exhibit Z-151 and its accompanying equipment that its ductility was substantially precluded.

In view of the fact that the 10-spindle conversion was a commercial exemplification of the 1947 invention all the evidence relating to uniformity of tension, control of temperature and correlation applies to the 10-spindle conversion. Counsel for the plaintiff contended that there was nothing in Mr. Seem's note book to indicate that correlation had been practised. But while no temperatures were recorded

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in the note book there were records of voltages in it which could be converted to temperatures and indicated that correlation had been practised. And there is the evidence that the yarn produced on the 10-spindle conversion was yarn-set and satisfactorily crimped.

In my opinion, there is no doubt that all the steps specified in Claim 1 of patent No. 552,104 were included in the method used by Mr. Seem and Mr. Stoddard when they operated Z-151 and its accompanying equipment and the 10-spindle conversion and that they invented the said method at least as early as November 13, 1950.

The inventions in issue have met with remarkable commercial success. The first license to use them was given to G. H. Heath & Co. Ltd., a large throwster operating in Macclesfield, on March 22, 1954, only a little more than two months after the date of the applications for the United States patents. Evidence of the events leading to the license and the circumstances under which it was given was adduced by Mr. Seem. He had known Col. Heath, the managing director of the company, and Mr. John Barnett, Sr., his assistant, for many years. They had made a practice of coming to the United States about every two years to keep in touch with developments in the industry. Prior to the war they had visited Mr. Seem's father at the Julius Kaiser Company and Mr. Seem at Georgetown. On one of their visits after the war they heard that Mr. Seem and Mr. Stoddard were working on nylon yarn and were told that when patent applications for their inventions had been filed they would be notified. Soon after the applications were filed on January 4, 1954, they were notified of the fact and that the inventors had eight machines operating on various types of yarn, various deniers and various twists. A few weeks later Col. Heath and Mr. Barnett came to Coatesville and saw Mr. Seem and his associates. He showed them yarn that had been produced on the eight machines by the use of the invented process and fabric, stockings, sweaters and various other garments made from it. He also showed them skeins of yarns made by the step-by-step or conventional process showing the better dyeing and other qualities of the inventors' yarn. There were meetings on at least seven consecutive days at which representatives of both parties were present and on March 22, 1954, a licensing agreement for the use of the inventions was entered into between Warren A. Seem, Nicholas J. Stoddard, Fred Tecce and Harold P. Berger, co-partners trading as The Permatwist Company, as Licensors, and G. H. Heath & Co. Ltd., as Licensee. This agreement, filed as Exhibit Z-172, contained certain representations on the part of the licensors regarding the inventions. Under its terms, G. H. Heath & Co. Ltd. paid the licensors $5,000 in cash to be applied as a credit on royalties, obligated itself to pay the licensors an additional $10,000, whether it used the inventions or not, and agreed to pay a royalty of 15 per cent of the selling price of all yarn produced by the use of the inventions. This agreement was executed before the representatives of G. H. Heath & Co. Ltd. saw any of the machines or were given any information about the invented process other than the representations contained in the agreement. After the agreement had been executed Mr. Seem showed Col. Heath and Mr. Barnett the eight machines and described and demonstrated the method of their operation. G. H. Heath & Co. Ltd. then gave The Permatwist Company an order for machines for 10,000 spindles.

Licenses similar to the one given to G. H. Heath & Co. Ltd. were given by The Permatwist Company to seven United States companies and to one Canadian company as set out in a list filed as Exhibit Z-173. The dates of these licenses extended from August 17, 1954, to November 26, 1954. Mr. Seem stated on his cross-examination that to the best of his knowledge all the licensees listed in Exhibit Z-173 paid $5,000 in advance and committed themselves to the payment of $10,000 more regardless of whether they used the inventions or not.

Counsel for the plaintiff objected to evidence of commercial success outside of Canada, but it should be noted that all the licenses thus far referred to were licenses to use the inventions and were given before any patents were issued. The evidence was, therefore, admissible for it is established that an invention is not limited to any particular locale. It is an invention wherever made: *vide Christiani & Nielsen v. Rice*[1]. After careful consideration of the matter, I am of the opinion that evidence of commercial success of an invention anywhere is admissible. Conse-

[1] [1930] S C R 444; [1931] A C 770; (1931) 48 R P C 511.

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quently, evidence of the commercial success of the inventions in issue outside of Canada was admissible.

After December 14, 1954, the defendant, which had acquired the inventions from The Permatwist Company, as already stated, continued the licensing of the inventions without waiting for the granting of patents for them.

The sale of the inventions to the defendant did not extend to rights to use them outside of the United States and Canada. There were provisions in the licensing agreement between The Permatwist Company and G. H. Heath & Co. Ltd. relating to the formation of corporations. The licensors, The Permatwist Company, were to cause to be organized a corporation under the laws of Great Britain, to be called Corporation 'A', to which the licensors should transfer exclusive licensing rights for Great Britain and Continental Europe and the exclusive right to apply for British and Continental patents for the inventions. It was further provided that the licensors and the licensee, G. H. Heath & Co. Ltd., should jointly cause to be organized a corporation under the laws of Great Britain, to be called Corporation 'B', the capital stock of which should be issued in equal shares to each of them. It was further agreed that Corporation 'A', after entering into an agreement with the licensee, would transfer to Corporation 'B' the exclusive right to issue further licenses of the use of the invention to applicants in Great Britain and in Continental Europe. The two corporations were formed, Corporation 'B' being called Fluflon Limited. This corporation entered into licensing agreements with nine licensees for the use of the inventions, representing that applications for Letters Patent for them had been filed in the British Patent Office. The dates of the nine licensing agreements ran from March 22, 1954, to November 15, 1955. Of the nine licensees, all of whom were in Great Britain, eight are in the Macclesfield area in which the plaintiff operates and their production represents 90 per cent of the throwing capacity of England.

Further evidence of the commercial success of the inventions in issue was given by Mr. W. S. Berky, the defendant's comptroller. Particulars of the production of yarn by the use of the inventions by licensees of the defendant for the period from April 1, 1955, to June 30, 1961, were set out in a table filed as Exhibit Z-195 and a statement of the gross royalties received by the defendant from its licensees for the inventions was filed as Exhibit Z-196. The gross royalties from licensees in the United States, Canada and the rest of the world in the said period came to a total of $9,264,537. This came from licensees of three machines known as Fluflon, Superloft and High Speed. The Fluflon machine referred to was the same as the defendant's Fluflon False Twisting Machine, of which an exemplification was set up in the basement of the Court House and filed as Exhibit Z-161. The Royalties received for its use for the period in question came to a total of $5,870,062 out of the total previously referred to.

In addition, there were the royalties paid by the licensees of the inventions in England in which the defendant had no interest.

The evidence establishes that the defendant and its licensees, The Permatwist Company, G. H. Heath & Co. Ltd., Fluflon Limited and its licensees all considered that the inventions in issue were very valuable. There is, in my opinion, no doubt that it was.

In order that the Court may construe the claims in issue in the light of the common knowledge which a person skilled in the art to which the inventions in issue relate is assumed to have had as at the date of the inventions it should determine not only the date of the inventions but also the state of the relevant art at such date. And since the Court must as far as possible put itself or be put with the aid of experts in a position similar to that of the skilled person referred to it is desirable to keep in mind the kind of skilled person to whom the patents in issue are assumed to have been addressed. I have already found that the invention of the apparatus defined in Claim 3 of patent No. 552,105 was made in July, 1947, or, at the latest, in August, 1947, and that the invention of the method or process defined in the claims in issue of patent No. 552,104 was made at least as early as November 13, 1950. Consequently, the construction must be made in the light of the common knowledge which the kind of skilled person referred to is assumed to have had at the specified dates respectively.

There was a dispute between the parties as to the relevant art in the present case. Counsel for the plaintiff contended that it was the whole of the textile art but counsel for the defendant took the position that the relevant art was that

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segment of the textile art known as the throwing art. He submitted that the textile art included a great variety of arts, including spinning, weaving, knitting, dyeing, braiding, lace making, thread making and yarn making as well as throwing, and that it is unreasonable to assume that the patents in issue were addressed to persons skilled in the entire textile art if, indeed, there are any such persons. While there was confusion on the part of some of the witnesses regarding the matter and Mr. Seem himself on several occasions referred to the textile art, I agree substantially with the submission made by counsel for the defendant with certain reservations. In my opinion, patent No. 552,104 was addressed to throwsters with a good deal of knowledge of the arts of their customers for the yarns produced by them, namely, weavers, knitters and dyers, for they had to produce yarns that met the needs of such customers. And patent No. 552,105 was addressed to manufacturers of false-twist process machines with knowledge of the needs of throwsters like the plaintiff or the defendant who would be the users of them.

Prior to July, 1947, the only thermoplastic yarn of the kind with which the patents in issue are concerned that was in commercial production was nylon yarn and it was only of recent production. But throwsters were familiar with cellulose acetate yarn. Cellulose acetate was discovered as early as 1865. Cellulose is a chemical substance found in wood and cotton, composed of carbon, hydrogen and oxygen, $C_{12}H_{22}O_{11}$, and cellulose acetate is formed when cellulose unites with acetic acid and acetic anhydride, the chemical formula of the latter being different from that of the former by reason of the fact that a molecule of water is removed from it. The fibres of cellulose acetate yarn are natural fibres. The thermoplastic yarns of the kind specified in the patents in issue, on the other hand, are synthetic in the sense that the fibres of which they are composed are wholly man made.

Nylon yarn was the first of the synthetic yarns to be produced. Nylon was discovered by Carrothers in England in 1928. It is made from coal, water, petroleum and limestone. One of the nylons known as "nylon 66" is described as polyhexamethyleneadipimide. Its name indicates a large number of molecules, six methylene groups of CH_2 and six atoms of adipic acid. The mixture referred to is extruded into fine continuous filaments or fibres, which are twisted together to form yarn. Nylon yarn is much stronger than cellulose acetate yarn but the fundamental difference between cellulose acetate and nylon lies in the character of the links that hold their respective molecules in a molecular chain. The links of the former are large and bulky, whereas those of the latter are long and thin.

Terylene was discovered by Whinfield in England about 1949. In the United States it is called dacron. Its proper name is polyethylene teraphthalate. Its origin was by the polyester route instead of the polyamide one. Terylene (dacron) is stronger than nylon. The chemical formulae for cellulose acetate, nylon and dacron (terylene) were set out in detail in Exhibit 93, after Dr. Finlayson had consulted Professor Speakman about them. These show the arrangement of the atoms in the molecules and the manner in which the molecules are linked with one another in a continuous molecular chain.

The work on nylon yarn that Carrothers had discovered in 1928 progressed rapidly. I have already referred to the fact that Mr. Seem and Mr. Stoddard had received some nylon yarn in the fall of 1938. By 1939 it was in production on a commercial scale. The first nylon yarn was used almost entirely for women's hosiery and sewing yarn. The sheerness of the yarn made it especially useful for women's stockings. During the war years in the United States, meaning thereby the period after Pearl Harbour on December 7, 1941, nylon was taken over almost exclusively for military use purposes, namely, for cartridge belts, parachute cloth and airplane tires. After the war the supply of nylon yarn rapidly expanded but it did not meet the demand for it until late in 1952 or early in 1953.

The thermoplastic yarns specified in the patents in issue are remarkable substances in that they have the physical characteristics of great strength and resistance to wear. But they also had undesirable characteristics. The evidence of these characteristics related particularly to nylon yarn. When it was first produced for commercial use it was in a flat or raw form. While it had great strength and resistance to wear, the articles knitted or woven from it had an undesirable sheen or lustre and had what was called a cold hand, that is to say, they were cold to the touch. In addition, they

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were transparent and not absorbent. The yarn lacked the opacity and bulk of such yarns as cotton and wool.

Various efforts were made to overcome the undesirable characteristics to which I have referred. One of them was to cut the continuous nylon filaments into short lengths like those of cotton or wool fibres and spin them into yarn. But these filaments were slippery and in the course of wear and washing of sweaters and men's socks made from spun nylon yarn the filaments pulled out and got entangled and formed what were called pills. Moreover, the articles tended to become felted. There is now very little spun nylon yarn, its use being mainly that of a blend with other staple yarns in heavier garments.

Other methods of processing nylon yarn were used. For example, in the Agrilon method the yarn was run over a knife edge in order to cut a curl in it; in the Taslan method it was fed into a tube in such a way as to separate the filaments and a strong jet of cold compressed air tangled them; and in the Banlon method it was stuffed into a tube in order to deform it.

The yarn produced by the use of these methods was not as useful as that produced by the use of the apparatus and method invented by Mr. Seem and Mr. Stoddard. By their use a uniform and permanent crimp was put into the yarn and this gave it the desired bulk, with the result that articles knitted or woven from it no longer had an undesirable lustre or sheen, they were soft to the touch and they were no longer transparent. Consequently, in addition to its great strength and resistance to wear the yarn had aesthetic qualities similar to those of cotton and wool yarns. As a result there has been a very great extension in the use of the synthetic thermoplastic yarns specified in the patents in issue.

The idea of putting a crimp in nylon yarn for the purpose of giving it the desired qualities that I have mentioned was not conceived by Mr. Seem and Mr. Stoddard. The specification of patent No. 552,104 recognizes the existence, as at January 4, 1954, the date of the application for the patent, of a method of producing crimped thermoplastic yarn. This was known as the step-by-step or conventional method. The specification refers to it as the normal prior art procedure. Mr. Seem stated that it first appeared in the

United States late in 1952 and that, to his best recollection, it had started in Europe in 1949 or 1950. Thus, while the step-by-step method of crimping nylon yarn antedates the date of the inventors' applications for their United States patents, it does not antedate the date of the invention defined in Claim 3 of patent No. 552,105, namely, July or early in August, 1947.

There were five separate operations in the step-by-step method. They are set out in the specification of patent No. 552,104 but Mr. Seem described them in greater detail. The first step was to redraw the yarn from the producer's pirn (a term similar to bobbin or supply package) on to a spinner bobbin (supply package), the second to place the spinner bobbin on an up-twister and insert the desired twist in the yarn, the third to put the take-up package on the up-twister into a pressure steam box where it was treated with from 15 to 20 pounds steam pressure for a period of two hours, the fourth to redraw the yarn from the steamed take-up package and put it back on the spinner bobbin and the fifth to place the spinner bobbin on an up-twister running in the opposite direction in order to remove the twist. The yarn was deformed by the high twist put into it in the second step of the method, the deformation was set by the steam pressure in the third and the twist was removed in the fifth leaving the yarn in its deformed state with the desired crimp in it.

There were several disadvantages in the step-by-step method. Its greatest fault lay in the third step where the take-up package was steamed. This resulted in a lack of uniformity in the yarn due to the fact that the yarn tended to shrink under the pressure of the steam and the yarn closest to the centre of the package did not shrink as much as that on the outside. There was also the fact that the method was slow and expensive. Mr. Seem stated that the step-by-step method was used until 1954, 1955 or 1956 when the manufacturers purchased false twisting equipment and that this supplanted the step-by-step method. The latter part of his statement is not correct. The step by step method has not been entirely supplanted. Steps have been taken to lessen the effect of the fault to which I have referred and the method is still in use, but the sale of nylon yarn produced by it is now comparatively small.

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As already stated, the invention covered by patent No. 552,104 is especially concerned with the production of substantially permanently crimped wavy or fluffed thermoplastic yarns of the kind specified in the patent. Its chief aim, as set out in the specification, is to provide a simple, continuous, rapid and economical method for producing, *inter alia*, uniformly processed, continuous filament thermoplastic yarns having increased elasticity and the appearance of spun yarn. The invention covered by patent No. 552,105 is concerned with apparatus for processing the thermoplastic yarns specified in the patent by thermal treatment according to the method referred to. It is directed towards the provision of simple, reliable apparatus with the aid of which the method referred to can be expediently carried out at high speeds and at much less cost than possible with stepwise methods for the production, *inter alia*, of thermoplastic yarns of improved uniformity, as regards their physical characteristics.

There cannot be any doubt about the superiority of the inventors' method, known as the continuous false twist process, over the step by step method. While it might be said that nylon yarn produced by the step by step method, refererd to as conventional yarn, was comparable to continuous false twist process yarn in the sense that each overcame the undesirable characteristics of flat or raw thermoplastic yarns, the evidence is conclusive that the nylon yarn produced by the continuous false twist process was more uniform than conventional yarn in appearance and superior in quality. While some irregularities show up in continuous false twist process yarns, resulting in seconds, more seconds result from the use of the step by step method. The quality of conventional yarn for dyeing purposes is considerably inferior to that of the continuous false twist process yarn. The variation in dyeing quality was the chief reason why step by step yarn was not used in knitted or woven garments but put only into men's socks or white fabrics. Nor was there any dispute of the fact that the continuous false twist process yarn had a softer hand than the conventional yarn and that its introduction opened up a wide variety of uses for nylon yarn, including, for example, carpets, for which conventional yarn was not acceptable.

The evidence indicates that the superior uniformity of the continuous false twist process yarns was due to the uniformity of the conditions under which they were produced. There was recognition of this fact in the statement of Mr. Seem that he had never seen the step by step method used for the production of permanently crimped terylene (dacron) yarn and that he did not believe that it could be used for that purpose by reason of the fact that the step by step method did not lend itself to the necessary uniformity and correlation of tension, temperature and linear speed with the result that the yarn produced by it would be too ductile and the crimp could be easily pulled out. But permanently crimped terylene yarn could be produced on the defendant's Fluflon False Twisting Machine.

Morever, the evidence is conclusive that the continuous false twist process was superior to the step by step method from an economic point of view. There was a great saving in the floor space respectively required by the two methods. The operation of the step by step method took up four times as much floor space as that of the continuous false twist process. Moreover, the cost of the latter was no greater than that of one of the steps in the step by step method. There was also a saving in electrical energy.

There is no doubt in my mind that the superiority of the continuous false twist process over the step by step method, both as to the quality of the yarn produced and as to the cost of production, was the cause of the commercial success to which I have referred.

Before I come to the construction of the claims in issue and consideration of the attacks on their validity by counsel for the plaintiff I should refer to his submissions relating to certain matters which were said to lead up to the charge that the invention defined in the claims in issue of patent No. 552,104 had been anticipated. His comments related to the state of the prior art. I shall deal with them briefly.

Counsel's first submission was that the product of the use of the patented process, that is to say, the continuous false twist process, namely, a crimped thermoplastic yarn, was old and he relied on the fact that crimped cellulose acetate yarn had been produced by Dr. Finlayson prior to the date of the invention in issue. But Mr. Seem's evidence was that the crimp in the yarn produced by the use of Dr. Finlayson's machine, to which I shall refer later, was not permanent in the same sense as that in the thermoplastic

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yarns specified in the patents in issue. Moreover, as already stated, while crimped thermoplastic yarn had been produced by the step by step method, the yarn produced by the continuous false twist process of the claims in issue was superior to it and, to the extent of its superiority, it was not an old product but a new one.

Counsel's next contention was that the dry heat setting of thermoplastic yarns at high temperatures was known in the art prior to the date of the invention in issue. There was conflicting evidence on this. It was disputed by Mr. Seem. I have already referred to his evidence that in the course of their experiments between 1938 and 1941 he and Mr. Stoddard had found that when nylon yarn was heated to a high temperature they were getting a very good set with the use of dry heat alone and that this surprised them for the teaching in the industry had been that moisture was always used for setting the fabric or the twist in the yarn.

In support of his contention counsel relied on certain patents and on the evidence of Professor Speakman and Dr. Hoff. The first reference in a patent to the setting of crimp in a nylon yarn was in U.S. patent No. 2,197,896, dated April 23, 1940, and issued to the Dupont Company as the assignee of J. B. Miles, Jr. This related to the setting of crimp in a nylon yarn in a step by step process and it was stated that while heat setting with steam was preferred it was within the scope of the invention to set the crimp by other methods, e.g., dry heating at 100-150°C. And in U.S. patent No. 2,199,411, dated May 7, 1940, and issued to the Dupont Company as the assignee of E. V. Lewis, it was stated that if oriented synthetic polyamide filaments or yarns (nylon) are subjected to dry heat to a temperature of over 100°C. under low tension they will shrink rapidly and the residual shrinkage is greatly reduced. There was evidence that the dry heat setting of nylon fabrics was known at least as early as 1946. Mr. Seem gave a qualified admission that it was known at least as early as 1949 that nylon fabrics could be set by dry heat well up to the melting point but he knew of no thermoplastic yarn having been yarn set prior to the date of the invention in issue. Professor Speakman gave evidence that the dry heat setting of running nylon fabrics was known at least as early as 1946. But he also stated that he did not think that the continuous dry heat setting of nylon yarn was being practised at that time except in the form of fabrics. Later, he expressed the opinion that there was no difference between the setting of nylon fabrics and the setting of nylon yarn. Dr. Hoff stated that at first the nylon yarn was kept as little set as possible. And the avoidance of yarn setting appears in the Lewis patent to which I have referred. Indeed, it led away from the teaching of yarn setting. Dr. Hoff stated that the dry heat setting of running nylon yarn at a higher temperature than that of steam in order to manufacture satisfactorily hosiery was known in 1945. There is no doubt that he had in mind the Miles and Lewis patents of which his company was the owner.

Mr. Seem did not agree that the effect of dry heat setting of nylon yarn at a high temperature was well known prior to the date of the invention in issue. He and Mr. Stoddard had had to experiment in order to ascertain what effect any particular degree of heat had. The dry heat setting of stretch nylon yarn, meaning thereby a nylon yarn having a permanent crimp with extensive stretch and recovery, taught by the patent in issue became known in the art only after he and Mr. Stoddard had told their licensees how to operate their machine. Mr. Seem stated categorically that in his experience he had never encountered any commercial operation prior to 1947 where a throwster set any fibre by dry heat, that, apart from the patented machine, there was no commercial process in existence, prior to 1954, in which thermoplastic yarn was produced with dry heat near the melting point or in which it was highly twisted and subjected to dry heat near the melting point. I have not found anything in the evidence that controverts his statements. Certainly, there was no evidence that the dry heat setting of thermoplastic yarns of the kind specified in the patent in issue was known in the art prior to 1947 or, indeed, prior to 1954.

Counsel's next submission was that adjustable constant tension devices were old. The evidence discloses that there were many types of tension controlling devices, including finger gate and disc type tension devices, that were available prior to 1947. I have already referred to Mr. Seem's evidence relating to the date of the inventions in issue that in the experiments which he and Mr. Stoddard were

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making in respect of nylon yarns they were using all the tension devices that were commercially available and that the tension device appearing on Exhibit Z-151, the portable bench model made in July, 1947, with its additional equipment, was made by Mr. Stoddard. There was also his evidence in connection with the 10-spindle conversion in 1950 that before they made their final decision they used tension devices of all the kinds that were commercially available, tested them and made modifications of them in their attempt to find a tension device that would suit their purpose, that they were trying to design an apparatus that could be applied to conventional up-twisters of various kinds in order to convert them from a true twisting process to a false twisting one, that what they needed was a multipoint tensioner and that they finally decided on a tension device that was substantially the same as the one in Exhibit Z-151 which Mr. Stoddard had made. Mr. Seem stated that the gate tensioners that were available prior to 1947 were not capable of supplying a tension that was sufficiently uniform to be useful in the false twisting art and that he and Mr. Stoddard had disclosed a tension device that was capable of maintaining a uniform tension within plus or minus one gram. There was justification, therefore, for his statement that in his experience there was no commercial apparatus, prior to January 1954, that was available to throwsters for the purpose of obtaining uniform tensions.

It was also submitted that false twist devices were known in the art prior to 1947. There is support for this submission in patents issued prior to 1947 and in the evidence of Dr. Hoff and Mr. Dufort but, as Mr. Seem stated, there was no false twisting device prior to 1947 for the production of stretch yarn, that is to say, permanently crimped thermoplastic yarn, such as that specified in the patents in issue, having extensive stretch and recovery.

Counsel made several submissions relating to the subject of correlation but I shall for the moment consider only those that were put forward in the attempt to show that the correlation referred to in the patents in issue was known in the prior art, namely, that the direction to correlate tension and temperature is nothing more than a direction to the workman in the art to make the necessary adjustments in operating conditions of the type that had always been made on textile machines to produce the desired or best result, that the correlation referred to is nothing more than the controllable tension disclosed in the Lewis patent and practised by Dr. Finlayson, that in producing a false twist yarn there is no particular or critical relationship between the conditions of tension, temperature and linear speed of twist to produce satisfactory results, that correlation is old and was known in the art as early as 1940, as appears from the Lewis patent, and that while the term correlation was not mentioned in the Finlayson patents they did in effect teach correlation of tension, temperature and linear speed.

In effect, counsel's submission was that the correlation referred to in the patents in issue was old. I do not agree. The correlation of tension and temperature as a step in the process of producing a permanently crimped thermoplastic yarn of the kind specified in the patents in issue was not old. It had not been taught in the prior art and had never been practised in a continuous false twist process prior to the date of the invention in issue. It was not the same as the controllable tension referred to in the Lewis patent and there is no evidence that it was practised by Dr. Finlayson at Spondon. The direction to correlate is not merely a direction to the workman in the art to make adjustments in operating conditions of the kind known in the textile art. It is a direction to correlate tension to temperature in such a way as to preclude substantially any ductility in the yarn as a step in the process of producing a permanently crimped yarn that will withstand the stresses and temperatures of commercial use. As Mr. Seem put it, he had never, prior to January 4, 1954, known of any commercial operation in a false twist process other than that of the inventions in issue, in which correlation of tension and temperature was practised to produce a yarn that could withstand the stresses and temperatures involved in subsequent processes and commercial use. In my opinion, the use of correlation of the kind referred to or for the purpose described was not known in the prior art.

Counsel also submitted that the requirement of uniformity of heating and uniformity of tension to produce a uniform product was not new, but was no more than direction to the workman to adopt the optimum conditions of operation to get the best results and that if he kept his conditions of operation uniform his result would be uniform.

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Mr. Seem admitted that all experienced throwsters would have sufficient intelligence to feel that the more uniform any process is the better it would be but it was also true that the machinery that was sold had variations of tension but it was satisfactory to the trade. He also stated that the throwing equipment used prior to 1947 was not capable of accurate uniform tension control. And there was his statement, as already set out, that in his experience there was no commercial apparatus, prior to January 1954 that was available to throwsters for the purpose of obtaining uniform tensions.

In his argument relating to the state of the prior art counsel for the plaintiff referred to a great many patents but, in my opinion, there is no support in any of them for any of the attacks made on the validity of the claims in issue and no useful purpose could be served by discussing them.

The kind of skilled person to whom the specification of a patent is assumed to be addressed was considered by the House of Lords in *King, Brown and Co. v. The Anglo-American Brush Corporation*[1]. There it was laid down by Lord Watson that the contemplated addressee is a workman of ordinary skill. At page 320, he said:

> Every patentee, as a condition of his exclusive privilege, is bound to describe his invention in such detail as to enable a workman of ordinary skill to practise it;

In Blanco White on Patents, Second Edition, the author states, at page 136, that a specification is addressed to the man who must use it, not to expert scientists, not to amateurs, but to those who will be responsible for putting it into practice and have the necessary skill for doing so. There is support for his statement in the remarks of Lord Parker in the House of Lords in *Osram Lamp Works Ld. v. Pope's Electric Lamp Company Ld.*[2]:

> A patentee must, in his Specification, describe and ascertain not only the nature of his invention but also the manner in which the same is to be performed. A Specification may therefore be considered as addressed, at any rate primarily, to the person who would, in normal course, have to act on the directions given for the performance. These persons may be assumed to possess not only a reasonable amount of common sense, but also a competent knowledge of the art or arts which have to be called into play in carrying the patentee's directions into effect. I say "art or arts" because in carrying out the directions given by the patentee it may well

[1] (1892) 9 R.P.C. 319.

[2] (1917) 34 R.P.C. 369 at 391.

be necessary to call in aid more than one art. Some of the directions contained in a Specification may have to be carried out by skilled mechanics, others by competent chemists. In such a case, the mechanic and chemist must be assumed to co-operate for the purpose in view, each making good any deficiency in the other's technical equipment.

And in *British Thomson-Houston Company Ld. v. Charlesworth, Peebles & Co.*[1] it was stated by Lord Buckmaster in the House of Lords:

the document must be regarded as addressed to craftsmen in the particular branch of the industry to which the alleged invention relates.

Thus, in the present case, the specification of patent No. 552,104 must be assumed to have been addressed to throwsters for they are the persons who will be called upon to carry its directions into effect and the specification of patent No. 552,105 must be assumed to have been addressed to manufacturers of false twist process apparatus who must meet the needs of the throwsters who are to use it. Finally, I refer to the statement of Upjohn, L.J., in the Court of Appeal in *Van der Lely (C.) N. V. v. Bamfords Limited*[2]:

The supposed addressee is the ordinary, the average man of the relevant class.

Vide also the remarks of Lord Reid in the House of Lords[3] and of Viscount Radcliffe, at page 77.

I come now to the construction of the claims in issue. I had occasion recently in the case of *Lovell Manufacturing Company et al. v. Beatty Bros. Limited*[4] to consider the principles to be applied in construing a patent specification. There I referred to several decisions in which the governing principles are set out and particularly to the statements of Lord Loreburn, L. C. in *Ingersoll Sergeant Drill Company v. Consolidated Tool Company Ld.*[5]; of Lord Buckmaster in *British Thomson-Houston Company Ld. v. Charlesworth, Peebles & Co.*[6] and of Lord Russell of Killowen in *Electric and Musical Industries Ld. v. Lissen, Ld. et al.*[7] My references to these statements are incorporated in these reasons for judgment without repetition of them.

While the Golden Rule of construction of a document, namely, that its words should be given their plain and

[1] (1925) 42 R.P.C. 180 at 208.
[2] (1961) R.P.C. 296 at 305.
[3] (1963) R.P.C. 61 at 71.
[4] (1963) 23 Fox Pat. C. 112.
[5] (1908) 25 R.P.C. 61 at 83.
[6] (1925) 42 R.P.C. 180 at 208.
[7] (1939) 56 R.P.C. 23 at 39 and 41.

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ordinary meaning applies to the claims of a patent it is a fundamental principle of patent law that a patent specification should be construed fairly. The Court must recognize the fact that just as there may be imperfections in speech and words may be used that do not convey the meaning of the speaker as precisely as the use of more appropriate words would do so there may be lack of precision in the use of the words in a patent specification and in a patent claim, but this must not be allowed to defeat the claim if its meaning, notwithstanding the misuse of some of its words, would be plain to the person of ordinary skill in the art to which the invention covered by the patent relates. The Court must, therefore, construe the claims in issue accordingly without regard to any faults of expression or misuse of words that do not mislead the addressee of the patents in issue.

The proper attitude of mind of the Court in construing a patent specification was defined by Sir George Jessell, M. R. in *Hinks & Son v. Safety Lighting Co.*[1] where he said:

> I am anxious, as I believe every Judge is who knows anything of patent law, to support honest bona fide inventors who have actually invented something novel and useful, and to prevent their patents from being overturned on mere technical objections, or on mere cavillings with the language of their specification so as to deprive the inventor of the benefit of his invention. This is sometimes called a "benevolent" mode of construction. Perhaps that is not the best term to use, but it may be described as construing a specification fairly, with a judicial anxiety to support a really useful invention if it can be supported on a reasonable construction of the patent.

This basic principle of fair construction of a patent specification was stated graphically by Chitty, J. in *Lester v. Norton Brothers and Co.*[2] where he said:

> Before reading the specification, I will briefly mention some of the leading principles applicable to the construction of a specification, and bearing on the points argued. Its office is to describe particularly and to ascertain the nature of the invention and in what manner the same is to be performed. It ought to be construed, like any other document, as a whole. It certainly ought not to be construed malevolently. I will not say it ought to be construed benevolently; I do say that it ought to be construed fairly. It must be read by a mind willing to understand, not by a mind desirous of misunderstanding. Inventors and those who assist them are seldom skilled in the use of language; faults of expression may be got over when there is no substantial doubt as to the meaning The persons to whom a specification is particularly addressed are those who are conversant with

[1] (1876) 4 Ch. D. 607 at 612. [2] (1886) 3 R.P.C. 199 at 203.

the business to which the business relates. The specification is sufficient if a person of ordinary skill and intelligence in the business can understand the directions, and work upon them without experiments. The specification must define in reasonable terms the ambit of the invention and thus give fair warning to the public what the invention is for which the monopoly is claimed.

The principle thus stated by Lord Esher, M. R. and Chitty J. has received full acceptance. There is support for it in the reasons for judgment of Lord Parmoor in the House of Lords in *Natural Colour Kinematograph Co. Ld. (in liquidation) v. Bioschemes Ld. (In the Matter of 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, in delivering the judgment of the Court, stated that the specification "should not be construed astutely" and approved the statement of Sir George Jessell that a patent should be approached "with a judicial anxiety to support a really useful invention." And in *Baldwin International Radio Company of Canada, Limited v. Western Electric Co. Inc. et al.*[3] Rinfret J., again speaking for the Court said that the respondents in the case were entitled to have the claims interpreted "by a mind willing to understand, not by a mind desirous of misunderstanding", thus approving the remarks of Chitty J. in the *Lester v. Norton Brothers case* (*supra*). And in *Western Electric Co. v. Baldwin International Radio of Canada*[4] Duff C.J., delivering the judgment of the Court, said:

the courts, as in the case of other documents, have, where they have been satisfied that there was a meritorious invention, resorted to the maxim *ut magis valeat quam pereat*. And, where the language of the specification, upon a reasonable view of it, can be read so 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.

I refer also to the salutary admonition of Lord Greene M. R. in *The Cleveland Graphite Bronze Company and Vandervell Products Ld. v. The Glacier Metal Coy. Ld.*[5]:

Much time and much ingenuity were occupied in endeavouring to establish meanings for words and phrases without paying due regard to the context in which they appear in the specification. It is sometimes forgotten that the notional person skilled in the art to whom specifications are addressed must be assumed to read them, not with a view of picking holes,

[1] (1915) 32 R.P.C. 256 at 272.
[2] [1930] S.C.R. 462 at 470.
[3] [1934] S.C R. 94 at 106.
[4] [1934] S.C R. 570 at 574.
[5] (1949) 66 R.P.C. 157 at 160.

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but with common sense and with an understanding of at least that rule of construction which requires words to be interpreted not in the air but in relation to the context.

It is essential to the fair construction of a patent claim that the specification should be read as a whole. In *The British Hartford-Fairmont Syndicate, Ld. v. Jackson Bros. (Knottingley), Ld.*[1] Lord Romer said, at page 556:

> One may, and one ought to, refer to the body of the Specification for the purpose of ascertaining the meaning of words and phrases used in the claims or for the purpose of resolving difficulties of construction occasioned by the claims when read by themselves.

Lord Romer's statement was cited with approval by Lord Russell of Killowen in the *E. M. I. v. Lessen* case (*supra*). The Supreme Court of Canada has stated the same principle. In *Electrolier Manufacturing Co. Ltd. v. Dominion Manufacturers Ltd.*[2] Rinfret J., as he then was, after construing the claims, said, at page 440:

> That is an interpretation of the claims to which, in our view, the respondent is entitled upon a fair reading of the whole of the specification.

And in *Rosedale Associated Manufacturers Ld. v. Carlton Tyre Saving Coy. Ld.*[3] Lord Evershed M. R. said, at page 69:

> it is clearly legitimate and appropriate in approaching the construction of the claims to read the specification as a whole. Thereby the necessary background is obtained and in some cases the meaning of the words used in the claims may be affected or defined by what is said in the body of the specification.

The principle of fair construction of a patent claim must be applied in such a way as to give effect to the expressed or necessarily implied intent of the inventor as it would be understood by the assumed addressee of the patent, namely, the workman of ordinary skill in the art to which the invention relates.

While the Golden Rule of construction requires that the words of a patent claim should be given their plain and ordinary meaning this is on the assumption that the words have a plain and ordinary meaning, but it is well established that the words may bear a "special or unusual meaning by reason either of a dictionary found elsewhere in the Specification or of technical knowledge possessed by persons skilled

[1] (1932) 49 R.P.C. 495. [2] [1934] S.C.R. 436.
[3] [1960] R.P.C. 59.

in the art": *vide* Lord Russell of Killowen in the *E. M. I. v. Lessen* case (*supra*), at page 41. There he went on to say:

The *prima facie* meaning of words used in a claim may not be their true meaning when read in the light of such a dictionary or of such technical knowledge; and in those circumstances a claim, when so construed, may bear a meaning different from that which it would have borne had not such assisting light been available That is construing a document in accordance with the recognized canons of construction.

It is established that experts in the relevant art may give evidence of the meaning of technical terms and expressions in a patent claim as they would be understood by the assumed addressee of the patent. The permissive rule, together with the limitation of its applicability, was defined by Lord Buckmaster in *British Thomson-Houston Company Ld. v. Charlesworth, Peebles & Co.*[1] in the following terms:

As, however, in ordinary cases, the existing circumstances in which documents were prepared, the relationship of the parties and the interpretation of terms of art are the proper subject-matter of evidence, so in specification of patents the state of knowledge in the craft, art or science to which the specification is directed and the explanation of technical terms, words and phrases are the proper subject-matter of testimony to aid interpretation, but, beyond this, evidence affecting construction should not be allowed to stray.

In the present case there were many instances of such expert evidence and in several cases there was conflicting evidence.

There are also many decisions in which the Courts have recognized the fact that inventors have used the specification of the patent as a dictionary in which they have defined the meaning of certain terms and expressions used by them in the claims and they have construed the terms and expressions according to the meaning defined in the specification. In such cases the specification serves a purpose similar to that of the definition section of a statute. The first decision on this subject to which I shall refer is that of *Needham et al. v. Johnson & Co.*[2] where Lindley, L.J., after referring to the term "conduit" in the second claim of the patent in suit in the case, said, at page 58:

The expression "conduit" requires explanation, and one must look for it, and see what it does mean Of course, it does mean that which the patentees have said it means You are not to look into the dictionary to see what "conduit" means, but you are to look at the specification in order to see the sense in which the patentees have used it.

[1] (1925) 42 R P C 180 at 208 [2] (1884) 1 R P C 49.

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The principle of construction thus expressed was authoritatively recognized by the House of Lords in *British Thomson-Houston Company Ld. v. Corona Lamp Works Ld.*[1] In that case one of the patent claims was for an incandescent lamp having a filament "of large diameter", and one of the attacks on the patent was that the ambit of the claim had not been sufficiently defined. Sargent J. gave effect to this objection and the Court of Appeal affirmed his judgment, but the House of Lords unanimously reversed it. Viscount Haldane, after stating that the specification must be read as a whole, said, at page 67:

> The Claiming Clauses, for example, are not to be taken as standing in complete isolation. For if the Patentee has used in these clauses expressions which he has already adequately interpreted in the body of the Specification, he is entitled to refer to the Specification as a dictionary in which the meaning of the words he uses has been defined.

The principle has also been recognized by the Supreme Court of Canada. In *Western Electric Co. v. Baldwin International Radio of Canada*[2] Duff C.J., speaking for the Court and referring to certain terms in one of the claims under consideration, said, at page 593:

> the specification itself provides the dictionary by which the scope and effect of these terms is to be ascertained.

And in *Smith Incubator Co. v. Seiling*[3] Duff C.J., referring to the two cases just cited, said, at page 256:

> Lord Haldane's judgment in *British Thomson-Houston Co Ld. v. Corona Lamp Works Ld.* (*supra*), at page 67, affords an illustration of the manner in which expressions used in the claims may be interpreted by reference to the body of the Specification. *Western Electric Co. Inc. v. Baldwin International Radio of Canada* is another case in which the description in the body of the specification provided a lexicon interpreting the phrases in the claim.

And, as already stated, Lord Russell of Killowen in the *E. M. I. v. Lessen* case (*supra*) recognized that the specification may provide a dictionary by which the meaning of terms in a claim is defined. *Vide* also the recognition of the principle by Lord Evershed M. R. in the *Rosedale Associated Manufacturers* case (*supra*) in the passage which I have cited. Finally, in this connection, I refer to the note of caution sounded by Lord Reid, in delivering the judgment of the Judicial Committee of the Privy Council in

[1] (1922) 39 R.P.C. 49. [2] [1934] S.C.R. 570.
[3] [1937] S.C.R. 251.

Minerals Separation North American Corporation v. Noranda Mines Ld.[1] After referring to the appellant's contention in that case that in the earlier part of the specification there was a definition of the word "xanthate" as used by the patentee which was in effect a "dictionary" and that, as the patentee had shown that he intended the word to be understood in a limited sense throughout, that limited sense ought to be attached where it occurred in Claim 9, Lord Reid said, at page 94:

> Their Lordships do not doubt that it is possible for a patentee to make his own dictionary in this way. If he has put something in the earlier part of the specification which plainly tells the reader that for the purpose of the specification he is using a particular word with a meaning which he sets out, then the reader knows that when he comes to the claims he must read that word as having that meaning.

After this recognition of the principle to which I have referred, made seemingly with reluctance but made nevertheless, Lord Reid sounded this caution:

> But this is an awkward method of drafting and is very undesirable when a simpler method could easily be adopted, and it is in all cases incumbent on a patentee who chooses to adopt this method to make his intention plain to those who read the specification.

It may, I think, be fairly said, with reference to this caution, that it is easy, after the trial of a patent action, to point out the respects in which a specification could have been improved and the claims expressed with a greater degree of precision.

In my opinion, the decisions to which I have referred establish that the applicant for a patent may in the specification define the meaning of terms or expressions used by him in the claims and thereby make the specification a dictionary for the purpose of interpreting the said terms or expressions as they appear in the claims and that, if he has made his intention plain to the person of ordinary skill in the relevant art to whom the patent is assumed to be addressed that the terms or expressions referred are to be read with the meaning defined for them in the specification, the Court, in pursuance of its duty of fair construction of the claims, must construe the said terms or expressions as having such meaning.

[1] (1952) 69 R.P.C. 81.

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There are several terms and expressions in the claims in issue that require comment. The first one to which I shall refer is the term "thermoplastic yarns". There was a dispute between the parties as to its ambit and whether the patents in issue relate to cellulose acetate yarn. It was argued for the plaintiff that cellulose acetate yarn is thermoplastic and that, consequently, the term must be construed as inclusive of it. On the other hand, it was submitted on behalf of the defendant that the inventors have defined the meaning of the term in the specification of patent No. 552,104 by the statement that the invention relates to thermoplastic yarns "such as nylon, vinyon, orlon, velon, dacron, saran and the like" and that cellulose acetate yarn is not one of the specified yarns. It was also argued that cellulose acetate yarn is specifically excluded from the ambit of the term by the expression in the specification "(as distinguished from silk, rayon, cotton, linen or wool, etc.)" on the ground that the meaning of the term "rayon" is wide enough to include cellulose acetate.

There was a difference of expert opinion on the ambit of the term "thermoplastic". Dr. Finlayson gave it a very wide meaning and said that it applies to any material that is capable of being softened by the action of heat. To him "thermoplastic" meant "becoming plastic by reason of heat". Consequently, in his opinion, silk is thermoplastic because it softens when heated, and the same is true of such fibres as wool, mohair and alpaca. Dr. Finlayson realized that Professor Speakman's definition of thermoplastic was different from his but he thought that his was generally accepted.

Professor Speakman gave the term a narrower meaning. He defined a thermoplastic fibre as one that melts without decomposition. Consequently, since silk does not do that, it is not thermoplastic. Similarly, wool, mohair and alpaca are not thermoplastic.

Counsel for the plaintiff relied on several technical dictionary and other definitions of which I need refer only to Chamber's Technical Dictionary which defines "thermoplastic" as follows:

(Chem) Becoming plastic on being heated. Specifically *(Plastics)* any resin which can be melted by heat and then cooled, the process being able to

be repeated any number of times without appreciable change in properties: e g. cellulose derivatives, vinyl resins, polystyrenes, polyamides, acrylic resins.

The first sentence of this definition confirms Dr. Finlayson's definition but the rest of it indicates a specific and more particular meaning.

The plaintiff's experts, Dr. Finlayson, Professor Speakman and Dr. Hoff were all of the opinion that cellulose acetate yarn is thermoplastic. But I should refer to Dr. Finlayson's recognition of the fact that there are degrees of thermoplasticity. This was implicit in his admission that silk is not thermoplastic to the same extent as the synthetic yarns such as nylon and the like.

Mr. Seem disagreed with Dr. Finlayson's definition of thermoplastic material as material which softens when heated. In his opinion, if this broad meaning of the term were accepted almost everything would be thermoplastic. He did not accept the opinion that silk is thermoplastic. On his examination in chief he gave his definition of thermoplastic material as material which will become soft and plastic when heated and become set when cooled and can then be plasticized again by heating it and set again by cooling it. On his cross-examination he agreed that cellulose acetate yarn softens when heated, sets when cooled and can then be re-softened by heating it and re-set when cooled and had to admit that cellulose acetate yarn is thermoplastic. His admission, however, was a qualified one, namely, that while in some respects it is thermoplastic in other respects it is water plastic. On his examination for discovery he said that cellulose acetate was considered a thermoplastic before the wholly synthetic yarns came on the market and that it would hardly qualify as truly thermoplastic to the same extent as other thermoplastic yarns. He expressed the opinion that there is a great deal of confusion among the experts on whether cellulose acetate yarn should be called thermoplastic or not by reason of the fact that while it is thermoplastic it is also water plastic so that a setting or deformation of the yarn that has been induced by heat can be removed by moisture or water which is not possible in the case of the specified yarns. While he could not disagree with the definition in Chamber's Technical Dictionary as a good general one it was not what was thought of in the textile industry since the creation of the wholly synthetic thermoplastic yarns. Mr. Seem's evidence read as a whole indicates that he considered that the water plastic characteristics of cellulose acetate outweigh its thermoplastic characteristics and that he did not consider cellulose acetate yarn as truly thermoplastic.

And Dr. Dudzik expressed the opinion that cellulose acetate yarn is not a thermoplastic yarn such as nylon, vinyon, velon, orlon, dacron and saran as thermoplastic yarns are known in the textile and throwing industry.

The evidence establishes that the characteristics of cellulose acetate yarn are different from those of the specified thermoplastic yarns. It was submitted by counsel for the defendant that cellulose acetate yarn is hydrophilic, meaning thereby that it absorbs water and is, therefore, water plastic, whereas all the specified yarns are hydrophobic, meaning thereby that they repel water and are, therefore, not water plastic. The submission is an over simplification. Dr. Finlayson stated that cellulose acetate, nylon and terylene (dacron) are all affected by water, cellulose acetate being affected the most and terylene the least. According to him water has a softening or plasticizing effect on both cellulose acetate and nylon particularly at high temperatures but it has very little effect on terylene. And Professor Speakman expressed the opinion that nylon has an affinity for water and that water does soften it but that terylene absorbs only a very small amount of water. On his cross-examination he agreed that in terms of water plasticity nylon is more akin to terylene than to cellulose acetate. Mr. Seem admitted that nylon has a certain affinity for water and is water plastic to that extent which, he said, is very small. He pointed out that nylon is classified in the Dupont Company literature as hydrophobic.

It is clear from the evidence that cellulose acetate yarn is water plastic to the extent that a crimp inserted in it by heat can be taken out by plasticizing it with water, whereas this cannot be done with the specified thermoplastic yarns which are all more resistant to water than cellulose acetate yarn is, and that its water plasticity is such as to differentiate it from the specified yarns. This fact alone affords some justification for Mr. Seem's exclusion of it as a thermoplastic yarn as the term is known in the textile and throwing industry.

In addition, there are the basic differences between cellulose acetate yarn and the new synthetic thermoplastic yarns to which I have already referred.

As I view the situation, the dispute between the parties on whether the patents in issue relate to cellulose acetate yarn must be resolved in favor of the defendant. The inventors have, in the specification referred to, plainly defined the meaning of the term "thermoplastic yarns" as being thermoplastic yarns "such as nylon, vinyon, orlon, velon, dacron, saran and the like" and have made their intention plain to any person of ordinary skill in the relevant art who reads the patent with a mind willing to understand it that when he comes to the claims he must read the term "thermoplastic yarns" as having the meaning defined in the specification, namely, "thermoplastic yarns such as nylon, vinyon, orlon, velon, dacron, saran and the like". In view of the dispute to which I have referred this is an appropriate case for making the specification a dictionary for the purpose of interpreting the meaning of the term "thermoplastic yarns" as it appears in the claims in issue. It does not matter, therefore, whether cellulose acetate yarn is thermoplastic or not or whether its water plasticity outweighs its thermoplasticity and is such as to differentiate it from the specified thermoplastic yarns or whether it is basically different from them in the other characteristics referred to, for the inventors have made it clear that it is not included in the category of thermoplastic yarns which they have specified. Cellulose acetate yarn is not one of the specified thermoplastic yarns "such as nylon, vinyon, orlon, velon, dacron, saran and the like". It is not, therefore, within the ambit of the term "thermoplastic yarns" as the inventors have defined it.

Counsel for the plaintiff sought to construe the expression "such as" as meaning simply "for example". I do not agree. It is clearly restrictive and definitive of the term "thermoplastic yarns" and limits its meaning to thermoplastic yarns of the kind or type specified. Cellulose acetate yarn is not one of the specified yarns. If it were intended that the term "thermoplastic yarns" should include all thermoplastic yarns there would be no need for the expression "such as" and no sense in it.

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In this connection I am mindful of the caution sounded by Lord Reid in the *Mineral Separation v. Noranda* case (*supra*). In my opinion, the inventors have plainly told the assumed reader of the patent that when he comes to the claims he must read "thermoplastic yarns" as having the meaning defined for it in the specification and they have made their intention clear that it does not include cellulose acetate yarn. The assumed reader of the patent could not have any reasonable doubt of such intention.

In view of this finding I need not, strictly speaking, consider the argument that cellulose acetate yarn is specifically excluded from the ambit of the term "thermoplastic yarns" on the ground that it is within the meaning of the term "rayon". There is no doubt that Mr. Seem considered that cellulose acetate is a rayon and there is support for his opinion in Chamber's Technical Dictionary in the 1944 and 1957 editions, portions of which were filed as Exhibits Z-87 and Z-87A, where rayon is defined as "artificial silk" and "acetate rayon" is defined as rayon made from cellulose acetate. Mr. Seem agreed with these definitions and on his cross-examination agreed that there was confusion in the trade regarding the definition of rayon in general and whether cellulose acetate was properly so classified. Moreover, the Encyclopedia Britannica, 1958 Edition, a portion of which was filed as Exhibit Z-247, describes cellulose acetate as the fourth method for making rayon, and the Encyclopedia Canadiana, 1958 Edition, a portion of which was filed as Exhibit Z-248, says that acetate rayon consists of cellulose acetate.

For the plaintiff Dr. Turl outlined the history of the use of the term "rayon" and I summarize his evidence; the term was first coined in 1924 to take the place of the term "artificial silk"; rayon was produced by several processes and the products were known as viscose rayon, cuprammonium rayon and acetate rayon; this was the situation up to 1948 when the American Society for Testing Materials published a tentative list of definitions in which the term "rayon" was defined in such a manner as to exclude fibres made of cellulose acetate; and in 1951 the Federal Trade Commission of the United States published definitions according to which "rayon" means fibres of re-generated cellulose and fibres made of cellulose acetate are not included. Dr. Turl stated that these definitions have been accepted very widely.

While the evidence, viewed as a whole, indicates that as at the date of the application for the patents in issue the term "rayon" did not include cellulose acetate, the fact remains that the inventors made it plain to the assumed reader of the patents that the terms "thermoplastic yarns" in the claims in issue did not include cellulose acetate yarn.

It follows from what I have said that the term must be construed accordingly.

One of the elements in the claims in suit of patent No. 552,104 is stated as follows, namely, "continually passing the yarn at a selected linear speed under uniform tension through a restricted thermally isolated and uniformly heated zone to uniformly heat the yarn to a prescribed temperature to reorient the molecules of the yarn to the twisted formation of the yarn and yarn set the same." There are two terms in this statement that require comment. One of these is "yarn-set" and the other "prescribed temperature".

I shall deal with the term "yarn-set" first. This is clearly a technical term in the art to which the patent relates. There was a great deal of evidence and argument about it. Mr. Seem sought to draw a distinction between twist setting thermoplastic yarn and yarn setting it. In his opinion, twist setting makes the torsion forces in the fibres of the yarn temporarily dormant so that it will not snarl in the course of subsequent processing of it, whereas yarn setting extinguishes, in effect, the torsion forces in the sense that the molecules, which have been re-oriented in a helical formation by twisting the yarn at a high temperature and then cooling it before it is untwisted, are permanently fixed in their distorted helical formation with the result that the crimp in the yarn is permanent.

The terms "permanent" and "fixed" in the claims are relative for it is agreed that the condition that brings either twist setting or yarn setting about may be altered by subjecting the yarn to more extreme conditions than those at which it was twist set or yarn-set. Mr. Seem sought to establish that the lowest temperature in the false twist process at which thermoplastic yarns of the kind defined in the specification can be said to be yarn set is 40 per cent

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below the melting point of the yarn. In the case of nylon yarn which melts at 482°F this is 289.2°F. Mr. Seem concluded from experiments that he and Mr. Stoddard had made that he could get a yarn set in the specified thermoplastic yarns if the yarn was heated to a temperature ranging from 40 per cent below its melting point to a point as close as possible to its melting point. In his opinion, a temperature within that range was required for yarn setting and he would not consider that a yarn had been yarn-set if it had been heated at a temperature lower than 40 per cent below its melting point. But on his cross-examination he was forced to admit that there is not really a sharp dividing line between twist setting and yarn setting.

Counsel for the plaintiff submitted that the difference is merely a matter of degree, and not of kind. His submission was supported by the plaintiff's experts. For example, Professor Speakman found that the higher the temperature at which nylon was treated while it was in a state of deformation the greater was the set imparted to it and the greater its resistance to subsequent removal. Dr. Hoff and Dr. Turl were of a similar opinion but there was agreement that yarn that had been yarn set will tend to retain the physical configuration it had at the time of the yarn setting, that is to say, that the molecules will be fixed in the helical formation into which they were reoriented.

For the purpose of construing the term "yarn-set" as it appears in the claims in issue it is immaterial whether the difference between twist setting and yarn setting is one of kind or only one of degree, for the specification itself clearly defines its meaning. It is disclosed that, in order to be yarn-set, the yarn must be heated to a pre-determined temperature of not less than 40 per cent below its melting point, that while the yarn is in this plastic state it is twisted, and that it is cooled before it is untwisted. The specification then states:

As a result of this continuous processing in accordance with our invention, an improved substantially permanent crimp, wave or fluff is set into the yarn. By this it is meant that the yarn is yarn-set, that is, the molecules in the thermoplastic yarn are permamently and uniformly reoriented or realigned therein according to the twisted formation of the yarn at the time of yarn-setting so that the individual filaments of the yarn have an inherent tendency to twist uniformly and assume the twisted formation which they had at the time of yarn-setting.

Yarn-setting is, therefore, in effect, the stabilization of the molecules of the yarn in the helical deformation into which they were reoriented by the twisting while the yarn was in its plastic state followed by the cooling of the yarn before it was untwisted. In my opinion, the inventors made it plain to those who read the specification that this is the meaning to be given to the expression "yarn-set" as it appears in the claims in issue.

The term "prescribed temperature" gave rise to controversy. It is clear that the temperature referred to is that of the yarn and not that of the heater. The evidence establishes that there is no known way of determining precisely the temperature to which the yarn is heated during its passage through the heated zone, that the temperature of the yarn is lower than that of the heated zone and that all that can be precisely determined is the temperature to which the yarn is subjected. It was urged, accordingly, on behalf of the plaintiff that the term is objectionable on the ground that, since the temperature of the yarn cannot be determined, the person of ordinary skill in the art to whom the patent is assumed to be addressed is left in doubt as to the prescribed temperature. There is no merit in the submission. It is clear from the wording of the claims that the purpose of controlling the supply of heat to the heated zone is to maintain it uniformly at the temperature required to heat the yarn uniformly to the prescribed temperature, namely, the temperature that is required "to reorient the molecules of the yarn to the twisted formation of the yarn and yarn-set the same". The use of the word "prescribed" in the expression is inept but its meaning is clear to any addressee of the patent who is willing to understand it. The "prescribed temperature" of the yarn is the temperature to which the yarn must be subjected in order to yarn-set it, that is to say, a temperature between 40 per cent below the melting point of the yarn and a point as close as possible to it. It is not, therefore, necessary to determine the precise temperature of the yarn so long as it is high enough to enable the yarn to be "yarn-set" within the meaning of that term as defined in the specification.

The expression "to preclude substantially any ductility", which appears in the claims in issue, followed by the words "in the cooled yarn" or "in the yarn after cooling", gave rise to controversy. There was a difference of opinion on its

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meaning and conflicting evidence relating to tests made for the purpose of determining whether there has been a substantial preclusion of ductility in yarn produced on the plaintiff's CS3 machine. Counsel for the plaintiff dealt extensively with the subject but I shall at this stage confine myself to the determination of the meaning of the expression as used in the claims in issue.

The experts for the plaintiff were in general agreement on the meaning of the term "ductility" in relation to textile yarns. Dr. Finlayson defined it as meaning "the property of a textile yarn which allows it to be lengthened or stretched permanently so that when the stress is removed the yarn does not recover to its previous length". Professor Speakman said that the word "ductility" meant to him "that if a stress is applied to a fibre it extends but does not recover completely when the stress is removed, and the extent to which recovery is incomplete is the measure of the ductility of the material". Dr. Hoff stated that ductility is an inherent property of a yarn which appears when the yarn is subjected to longitudinal stress when a load is applied to it, that if the load is removed and the yarn recovers completely to its former length the yarn is completely elastic but to the extent to which it fails to return to its original length it is ductile and the amount of its ductility can be measured. There was also the definition of ductility in the Calloway Textile Dictionary: "that property of a material that allows it to be stretched or elongated permanently so that it will not recover its original length when the stress is removed". And Mr. Dufort said that ductility in relation to thermoplastic fibres means that if the yarn is stretched and the stretching load is removed the ductility of the yarn is the extent to which it does not recover fully from the stretching.

These definitions are open to the criticism that they focus attention on the lack of capacity of the yarn to recover its former length after the stress or load by which it was lengthened has been removed rather than draw attention to the fact that the word "ductility" indicates a particular quality or state.

On his examination for discovery, Mr. Seem said that the term "ductility", as applied to thermoplastic yarn, meant "the ability to be drawn out and extended in length without elastic recovery", but on his cross-examination he said that this answer was not complete. He also stated that in 1954, as also in 1947, the term "ductility" was not generally applied to textiles and that he had adopted the use of the word because he "could find no generally accepted word in our textile art that would better describe the condition we were trying to describe" and he would assume that in the textile art the dictionary definition of ductility would be used.

Webster's New International Dictionary, Second Edition, 1953, defines "ductility" as "Ductile quality or state" and gives the following as the first definition of "ductile":

1. Capable of being permanently drawn out or hammered thin;—said esp. of metals; capable of being molded or worked; specif., capable of being drawn out into wire or thread.

and the New English Dictionary, Volume III, defines "ductility" generally as "The quality of being ductile" and specifically as:

1. Capability of being extended by heating, drawn out into wire, worked upon or bent; malleability, pliableness, flexibility.

and includes the following under the definition of "ductile":

1. Of metal: *a*. That may be hammered out thin; malleable; flexible, not brittle. *b*. Capable of being drawn out into wire or thread, tough.
2. Of matter generally: Flexible, pliant; capable of being moulded or shaped; plastic.

Webster's New International Dictionary, Second Edition, defines "plastic" as including the following:

6. *Physics*. Capable of being deformed continuously and permanently in any direction without rupture under a stress exceeding the yield value.

and defines "yield value" as

Mech. The minimum shearing stress required to produce continuous deformation in a solid.

I should also refer to the definition of "preclude" in Webster's New International Dictionary, Second Edition, as follows:

1. To put a barrier before; to close; to shut up; to shut out; to hinder; stop; impede, to close beforehand.
2. To shut out or obviate by anticipation; to prevent or hinder by necessary consequence or implication; to deter action of, access to, enjoyment of, etc.; to render ineffectual.

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Mr. Seem related the idea of substantial preclusion of ductility in the specified thermoplastic yarns to that of their retentivity of the permanent crimp put in them by the use of the patented process. His line of reasoning was clear. On his examination in chief he gave a detailed description of what happens to the yarn from the time of its production by the use of the false twist process of the patent to its incorporation in a knitted or woven garment and the use of such garment. After the yarn has been produced and while it is still in the throwster's plant it goes through other processes before it is delivered to the throwsters' knitter or weaver customer. It is doubled on a down-spinner machine with a yarn of a different twist and is then wound on a cone by a coning machine. During these processes it is subjected to bending, compressional, tensile and tortional stresses. While it is in the throwster's plant and during its delivery to the customer it is subjected to wide variations of temperature. In the knitter's or weaver's plant it is subjected to the stresses involved in the knitting or weaving process and the knitted or woven article is scoured and dyed. Knitted stockings are stretched on a form and woven fabrics are finished and set to their desired shape. Some of these processes involve the use of high temperatures. The finished knitted or woven article is then subjected to the stresses of use by the wearer and washing and drying. Mr. Seem stated, that if the yarn were ductile the various stresses and temperatures to which it is subjected would cause the crimp in it to be pulled out with the result that the knitted or woven article would be useless for the purpose for which it was bought, whereas, if the article retained its permanent crimp this showed that the use of the process by which the permanent crimp had been put into the yarn had the result of preventing or hindering it from becoming ductile and that, consequently, its ductility had been substantially precluded.

It is admitted that it is not possible to eliminate ductility from a thermoplastic yarn altogether and there are instruments for measuring it in the case of a flat yarn. Mr. Seem stated that no machine was available to determine the ductility of a permanently crimped yarn but that this can be determined in a practical way by examining the extent to which the crimp in the yarn has been retained. It was Mr. Seem's opinion that if a yarn has retained its permanent crimp it cannot be said to be ductile and his conclusion, put briefly, was that since the use of the patented process results in the production of a thermoplastic yarn that is permanently crimped in such a manner that it can withstand the stresses and temperatures to which he referred and still retain its permanent crimp it may properly be said that the use of the process has precluded substantially any ductility in the yarn produced by it.

I adopt Mr. Seem's opinion and conclusion. There is ample support for both in the specification of patent No. 552,104. The term "ductility" is a technical one and I accept Mr. Seem's evidence that it was not generally applied to textiles. It would, therefore, be fair to say that it was not generally applied to thermoplastic yarns of the kind specified in the patents in issue. Certainly, the experts for the plaintiff, except Mr. Dufort, were not asked to define it as applied to thermoplastic yarns. Under the circumstances, it is proper to look to the specification for an indication of the meaning of the term "ductility" and of the expression "to preclude substantially any ductility" as used in the claims in issue. In my opinion, the specification plainly defines the meaning to be given to them.

The specification recites that "thermoplastic yarns of the kind referred to materially respond to shrinking by becoming more ductile or plastic and thermally stabilized in cooling which, after subjected to the action of heat assume new and substantially permanent physical characteristics when twisted, stretched or shrunk while heated". Thus the specification regards "ductile" and "plastic" as synonymous terms and thereby equates ductility with plasticity. Consequently, the ductility of the thermoplastic yarn of the specified kind is its quality of being capable of being permanently drawn out or of being deformed continuously and permanently in any direction and the preclusion of substantially any ductility in it means, in effect, that it has been substantially prevented or hindered from assuming the ductile or plastic quality or state of which it would otherwise have been capable. This is effected by subjecting it to the process described in the specification and defined in the claims in issue.

The specification also contains the following instruction, namely, "By the use of adequate tension while twisting-untwisting, we can draw the yarn approximately the same degree as normally drawn by the producers, and by this method any ductile yarn is drawn helically due to the simultaneous twisting and drawing and this spiralled formation of the yarn substantially remains after untwisting. Thus in the case of yarns having thermal characteristics, such as Dacron, for example, which exhibits substantial ductility when heated, the yarn is processed under sufficiently high tension during heating to preclude substantially any ductility in the yarn when cooled." Thus the specification teaches that a ductile yarn may be drawn helically by the use of adequate tension during the process of twisting-untwisting and that the spiralled formation thus produced in the yarn substantially remains in it after untwisting if it is processed under sufficiently high tension during heating to preclude substantially any ductility in it when cooled. The assumed addressee of the patent is told that the tension on the heated yarn should be correlated to its temperature, being its "prescribed temperature", in such a way as to maintain the yarn under a sufficiently high tension to keep it permanently in its spiralled formation to preclude substantially any ductility in it.

Moreover, it should not be forgotten that the specification requires that the yarn should be yarn-set. As I have already stated in construing the term "yarn-set", the specification teaches that yarn-setting stabilizes the molecules of the yarn in the twisted helical deformation into which they were reoriented by the twisting while the yarn was in its plastic state followed by the cooling of the yarn before it was untwisted.

The claims in issue define a method of producing a permanently crimped yarn and then specify the steps by which the method is accomplished. These include, *inter alia*, a yarn-setting of the yarn under closely controlled uniform conditions of temperature involving twisting it and stabilizing its molecules in their twisted helical deformation, whereby a spiralled helical formation is set in it, and correlating the tension and the temperature in the manner referred to. If the specified steps are taken the desired permanently crimped yarn will be produced.

The specification is concerned with the commercial production of substantially permanently crimped thermoplastic yarns of the kind specified in it. It is not addressed to scientists but to practical throwsters and should be read in the light in which a practical throwster would read it. Such a person would know the purposes for which the yarn is to be used and the conditions of stress and temperature to which it would be subject. He would be concerned with whether the crimped yarn was ductile or not, for he would know that if it were ductile the crimp in it would pull out and it would be useless for its intended use. On the other hand, if the crimp should remain substantially permanent in the yarn this would show that the use of the process had precluded substantially any ductility in it, for the purposes for which it was intended.

The specification has set the preclusion of substantially any ductility in the yarn as the standard of the proper correlation of tension and temperature. The assumed addressee of the patent knows that the best proof of the attainment of the standard and of the proper correlation is the retention of the permanent crimp in the yarn under the conditions of its actual commercial use and that he should make the necessary adjustments to ensure such a result before he sets his machine for full scale production.

It is, therefore, proper to relate the preclusion of substantially any ductility in the cooled yarn to the retention of the permanency of its crimp under the conditions of its actual use. There has been a preclusion of substantially any ductility in the yarn if it has been produced according to the process defined in the claims in issue under such a correlation of tension and temperature that it can be subjected to the stresses and temperatures described by Mr. Seem and substantially retain its permanent crimp characteristics.

Only a brief reference need be made to the term "twist". Here a distinction should be drawn between true twist and false twist. The first occurs in a length of yarn when one end of it is held and the other is rotated. This inserts a true twist in the yarn. False twist occurs in a length of yarn when both ends of it are held and the portion in between the ends is rotated in one of two directions.

The meaning of the term "contractile force", as it appears in the claims in issue, was given by Dr. Finlayson and Professor Speakman. Their evidence indicates peculiar qualities of almost a human character in the synthetic thermoplastic yarns. Dr. Finlayson explained that when the fibres

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of synthetic thermoplastic yarns are stretched in the direction of their length the molecules in it are arranged in the direction of their length, that this is an unnatural state for them, for, according to the teachings of thermodynamics, they seek to get back to their original non-stretched random state, that the attributed desire of the molecules to return to their original disorderly state results in a tendency on the part of the yarn to shrink and that the contractile force referred to is the amount of force required to prevent the yarn from shrinking or contracting as it would ordinarily have the tendency to do. Pofessor Speakman gave a graphic description of the behaviour of the molecules of nylon. When the melted mixture of coal, water, petroleum and limestone, of which nylon is composed, is extruded through the small holes of what is called a spinnerette the molecules in the resulting chilled continuous filament are in random order. This is their natural state. When the manufacturers of the nylon stretch the filaments the chain molecules in it are pulled into line along the length of the filaments. Their natural tendency is to revert to their normal original random order and the higher the temperature of the filaments is the greater is the agitation of the molecules in them and the greater their tendency to revert to their former order. As Professor Speakman put it, the amount of force that must be put on the ends of the filament to prevent it from contracting and so prevent the molecules from reverting to their original random order is called the contractile force of the yarn. Put simply, it is the amount of force that must be applied to the ends of the filament to prevent it from contracting as it would do if the force were not applied.

I now come to consideration of the attacks on the validity of the claims in issue but before I do so I must refer to the statutory provision for the *prima facie* validity of a Canadian patent enacted by section 48 of the *Patent Act*, R.S.C. 1952, Chapter 203, which reads as follows:

> 48. Every patent granted under this Act shall be issued under the signature of the Commissioner and the seal of the Patent Office; the patent shall bear on its face the date on which it is granted and issued and it shall thereafter be *prima facie* valid and avail the grantee and his legal representatives for the term mentioned therein, ...

This section was previously section 47 of the *Patent Act*, 1935, Statutes of Canada, 1935, Chapter 132.

The first reference to this statutory presumption of the validity of a Canadian patent, or statutory provision for its *prima facie* validity, was in *The King v. Uhleman Optical Company*[1]. Since then I have referred to it in several cases: *O'Cedar of Canada Ltd. v. Mallory Products Ltd.*[2]; *Riddell v. Patrick Harrison & Co. Ltd.*[3]; *Reliable Plastics v. Louis Marx*[4]; *Unipak Cartons v. Crown Zellerbach*[5]; *The McPhar Engineering Company of Canada Ltd. v. Sharpe Instruments Limited et al.*[6]; *Durkee-Atwood Co. v. Richardson*[7] and *Lovell Manufacturing Company et al. v. Beatty Bros. Limited*[8].

The broadest statement of the ambit of the provision was made in the *McPhar Engineering Company* case and repeated in the *Lovell Manufacturing Company* case. The provision of *prima facie* validity extends to all the attributes of patentability that an invention must have in order to be patentable under the Act. The attributes of novelty, utility and inventive ingenuity or lack of obviousness are all presumed to be present in an invention for which a patent has been granted until the contrary is shown. The provision also extends to the obligations imposed by law on a patentee and the requirements specified in the Act. Compliance with them is presumed until the contrary is shown. It follows that the onus of showing that a patent is invalid lies on the party attacking it, no matter what the ground of attack may be. This does not mean, of course, that the patent is immune from attack or that the patentee is free from the obligations that he owes by way of consideration for the grant of the monopoly to him or from the requirements of the Act. But it does mean that when an attack has been made on the patent in an action, either for infringement or for impeachment, the owner of the patent need not prove the existence of any of the necessary attributes of patentability or performance of his legal obligations or compliance with the requirements of the Act, for there is a presumption in his favor that all the necessary attributes of patentability are present in the

1 [1950] Ex. C.R. 152 at 161.
2 [1956] Ex. C.R. 299 at 316.
3 (1957-58) 17 Fox Pat. C. 83 at 99.
4 (1958) Fox Pat. C. 184; 29 C.P.R. 113 at 127.
5 (1960) 20 Fox Pat. C. 1 at 33.
6 (1960) 21 Fox Pat. C. 1 at 27.
7 (1963) 23 Fox Pat. C. 30 at 44.
8 (1963) 23 Fox Pat. C. 112.

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invention and that he has performed his obligations and met the requirements of the Act.

Counsel for the plaintiff submitted that the section does not cast any onus on a party attacking a patent for invalidity other than that of introducing some evidence tending to establish invalidity. This was the first attempt to cut down the ambit of the statutory provision for validity under consideration since I first referred to it in *The King v. Uhlemann Optical Company* case. I disagree with counsel's submission. While the presumption of validity created by section 48 is a *prima facie* one, and, therefore, rebuttable, it cannot be rebutted as easily as counsel attempted. Parliament has deliberately endowed a patent granted under the Act with the quality of validity specified in the section. Although the presumption of validity thus created is only a *prima facie* one it is reasonable to assume that Parliament intended that its provision for validity should be a substantial one. Indeed, it would be unreasonable to assume that it intended that its provision should be whittled away and, in effect, nullified by the mere introduction of some evidence tending to show invalidity. The evidence required to rebut the presumption must be more than "some evidence". It must be credible evidence and substantial enough to satisfy the Court that the patent is invalid. In my opinion, the presumption of validity created by the section remains in effect unless the party attacking the patent shows to the satisfaction of the Court that it is invalid. Thus the section does impose on the party attacking the patent for invalidity the onus of showing that it is invalid and, in my opinion, the onus so imposed is not an easy one to discharge. There is support for this opinion in Halsbury's Laws of England, Third Edition, Vol. 15, where the author says, at page 343:

> The nature of a presumption of law is that the court treats as established some fact of which no evidence has been given, and when rebuttable, it can have no weight capable of being put in the balance against opposing evidence which is believed.

The author then goes on to say:

> It does not follow that such a presumption may be rebutted in every case by any evidence however slight. The rebutting evidence must be considered on its merits: its credibility is neither increased or diminished by the existence of the presumption; but, if it is believed, the presumption is displaced.

In my opinion, the provision for the validity of a patent granted under the Act enacted by section 48 enures to the benefit of the owner of the patent until the party attacking it shows to the satisfaction of the Court that it is invalid.

There were several grounds on which the plaintiff based its action for impeachment of the patents in issue. The first was that the process invention defined in the claims in issue of patent No. 552,104 had been anticipated. It was not contended that there had been any anticipation of the apparatus invention defined in Claim 3 of patent No. 552,105. In support of the charge of anticipation of the process invention counsel for the plaintiff relied at the outset on two prior publications and an alleged prior use. The prior publications were two patents issued to Dr. Finlayson, one being United Kingdom patent No. 424,880, dated March 4, 1933, filed as Exhibit 1, and the other United States patent No. 2,111,211, dated March 15, 1938, filed as Exhibit 51. The alleged prior use was that of a machine said to have been used by Dr. Finlayson at Spondon in England, which was set up in the basement of the Court House and filed as Exhibit 62. At a later date, counsel also relied on two patents issued to Moulinage et Retordie de Chavanoz S. A., one being a French patent No. 63,983, dated October 14, 1955, filed as Exhibit 90, and the other a Canadian patent No. 538,463, dated March 19, 1957, filed as Exhibit 92.

The requirements that must be met before an invention should be held to have been anticipated by a prior publication have been stated in many cases. I summarized them in *The King v. Uhlemann Optical Company*[1] and cited the leading cases in which they were set out, and in *Lovell Manufacturing Company et al. v. Beatty Bros.*[2] I dealt more particularly with them.

It is established that a prior publication must not be held to be anticipatory of an invention in issue in an action for infringement or impeachment of a patent unless the conditions specified in the leading cases are clearly shown to be present in it. The basic tests may be stated briefly. The information as to the invention in issue given by the prior publication must, for the purposes of practical utility, be equal to that given by the patent for the invention and show everything that is essential to it so that a workman

[1] [1950] Ex C R. 152 at 157.

[2] (1963) 23 Fox Pat. C 112 at 137.

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of ordinary skill in the relevant art would at once have perceived, understood and been able practically to apply the invention without the necessity of further experiment. It is not enough to prove that the information could have been used to produce the result of the invention in issue; there must have been a clear and unmistakable direction to use it for such purpose. Nor is it sufficient that the prior publication contained suggestions which, taken with other suggestions, might be shown to have foreshadowed the invention in issue or important steps in it, or that it contained the nucleus of the idea of the invention which could have been regarded as the beginning of its development. If the prior publication is to be regarded as a prior publication of the invention in issue it must be shown that it published to the world the whole invention with all the material necessary to instruct the public how to put it in practice and that it so disclosed the invention to the public that no person could subsequently claim it as his own. Put in different terms, there is the test stated by Viscount Dunedin, in delivering the judgment of the Judicial Committee of the Privy Council in *Pope Appliance Corporation v. Spanish River Pulp and Paper Mills Ld.*[1] that a prior publication is not to be regarded as an anticipation of the invention in issue unless it can be shown that a person grappling with the problem solved by the patent and having no knowledge of it but having the prior publication in his hand would have said "That gives me what I wish". Nor can anticipation of the invention in issue be proved by resort to alleged inventions that were not put into practice or were inoperable.

Under the circumstances, it is not surprising, in view of the severity of the tests which a prior publication must meet before it should be regarded as anticipatory of an invention in issue, that attacks on the validity of a patent on the ground that the invention covered by it was anticipated by a prior publication so seldom succeed. Indeed, although I have been the President of this Court for over twenty-one years, I have not yet heard a patent case in which the validity of the claims in suit in the case has been successfully attacked on the ground that the invention defined in them had been anticipated by a prior publication.

[1] (1929) 46 R.P.C. 23 at 52 and 56.

I find without hesitation that the invention defined in the claims in issue of patent No. 552,104 was not anticipated by either of the Finlayson patents or by the alleged prior use of the Finlayson machine. There was no teaching of the solution of the problems that faced Messrs. Seem and Stoddard prior to the date of the invention in issue. To put it briefly, there was no information, for the purposes of practical utility, in either of the patents or in the machine as to the invention in issue equal to that given by patent No. 552,104 and, consequently, there was no meeting of the test of an anticipatory publication that was set as early as 1862 by *Hill v. Evans*[1]: *vide* also *Canadian General Electric Co., Ltd. v. Fada Radio Ltd.*[2]

I shall deal first with United Kingdom patent No. 424,880. This was concerned particularly with the production of continuous filament yarns of cellulose acetate or other organic derivatives of cellulose but was not limited to the production of such yarns. The heat called for in the production was that of steam with its constant temperature of 100°C (212°F) but it was stated in the specification that "heat may be used to bring about the setting of filaments which are thermoplastic" and it is clear that the heat referred to was intended to be dry heat. In support of his charge that patent No. 424,880 was an anticipation of the invention in issue counsel for the plaintiff relied on Dr. Finlayson's statement that if he had been asked to produce a false twist nylon yarn in 1946 all that he would have had to do was to put in a Dalgleish heater in the place of the steam tube specified in the patent and he would have found the proper temperature for dealing with the new synthetic thermoplastic yarns as they came into existence. It would have been simply a matter of adjusting the supply of electrical energy to the heater to ensure a temperature that would produce the desired result. If the nylon yarn had been run through the steam and it was found that the fabric made from it could not stand washing this would have disclosed that dry heat would be better for the purpose than steam heat had been. Dr. Finlayson would have known, so he said, that he should use a temperature between 150°C and the melting point of the yarn and would have found the correct temperature by experimentation.

[1] (1862) 4 De G.F. & J. 288.

[2] [1927] Ex. C.R. 134; (1940) 47 R.P.C. 69.

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Counsel also relied on the statement of Professor Speakman that if he had been asked to crimp nylon yarn in 1946 he would have approached Dr. Finlayson for the use of his machine as it was and observed its results, that if the crimp had been satisfactory he would have got all that he wanted, that if it was not satisfactory he would have moved to his alternative of hot air and if that had not been satisfactory, knowing that the setting of nylon is more difficult than that of cellulose acetate, he would have moved to a higher temperature until he arrived at the desired result.

The statements of Dr. Finlayson and Professor Speakman on which counsel relied are subjected to critical comment. It was clear that each was made with the knowledge possessed at the date of the statement. They should, therefore, be carefully scrutinized, for it is exceedingly difficult for an expert who is asked for his opinion regarding a matter that happened in the past, even if he seeks to be objective, to divest himself of his knowledge at the date of his expression of his opinion and confine himself to the knowledge that he would have had at the date of the happening of the matter on which his opinion is requested.

I am unable to accept Dr. Finlayson's statement that all that he would have had to do in 1946 to produce a false twist nylon yarn was to put in a Dalgleish heater in the place of his steam tube as proof that patent No. 552,104 anticipated the invention in issue. There is no evidence that the Dalgleish heater was known prior to its disclosure in United Kingdom patent No. 557,597, dated November 26, 1943. Knowledge of it would not have been available at the date of patent No. 424,880 to a man who was grappling with the problem solved by the invention in issue and had no knowledge of the patent in issue and had only patent No. 424,880 in his hand in such a way as to enable him to say in 1935, "That gives me what I wish." The test of whether a prior publication should be considered as an anticipation of an invention put by Viscount Dunedin in *Pope Appliance Corporation v. Spanish River Pulp and Paper Mills Ltd.*[1] cannot, therefore, be met in this case. Counsel's reliance on Dr. Finlayson's statement was an attempt on his part to make a mosaic of the Finlayson

[1] (1929) 46 R.P.C. 23 at 52.

patent issued in 1935 and the Dalgleish patent issued in 1943, which is not permitted: *vide* the decision just cited. There is a further reason for not accepting Dr. Finlayson's statement as proof that his patent anticipated the invention in issue. Even if he had used the Dalgleish heater it would not have enabled him to control the temperature within the limits necessary for uniform heat. Mr. Seem stated that the limits of control exerciseable by the Dalgleish heater were not such as to control the temperature within the necessary limits of plus or minus 1 per cent. The inertia of the system was not finely sensitive enough for the purpose. He admitted that he had never seen a Dalgleish heater but he had had experience with every known type of heater control and based his opinion that the Dalgleish heater would not be capable of controlling the temperature within the fine limits required from reading the specification and the drawings of the Dalgleish United States patent No. 2,373,550, dated April 10, 1945. I accept his opinion.

I reject Professor Speakman's statement. It is subject, of course, to the criticism to which I have already referred. But I must say that in addition to this criticism I formed the impression that a good deal of his evidence including his statement lacked the objective character that might have been expected from an expert of his high qualifications and during his evidence I gave expression to this impression. Moreover, his own reading of patent No. 424,880 demonstrates that it did not anticipate the invention in issue. He agreed that it showed that the yarn being processed under its method was cooled after it was untwisted, which is contrary to the teaching of the patent in issue which calls for cooling of the yarn before it is untwisted as an essential requirement of yarn-setting it. That being so, the patent did not teach him how to accomplish the result for if he had followed its teaching he could not have achieved the necessary yarn-setting taught by the patent in issue. Under the circumstances, his statement in reply to counsel's question to the effect that the element in the claims in issue calling for yarn setting was included in patent No. 424,880 was incorrect.

There are several reasons for finding that patent No. 424,880 did not anticipate the process invention in issue.

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It was particularly concerned with the production of continuous filament yarns of cellulose acetate or other organic derivatives of cellulose. At the time of its issue the synthetic thermoplastic yarns with which the patents in issue are concerned were not in commercial production. Their characteristics, as already stated, were different from those of cellulose acetate and their production raised problems that could not have been contemplated by patent No. 424,880.

It is an essential element of the invention in issue that the yarn being produced by its use should be uniformly heated "to a prescribed temperature to reorient the molecules of the yarn to the twisted formation of the yarn and yarn-set the same". As already stated, it is disclosed that in order to be yarn-set the yarn must be heated to a predetermined temperature of not less than 40 per cent below its melting point, that while it is in this plastic state it is twisted and it is cooled before it is untwisted. Patent No. 424,880 did not disclose the essential element of yarn setting or the need for cooling the yarn before it is untwisted. On the contrary, it appears from Figure 1 of the drawings accompanying the specification that the cooling of the yarn produced under it took place after it was untwisted. This was certainly Professor Speakman's understanding of what Figure 1 indicated. This was contrary to the teaching of the patent in issue. It follows, accordingly, that, if Professor Speakman had used a machine constructed according to the teaching of patent No. 424,880, he could not have produced a permanently crimped nylon or other thermoplastic yarn because it would not have been yarn-set. Mr. Seem expressed his opinion to this effect and I accept it.

Moreover, the steam called for by the patent, being at a constant temperature of 100°C (212°F), would not be hot enough to yarn-set the thermoplastic yarns specified in the patent in issue. It is true that the specification states that heat may be used to bring about the setting of filaments which are thermoplastic but there was no direction to use heat. In the absence of such a direction the mere statement that heat may be used is not enough to make the patent an anticipation of the invention in issue: *vide* the decision of Parker J. in *Flour Oxidizing Company Ld. v. Carr &*

Co. Ld.[1] Moreover, there is no indication in the patent of how high the temperature of the heat should be. There was certainly no suggestion that it should be as high as the "prescribed temperature" referred to in the claims in issue.

Under the circumstances, patent No. 424,880 fails to meet the test of an anticipatory patent laid down by Fletcher Moulton L.J. in *British Ore Concentration Syndicate Ld. v. Minerals Separation Ld.*[2] where he said, at page 147:

> It cannot be too carefully kept in mind in patent law, that in order to render a document a prior publication of an invention it must be shown that it publishes to the world the whole invention—*i.e.*, all that is material to instruct the public how to put the invention into practice.

The failure of the patent to disclose the essential element of yarn-setting and the necessary conditions for its accomplishment was a failure "to publish to the world the whole invention" and disposes of it as an anticipation.

There are other reasons for finding that patent No. 424,880 did not anticipate the invention in suit. It did not disclose that if dry heat should be used the tension should be correlated to the temperature "to maintain the yarn under tension adequate to preclude substantially any ductility in the cooled yarn" or that there must be a close control of temperature and uniform processing conditions in order to produce a permanently crimped thermoplastic yarn. And there is Mr. Seem's statement that a device such as that disclosed in patent No. 424,880 would not enable the production of a stretch yarn.

I now turn to United States patent No. 2,111,211 issued to Dr. Finlayson and Mr. L. Lathem, dated March 15, 1938. The invention covered by it related to a process and apparatus for crimping filamentous threads and was said to be of special advantage in crimping organic derivatives of cellulose, whether by means of solvent vapours or by means of other setting agents including steam or hot air.

There are several reasons for finding that it did not anticipate the invention in issue. It was not concerned with thermoplastic yarns of the kind specified in the patents in issue, which were not in commercial production at the date of its issue, and it did not give the necessary information for the solution of the problems attending the processing of such yarns as they came into commercial existence. The

[1] (1908) 25 R.P.C. 428 at 457. [2] (1909) 26 R.P.C. 124.

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characteristics of the new yarns were different from those of the cellulose derivative yarns with which it was particularly concerned and the problems in connection with processing them were not the same.

There are several respects in which patent No. 2,111,211 did not disclose the whole invention defined in the claims in issue and, therefore, failed to meet the test of an anticipatory prior publication stated in the *British Ore Concentration Syndicate v. Minerals Separation* case (*supra*) to which I have already referred.

As in the case of United Kingdom patent No. 424,880 it did not disclose the essential element of yarn-setting specified in the claims in issue. On the contrary, any yarn processed under it could not have been yarn-set. A blown-up drawing of Figure 1 of the specification, filed as Exhibit Z-32, shows the path of the yarn through the machine. It is clear from this drawing that the orifice in the steam pipe by which the yarn left the steam pipe was immediately below the opening of the false twist spindle through which the yarn entered the spindle. The steam from the orifice would have kept the yarn hot and moist when it should have been cooled before it entered the false twist spindle to be untwisted. Moreover, the heat of the steam would not have been high enough to cause yarn-setting within the meaning of the patent in issue. It follows that a permanently crimped yarn such as that contemplated by the patent in issue could not have been produced by the use of the apparatus and process described in patent No. 2,111,211. And, while it was stated in the specification that hot air might be used as a setting agent, there was no direction that it should be used and no indication that the temperature required in order to yarn-set the yarn must be not lower than 40 per cent below its melting point. Indeed, yarn-setting as defined in patent No. 552,104 was not contemplated at all by patent No. 2,111,211. This fact, by itself, is enough to dispose of it as being anticipatory of the invention in issue.

There is also the fact that the patent did not disclose that if hot air should be used as a setting agent for the yarn being processed there should be correlation of tension to temperature of the kind and for the purpose disclosed and specified in the patent in issue.

Moreover, it was established that the system disclosed in the patent made for a lack of uniformity and permanency of crimp in the yarn processed by its use. Both the twist trapper of the device and the twist stop allowed slippage of the yarn with the result that some of the twist might not be removed from it and it would lack uniformity and the crimp in it would not be permanent. Moreover, the tension means was not such as to produce a uniform tension. Indeed, the patent did not contemplate the uniform processing conditions of the kind disclosed in the patent in issue. It could not, therefore, be said that it anticipated an invention in which uniformity and permanency of crimp were essential objectives. Nor did the patent teach the need for close temperature control. There was no need for this, of course, so long as steam was used, for its temperature is constant at 100°C. But that heat, as already stated, was not high enough to process in a satisfactory manner such yarns as nylon or terylene (dacron). And if hot air were to be used there was no direction in the patent relating to close control of it to ensure the uniformity of heat necessary for the production of a uniform and permanently crimped thermoplastic yarn.

In addition, there was the evidence of Dr. Dudzik that it would not be possible to produce a commercial cellulose acetate yarn by the use of the invention disclosed in the patent. Nor could the process be used for the production of a satisfactory permanently crimped nylon or terylene yarn.

Thus, neither of the Finlayson patents anticipated the invention in issue.

There remains the question whether the machine operated by Dr. Finlayson at Spondon which I shall refer to as the Spondon machine was a prior use of the invention in issue and, therefore, anticipatory of it. The evidence relating to the machine prior to its being set up in the basement of the Court House may be stated briefly. It was operated from 1936 to 1947 and its use enabled the production of 424,000 lbs. of cellulose acetate yarn that went into commercial use but this yarn was made with three ends together and was doubled and plied. The use of the machine stopped in 1947. It was purchased by the plaintiff in 1958 at about the date of the commencement of the present action. Prior to the trial it was dismantled in England and set up in the basement of the Court House. In England the only heat

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used was that of steam but when the machine was set up in the basement a hot air system was added to it. Tests were run on the machine and three types of yarns, namely, cellulose acetate, nylon and terylene, were processed on it on both the steam side and the air side. But, of course, for the purposes of determining whether the machine was a prior use of the invention in suit only its steam side need be considered. While the Spondon machine was said to have been made according to the teaching of United Kingdom patent No. 464,981, which was the United Kingdom counterpart of United States patent No. 2,111,211, it differed from the apparatus disclosed in that patent in several particulars. A drawing filed as Exhibit Z-31 is a schematic representation of the machine and shows the path of the yarn through it. A comparison of Exhibit Z-32 and Exhibit Z-31 will indicate the differences referred to. They were all made for the purpose of overcoming defects of the apparatus disclosed in patent No. 2,111,211 and its United Kingdom counterpart. I need only mention them. There were improvements in the supply package, in the thread line of the yarn, in the tension device, in insulation of the steam pipe, in the position of the spindle in relation to the orifice in the steam pipe and in the false twist spindle itself. I shall refer particularly to only one difference. In the Spondon machine the spindle was offset so that the orifice in the steam pipe by which the yarn left it was not directly below the opening of the spindle through which the yarn entered the spindle. But this did not remedy the defect to which I have referred. Some of the steam from the orifice hit the yarn as it was running and kept it moist and hot when it should have been cooled.

Even with the differences referred to the Spondon machine cannot be regarded as an anticipation of the invention in issue. It is obvious that it could not produce a yarn that was yarn-set within the meaning of the patent in issue. As a matter of fact Mr. Seem expressed the opinion that cellulose acetate yarn cannot be yarn-set within such meaning and I accept his opinion. Nor could its use result in yarn-setting the thermoplastic yarns specified in the patent in issue.

The comments relating to the defects in the twist trapper and the twist stop of the apparatus disclosed in patent No. 2,111,211 apply also to the Spondon machine. The slippage of the yarn would adversely affect its uniformity and the permanency of its crimp. Mr. Seem expressed the opinion that a false twist spindle and trapper, whether of the type shown on the Spondon machine or of the type disclosed in patent No. 2,111,211, if used on the Spondon machine would not operate to produce a commercial crimped thermoplastic yarn. He explained that while the yarn was being run on the Spondon machine in the basement he had picked a piece of it while it was running between the tension device and the orifice at the bottom the steam pipe and saw that it was snarling which fact indicated to him that there had been a slippage of twist with the result that there would be a lack of uniformity in the yarn. The twist slippage showed a defective system. There was also the fact that the heat of the steam was not high enough for yarn-setting thermoplastic yarns of the kind specified in the patent in issue. Mr. Dudzik confirmed Mr. Seem's evidence that the operation of the Spondon machine in the basement showed that there was twist slippage in it and that the system of processing was defective. While there is no reference in the claims in issue to a twist trapper or to a twist stop it was of the essence of the invention defined in them that a permanently crimped yarn of uniform characteristics should be produced. It could not, therefore, be said that a machine with the defects referred to anticipated an invention in which uniformity and permanency of crimp in the yarn produced by its use were essential objectives.

The fact that commercial crimped thermoplastic yarns could not be produced by the use of the Spondon machine was conclusively proved by Dr. Dudzik. He made tests of the yarns produced by use of the Spondon machine in the basement on its steam side. These were made in the presence of representatives of the plaintiff. The tests included knitting of the yarns, finishing the fabrics made from them and dyeing them. Dr. Dudzik gave a detailed account of how the tests were conducted but it will be sufficient to state his conclusions of what they disclosed. He found, in effect, that the crimp in the cellulose acetate yarn was almost all out and that it was valueless for commercial purposes, and that in the nylon and terylene yarns there was a loss of crimp, a diminution of stretch quality and an increase in lustre and that neither was a commercial yarn.

Consequently, I find that the Spondon machine was not a prior use of the invention and did not anticipate it. This

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makes it unnecessary to consider whether the state of the pleadings permitted evidence of it to be given or whether there had been a disclosure or use of the machine in such a manner that it had become available to the public within the meaning of section 63(1) of the *Patent Act*.

In view of my finding that the invention defined in the claims in issue of patent No. 552,104 was made at least as early as November 13, 1950, the Chavanoz patents, on which counsel for the plaintiff relied, cannot be regarded as anticipatory of the invention in issue. Nor need I consider the argument of counsel for the plaintiff that since the Chavanoz applications and the application for the patent in issue were co-pending in the Patent Office at the same time they should have been placed in conflict under section 45 of the Act.

It follows from what I have said that the attack on the validity of the claims in issue of patent No. 552,104 on the ground that the invention defined in them had been anticipated fails. In my opinion, there was not a vestige of support for it. I find, therefore, that the invention defined in the claims in issue was new.

The usefulness of the invention in issue was established beyond any possibility of dispute. I have already referred to the evidence relating to the undesirable characteristics of the specified thermoplastic yarns in their raw or flat form, the efforts made and the methods used to overcome them, the use of the step by step method of putting a uniform and permanent crimp into the yarns in order to overcome the undesirable characteristics referred to and give the yarns the desired aesthetic qualities, the disadvantages of the method and the superiority of the inventors' continuous false twist process over it. And I have found that the nylon yarn produced by the use of the apparatus and method invented by Mr. Seem and Mr. Stoddard was more uniform than that produced by the use of the step by step method and superior to it in quality and that this greater uniformity and superiority resulted from the uniformity of the operating conditions under which the yarn was produced. I have also found that the use of the apparatus and process was superior to the use of the step by step method from an economic point of view.

There is no doubt that when Col. Heath and Mr. Barnett of G. H. Heath & Co. Ltd. came to Coatesville early in 1954 they were greatly impressed with the yarn produced on the inventors' machines by the use of the invented process and the fabric, stockings, sweaters and other garments made from it shown to them and the superiority of the yarn over that in the skeins of yarn made by the use of the step by step method which were also shown to them.

Counsel for the plaintiff referred in detail to the representations on the part of The Permatwist Company contained in the licensing agreement between it and G. H. Heath & Co. Ltd., filed as Exhibit Z-172, namely, that the use of the methods and apparatus referred to made possible the production of fluffed thermoplastic yarn similar in appearance and other physical characteristics to the so-called "helanca" yarn, being yarn produced by the step by step method, the production of fluffed thermoplastic yarn substantially uniform in appearance, dyeing qualities and elasticity, the economical production of many novelty fluffed yarns, the saving of floor space, in that to produce essentially the same yarn by conventional equipment approximately four times as much floor space would be required, the elimination of many operations detrimental to quality, the economical production of single or plied fluffed yarn ready for coning at no greater labour cost than required to perform one of the twisting operations of conventional methods, economy through using electrical energy and the ease of conversion of the licensee's conventional throwing machinery, and he submitted that it was economy of production that was at the back of the license agreement. Even if this submission were accepted the fact is that G. H. Heath & Co. Ltd. certainly considered that the inventions in issue were useful. Moreover, their remarkable commercial success even before any patents for them were granted is, in my opinion, conclusive proof that the inventions defined in the claims in issue were useful and I so find. Thus the inventions were new and useful within the meaning of section 2(*d*) of the Act which defines "invention" as follows:

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

I now come to the charge that the patents in issue are invalid on the ground that the inventions in issue did not involve the exercise of any inventive ingenuity having

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regard to the state of the prior art but were obvious. There was no substance in the charge and I dismiss it. But in view of the fact that the validity of a patent is so frequently attacked on the ground that the invention for which it was granted was obvious it is desirable, I think, to set out the considerations that ought to govern the Court in determining whether an invention that is new and useful was obvious and, therefore, unpatentable. The fact referred to warrants a statement of the basic principles to be applied in dealing with this important question.

Counsel for the plaintiff submitted that it ought not to be assumed from the fact that in *Ciba Limited v. Commissioner of Patents*[1] Martland J., in delivering the judgment of the Supreme Court of Canada, did not specifically mention inventive ingenuity or lack of obviousness as an essential attribute of patentability that it was thereby decided that it was not necessary to the validity of an invention that this attribute should be present, and he submitted further that the cases, both in Canada and in Great Britain, decide that the presence of this attribute is essential. I accept these submissions. In *Farbwerke Hoechst A.-G vormals Meister Lucius & Bruning v. Commissioner of Patents*[2] I commented on the decision in the *Ciba Limited* case and stated, at page 164, that prior to the decision in that case the courts had proceeded on the assumption that it is not sufficient to constitute an invention that the subject of a patent should be new and useful but that a further attribute of patentability, namely, the exercise of inventive ingenuity must also be present. I proceed on that assumption in the present case.

The question whether an alleged invention was obvious or not is exclusively a matter for the Court. It is not within the competence of a witness, whether an expert or not, to express his opinion on the subject. Moreover, the question is one of fact. It follows, therefore, that a decision in a particular case that the alleged invention there under consideration was obvious is of little, if any, value to the Court in helping it to decide whether the alleged invention before it was obvious or not.

Moreover, since the question is one of fact the trial judge has no right to determine it according to his own opinion on whether the invention in issue before him was obvious.

[1] [1959] S.C.R. 378.

[2] (1962) 22 Fox Pat. C. 141.

He must do his utmost to abstain from a subjective approach to the matter and deal with it as objectively as possible. The issue is not whether the alleged invention would have been obvious to him but whether it would have been obvious to the person of ordinary skill in the relevant art. The judge must, as far as possible, as already stated, put himself or be put in the position of such a person and determine the question accordingly. This may be difficult in some cases but in others, including the present, it is simple.

There is authority for holding that the Court should look askance at the effort of a party to defeat a new and useful invention by the plea that it was obvious. That plea is frequently the last resort of the infringer. In this connection, I refer to the caustic statement of Lord Esher, M. R. in *The Edison Bell Phonograph Corporation, Limited v. Smith and Young*[1] where he said, at page 398:

> What is the meaning of subject matter? It is not the same thing as want of invention, or rather as I should say as want of novelty: it is not the same thing as want of utility, but, where you cannot maintain either of those propositions which would be sufficient to destroy the patent, it is something else, which some one or other, at some time, has invented as an idea for destroying patents. It really comes to this, that, although the invention is new—that is, that nobody has thought of it before—and although it is useful, yet, when you come to consider it, you come to the conclusion that it is so easy, so palpable, that everybody who thought for a moment would come to the same conclusion; or, in more homely language, hardly judicial, but rather businesslike, it comes to this; it is so easy that any fool could do it. Well, I look, as I say, upon that objection, when all others have failed, generally with amused contempt. It can be made out, but hardly ever.

While the language used by Lord Esher was extreme, his admonition to look askance at an effort to destroy a new and useful invention by the plea of obviousness should not be disregarded.

Moreover, the Court should keep in mind the fact that it has never been possible to define with precision, apart from the statutory definition, what constitutes an invention. Some of the attempts to do so have verged on the ludicrous. One of the reasons for the difficulty is the lack of a standard for differentiating an invention from a workshop improvement. This was the subject of comment by Tomlin J. in

[1] (1894) 11 R.P.C. 389.

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Samuel Parkes & Co. Ltd. v. Cocker Brothers Ltd.[1] where he said:

> Nobody, however, has told me, and I do not suppose anybody ever will tell me, what is the precise characteristic or quality the presence of which distinguishes invention from a workshop improvement . . .

In the English cases the term "subject matter" has been used to define the attribute under discussion. In the Canadian cases this attribute of patentability has been variously described. For want of a better term, and fully recognizing its inadequacy, I have referred to it as the exercise of inventive ingenuity. The term "exercise of the inventive faculties" has also been used: *vide Crosley Radio Corpn. v. Canadian General Electric Co. Ltd.*[2] And the term "lack of obviousness" has also been used. It follows from the fact that the quality of inventiveness has thus far not lent itself to precise definitions that the provision of *prima facie* validity enacted by section 48 of the *Patent Act* is of particular importance so far as this attribute of patentability is concerned. Its presence in the invention need not be proved by the patentee for its existence is presumed until the party attacking the patent shows to the satisfaction of the Court that the invention is obvious. The statement that the onus of showing that a patent is invalid imposed by section 48 is not an easy one to discharge is particularly applicable in cases where a party seeks to destroy a new and useful invention by the plea that it was obvious.

While care must be shown in applying English decisions on the subject of obviousness in view of the fact that there is no provision in the English *Patents Act* similar to section 48 of the Canadian *Patent Act*, there are many English decisions indicating what should not be regarded as a negation of the presence of the attribute of inventive ingenuity in an invention. It is well established, for example, that a mere scintilla, meaning thereby "the slightest trace", of an invention is sufficient to support a patent: *vide* the statement to this effect of Lord Tomlin in the *Samuel Parkes v. Cocker Brothers* case (*supra*), at page 248, and the approval of his statement by Lord Russell of Killowen in *Non-Drip Measure Corp., Ld. v. Strangers, Ld. et al.*[3]; by Lord Normand in *Cleveland Graphite Bronze Corpn. et al. v.*

[1] (1929) 46 R.P.C. 241 at 248. [2] [1936] S.C.R. 551 at 556.
[3] (1943) 60 R.P.C. 135 at 143.

Glacier Metal Corp. Ld.[1] and by Lord Morton of Henryton in *Martin and Biro Swan Ld. v. H. Millwood Ld.*[2]

There are numerous decisions to the effect that the simplicity of a device is not proof that its production did not involve the exercise of inventive ingenuity and that it was obvious. This was stressed as early as 1890 in *Vickers, Sons and Co., Limited v. Siddell*[3] where Lord Hershell said in the House of Lords, 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 everyone.

This statement has been cited with approval: *vide Patent Exploitation, Ld. v. Siemen Brothers & Co., Ld.*[4] per Lord Davey, at page 549; *Van der Lely (C.) N. V. v. Bamfords Ltd.*[5] per Upjohn L.J., at page 317.

Indeed, it is established that an invention is not to be considered obvious because of its simplicity. For example, in *Pope Appliance Corporation v. Spanish River Pulp and Paper Mills Ld.*[6] Viscount Dunedin said, at page 55:

> there may be invention in what, after all, is only simplification

And in *Electrolier Manufacturing Co. Ltd. v. Dominion Manufacturers Ltd.*[7] Rinfret J., as he then was, said of the device under consideration, at page 441:

> Though simple, his device cannot be said to have been obvious.

And in *The Rheostatic Co. Ltd. v. Robert McLaren & Co., Ltd.*[8] 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.

There is another aspect of the question which should be considered, namely, that the invention of a combination,

1 (1950) 67 R.P.C. 149 at 156.
2 (1956) R P.C. 125 at 139.
3 (1890) 7 R P.C. 292.
4 (1904) 21 R P.C. 541.
5 [1961] R P.C. 296.
6 (1929) 46 R P.C. 23.
7 [1934] S.C.R. 436.
8 (1936) 53 R P.C. 109.

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such as, for example, that defined in the claims in issue, must not be considered obvious, even although it might be shown that several or, indeed, many of its integers were obvious. Just as a combination may be new, and its invention consequently not anticipated, notwithstanding the fact that many of its integers were old, so also there may be inventive ingenuity in a combination although many of its integers were obvious. The fact that the inclusion of certain parts in an apparatus or certain steps in a process was obvious does not warrant the conclusion that the invention of the apparatus or process was obvious. There was a strong admonition against any such conclusion by Fletcher Moulton L. J., in *British Westinghouse Electric and Manufacturing Company Ld. v. Braulik*[1] where he said:

> I confess that I view with suspicion arguments to the effect that a new combination, bringing with it new and important consequences in the shape of practical machines, is not an invention, because, when it has been once established, it is easy to show how it might be arrived at by starting from something known, and taking a series of apparently easy steps. This *ex post facto* analysis of inventions is unfair to the inventors, and in my opinion it is not countenanced by English Patent Law.

This admonition was approved by Lord Russell of Killowen in the House of Lords in *Non-Drip Measure Coy., Ld. v. Strangers, Ld., et al.*[2]

And in the same case Lord Russell of Killowen made a classic statement when he said, also at page 142:

> 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.

It was after this statement that he approved the admonition of Fletcher Moulton L. J. to which I have referred. There was also the statement of Lord Macmillan 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.

I agree with the submission of counsel for the plaintiff that in considering whether an invention was obvious the whole of the relevant prior art may be looked at. There is

[1] (1910) 27 R.P.C. 209 at 230. [2] (1943) 60 R.P.C. 135 at 142.

authority for this view in *Allmanna Svenska Elektriska A/B v. The Burntisland Shipbuilding Coy. Ld.*[1] where Jenkins L.J. said, at page 69:

> The matter of obviousness is to be judged by reference to the "state of the art" in the light of all that was previously known by persons versed in the art derived from experience of what was practically employed, as well as from the contents of previous writings, specifications, text books and other documents.

This statement was approved by the House of Lords in *Martin and Biro Swan Ld. v. H. Millwood Ld.*[2] But while Viscount Simonds voiced approval of the statement he emphasized the fact that although it might be shown that individual integers in a combination were obvious that fact did not make the combination itself obvious. Indeed, as he found in the case before the Court, there might well be many integers in a combination that were obvious but there might be one integer that was not obvious and of such a nature as to warrant the conclusion that the combination was not obvious. The issue is not whether the integers in a combination invention were obvious but whether the invention of the combination was obvious, or, to put it in other terms, a patent for the invention of a combination should not be found invalid for obviousness of the invention for which it was granted unless it is shown to the satisfaction of the Court that it was obvious that the integers of the combination should be combined as specified in the claim defining the invention. The unobvious nature of one integer of a combination may be such as to establish the unobviousness of the combination. Viscount Simonds found that many of the integers in the combination invention under consideration were obvious but that there was one that was not and that this supported the conclusion that the invention of which it was an integer was not obvious. At page 136, he said:

> I am of the opinion, therefore, that in this combination of integers there is at least one which by itself was not obvious. This leads to and supports the view that the combination, in which the invention is said to consist, was not obvious.

Moreover, the practical utility and commercial success of an invention may be material in determining whether it involved the exercise of inventive ingenuity. I dealt with this question in detail in *The King v. Uhlemann Optical*

[1] (1952) 69 R.P.C. 63. [2] [1956] R.P.C. 125 at 133.

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Company[1] and in *The King v. American Optical Co.*[2] In the latter case I held, as set out in the head note:

> That the practical utility and commercial success of a new device may be material in determining whether the new result produced by it was an obvious workshop improvement or involved the exercise of inventive ingenuity. Commercial success, by itself, without the solution of a difficulty, is not sufficient to establish subject matter. But when it is found that there has been a problem calling for solution and that the new device has solved it then its practical utility and commercial success in displacing alternative devices should be considered strong evidence that its production required the taking of an inventive step and that the applicant for the patent was the first to take it.

In making this finding I followed Lord Tomlin in the *Samuel Parkes v. Cocker Brothers* case (*supra*) where he said, at page 248, after referring to the large user of the device under consideration:

> The truth is that, when once it has been found, as I find here, that the problem had waited solution for many years, and that the device is in fact novel and superior to what had gone before, and has been widely used in preference to alternative devices, it is, I think, practically impossible to say that there is not present that scintilla of invention necessary to support the Patent.

and Lord Russell of Killowen in the *Non-Drip Measure v. Stranger's* case (*supra*) where, at page 142, he approved Lord Tomlin's statement.

In view of the considerations which I have outlined the contention of counsel for the plaintiff that the inventions in issue were obvious must be rejected.

As I have already stated, there is no support for the contention in any of the many prior art patents to which he referred and on which he relied.

Moreover, there are several reasons for finding not only that the plaintiff has failed to discharge the onus imposed by section 48 of the Act of showing that the inventions in issue were obvious but also that they were not obvious.

The dry heat setting of nylon yarn at a temperature well up to its melting point that was accomplished by the use of the apparatus invented by Mr. Seem and Mr. Stoddard was not obvious. I have already referred to Mr. Seem's evidence, which I accept, that between 1938 and 1941 he and Mr. Stoddard experimented with heaters of various types and found that the use of steam for the purpose of setting twist in the yarn was not satisfactory, that they also

[1] [1950] Ex.C.R. 142 at 163. [2] [1950] Ex.C.R. 344 at 367.

tried other means for the purpose, including the use of certain chemicals, wetting the yarn and running it through the heater and adding high boiling point materials to it, that in the course of their experiments they found that when the yarn was heated to a high temperature they were getting a good set with the use of dry heat alone and that this surprised them because the teaching in the industry had been that moisture was always used. There was also his evidence that apart from the patented machine there was no commercial process in existence, prior to 1954, in which thermoplastic yarn was produced with dry heat near the melting point. It might be argued that the use of an electrically energized heating device was obvious since the idea of using dry heat at a high temperature was known but the invention of the apparatus for thermally processing thermoplastic yarn involving heating the yarn to the prescribed temperature, meaning thereby the temperature required to enable the yarn to be yarn set, defined in Claim 3 of patent No. 552,105 was not obvious.

And the concept that the thermoplastic yarn should be yarn-set as required in the claims in issue of patent No. 552,104 was not obvious. No one had taught the technique of stabilizing the molecules of the yarn in the helical deformation into which they were reoriented by twisting the yarn while it was in its plastic state, having been heated to a temperature not less than 40 per cent below its melting point and then cooling it before untwisting it and finally untwisting it. Neither the idea involved in this step in the process nor the means for putting it into effect was obvious. Nor were the integers of close control of operating conditions in order to produce a uniform crimp in the yarn obvious. And the requirement of correlation of tension and temperature for the purpose of precluding substantially any ductility in the yarn when cooled and producing a permanent crimp that would withstand the stresses and temperatures to which it would be subject was certainly not obvious.

It would be unreasonable to find that inventions of combinations in which there are so many unobvious integers such as those defined in the claims in issue were obvious.

Moreover, the great commercial success of the inventions in issue is further evidence, if any is needed, that they were not obvious. Surely the licensees of the inventions would not be likely to pay the large royalties that have been paid

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if the inventions were obvious. I find that the inventions in issue were not obvious.

Consequently, the three essential attributes of patentability, namely, novelty, utility and inventive ingenuity or lack of obviousness were all present in the inventions in issue.

There were other attacks on the validity of the patents in issue. Each was attacked on the grounds of insufficiency and ambiguity in the specification. I shall deal first with the attack on the ground of insufficiency. It was directed particularly against patent No. 552,104 and the requirement in the process claims in issue relating to correlation.

Counsel for the plaintiff contended that the applicants for the patents in issue had failed to comply with the requirements of section 36 of the *Patent Act* that they should in the specification correctly and fully describe the invention applied for and its operation and use as contemplated by the inventor and set forth clearly the various steps in the process in such full, clear, concise and exact terms as to enable any person skilled in the relevant art to use the invention. He submitted that, while the claims require that the tension on the heated yarn should be correlated to its prescribed temperature to maintain the yarn under tension adequate to preclude substantially any ductility in the cooled yarn, the only direction in the specification relating to correlation is that care must be exercised to maintain the proper correlation between heat, speed and tension, that there is no information of the relationship of these factors to one another or direction of how the correlation should be effected in order to accomplish the desired result, that the specification does not contain any statements or examples of how the factors of linear speed of the yarn, tension and temperature are to be correlated, that the mere direction to exercise care to maintain the proper correlation between them without a statement of their relationship or any specific examples of the correlation is useless to the addressee of the patent, that the failure to give the necessary information or direction or examples sets a problem for him requiring him to engage in research and experiment in order to find out how to practise the invention without knowing what trials or experiments to make or how to make them and that, consequently, the specification is insufficient and the patent invalid. In support of his submission counsel relied, *inter alia,* on the statement of Wills J. in *Hookham v. Johnson*[1] that the patentee must not set a problem and the statement of Fletcher Moulton L. J. in *Vidal Dyes Syndicate Ld. v. Levinstein Ld.*[2] to the effect that if the patentee has left it to the public to find out by research and experiment the practical way of obtaining the result claimed by the patent he has failed to perform his duties to the public and his failure is fatal to the validity of the patent. Put briefly, the contention of counsel was that the applicants for the patents in issue should have given specific examples of the rate of speed of the yarn, the degree of twist required, the temperature of the heated zone or of the yarn, the amount of tension to which the heated yarn should be subjected and specific instructions on how the proper correlation of speed, heat and tension should be maintained in order to accomplish the desired result and that their failure to do so invalidates the patent on the ground of insufficiency in the specification.

The submission thus put forward should not be accepted. It is settled law that a patent specification is not insufficient by reason of the fact that a competent workman of ordinary skill in the art to which the invention relates may have to make trials or experiments in order to accomplish the result of the invention, if such trials or experiments are not themselves inventions and the competent workman can accomplish the desired result by following the teaching of the specification. The specification is sufficient if it enables him to put the invention into practice and sufficient directions are given to him to enable him to know what trials or experiments he may have to make and how to make them. The applicable principle was clearly laid down in *No-Fume Ld. v. Frank Pitchford & Co. Ld.*[3] In that case Lord Hanworth M. R. reviewed and followed the earlier decisions on the subject.

Lord Hanworth stated that the question whether there is insufficiency in the specification is an issue of fact. In the present case there was some conflict of evidence. Professor Speakman expressed the opinion that examples of tension, temperature and speeds of travel of the yarn were needed to make it possible to carry out the process of the

1 (1897) 14 R.P.C. 563. 2 (1912) 29 R.P.C. 245 at 279.
3 (1935) 52 R.P.C. 231.

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claims. But Mr. Seem said that he had enough information in the specification to enable him to obtain a commercial stretch yarn and Dr. Dudzik stated that nothing else was needed than the specification for the realization of the invention. It is significant that neither Mr. Seem nor Dr. Dudzik was cross-examined on these statements. I accept their evidence rather than the opinion of Professor Speakman.

I do so for several reasons. In the first place the defendant has been able to carry out the inventions in issue. The purpose of the inventions is clear, namely, to enable the production by the use of the continuous false twist process defined in the process claims in issue of thermoplastic yarns of the kind specified in the patents having a crimp that is uniform and permanent in the sense that it can withstand the stresses and temperatures to which it will be subjected in the course of the processes subsequent to its production to which Mr. Seem referred and the commercial uses of the articles into which it may be knitted or woven, the said yarns being not only more uniform in appearance than yarns produced by the step by step method and superior to them in quality but also producible at a lower cost of production. The evidence that the purpose of the inventions has been accomplished is conclusive. Mr. Seem demonstrated the fact in a convincing manner to the representatives of G. H. Heath & Co. Ltd., early in March of 1954 and the remarkable commercial success of the inventions since then is a strong indication that its licensees have been able to put them into practice effectively.

Moreover, any competent workman of ordinary skill in the art can do so by following the teaching of the specification just as easily and effectively as Mr. Seem could do himself. He is taught to use a temperature ranging from 40 per cent below the melting point of the yarn up to as close as possible to its melting point in order to yarn-set it. This means that the temperature in the heated zone must be high enough to heat the yarn to the "prescribed" temperature which, as already stated, means the temperature that is required in order to enable it to be yarn-set. This involves twisting the yarn, heating it to the prescribed temperature, cooling it before untwisting it and then untwisting it. This, if the proper tension in correlation to the prescribed temperature is used, will result, as already stated, in the stabilization of the molecules of the yarn in the helical deformation into which they were reoriented by the twisting while the yarn was in its plastic state due to its heating followed by cooling it before untwisting it. This fixes the crimp in the yarn.

The claims in issue require that the tension on the heated yarn should be correlated to its prescribed temperature to maintain it under tension adequate to preclude substantially any ductility in the cooled yarn. The specification teaches the addressee of the patent that he must subject the yarn to an adequate tension in correlation to its temperature in order to accomplish the desired result and that care must be exercised to maintain the proper correlation.

He is told, in effect, that the degree of heat required for the purpose of enabling a particular yarn to be yarn-set depends on such factors as the speed of the yarn and its kind or denier. It is obvious, for example, that if the selected linear speed of the yarn is so fast that it cannot be heated to the prescribed temperature in the time it takes to pass through the heated zone the speed of the yarn must be reduced or the temperature of the heated zone increased. Similarly, the degree of heat required will be affected by the factors of the kind of yarn to be heated and its size. He is also told that the preclusion of substantially any ductility in the yarn so that the permanency of its crimp will be retained depends on the proper correlation of the tension on the heated yarn to its prescribed temperature.

It will be clear to the addressee that the invention covers a very wide range for the differences in the possible combinations of speed, heat and tension will result in corresponding differences in the resulting yarn. He knows, therefore, that in order to make a particular yarn he must make adjustments of the speed, heat and tension in order to correlate them properly. The fact that he must make trials and experiments in order to accomplish the desired result does not set a problem for him that would invalidate the claims, for the specification prescribes the limits within which the trials and experiments may be made and contains sufficient instructions on how to make them.

The range of the prescribed temperature that may be used runs from a low of 40 per cent below its melting point

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to a high of as close as possible to it, for example, 20°F. below it. This appears clearly from the specification. Mr. Seem stated, on his cross-examination, that he had produced satisfactory yarn on the defendant's Fluflon False Twisting Machine with the use of temperatures in the heated zone ranging from well up to the melting point of the yarn down to 40 per cent below it. In a test run on Exhibit Z-161, being the exemplification of the defendant's machine set up in the basement of the Court House, he had used a temperature of 465°F. in the heated zone but he said that variations of temperature could be used. He explained that if the temperature in the heated zone were reduced to 445°F. the yarn produced by its use might be satisfactory to a particular customer. Indeed, he might prefer it to a yarn produced with the use of a higher temperature for it would have a softer hand. Even if the temperature were reduced to 435°F or 400°F or even 350°F the yarn produced by the use of such a lower temperature would be satisfactory for some commercial uses. Much depended on the demand of the throwster's knitter or weaver customer. Yarns produced by the use of a temperature lower than 465°F had a softer hand but less stretch and recovery than yarn produced by the use of the higher temperature of 465°F. If the customer wanted a particular yarn the throwster would make the necessary adjustments in order to produce the kind of yarn he wanted. But Mr. Seem stated that while the use of a temperature in the heated zone as low as 350°F would enable the production of a yarn suitable for some commercial purposes he could not think of any commercial use for a yarn produced with the use of a temperature of 300°F for the temperature of such a yarn would be at least 15° below that of the heated zone and, therefore, not high enough to enable it to be yarn-set. On the other hand, according to Mr. Seem, it would not be safe to use a temperature much above 465°F. Perhaps 475°F was as high as it would be safe to go. This evidence indicates that any competent workman of ordinary skill in the art can successfully use temperatures in the range prescribed in the specification for the production of satisfactory yarns just as easily as Mr. Seem did.

The specification also sets the upper and lower limits of the tension to which the heated yarn should be subjected in correlation to its prescribed temperature in order to accomplish the desired result of preclusion of substantially any ductility in the cooled yarn and the production of permanently crimped yarn. It teaches the addressee of the patent that if the yield value of the heated yarn is intermittent or uniformly exceeded by the tension the resultant yarn, after untwisting, will be uneven and lack uniform crimp and that the portions of the yarn where the tension exceeds the yield value of the heated yarn "will assume the appearance and other characteristics of monofilament yarn". Thus he knows the upper limit of the tension that may be used. It must not be so high as to cause the heated yarn to assume the appearance and other characteristics of monofilament yarn. If there is any indication of this being about to happen the tension must be reduced. The addressee also knows the lower limit of the permissible tension. It must be high enough to preclude substantially any ductility in the cooled yarn.

Earlier in these reasons I dealt at length with the meaning of the expression "to preclude substantially any ductility", as used in the claims in issue, and came to the conclusion that it is proper to relate the preclusion of substantially any ductility in the yarn to the retentivity of the permanency of its crimp in the sense that it will withstand the stresses and temperatures to which I have referred and retain its crimp.

The opening paragraph of the specification states that the thermoplastic yarns referred to in the patent materially respond to shrinking by becoming more ductile or plastic, so that when the addressee of the patent is instructed to correlate the tension on the heated yarn to its prescribed temperature in order to maintain it under a tension adequate "to preclude substantially any ductility in the cooled yarn" he knows that if an adequate tension in correlation to the prescribed temperature is used it will prevent the shrinkage of the yarn and result in the production of a yarn that is not ductile or plastic and he will correlate the tension on the heated yarn to its prescribed temperature accordingly. He knows that if the yarn is ductile or plastic the crimp in it will pull out but that if an adequate tension is used he will be able to produce a yarn that is not ductile or plastic and will retain its crimp. By the use of an adequate tension on the heated yarn in correlation to its prescribed temperature he will have succeeded in precluding substantially any

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ductility in the cooled yarn and producing a yarn which is permanently crimped. He will be concerned, therefore, with producing a yarn with the desired uniform and permanent crimp and to that end will maintain it under an adequate tension to keep it in its spiralled formation due to the helical deformation of the molecules to which I have referred in order to preclude substantially any ductility in it so that the permanency of its crimp may be retained.

The effect of a change in tension on the crimp in a yarn that is being processed was vividly illustrated by Mr. Holden, one of the plaintiff's workmen, when he was operating the air side of Exhibit 62 in the basement of the Court House. When he was running the yarn through the air side he examined it by "milking" it, an expression to which I shall refer later, in order to determine whether the crimp in it was satisfactory and finding that it was not good he adjusted the tension means by adding weights to it in order to increase the tension on the yarn and produced a yarn that had a better crimp in it.

Under the circumstances, it is clear that the specification, when read as a whole and fairly, teaches any competent workman of ordinary skill in the art who is willing to understand it what is necessary to the production of yarn of the superior uniformity and quality promised by the patent and how it should be accomplished. It is not necessary in a patent specification to give directions of a more minute nature than a person of ordinary skill and knowledge of the art might fairly be expected to need: *vide* Terrell and Shelley on Patents, Tenth Edition, at page 74, and the cases there cited. By following the teachings of the specification the addressee of the patent can put the invention into practice as easily and effectively as the inventors could do themselves. Consequently, he does not need any of the specific examples or directions referred to by counsel for the plaintiff. As a matter of fact, in view of the wide limits within which the invention may be operated in order to satisfy the various demands of knitter or weaver customers, the general directions in the specification give more effective information on how the result of the invention is to be accomplished than if the specific examples and directions referred to had been given. In my opinion, the specification was not insufficient.

The contention of counsel for the plaintiff that there is ambiguity in the specification falls next to be considered. The principle to be applied in determining whether a patent is invalid for ambiguity was laid down by the House of Lords in *Natural Colour Kinematograph Co. Ld. v. Bioschemes Ld.*[1] There Earl Loreburn said, at page 266:

> It is the duty of a patentee to state clearly and distinctly, either in direct words or by clear and distinct reference, the nature and limits of what he claims. If he uses language which, when fairly read, is avoidably obscure or ambiguous, the Patent is invalid, whether the defect be due to design, or to carelessness or to want of skill.

and Lord Parker said, at page 269:

> It is open to the Court to conclude that the terms of a specification are so ambiguous that its proper construction must always remain a matter of doubt, and in such a case, even if the Specification had been prepared in perfect good faith, the duty of the Court would be to declare the Patent void. Once again, though the Court may consider that the meaning of the Specification is reasonably clear, yet if the Specification contain statements calculated to mislead the persons to whom it is addressed, and render it difficult for them without trial and experiment to comprehend in what manner the patentee intends his invention to be performed, these statements may avoid the Patent.

Counsel for the plaintiff submitted that since the temperature of the yarn cannot be determined the addressee is left in doubt as to its "prescribed temperature" and that the expression is ambiguous. I have already dealt with this submission and dismissed it as being without merit and my reasons for doing so are set out earlier in these reasons. While the use of the word "prescribed" is inept its meaning is clear to any addressee of the patent who is willing to understand it, namely, that the "prescribed" temperature of the yarn means, to put it simply, the temperature required to enable it to be yarn-set, that is to say, a temperature ranging from 40 per cent below the melting point of the yarn up to as close as possible to its melting point, for example, 20°F below it. If a yarn is heated to a temperature within this range it has the "prescribed" temperature contemplated by the claims in issue and the fact that its precise temperature may not be known is of no importance. The expression "prescribed temperature" is not ambiguous.

In support of his contention that there was ambiguity in the specification counsel relied on the statement of

[1] (1915) 32 R.P C 256.

Professor Speakman that he found certain passages in it difficult to understand. He referred to the statement that "The degree and permanency of the crimp, wave or fluff is attained by maintaining the treating temperature well up to the melting or equivalent point of the thermoplastic, i.e., not less than forty per cent below the melting or equivalent point" and the statement that as the yarn passes down through the heater "it is uniformly heated to a temperature within twenty degrees of the melting point of the thermoplastic" and expressed the opinion that there was a contradiction in the two statements and ambiguity in the expression "not less than forty per cent below", which implied, as he put it, that it must be "more than forty per cent below". I was not favorably impressed with Professor Speakman's statement and opinion on this matter. It seemed to me at the time that it was the statement and opinion of a person not willing to understand and I expressed my reaction accordingly. It would be clear to any person, let alone a competent workman of ordinary skill in the relevant art, that the expression "not less than forty per cent below" does not mean "more than forty per cent below". The word "less" is inept but it is clear that the temperature to be used must not be "lower" than forty per cent below the melting point of the yarn. Moreover, there is no contradiction between the two statements. The first teaches the use of a temperature "not less than forty per cent below" the melting point of the yarn and the second gives, for the purposes of illustration, an example of a multifilament yarn being uniformly heated to a temperature within twenty degrees of the melting point. Thus a range of temperature from forty per cent below the melting point of the yarn up to close to its melting point, namely, 20°F below it, is clearly indicated. And there is no merit in the submission that it is not clear whether the "treating temperature" referred to in the first statement is that of the heated zone or that of the yarn and that the expression is, therefore, ambiguous. In my opinion, it does not matter which it is, for it is clear that the temperature of the yarn must be "not less than forty per cent below the melting point".

Professor Speakman also said that he found a contradiction between the statement in the specification, "Care must, of course, be exercised to maintain the proper correlation between heat, speed and tension, for if the yield value of the heated yarn being processed is intermittent or uniformly exceeded by tensile stress the resultant yarn, after untwisting, will be uneven and lack uniform crimp, wave or fluff and the degree of the crimp, wave or fluff will be relative to the degree to which the tension exceeds the yield value", on the one hand, and the statement in Claim 8 calling for "correlating the tension in said yarn to said prescribed temperature and linear speed of travel of the yarn to maintain the yarn at a uniform tension substantially in excess of the contractile force of the yarn resulting from heating and twisting the same" on the other. There is no contradiction between the two statements. They refer to related situations. The first is concerned with the undesirable result of applying tension to a yarn while it is being heated that is in excess of its yield value and the care to be exercised to avoid such a result, whereas the second contemplates the use of a tension substantially in excess of the contractile force of the yarn resulting from heating and twisting it. The statements are not inconsistent with one another, for it is clear that a tension substantially in excess of the contractile force of the yarn may be applied to it while it is being heated without such tension being in excess of its yield value. On his cross-examination, Mr. Seem established this fact. He stated that any substantial change in tension would result in a change in the yarn but a customer might prefer a yarn produced with a lower tension than one produced with a higher one. Both Dr. Finlayson and Professor Speakman gave the meaning of the term "contractile force" as it appears in the claims in issue. Put simply, the contractile force of the yarn is the amount of force that must be applied to the ends of the filament in it to prevent them from contracting as they would do if the force were not applied. Mr. Seem explained that the contractile force of a yarn is measured in terms of grams per denier, that if a tension greater than its contractile force is applied to it while it is being heated it will be stretched, that if the tension is less it will be shrunk and that if it is equal it will be neither stretched nor shrunk. Any prospective operator of the invention would, therefore, be able to tell from the result whether the tension that he had applied to the yarn while it was being heated was greater than, less than or equal to its contractile force and make such adjustments of tension as might be necessary to satisfy his cus-

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tomer's demand. Mr. Seem stated that he had produced yarns that were not ductile by using tensions equal to the contractile force of the yarn, less than such force and greater than it. He gave evidence of a particular case where it was necessary, in order to produce a yarn with preclusion of substantially any ductility in it, to use a tension that was in excess of the contractile force of the yarn by reason of the fact that if a lower tension had been used the crimp would have pulled out. Mr. Seem thus proved that it is possible to produce a satisfactory continuous false twist process yarn by the use of a tension in excess of the contractile force of the yarn but is not in excess of its yield value. Mr. Seem also gave an example of the production of a nonductile yarn by the use of a tension less than the contractile force of the yarn. Any workman of ordinary skill in the art could do what Mr. Seem had done. There was thus no support for Professor Speakman's opinion that the statements referred to are contradictory.

Counsel for the plaintiff also submitted that the directions in the specification relating to the correlation of the tension on the heated yarn to its prescribed temperature are contradictory of one another and that this results in ambiguity. He referred to the statement that "the portions of the yarn where the tensile strength exceeds the yield value of the heated yarn will assume the appearance and other characteristics of monofilament yarn" and the later statement that "in the case of yarns having thermal characteristics such as Dacron for example, which exhibits substantial ductility when heated, the yarn is processed under sufficiently high tension during heating to preclude substantially any ductility in the yarn when cooled" and contended that the yield value referred to in the earlier statement is the stress applied to the yarn where it reaches the yield point and that the yield point is the point beyond which the yarn begins to be drawn out. In effect, his submission was that in order to preclude substantially any ductility in the yarn it is necessary to draw it out or stretch it beyond its yield point and that if a tension is used that will have such a result it will be a tension in excess of the yield value of the yarn and result in the yarn having the appearance of a monofilament yarn. Consequently, according to his submission, it is impossible to reconcile the teachings with one another, namely, on the one hand, that a tension must not be used that will exceed the yield value of the yarn so that it will go beyond its yield point and, on the other, that in order to produce a yarn with preclusion of substantially any ductility in it it is necessary to use a tension that will result in a yarn being drawn out or stretched beyond its yield point and, therefore, a tension in excess of the yield value of the yarn.

There is a clear answer to this submission. It was based on the erroneous assumption that "yield value" and "yield point" are the same. They are not. The statement in the specification that "the portions of the yarn where the tensile strength exceeds the yield value of the heated yarn will assume the appearance and other characteristics of monofilament yarn" contains as implied definition of the yield value of the heated yarn, namely, that it is the state of the heated yarn beyond which, if too great a tension is applied, it will assume the appearance of monofilament yarn. The specification does not mention the term "yield point" but it was defined as the point in a cooled yarn beyond which there is still some non-recoverable extension or ductility. "Yield value", according to the specification, has reference to the tension on a heated yarn, whereas "yield point", according to the evidence, relates to a cooled yarn that is being tested for residual ductility. "Yield value" and "yield point" cannot be equated. The attempt to equate them was responsible for the submitted contradiction in the directions. They were not contradictory of one another. The attack on the patents based on alleged ambiguity in the specification fails.

Counsel for the plaintiff also contended that the claims in issue were invalid by reason of being indefinite and flexible. He referred to the requirement of section 36(2) of the *Patent Act* that the specification shall end with a claim or claims stating distinctly and in explicit terms the things that the applicant regards as new and in which he claims an exclusive property or privilege and submitted that the claims in issue do not meet this requirement. In support of his submission he relied on the statement of Lord Russell of Killowen in *Electric and Musical Industries, Ld. et al. v. Lissen, Ld. et al.*[1]

> The function of the claims is to define clearly and with precision the monopoly claimed, so that others may know the exact boundaries of the area within which they will be trespassers.

[1] (1939) 56 R.P.C. 23 at 39.

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and my statement in *Mineral Separation North American Corporation v. Noranda Mines Limited*[1]:

> By his claims the inventor puts fences around the fields of his monopoly and warns the public against trespassing on his property. His fences must be clearly placed to give the necessary warning and he must not fence in any property that is not his own. The terms of the claims must be free from avoidable ambiguity or obscurity and must not be flexible; they must be clear and precise so that the public will be able to know not only where it must not trespass, but also where it may safely go. If a claim does not satisfy these requirements it cannot stand.

A claim must be stated with such precision as to leave no doubt of the scope of the monopoly defined in it, so that an addressee of the patent will, on a fair reading of the claim, be able to determine whether what he proposes to do will infringe it or not.

Counsel contended that the process claims are vague and indefinite. He also submitted that Claim 3 of patent No. 552,105 is invalid for indefiniteness on the ground that no information is given on how the regulating means referred to in it are to be adjusted so as to correlate the tension on the yarn to its prescribed temperature and its linear speed in order to maintain it at a selected uniform tension relative to the contractile force of the yarn, that the expression "contractile force" is not defined, that the addressee is not told what the prescribed temperature of the yarn is or what its linear speed of travel is. The claims in issue are said to be indefinite for several reasons, namely, that there is no definition of the selected linear speed of the yarn and no direction as to the speed to be employed, that there is no definition of the prescribed temperature of the yarn and the workman is not told what temperature is required to yarn-set it, that there are no directions on how the tension in the heated yarn is to be correlated to its prescribed temperature and linear speed in order to produce the result referred to, that there is no definition of the tension that may be adequate and that the result itself is undefined so that a competent workman will not know whether he has produced it or not.

In support of his submission that the claims in issue are invalid for failure to define the invention counsel relied on the statement of mine in *New Process Screw Corporation v. Robertson Mfg. Co.*[2]

[1] [1947] Ex. C.R. 306 at 352. [2] (1962) 22 Fox Pat. C. 71 at 83.

In claims 2, 4 and 5 the reference was to "a pitch angle varying from substantially 12° to substantially 22°" without specifying the size of the screws for the production of which they were intended. Such a specification, without giving the diameters of the blanks to be rolled, is meaningless and the claims are invalid for failure to define the invention contemplated by the inventor.

I must confess, after further consideration of this statement, that the reason which I assigned for finding claims 2, 4 and 5 invalid, namely, in effect, that they were invalid for failure to define the invention contemplated by the inventor because of the failure to give the diameters of the blanks to be rolled was erroneous. Even if the diameters had been given the claims would have been invalid but not for the reason I gave. I should have found them invalid for lack of utility as I did in the case of claims 1 and 3. Under the circumstances, the statement should not be regarded as proper finding of the invalidity of a claim for failure to define the invention contemplated by the inventor.

The complaints made against the claims for indefiniteness and flexibility are similar to those made against the specification for insufficiency and ambiguity and the answers to them are similar. It is established, of course, as Evershed M.R. said in *Martin and Biro Swan Ld. v. H. Millwood Ld.*[1]:

A reader must not be left in any doubt whether any given apparatus, method or process, falls within the claim or not.

but, in my opinion, any workman of ordinary skill in the art would know, without any doubt on his part, whether his proposed action would infringe the claims or not.

It is not necessary, for example, to specify any rate of linear speed of the yarn for such rate depends on the capability of the apparatus and any rate within such capability may be used. Moreover, the addressee of the patent knows that the "prescribed temperature" referred to in the claims is that which is required to enable the yarn to be yarn-set and the specification tells him that any temperature between 40 per cent below the melting point of the yarn and 20°F below it will be sufficient. He also knows that the tension which he is to apply to the heated yarn so that he may correlate it to the prescribed temperature to obtain the desired result of preclusion of substantially any ductility in the yarn so that the crimp in it will not pull out must not

[1] (1954) 71 R.P.C. 453 at 460.

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be so high as to result in the yarn assuming the appearance of a monofilament yarn and yet be high enough to prevent the yarn from being ductile or plastic so that the crimp in it will pull out. He will be able to ascertain this just as easily as Mr. Seem did or, for that matter, as Mr. Holden did, by watching the yarn as Mr. Holden did to see whether the crimp in it is satisfactory and increasing the tension if it is not. He will also be able to determine the relationship between the tension he uses and the contractile force of the yarn by observing whether it is being stretched or shrunk or neither stretched or shrunk and make whatever adjustments may be desirable.

As I have already found, any competent workman of ordinary skill in the art would, by following the teachings of the specification, be able to put the invention defined in the claims in issue into practice as easily and effectively as the inventors could do themselves. Similarly, any addressee of the patents would know, without doubt, that if what he proposes to do is tantamount to following the teachings of the specification he will produce a uniform and permanently crimped yarn and his action will be within the scope of the monopoly defined in the claims and constitute an infringement by him.

It was submitted by counsel for the plaintiff that the evidence indicated that yarn-setting and preclusion of substantially any ductility in the cooled yarn can be determined only by making the yarn into a fabric and subjecting it to commercial use and that there is infringement only if the yarn is a commercial one and that the addressee of the patent should not have to run the risk of committing an act of infringement in order to be able to tell whether he will infringe the claims or not.

The submission is not well founded. I have carefully reviewed the evidence to which counsel referred and find that it is not necessary to the production of a yarn that is yarn-set and has substantially any ductility precluded from it to make it into a fabric and subject it to commercial use. If any person does what the specification teaches he will, of necessity, produce a yarn that is a commercially useful one and he will have infringed the claims if his act was done without the consent of the owner of the patents. When Mr. Seem's evidence on this point is read as a whole it is clear that he was describing the course that a throwster would follow in order to ensure the production of a particular kind of yarn. As I have stated, the range of the inventions in issue is very wide and there are many variations in the kind of yarn that may be produced by their use. A knitter or weaver customer of the throwster might desire a yarn with a particular amount of twist in it or a particular amount of stretch or a yarn with a particular softness of touch or the throwster himself might wish to have a particular kind of yarn for his own needs. It is under such circumstances and in order to meet the particular wishes of his customer on his own particular needs that the throwster will subject a sample of yarn to the processes and commercial use referred to and make such adjustments of temperature and tension and correlation of tension to temperature as may be required to satisfy his customer and his own needs before he embarks on a full scale commercial run. Having made such adjustments he will know exactly what degree of temperature he should use and what tension he should apply to the heated yarn in correlation to its required temperature and will be able to produce a yarn that is exactly in conformity with the particular requirements of his customers or his own particular needs. But this does not affect the fact that the addressee of the patents knows, without doubt, that if he does what the specification teaches he will produce a yarn that is uniform and permanently crimped and that his act in doing so will bring him within the terms of the claims. The fact that they cover a wide range of invention, as they clearly do, does not invalidate them if, as I find, the limits of the claims are clearly defined and they are not indefinite or flexible.

The remaining attacks on the validity of the patents in issue may be dealt with briefly. The complaint that they fail for inoperability of the invention defined in the claims in issue by reason of the fact that there is no means available for determining the temperature to which a running yarn has been heated has been sufficiently answered. It is, as already stated, not necessary to the accomplishment of the result of the invention that the precise temperature of the yarn should be ascertained or be ascertainable, so long as its temperature is high enough to enable it to be yarn-set. The temperature to be used will depend on a variety of factors including the linear speed of the yarn, the kind of

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yarn and its size or denier, but a wide range of temperatures is available for use in order to ensure the desired result.

And there is no merit in the submission that the apparatus defined in Claim 3 of patent No. 552,105 is inoperable by reason of the alleged fact that if the temperature sensitive resistor (sensing means), to which reference has been made earlier, is inserted in one of the heaters of a group of machines and the yarn that passes through it breaks the temperature will rise not only in the said heater but also in the other heaters of the group. It makes no difference, as Mr. Seem said, from a functional point of view whether the sensing means is inserted in one of the machines in a group of machines or is mounted on a central position relative to all of them. Moreover, the claim is not limited to an apparatus having the sensing means inserted in the heater. And, in any event, even if a break in the yarn should occur with the result alleged this could not affect the validity of the claim for the interruption in processing until normal operation is restored would be of only very brief duration.

Nor is there any substance in the suggestion that the patents in issue are inoperative on the ground that vinyon, orlon, velon, dacron and saran yarns could not stand the tests of boiling such as those set out in Exhibit Z-215 to which cellulose acetate yarn was subjected. There is no evidence that these yarns are dyed at the boil as in the case of cellulose acetate yarn. Mr. Seem stated that it was possible to yarn-set all the yarns referred to and that he had been able to obtain a yarn-set in all of them by the use of temperatures within of the range of from 40 per cent below the melting point of the yarn up to as close to it as possible. I accept this evidence. And there is no evidence that such yarns could not stand the processing conditions and commercial use to which they would normally be subject and retain their crimp.

Finally, the submission that there was an independent development of the inventions defined in the claims in issue and that this indicated that they were obvious should be summarily dismissed. There was no evidence of any independent development of the apparatus invention or the process invention at the respective dates of invention that

I have found. Mr. Seem said that he first saw a one or two-spindle experimental unit at the premises of the defendant the day after the inventions in issue were sold to the defendant on December 14, 1954. He was unable to give any description of it other than to say that it was a device for the continuous false twisting of a running thermoplastic yarn. He had heard about it about a month earlier. But Dr. Dudzik was able to give additional particulars about the machine. He said that it had a roller above the yarn supply in order to forward the yarn to the heater and that the roller rested in a U-shaped water trough below the heater in order to wet the yarn before it entered the heater. The trough was used because it was thought at the time that the use of wet heat was necessary for the production of the yarn. Later, it was learned from Mr. Seem, early in 1955, that the use of dry heat was sufficient and the machine was no longer supplied with a trough. Even if the purpose of the machine was similar to that of the invention in suit there is no evidence of when it was devised and the use of the water trough showed a substantial difference from the defendant's device. Moreover, the fact that the throwsters took out licenses for the use of the invention in issue indicates that an independent development of the inventions had not taken place. I find on the facts that there was no independent development of them.

The evidence establishes that the use of the inventions in issue has made it possible to produce thermoplastic yarns of the kind specified in the patents that were more uniform than yarns produced by the step by step process and superior to them in quality and that such production was possible at greatly reduced cost. The inventors have thereby made a substantial and valuable contribution to the throwing art and the textile industry generally. In my opinion, when a meritorious invention, such as that defined in the claims in issue, has been made its owner's rights in respect of it should be protected unless it has been clearly shown that the patent granting the monopoly is invalid. Consequently, in dealing with the attacks on the validity of the patents in issue, all of which have failed, I have applied the principle laid down by Lord Evershed M. R. in the

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recent case of *Rosedale Associated Manufacturers Ld. v. Carlton Tyre Saving Corp. Ld.*[1] where he said:

> When it is established that an invention in the true sense has been made, the Court will not be astute in construing the claims to deprive the inventor of the protection that his invention merits.

In making this statement he applied the principle expounded by Lord Normand in the case of *Cleveland Graphite Bronze Corp. et al. v. Glacier Metal Corp. Ld.*[2] who referred to the case of *British Thomson-Houston Company Ld. v. Corona Lamp Works Ld.*[3] which I cited earlier in these reasons, and said:

> It is important that the principle established in the *Corona* case should not be whittled down by refinements and exceptions that would impair the protection due to an inventor who has made an honest and careful disclosure of the invention and given as clear a definition of the monopoly claimed as the subject admits of.

Lord Normand's statement is applicable in the present case, notwithstanding the fact that there are instances in the patents in issue of inept expressions and the misuse of words, none of which would mislead any addressee of the patents who would read them fairly with a willingness to understand them. An inventor's rights are not to be measured by his capacity for precision of speech if he has fairly complied with the requirements of the law, as the inventors in the present case have done.

Since all the attacks on the validity of the patents in issue have failed, I find that as between the parties all the claims in issue are valid from which it follows that the plaintiff's action, so far as it seeks to impeach the patents in issue, must be dismissed.

There remains for consideration the issue of infringement. The plaintiff seeks a declaration that it has not infringed the defendant's rights under the patents in issue and the defendant counterclaims for infringement of them.

Counsel for the plaintiff contended that there was no evidence that the plaintiff manufactured, used or sold in Canada any machines that fall within the scope of Claim 3 of patent No. 552,105 and that since it has not itself operated any such machines in Canada it has not infringed any of the process claims in issue of patent No. 552,104 and

[1] [1960] R.P.C. 59 at 68. [2] (1950) 67 R.P.C. 149 at 154.
[3] (1922) 39 R.P.C. 49.

he submitted, accordingly, that the defendant's counterclaim must fail.

The facts do not support the contention. It is admitted in the statement of claim that the plaintiff manufactures and sells textile machinery and has sold such machinery in England and Canada and elsewhere throughout the world. One of the textile processing machines manufactured and sold by it is a crimp twisting machine known as the "Crimp-Spin" machine. This is of the types known as CS1, CS2 and CS3. The CS3 machine was brought out by the plaintiff in England in August of 1957 and, pursuant to a sales contract, dated December 2, 1957, and filed as Exhibit Z-139, the plaintiff sold two CS3 machines to Galtex Company Limited at Galt in Ontario. Counsel for the plaintiff contended that the sale was made in England but it is clear from Mr. Dufort's evidence that the plaintiff delivered the machines to Galtex Company Limited at its premises at Galt. Mr. Dufort explained the procedure followed by the plaintiff when it makes a sale to a customer in Canada such as Galtex Company Limited. The machine is erected in England with the necessary shafting, main gearing, motors and belts for a run without yarn, then dismantled and shipped to Canada and re-erected on the customer's premises by an erector sent by the plaintiff to the customer's plant for the purpose of putting the machine together and staying until it is started to the customer's satisfaction. Delivery of the machine to the customer takes place two weeks after the boxes containing the dismantled machine arrive at the customer's premises. It is clear that the plaintiff's two CS3 machines were delivered to Galtex Company Limited some time after December 2, 1957, and Mr. Dufort stated that he believed that one of the plaintiff's erectors went to the Galtex Company Limited plant and erected the machines there. According to the sale contract the charges for the erection of the machine were not included in the sale price.

It was also finally proved, after strenuous opposition on the part of the plaintiff, that the plaintiff subsequently gave Galtex Company Limited instruction on how to run the CS3 machines which the plaintiff had sold to it, the instructions being contained in a document headed "Some Observations On Running CS3 Machine" which was handed

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to Mr. Tomlin by Mr. S. Pimlott, a service engineer in the plaintiff's employ. Mr. Tomlin stated that the document was given to him "to assist us in the running of the Scragg machines" and that it had been used for that purpose. Mr. Pimlott took the document away with him after three photostat copies of it had been made, one of which was filed as Exhibit Z-138. Mr. Dufort, after having made enquiries in England about the document, explained that it had been written by Mr. Pimlott during his visit in Canada at the request of Mr. N. Kent of Crowther Limited, the plaintiff's sales representative in Canada. Two Canadian customers other than Galtex Company Limited also received copies of it. The plaintiff must assume responsibility for the document and Mr. Pimlott's purpose.

The contention of counsel is inconsistent with his statement in opening that the plaintiff is responsible for certain machines now operating in Canada and the method of their use and with the statement in paragraph 8 of the statement of claim which reads as follows:

> 8. The plaintiff manufactures and sells a textile processing machine known as the "CrimpSpin" machine. The plaintiff instructs its customers in the operation of the said machine in the processing of textile yarns. The plaintiff has reasonable cause to believe that the said machinery might be alleged by the defendant to constitute an infringement of Canadian Letters Patent No. 552,105. The plaintiff has further reason to believe that the use of the said "CrimpSpin" machine in the practice of the processing of textile yarns carried on by purchasers of the said machine in accordance with the instructions of the plaintiff might be alleged by the defendant to constitute an infringement of Canadian Letters Patent Nos. 552,103 and 552,104.

This statement together with the prayer for a declaration that the said machine and its use does not constitute an infringement of the plaintiff's rights under the patents in issue is an implied admission that the plaintiff has sold its "CrimpSpin" machine in Canada and used its process in Canada. If it were otherwise, there would be no basis for considering whether the declaration should be made or not.

There was also an agreement between the parties for the purpose of the trial of the action, filed as Exhibit 49. Seven exhibits were attached to it and filed respectively as Exhibits 49A to 49F. A brief description of them is given. Exhibit 49A is a photograph of the CS3 machine similar to the machines sold by it to Galtex Company Limited and Exhibit 49B is a diagrammatic side view of it. Exhibit 49C is an instruction brochure describing the Fielden System which was employed by the plaintiff in its CS3 machines. A copy of this brochure was furnished by the plaintiff to Galtex Company Limited when it sold the two CS3 machines to it. Exhibit 49D is a pamphlet prepared and distributed by the plaintiff relating to its CS1 machine, an earlier type of its "CrimpSpin" machine, Exhibit 49E is a copy of an article in a publication called "The Textile Industry" relating to the plaintiff's "CrimpSpin" machine, Exhibit 49F is a pamphlet prepared and distributed by the plaintiff relating to its CS3 machine and Exhibit 49G is a copy of an article by Mr. Philip Scragg published in "Man-made Textiles" relating to the plaintiff's "CrimpSpin" machines.

It was stated in the agreement that type 66 nylon, 70 denier, 34 filament and terylene 75 denier multifilament yarns were processed as described in Exhibit 49C on "Crimp-Spin" machines sold by the plaintiff to its customers in Canada prior to the institution of the action and after issuance of the defendant's patents. And the parties agreed that the issue which arises in the action should be tried with reference to the plaintiff's CS3 model and that the judgment rendered on this basis should be applicable and binding with respect to the plaintiff's CrimpSpin and Fal-Spin machines.

Under the circumstances, it is clear that if the CS3 machines which the plaintiff sold to Galtex Company Limited and the process used in their operation are respectively within the ambit of the invention defined in the claims in issue the plaintiff cannot escape from the charge of infringement laid against it in the defendant's counterclaim and it is not entitled to the declaration of non-infringement sought by it.

In dealing with the issue of infringement it will be convenient, notwithstanding the fact that Galtex Company Limited is the owner of the CS3 machines which the plaintiff sold to it and the operator of the process for which they were used, to refer to the premises of the Company simply as Galtex and to the two CS3 machines as the CS3 machines at Galtex and to the process used in their operation as the plaintiff's process.

I shall deal first with the question whether the plaintiff's process is within the ambit of the invention defined in the process claims in issue. The determination of this question requires consideration of the evidence describing the process.

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The course of the yarn through the CS3 machine was illustrated by schematic drawings, including a long line drawing of the machine, filed as Exhibit 48, and a diagrammatic side view of it, filed as Exhibit O, shown also in Exhibit 49B. These drawings carry numbers showing the parts through or over which the yarn passes. Counsel for the defendant also filed as exhibit Z-6 a model or mockup of a single unit of the CS3 machine. This carried tags corresponding to the numbers on Exhibit 48. It was established that Exhibit Z-6 was made from actual parts of a CS3 machine. Mr. Tomlin said that when Mr. Seem and Mr. Stoddard came to Galtex early in 1960 he gave them a complete spindle of one of the CS3 machines at Galtex with heater and feed rolls, meaning thereby a complete single unit of the machine. Exhibit Z-6 was made by Dr. Dudzik and Mr. Seem from the parts thus obtained together with some schematic additions. Counsel for the plaintiff also filed as Exhibit 95 a schematic model of the operating parts of the CS3 machine employing actual parts of it.

Evidence describing the course of the yarn through the machine was given by Professor Speakman and by Mr. Dufort. I summarize their evidence, using the numbers shown on Exhibit 48 to indicate the parts referred to. Exhibit 48 and Exhibit Z-6 show the paths of two yarns processed together. At the bottom of the machine there is a creel with two pegs each carrying a bobbin or supply package of yarn (1). Yarn is led from the top of each bobbin through a tension device (2) above it and the two yarns are then led together through a pigtail guide (3) to a separator (4*a*) which spaces them apart. The yarns are then led side by side around the upper input roller (4) of the machine and between it and the lower input roller (5) to and around the separator (4*a*) again. The two yarns pass through a guide (6) below the heater (8) and through the heater. They each leave the heater by a guide (9) and pass through the cooling zone (10) between the heater and the false twist spindle (11). Each yarn passes through a false twist spindle and is wrapped around a twist trapper immediately above it. Only one false spindle and twist trapper are shown on Exhibits 48, 49C and 0, but there are two false spindles and twist trappers on the machine, as shown by Exhibit Z-6. The two spindles are driven in opposite directions by a driving belt (12) shown schematically on Exhibit Z-6. After the yarns have passed through their respective false twist spindles and been wrapped around their twist trappers they come together and go through a pigtail guide (9*a*) to and around a separator (13*a*), then around the upper output roller (13) and between it and the lower output roller (13*b*) and back to and around the separator (13*a*) again. The two yarns then separate and proceed to the wind up means and their respective take up packages (14), one yarn to the upper package and the other to the lower one. Two sets of wind-up means and take-up packages are indicated on Exhibit 48 but there was only one set on Exhibit Z-6. I should add that the lower input and output rollers drive the upper input and output ones.

I should also refer to Mr. Dufort's evidence relating to the adjustments that are available to purchasers of the CS3 machines. These enable variations to be made in the speed of the yarn through the machines, the tension on the yarn and its temperature. The machine is driven by an electric motor fitted with a driving belt, shown as (12) on Exhibit Z-6, that runs around the machine. Customers are supplied with pulleys that enable them to increase the speed of the spindles and, consequently, the speed of the yarn. For example, one pulley would give a spindle speed of 40,000 revolutions per minute, whereas a larger one would give a spindle speed of 60,000 revolutions per minute, without any change in the speed of the motor. Customers are also given a train of gears, called a twist-gearing, with means for adjusting the speed of the output rollers relative to the speed of the spindles so that desired variations of twist may be made. Then between the output rollers and the input rollers there is another train of gears which will enable the customer to operate the machine with a zero or a two per cent or a three per cent overfeed. This makes possible a variation in the relative speeds of the input and output rollers with resulting variations in the tension on the yarn. If the gears give a zero overfeed the speed of the input roller is the same as that of the output roller, but if the gears result in a two per cent or three per cent overfeed this means that the speed of the input roller is two or three per cent greater than that of the output roller or, in other words, that the input roller feeds the yarn two or three per cent faster than the output roller operates to take it up. A variation in the overfeed results in a variation in the tension on

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the yarn. If a zero overfeed is used the yarn is not allowed to shrink and there is no change in the tension on it. But if a two or three per cent overfeed is used the yarn is allowed to shrink which means that the tension on it is reduced. On the other hand, if an underfeed should be used, as is possible, the tension on the yarn will be increased. As Dr. Dudzik put it, the tension on the yarn produced by the use of the plaintiff's process at Galtex was determined by the relative speeds of the input and output rollers. There must be heat in order to shrink the yarn but variation in the tension on it resulted from variation in the relative speeds of the rollers. If the speed of the input roller was increased by the use of an overfeed the tension on the yarn was reduced because it was allowed to shrink, but if it was decreased by the use of an underfeed the tension on the yarn was increased because it was not allowed to shrink. Thus, as Dr. Dudzik found, there were means in the CS3 machines at Galtex to change the speed of the input rollers, the speed of the output rollers, the relative speeds of the rollers and the speed of the false twist spindle with its resultant linear speed of the yarn. Further facts relating to the plaintiff's process will be referred to later as consideration is given to the question whether the requirements of the process claims in issue are comprised in it. I shall also deal later with the temperature control system employed by the plaintiff in its CS3 machines.

I now come specifically to the question whether the plaintiff's process is within the ambit of the invention defined in the process claims in issue. This requires consideration of the elements of the claims and whether the requirements of the process defined in them were comprised in the process used by Galtex Company Limited in the operation of the CS3 machines at Galtex.

The determination of the question requires an analysis of the process claims in issue. I shall deal first with Claim 1. Its preamble, which is common to all the process claims in issue, reads as follows:

> A method of producing evenly and permanently crimped, wavy or fluffed multi-filament thermoplastic yarn having improved and uniform physical characteristics which comprises, . . .

Counsel for the plaintiff submitted that the word "permanent" must be read in its plain and ordinary meaning and that the expression "permanently crimped yarn" must mean yarn in which the crimp is set as close to the ultimate set as possible at such a temperature that it cannot be altered or removed without destroying the yarn. He contended that the set imparted to a Scragg CS3 crimped yarn can be partially or wholly removed by subjecting the yarn to more severe conditions than the setting conditions, that the yarn is, therefore, not "permanently crimped" and that, consequently, the plaintiff has not infringed any of the claims in issue. The contention is summarily dismissed. No addressee of the patent who reads the specification as a whole and fairly with a mind willing to understand it could reasonably think that the expression "permanently crimped yarn" is used in the absolute sense submitted by counsel. He would know that the word "permanently" is intended to be used in a relative sense and that what is meant by the expression "permanently crimped yarn" is yarn that will withstand the stresses and temperatures to which it will be subjected in the ordinary course of processing and commercial use and still retain its crimp. It is established that it was intended by the plaintiff, as indicated by Exhibit Z-138, that the CS3 machines should be used for the production of three types of thermoplastic yarns, namely, nylon 6, nylon 66 and terylene, and Exhibit Z-138 gave instructions for the production of such yarns. Mr. Tomlin said that stretch yarn for use in half hose and leotards was produced on the CS3 machines at Galtex and sold in the open market. Mr. Seem produced a sample of 70 denier, 30 filament, type 66, nylon yarn which he had seen being processed on one of the machines when he visited the premises on November 2, 1961, and which he had taken off the machine itself. This was filed as Exhibit Z-143. It had been produced at a heater temperature of 464°F and with an overfeed of three per cent. Mr. Seem milked the yarn and showed that it was uniformly crimped. In his opinion, it was a stretch yarn, meaning thereby a crimped yarn with stretch and recovery. Subsequently, Dr. Dudzik made tests of the yarn and expressed the opinion that yarns produced on the CS3 machines at Galtex were comparable to yarns produced on the defendant's Fluflon machine. Further reference to these tests will be made later. Mr. Scragg stated that it is the act of yarn setting that produces a permanently crimped yarn. He took the term

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"permanently crimped" as meaning that when the yarn is stretched, as it is during use and subsequent manufacture, the crimp does not pull out and it was his opinion that the CS3 machine produces "as equally permanently crimped a yarn" as the defendant's machine does. Moreover, Exhibit 49D contains the statement that the heat-setting and twisting zones in the plaintiff's CS1 machine are controlled so that variation either in the crimp or in the dyeing properties of the yarn produced by it is almost impossible. There is no reason why the statement should not also be applicable to the CS3 machines at Galtex. And Exhibit 49F tells users of the CS3 machines that they can be assured of yarn production under the most controlled conditions and that the hazards of yarn variation are virtually eliminated. In my opinion, the evidence establishes that the plaintiff's process is a method of producing evenly and permanently crimped, wavy or fluffed multi-filament thermoplastic yarn having improved and uniform physical characteristics within the meaning of the preamble to the process claims in issue and I so find.

I now come to the several requirements comprised in the claim. The first of these is "continually drawing the yarn from a source of supply". In the plaintiff's process the yarn is drawn from a supply bobbin or supply bobbins, shown as (1) on Exhibit 48. The fact that the yarn is so drawn was proved by Mr. Dufort and by Mr. Seem.

The next requirement, namely, "continually twisting the yarn drawn from said supply" was also comprised in the plaintiff's process. This was done by the false twist spindle, shown on Exhibit 48 and on Exhibit Z-6. The function of the false twist spindle and its operation were described by Mr. Dufort and Mr. Seem.

There was controversy between the parties regarding the next requirement, stated as follows:

> continually passing the yarn at a selected linear speed under uniform tension through a restricted thermally isolated and uniformly heated zone to uniformly heat the yarn to a prescribed temperature to re-orient the molecules of the yarn to the twisted formation of the yarn and yarn-set the same.

This appears in all the process claims in issue.

Counsel for the plaintiff submitted that there is no heated zone in the plaintiff's CS3 machine and that, consequently, the plaintiff has not infringed any of the claims in issue. His argument was involved. It was stated that in the case of the patented process the yarn passes through a tube, that the air in the tube is electrically heated and that, consequently, the yarn passes through a heated zone, whereas, in the plaintiff's process, the yarn is heated by passing it in direct contact with the metal strip of the heater. It was contended that, under the circumstances, it cannot be said that the yarn passes through a heated zone. The evidence is against the argument. Professor Speakman, in describing the path of the yarn through the plaintiff's machine, referred to a guide, shown as 6 on Exhibit 48, and stated that the yarn passes through the guide into the electrically heated zone, shown as 8 on the exhibit referred to. Moreover, Exhibit 49F states that the plaintiff has radically redesigned its heaters and that "each now takes two yarns, the twin yarn paths being heated by a common electric element". Exhibit Z-139 describes the plaintiff's heater units as standard equipment 12″ long and incorporating twin heat setting zones. Counsel submitted that there was a difference between the "heated zone" referred to in the claims and the "heating zone" in the plaintiff's CS3 machine, namely, that a heating zone is merely a location in which heating of the yarn takes place, whereas a heated zone is a zone which actually heats the yarn. Counsel's argument on this point is untenable. The fact that the yarn is heated by contact with the metal strip of the heater as it passes through the heater does not detract from the fact that there is a heated zone in the plaintiff's CS3 machine, namely, the space contained in the heater, and that the yarn passes through it.

And it is clear that it does so "at a selected linear speed". Mr. Seem testified that the CS3 machines at Galtex operated at a selected linear speed of the yarn and his evidence to that effect was confirmed by Mr. Tomlin and Dr. Dudzik.

It was strenuously argued by counsel for the plaintiff, on the assumption that in the plaintiff's CS3 machine the yarn does pass through a heated zone, that it does not do so under "uniform" tension as required in the process claims in issue. He submitted that the word "uniform", as applied to tension, means that the tension must be the same at every point in the zone, that in the plaintiff's process, by reason of the fact that the yarn is heated by direct contact

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with the metal strip of the heater, the tension on the yarn is greater at the top of the heater than at the bottom, that since it is not the same throughout the heater it is not uniform within the meaning of the claims in issue and that, consequently, the plaintiff has not infringed any of them. In support of his submission counsel relied on the evidence of Mr. Dufort that in the plaintiff's process the tension on the yarn immediately after it comes out of the heater is greater than just before it went in, which indicates that it has increased as it passed through the heater, and, therefore, is not uniform. I disagree with counsel's interpretation of the meaning of the word "uniform" in the context in which it appears. Webster's New International Dictionary, Second Edition, gives several definitions of the word "uniform", namely:

> uniform, adj. [F.uniforme, fr L. uniformis, fr. *unus* one and *forma* form.]
>
> 1. Having always the same form, manner, or degree, not varying or variable; unchanging, homogeneous; as the dress of Asiatics has been very *uniform;* the temperature is *uniform*; a stratum of *uniform* clay.
>
> 2. Of the same form with others; agreeing with each other; conforming to one rule or mode, consonant; alike.
>
> 3. Presenting an undiversified appearance of surface, pattern, color, etc.
>
> 4. Consistent in character, conduct, opinion, etc.

It is clear from these definitions that the word "uniform" has more than one meaning and that the context in which it is used must be considered. That being so, the expression "uniform tension" in the claims in issue ought not to be interpreted as meaning that the tension on the yarn must be the same throughout the heated zone, for every workman of ordinary skill in the art would know of necessity that, just as the temperature of the yarn could not be as high when it entered the heating zone as it had become when it left it, so also the tension on the yarn would increase as it passed through the heated zone and could not be the same throughout. He would know, accordingly, without doubt, that it could not have been intended by the inventors that the tension on the yarn must be the same throughout the heated zone. Such an interpretation of the expression "uniform tension" as used in the claims is unreasonable. It does not mean that the claims require that the tension on the yarn must be the same throughout the heated zone. All that is required is that it should be invariable at any given point in the zone so that there should not be any variation in the operating conditions, so far as tension on the yarn is concerned, for every throwster would know that variation in the operating conditions will result in lack of uniformity in the yarn and prevent the accomplishment of the desired objective of the invention. Mr. Dufort put the position of the operator of the machine properly when he said that "he would want to have the condition constant in the system at given points so that the yarn will be uniform". The word "uniform", as applied to tension, should be interpreted accordingly. The requirement that the yarn should pass through the heated zone under uniform tension means simply that the tension should be the same at any point in the zone so that there will be no variation in it as the yarn passes such point in the course of its run. That being so, the evidence established that the tension on the yarn as it passes through the heater (heated zone) of the CS3 machine is uniform within the meaning of the process claims in issue. It is clear that the operator by selecting a particular speed of the yarn and a particular overfeed can control the tension on the yarn. Mr. Scragg stated in a letter to British Nylon Spinners that the plaintiff's new machine incorporates complete control of all tensions and temperatures to very fine limits. Exhibit 49F refers to the precise yarn feed control of the CS3 machine as ensuring "absolutely constant yarn processing conditions". Mr. Seem testified that the tension on the yarn in the plaintiff's process at Galtex at any given point in the heater was constant, uniform. It might be higher at one point than at another but at any given point it was constant. And Professor Speakman was of the opinion that the tension on the yarn in the plaintiff's process was essentially uniform throughout the heater. I find, therefore, that in the plaintiff's process the yarn passes through the heated zone under uniform tension within the meaning of the process claims in issue.

There was a dispute on whether the heated zone in the CS3 machine is restricted. Counsel for the plaintiff submitted that the expression "restricted heated zone" must mean a zone of very small cross section. Mr. Dufort's opinion was that it means a zone that is closed in at the ends of the heater and Dr. Hoff thought that it means a zone that is insulated and, so far as practical, isolated from its surroundings. Counsel contended that there is no restricted

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heated zone in the CS3 machine. There is no suggestion anywhere in patent No. 552,104 that the expression "restricted heated zone" has any reference to the dimensions of the entrance or exit ends of the heater. The heated zone is defined by the length of the heater and is contained within it and is restricted accordingly to the space in the heater from its bottom to its top. This is the zone in which the yarn is heated before it enters the cooling zone immediately above it. Figures 1, 2 and 3 of the drawings accompanying the specification of patent No. 552,104 clearly indicate the extent of the heated zone and show its restriction. There is a similar restricted heated zone in the CS3 machine. It is defined by the length of the passageway in the heater through which the yarn passes and is restricted accordingly. Mr. Seem stated that the heated zone in the CS3 machines at Galtex extended from the bottom to the top of the heater, that the yarn travelled a total of approximately eight and one-half feet but its pathway through the heated zone was only one foot, that being the length of the heater. Thus the heater, shown as 8 on Exhibit 48, defined the plaintiff's restricted heated zone. Mr. Scragg contemplated that the effective length of the heated zone is restricted to 12″. Exhibit 49F refers to the heater as being of 12″ effective length and Exhibit Z-139 refers to the heat setting zones in the CS3 machines as being incorporated in the 12″ long heaters. It is clear, in my opinion, that there is a restricted heated zone in the CS3 machine.

The next point of dispute raises a question of more difficulty. Counsel for the plaintiff contended that the heated zone in the CS3 machine is not "thermally isolated" as required by the process claims in issue and that, consequently, the plaintiff has not infringed any of them. He submitted that the expression "thermally isolated zone" must mean a zone "that is removed from external conditions so far as heat is concerned" and Mr. Dufort took the position that the expression means that the thermal conditions of the heated zone are cut off from the thermal conditions outside it and that the heat inside the heated zone is kept from going out and the outside conditions are kept from coming in. Counsel contended that the expression cannot properly apply to a heater in which room air is encouraged to pass from the bottom of the heater to the top in the manner described by Dr. Hoff in respect of the CS3 machine which he saw in the mill of Southern Silk Mills at Spring City in Tennessee. He said that he was struck by what he would call a blast of warm air coming out of the top of the heater. He was told that it had been opened up deliberately to encourage the removal of decomposed products largely from the finish applied to the yarn and also from certain volatile by-products that might come from the yarn itself. Mr. Dufort expressed the opinion that the heater in the CS3 machine is not thermally isolated for the reason that it has a hole at the bottom and a hole at the top put there for the purpose of permitting a passage of air for the purpose mentioned by Dr. Hoff, but, he agreed that the heater is insulated. There are several answers to the submission. The specification of patent No. 552,104 shows that the inventors used the expression "thermal insulation" in relation to the heater and the expression "thermal isolation" in relation to the heated zone. The use of the latter is simply another way of saying that the heater should be insulated so that as far as possible the heat in the heated zone should be kept from going out of it. That being so, the use of the expression "thermally isolated" is simply another illustration in the patent of an inept expression which would not mislead any addressee of it. In that view, there is no real difference between the heated zone in the CS3 machine and that in the defendant's Fluflon machine. Mr. Scragg, in reply to a question relating to the heated zone in the CS3 machine, appeared to consider that the expressions "thermally insulated" and "thermally isolated" mean the same thing. Exhibit 49C describes the heater as an insulated container housing a heated strip over which the yarn passes. Exhibit 49F says that the heaters of the CS3 machines "have highly efficient thermal insulation" and Mr. Seem said that the heaters in the CS3 machines at Galtex had very effective insulation. Under the circumstances, it may fairly be said that since the plaintiff's heater is effectively insulated the passageway in the heater through which the yarn passes, being surrounded by insulation, is, in effect, thermally isolated within the meaning of the process claims in issue.

If counsel's contention that the heated zone in the CS3 machine is not thermally isolated by reason of the fact that air is allowed to pass through the heater for the purpose referred to by Dr. Hoff is accepted, this is tantamount to finding that the heater is not as effectively insulated as the

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defendant's, but that would not save the defendant from the charge of infringement, for it is well established that it is not a defence to a claim for infringement that the alleged offending device or process is inferior to the patented one.

Counsel for the plaintiff next took the position that the expression "uniformly heated zone" in the process claims in issue means that the temperature in the heated zone must be the same throughout the zone and submitted that the temperature in the heated zone of the CS3 machines at Galtex was not the same throughout it and that, consequently, the plaintiff has not infringed any of the claims. In support of his contention he relied on the report which Mr. Seem made following his visits to the premises of Galtex Company Limited. This report, filed as Exhibit Z-144, showed that the temperature in the heater of one of the CS3 machines at Galtex ran from 350°F at the bottom to 440°F at three inches from the top and 375°F at the top. Dr. Speakman also stated that the temperature in the plaintiff's heater is not uniform throughout it, but is lower at the top and bottom and reaches its greatest height slightly above the middle.

Counsel's submission on this point is similar to that made with respect to the expression "uniform tension". It is equally erroneous. My reasons for rejecting the submission that the expression "uniform tension" means that the tension in the yarn as it passes through the heated zone must be the same throughout the zone are equally applicable, *mutatis mutandis*, for rejecting the submission now made. The expression "uniformly heated zone" does not mean that the temperature in the heated zone must be the same throughout the zone and no addressee of the patent in issue would think that it does. All that is meant is that the temperature in the heated zone should be invariable at any given point in it. What is required is that the temperature in the heated zone, being an element in the operating conditions for the production of the specified yarns, should be constant so that the yarn may have the desired uniformity. Every addressee of the patent who is willing to understand it would know that this is the intended meaning of the expression.

In this view, it is clear that the heated zone in the CS3 machines at Galtex was uniformly heated in the sense that its temperature at any point in the zone was constant. Mr. Scragg said that almost from the start the plaintiff was concerned with the need for a constant temperature. In this connection, I refer again to his letter to British Nylon Spinners in which he said "our new machine incorporates complete control of all tensions and temperatures to very fine limits". It is also clear that he realized the advisability of controlling temperatures to plus or minus 1 per cent in order to produce a quality yarn. Exhibit 49F says that the temperature level of the CS3 heaters is controlled by an electronic thermostat "to maintain the temperature at an accuracy of plus or minus 1 per cent". Dr. Dudzik testified that he had made measurements of the temperature of the heaters in the CS3 machines at Galtex and found less than a plus or minus 1 per cent variation. And Exhibit Z-139 provides that the electronic control on the plaintiff's heaters ensures temperature accuracy up to limits as close as plus or minus 1 per cent.

Moreover, the requirement that the yarn should pass under uniform tension through a restricted thermally isolated and uniformly heated zone is for a specific purpose, namely, "to uniformly heat the yarn to a prescribed temperature to re-orient the molecules of the yarn to the twisted formation of the yarn and yarn-set the same." It is not essential to the accomplishment of this purpose that the tension on the yarn as it passes through the heated zone or that the temperature in the heated zone should be the same throughout the zone. What is essential is that the yarn should be heated uniformly to a prescribed temperature in order that the molecules of the yarn may be re-oriented to its twisted position and the yarn be yarn-set. All that is required is that there should be a constancy of tension and temperature in the heated zone so that the purpose specified in the claim, namely, that the yarn should be yarn-set, may be accomplished. That being so, the evidence is conclusive that the use of the plaintiff's process on the CS3 machines at Galtex resulted in the yarn produced by it being yarn-set within the meaning of the claims. Earlier in these reasons I referred to the meaning of the term "yarn-set". It is the result of the processing steps comprised in the invention in issue, consisting of the twisting of the yarn under the required temperature and necessary tension, the cooling of the yarn in the cooling zone and then the untwisting of it

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after it has been cooled. Mr. Scragg admitted that in the CS3 machine the yarn was cooled after it had been twisted in the heated zone and before it was untwisted and that the effect of this was to stabilize the arrangement of the molecules in the yarn. He did not find any difficulty in the term "yarn-set" and, as already stated, agreed that it is the act of yarn-setting that produces a permanently crimped yarn. He also stated that in order to get permanent crimp the yarn has to be treated at the correct high temperature and the correct degree of tension in the yarn at the time of the heat treatment. There was also the evidence of Mr. Seem with regard to the sample of yarn, filed as Exhibit Z-143, to which I have already referred. He took some of the yarn off the sample and showed that by stretching it between his fingers and permitting it to contract, a process called "milking", one could see that it was a uniformly crimped yarn. Mr. Seem also gave evidence regarding some yarn which he had taken from the CS3 machines at Galtex, when he made his first visit to the premises on February 18, 1960, some of which was later put in a finished fabric at Coatesville. In his report of the tests he made on the CS3 machines at Galtex, filed as Exhibit Z-144, he gave the details of the tests that he made on the yarn produced on the machines in order to determine whether it would withstand the normal combination of stresses and temperatures encountered in the production of men's hose and found that the finished fabric had the appearance and full stretch and recovery comparable to fabric similarly processed from Fluflon false-twist yarn. He found that the twist in this yarn had been yarn-set. He made this determination in two ways. I put his explanation in his own words.

> I took a length of yarn, of the twisted yarn, from the heater, which is my custom, and examined it whether it has any tendency to untwist. I found it to be in a compact, tightly twisted form, having no tendency to untwist. I also determined it was yarn set because the finished fabric maintained its full crimp characteristics after being subjected to all the stresses and temperature combinations which stretch yarns are subjected to up to their final use, and found that it was permanent, and consequently, there, of necessity, had to be a yarn set in that yarn.

There was also Dr. Dudzik's evidence, to which I shall make a further reference later, that the yarn, filed as Exhibit Z-143, was yarn-set. I find, therefore, that the purpose of the specific requirements referred to, namely, that the yarn

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should be yarn-set, was accomplished at Galtex by the use of the plaintiff's process on the CS3 machines there.

The following requirements of the claim, namely,

controlling the supply of heat energy to said zone to thereby maintain said heated zone uniformly at the temperature required to uniformly heat said yarn to said prescribed temperature, continually cooling the yarn to stabilize the same after passage under tension through said heated zone, continually untwisting the yarn after cooling the same, and finally continually collecting the processed yarn,

may be considered together.

Mr. Scragg agreed that the Fielden system, described in Exhibit 49C, also Exhibit 16, is employed on the standard CS3 machines, including the CS3 machines at Galtex, and said that under this system the temperature of the CS3 heaters is controlled through control of the temperature in a device called a hot-pot. Exhibit 49C describes the equipment used and sets out the details of how the control of the supply of heat energy to the plaintiff's heated zone is accomplished. Mr. Seem testified that the heater of the CS3 machines at Galtex was electrically energized through busbars at the lower and upper ends of the heater from the Fielden control circuit which included the hot-pot. Mr. Scragg agreed that the object of the Fielden control system "is to keep the yarn at a constant and predetermined temperature". Exhibit Z-138 set out certain temperatures suggested for use by the plaintiff's customer at Galtex and by two other Canadian customers. And Mr. Dufort's report, filed as Exhibit 96, gave the temperatures actually used on the CS3 machines in Canada. It is clear that in the plaintiff's process at Galtex the yarn was cooled after its passage under tension through the heated zone. Mr. Scragg agreed that in the CS3 machine the cooling starts immediately after the yarn has passed through the heater and that the effect of the cooling is to stabilize the rearrangement of the molecules in the yarn before it is untwisted. Mr. Dufort agreed that the CS3 machine has a cooling zone and Mr. Seem stated that the cooling zone in the CS3 machines at Galtex extended from the top of the heater to the top of the twist trapper. He also said that in the plaintiff's process at Galtex the yarn was untwisted after it had been cooled, the reverse twisting being of exactly the same number of turns as had been inserted in the original twisting. And it is clear that the processed yarn was finally collected. Thus all the require-

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ments just referred to were comprised in the plaintiff's process at Galtex.

There remains for consideration the following requirement in the claim, namely:

> the tension upon the heated yarn being correlated to said prescribed temperature of the heated yarn to maintain the yarn under tension adequate to preclude substantially any ductility in the cooled yarn.

Counsel for the plaintiff contended that this was not comprised in the plaintiff's process. Indeed, the plaintiff's main defence to the charge of infringement laid against it depended on the contention put forward by counsel that in the plaintiff's process the tension on the heated yarn was not correlated to its prescribed temperature at all and, in any event, not correlated to maintain the yarn under tension adequate to preclude substantially any ductility in the cooled yarn.

I shall deal first with the contention that the tension on the heated yarn was not correlated to its prescribed temperature at all. Counsel based it on the assumption that in the plaintiff's process the factors of tension on the yarn and temperature of the yarn are not independently variable and cannot, therefore, be correlated. In support of it he relied on the opinion of Professor Speakman and the evidence of Mr. Dufort. Professor Speakman stated that the plaintiff's machine works on the principle known as constant feed and not that of constant tension as in the case of the defendant's machine, that there is a fundamental difference between the two methods of treating the yarn, the plaintiff's being processed under constant feed and the defendant's under constant tension, that the plaintiff's constant feed device is not the same as the defendant's constant tension device, that in the plaintiff's machine the tension on the yarn is developed in the heated zone by the action of heat as the result of the tendency of the yarn to contract under its influence, that such tension is dictated by the temperature in the heated zone and not controlled independently of it, whereas in the defendant's machine the tension on the heated yarn is controlled by the tension device independently of the temperature in the heated zone. Consequently, he stated, it would be possible in the defendant's machine to have a low tension on the yarn and a high temperature in the heated zone, whereas this would be impossible in the plaintiff's machine, for if the temperature was high so was the tension. It was Professor Speakman's opinion that correlation is possible only between independent variables and that, consequently, while correlation between the tension on the heated yarn and the temperature of the yarn is possible in the case of the defendant's machine because the tension and the temperature are controlled separately and independently of one another by different devices, it is not possible in the case of the plaintiff's machine because there is only one variable, namely, the temperature, the tension being dependent on it.

The evidence of Mr. Dufort was to a similar effect. He stated that in the CS3 machine the tension on the yarn is controlled by the overfeed. The yarn can be held to its length by the use of a zero overfeed or allowed to shrink by the use of a two per cent or three per cent overfeed and it does not matter, so far as the length of the yarn is concerned, whether the temperature is put up or down or the rate of linear speed increased or reduced or a change in the denier of the yarn is made, whereas in the defendant's machine if any of these changes are made and it is desired to maintain the length of the yarn the tension on it must be adjusted accordingly by the tension device. It was his opinion that the whole difference between a roller feed machine such as the plaintiff's and a tension control machine such as the defendant's is that on the latter the tension on the yarn must be adjusted to suit the conditions of the temperature and speed of the yarn, whereas on the former this is not necessary.

The contention put forward on the basis of Professor Speakman's opinion and Mr. Dufort's evidence raises a question which is really a matter of semantics, namely, the meaning of the word "correlated" in the context in which it is used in the claim. Webster's New International Dictionary, Second Edition, gives the following definitions of the word "correlate" as a transitive verb, namely:

1. To put in relation with each other, to connect systematically, . . .

2 To establish a mutual or reciprocal relation of; to relate as necessary or universal accompaniments; . . .

3. To establish a one-to-one correspondence of (two sets or series of things); to relate (such sets or series) that to each member of one set or series a corresponding member of the other is assigned.

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and the word "correlated" is given the following as one of its meanings, namely:

> 1. Closely, systematically, or reciprocally related; involving correlation.

In my opinion, the word "correlated" in the context in which it is used in the claim does not have the restricted meaning that Professor Speakman assigned to it and there is no justification for his assumption that in the plaintiff's process the tension on the yarn cannot be correlated to its prescribed temperature on the ground that the factors of tension and temperature are not independently variable. All that is required by the claim is that the tension on the heated yarn should be put in relation with its temperature so that it will be adequate for the accomplishment of the purpose specified in the claim. Thus, the question for determination is not whether there is a difference between the plaintiff's method of processing the yarn and the defendant's but whether in the plaintiff's process the tension on the heated yarn was put in relation with its prescribed temperature so that it was adequate for the accomplishment of the purpose specified in the claim. If it was, then the tension on the heated yarn in the plaintiff's process was correlated to its prescribed temperature within the meaning of the claim and the fact that the relationship was brought about by the use of the plaintiff's constant feed system does not matter. Nor does it matter whether the factors of tension and temperature are independently variable or not.

In my opinion, the evidence established that in the plaintiff's process the tension on the heated yarn was put in relation with its temperature as required by the claim. Mr. Scragg stated that the plaintiff provided overfeeds up to ten per cent and underfeeds up to ten per cent in steps of one per cent and did so for the purpose of enabling its customers to provide different effects for different yarns, and he agreed that a change in the overfeed would result in a change in the tension on the yarn. Mr. Dufort qualified Mr. Scragg's statement by saying that it was the plaintiff's usual practice to provide zero, two per cent and three per cent overfeeds but he admitted that the plaintiff's system of operating lower and upper rollers at differing rates of speed amounted to a tension regulating means. He stated that an operator of the CS3 machine might make changes in the overfeed for various reasons. For example, if it was desired to produce a yarn with a different bulk from the one ordinarily required he would reduce the overfeed if greater bulk was desired or increase it if less bulk was wanted. Exhibit Z-138 gave overfeed suggestions ranging from zero to five per cent which indicated that the plaintiff contemplated different tension and temperature relationships for different yarns. And Mr. Tomlin said that he had gears that gave overfeeds up to nine per cent and an underfeed of one per cent and had used all of them to produce commercial stretch yarn. Mr. Seem expressed the opinion, in effect, that if an operator followed the suggestions contained in Exhibit Z-138 he would be correlating the tension on the yarn to its temperature and linear speed. Dr. Dudzik stated that in the plaintiff's process the function of the overfeed is to control the tension on the heated yarn and he expressed the same opinion regarding Exhibit Z-138 as Mr. Seem did, saying that if a throwster operates according to the instructions given in Exhibit Z-138 then he is practising correlation as regards temperature, tension and yarn speed. Dr. Dudzik also referred to a report made by Mr. Dufort setting out the processing conditions actually used in certain mills in operating the CS3 machines, including mills in Canada, which report was filed as Exhibit 96, and expressed the opinion that the mills referred to in the report were practising correlation as regards overfeed, temperature and yarn speed. I adopt these opinions as my own, thus disposing of the objection of counsel for the plaintiff that the opinions of Mr. Seem and Dr. Dudzik were inadmissible on the ground that such opinions were a matter for the Court and not for experts. I also refer to the statement of Mr. Dufort that the operator of a CS3 machine who was seeking to produce a yarn of a particular kind for a customer would "play around" with the adjustments of overfeed, temperature and yarn speed until he found the adjustments that would enable him to produce yarn of the desired kind and he would then fix the operating conditions for a commercial run. This indicated that he was seeking to correlate the tension on the yarn to the other processing conditions. There is also the fact that the proper tension on the heated yarn in relation to the conditions of the temperature of the yarn and its linear speed is just as important in the case of the plaintiff's process as in the defendant's. Tension on the yarn will change with changes in the denier, kind and temperature

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of the yarn and if the necessary tension is not obtained there will be a change in the overfeed. There was confirmation of this fact by Mr. Tomlin who stated that at Galtex he had processed 70 denier yarn on the CS3 machines at three per cent overfeed but when he processed 140 denier yarn he used one per cent overfeed. On the evidence, I find that in the plaintiff's process the tension on the heated yarn is correlated to its prescribed temperature within the meaning of the claim, notwithstanding the fact, to use the language of Professor Speakman, that the plaintiff's machine works on the principle known as constant feed and not on that of constant tension as in the case of the defendant's machine.

The requirement that the tension on the heated yarn should be correlated to its prescribed temperature "to maintain the yarn under tension adequate to preclude substantially any ductility in the cooled yarn" was the subject of much dispute between the parties. Basically, it turned on the meaning of the expression "to preclude substantially any ductility in the cooled yarn". Earlier in these reasons I dealt with the meaning of the expression, but in view of the conflicting opinions on the subjéct of the substantial preclusion of ductility in crimped thermoplastic yarns it is necessary to give further consideration to its meaning as used in the claims in issue.

Counsel for the plaintiff put forward two contentions, the first being that, if the word "ductility" is given its plain and ordinary meaning, the evidence established that substantial preclusion of ductility in crimped thermoplastic yarn is impossible and, consequently, the patents in issue are invalid for failure of the promise of the specification. The second contention was that if the idea of substantial preclusion of ductility in the cooled yarn is related to the idea of retentivity of the crimp in the yarn there is nothing novel in the idea of processing thermoplastic yarns so that they are permanently crimped, since it was established that yarns processed by the use of the step by step method had crimp retentivity.

In support of his first contention counsel had to rely partly on the opinion of Professor Speakman that it is impossible to process nylon yarn so that there will be substantially no ductility in it, that there will always be ductility in it and that the false twist process will increase the ductility, not decrease it. It was his belief that it is impossible to prevent ductility in the yarn by the use of the process defined in the process claims in issue. Indeed, he thought that its use would result in more ductility in the crimped yarn than there had been in the flat yarn that was being processed. And, so far as the plaintiff's process is concerned, he expressed the opinion that any increase in the rate of the overfeed would result in an increase in the ductility of the crimped yarn processed by it.

Counsel also relied on the opinion of Dr. Hoff and certain tests made by him on nylon yarn produced by Southern Silk Mills at Spring City in Tennessee on a CS3 machine which the plaintiff had sold to that Company. Dr. Hoff's conclusion from these tests, which were made on October 19 and 20, 1961, and are set out in a report, filed as Exhibit 113, was that the ductility of the crimped yarn processed on the CS3 machine was greater than that of the flat yarn that had been processed. I should also refer to certain statements made by him, apart from the conclusion that he based on the tests referred to. While he said that ductility is the property of the yarn, apart from any geometric formation in it, he stated that its ductility might be affected by the method by which it was crimped, for the reason that if the treatment by which the crimp was inserted in the yarn caused a modification in its molecular configuration its ductility would be modified accordingly. Dr. Hoff equated ductility with plastic flow. He agreed that, while the application of heat to the yarn had the effect of increasing its ductility, the application of tension on the yarn would offset the effect of the temperature, but he did not believe that there are any conditions that would completely offset its effect and he did not know of any conditions where there would be less ductility in a yarn processed on a Scragg machine than there had been on the flat yarn processed by it.

The conclusion which Dr. Hoff based on the tests which he had made on yarns produced by the use of the CS3 machine at the Southern Silk Mills plant may be disposed of briefly. The tests had involved the use of an Instron machine. Dr. Dudzik, with a view to checking the correctness of Dr. Hoff's conclusion, conducted Instron tests on yarns that were the same as those that Dr. Hoff had used

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and Mr. Dufort conducted tests by way of surrebuttal of the conclusion reached by Dr. Dudzik.

After a review of the evidence and arguments relating to the tests I am of the opinion that the conclusion which Dr. Hoff drew from them should be disregarded. It was proved that the yarns on which his Instron tests were made were not commercially produced yarns. His conclusion, therefore, has no relevancy to the yarns produced by the use of either the plaintiff's or the defendant's process and is valueless. Moreover, the yarns were not processed under the operating conditions set forth in the report, the evidence being that the CS3 machine at the Southern Silk Mills plant was run at an underfeed and not at a two per cent or three per cent overfeed as stated in the report.

There is a further reason for rejecting Dr. Hoff's conclusion. Dr. Dudzik expressed the opinion that the tests made by Dr. Hoff had not been properly conducted and that the calculations based on them were erroneous. He found from the Instron tests that he made that the ductility in the flat yarn was greater than that in the crimped yarn that had been processed from it. This conclusion was diametrically opposite to Dr. Hoff's, but since it was based on tests run on yarn that had not been commercially produced it ought also to be disregarded as having no bearing on the yarns produced according to either the plaintiff's or the defendant's process. And, for a similar reason, the conclusion which Mr. Dufort based on the tests run by him is irrelevant.

It follows that Professor Speakman's opinion, to the extent that it was based on the tests made by Dr. Hoff, and he admitted that it was partly so based, is subject to discount.

Moreover, Dr. Dudzik stated that he did not agree with Professor Speakman's statement that the use of the process defined in the process claims in issue will increase the ductility of the crimped yarn processed by its use. This, Dr. Dudzik, said, was not the case. His statement is also applicable to Dr. Hoff's opinion. He agreed with Professor Speakman that it is impossible to prevent all ductility in crimped yarn. There will always be some ductility left in it and it is not possible to say exactly how much remains in it, but it was his opinion that there is very little ductility left in crimped yarn. Later he stated that all the crimped yarns that he had seen had little or no ductility in them.

I have no hesitation in saying that I prefer Dr. Dudzik's opinion to the opinions of Professor Speakman and Dr. Hoff, but the determination of the meaning of the expression "to preclude substantially any ductility in the cooled yarn", as it appears in the process claims in issue, does not depend on the preference I have expressed. The patents in issue are not addressed to scientists but to workmen of ordinary skill in the relevant art who would regard the expression in the light of the claim in which it appears.

The claim defines a method of producing evenly and permanently crimped, wavy or fluffed multi-filament thermoplastic yarn having improved and uniform physical characteristics. For the purpose of brevity I shall refer to the method simply as the process and to the yarn simply as permanently crimped yarn. The claim sets out the requirements for the accomplishment of the purpose of the process. It is not correct to describe compliance with each requirement as a step in the process in the sense that it must be made in any particular order. The process is a unitary one calling for compliance with several of the specified requirements in combination with one another at the same time. But compliance with all the requirements is necessary for the accomplishment of the purpose of the process and every requirement must be regarded accordingly. In my opinion, every throwster or other workman of ordinary skill in the art would read the claim in that light. It would, therefore, be obvious to him that the requirement that the tension on the heated yarn should be correlated to its prescribed temperature to maintain the yarn under tension adequate to preclude substantially any ductility in the cooled yarn must have been intended to be related to the purpose of producing a permanently crimped yarn. It should be construed accordingly. There would be no sense in including it in the claim unless it was so related and it would be a misconception of the claim to think of it otherwise.

Analysis of the claim makes it clear that it is essential to the production of permanently crimped yarn that the yarn should be yarn-set. This is a basic requirement. Earlier in these reasons I described yarn setting of the yarn as the

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stabilization of the molecules of the yarn in the helical deformation into which they were re-oriented by the twisting while the yarn was in its plastic state followed by the cooling of the yarn before it was untwisted. To enable the yarn to be yarn-set two requirements must be simultaneously complied with. The yarn must be uniformly heated to the "prescribed temperature", meaning, as already explained, the temperature required in order to enable it to be yarn-set. It is specified in the claim that the yarn should be continually (continuously) twisted from its source of supply and passed at a selected linear speed through a heated zone which is to be restricted and thermally isolated. The zone must be uniformly heated in order to heat the yarn to the temperature required to reorient the molecules of the yarn to its twisted formation and yarn-set it. The range of temperature to be used is stated in the specification. While the yarn is passing through the heated zone under the conditions referred to it must be under uniform tension. It is clear that the application of the prescribed heat to the yarn is not sufficient by itself to enable it to be yarn-set. It must also be subjected to the necessary tension. The molecules of the yarn will be re-oriented to its twisted formation by the effect of the heat on the yarn while it is being twisted and passing through the heated zone, but every throwster or other workman of ordinary skill in the art would know, as Mr. Dufort admitted, that the set in the yarn cannot be maintained unless the yarn while it is being twisted and heated is subjected to tension in order to offset the plasticising effect on the yarn of the high temperature to which it must be subjected. The application of heat to the yarn tends to make it ductile or plastic but the imposition of tension on it tends to counteract the effect of the heat. Consequently, the claim requires not only that the temperature of the yarn should be high enough to enable it to be yarn-set but also that the tension on the heated yarn should be put into such a relation with the necessary temperature that the combined effect of the temperature and the tension will result in the yarn being yarn-set.

Moreover, the specification discloses the desirability of maintaining the spiralled formation of the yarn after it has been cooled and then untwisted. Here I digress for a moment from analysis of the claim for the purpose of referring to the following statement in the specification:

> By the use of adequate tension while twisting-untwisting we can draw the yarn approximately the same degree as normally drawn by the producers, and by this method *any ductile yarn* is drawn helically due to the simultaneous twisting and drawing and this spiralled formation of the yarn substantially remains after untwisting. Then in the case of yarns having thermal characteristics, such as Dacron for example, which exhibits substantial ductility when heated, the yarn is processed under sufficient high tension during heating to preclude substantially any ductility in the yarn when cooled.

It is in this connection that the requirement under consideration is of particular importance. I have already discussed the meaning of the word "ductility" and the expression "to preclude substantially any ductility in the cooled yarn" and stated that it has been defined in the specification. The statement which I have cited may properly be considered as an indication of how the expression should be construed in view of the inclusion of the requirement in the claim. While it is clear that the combined effect of the temperature of the yarn and the tension on it is necessary in order to enable the yarn to be yarn-set it is significant that the claim requires that the tension on the heated yarn should be so correlated to its prescribed temperature as to *maintain* the yarn under such a tension that it is adequate "to preclude substantially any ductility in the cooled yarn". This indicates that the tension on the yarn is to be maintained, not only while the molecules of the yarn are being re-oriented to its twisted formation while the yarn is being twisted and passing through the heated zone in order to assist in its being yarn-set, but also after the yarn has left the heated zone in order to be cooled before it is untwisted and until it has been untwisted. It is in the light of this need for continued maintenance of the tension on the yarn in the process of the production of permanently crimped yarn that the requirement that the tension should be adequate "to preclude substantially any ductility in the cooled yarn" must be considered. The objective of substantial preclusion of any ductility in the cooled yarn is inseparably related to the objective of production of permanently crimped yarn. Compliance with the requirement cannot serve any other purpose. Consequently, all that is really meant by the requirement is that the tension on the yarn should be so related with its tempera-

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ture that it will be adequate to effect a substantial offset against the tendency of the yarn to become ductile or plastic by reason of the effect of the application of the heat to it. To put it in other words, all that is meant is that the tension on the yarn should be so related with its temperature as to ensure that the spiralled formation of the yarn should remain in it after it has been untwisted so that the crimp in it will be permanent in the sense that it will withstand the stresses and temperatures to which it will be subjected and retain its crimp.

In this view of the meaning of the requirement it is clear that it was comprised in the plaintiff's process. Indeed, if Mr. Scragg's opinion that the CS3 machine produces as equally permanently crimped a yarn as the defendant's machine does is accepted,—and there is no reason why it should not be—it could not be otherwise. If the yarn produced by the use of the plaintiff's process is permanently crimped, as I have found it to be, it is not ductile or plastic, meaning thereby that the crimp in it will not pull out under the ordinary conditions of processing and commercial use to which it will be subjected, from which it follows, as a matter of necessary deduction from the fact of the retentivity of the permanency of the crimp in the yarn, that there has been a preclusion of substantially any ductility in it, meaning thereby that it is not plastic or ductile in the sense explained and as a matter of further deduction that such preclusion has been made possible by the maintenance of an adequate tension on the yarn in relation with its prescribed temperature, for without the maintenance of such adequate tension in relation with the prescribed temperature it would not have been possible to offset the plasticizing effect of the temperature on the yarn and to ensure that its spiralled formation should remain in it after it has been untwisted.

Counsel for the plaintiff submitted that, since the expressions "permanently crimped" and "to preclude substantially any ductility in the cooled yarn" are both used in the process claims in issue, they indicate different properties in the yarn. This is a misconception on his part. The preclusion of substantially any ductility in the cooled yarn is a requirement that must be complied with if the purpose of producing permanently crimped yarn is to be accomplished. In my opinion, Mr. Dufort put the matter beyond dispute when he said frankly, at page 4968 of the transcript:

> In respect of Mr. Seem's definition, which is that preclusion of substantially any ductility means that the yarns will stand up to use afterwards without their crimp disappearing, then certainly all yarns made in commerce on the Scragg machine have their ductility precluded by that standard because otherwise they would not be commercial yarns.

In view of the meaning ascribed to the requirement of preclusion of substantially any ductility in the cooled yarn Mr. Dufort's statement is a conclusive answer in the affirmative to the question whether the requirement was comprised in the plaintiff's process.

In my opinion, Mr. Dufort's statement puts an end to the dispute relating to the requirement that there should be a preclusion of substantially any ductility in the cooled yarn, but if any confirmatory answer to the question is necessary it is found in Dr. Dudzik's evidence on the subject. He visited the premises of Galtex Company Limited on November 1 and 2, 1961, and saw the CS3 machines there operating in the commercial production of nylon yarn. Mr. Seem was with him. He took a sample of the yarn from one of the machines, being the sample already referred to and filed as Exhibit Z-143, and ran three tests on it. He first "milked" the yarn, in the manner described by Mr. Seem, to see whether the crimp in it came out. He explained that if it came out easily when this test was used the yarn had no commercial value. The crimp did not come out of the yarn when Dr. Dudzik milked it and he concluded that it appeared to be a good yarn. He then ran a second test on it known as the skein test. This consisted of winding a skein of yarn, hanging a weight calculated on a known formula on it and suspending it with its attached load in water at 180°F for 10 minutes. He explained that if the yarn immediately shrank up to 50 per cent and then got progressively longer the yarn would not be good, but if it maintained its skein length it would maintain the level at which it was set. After leaving the skein in the water for the required length of time Dr. Dudzik took it out of the tank and hung it up to dry. He then measured its skein shrinkage according to a known formula and concluded that the yarn was a commercial yarn. Dr. Dudzik then ran the third test on the yarn in the presence of several persons including Mr. Dufort

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Four sleeves of two types were knitted. Two sleeves were knitted each with one half from yarn from Exhibit Z-143 and the other half from yarn produced from the defendant's Fluflon machine, Exhibit Z-161, these sleeves being filed as Exhibits Z-207 and Z-208. The other two sleeves were knitted with yarn from Exhibit Z-143 and filed as Exhibits Z-209 and Z-210. Dr. Dudzik then put Exhibits Z-207 and Z-209 in an enamel pot of water at 130-140°F, heated the water up to the boiling point for 40 minutes, let the water boil for another 20 minutes, let it cool to 100°F, squeezed the water out of the sleeves, took them to a laundry and put them in a commercial dryer. The purpose of these operations was to simulate the conditions of processing and commercial use to which yarns would ordinarily be subjected. Dr. Dudzik found little or no difference after this test between the yarn from Exhibit Z-143 and that produced from the defendant's machine. He concluded that the yarn from Exhibit Z-143 had been yarn set and that its ductility had been substantially precluded. It was his opinion that the yarn produced by the use of the plaintiff's process at Galtex was comparable to that produced by the use of the defendant's process.

The evidence of Mr. Seem on this subject was to the same effect as that of Dr. Dudzik. He visited Galtex twice, once on February 18-19, 1960 and again on November 2, 1961. He found that the yarn being processed on the CS3 machines at Galtex was produced with a temperature of 464°F and a three per cent overfeed and that the spindle speed of the machines was 60,000 revolutions per minute. He did a preliminary test of the yarn, filed as Exhibit Z-143, by milking it and it was his opinion that its ductility had been substantially precluded. I have already referred to his tests of the yarn taken on his second visit.

Under the circumstances, I find without hesitation that the requirement in Claim 1 that the tension on the heated yarn should be correlated to its prescribed temperature to maintain the yarn under tension adequate to preclude substantially any ductility in the cooled yarn was comprised in the plaintiff's process at Galtex.

It follows that the plaintiff's process at Galtex fell within the express terms of Claim 1 and the ambit of the invention defined in it.

I should add that there is no substance in the contention of counsel for the plaintiff that if the idea of preclusion of substantially any ductility in the cooled yarn is related to the idea of retentivity of the permanency of the crimp in it there is nothing novel in the idea of processing thermoplastic yarns so that they are permanently crimped. It was never pretended on the defendant's behalf that the idea of the preclusion of "substantially any ductility in the cooled yarn" was novel. Mr. Seem freely admitted that crimped nylon yarn produced by the use of the step by step process was not ductile. Indeed, he had never seen a step by step processed nylon yarn that was ductile. If any yarn was ductile it would be considered non-commercial.

The validity of the process claims in issue does not depend on whether the idea of preclusion of substantially any ductility in the cooled yarn is novel or not. The essence of the invention in issue is that the combination of the requirements set out in the claims results in the production of permanently crimped thermoplastic yarns of the kind specified in the patents by its continuous false twist process that are not only more uniform in character than any yarns produced by any other process but also superior to them in quality and producible at greatly less cost.

Claim 2 differs from Claim 1 in that it includes two additional requirements. These appear from the following statement in the claim:

> correlating the tension in said yarn to said prescribed temperature and linear speed of travel of the yarn to maintain the yarn at a selected uniform tension relative to the contractile force of the yarn resulting from heating and twisting the same to preclude substantially any ductility in the yarn after cooling,

The first additional requirement is that the tension on the yarn should be correlated to the linear speed of travel of the yarn as well as to its prescribed temperature. The evidence established that this requirement was comprised in the plaintiff's process. Mr. Scragg agreed that the operator of the CS3 machine selected the speed of travel of the yarn. Mr. Seem took measurements at Galtex of speed, tension and temperature and concluded that there was correlation of the tension to the linear speed of the yarn. He said that the longer a heated yarn is subjected to a given stress the greater will be the permanent deformation resulting from it. And I have already referred to Dr.

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Dudzik's opinion that the mills referred to in Mr. Dufort's report, filed as Exhibit 96, were practising correlation as regards overfeed, temperature and yarn speed.

The second additional requirement is that the yarn should be maintained at a selected uniform tension relative to the contractile force of the yarn. Mr. Scragg agreed that the input rollers on the CS3 can be set in such a way as to give varying degrees of relaxation on the heated yarn. This was confirmed by Mr. Dufort who said that the amount of shrinkage that is permitted in the use of the CS3 machine is in accordance with the overfeed put on it. This was another way of saying that the tension on the yarn was relative to its contractile force. Mr. Tomlin stated that Galtex Company Limited had gears that enabled the CS3 machines at Galtex to be operated at a one per cent underfeed, at a zero overfeed and at overfeeds of one, two, three, five, six and nine per cent and that they had experimentally used "pretty well all of them to make a stretch yarn". They had used a three per cent overfeed for their commercial production on 70 denier yarn but had processed 140 denier yarn with a one per cent overfeed. Mr. Seem gave evidence, in describing the operation of the CS3 machines at Galtex, that they were capable of being operated with the use of the gears mentioned by Mr. Tomlin with their resulting feeds and stated that the tension on the yarn would be greater than its contractile force if a one per cent underfeed was used, equal to it if the overfeed was zero and less than it if any one of the overfeeds from one to nine per cent was used. Mr. Tomlin gave an illustration of this when he said that when a 140 denier yarn was processed a one per cent overfeed was used instead of the three per cent that was used for the production of a 70 denier yarn for the use of the lower overfeed gave a greater tension in the case of the larger yarn. Thus it was established that the second additional requirement referred to was complied with in the plaintiff's process. Consequently, the plaintiff's process at Galtex was within the ambit of the invention defined in Claim 2.

There are two requirements in Claim 3 that are not included in either Claim 1 or Claim 2. The first of these is expressed as follows:

controlling the supply of heat energy to said zone compensatively according to the ambient temperature and rate of transfer of heat to the yarn to thereby maintain said heated zone uniformly at the temperature required to uniformly heat said yarn to said prescribed temperature,

It is clear, of course, that the "zone" referred to is the heated zone and that the "prescribed temperature" referred to is that which is required to enable the yarn to be yarn-set. There was no serious dispute that in the plaintiff's process the supply of heat energy to the heated zone was controlled compensatively according to the ambient temperature. The expression "ambient temperature" means the temperature of the ambient atmosphere. Mr. Scragg said, as already stated, that the Fielden system, described in a manual filed as Exhibit 16, is employed in the plaintiff's standard CS3 machines, including the CS3 machines at Galtex. Exhibit 16 is the same as Exhibit 49C, one of the documents attached as an exhibit to the agreement between the parties and referred to therein as an "instructional brochure". The agreement recites, as already stated, that such an instructional brochure was furnished to Galtex Company Limited when the plaintiff sold the two CS3 machines to it. It also recites, as already stated, that certain nylon and terylene yarn have been processed as described in Exhibit 49C on the said CS3 machines. Exhibit 49C contains the following statement:

The equipment compensates for ambient temperature changes and supply voltage variations.

This statement is conclusive of the matter. It is not limited in its application to ambient temperature changes of a long term order, as counsel for the plaintiff contended. It applies to short term changes as well. The statement is categoric and the plaintiff is bound by it. Moreover, Mr. Seem found as a fact that the Fielden system in the CS3 machines at Galtex did compensate for changes in the ambient temperature and variations in the voltage.

Counsel for the plaintiff contended, however, that the system did not compensate for the rate of transfer of heat to the yarn. This was denied on behalf of the defendant. The argument relating to this issue was involved. Mr. Seem stated that the rate of transfer of heat from the heater to the yarn depends on the temperature of the heater, the length of time that the yarn is in the heater and the temperature of the yarn as it enters the heater, and submitted that the greater the differential between the heat of

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the heater and that of the yarn is the faster is the rate of transfer of the heat. He stated further that the temperature of the heater is affected by changes in the ambient temperature and voltage variations, whereas that of the yarn is affected only by changes in the ambient temperature and he said that by the time the yarn has reached the heater it has assumed the ambient temperature. He deduced from these facts that, since the equipment compensates for ambient temperature changes and supply voltage variations, it compensates according to the rate of transfer of heat to the yarn. In his evidence he confirmed the evidence of Dr. Dudzik, to which I shall refer later, that the variation in the temperature in the heaters of the CS3 machines at Galtex during the period of test was less than 1°C.

Counsel for the defendant argued that since the plaintiff's equipment compensates for ambient temperature changes and voltage variations it follows that as the ambient temperature changes so does the supply of heat energy to the heater and that, consequently, if there is a drop in the ambient temperature there is an increase in the supply of heat energy to the heater to compensate for such drop, which results in an increase in the heat differential between the heater and the yarn with its resultant acceleration in the rate of transfer of heat from the heater to the yarn, and that the converse takes place if there is a rise in the ambient temperature, in which case there is a decrease in the supply of heat energy to the heater, a decrease in the heat differential and a deceleration in the rate of heat transfer. Counsel concluded, accordingly, that the equipment used on the CS3 machines at Galtex compensated for the rate of transfer of heat to the yarn within the meaning of the requirement under consideration.

Counsel for the plaintiff, on the other hand, contended, as I have stated, that the plaintiff's equipment did not compensate for the rate of transfer of heat to the yarn. He based his contention on the assumption that the effect of compensation for changes in the ambient temperature would be to maintain the heater always at the same temperature. From that assumed basis he argued that since, according to Mr. Seem's evidence, the temperature of the yarn varies with changes in the ambient temperature, it is clear, since the heater is always at the same temperature, that the temperature reached by the yarn must vary with changes in the ambient temperature. On the same assumption he submitted that in the equipment in the plaintiff's CS3 machines there was no compensation for the rate of heat transfer to the yarn.

There are two answers to the contention thus put forward. If the Fielden equipment used in the CS3 machines compensated for ambient temperature changes and supply voltage variations and the heater was maintained at the same temperature and the temperature of the yarn varied according to changes in the ambient temperature, it would follow that there would be variations in the temperature of the yarn produced by the use of the plaintiff's process. But the fact is that there are no such variations. Exhibit 49F contains the following statement:

> The extraordinarily accurate heat control arrangements, precise yarn feed control and perfectly straight yarn path all ensure absolutely constant yarn processing conditions, which are identical from one spindle to the next. The user of our CrimpSpin machine can therefore be assured of yarn production under the most controlled conditions: the hazards of yarn variation are virtually eliminated.

and there is also the statement:

> This system which is unique, ensures that no yarn can leave the machine unless it has been correctly processed.

It follows that the plaintiff's system must, as it compensates for ambient temperature changes and supply voltage variations, also compensate for the rate of transfer of heat to the yarn.

The other answer is that the assumption from which counsel proceeded was not sound. The requirement under consideration must be read as a whole. The purpose of requiring that the supply of heat energy to the heated zone should be controlled compensatively according to the ambient temperature and rate of transfer of heat to the yarn is to maintain the heated zone uniformly at the temperature required to uniformly heat the yarn to its prescribed temperature. It is not essential to the achievement of this purpose to maintain the heater at the same temperature. The purpose of the requirement is that there should be such a control of the supply of heat energy to the heated zone as to ensure, notwithstanding changes in the ambient temperature and the rate of transfer of heat to

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the yarn, that the yarn when it comes out of the heater has been uniformly heated to its prescribed temperature. It is immaterial, therefore, whether in the course of the compensative control referred to the temperature in the heater rises or falls so long as the temperature of the yarn is maintained at the desired "prescribed" level. Counsel for the plaintiff in his final argument realized that this was the true intendment of the requirement under discussion. In my opinion, the requirement was complied with as completely in the plaintiff's process as contemplated in the claim.

The other requirement in the claim, to which I referred, is expressed as follows:

to maintain the yarn at a selected uniform tension less than the contractile force of the yarn resulting from heating and twisting the same

Counsel for the plaintiff contended that in the plaintiff's process the tension on the yarn would be less than the contractile force if an overfeed was used, in which case the yarn would shrink and there could not be any preclusion of ductility in it. The contention is contrary to the evidence of Dr. Dudzik relating to the tests made by him on yarn from the sample filed as Exhibit Z-143, which was produced at Galtex with the use of a three per cent overfeed. In that case the tension on the yarn was less than the contractile force and the yarn was not ductile or plastic.

Nor was there any substance in the contention that in the plaintiff's process, while there was a selection of overfeed, there was no selection of tension. Mr. Scragg agreed that the operator of a CS3 machine selects the speed of the yarn and the overfeed "and in consequence the tension of the yarn". The selection of the overfeed is tantamount to the selection of the tension.

It follows, accordingly, that the requirements of Claim 3 were complied with in the plaintiff's process and that it came within the ambit of the invention defined in it.

Claim 5 is broader than Claim 3 in that the requirement of control of the tension on the heated yarn is not limited to maintaining it at a tension less than the contractile force of the yarn is but is a control of the tension that is relative to the contractile force and thermal characteristics of the yarn. Consequently, since the CS3 machines at

Galtex were operated with an overfeed and the plaintiff's process came within the ambit of the invention defined in Claim 3, as already found, it also fell within the broader ambit of the invention defined in Claim 5.

Claim 8 is in almost the same terms as Claim 3. One exception is that, instead of the requirement in Claim 3 that the yarn should be maintained at "a selected uniform tension less than the contractile force of the yarn resulting from heating and twisting the same", Claim 8 requires that the yarn should be maintained "at a uniform tension substantially in excess of the contractile force of the yarn resulting from heating and twisting the same". In respect of this requirement counsel for the plaintiff contended that the maintenance of a tension on the heated yarn that was greater than the contractile force could be accomplished by the use of the plaintiff's process only if the CS3 machine was operated at an underfeed which was not the case in practice and that, consequently, the plaintiff's process did not infringe this claim. The contention cannot be accepted. Mr. Scragg stated

> we provide a ten per cent, up to a ten per cent overfeed or a ten per cent, up to a ten per cent underfeed, in steps of one per cent.

and it was admitted that the yarn used by Dr. Hoff in his tests at the Southern Silk Mills plant at Spring City in Tennessee had been produced on a CS3 machine with an underfeed. There is also the evidence of Mr. Tomlin that Galtex Company Limited had gears that gave a one per cent underfeed and that he had used such an underfeed experimentally. It was also established that any operator who wished to obtain the effect that the use of an underfeed would give could obtain the necessary gears from the plaintiff. There is also the requirement in Claim 8, which does not appear in the other process claims in issue, that the yarn should be continually untwisted to the exact extent to which it was twisted. The evidence of Mr. Scragg, Dr. Dudzik and Mr. Seem to the effect that the yarn produced on the CS3 machines was comparable in quality to that produced on the defendant's machine sufficiently establishes that this requirement was met in the plaintiff's process. Consequently, the plaintiff's process came within the ambit of the invention defined in Claim 8.

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In view of the fact that the plaintiff's process as used at Galtex came within the ambit of the invention defined in each of the claims in issue of patent No. 552,104 I find that the plaintiff has infringed the defendant's rights under them.

There remains the question whether the plaintiff has infringed the defendant's rights under Claim 3 of patent No. 552,105. Before I deal specifically with this question, I should refer to the evidence relating to the temperature control system used by the plaintiff in the operation of its CS3 machine.

Earlier in these reasons I referred to Mr. Seem's explanation of how the temperature controls in the defendant's apparatus operated. With the portable bench model which he and Mr. Stoddard invented in July, 1947, they used certain pieces of equipment in addition to the motor, comprising a voltage regulator, a step-down transformer, a rheostat, a calibrated voltmeter and a voltmeter. The voltage regulator was used to make corrections in the voltage coming from the outside power system. The stepdown transformer was used to step the incoming voltage being fed to the heater down from 120 volts to safe voltages of from 24 volts downward. The output of the stepdown transformer went through the rheostat and this enabled Mr. Seem to make a fine adjustment of the voltage going to the heater. This was changed as required in order to correlate changes in the temperature of the heater with tensions in the yarn. There was originally a thermometer in the heater which enabled Mr. Seem to observe the temperature in the heater so that if there was a change in the ambient temperature he could make a hand adjustment of the rheostat in whatever direction was necessary in order to maintain a uniform temperature in the heater. Within a week or two after the receipt of the bench model Mr. Seem used additional equipment for the purpose of making automatic changes in the voltage fed to the heater to meet changes in the ambient temperature. This consisted of a small induction voltage regulator with a temperature sensitive resistor. The thermometer in the heater was taken out and the temperature sensitive resistor inserted in its place. Effective insulation was used and the equipment worked satisfactorily. It compensated automatically for changes in the ambient temperature. Mr. Seem and Mr. Stoddard found that with the use of this equipment they were able to control the temperature in the heater and keep it uniform within plus or minus one per cent in spite of changes in the ambient temperature. The second voltage meter was used merely for the purpose of determining what voltage was required to produce a given temperature in the heater. Subsequently, there was a change in the location of the temperature sensitive resistor. When the single machine was built it was in one of the heaters but when the eight machines were completed in 1953 or early in 1954 it was put in a central position relative to them so that it could control them all.

The evidence regarding the temperature controls in the plaintiff's CS3 machines is clear. It was admitted that the plaintiff used the Fielden System in its machines. This is described in detail in Exhibit 49C. The equipment is referred to as a "Multipoint Temperature Controller and Automatic Monitor". Exhibit 49C states that it "has been developed to ensure that all the yarn which is being processed on the machine is maintained at a constant and predetermined temperature". Mr. Scragg agreed that this was the object of the system. Exhibit 49C also states that the machine consists of a number of processing zones, that each zone is electrically heated, that the heater is "lagged" to minimize the effect of ambient temperature changes and also ensured that the yarn during processing attains the temperature of the heater itself. Mr. Scragg explained that the term "lagged" means that the heater is thermally insulated or thermally isolated. Exhibit 49C sets out the essential parts of the equipment, namely, thermocouples, heater, hot-pot, A.C. thermostat, transformer, ballast resistor, contactor, calibrate control, error scanner and error indicator. The heater is an insulated container having a heated strip over which the yarn passes and to which a thermocouple is clamped, which provides a small voltage relative to temperature. The thermocouple wires are led from the heaters down the centre of the machine and terminated in a junction box. The hot-pot is an insulated container which houses a heating element, the temperature of which is meaured by a thermometer. The hot-pot con-

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tains a resistance element the resistance of which changes as the temperature changes and a thermocouple similar to the thermocouples within the heaters. The A.C. Thermostat is an electronic unit that provides switching action relative to the change of resistance of the resistance element in the hot-pot. The transformer is employed as a method of reducing the main's supply voltage to a safe working voltage for the bussbars which feed each heater. The error scanner is a motor driven switch which selects each thermocouple in each of the heaters in turn automatically and feeds the voltage to the error indicator which is a self balancing system arranged to provide a visual indication of the difference in voltage between the thermocouple within the hot-pot and the thermocouples within the heaters and relating the voltage to an arbitrary temperature scale. Exhibit 49C states that each heater pad is controlled to very fine temperature limits and describes in detail the manner in which the control action operates. There is a close relationship in the system between the temperature in the heater and the temperature of the hot-pot. Exhibit 49C states that the heaters are all connected to the bussbars in the machine and that they will settle down to a temperature which, although constant may not equal that of the hot-pot, but that to ensure that the temperature of the heaters is the same as that within the hot-pot the output voltage from the thermocouple within the heaters is compared in turn through the scanning switch with the output voltage from the thermocouple within the hot-pot. The function of the scanner is a monitoring one, namely, to connect the thermocouple in each heater in turn with the thermocouple within the hot-pot and display the difference in temperature which may exist on the error indicator. It looks at each heater temperature in turn, compares it with the hot-pot temperature and if the deviation in temperature is more than a pre-determined amount a warning light goes on so that the heater may be trimmed and the deviation eliminated.

Exhibit 49F specifies the heater control of the CS3 machine as follows:

> Temperature controlled by electronic thermostat. Automatic monitoring of individual heaters.

and describes the electronic control of temperature as follows:

The heater temperature regulation and monitoring system is mounted as a unit at the end of the machine. The temperature level of the heaters is controlled by an electronic thermostat sensitive to the temperature of a master hot-pot mounted at the end of the machine and adjustable to cover a temperature range of 150°C. to 250°C. and to maintain the temperature at an accuracy of ±1°C. A fully automatic scanning system samples the temperature of each individual yarn heater by measuring the output of its thermocouple every 15 minutes. The reference number of the heater being monitored is indicated on a large dial at the end of the machine, and its temperature is shown on a further dial as a deviation from the hot-pot temperature. Should this deviation ever exceed a pre-determined amount, the scanning system stops with the indicator finger at the appropriate heater number and a red light gives the alarm. The heater can then be trimmed manually. The same signal is given in the event of a yarn break.

Then Exhibit 49F states:

This system which is unique, ensured that no yarn can leave the machine unless it has been correctly processed.

I come now specifically to the question whether the CS3 machines at Galtex were within the ambit of the apparatus invention defined in Claim 3 of patent No. 552,105. It will be convenient in determining this question to set out the elements in the claim and consider whether they were comprised in the CS3 machines at Galtex.

There is no doubt that each of them was an "apparatus for thermally processing thermoplastic yarn". It was admitted in the agreement, filed as Exhibit 49, that certain nylon and terylene yarns were processed on the said machines. The fact that thermoplastic yarn was produced on them was proved by Mr. Tomlin, Mr. Seem and Dr. Dudzik and the production of the sample of yarn filed as Exhibit Z-143. And Mr. Dufort testified that thermoplastic yarn had been produced on CS3 machines in several mills in Canada.

The first element comprised in the apparatus defined in Claim 3 is stated as "a support for a supply of yarn". Mr. Scragg stated that the CS3 machine did have such a support and such support is shown on Exhibits Z-6 and 95.

The next element is set out as follows:

wind-up means for the processed yarn spaced from said support and operable to draw the yarn continuously at a selected linear speed from the supply to the wind-up means

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There is no dispute that the wind-up means is "spaced from said support" but counsel for the plaintiff contended that the wind-up means in the plaintiff's machine was not operable to draw the yarn continuously at a selected linear speed from the supply to the wind-up means. Two submissions were involved in the contention. One was that since the input rollers in the CS3 machine might operate at a different speed from that of the output rollers there would be differences in the linear speed of the yarn as it passed through the machine and it could not be said that the wind-up means drew the yarn "continuously" at a selected linear speed. The submission is without merit, for the fact that the linear speed of the yarn may change does not detract from the fact that it was selected. The fact that the linear speed of the yarn was selected was proved by Mr. Scragg, Mr. Seem, Dr. Dudzik and Mr. Tomlin. The other submission involved in the contention, namely, that in the CS3 machine the wind-up means is not operable to draw the yarn from the supply to the wind-up means, requires more consideration. Mr. Seem expressed the opinion that the wind-up means in the CS3 machine consists of the output rollers acting together with the take up package, as the same are shown on Exhibit Z-6, but counsel for the plaintiff submitted that even if this is so, the output rollers draw the yarn only from the input rollers and they in turn draw it from the supply and that, consequently, it cannot be said that the wind-up means draws the yarn from the supply. In my opinion, the submission is not well founded. It cannot fairly be said that the input rollers draw the yarn from the supply. It is their function, if an over-feed is used, to control the tension on the yarn and thereby hold it back rather than draw it. But even if the input rollers assist in drawing the yarn from the supply the evidence established that the forces developed at the output rollers and at the take up package co-operate to draw the yarn through the system, including the input rollers, notwithstanding their hold back function. This was the effect of Mr. Scragg's evidence relating to the forces referred to. He also agreed that there is nothing in the CS3 machine other than the take up mechanism that operates to draw the yarn upwardly from the source of supply. In my opinion, the element under discussion was comprised in the CS3 machines at Galtex.

The next element in Claim 3 is stated as follows:

an electrically energized heating device defining a restricted thermally isolated heating zone for passage of the yarn therethrough to heat the yarn to a prescribed temperature.

Counsel contended, as he did in the case of Claim 1 of patent No. 552,104, that in the plaintiff's apparatus there is no restricted heated zone, no thermally isolated heated zone and no prescribed temperature. The answers made to the contentions put forward in the case of Claim 1 are equally applicable to the contentions now put forward and need not be repeated. It was clearly established that the CS3 machines at Galtex had an electrically energized heating device and that it defined a restricted thermally isolated heating zone for the passage of the yarn through it. And it is clear that its purpose was to heat the yarn to a prescribed temperature, meaning thereby the temperature required to enable the yarn to be yarn-set.

And it is clear that the CS3 machines at Galtex contained

a false-twist device operable to twist the yarn before passage thereof through said heated zone and to untwist the yarn after the said passage through the heated zone

There was a dispute regarding the next element in the claim which is stated as follows:

control means operable automatically to regulate the supply of heat energy to said zone compensatively according to the rate of transfer of heat to the yarn to maintain said zone uniformly at the temperature required to heat the yarn to said prescribed temperature

Counsel for the plaintiff gave three reasons for contending that this element was not comprised in the plaintiff's CS3 machine. His first was that it did not have any control means that were operable automatically to regulate the supply of heat energy to the heated zone, the second that the control means in its machine did not operate compensatively according to the rate of transfer of heat to the yarn and the third that its heated zone was not maintained uniformly at the temperature required to heat the yarn to its prescribed temperature.

In my opinion, the temperature control means specified in the claim must not be considered apart from the purpose intended to be served by it, namely, to maintain the heated zone uniformly at the temperature required to heat the

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yarn to its prescribed purpose. It is, therefore, important to consider whether the specified purpose was accomplished by the control means in the plaintiff's machine. If it was not, that is the end of the matter. I shall, therefore, deal with counsel's reasons in their reverse order and consider first whether the specified purpose was accomplished by the control means in the plaintiff's CS3 machine. In my opinion, the evidence is conclusive that it was. The prescribed temperature referred to is that which is required in order to enable the yarn to be yarn-set. The specification of patent No. 552,105 states that "the degree and permanency of the crimp wave or puff is attained by maintaining the treating temperature well up to the melting point of the thermoplastic, i.e., not less than forty per cent below the melting point". It was established that the temperature of the master hot-pot in the CS3 machine was set at such a level as to enable the yarn to be treated at the appropriate temperature so that it might be correctly processed, that is to say, the prescribed temperature. This was implied in Mr. Scragg's agreement that "the operator selects the speed of the yarn and he selects the overfeed and in consequence the tension of the yarn, and he selects indirectly, by means of his hot-pot, the temperature at which in fact the yarn is treated". Exhibit 49C emphasizes that the plaintiff's system ensures that no yarn can leave the machine unless it has been correctly processed. This means that the "prescribed temperature" has been used in processing it. In its description of the electronic control in the plaintiff's system Exhibit 49F states:

> The temperature level of the heaters is controlled by an electronic thermostat sensitive to the temperature of a master hot-pot mounted at the end of the machine and adjustable to cover a temperature range of 150°C to 250°C and to maintain the temperature to an accuracy of ±1°C.

There was a dispute between counsel whether the accuracy of temperature referred to was that of the heater or that of the hot-pot. Counsel for the plaintiff contended that it was the latter. In my opinion, it does not matter which is right, for it is clear that the purpose of the Fielden system is "to ensure that all the yarn which is being processed on the machine is maintained at a constant and predetermined temperature" and this means that the heated zone must be maintained uniformly at the required temperature, in the sense that the temperature at any given point in the heater is constant. It is not necessary to the uniformity of the temperaure in the heated zone that it should be the same throughout the zone. In this connection I should also refer to the statement in Exhibit 49D:

> The temperature control is designated to cover a range from 150°C. to 250°C., and in conjunction with the automatic scanner the temperature of each heater can be controlled to an accuracy of ±1°C.

While Exhibit 49D refers specifically to the plaintiff's CS1 machine the statement is also applicable to the plaintiff's CS3 machine.

There is also the conclusive evidence of Dr. Dudzik that he measured the temperature of the heater during the two-day period he was there. I set out his statement:

> Well, what I did was to take one of our standard instruments known as a Rubicon tensiometer which is calibrated to measure temperature and tapped it into the controlling thermocouple of the heater and let it stay there for the two days I was there. I made probably 40 to 50 observations of the temperature indicated by that meter and I found that the temperature varied within the range of 464 to 468 degrees Fahrenheit, a difference of four degrees.

His examinations were made at all hours in order to observe whether local mill or city conditions would affect it. Counsel for the plaintiff contended that "the controlling thermocouple of the heater" is, of course, the thermocouple in the hot-pot. I dismiss this contention summarily. There is a thermocouple clamped to each heater as well as the thermocouple in the hot-pot. Dr. Dudzik would know the difference between the heater and the hot-pot. There would be no purpose in his measuring the temperature of the hot-pot and he made no reference to it in his statement. He said specifically that he measured the temperature "of the heater" and found a variation of only 4°F., which indicated a control of temperature in the heater to an accuracy of less than 1°C. It is significant that Dr. Dudzik was not cross-examined on his statement. I accept his evidence without hesitation. On the evidence which I have reviewed I find that the heater in the CS3 machines at Galtex was maintained uniformly at the temperature required to heat the yarn to its prescribed temperature within the meaning of the claim.

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Counsel's contention that the control means in the plaintiff's CS3 machine did not operate compensatively according to the rate of transfer of heat to the yarn is the same as that put forward in connection with Claim 3 of patent No. 552,104 and the answer made to it is applicable in the present case without repetition in it.

This leaves counsel's contention that the plaintiff's machine did not have control means that were operable automatically to regulate the supply of heat energy to the heated zone. He argued that the method of operating the plaintiff's machine was different from that used by the defendant in operating its machine in that in the latter there is a thermal sensing device in one of the pots, meaning, no doubt, the temperature sensitive resistor that was inserted in one of the defendant's heaters in the place of the thermometer that was previously placed in it, and that the use of this device resulted in temperature control means that compensated automatically for changes in the ambient temperature and rate of transfer of heat to the yarn and made it possible to control the temperature in the heater within plus or minus one per cent, whereas in the plaintiff's machine there was no such method of control and no means for it. In the plaintiff's system, he contended, there was a reference pot which did nothing more than supply a fixed rate of heat to each of the heaters and a scanning device which gave a warning signal if there was a deviation in the temperature of any one of the heaters from the hot-pot temperature in excess of a pre-determined amount, in which case the deviation was corrected manually by trimming the deviating heater. The fact that the temperature control means used in the plaintiff's machine is different from that used in the defendant's machine does not take it out of the ambit of the claim. There is no doubt that the plaintiff's CS3 machine does comprise a control means to regulate the supply of heat energy to the heated zone. Mr. Dufort gave a detailed and clear explanation of the operation of the plaintiff's temperature control system and heater monitoring system, which were illustrated in a schematic diagram, filed as Exhibit 97. One system, the temperature control system, controls the voltage and the supply of heat energy to the hot-pot and to the heaters. The thermostat sets the temperature of the hot-pot at the desired level and controls the supply of heat energy to it to keep it at a constant temperature. Then the temperature of each heater is set to that of the hot-pot by a trimmer just below the heater and the thermostat controls the supply of heat energy to the heaters as well as to the hot-pot. The function of the other system, the monitoring system, is to inspect the temperatures of the heaters and compare them with the temperature of the hot-pot and to give a warning to the operator of the machine if there is an undue deviation between the temperature of a particular heater and that of the hot-pot. If there is such a deviation it is corrected manually by the trimmer and the temperature of the heater is restored to its desired level. Mr. Scragg stated in a letter to British Nylon Spinners that the plaintiff's new machine incorporates complete control of all tensions and temperatures to very fine limits. Exhibit 49C contains the statement that each heater pad is controlled to very fine temperature limits and Exhibit 49F refers to the heat control arrangements in the CS3 machine as being "extraordinarily accurate". There is thus no doubt that the plaintiff's CS3 machine had control means that was operable to regulate the supply of heat energy to the heated zone. Counsel is, therefore, left with his bare contention that, because the monitoring system in the plaintiff's machine contemplates that the heater in which it finds that there has been an undue deviation of temperature from that of the hot-pot will be adjusted manually, the control means in the plaintiff's machine is not operable "automatically" to regulate the supply of heat energy to the heated zone. The contention is a technical one based on too literal a meaning being given to the word "automatically". Any system based on the operation of a thermostat may run into a temporary deviation from its normal course. The fact that provision is made for a warning signal that a deviation has occurred calling for a manual adjustment to correct the deviation does not mean that the system is not operable automatically. The temperature of the heater in the plaintiff's machine is set by the trimmer in the first place and when the monitoring system gives its warning the temperature is set again by the trimmer and the normal course is restored. The thermostat operates to regulate the supply of heat energy and the monitoring

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system operates automatically to give a warning signal if a deviation has occurred so that it can be instantly corrected. In my view, the plaintiff's temperature control system and its monitoring system, illustrated by Exhibit 97, co-operate with one another and constitute control means operable automatically to regulate the supply of heat energy to the heated zone within the meaning of the claim as any addressee of the patent would understand it if he were willing to do so.

In my opinion, the element referred to was comprised in the CS3 machines at Galtex.

The next element relates to the tension means in the patented apparatus and is described as follows:

> tension means operable to maintain the yarn at a uniform tension during passage thereof through said heating device and to the wind-up means.

Counsel for the plaintiff contended that in the plaintiff's CS3 machine there was no tension means operable to maintain the yarn at a uniform tension during passage thereof through said heated device and to the wind-up means. He contended further that the claim required that the tension must be the same throughout the distance from the beginning of the heater to the wind-up means and that this condition was not present in the plaintiff's machine. He submitted that one of the principal differences between the plaintiff's machine and the defendant's apparatus is that in the former the yarn feed is controlled by shafts having rollers which are common to the whole machine which ensures that the contraction rate and yarn speed on all the spindles of the machine are the same, whereas in the defendant's apparatus each yarn position has a tensioner which must be carefully adjusted in accordance with the temperature and the rate of linear speed of the yarn. The fact of this difference does not matter, for the claim is not limited to any particular tension means. Mr. Dufort admitted that the plaintiff's system of rollers is a tension regulating means and Dr. Dudzik stated that the rollers operate as a tension device. Thus there is a tension means in the plaintiff's machine. The contention of counsel that the claim requires that the tension must be the same throughout the machine is similar to that put forward in connection with the expression "uniform tension" in Claim 1 of patent No. 552,104 and the answer to it is similar.

Moreover, it is obvious that as the yarn passes through the heater towards the wind-up means it will pick up additional tension through friction with the parts over which it passes. Any addressee of the patent who was willing to understand it would, therefore, know that the expression "uniform tension", as it appears in the claim, could not have been intended to mean that the tension on the yarn must be the same throughout the machine. He would know, without doubt, that the expression means that the tension on the yarn should be constant at any given point in the system. There is no doubt that in the plaintiff's machine the tension on the yarn as it passed through the heater and to the wind-up means was constant. Mr. Scragg stated that "our new machine incorporates complete control of all tensions . . . to very fine limits . . ." Exhibit 49D says of the plaintiff's CS1 machine that "constant tension values are retained throughout". And Exhibit 49F says that "the precise feed control and perfectly straight yarn path all ensure absolutely constant yarn processing conditions". Mr. Seem stated that the tension on the yarn in the CS3 machines at Galtex would be constant at any given point along the system. In my opinion, the element under discussion was comprised in the CS3 machines at Galtex.

There remains only the final element specified in the claim which is expressed as follows:

> means to regulate the tension means to control the tension of the yarn in correlation to the prescribed temperature and linear speed of travel of the yarn to maintain the latter at a selected uniform tension relative to the contractile force and thermal characteristics of the yarn.

In respect of this element counsel for the plaintiff contended that the provision in the plaintiff's machine for changes in the overfeed in increments of one per cent is not regulation of the tension means, that because the tension in the machine is determined by the temperature for any given overfeed it cannot be said that the tension and the temperature are correlated, that there is no selection of tension and that the tension resulting from the selection of a heater temperature and overfeed is not uniform.

The contentions are not well founded. The gears that enable a change to be made in the overfeed of the machine is a means to regulate the tension means to control the

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tension of the yarn. Mr. Dufort said that the relative speeds of the input and output rollers would affect the tension on the yarn and Dr. Dudzik said that there was means on the CS3 machines at Galtex to change the relative speeds of the lower and upper rolls and that the tension on the yarn could be controlled accordingly. Both Dr. Dudzik and Mr. Seem expressed the opinion, which I adopted as mine, that the plaintiff practised correlation of tension, temperature and linear speed of travel of the yarn. The whole purpose of supplying gears was to enable the user of the machine to control the tension on the yarn in correlation to the prescribed temperature and linear speed of the yarn. Nor is there any doubt that the tension on the yarn was selected. Mr. Scragg made this clear when he agreed that "the operator selects the speed of the yarn and he selects the overfeed and in consequence the tension of the yarn". And it is clear that the tension was uniform in the sense already stated. It was also established, as already stated, that the tension was relative to the contractile force and thermal characteristics of the yarn. Mr. Seem explained how the CS3 machines at Galtex were operated in such a way as to relate the tension on the yarn to its contractile force, for example, the tension would be greater than the contractile force if an underfeed was used, equal to it if the overfeed was zero and less than it if any of the other overfeeds was used. And it is clear that certain overfeeds were used for different kinds and deniers of yarn. In my opinion, the element under consideration was comprised in the CS3 machines at Galtex.

I find, accordingly, that the CS3 machines at Galtex came within the ambit of the invention defined in Claim 3 of patent No. 552,105 and that the plaintiff has infringed the defendant's rights under it.

In view of my finding that the invention defined in the claims in issue was not anticipated and that the plaintiff has infringed the rights of the defendant under them I find that the so-called Gillette defence based on the statement of Lord Moulton in *Gillette Safety Razor Company v. Anglo-American Trading Company Ld.*[1] is not open to the plaintiff.

[1] (1913) 3 R.P.C. 465 at 480.

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It follows from what I have said that the plaintiff's action must be dimissed and the defendant's counterclaim allowed. There will, therefore, be judgment in favor of the defendant against the plaintiff that as between the parties the claims in issue are valid and that the plaintiff has infringed the defendant's rights under them and that the defendant is entitled to the relief sought by it in the counterclaim, except as to damages. If the parties are unable to agree on the amount of the damages or the amount of the profits, if the defendant elects an account of them, there will be a reference to the Registrar or a Deputy Registrar to determine the amount of such damages or profits and judgment in favor of the defendant for the amount found on such reference. The defendant is entitled to the costs of the action and of the counterclaim to be taxed in the usual way.

Judgment accordingly.

1962
May 22
1963
Nov. 13

BETWEEN:

MEYER SHUCHAT ....APPELLANT;

AND

MINISTER OF NATIONAL REVENUE ..RESPONDENT.

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, s. 11(1)(c)—Interest payments—Deduction of interest on borrowed money.

In 1954 the City of Montreal publicized its plans for the opening of Burnside Street, and the necessary expropriation was approved on June 1, 1955. Early in 1955, the appellant, who owned a four-storey building which would front on Burnside Street when it was extended, borrowed $140,500 on a mortgage of the property to finance its improvement. The actual opening of Burnside Street was delayed for about three years and the appellant in the meantime transferred the borrowed money as a loan to a company wholly controlled by him and which was indebted to its bankers for $139,054.

The appellant alleged that the loan constituted a capital investment, the proceeds of which would be income from a business or property and sought to deduct the interest payable by him on the borrowed money in computing his taxable income.

Held: That the money borrowed by the appellant and subsequently transferred to the company controlled by him was not used for the purpose of earning his own personal income and the interest paid thereon was not properly deductible from his income in the computation of his taxable income.

2. Appeal dismissed.

APPEAL from a decision of the Income Tax Appeal Board.

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

N. L. Rappaport, Q.C. for appellant.

Paul Boivin, Q.C. and *Louis Trempe* for respondent.

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

DUMOULIN J. now (November 13, 1963) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board, dated the 8th day of February, 1961, which affirmed a reassessment made by the Minister of National Revenue in respect of the appellant's income tax for the years 1955, 1956 and 1957.

By consent of both parties, the entire record of evidence heard and all exhibits filed before the Income Tax Appeal Board are produced in the instant case.

Mr. Meyer Shuchat, the appellant, describes his business pursuits as those of a manufacturer and merchant of fur garments "... controlling and operating the following corporate firms:

a) S. & G. Furs Inc., manufacturers of fur coats and fur garments for wholesale distribution;

b) M. Shuchat Fur Co. Limited, manufacturers of fur coats and fur garments to order for consumers;

c) A. J. Alexandor Furs (Montreal) Ltd., operators of retail fur shops."

In 1946, the appellant constructed for investment purposes in Montreal a four-storey building to which he added, in 1950, two floors. Shuchat next proceeds to say that (cf. "A. Statement of Facts".):

...

5. On May 28, 1954, the City of Montreal prepared and publicized its final plans for the opening of Burnside Street and on June 1, 1955, the City Council of Montreal approved expropriation in accordance therewith.

In Paragraph 6, the appellant states that he prepared plans for improvements to the "Shuchat Building", with a view to developing the site as a corner location having a large frontage on the projected new commercial thoroughfare.

To this effect (paragraph 7) additional financing was required and obtained, early in 1955, from the Canada Trust Company to the extent of $140,500, a sum which raised the mortgage on the property aforesaid to a total of $300,000.

Paragraph 9 notes that an unusual delay of three years occurred before the City of Montreal realized its decision for the extension of Burnside Street and the actual demolition of the expropriated buildings. It is furthermore alleged that this unwonted proceeding of expropriation without prior possession was adopted after Shuchat had increased the initial mortgage by so much as $140,500.

Paragraph 12 is the culmination of a somewhat lengthy preamble setting out that:

...

12. S. & G. Furs Inc, a firm wholly controlled by the appellant, was indebted to its bankers to the extent of $139,054, and the appellant, having no immediate use for the $140,500 in capital funds received from the Canada

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Trust Company, and being unable to return same to his mortgage creditor, transferred these funds from his own account to S. & G. Furs Inc. as a personal loan to the firm repayable on demand without interest whenever such funds shall be required for building operations.

Pursuant to the premises thus outlined, the appellant would avail himself of the income tax deduction permitted by Section 11 (1) (*c*) of the Act. I quote:

. .

1. Section 11(1)(*c*) of the *Income Tax Act* provides:

(11. (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of sub-section (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year:)

. . .

(*c*) an amount paid in the year or payable in respect of the year (depending upon the method regularly followed by the taxpayer in computing his income), pursuant to a legal obligation to pay interest on

(i) borrowed money used for the purpose of earning income from a business or property

(other than borrowed money used to acquire property the income from which would be exempt).

The appellant's contention that in extending to S. & G. Furs, Inc., an otherwise idle amount of $140,500 constituted a capital investment, the proceeds of which would be income from a business or property, can hardly be substantiated under the circumstances of the case.

S. & G. Furs, Inc., is a company duly endowed with its own legal entity, completely separate from that of the appellant, and, therefore, had no financial connection whatever in law with Shuchat's personal income. If this assumption is exact, the money appellant borrowed from Canada Trust Company and subsequently passed on to S. & G. Furs, Inc., was not used for the purposes of earning his own personal income.

Other considerations also militate strongly against the admission of the instant plea.

First of all, the incidents alleged by Shuchat concerning the three years' delay before the City of Montreal undertook the broadening of Burnside Street, cannot in the least give rise to any responsibility on the part of the Minister of National Revenue, respondent.

Next, should it be feasible to borrow money in one's own name, invest these loans in firms or companies controlled by the borrower and deduct from one's income tax the interest, as was done in the present case, such a practice would easily circumvent the meaning of the *Income Tax Act*. It seems obvious that whatever yield accrued from the loan by the appellant to S. & G. Furs, Inc., had no direct relationship and nothing to do with the earning of Mr. Shuchat's personal income, as required by Section 11 (1) (*c*) of the Act.

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For the reasons above, this Court dismisses the appeal and the respondent will be entitled to recover its legal costs after taxation.

Judgment accordingly.

BETWEEN:

1963
Oct. 1, 2
1964
Jan. 6

RHONE-POULENC S.A. ....PLAINTIFF;

AND

MICRO CHEMICALS LIMITED, GRYPHON LABORATORIES LIMITED, AND PAUL MANEY LABORATORIES CANADA LIMITED ......DEFENDANTS.

Patents—Patent Act R S C. 1952, c. 203, s. 41(3)—Compulsory licence—Infringement—Whether compulsory licence may control sale of medicine as well as production

This is an action brought by the plaintiff, a French corporation, and the owner of Canadian Patent No. 519525, which relates, *inter alia*, to a process for producing chlorpromazine, a medical substance, against the three defendants which are Canadian companies sharing common offices and having officers and personnel in common, as a result of the alleged infringement of a compulsory licence granted by the plaintiff to the defendant, Micro Chemicals Limited

Micro Chemicals Limited makes chemicals used as a basis for pharmaceutical preparations; Gryphon Laboratories Limited makes up pharmaceutical preparations from chemicals it buys; and Paul Maney Laboratories Canada Limited is a supplier.

The compulsory licence issued by the Commissioner of Patents under s. 41(3) of the *Patent Act*, licensed the defendant, Micro, "to use the patented invention in Canada in its own establishment only for the purpose of the preparation or production of medicine but not otherwise and to sell the medicine so prepared or produced by it, to be used in Canada". The defendant, Micro, manufactured chlorpromazine in bulk, sold it to the defendant, Gryphon, which used it to make chlorpromazine hydrochloride tablets which it then sold to the defendant, Maney, which in turn sold the tablets to the New Zealand government.

The plaintiff alleged that the sale of the tablets to the New Zealand government infringed the terms of the licence. It was admitted at

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trial that all three defendants had knowledge of the terms of and the restrictions in the licence issued to Micro.

Held: That the words "but not otherwise" as used in the grant clause of the licence and in s. 41(3) of the *Patent Act* restrict the licensee to the preparation or production of medicine only and not of any other kind of product but if, as in this case, the process patent contains a claim to the product, these words do not exclude the sale of the product by the licensee, i.e. the words "but not otherwise" do not refer to the use of the patent but to the kind of product that may be produced under the licence.

2. That the natural and ordinary meaning of the words of the grant clause appear clearly to indicate that the licensee is authorized to sell the medicine prepared or produced by it to be used in Canada only and the ambit of the licence as set out in the grant clause and the restriction contained therein apply throughout the licence document without the necessity of repeating it in each paragraph.

3. That Micro cannot be said to have complied with the licence requirements because it knew before it sold the bulk chlorpromazine to Gryphon that the tablets to be made by Gryphon using the chlorpromazine were to be sold to Maney and that both Gryphon and Maney had taken the position that they were entitled to sell the tablets outside Canada despite the restrictions contained in the licence to Micro, and, indeed, Micro took the same position itself.

4 That the burden of establishing that Micro, the licensee, had no knowledge of the proposed sale of the tablets to the New Zealand government rested on Micro, and the evidence leaves this question in doubt.

5. That the evidence establishes that the sale and delivery of the tablets were made in Canada for use outside Canada and the infringement for all intents and purposes took place in Canada.

ACTION for infringement of a patent.

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

Christopher Robinson, Q.C. and *R. S. Smart* for plaintiff.

David M. Rogers for defendants.

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

NOËL J. now (January 6, 1964) delivered the following judgment:

This is an action for damages and consequential relief in which the plaintiff claims that the defendants have infringed patent No. 519,525 issued to it on December 12, 1955, as the assignee of Paul Charpentier, the inventor of the invention covered by the said patent.

The plaintiff is a French corporation having its head office and chief place of business at 22 Avenue Montaigne, Paris, France. The defendant, Micro Chemicals Limited, a Canadian company (hereinafter sometimes referred to as Micro) is the non-exclusive licensee in Canada under the patent and has its head office and chief place of business at 20 Advance Road, Toronto 14, Ontario, where the other two defendants, Gryphon Laboratories Limited and Paul Maney Laboratories Canada Limited, both Canadian companies (sometimes hereinafter referred to as Gryphon and Maney) are also located.

The patent in question relates to new phenthiazine derivatives having valuable therapeutic properties and to processes for their preparation and is confined for the purpose of the present action to claim 5 which reads as follows:

> 5. A process according to claim 1, 2 or 3 wherein X is a chlorine atom in the 3-position, A is a $-CH_2-CH_2-CH_2-$ group and R_1 and R_2 are methyl groups.

This is a process for producing a chemical product called chlorpromazine and relates to a medical substance.

The present action is rather unusual in that as there is no dispute that what the licensee, Micro Chemicals Limited, one of the defendants, uses or sells is within the patent, its validity is not in question.

The only matter to be determined is whether the activities of the defendant companies are or not within the scope of a licence obtained from the patentee by Micro Chemicals Limited.

This licence is a compulsory one and was obtained from the Commissioner of Patents pursuant to s. 41(3) of the *Patent Act* following an application by Micro Chemicals Limited. It was issued and its form was determined by the Commissioner of Patents on May 31, 1962, following his decision of September 7, 1961, in which he held that in principle a licence should be granted and after a period of sixty days during which the parties were unable to agree on the terms of the licence.

The defendants submit that all of their acts come within the terms of the formal licence agreement issued by the Commissioner of Patents and that Gryphon Laboratories Limited and Paul Maney Laboratories Canada Limited have not, in any event, infringed. They admit that they have sold the product produced by the process claim but submit that the claim here is to a process and not to a prod-

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uct and that as the sale of a product does not infringe a process claim, the two defendants, Gryphon and Maney are not liable in any event for infringement. Finally, that there is no evidence that either Gryphon or Maney has carried out the process claimed. It therefore appears that the only question to be determined here is whether on the interpretation of the formal licence, and more particularly of the grant clause and clauses 1 and 8 of the said licence, the defendants have infringed this licence.

This grant clause, as well as clauses 1 and 8, read as follows:

NOW THEREFORE be it known that pursuant to the powers vested in me by the Patent Act and particularly by sections 4 and 41 of the said Act, I do order the grant to the applicant, MICRO CHEMICALS LIMITED of a non-exclusive licence under Canadian Patent Number 519,525, for the unexpired term thereof, to use the patented invention in Canada in its own establishment only for the purpose of the preparation or production of medicine but not otherwise and to sell the medicine so prepared or produced by it, to be used in Canada the whole under the following terms and conditions:

1. MICRO CHEMICALS LIMITED shall pay to RHONE-POULENC a royalty of 15% (fifteen per cent) on its net selling price to others of the active product in its crude form prepared or produced pursuant to this licence and sold by it.

. . .

8. This licence is not transferable and MICRO CHEMICALS LIMITED is precluded from granting any sub-licence thereunder, provided always that purchasers of medicine prepared or produced by MICRO CHEMICALS LIMITED pursuant to this licence may use the medicine and vend the medicine to others to be used.

The grant clause indicates that the compulsory licence imposed on the patentee and given to the licensee allows the latter to use the invention to prepare medicine in its own establishment and then to sell the medicine so prepared to be used in Canada.

The infringement alleged against the three companies consists in a sale of tablets to the Government of New Zealand made possible by means of defendants' joint action which, according to the plaintiff, infringes Micro Chemicals Limited's non-exclusive licence which, as we have seen, allows the sale of the product to be used in Canada only and not outside of the country.

The three defendant companies have the same offices and they have officers and personnel in common. Mr. Miller and Mr. John M. Cook are common officers to all the defendants. A Mr. I. D. Heintzman is vice-president of both Micro and Gryphon and Micro's purchasing agent acts as such for all three defendant companies. As explained by Mr. Cook, who is president and general manager of Micro and secretary-treasurer of Gryphon and Maney and is active in the three companies, day to day co-operation between the latter would be a very close one. His position as secretary-treasurer of Gryphon and Maney is more of a financial type of administration and covers office routine, and in the case of Gryphon, he did sign some documents as manager of the company.

Micro is a company that makes chemicals used in many cases as the basis for pharmaceutical preparations. Gryphon is a company which makes up pharmaceutical preparations from chemicals it buys, sometimes from Micro and sometimes from elsewhere. In the present case, Gryphon made up into tablets the substance called Chlorpromazine with other ingredients and only a small part of its weight is chlorpromazine.

Mr. Cook admits that in the case of a product marketed by Maney originally manufactured by Micro and made up into tablets by Gryphon, the information required by the Food and Drugs administrator for approval purposes would have come from all three companies.

When Gryphon sells its finished products it can be in the form of tablets such as we have here, or in liquids and suppositories packed in bottles or containers with sometimes the customers' label on, but normally its products are shipped in bulk containers in accordance with whatever packaging instructions the customer has given.

The third company, Paul Maney Laboratories Canada Limited, is a supplier. It markets pharmaceutical preparations which it gets either from Gryphon or elsewhere.

Exhibit 1 is documentation covering the alleged infringement, i.e., a transaction which took place on December 4, 1962 and involving the sale to the New Zealand Government of a quantity of 450,000 tablets of chlorpromazine hydrochloride which bulk substance Mr. Cook admitted had been manufactured by Micro and then sold to Gryphon and held in stock by the latter until the need to make the order arose. He also admitted that these 450,000 tablets were manufactured by Gryphon and packaged to the specification of Maney after which they were delivered to Maney and delivered by Maney to the appropriate agents of the New Zealand Government.

Exhibit 2 is a bottle of Chlor-Promanyl "100" which is the generic name of the drug put up for the New Zealand Government by Gryphon and sold by Maney and Ex. 4 is a bottle of the same drug put up, however, for Canadian consumers; the technical information on the labels is slightly different.

Mr. Cook also admitted that any of the three defendants had knowledge of the restrictions in the licence because of his position in them and that no notice of any restriction was required to be given here to any of the defendant companies because he knew the contents of the licence.

He finally admitted at p. 73 of the transcript "that all the defendants take the position that material manufactured pursuant to this registered licence No. 560,089 can be sold by them free of any restriction as to the place at which it can be used" and that they, therefore, would be entitled to sell without Canada.

Indeed, counsel for the defendants submits that the licence gives to the defendant Micro the licensee, the right to manufacture the medicine chlorpromazine hydrochloride, and sell it freely and refers to the grant clause (*supra*) and to a comma which is before the phrase "to be used in Canada" and not after it and from this concludes that the above quoted words do not refer to the words "to sell the medicine so prepared or produced by it" but to the larger phrase of the said grant clause, i.e., "a non-exclusive licence under Canadian patent No. 519,525."

In other words, the larger phrase does not refer to medicine but would refer back to the patented invention to which he suggests alone the restriction "to be used in Canada" applies. He admits that the grant clause of the licence (*supra*) is hard to interpret but with the assistance of s. 41(3) of the *Patent Act* which is the clause under which the Commissioner issued the compulsory licence, its meaning can be clarified and that his interpretation is in accordance with the powers of the Commissioner under this section which reads as follows:

41. . . .

(3) In the case of any patent for an invention intended for or capable of being used for the preparation or production of food or medicine, the Commissioner shall, unless he sees good reason to the contrary, grant to any person applying for the same, a licence limited to the use of the invention for the purposes of the preparation or production of food or medicine but not otherwise; and, in settling the terms of such licence and fixing the amount of royalty or other consideration payable the Commissioner shall have regard to the desirability of making the food or medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention.

Counsel for the defendants argues that as the plaintiff relies here on the process only and the licence issued under the above section cannot go beyond purposes "of the preparation or production of food or medicine" (because there is no patent on the product per se, but only on the process), once the licence for the process is given out, the licensee can use the product as he wishes, as the right to use the product is not given by any power of the Commissioner but flows from the right to use the process.

According to the defendants, s. 41(3) would allow the Commissioner to regulate the use only of the process, but not the use or sale of the product and, therefore, the licence here should be interpreted in a manner consistent with the power of the Commissioner.

This interpretation would also, they suggest, be in conformity with a proper construction of the words "but not otherwise" in s. 41(3) which would refer to the "use of the invention for the preparation or production of food or medicine."

This construction, however, cannot be accepted if one goes to the French text which translates the words, "but not otherwise" by "mais pas pour d'autre fins" which, in that context, clearly means, "but not for purposes other than food or medicine" and this, of course, establishes that the restriction does not apply to the use of the invention, but to the food or medicine.

Furthermore, such a narrow interpretation, as that suggested by the defendants, was attempted in the *Parke*

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Davis v. Fine Chemicals case[1] but was rejected by Martland J. as follows:

> . . . Emphasis was placed on the following words of the subsection: "a licence limited to the use of the invention for the purposes of the preparation or production of food or medicine but not otherwise." It was urged that such a licence could not permit the sale of the product, but only the use of the process. If the invention relates only to the process, then a sale of the product would not infringe the patent, but, if the product also is patented, then the sale would involve an infringement and the licence cannot, under the wording of the subsection, authorize such a sale.
>
> In my opinion subs (3) is not to be interpreted in this narrow manner. In terms it applies to "any patent" if such patent is for "an invention intended for or capable of being used for the preparation or production of food or medicine".

And at p. 133 he added:

> . . . The subsection relates to the use of any invention intended for or capable of being used for the preparation of food or medicine and the provisions as to royalty clearly contemplate the sale of the product produced by such use, for they refer to the making of the food or medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for his search.

The Supreme Court in the above decision was merely following a former decision of the same Court in the *Hoffman-Laroche* case[2] that the sale of a product made in accordance with a patented process infringes the process patent, even though the patent contained no claim to the product.

Now although there might have been some discussion as to the dictum of the Court in this latter case where the patent contained no claim to the product, there surely can be no doubt in the present one where although the plaintiff stated he relied on the process patent only, the latter contains also a claim to the product and, therefore, the sale of the product outside of the licence document would be here an infringement of the patent.

There is, however, a further reason to deny such a narrow interpretation in that it might in some cases prevent the Commissioner from dealing with the whole purpose of s. 41(3) of the Act which, in addition to regulating the use, comprises also the royalty aspect which, as pointed out by Martland J. in the *Parke Davis* case (*supra*) in clear terms contemplates also the sale of the product "produced

[1] 18 Fox Pat. Cas. 125 at 132. [2] [1955] S.C.R. 414.

by such use" for it refers to the making of the food or medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for his research.

Paragraph 1, the royalty clause, which states that Micro shall pay 15 per cent on its net selling price to others, would not, in my opinion, assist the defendants and would not when the words "to be used in Canada" are applied to the medicine produced by the process, cause Micro to pay royalties on sales not authorized under the licence agreement. Indeed, the sales on which the royalties shall be paid are those covered by the licence document and if they are not so covered, they would constitute infringement.

Nor would para. 8 of the licence document which, as we have seen, deals with its non-transferability and contains a provision that the purchasers of the medicine prepared or produced by Micro pursuant to the licence, may always use the medicine and vend it to others to be used. On the basis that the words "in Canada" do not appear here, counsel for the defendants suggests that this clause means that purchasers are free to sell the product as they please. I am afraid I cannot agree with this interpretation. Indeed, the ambit of the licence is contained in the grant clause which, as we have seen, states that Micro has a licence to sell the medicine prepared or produced by it, to be used in Canada. Now, as this restriction, in my opinion, applies throughout the licence document, it is not necessary to repeat it in each paragraph and in any event its absence in one paragraph could not have the effect of eliminating it from the grant clause.

There is no question that the comma at the end of the grant clause immediately preceding the words "to be used in Canada" is placed in a peculiar spot but, notwithstanding this, from the context it would appear to me that the words "to be used in Canada" must of necessity apply to "the medicine so prepared or produced by it" immediately preceding and not as suggested by the defendants, to the large phrase and to the patented invention. My reason for saying this is that at the beginning of the grant clause, the use of the patented invention is already restricted to Canada by the words "to use the patented invention in Canada" and should the words "to be used in Canada" at the end of the said clause also apply to the patented invention, as suggested by the defendants, there would be an unnecessary and senseless repetition. Under these circumstances, such an interpretation as that advanced by the defendants cannot be accepted on the basis of a comma which, in my opinion, was misplaced and should have been inserted after instead of before the words "to be used in Canada" and this also drives me to the conclusion that the natural and ordinary meaning of the words of the grant clause appear clearly to indicate that the licensee is authorized to sell the medicine prepared or produced by it to be used in Canada only.

This, however, does not end the matter as defendants submit that even assuming the words "to be used in Canada" refer to medicine, they would still not be liable under any of the three possible interpretations that can apply to the situation created by the restriction of the licence "to sell the medicine so prepared or produced by it, to be used in Canada."

The first interpretation is that Micro must not sell unless it knows that the medicine is going to be used in Canada and defendants suggest that Micro has complied with this requirement as all the bulk medicine produced by it has been sold to Gryphon only. Now although the evidence discloses that Micro knew that Gryphon was going to make tablets with the bulk chlorpromazine and that the operation would take place in Canada as the defendants are all located in the same building, Micro also knew that Gryphon had taken the position that it was wholly entitled to sell to all comers and was prepared to do this and that Gryphon was going to sell some of these tablets to Maney who in turn also took the position it could sell to anybody even outside the country. Under these circumstances, it can hardly be said that Micro has complied with the above requirement.

Defendants' second interpretation that Micro should not sell when it knew the product was going to be used outside Canada and their suggestion that Micro had complied with it on the basis that when the bulk chlorpromazine was delivered to Gryphon, the New Zealand sale was not in contemplation, might be true if the evidence so establishes.

However, as we have seen, the evidence does not indicate what the state of knowledge as to the New Zealand sale was at the time Micro delivered to Gryphon the particular chlorpromazine which ultimately went into the New Zealand tablets because it is not shown from what particular delivery of Micro to Gryphon the amount of chlorpromazine that went into the New Zealand tablets was taken.

Mr. John M. Cook, president and general manager of Micro and secretary-treasurer of both Gryphon and Maney states, as we have seen, that he believes that when the time came to make up the New Zealand tablets, Gryphon did not have to order more chlorpromazine from Micro, but took it from its bulk inventory and there is no evidence as to when knowledge of the New Zealand transaction became known by anyone before it actually occurred. In other words, the evidence does not make it clear that the New Zealand sale was or was not in contemplation when the bulk chlorpromazine was delivered to Gryphon and as the defendant Micro had (as part of its duty to show that it was selling within the scope of its licence) the burden of establishing that the deal was not in contemplation, it has failed in this respect.

Defendants' third interpretation that Micro, at the time of the sale, should notify the purchaser that the product is to be used in Canada only and that Micro had complied with this as the evidence indicates the three defendants had knowledge of the restriction of the licence before any relevant time, cannot either be entertained here because Micro not only knew that Gryphon and Maney had no intention of abiding by the restriction in the licence on the basis that no such restriction existed, but also took the same position itself.

Indeed, at p. 73 of the transcript Mr. Cook made it clear that all the defendants took the position that the restriction of the licence was not binding on them.

Now, once again, defendants raise here the argument that although Gryphon and Maney knew the licence terms, they were allowed as purchasers, because of the absence of the words "in Canada" in para. 8 of the licence document, to use the medicine and vend it to others to be used anywhere.

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Noël J.

I have already dealt with this paragraph (*supra*) and for the same reasons the above proposition cannot be entertained. Indeed, para. 8 is subject to the restriction contained in the grant clause of the licence and, as I said before, it does not appear to be necessary to repeat this restriction in all the paragraphs of the licence document.

Having dealt with Micro, it is now necessary to deal with the situation of Gryphon and Maney who, according to the defendants, used the product "in Canada" only as the sale by Maney took place in Canada and the sale by Gryphon to Maney of the tablets ultimately sold by Maney to the Government of New Zealand also took place in Canada and, therefore, they would not have violated the licence document.

This proposition, however, cannot be accepted either as this sale by Gryphon was with the knowledge not only of the restriction of the licence, but also of what Maney was to do with the product, i.e., ship it to New Zealand, and furthermore the evidence discloses that the containers had special labels placed on them by Gryphon upon instruction from Maney which were somewhat different from those used for Canadian sales and, of course, Maney would also be in the same situation as it had knowledge of the restriction and ordered the special labels to be affixed on the containers for export.

Defendants have therefore failed to establish that the sale of tablets to New Zealand by Gryphon to Maney was a sale of chlorpromazine "to be used in Canada" and the sale of Maney to the New Zealand Government having been made outside of Canada, this constitutes a sale outside of this licence as the licence permits sale in Canada only.

Defendants' final and last argument is of a general nature and deals with the proposition that if Gryphon and Maney have done something outside of Canada, the patentee would have no claim against them in this matter as a Canadian patent cannot be extended to any other country and that anything that infringes a Canadian patent must be done in Canada.

In *Auer Incandescent Light v. O'Brien*[1] Mr. Justice Burbidge dealt with a similar submission as follows:

> Before leaving this question of infringement I ought, perhaps, to refer to the contention made on behalf of the defendant that under any

[1] (1897) 5 Can. Ex. C R 243 at 292

circumstances he would at least be entitled to import for use or sale illuminant appliances made in a foreign country in accordance with the process protected by the plaintiff's patent. With that view, however, I cannot agree. I think that the law is well settled to the contrary, and I need only refer for this purpose to the cases cited by Mr. Hellmuth . . .

This decision was later referred to and accepted by the Chief Justice of the Supreme Court in the *Hoffman-Laroche* (*supra*) case at p. 415:

According to the decision of the Court of Appeal in England in *Van Heyden v. Newstadt* following previous decisions of single judges, the applicant would have a monopoly in respect of aldehyde (which was the product) when prepared according to his process In Canada it was decided in the same sense by Mr. Justice Burbidge in the Exchequer Court in *Auer Incandescent Light Manufacturing Company and O'Brien* and by a divisional court in Ontario, in *Toronto Auer Light Company Limited v. Colling*. There seems to be no reason to doubt the correctness of these decisions.

That there is infringement of a Canadian process patent by the sale in Canada of a product made abroad by that process would now appear to be accepted by our courts and defendants' submission that the act infringing a Canadian patent must necessarily be done in Canada, cannot, therefore, be accepted.

On that basis it may well be also that the situation we have here of a sale of the product outside of the country would also infringe a Canadian process patent limited by a licence to sell and use within the country only.

However, in my opinion, it is not necessary to examine this situation as the evidence establishes that the sale and delivery of the product here were made in Canada for use outside of the country and the infringement for all intents and purposes took place here.

I might also add that I can see nothing in the restriction contained in the licence document, i.e., "to sell the medicine so prepared or produced by it, to be used in Canada" that goes against the legislative policy as set down by Rand J. in *Parke Davis v. Fine Chemicals* (*supra*) which underlies the economy of the whole s. 41 and particularly s-s. (3) and which is that all new substances intended for food or medicine, apart and as distinguished from processes, are in the public interest to be free from legalized monopoly and subject to a compulsory licence granted by the Commissioner upon request and upon terms and conditions commensurate with making the food or medicine available to the public at the lowest possible price consistent with giving

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to the inventor due reward for the research leading to the invention.

I might go further and state that in my opinion it is permissible for a patentee and a person who entered into a licence with him or for that matter for the Commissioner under s. 41(3) to arrange for a licence subject to a number of restrictions as long as the latter do not go against the legislative policy mentioned above and these restrictions would be effective against any transferee provided, however, proven notice of the limited licence was given or could be considered or taken to have been given to any subsequent handler and those persons would be infringers if they were not operating within the licence.

Indeed, in *National Phonograph v. Menck*[1] it was decided that restrictions can follow patented chattels:

> In their Lordships' opinion, it is thus demonstrated by a clear course of authority, first, that it is open to the Patentee, by virtue of his statutory monopoly, to make a sale *sub modo,* or accompanied by restrictive conditions which would not apply in the case of ordinary chattels; secondly, that the imposition of these conditions in the case of a sale is not presumed, but, on the contrary, a sale having occurred, the presumption is that the full right of ownership was meant to be vested in the purchaser; while, thirdly, the owner's rights in a patented chattel will be limited, if there is brought home to him the knowledge of conditions imposed, by the Patentee or those representing the Patentee, upon him at the time of sale. It will be observed that these propositions do not support the principles relied upon in their absolute sense by any of the Judges of the Court below. On the one hand the patented goods are not, simply because of their nature as chattels, sold free from restriction. Whether that restriction affects the purchaser is in most cases assumed in the negative from the fact of sale, but depends upon whether it entered into the conditions upon which the owner acquired the goods. On the other hand, restrictive conditions do not, in the extreme sense put, run with the goods, because the goods are patented.

I am satisfied here that the restriction "To sell the medicine so prepared or produced by it to be used in Canada" not only does not go against the policy underlying the whole of s. 41 and in particular s-s. (3), but that such a restriction may well have been necessary to enable the attainment of the section's expressed objects, i.e., the desirability of making the food or medicine available to the public at the lowest possible price consistent with giving the inventor due reward for the research leading to the invention.

Defendants' argument that by limiting the sale to Canada, the licensee, in order to sell to countries where there

[1] 28 R.P.C. 229 at 248.

is no patent would have to set up a manufacturing plant there and this would not be conducive to a reduction of the cost of producing this particular medicine to the public, which is one of the purposes of this section, may well be, but it certainly is not the only way the foreign market in such a case can be supplied as the Commissioner could have given the licensee the right to export which would also have solved the problem, with no damage to the Canadian public.

Indeed, if the Commissioner had felt on the evidence before him that the licensee should have the right to sell outside the country in order to meet the requirements of s. 41(3) of the Act, it would have been an easy matter to so express it in the licence document by giving it the right to export, which he did not do, and may I add that on the appeal from the terms of this licence which is before me and on which judgment has been rendered this day under No. A-826 of the files of this Court, I would not be prepared on the evidence before me to substitute my finding on this for his.

The evidence in my opinion clearly establishes that the three defendants, with full knowledge of the restrictions in the licence document, did not operate within the ambit of the licence and hence they are infringing.

Maney has infringed by the sale to the Government of New Zealand because it made that sale with knowledge of the licence restriction. Gryphon has infringed by the sale to Maney of what it knew was for use outside Canada, and Micro has infringed by the sale to Gryphon of what it knew Gryphon was going to sell with no restrictions on the place of use and all three of the defendants threatened to infringe by asserting their right to sell without restrictions.

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 if any as 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 its costs to be taxed in the usual manner.

Judgment accordingly.

1963 Oct. 2, 3 — 1964 Jan. 6

BETWEEN:

RHONE-POULENC, S.A. ....APPELLANT;

AND

MICRO CHEMICALS LIMITED ....RESPONDENT.

Patents—Compulsory licence—Patent Act, R.S.C. 1952, c. 203, s. 41(3) and (4)—Variation of terms of compulsory licence.

The appellant, a French corporation, was the plaintiff in *Rhone-Poulenc, S.A. v. Micro Chemicals Limited, et al., ante,* p. 816 and the respondent was one of the defendants therein, and is the holder of a compulsory licence granted by the appellant and which was the subject of that action. This is an appeal by the licensor from the order of the Commissioner of Patents settling the terms of the licence on the grounds that the licence as issued does not effectively limit the use and sale of medicine made pursuant to the licence to Canada only and that the licence does not limit the net sale price, on which the royalty is based, to a selling price to purchasers with whom the licensee is dealing at arms length, or otherwise to a selling price representing a reasonable and usual advance over cost.

Held: That the grant clause should be amended to make it clear that the licence permits the licensee to prepare or produce the medicine to be used in Canada only and a paragraph should be added to the licence document requiring the licensee to label every container of the medicine as follows—"Licensed under Canadian Patent No. 519,525 but not for export".

2. That the licence document should be amended by revision of certain provisions thereof and the addition of other provisions to which the parties have agreed.

3. That since such a licence is personal only and does not give the licensee the right to grant sub-licences or to assign its licence, the provision in the licence dealing with its non-transferability is unnecessary and should be deleted.

4. That there should be added to the licence a provision that purchasers of the medicine prepared or produced by the respondent pursuant to the licence are not precluded from using the medicine in any way they choose for their own personal consumption.

APPEAL from a decision of the Commissioner of Patents.

The appeal was heard before the Honourable Mr. Justice Noël at Ottawa.

Christopher Robinson, Q.C. and *R. S. Smart* for appellant.

David M. Rogers for respondent.

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

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NOËL J. now (January 6, 1964) delivered the following judgment:

In these proceedings, Rhone-Poulenc S.A., a French corporation of Paris, France, has appealed from a decision and order of the Commissioner of Patents dated May 31, 1962 by which the Commissioner settled the terms of a licence granted to Micro Chemicals Limited, a Canadian company under Canadian patent No. 519,525, the property of the appellant under the compulsory licensing provisions of s. 41(3) of the *Patent Act.*

This appeal is based on s. 41(4) of the *Patent Act* which reads as follows:

> 41 . . .
>
> (4) Any decision of the Commissioner under this section is subject to appeal to the Exchequer Court.

The patent in question relates to a process and a process dependant product and deals with new phenthiazine derivatives having valuable therapeutic properties and to processes for their preparation and, therefore, falls within the terms of s-s. 3 of s. 41 of the Act.

The notice of appeal sets out the reasons of appeal as follows:

(1) The Commissioner did not limit the licence to the use of a patented invention for purposes of the preparation or production of medicine, for human use;

(2) The Commissioner did not include provisions in the licence which would be fully effective to limit the sale and use of any medicine, made pursuant to the licence to sell and use in Canada only;

(3) The Commissioner did not in the licence limit the net sale price of the product produced pursuant to the licence, on which royalty is based, to a selling price to purchasers with whom the licensee is dealing at arms length, or otherwise to a selling price representing a reasonable and usual advance over cost.

Before dealing with the contestation of this appeal, I might say here that counsel for the appellant stated at the hearing that he was withdrawing the reasons covered in paragraph (1) thereof and we are, therefore, left with those contained in paragraphs (2) and (3) only.

I might also add that with respect to appellant's second ground of appeal, in order to make fully effective what

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is clearly the intention of the Commissioner in framing the licence as he did, namely, that any medicine produced by Micro Chemicals under the present licence should be used only in Canada (as I held in a judgment rendered this day, bearing No. A-1408 of the files of this Court, involving amongst others the appellant and the respondent and dealing with the same licence document but with respect to the matter of infringement, the reasons therein applying *mutatis mutandis* to the present appeal), the comma after the words, "so prepared or produced by it", in the tenth line of the grant clause on p. 2 of the licence document shall be deleted and placed instead after the words, "to be used in Canada", on the same line; the said grant clause shall contain the words, "with notice of such restriction" inserted after the said words, "to be used in Canada", and the following paragraph shall be added immediately after the grant clause as a new para. 1:

> Micro Chemicals Limited shall apply to every container of medicine prepared or produced by it and sold pursuant to this licence, a notice reading "Licensed under Canadian Patent No. 519,525 but not for export".

and the old para. 1 shall become para. 1A.

Counsel for the appellant has suggested that the words "for use in Canada only" be applied on every container. However, I do feel that the above words "but not for export", which I have inserted, would be as effective and more appropriate than the words "for use in Canada", which would have the effect of confusing the purchaser for personal medicinal consumption who might at times, when out of the country, have to use this medicine. Furthermore, the verb "export" implies a trade outside of the country which is really what the Commissioner intended to prohibit in the licence document.

With respect to appellant's third ground of appeal, i.e., that the Commissioner did not, in the licence, properly limit the net selling price of the product on which the royalty is based, respondent in its notice of contestation states that it is and has at all times been willing to agree to the inclusion in the licence of a clause insuring that the royalty is based on a fair and reasonable selling price, adding however, that the price on which royalty is paid must be definite so that the licensor cannot harass the licensee and involve the latter in disputes as to the amount of royalty, and the price upon which royalties are paid must not be so high as to prevent the licensee from competing in the market.

It is, however, not necessary to go into this matter as the parties, through their respective counsel, have agreed to the insertion of a text which will cure whatever difficulties existed:

1. By revising the second paragraph of section 1A to read as follows:

   The term "net selling price" employed herein shall mean,

   (*a*) in the case of a sale to a purchaser other than Paul Maney Laboratories Ltd., or Gryphon Laboratories Ltd. and with whom MICRO CHEMICALS LIMITED is dealing at arms length (such a purchaser being referred to hereafter as an arms length purchaser), the net price received by MICRO CHEMICALS LIMITED (which expression as used herein means the price actually received less any allowances for returns and any sales or other tax forming part of the price and remitted by MICRO CHEMICALS LIMITED to any governmental authority),

   (*b*) in the case of a sale to a purchaser other than an arms length purchaser, either

      (i) the average of the net prices received in the preceding three months on sales in the ordinary course of trade to arms length purchasers, or if there have been no such sales in such period to such purchasers,

      (ii) MICRO CHEMICALS LIMITED's cost of production of the active product (including a reasonable amount for overhead) plus 50% of such cost, provided that the net selling price so calculated shall not be less than $33.00 nor more than $53.00 per kilogram of active product.

2. By revising section 3, line 7, by cancelling "selling price" and inserting instead, "net selling price" (and in the case of sales purchasers other than arms length purchasers whether such price is calculated under section 1(*b*)(i) or 1(*b*)(ii).)

3. By revising section 5 by inserting:

   "(*a*)" after the number, so that the section number becomes "5(*a*)" and by revising line 7 of the said section

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by inserting after "statements" the words, "(otherwise than in respect of any cost of production used pursuant to section 1(*b*)(ii) as a basis of calculation of net selling price)" and by adding the following subparagraph:

"5(*b*) If, within six months after the receipt of a statement in accordance with paragraph 3 which shows that a cost of production has been used pursuant to section 1(*b*)(ii) as a basis of calculation of net selling price, RHONE POULENC gives notice to MICRO CHEMICALS LIMITED that it wishes to have such cost of production determined independently, then MICRO CHEMICALS LIMITED shall give to Messrs. Thorne, Mulholland, Howson and McPherson, chartered accountants, promptly upon the latter's request, all facilities of inspection of any of its records and operations which the said chartered accountants may require for the purpose of determining the cost of production, provided that MICRO CHEMICALS LIMITED has first received from the said chartered accountants a statement in writing that the said chartered accountants will disclose to no one any information obtained from such inspection except for the disclosure to RHONE POULENC and MICRO CHEMICALS LIMITED of the cost of production thus determined."

4. By adding the following section immediately following section 5:

5A (*a*) If a cost of production determined and reported by Messrs. Thorne, Mulholland, Howson and McPherson pursuant to section 5(*b*) is higher than that used by MICRO CHEMICALS LIMITED as the basis of calculation of net selling price in the statement with respect to which RHONE POULENC gave notice, then MICRO CHEMICALS LIMITED shall, within two months of such report, pay to RHONE POULENC the difference between the royalty paid with such statement and the royalty calculated on the basis of the cost of production determined by Messrs. Thorne, Mulholland, Howson and McPherson. (*b*) A determination of cost of production pursuant to section 5(*b*) shall be at the expense of RHONE POULENC, but if the cost of production so deter-

> mined by Messrs. Thorne, Mulholland, Howson and McPherson is over 20% greater than the cost of production used by MICRO CHEMICALS LIMITED as the basis of calculation of net selling price in the statement with respect to which RHONE POULENC gave notice, then MICRO CHEMICALS LIMITED shall reimburse RHONE POULENC for such expense within one month after receiving from RHONE POULENC the receipted account of Messrs. Thorne, Mulholland, Howson and McPherson showing such expense.

Now in view of my finding in the judgment rendered this day and bearing No. A-1408 of the files of this Court to which I have already referred, it is not necessary to deal with the respondent's contestation and counter-appeal that (1) if it was proper for the Commissioner to limit the licence to sale and use of the patented invention in Canada, the provisions of the licence granted by the Commissioner are sufficient for that purpose; that (2) the Commissioner exceeded his authority in limiting the licence to sale of the patented medicine to be used in Canada; or that (3) the limitation that the patented medicine be sold "to be used in Canada" should not have been included in the licence granted by the Commissioner since it would have the effect of preventing the respondent from producing the medicine in Canada in volume and at a price competitive with imported products and, therefore, should be deleted; or that (4) the limitation that the patented medicine be sold "to be used in Canada" is not necessary to satisfy the requirements of section 41(3) of the *Patent Act*, other than to say that all these matters have been dealt with extensively in the above judgment and anything that I might say in this regard would be repetitious.

I might however reiterate what I had occasion to say in the above referred to judgment, that had the Commissioner of Patents felt on the evidence before him that the licensee should have the right to sell outside the country in order to meet the requirements of s. 41(3) of the *Patent Act*, it would have been an easy matter to so express it in the licence document by giving it the right to export, which he did not do, and I am not prepared on the evidence before me to substitute my finding on this for his.

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Now as a licence such as this is personal only and does not give the licensee the right to grant sub-licences or to assign its licence, that part of paragraph 8 which deals with the non-transferability of the licence is unnecessary and therefore shall be deleted. Furthermore, in view of the interpretation given to this paragraph in the judgment referred to above and which deals with the infringement action, i.e., that the use and sale by purchasers from Micro Chemicals Limited is permitted but conditioned by the grant clause which, as we have seen, restricts use to Canada only, the balance of the said paragraph can also be removed.

I would, however, allow the purchasers for personal medicinal consumption of the product or medicine to use it as required whether it be in this country or outside of this country and with this in view would replace paragraph 8 by a new paragraph 8 as follows:

> 8. Nothing herein contained shall preclude purchasers of the medicine prepared or produced by Micro Chemicals Limited pursuant to this licence from using the medicine in any way they choose for their own personal consumption.

The appeal from the terms of the licence will, therefore, be allowed to the extent hereinabove indicated and the respondent's request that the licence be varied by cancelling the words, "to be used in Canada", is dismissed.

The appellant will have the general costs of the appeal.

Judgment accordingly.

1963 Jun. 3 — 1964 Jan. 16

BETWEEN:

JOHN S. STEWART. .... APPELLANT;

AND

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

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 12(1)(a) and (h), 13 and 139(1)(ae) and (p)—Farming carried on with reasonable expectation of profit—Farming—Farming loss—Personal or living expenses—Onus on taxpayer to establish that expense incurred to produce income from business.

The appellant, an advertising and display man, resides on a ten acre parcel of land outside of the Town of Aurora, Ontario, on which

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there is a barn, a shed, a dog kennel and a home, and on which he operates the Crackerjack Kennels and breeds airedales, of which he had twenty-seven in the years 1957 and 1958. The appellant had deducted certain sums from his income for these two years as expenses incurred in raising the airedales. He had not sold a dog from 1956 to the date of the hearing of this appeal and testified that the dogs were not raised for that purpose. His revenue from the dogs from 1957 to 1961 amounted to about $500.00 of which more than $400.00 was in prize money. The appellant admitted he had done nothing to promote Crackerjack Kennels and that none of his many schemes to use the dogs in connection with his advertising and display business had materialized.

The appellant alleged that the sums of money spent on his dogs in 1957 and 1958 were proper deductions from his income for those years on the ground that the dogs were part and parcel of his advertising business, or, alternatively, that his kennel operation constituted a farm.

Held: That the evidence of appellant's unsuccessful efforts to use these dogs profitably is such that the only inference one can draw from such a long story of frustrations is that it is not possible for him to use these dogs with a reasonable expectation of profit and, therefore, these expenses would be "personal or living expenses" under s. 139(1) (*ae*) and undeductible.

2. That even if the appellant's kennels were part and parcel of his advertising business, these expenses would not be deductible under s. 12(1) (*a*) and having been made for the purpose of producing income from a business because that section of the Act requires the taxpayer to satisfy the Court as to the extent to which the outlay or expense was made for such purpose and the evidence is clear that the appellant had not in fact used the dogs at all in connection with his advertising business.

3. That even if the words "livestock raising or exhibiting" as used in s. 139(1)(*p*) include the raising or exhibiting of dogs, the words mean raising or breeding or exhibiting either for sale, exhibition or for service and the appellant has denied that such was his object, maintaining that his sole purpose was to qualify as many dogs as he could as champions for the purpose of using them in his advertising business. His kennel operation does not therefore constitute farming under s. 139(1)(*p*) of the Act, and the sums in issue are not farming losses under s. 13.

4. Appeal dismissed.

APPEAL from a decision of the Tax Appeal Board.

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

Ross L. Kennedy for appellant.

T. Z. Boles and *M. Barkin* for respondent.

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

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NOËL J. now (January 16, 1964) delivered the following judgment:

This is an appeal from a decision of the Tax Appeal Board[1] rejecting the taxpayer's appeal from the assessments for the years 1957 and 1958 whereby the sum of $1,736.16 and $2,589.61 were added to his income for the respective years.

These amounts are expenses incurred by the taxpayer in the raising of a number (27) of purebred airedales under the name of Crackerjack Kennels, which the appellant had deducted from his income for the taxation years 1957 and 1958 and the only issue here is whether they are deductible or not, as the parties agree that they have been properly computed.

The appellant describes himself as an advertising and display man which he has been since he left the Navy in 1945 and his contention is that these dogs are part and parcel of his business. This occupation entails taking different types of merchandise and bringing them to the notice of the public, by building backgrounds and suggesting means to sell them. He receives a fee for setting up the promotion and, in some cases, for building or supplying the props. A number of ads in Chatelaine magazine depicting old vintage cars, old icecream parlour chairs, old wire furniture, used at the turn of the century, all the property of the appellant and taken out of his games room, were used to sell dresses, shoes and accessories and exemplify the type of promoting and advertising he has been engaged in.

He has done a number of promotions, such as windows and interiors for Eatons, Simpsons, Hudson's Bay, Spencer's, Woodword's and one of his largest promotions was when he made Simpson's Christmas tree and it has been advertising as a Christmas tree store ever since. This was an artificial Christmas tree, which the taxpayer claims he dreamed up, that could be put on a pillar or used for display purposes in the store and is made of fibre twist wire. He also promoted a fashion colour window display for Simpsons called Victorian Red with papier-mache flowers and built the carriages that go with it.

He lives outside of the town of Aurora on Yonge Street, in the Township of Whitchurch on a ten acre parcel of land

[1] 28 Tax A.B.C. 174.

which he purchased in 1955 and on which there is a barn, a shed, a dog kennel and a home. He started breeding and running a kennel of airedales in February, 1956 and in the years 1957 and 1958 he had twenty-seven dogs. All of the taxpayer's time as well as that of his wife is devoted to looking after these dogs.

He bought a bitch in 1953 who went through to her championship very fast and, according to the appellant, proved she was the best airedale in Canada by far. In 1956 she had an extraordinary litter, out of which nine became champions, and they were very uniform. His original intention was to keep a puppy or a couple of puppies out of the litter and sell the rest of them, but as he put it, "when things started to turn out the way they did we could see the promotional value."

Since he started his kennel, he has had twenty champions and out of 101 shows his dogs have taken 100 prizes. They were shown in Canada from Ottawa through to Fredericton and in New York and Chicago. He started showing them as puppies in the fall of 1956 up until two years ago. He did not, however, raise these dogs to merely exhibit them as his main purpose was to qualify them and use them in his advertising business, as had he wanted, as he put it, to win awards for the best breeds, he did not need the number of dogs he had, but could have used his best bitch and taken everything with it.

According to the taxpayer, it is not possible to go on the market and buy twenty-seven comparable airedales, as they do not exist and if they did he would have to pay between $5,000 for the male and $3,500 for the female. However, he did not wish to sell his dogs, but as he stated, "Being in the business I was in I could see there was a background for promotion originally on dog food, . . ." adding, ". . . we then came up with a meatless diet for dogs," which, however, he has not marketed to this day, although he expects to eventually make profits from this dog food by having a dog food company take it over and market it.

The taxpayer's first promotional scheme with the dogs was when he attempted to use the bitch that had produced nine champions at the Sportsmen's Show. The idea was to set up the bitch with her nine champions outside of the Coliseum on a towing car which would create an interest to go in and see the rest of the dogs. However, this did not

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work out as the mother of the champions was let out and killed on the highway and the promotion was ruined as the important part of the show was the bitch.

It then took the taxpayer three years to reproduce the bitch and in the meantime these three years were lost as far as promoting was concerned.

The proposal here was that the Sportmen's Show would have supplied the space and a dog food company would have made it worth his while. The appellant stated that, "There was some talk of $15,000" which, however, would never have materialized even if the bitch had not been killed as the Master Dog Food Company involved turned the scheme down on the basis that this was not their type of promotion.

The taxpayer then lined up a promotion with Simpson's, "a dog-in-the-window of a pet store" type of display in Toronto. He explained here that what he wanted mostly was Simpson's window space which, from an advertising point of view, is exceptionally good and the moment he would have his dogs in the window, he would have a box of dog food with either the name of the food company or with just Crackerjack across it. A person would say, looking at this display, "This man has got twenty champions; this is what he feeds them". He admitted, however, that he never discussed this plan of his with any dog food producer, but states that he was going to.

Unfortunately, once again, this scheme did not work out either as it did not suit Simpson's, so he then discussed the possibility of doing something inside the store in the sporting goods section where they would deal with black and tan fashion colours for fall which would tie in with the airedales which were black and tan. This, however, did not work out either and was turned down by Simpson's General Merchandising Manager.

Another attempt was then made to use the dogs in connection with Simpson's House of Ideas which is a house inside the store built for promoting household goods such as furniture, stoves and curtains. It is furnished three times a year with a different setting each time and in 1961 the taxpayer had given it the name of "The home of a dog breeder in the country."

His contribution to the above scheme appears, as far as the dogs were concerned, to hang some of their pictures around the House of Ideas with a painting of his kennels and dogs in the kitchen window and the hall was fitted with trophies and certificates of the dogs. Although he intended and he had made arrangements to trim live dogs in the house it appears that this was not done.

The budget for this promotion which was originally $5,000 was then reduced to $3,000 and from all this it appears that the taxpayer received $75 only which he explains by saying, "We have done a lot of jobs on television where we haven't made much money but others we have like the General Motors Show."

The taxpayer then stated that he envisaged some type of public exhibition of his dogs, but here again has not yet done this. In answer to a question of the Court as to why in seven years he did nothing with his dogs in this regard, he stated that the bitch was the important thing for exhibition purposes, although he finally admitted that nine champions was an extraordinary feat in itself even without the bitch.

His main idea, he states, is to set up a place called "Dogland" for instance where children can be taken and shown dogs and what dogs have done through the years. He thought of placing them on a treadmill which would also be good exercise for them. He even investigated the dog cart games. He also, he says, chatted with one of the dog food producers with the idea of taking the dogs to shopping centers to promote dog food but he says this takes a lot of money which he has not.

In connection with this dogland business, the taxpayer states that he would not confine himself to airedales but would use other breeds as well. He would set this up on his ten acres at Aurora, Ontario, and he proposes to put up a building where the dog shows can be held, together with a restaurant and a rest room and the adjoining field could be used for trials.

He states he has contacted Mr. Bunty Lewis, Manager of the Sportsmen's Dog Show and president of the Field Trials Association who told him that if he had the proper spot he would hold his shows and trials there.

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He has never sold a dog from 1956 to date, adding, "No, they were not raised for that purpose, not from the time we discovered we had these. If I had known what I know now I never would have, but I have something good and I am staying with it."

From 1957 to 1961 the revenue received by the taxpayer from the breeding of airedales amounts to, according to the taxpayer, between $700 and $800. He could not, however, substantiate more than $510, of which $200 in prize money in 1956, $235 in 1959 and $75 from Simpson's House of Ideas.

He maintains that it is possible to make a profit out of prize money from just showing dogs but states that it is not his intention to make money in this manner, nor has he sold any of his dogs and will only do so if he has a surplus over his needs and it, therefore, appears that he has made no profit from his kennels at all. Asked as to whether he had any idea when he will make a profit, he answered, "I hope it will be very shortly and I have a feeling it will be shortly."

The taxpayer has no office aside from his Aurora place where he claims he runs his business and where he pays a kennel tax but no business tax. He has done no advertising for his Crackerjack Kennels, is not listed in the telephone book as he has no telephone, has no letterhead showing Crackerjack Kennels, as a matter of fact he admits that there has been no promotional work done for the Crackerjack Kennels at all.

The uncertainty of his expectation of profits from his activities is reflected in the following answer:

A. Yes, I had an idea it was going to be on the way three years ago but it didn't work out and prior to that it didn't work out. I have an idea it may be next month.

In his examination for discovery, the taxpayer was still more uncertain in answer to a question regarding his chances of making money with his dog business:

Q. Have you any idea when you expect that picture to change?

A. Well, you think you have good ideas and sometimes you sell them and sometimes you don't sell them.

Q. But you don't know how soon?

A. In this business no-one knows.

Mrs. Stewart, who with her husband, looks after the dogs, on a full-time basis, stated that perhaps two or three dogs might be a hobby, but maintains twenty-seven would not. She added that she liked and enjoyed working with them. She confirmed the evidence given by her husband and added that they would not go along as they are if they did not think something definitely was going to come out of it, admitting, however, that at times she got fed up with the dogs.

She stated that she and her husband did not start off with the intention of using the dogs for promotional purposes, but as she put it, ". . . we saw what we had and it was quite unusual and as we went along a little further and proved the quality of them and found that we were attaining something that was quite unusual, to have so many of such a uniform quality, that is when we really started to think that perhaps we could put this to some use."

The appellant submits that the money he spent on his dogs for the years 1957 and 1958 are proper deductions on either one of two alternative grounds: (1) these dogs are part and parcel of his advertising business; (2) even if these dogs are too unrelated from this endeavour, then the whole kennel operation constitutes a farm and under s. 13 of the *Income Tax Act*, the provisions limiting farm loss will apply.

There is no question that the appellant was in the advertising display field, although the evidence indicates that in recent years he had given up all other lines of activity to devote his, as well as his wife's, full-time to these dogs. The only question remaining is whether the dogs constitute a part of what could be considered as "a business carried on for profit or with a reasonable expectation of profit" under s. 139(1)(*ae*) of the Act which defines "Personal or Living Expenses" as follows:

> the expenses of properties maintained by any person for the use or benefit of the taxpayer or any person connected with the taxpayer . . . and not maintained in connection with a business carried on for profit or with a reasonable expectation of profit, . . .

and, of course, if they are personal or living expenses they would not be deductible as such under s. 12(1)(*h*) of the Act which reads as follows:

> In computing income, no deduction shall be made in respect of personal or living expenses of the taxpayer . . .

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Now the fact that farming losses are experienced year after year by one carrying on the business of farming has been held not to make them "personal or living expenses" disallowed by s. 12(1)(*h*) so long as farming is carried out in good faith with a reasonable expectation of profit.

Thorson P. stated in *McLaughlin Estate v. M.N.R.*[1] at p. 391:

> I am also satisfied from the evidence that he carried on his business as a farmer and cattle breeder *bona fide* for a profit. He was not merely indulging himself in an activity for pleasure.

The evidence of this taxpayer's unsuccessful efforts to use these dogs profitably is such that the only inference one can draw from such a long story of frustrations is that it is not possible for him to use these dogs with a reasonable expectation of profit and, therefore, these expenses would be "Personal or living expenses" under the above sections and undeductible.

Indeed, although in 1955 he came up with a meatless diet for dogs which seems to have assisted him in breeding his champions, he has not to this day marketed it, nor has he made arrangements with a dog food company to do it for him. His attempt to use his champion bitch with her nine champion pups at the Sportsmen's Show failed also because of her untimely death and he could not use the nine surviving champion pups, although that number in one litter was a feat in itself; it turned out also that even if the bitch had not died, his scheme would not have worked anyway as it was turned down by the proposed sponsor food company on the basis that this was not their type of promotion.

The appellant's "A dog in the window of a pet store" promotion with Simpsons in their display window did not work out either as it did not suit Simpsons, nor did the sporting goods promotion inside the store as it was turned down by their merchandising manager. The taxpayer's attempt to use his dogs in connection with Simpson's House of Ideas with his dogs being trimmed, did not materialize either, although here he managed to get the pictures of his dogs and trophies in the dream house as well as a painting of his kennel and dogs for which he received the amount of $75.

[1] [1952] Ex. C.R. 386.

Although he says he has envisaged public exhibition of his dogs (still maintaining however that it is not his intention to make money in this manner as we have seen (*supra*)) over a period of eight years he has not been able to do so and his idea of using his ten acre farm as a place to hold dog exhibitions, shows and trials with a restaurant and a rest room although contemplated has never been implemented.

Finally to confuse matters further with twenty-seven dogs, he claims his breeding program is not completed to date and he does not know when it will be, after which he maintains that he cannot handle any more dogs and that he has too many. From all this, there seems to be but one conclusion which is that although this may not be a hobby in the ordinary sense of the word, i.e., a favourite occupation pursued for amusement, it could well be considered, as in my opinion it is, an inordinate and unreasonable passion for the breeding of dogs.

There is, however, a further reason for disallowing these expenses in that, even if the appellant's kennels were part and parcel of his advertising business, these expenses are not outlays for the purpose of gaining or producing income from the business and are prohibited under s. 12(1)(*a*) of the *Income Tax Act* 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.

This section prohibits a deduction of any outlay or expense unless the taxpayer can satisfy the Court as to the extent to which the outlay or expense was made for the purpose of gaining or producing income from business or property.

Now the evidence here is clear that the appellant has not in fact used these dogs at all in connection with his advertising business.

Indeed in 1957 nothing came in by way of receipts from the operation of Crackerjack Kennels; the taxpayer's income tax return for that year indicates that there were certain receipts from appellant's Artland Studios, but none are shown from disbursements made in connection with his dogs. The same holds true also for the year 1958.

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This drives me to the conclusion that the expenses involved here are altogether too remote and were not "made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer" within the meaning of s. 12(1)(*a*) of the Act.

The only matter now remaining is appellant's second submission that if the dogs are too unrelated or remote from his advertising business, then the whole kennel operation would constitute a farm under s. 13 of the *Income Tax Act* which is known as the "hobby farming" limitation on loss deductions.

Now this section (which limits the deduction of expenses incurred in farming) will apply only if a taxpayer's chief source of income for a taxation year "is neither farming nor a combination of farming and other source of income" and it would seem that here (providing the raising, breeding or exhibiting of the taxpayer's dogs fall within the definition of farming under the Act, which is another matter with which I shall deal later) this taxpayer meets with this requirement, his chief source of income being other than farming or a combination of farming and some other source of income as for the years under review, his only receipts come from investment income in the sum of $3,174.48 for 1957 and $5,230.50 for 1958 and there are no receipts whatsoever from his kennel operations. Under the Act, as it stood in the years 1957 and 1958, this taxpayer, under s. 13 of the Act, would be entitled to half of his farming losses for 1957 and his entire farming losses for 1958 provided, however, his kennel operations fall within the definition of "farming" under the Act which (according to s. 139 (1)(*p*)) "includes tillage of the soil, livestock raising or exhibiting, maintaining of horses for racing, raising of poultry, fruit growing and keeping of bees . . .". Now the appellant never said that he was raising or breeding or exhibiting dogs either for sale, exhibition or for service which is what the words, "livestock raising or exhibiting" may mean in the above definition, if the word "livestock" comprises dogs. As a matter of fact he denied that this was his object maintaining right along that he did not breed these dogs to sell them, nor did he exhibit them for prize money, but that his sole purpose was to qualify as many dogs as he could as champions for the purpose of using them in his advertising business and he therefore, on this basis alone, cannot benefit from the deductions provided by s. 13 of the Act.

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For these reasons, in my opinion, the appeal should be dismissed with costs.

Judgment accordingly.

BETWEEN:

HELEN D. DAVIS .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

1963
Mar. 20, 21, 22
Apr. 2
1964
Jan. 31

Revenue—Income tax—Income Tax Act, R S.C. 1952, c. 148, ss. 59, 60(2) and 89 and 90 as amended by S. of C. 1952-53, c. 40, ss. 75 and 76 and by S. of C. 1958, c. 32, s. 36—Order-in-Council P.C. 1954-1734, Rule 1—Interpretation Act, R.S.C. 1952, c. 158, ss. 31(d) and 31(1)(j)—Practice—Appeal to Exchequer Court after withdrawal of irregular appeal to Income Tax Appeal Board—Appeal procedure.

On February 12, 1960 notices of objection to her income tax assessments for 1950 and 1951 were served on the respondent by the appellant. On December 9, 1960 the appellant sent a combined notice of appeal from the two assessments to the Registrar of the Income Tax Appeal Board with the sum of $15 00, and a copy of the said notice of appeal was sent by the Registrar to the Deputy Minister of National Revenue for Taxation. On the following day, and before the respondent had taken any step in the proceedings, the appellant notified the Registrar that she wanted the appeals withdrawn. Two days later, after receiving a notice of withdrawal from the appellant, the Registrar sent a letter to her enclosing a copy of the judgment of the Tax Appeal Board with respect to her appeal wherein it was stated that her appeal was dismissed, she having filed a Notice of Withdrawal. Subsequently the appellant launched an appeal from her assessments for 1950 and 1951 directly to this Court.

The respondent moved to quash the proceedings on the ground that the appellant had lost her right of appeal directly to this Court when she instituted her appeal to the Tax Appeal Board.

Held: That there is nowhere in the *Income Tax Act* any provision for combining returns, assessments or appeal proceedings relating to one taxation year with those relating to another and in the absence of some authority for such a combination appeals can be made only by separate proceedings with respect to each taxation year, and, accordingly, the combined notice of appeal forwarded by the appellant to the Registrar and purporting to institute an appeal from assessments for two years was irregular and ineffective to institute an appeal for the two years or either of them.

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2. That the effect of the withdrawal of the notice of appeal was simply to expressly annul voluntarily and before it had been acted upon by the respondent a proceeding which was invalid and open to the objection that it was not an appeal under the statute and thus to put the matter in a position where no action by the respondent could waive the objection to the form of the proceeding and cure the defect therein.
3. That it had not been established that the appellant appealed to the Tax Appeal Board from the assessments in question and she was accordingly entitled to appeal to this Court.

MOTIONS to quash appeals under the *Income Tax Act.*

The motions were heard before the Honourable Mr. Justice Thurlow at Ottawa.

R. F. Reid, Q.C. for appellant.

G. W. Ainslie and *D. G. H. Bowman* for respondent.

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

THURLOW J. now (January 31, 1964) delivered the following judgment:

In each of these cases, which purport to be appeals under s. 60(2) of the *Income Tax Act* R.S.C. 1952, c. 148 from assessments of income tax for the years 1950 and 1951 respectively a motion has been made on behalf of the Minister to quash the proceedings on the ground that the appellant has no right of appeal to this Court. The motions were heard together and at the same time as similar motions were heard in two similar cases in which the appellant's husband, W. W. Davis is the appellant.

The motions turn on the application of the words "in place of appealing to the Tax Appeal Board under s. 59" which appear in s. 60(2) by which it is provided that:

> Where a taxpayer has served a notice of objection to an assessment under section 58, he may, in place of appealing to the Tax Appeal Board under section 59, appeal to the Exchequer Court of Canada at a time when, under section 59, he could have appealed to the Tax Appeal Board.

In each case the appellant has served notice of objection to the relevant assessment under s. 58 and is entitled to appeal to this Court under s. 60(2) unless the events to be related show the case to be one in which the appellant exercised her right under s. 59 to appeal to the Tax Appeal Board and thereby lost her right to appeal directly to this Court under s. 60(2).

From the material filed on the motions it appears that the appellant's notices of objection under s. 58 to the assessments in question, both of which were dated December 14, 1959, were served on the Minister on February 12, 1960, and that on Friday, December 9, 1960, more than 180 days having elapsed and the Minister having in the meantime failed to notify the appellant pursuant to s. 58(3) of his disposition of the objections, the appellant through her agent, W. W. Davis, sent by registered mail addressed to the Registrar, Income Tax Appeal Board, at Ottawa three copies of a combined notice of appeal from the two assessments together with a bank money order for $15 payable to him. These documents were received by Mr. W. O. Davis, the Registrar of the Tax Appeal Board, on Monday, December 12 and on the same day the Registrar sent one copy of the notice by post to the Deputy Minister of National Revenue for Taxation. The Minister had not, however, taken any step in the proceeding and in particular had not filed with the Board under s. 89(4) copies of the documents relevant to the assessments, when on the following day, for reasons which it is unnecessary to set out, the appellant's agent having come to the conclusion that the appeal could not succeed on the grounds set out in the notice, contacted Mr. W. O. Davis by telephone and later requested him by letter to withdraw the notice of appeal. It appears from the letter that in doing this the appellant's agent was under the impression that the withdrawal of the appeal would put the appellant in the same legal position as she had been in immediately before the notice was sent and that she could await the Minister's notification under the statute and have a right of appeal in the meantime. Two days later on December 14, 1960, the Registrar sent to the appellant a letter stating that he was enclosing a copy of the judgment of the Board with respect to her appeal and with the letter he enclosed what purports to be a copy of judgment of the Tax Appeal Board in her appeal dated December 14, 1960, and stating that:

> The appellant through her Agent having filed with the Board a Notice of Withdrawal of her appeal herein;
>
> The said appeal is hereby dismissed.
>
> *Chairman.*

No formal proof of a judgment of the Board was made but whether or not a judgment was in fact rendered is in

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my view not material. For if what occurred amounted in point of law to appealing to the Board what happened to such appeal is irrelevant to the question arising on the motions now before the Court. On the other hand if what occurred did not amount in point of law to an appeal under the statute the purported dismissal of the proceedings by a judgment reciting its withdrawal could not in my opinion convert the proceeding into such an appeal.

The procedure for an appeal to the Tax Appeal Board is governed by ss. 89 to 92 of the Act and by rules made pursuant to s. 87. Sections 89 and 90 as amended by S. of C. 1952-53, c. 40, ss. 75-76 and S. of C. 1958, c. 32, s. 36 read as follows:

> 89 (1) An appeal to the Board shall be instituted by filing with the Registrar of the Tax Appeal Board or by sending by registered mail addressed to him at Ottawa three copies of a notice of appeal in such form as may be determined by the rules.
>
> (3) When the three copies of the notice of appeal have been filed, and the filing fee of $15 has been paid as required by section 90, the Registrar of the Income Tax Appeal Board shall forthwith transmit two copies of the notice of appeal to the office of the Deputy Minister of National Revenue for Taxation.
>
> (4) Immediately after receiving the notice of appeal the Minister shall forward to the Board copies of all documents relevant to the assessment.
>
> 90 (1) An appellant shall pay to the Registrar of the Tax Appeal Board a fee of $15 upon the filing of the notice of appeal and if the appellant receives any of the relief sought on the ultimate disposition of the appeal by the Income Tax Appeal Board, the Exchequer Court of Canada or the Supreme Court of Canada, as the case may be, the fee shall be returned to the appellant after the ultimate disposition of the appeal but not otherwise.
>
> (2) Subject to subsection (1), no costs may be awarded on the disposition of an appeal and no fees may be charged the appellant by the Board.
>
> (3) Subject to subsection (1), fees received under this section shall be retained in the Consolidated Revenue Fund.

By s. 22 of S. of C. 1958, c. 32 it was enacted that upon and after the coming into force of that Act, the Income Tax Appeal Board should be known as the Tax Appeal Board. Rule 1 of the Rules contained in Order in Council P.C. 1954-1734 which were in force at the material time provided:

> 1. An appeal to the Board shall be made in writing, signed by the appellant or his solicitor or agent, and shall as closely as may be follow the form set forth in the Schedule hereto, and shall set out

a statement of the allegations of fact and the reasons which the appellant intends to submit in support of the appeal.

and the Schedule therein referred to read thus:

SCHEDULE

FORM OF NOTICE OF APPEAL:

In re the Income Tax Act and ....
(Name of Appellant)

of the ....of..............................
(City, Town or Village) (Name of City, Town or Village)

Province of ....

....
(Appellant)

Notice of Appeal to the Income Tax Appeal Board is hereby given from the assessment dated the .... day of .... 19.... wherein a tax in the sum of $........... was levied in respect of income for the taxation year 19.....

Then complete the Notice of Appeal with

(1) A statement of allegations of fact,

(2) A statement of the reasons to be advanced in support of appeal, and

(3) Address for service of notices, etc.

Dated at .... this .... day of .... 19........

....
(Signature)

It will be observed that the procedure for instituting an appeal as prescribed in these provisions is not complicated but it is well to bear in mind that as the right to appeal to the Tax Appeal Board is simply that provided by the statute it can be enforced only by proceeding as the statute prescribes. All that is required to institute an appeal is that the appellant file with the Registrar, or send to him by registered post, three copies of a notice of appeal in writing signed by the appellant or his solicitor or agent following as closely as may be the form in the schedule to the rules and setting out a statement of the allegations of fact and the reasons which he intends to submit in support of the appeal. At the same time the appellant must pay the Registrar a fee of $15. Since the statute refers to the $15 as a fee, it may be that the institution of an appeal is accomplished by the mere filing of the notice, or the sending of it by registered post, within the prescribed time regardless of whether the fee is paid at the time or not but on the

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other hand as the fee is not simply one for filing the notice but is in some respects more like a deposit, since in certain events it is returnable, it may be that the payment of it is also one of the requirements of the valid institution of an appeal. I do not find it necessary for the purposes of these motions to express an opinion on this question but whatever may be the true view as to the nature of the required payment the provisions of the statute with respect to it suggest to me that it is payable for each taxation year an assessment in respect of which is the subject of an appeal. The provision for repayment of it in the event of the appellant receiving any of the relief sought in my opinion must refer to the kind of relief for which a taxpayer may appeal that is to say "to have the assessment vacated or varied" and this appears to me to contemplate only an assessment for a particular taxation year. Were it otherwise a taxpayer having a right to variation of an assessment in respect of one year might obtain a free appeal of one or more other assessments simply by including all the appeals in a single proceeding and paying a single $15 fee. His right to do this might then depend on the mere chance that the time limits had not barred his right to appeal the other assessments and when the appeal was disposed of it would become equally arguable that he was entitled to return of his $15 because he had succeeded in having one assessment varied and that he was not entitled to return of the money because he had not succeeded in obtaining relief from any of the other assessments. It must, I think, be borne in mind that the *Income Tax Act* contemplates a separate application of the Act with respect to each taxation year. It creates liability for tax for that year, and prescribes a procedure which culminates in an assessment of tax for that year and gives the taxpayer a right to object and subsequently to appeal from the assessment. Nowhere is there any provision for combining returns or assessments or appeal proceedings relating to one taxation year with those relating to another and in the absence of some authority for such a combination I am of the opinion that appeals can only be made by separate proceedings with respect to each taxation year.

It was argued that s. 31(1)(*j*) of the *Interpretation Act* R.S.C. 1952, c. 158, which provides that "in every act unless the contrary intention appears words in the singular include

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—

the plural and words in the plural include the singular", applies to the word "assessment" in s. 59(1) of the *Income Tax Act* and requires that s. 59(1) be interpreted as authorizing a single appeal from several assessments but if this rule of interpretation is to be applied so as to authorize the combining in one proceeding of appeals from assessments for several taxation years it would seem to be equally logical to read the word "taxpayer" as well in s. 59(1) in the plural and the section as authorizing several taxpayers having nothing in common to appeal several assessments for several years in a single proceeding for which they would then pay a single fee of $15. This I think would be manifestly contrary to the intention to be gathered from the section and from the statute as a whole and I think it also appears from the scheme of the statute applying as it does to separate taxation years that the intention is simply to authorize a single taxpayer to pursue an appeal procedure the object of which is to obtain an adjudication of the issues which have arisen between him and the Minister as to his liability or liabilities under the statute for a particular taxation year but that a single appeal from assessments for more than one taxation year is not contemplated.

Turning now to the combined notice of appeal for both 1950 and 1951 which the appellant forwarded to the Registrar it follows from what I have said that the forwarding of this document purporting as it did to institute an appeal from assessments for two years was a procedure which was not authorized by the statute or the rules and that at least in the absence of consent by the Minister, it was irregular and ineffective to accomplish that dual purpose. But the question then remains whether it could nevertheless have been effective to institute an appeal from the assessment for one of the taxation years to which it refers. In my opinion it could not. When one attempts to regard it as an appeal from the assessment for a single year, for example 1950, it is found to follow the prescribed form in the sense that it states with respect to the 1950 assessment all that is necessary to apepal from that assessment but that instead of confining itself to stating what is necessary to appeal from the 1950 assessment it goes on to state as well all that is necessary to appeal from the assessment for another year and to purport to be a notice of appeal from that assessment as

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well, thereby including not mere immaterial surplusage but surplusage which affects the substance of the document by rendering it uncertain whether it is a valid notice of appeal from a 1950 assessment or from a 1951 assessment. *Vide* s. 31(1)(*d*) of the *Interpretation Act*. Because of the presence in it of this surplusage which renders the legal purport uncertain the notice in my opinion did not "as closely as may be" follow the form prescribed as required by Rule 1 and s. 89(1) of the Act and it was therefore ineffective to institute an appeal to the Board from the assessment for the year 1950. Moreover for similar reasons the notice cannot be regarded as having effectively instituted an appeal to the Board from the assessment for the year 1951.

At the time when this notice of appeal was sent to the Registrar the legal position was accordingly one in which the appellant was purporting to institute an appeal to the Board by a procedure not authorized by the statute or by the rules and which was accordingly open to objection upon which in my opinion the purported proceeding might properly have been quashed. If such a motion had been made and the appeal had been quashed, I think it is clear that there would have been no legal impediment to the appellant starting over again by asserting her rights to appeal in the prescribed form. *Vide Wilson v. Village of Long Branch*[1]. However, before any such motion was made on behalf of the Minister and, more important, before any step in the proceeding was taken by him from which a waiver of his right to object to the form of the proceeding might be inferred, the appellant withdrew her notice of appeal by a letter which clearly indicates that she was not doing so with a view to abandoning her right of appeal but on the contrary that she intended to await the Minister's notification and that she believed that the withdrawal would return the matter to the status quo. In my opinion the effect of this withdrawal of the notice was simply to expressly annul voluntarily and before it had been acted upon by the other party to it a proceeding which was invalid and open to the objection that it was not an appeal under the statute and thus to put the matter in a position where no action by the other party to the appeal could waive the objection. I know of no principle which would

[1] [1957] O.R. 346.

require the appellant to await a motion to quash on the part of the Minister or to continue to provide the Minister with an opportunity to waive the objection and I see no legal reason why she could not at that stage withdraw the objectionable notice to clarify the existing legal position and ensure its continuance. However, even if she had no right to do so the fact is that, for the reason indicated, the forwarding of the notice to the Registrar did not amount to the institution of an appeal and it has not been shown that the defect in the purported proceeding was ever cured by waiver on the part of the Minister of his right to object thereto.

It follows that it has not been established that the appellant appealed to the Tax Appeal Board from the assessments in question and that under s. 60(2) she is entitled to appeal to this Court. The motions therefore fail and they will be dismissed with costs.

Judgment accordingly.

1963
Sept. 27, 30
1964
Feb. 20

BETWEEN:

EQUITABLE ACCEPTANCE CORPORATION LIMITED .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 11(1)(cb)(ii) and 12(1)(a) and (b)—Whether expense incurred to acquire an asset or to borrow money to be used to earn income from busines—Outlay of capital.

The appellant, a company incorporated under the laws of the Province of Ontario, was engaged in the business of purchasing conditional sales contracts and other commercial paper. In 1956 the company required additional funds in order to take advantage of business offered to it. It borrowed $200,000 from Triarch Corporation Limited on terms set out in a written agreement between the appellant, Triarch Corporation Limited and Emil E. Schlesinger, the president and controlling shareholder of the appellant who joined in the agreement as guarantor. Under the agreement, the guarantor agreed to assign to Triarch Corporation Limited, insurance policies on his life in the amount of not less than $150,000. He obtained and assigned to Triarch Corporation

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Limited two insurance policies totalling $200,000, Triarch Corporation Limited having insisted on the additional insurance when certain collateral security was not provided by the appellant. The appellant paid the premiums on the policies for 1956 and 1957 and used the proceeds of the loan in the course of its business. Subsequent to the taxation years in question, Schlesinger purchased the policies from the appellant at their cash surrender value.

The appellant claimed the premiums it paid on the two policies as deductions in computing its taxable income for 1956 and 1957.

Held: That the money borrowed by the appellant from Triarch Corporation Limited was used in the operation of the appellant's business and was an addition to the capital of the appellant, so that any payments made for the purpose of obtaining the money were outlays of capital within the meaning of s. 12(1)(*b*) of the *Income Tax Act* and are not deductible.

2. That the payment of premiums of the two policies was not an expense incurred in the course of borrowing money used by the taxpayer for the purpose of earning income from a business under s. 11(1)(*cb*)(ii) of the Act because the true nature of the transaction was that the appellant acquired an asset which was used as collateral security to borrow money to be used in its business.

3. Appeal dismissed.

APPEAL from a decision of the Tax Appeal Board.

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

D. K. Laidlaw and *D. Anderson* for appellant.

T. Z. Boles and *E. E. Campbell* for respondent.

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

CATTANACH J. now (February 20, 1964) delivered the following judgment:

This is an appeal from a judgment of the Tax Appeal Board[1] dismissing an appeal by the appellant from assessments of income tax for the taxation years ending December 31, 1956 and December 31, 1957.

The appellant is a company incorporated in 1952 pursuant to the laws of the Province of Ontario and is engaged in the business of purchasing commercial paper, particularly conditional sales agreements. It began the actual conduct of its business in 1953 and has continued to date.

The appellant was a family concern and until the year 1956 the capital used to carry on its business came from

[1] (1960) 25 Tax A.B.C. 225.

the subscription for shares of its capital stock and accommodation from its bankers.

In 1956 the appellant was unable to obtain any further money from its bankers and if the appellant were to take advantage of the opportunity of business offered to it, it was necessary to obtain substantial funds forthwith.

To this end the appellant entered into negotiations with Triarch Corporation Limited (hereinafter referred to as Triarch), which negotiations were begun in January, 1956 and culminated in an agreement dated April 30, 1956 filed in evidence as Exhibit I, between Triarch, the appellant and Emil E. Schlesinger as guarantor. At that time Emil E. Schlesinger was the president and controlling shareholder of the appellant.

This agreement provided that Triarch agreed to lend the appellant $200,000, bearing interest at the rate of 7½ percent on the principal amount from time to time outstanding, the principal to be repayable in annual instalments of $50,000 on the first day of May in each of the years 1957, 1958 and 1959 and the balance on January 1, 1960.

The agreement also provided that the appellant should assign to Triarch conditional sales agreements to an aggregate value of not less than 120 percent of the principal amount of the loan outstanding as security therefor.

In addition Emil E. Schlesinger by Clause 4 of the said agreement, undertook to pay or cause to be paid to Triarch the loan so made to the appellant.

Under Clause 5 of the said agreement the guarantor, Emil E. Schlesinger, undertook to transfer and assign to Triarch life insurance policies on his life of not less than $150,000. Clause 5 reads as follows:

> 5. The Guarantor further covenants and agrees to transfer and assign unconditionally to Triarch as an assignee for value, a policy or policies of insurance on the life of the Guarantor to an aggregate amount of not less than $150,000, such policy or policies to be issued by an insurer or insurers acceptable to Triarch.

Despite the fact that the obligation to transfer and assign life insurance policies on the life of the guarantor to Triarch was that of the guarantor, Emil E. Schlesinger, the appellant applied for and obtained two policies of insurance on the life of Emil E. Schlesinger, copies of which were introduced in evidence as Exhibits "A1" and "A2", which were subsequently assigned to Triarch by the appellant.

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The particulars of the two insurance policies so applied for and obtained by the appellant are as follows:

(1) *First Policy*

Insurer—The Manufacturers Life Insurance Company.
Policy No. 1370963
Amount, $150,000

Plan of Insurance—	Preferred Whole Life—annual dividends. Double Indemnity Accident Provisions.
Premium payable—	$6,811.50 of which $247 50 covers double indemnity.
Life insured—	Emil E. Schlesinger
Beneficiary—	the Appellant

Date of application by appellant—March 14, 1956
Date of issue of policy—April 2, 1956
Date of assignment by the appellant to Triarch—May 2, 1956.

(2) *Second Policy*

Insurer—The Manufacturers Life Insurance Company.
Policy No. 1374450
Amount, $50,000

Plan of Insurance—	Preferred Whole Life—annual dividends.
Premium payable—	$2,188
Life insured—	Emil E. Schlesinger
Beneficiary—	the Appellant

Date of application by the appellant—April 26, 1956
Date of issue of policy—May 1, 1956
Date of assignment by the appellant to Triarch—March 20, 1957.

Each policy upon being in force acquired a cash value calculated upon the length of time in effect in accordance with tables set forth in each policy. At the end of 1957 the cash values of the policies were respectively, $1350 and $450, a total of $1800.

Emil E. Schlesinger underwent the requisite medical examinations prescribed by the insurer and executed an assent to the application being made by the appellant for insurance on his life.

Triarch advanced the loan to the total amount of $200,000 agreed upon to the appellant in stages, $100,000 on May 2, 1956, $50,000 on July 31, 1956 and $50,000 on August 23, 1956.

In addition, the appellant borrowed a further $50,000 from Triarch on October 23, 1956 for a six month term which loan was repaid on April 1, 1957.

Clause 5 of the agreement, Exhibit I, provided for the assignment and transfer by the guarantor of life insurance policies on the guarantor's life "to an aggregate amount of not less than $150,000." However, the policies above described which were obtained and assigned by the appellant to Triarch were in the aggregate amount of $200,000. It was explained in evidence that Triarch had insisted on other additional collateral security from the appellant which the appellant was unwilling to provide and accordingly, by agreement between the appellant and Triarch, the amount of the insurance on the life of the guarantor, Emil E. Schlesinger was raised to $200,000.

The appellant paid the premiums on the above described insurance policies in the taxation years 1956 and 1957 and used the loan advanced to it by Triarch to purchase conditional sales agreements and like negotiable paper in the course of its business.

In compiling its income tax returns for the years ending December 31, 1956 and 1957 the appellant sought to deduct from income the premiums it had paid upon the life insurance policies above described.

The Minister disallowed as a deduction the appellant's claim of the amount of the life insurance premiums it had paid. No exception was taken to the disallowance by the Minister of the double indemnity accident assurance premiums amounting to $247.50 in each of the years ending December 31, 1956 and 1957 as a deduction, but by notice dated November 26, 1958 the appellant objected to the disallowance of the deduction of the balance of the life insurance premiums which it had paid.

By notification dated May 19, 1959 the Minister confirmed the assessments as having been made in accordance with the *Income Tax Act* and in particular on the ground that,

> insurance premiums amounting to $8,999 50 in 1956 and $7,869.48 in 1957 claimed as deductions from income were not outlays or expenses incurred by the taxpayer for the purpose of gaining or producing income within the meaning of paragraph (*a*) of subsection (1) of section 12 of the Act; that the said premiums were not expenses incurred in the course of borrowing money used for the purpose of earning income within the meaning of paragraph (*cb*) of subsection (1) of section 11 of the Act.

The Tax Appeal Board dismissed an appeal and upheld the relevant assessments. It is from that decision the appellant now appeals to this Court.

The issue in the case is a very narrow one, namely, whether the amounts of the premiums paid by the appellant on the insurance on the life of its president, Emil E.

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Schlesinger constituted an expense incurred in the year in the course of borrowing money used by the appellant for the purpose of earning income from its business within the meaning of section 11 (1) (*cb*) (ii) of the *Income Tax Act* which provides:

> 11. (1) notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year;
>
> . . .
>
> (*cb*) an expense incurred in the year,
>
> . . .
>
> (ii) in the course of borrowing money used by the taxpayer for the purpose of earning income from a business or property . . .

It was contended alternatively on behalf of the appellant that the payment by it of the life insurance premiums constituted an outlay or expense made or incurred by it for the purpose of gaining or producing income from its business within the meaning of the exception expressed in section 12(1)(*a*) of the Act and is, therefore, outside the prohibition of the section and that the payments were not capital outlays within the meaning of section 12(1)(*b*).

The provisions of section 12(1)(*a*) and 12(1)(*b*) are as follows:

> 12. (1) In computing income, no deduction shall be made in respect of
>
> (*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer,
>
> (*b*) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part,
>
> . . .

The evidence clearly established that the money borrowed by the appellant from Triarch was forthwith deposited in the appellant's bank account and was used in the operation of the appellant's business. The loan was not comparable to mere temporary accommodation from the appellant's bankers, but was rather an addition to the capital of the appellant.

Any payments for the purpose of obtaining capital are outlays of capital within the meaning of section 12(1)(*b*).

Therefore, it is quite clear the payment of premiums on the life insurance policies is not deductible unless it falls within the express terms of section 11(1)(*cb*)(ii) of the

Act and the issue for determination is whether the said payment of the life insurance premiums constituted an expense incurred in the year in the course of borrowing money.

Section 11(1)(*cb*) was enacted by section 1(1) of chapter 54, Statutes of 1954-5 and made applicable to the 1955 and subsequent taxation years and enables the deduction of expenses normally incurred in raising funds by borrowing which were not previously deductible because they were not directly related to the earning of income and were of a capital nature.

In my view the cost of the purchase of the two life insurance policies and the maintenance in force thereof by the payment of premiums is not an expense incurred in the year in the course of borrowing money used by the taxpayer for the purpose of earning income from a business. While it is true that the purchase of these life insurance policies and their assignment to Triarch was a condition imposed by Triarch before making the loan to the appellant, nevertheless the true nature of the transaction was that the appellant acquired an asset which could be used, and was in fact used, as a collateral security necessary to borrow money to be used in its business. In short, the appellant, by the purchase of the two insurance policies, merely enhanced its position as a reliable lending risk.

If the insured, Emil E. Schlesinger, had died while the policies were in force and before the repayment of the loan, the appellant would then be in the position of the loan being fully paid from the proceeds of the insurance policies and the amount of the loan received by the appellant would become part of the appellant's assets without any corresponding debit entry. Again if the proceeds were in excess of the amount required to repay the loan, then any such excess would have accrued to the appellant's assets. Further when the loan was repaid, as it was, there was nothing to prevent the appellant from securing another loan from the same or a different source on the strength of the security of the two life insurance policies, if the necessity arose.

It is interesting to note that subsequent to the taxation years and upon repayment of the loan made by Triarch to the appellant, Triarch reassigned the life insurance policies, to the appellant and when, in 1962, the controlling

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share interest in the appellant changed hands, the insured, Emil E. Schlesinger, purchased the life insurance policies on his life from the appellant at the cash surrender value of that time, the appellant thereby realizing upon the asset acquired by it.

For the foregoing reasons, I am of the opinion that the premiums paid by the appellant under the terms of the insurance policies on the life of its president, Emil E. Schlesinger, did not constitute an expense incurred in the course of borrowing money within the meaning of section 11(1)(*cb*)(ii) of the Act from which it follows that those payments are not deductible.

The Minister was, therefore, right in assessing the appellant as he did and its appeal herein must be dismissed with costs.

Judgment accordingly.

1963 Jun. 6

1964 Feb. 26

BETWEEN:

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

CLIFTON H. LANE .... RESPONDENT.

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4 and 139(1)(e)—Income or capital gain—Investment or speculation—Purchase and subsequent sale of large tract of undeveloped land—Secondary intention of purchaser.

The respondent was a member of the Mainshep Syndicate formed in April 1951, which acquired by deed dated April 13, 1951, a twenty acre parcel of undeveloped and unserviced land in the Township of North York, on the outskirts of Toronto, for $48,000, and, at the same time, obtained an option to purchase for $75,000, an additional twenty-three acre tract of land adjoining the first parcel. The purpose of the Syndicate, as revealed by the Syndicate agreement, was to acquire the said lands and erect thereon duplexes or other multiple dwellings, or to otherwise deal with the said lands. The deed to the second parcel of land was not taken up until April 1, 1954. Under a temporary holding by-law passed in January 1951, the said lands had been zoned industrial. The Syndicate retained an architect to make preliminary plans for the layout of a housing development on the lands, made inquiries of C.M.H.C. with regard to financing the project and enquired of a construction company if it would be interested in tendering on the proposed construction project. At an Ontario Municipal Board hearing on February 26, 1952, with respect to the proposed North York Township zoning by-law under which the Syndicate's land, i e. the twenty acre parcel, was zoned for warehousing only and virtually all of the land under option to the Syndicate, i e. the twenty-three acre parcel, was zoned industrial or commercial, the Syndicate requested that the whole of its lands be zoned for manufacturing on the basis that if it could not get housing the land would sell better for manufacturing than for warehousing. In October 1954, the Syndicate sold 3 06 acres of its lands which had been zoned residential to a builder for $30,000 and in December 1956, it sold the balance of the said lands to the Ford Motor Company of Canada Limited for $306,360.

The respondent was also a member of the New Sheppard Syndicate formed in September 1952, for the purpose of acquiring land in the vicinity of the Mainshep Syndicate's property on which to develop a shopping centre to service the proposed Mainshep Syndicate housing development. The land acquired by this syndicate consisted of twenty-six acres for which it paid $34,000. Eleven acres of the said land were sold in January 1954 for $50,000 and the balance was sold in February 1955 for $60,000.

Held: That whatever alternative is taken by the taxpayer in the event his preferred intention becomes unrealizable can be taxable or not depending on whether the evidence discloses that this alternative is or is not an operation of trade, and the alternative or secondary intention can, on proper evidence, be inferred from such things as the circumstances surrounding the transaction, the state of development of the lands in the vicinity at the time, i e. whether they were speculative or not and the knowledge the taxpayer had of such development, the skills of the taxpayer, or any other fact or circumstance sufficient to indicate that the purchase of the land as a speculation looking to resale was or must have been contemplated in the event the preferred intention could not be carried out.

2. That the transaction under review was a venture in the nature of trade, this conclusion being supported by the following facts—the lands purchased and subsequently sold by the Syndicate were already in a speculative state when they were purchased; the skills and knowledge of the members of the Syndicate were such as to establish that the Syndicate knew that if the land could not be rezoned residential or the necessary financing arranged, it was good and profitable land for commercial purposes; Sec. 1 of the Syndicate agreement provided for "otherwise dealing with the said lands", indicating that the Syndicate had the possibility of profitable resale in mind; the proposed investment project was quickly and easily set aside and arrangements made to sell the land after the OMB hearing of February 26, 1952; the expected investment yield was very low when considered in relation to the commercial risk involved in the proposed rental project; even after the Syndicate knew the proposed residential development was impossible it extended its option to purchase the twenty-three acre parcel of land which it eventually purchased in 1954, although, had the option been allowed to expire, the loss to the Syndicate would not have exceeded $5,000 and might have been less.

3. That it is clear that the purchases of land made by the New Sheppard Syndicate were commercial purchases looking to resale and as such were adventures or concerns in the nature of trade, since this Syndicate was not even formed until long after the proposed residential development of the Mainshep Syndicate had been given up and no attempt

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had been made to build anything on the New Sheppard Syndicate lands before they were sold.

4. Appeal allowed.

APPEAL from a decision of the Tax Appeal Board.

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

G. D. Watson, Q.C. and *John Gamble* for appellant.

W. Z. Estey, Q.C. for respondent.

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

NOËL J. now (February 26, 1964) delivered the following judgment:

This is an appeal by the Minister of National Revenue from a decision of the Tax Appeal Board[1] setting aside the taxes levied against the respondent in the sum of $4,541.23 for the taxation year 1954; $9,174.08 and $241.25 for the year 1955; $16,176.81 for the year 1956 and $11,624.03 for the year 1957, on the basis that the amounts received by the taxpayer in the above mentioned years, which were his share of the profits from a number of real estate transactions upon the winding up and liquidation of a syndicate or partnership, of which he was a member, were in fact capital receipts and not subject to income tax.

According to the respondent, the transactions, in respect of which these proceedings have arisen, relate to the creation of real estate investments which were frustrated and sold off and the difference between the land purchase price and the land proceeds of sale was of a capital nature and therefore not assessable.

This appeal was heard at the same time as eight others (one of which Mrs. Kathleen DeMara, who did not appear and whose solicitors stated she did not wish to appear in this appeal) involving members of two syndicates, Mainshep and Newshep, of which some were involved in the Mainshep Syndicate only and others in both the Mainshep and Newshep Syndicates. Counsel for H. A. Smith, John Van Nostrand, Mrs. A. Mulholland, C. Mulholland and W. Z. Estey, submitted that the latter, being involved in

[1] 26 Tax A.B.C. 129.

one venture only, their position was different from the three others, C. H. Lane, the respondent, Norman S. Robertson and F. D. Turville, who, in addition were also involved in another venture at approximately the same time in the same area and consequently the appeals of these nine taxpayers should not be heard at the same time. This request, however, was not granted it being decided and agreed by counsel for the parties that the evidence with respect to all the respondents would be submitted now and that the Court would make a proper segregation of the evidence produced and safeguard thereby the rights of the different respondents.

It was on this basis that the evidence was adduced and the appeals were heard.

The respondent, a Toronto lawyer, became a member of the Mainshep Syndicate in 1951. The latter had been set up upon the instigation and suggestion of a real estate broker, C. DeMara, who at the time, acting for the T. Eaton Co. Ltd., had obtained options of lands in the vicinity of Sheppard Avenue and the CPR tracks in the Township of North York, in the outskirts of the City of Toronto. The T. Eaton Co. Ltd. had decided to exercise its option on part of the lands only where they intended to build a twelve million dollar warehouse, and authorized their broker, Demara, to make whatever use he desired of their option on the adjacent balance of the lands, a 20 acre portion referred to as Parcel A. DeMara then obtained an option to purchase an additional 23 acres called Parcel B immediately adjoining Parcel A on the south. At the time the above acreage was undivided farm land lying along the CPR line and was remote from current development. On the south side of Sheppard Avenue there were scattered houses, one a farm purchased under the *Veterans' Land Act* presumably to be farmed, and a few small cottages. There were no stores, factories or warehouses, nor sewer facilities within at least one-half mile. Part of this land faced on Main Street and the latter extended southerly into Weston which is now a part of Metropolitan Toronto.

Mr. DeMara, who was a friend and a client of the respondent, approached the latter and proposed that a syndicate be formed to acquire the property under option. Mr. Lane then approached his partner, Mr. Norman

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Robertson, Q.C., who, he claims, immediately suggested that the property be used for the purpose of erecting thereon multiple dwelling houses as at the time there was a great shortage of housing in the area, and that the money necessary for this project be borrowed from Central Mortgage and Housing Corporation which, according to Mr. Robertson, would make, on a guaranteed rental system, very high mortgage advances, up to 85 per cent or even higher. The latter stated that at the time he knew of a builder of housing units by the name of Salter, who obtained from a company he knew, insured under the National Housing Plan, a loan so large that the whole board of directors went up to see the site and the plant and this, he said, had something to do with the decision to go ahead with the housing development of the Mainshep Syndicate.

I might add here that Mr. Robertson had received information also from a different source of the imminence of the Eaton development, as well as of an additional nearby large development of Murray Printing Company, and the housing development proposed was for the purpose of supplying housing facilities to the numerous families of the future employees of the Eaton warehouse and the printing company.

Eight others then joined with C. DeMara, C. H. Lane, the respondent, and N. Robertson and a Syndicate agreement, Ex. "A", was drawn up and signed some time prior to April 13, 1951. The Syndicate consisted of 1,500 units of $100 each, of which $130,000 were subscribed and $58,500 paid in. According to Schedule "C" attached to the agreement, the following amounts of cash were advanced: J. Van Nostrand, $2,025; C. R. DeMara, $18,900, F. D. Turville, $4,950, N. S. Robertson, $5,850, C. H. Lane, $2,025. The balance of $24,755 was subscribed by others who are not parties to these appeals. The agreement contained a number of terms dealing with the transferability of the units, the election of an executive committee, a prohibition against expenditure of capital for construction without unanimous approval of Syndicate members, and the appointment of Mr. Cyril R. DeMara & Co. Limited as real estate agent on an established scale of fees.

The purpose of the Syndicate is recited on p. 2 of the agreement document as follows:

> A syndicate is hereby formed for the purpose of acquiring the lands described in Schedules "A" and "B" hereto respectively situate in the Township of North York, in the County of York, in the Province of Ontario, with a view to erecting duplexes or other multiple dwellings thereon, preferably on the plan commonly referred to as "the guaranteed rental plan" sponsored by the Government of Canada, and holding the same until mortgages intended to be placed thereon for the purpose of financing the buildings have been fully satisfied, all upon the terms and conditions herein mentioned.

Section 1 of the agreement also provides *inter alia* that the lands were required for the purpose "of constructing duplexes or other multiple dwellings upon the same or otherwise dealing with the said lands."

Messrs. Norman Robertson, Cyril DeMara, F. D. Turville and C. H. Lane, the respondent, were appointed members of the executive or managing committee of the Mainshep Syndicate, which ultimately expanded to twenty-three members and comprised, in addition to DeMara who is a realtor, a surveyor, four lawyers, a number of businessmen, and the wives of some of the participants.

The Mainshep Syndicate acquired Parcel A by deed, dated April 13, 1951, at a price of $48,000, and obtained an option to acquire Parcel B at a price of $75,000 which had to be exercised on or before April 15, 1952. On March 11, 1952, an extension of the exercise of this option was obtained for one year upon payment of the sum of $5,000 and the deed for Parcel B was finally taken up on April 1, 1954.

The Syndicate, immediately after its formation around the end of April or beginning of May, 1951, obtained the services of a Toronto architect, a Mr. Hoare, who, after walking over the property, expressed his satisfaction with the location and thought "it was a very good piece of land and suited both the topography and the location" for the erection of multiple dwelling houses for the families of the men who would work in the Eaton and printing plants to be built in the area. He had designed a similar project for a Mr. Salter on Sheppard Avenue shortly before that (to which Mr. Robertson had also referred), as well as for several others, and confirmed that there was a housing shortage at that time. On May 15, 1951, Mr. Hoare

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made investigations as to the zoning of the area and the possibility of installing sewage and water mains and prepared a number of plans illustrating how the fifty-two housing units contemplated might be laid out on this property. The plans included a general property plan, a floor plan of a typical building, perspective elevation of a typical building, and a perspective drawing showing a whole development. He then estimated the cost of each building at $70,000 which, with the estimated cost for sewage and water mains at $150,000, involved a total expenditure for the whole project of approximately $3,790,000.

At this time the Township of North York, where the Syndicate lands were situated, did not have a general zoning by-law covering the whole township and large areas were agricultural lands and not zoned at all. It would seem, however, that the lands of the Syndicate at that time had been zoned industrial under the then current temporary by-law 7071 passed on January 1, 1951, and a planning committee set up to zone the whole township was still in the process of preparing a definite zoning by-law.

On June 25, 1951, the respondent wrote to a Dalton Engineering and Construction firm to inquire if it would be interested in tendering on the construction project and this firm, in another letter, expressed its desire to do so.

On September 18, 1951, the Syndicate itself applied to Central Mortgage and Housing for the desired loan and forwarded Mr. Hoare's plans along with the application. On October 10, 1951, Mr. Lane received a reply stating that the Syndicate's letter of development had been under review, but that because the mortgage situation "as affected by new Government policy is in a state of flux, it is difficult to talk financing until this office is aware of how Government policy is to be implemented", and suggesting that as they were dubious about the site being quite a distance away from existing new building, the matter should be postponed until sometime after October 15.

Mr. Lane, on October 15, 1951, answered some of the points raised in the above Central Mortgage letter, particularly with regard to the matter of the site being far from existing new building, stating:

> That is true enough, but there has been a great deal of activity in the subdivision and sale of real estate in that vicinity in the last year and our clients felt that a rapid development of the area is now imminent.

On January 31, 1952, the Syndicate received notice of the North York zoning by-law 7625 under which only a negligible part of the 23 acre parcel was zoned residential, the balance being zoned industrial or commercial, and as for the lands belonging to the Syndicate, they were zoned for warehousing only and precluded the building of any residential houses. Tuesday, February 26, 1952, was set down for the hearing of all parties interested in support of or in opposing this by-law.

On February 12, 1952, Mr. Lane wrote Central Mortgage and Housing Corporation, informing them that the matter had to be further delayed because "now that the North York zoning by-law is published we find that dwellings would not be permitted on the lands in question", adding that the Syndicate Committee intended to make representations to the Municipal Board with respect to the restrictive by-law. On February 15, 1952, a reply was received from Central Mortgage and Housing, stating:

In view of the efforts which you are about to make, we regret to advise you that this Corporation is not disposed to consider favourably any application for financing in respect to rental units at the location as indicated by you in previous correspondence. This conclusion has been reached after giving careful consideration to the proposal.

To this the Syndicate answered on February 18:

We are sorry to hear of the view expressed by your Corporation. There is not much we can say at the moment until the zoning by-law of the Township of North York is finally passed. In the meantime, however, we would be obliged if you would consider the matter open for us to make further representations.

The Syndicate then gave up their multiple dwelling development project, because before the Ontario Municipal Board, on February 26, 1952, it requested that the area be zoned for manufacturing on the basis that if it could not get housing it would sell better for manufacturing than for warehousing.

On July 22, 1952, the Syndicate wrote to Mr. J. E. Hoare, the architect, the following:

As you may have observed, under a new by-law of the township much of the land in the vicinity of our client's property near Sheppard Avenue and Main Street has been zoned for manufacturing or warehousing, etc., so that it becomes impractical to go on with our client's proposal to build multiple dwelling houses on the said lands. Part of our client's lands along Main Street have been zoned for single family dwellings and our client may try to salvage something of the original plans by building houses on

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the Main Street frontage. However, it is plain it cannot go on with the plans you prepared and we suggest, therefore, that you submit your account to date.

As the architect had previously agreed that if the Syndicate was unable to proceed beyond the preliminary work his fee would be a flat $400, this is the amount he was paid.

On October 29, 1954, the Mainshep Syndicate sold 3.06 acres on Main Street, which had been zoned residential, to Russell J. Peever, a builder, for the sum of $30,000, and in December, 1956, it sold the balance of the land to Ford Motor Company of Canada, Limited, for $306,360.

Three of the respondents, C. H. Lane, N. S. Robertson and F. D. Turville, were also members of a second syndicate of fourteen persons called New Sheppard Syndicate, evidenced by an agreement dated September 5, 1952, which was formed for the purpose of taking over some land situated in the vicinity of the Mainshep Syndicate's property and purchased in the spring of 1952, as well as purchasing some new acreage covering in all some 26 acres at a total purchase price of $34,000. No evidence was tendered with respect to any plans for erecting buildings or financing this venture, except that it was stated by Mr. Lane that the idea was initially to erect thereon stores, restaurants, etc., to service the residential development project of Mainshep. Eleven acres of the new Sheppard parcel was sold in January 1954, for $50,000 and the other 15 acres were sold in February 1955, for $60,000.

The question for consideration is whether, on the facts as disclosed by the evidence, the profits realized from the sale of the lands in question are profits from a business or property within the meaning of s-ss. (3) and (4) of the *Income Tax Act* and the extended meaning of "business" as defined in s. 139(1)(*e*) or, as submitted by the respondent, these Mainshep lands were acquired by the Syndicate and its members as an investment for the purpose of erecting thereon multiple residential units with a guaranteed rental plan and that it was only because this purpose was frustrated that the lands were sold, realizing therefrom a fortuitous profit by way of capital gain.

Now the test of trading is objective, as the intention or motive of the taxpayer, although relevant, cannot alone determine what his acts amount to and, in some cases, can be negated by these very acts; furthermore, whatever alternative is taken by the taxpayer in the event his preferred intention becomes for some reason or other unrealizable can be taxable or not depending on whether the evidence discloses that this alternative is or is not an operation of trade.

Indeed such is the situation found in all these cases where land is purchased for the purpose of using it to create an investment and this secondary or alternative intention can, by proper evidence, be inferred from a number of things such as the circumstances surrounding the transaction, the conduct of the taxpayer, the state of development of the lands in the vicinity at the time, i.e., whether they were speculative or not, and the knowledge the taxpayer had of such development, the skills of the taxpayer, or any other fact or circumstance sufficient to indicate that the purchasing of the land as a speculation looking to resale was or must have been contemplated in the event the preferred intention could not be carried out.

It is, I believe, on this basis that the Supreme Court of Canada in *Regal Heights v. Minister of National Revenue*[1] (Judson J.) stated at p. 905:

> There is no doubt that the primary aim of the partners in the acquisition of these properties, and the learned trial judge so found, was the establishment of a shopping centre, but he also found that their intention was to sell at a profit if they were unable to carry out their primary aim.

Now, in the present instance, although four members of the Syndicate, N. S. Robertson, H. A. Smith, J. Van Nostrand and C. H. Lane, stated that the sole purpose of the Syndicate was to erect on the lands purchased a multi-dwelling guaranteed housing development, and the agreement recites such an intent, which in turn is corroborated by the engaging of an architect who prepared plans and investigated the sewers and water situation, and the inquiring as to whether a construction company would be interested in bidding on the construction job, as well as the letters written to Central Mortgage and Housing Corporation for a loan on the housing project, Mr. Lane, the respondent herein, gave a number of answers which,

[1] [1960] S.C.R. 902.

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in my opinion, indicate that such was not the case. cf. pp. 56-57 of the transcript:

Q. Wasn't that the whole object in Mr. DeMara coming to you? He said "Here is some land we can get at X dollars and a few days or months or years from now it is going to be worth a lot more money"?

A. I think so, but I don't remember him putting it that way.

Q. What other reason would there be for him suggesting this parcel to you?

A. I do not know of any other.

Q. I suggest that is a reasonable situation. Then when he suggested the proposition to you I gather he suggested this is too big for you and me; we need some others to come in on it?

A. Yes.

And at p. 76 of the transcript, in answer to a number of questions he said:

Q. Was there any consideration given to the possibility of re-sale either of the land or of the completed buildings?

A. No, there was no set policy or arrangement on that.
HIS LORDSHIP: Was it ever discussed?
WITNESS: I think it was, my lord. If you couldn't do one thing you could sell. There was always the sale of it.

Now, there is also Mr. Lane's letter to Central Mortgage and Housing Corporation of October 15, 1951, and particularly that passage which has already been quoted to the effect that "there has been a great deal of activity in the subdivision and sale of real estate in that vicinity in the last year". This establishes that the lands belonging to the Syndicate were already in a speculative state when they were purchased and this would not appear to me to be surprising in view of the manner in which they were brought to the attention of the Syndicate by Mr. C. DeMara, an experienced and active realtor, it being in my opinion significant that the latter not only participated as a member in the transactions of this Syndicate but instigated their sale to the Syndicate, stipulated a high commission fee in the Syndicate's agreement where he was appointed its real estate agent and ended up by advertising and selling the lands.

May I also add that the organization of the Syndicate, as well as the various professional and business skills of its members, including that of a professional realtor, together with the knowledge they had of the large Eaton and Murray Printing developments which made certain the rising price of the surrounding lands including those of the Syndicate, also establishes that the Syndicate knew and realized that if the land could not be zoned residential, or the necessary finance could not be obtained from Central Mortgage and Housing Corporation, it was obviously good and profitable for commercial purposes and I must, therefore, conclude that the sale of these lands was surely contemplated.

There are, however, other aspects of these appeals which also drive me to the conclusion that if the purchase of the lands was for the purpose of erecting dwelling houses, it was also with a view to reselling them at a profit if the preferred intention was not possible. Indeed, there is the statement in section 1 of the Syndicate's agreement which says that the lands were required for the purpose "of constructing duplexes or other multiple dwellings upon the same or otherwise dealing with the said lands". Now although this may be a standard insertion in a document of this kind it does, in my opinion, indicate that the members had other purposes in mind and of course one of which might possibly have been their sale at a profit. The prohibition contained in the Syndicate's document of making capital commitments without the unanimous consent of the Syndicate's members, although a normal clause to prevent the executive committee from involving, without consultation the members in large capital expenses, would, however, indicate that the implementation of the proposed investment project could not commence until such time as the members had been consulted and had consented. That the evidence establishes that there never was a meeting of all the members for this purpose is not surprising in view of the refusal of Central Mortgage and Housing Corporation to make the necessary loans, but what appears to be more surprising, however, is that when immediately after the hearing before the Town Planning Committee, on February 26, 1952, in an attempt to zone the Syndicate's property for manufacturing, which incidentally is in itself also surprising, and may I add somewhat of an anticlimax to its letter to Central Mortgage and Housing Corporation of February 12, 1962, where it was stated that representa-

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tions would be made for residential zoning, a decision to sell the lands was then, around the end of February 1962, immediately taken by the executive committee without consultation with the members and C. DeMara (the pre-appointed real estate agent by section 9 of Ex. "A") immediately prepared an attractive printed brochure describing the property in question and offering it for sale at the date for a price of $320,000. This also, in my opinion, would indicate that the proposed investment project was not too important nor serious if it could so easily be set aside, without consultation and the sales of the land entered into without a meeting of the members, nor their authorization which does not seem to have even been requested.

It would appear from this that the Syndicate's non-active members were quite content to leave the handling of the Syndicate's activities to the executive committee who had carte blanche to handle the business of the Syndicate as they thought best and because of this situation, the passive members here would be in no different position than that of the active members. Indeed, if the transactions are business transactions, any profit derived therefrom from any of the members would be taxable.

The likelihood that the purchase of the lands as a speculation looking to resale was never considered in the event the preferred purpose could not be realized, is further negated by a number of imponderables which the Syndicate fully appreciated. It bought land which was not zoned for residential buildings; there were no sewers within one and a half miles; it was doubtful that the employees of T. Eaton's warehouse or the Murray Printing Company would live in that area; there was considerable doubt that the money would come from Central Mortgage and Housing Corporation; the investment yield under a guaranteed rental plan was very low, Mr. Robertson admitting that it was 5 per cent at the most; there was a serious commercial risk in the event of vacancies occurring; even if 85 per cent of the $3,790,000 required for the investment project was borrowed from Central Mortgage and Housing, the members would still have to find $700,000 and it does not appear that most of these members could have supplied this amount.

In my opinion, this is clearly a venture in the nature of trade and the above facts would alone be sufficient to establish this. However, there is still more convincing evidence of trade in that the Syndicate even purchased after the preferred investment scheme failed and, of course, these other subsequent transactions, if I had any doubt as to the Mainshep transaction being of such a nature, which I must say, however, I have not, would (as stated by Wheatcraft in his volume *The Law of Income Tax, Surtax and Profits,* p. 1-426) convince me of its taxability "in the same way that the thirteenth stroke of a crazy clock throws doubt on what has gone before."

Indeed, on March 11, 1952, after the issuance of by-law No. 7625, which zoned the Syndicate's property for warehousing only and prohibited the building of dwellings thereon and at which time the Syndicate knew of the impossibility of going ahead with the project not only because of this restrictive by-law but also because of the definite refusal of Central Mortgage and Housing to approve of the loan, it went ahead and extended the option to Parcel B, thereby committing itself to an immediate payment of $5,000, an additional payment of $25,000 on account of the purchase price on April 15, 1952, an increase of the original purchase price by $1,000 to be paid in cash by April 15, 1952, thus leaving an amount outstanding, to which they also committed themselves, of $40,000 due and payable on April 15, 1953.

Such an important commitment, as we have just seen, entered into after the Syndicate knew that it was no longer prepared to go along with its original intention and build residences on the land can only strengthen my conviction that the managing committee of the Syndicate to whom the other members were content to leave the details of the transactions on the date of the extension of this option of Parcel B on March 11, 1952, definitely acquired it for the sole purpose of reselling it at a profit as soon as possible which it eventually did. I might add here that, although Mr. Lane, with some hesitation, stated that he thought the

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Syndicate was committed to purchasing this Parcel B, such was not the case as at that time $5,100 only had been paid for the option and it is not even sure that this amount would have been appropriated by the optionor in the event the option was not taken up. In any event it could have meant at the most a loss of $5,000.

Now the same applies to the Newshep Syndicate, which, as we have seen, was organized and set up long after the residential development of Mainshep had been given up and there is no evidence of any attempt to build anything on this land.

It is therefore also clear here that the lands purchased by the Newshep Syndicate, of which three of the respondents, C. H. Lane, N. S. Robertson and F. Turville were members, were commercial purchases looking to resale, i.e., adventures or concerns in the nature of trade.

Mr. Lane raised another point applicable however to his case only which is that of the 3,400 units he owned in the Newshep Syndicate, 1,425 were held by him in trust for his wife and that the proceeds from the realization of this Syndicate's assets were divided between them in that proportion. At p. 46 of the transcript he explains why these units were held in his name:

> A. To go back, Cyril R. DeMara, who was one of the managers, and I discussed the question of wives and we thought to avoid having to call them to meetings and send notices and that sort of thing, the husbands would hold them in trust, and he did the same for his wife, as it appears in the lower court, and I had some for my wife.
>
> To obtain the money we put a new mortgage on a house which was jointly owned and out of that mortgage the old mortgage was paid off and the net result was divided between my wife and myself and she paid for what she received for units in the New Sheppard Syndicate. Subsequently, when a call was received, she had no more money and I put in just for myself and that is how the units, this proportion between us. The monies were divided and cheques were issued to me and I paid my wife. There was one error where I guess my secretary knowing of this interest, issued the cheque directly to Mrs. Lane but by and large I paid for it and it was paid to her.

This statement appears to be corroborated by Ex. J which is the mortgage document referred to by Mr. Lane and which establishes that on April 12, 1951, both he and his wife borrowed $9,000, part of which was used to purchase the units in the Sheppard Syndicate which apparently existed at that time but which had not yet been formalized in the later New Sheppard Syndicate agreement of September 5, 1952.

This document indicates that both Mr. Lane and his wife became jointly responsible for the money borrowed and covenanted to pay it.

In view of this, it would appear that the 1,425 units were beneficially owned by the respondent's wife and as the money used to purchase these 1,425 units was borrowed by her and was her money, this would take it out of the provisions of s. 21(1) of the *Income Tax Act* which to be applied requires that property be transferred to one's spouse and, consequently, of the 3,400 units in Newshep it must be held that 1,425 belonged to the respondent's wife.

He then raised another point which is that part of the monies invested by him in the Syndicates was borrowed and that any interest paid on monies so borrowed should be allowed as an expense. This submission, in my opinion, should be accepted provided satisfactory evidence is adduced and this matter is referred back to the Minister for reconsideration and reassessment.

It therefore follows that on the particular facts and circumstances of this case, I must and do find that of the 3,400 units held in the name of the respondent in the Newshep Syndicate, 1,425 belonged to his wife; that the matter of the interest on the money borrowed by the respondent to purchase his interest in the Syndicates be and is hereby referred back to the Minister for reconsideration and reassessment; that the profits realized by him from the sale of the Mainshep Syndicate property as well as those realized from the sale of the lands belonging to the Newshep Syndicate, were not enhancements of the value of investments but were made in the operation of a speculative business scheme for profit making and are adventures in the nature of trade and, therefore, taxable.

They are, because of the definition of "business" in s. 139(1)(*e*) income from a business within the meaning of s-ss. (3) and (4) of the *Income Tax Act*.

As the Minister was right in assessing the respondent as he did for the taxation years involved this appeal is therefore allowed and the appellant will be entitled to the costs to be taxed in the usual way in the eight appeals but as the latter were heard on the same evidence and at the same

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time, counsel for the appellant will be entitled to one set of counsel fee at trial only to be apportioned between the eight respondents with the exclusion of Mrs. Kathleen DeMara.

Judgment accordingly.

Editor's Note: The appeals in *Minister of National Revenue v. H. A. Smith, Minister of National Revenue v. John Van Nostrand, Minister of National Revenue v. Mrs. A. Mulholland, Minister of National Revenue v. C. Mulholland, Minister of National Revenue v. W. Z. Estey, Minister of National Revenue v. Norman S. Robertson* and *Minister of National Revenue v. F. D. Turville,* referred to in the foregoing reasons for judgment at p 868 were dealt with by consent on the same evidence and argument as that of the appeal in the case of *Minister of National Revenue v. Clifton H. Lane,* above reported, and for the reasons set out, the appeals were likewise allowed.

The appeal in *Minister of National Revenue v. Kathleen DeMara* was allowed after the respondent failed to appear at the opening of the hearing and the Court was informed through her solicitors that she did not wish to take any further part in the proceedings.

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nov. 22
1964
fév. 20

ENTRE:

LA CAISSE POPULAIRE DE ST-CALIXTE DE KILKENNY ... REQUÉRANTE,

ET

SA MAJESTÉ LA REINE ....INTIMÉE.

Couronne—Pétition de droit—Colis confié à la poste—Colis volé—Loi sur la Responsabilité civile de la Couronne, S. du C. 1-2 Eliz. II, 1952-53, ch. 30, art. 3(1)(a)—Loi des Postes, S.R.C. 1952, ch. 212, arts. 2(1), 40—Action en recouvrement de la perte subie—Entrepreneur de transport postal—Contrat avec le Ministère des Postes—Action rejetée.

Dans sa pétition de droit, la requérante réclame de la Couronne des dommages prétendument occasionnés par un présumé agent de la Couronne dans l'exécution de ses fonctions. Entrepreneur seul et indépendant, sous contrat avec le ministère des Postes, cette personne assumait la levée postale sur un certain parcours. La gérante de la caisse populaire avait confié au bureau de poste, à un endroit du parcours, un paquet ficelé, étiqueté et scellé contenant $14,000.00 en billets de banque. Alors qu'il prenait livraison de quelques sacs du courrier, l'entrepreneur se fit voler son camion et l'envoi contenant les $14,000.00 qui ne furent jamais retracés.

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La requérante, prétendant procéder sous l'empire de la *Loi sur la Responsabilité civile de la Couronne* S. du C. 1952-53, ch. 30, art. 3(1)(*a*) et faire assumer, dans les circonstances, la responsabilité au Ministère des Postes, poursuit en recouvrement de la somme susdite.

Comme défense, l'intimée plaide que l'entrepreneur, en considération d'une entente contractuelle avec le Ministère des Postes, assume la qualité de contracteur indépendant, et n'est pas l'agent ni le préposé de l'intimée. Conséquemment, cette dernière ne saurait être tenue responsable. Elle invoque de plus les dispositions de la *Loi des Postes*, S.R.C. 1952, ch. 212, arts. 2(1) et 40.

Jugé: La requérante n'a droit à aucune compensation des dommages réclamés dans sa pétition de droit.

2. En l'occurrence, la *Loi sur la Responsabilité civile de la Couronne,* S. du C. 1-2, Eliz. II, ch. 30, 3(1)(*a*) ne s'applique point. Le statut précité doit céder place à une législation particulière intitulée: *"Loi des Postes,* S R.C. 1952, ch. 212, et en particulier, les articles 2(1) et 40 ci-après cités:

«2(1) employé de la poste signifie une personne employée à toute opération de la poste au Canada mais ne comprend pas un *entrepreneur de transport postal ou un employé de ce dernier.*»

L'article 40 de la *Loi des Postes* édicte que:

«Ni Sa Majesté, ni le Ministre des Postes n'est responsable envers qui que ce soit, à l'égard d'une réclamation découlant de la perte, du retard ou du traitement défectueux de tout objet déposé à un bureau de poste, sauf les prescriptions de la présente loi ou des règlements.»

3. La clause 10 du contrat P-3 intervenu entre le Ministère des Postes et l'entrepreneur de livraison postale stipule que:

«L'entrepreneur s'engage en outre à protéger les dépêches, quand elles seront en route, contre les intempéries ou autre cause d'avarie et contre les dommages de toutes sortes; et, à tenir constamment les sacs sous sa propre garde ou celle des courriers employés par lui, sauf pendant que les dépêches sont examinées par un maître de poste ou autre employé de la poste dûment autorisé.»

Pareille stipulation «ne saurait être écartée en vertu de l'exception» *res inter alios acta.*

4. Il n'y a aucun lien de droit entre la requérante et l'intimée vu que l'entrepreneur de livraison postale n'était ni l'agent ni le préposé de l'intimée mais uniquement un contracteur indépendant.

PETITION DE DROIT en recouvrement d'une somme d'argent perdue à la suite d'un vol de courrier.

La cause fut instruite devant l'Honorable Juge Dumoulin à Montréal.

Claude Gagnon pour la requérante.

Gaspard Côté pour l'intimée.

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Les faits et questions de droit sont exposés dans les motivés que rend maintenant (20 février 1964) Monsieur le Juge Dumoulin:

La Caisse populaire de St-Calixte de Kilkenny réclame de Sa Majesté la Reine, intimée, par cette pétition de droit, une somme de $14,000 en compensation des dommages prétendument occasionnés par un préposé ou agent de Sa Majesté, agissant alors dans l'exécution de ses fonctions.

Les faits qui, selon la prétention de la requérante, donneraient ouverture à ce recours, sont ci-après relatés.

Le 26 janvier 1960, Dollard Pérusse, camionneur, domicilié à Montréal, signait un contrat par lequel il s'engageait à transporter les «dépêches» de Sa Majesté entre Montréal et Rawdon avec obligation d'effectuer la levée du courrier postal dans plusieurs municipalités intermédiaires. Dans ce document, pièce P-3, Pérusse est qualifié d'entrepreneur et un prix annuel de $5,819.85 lui est consenti pour la bonne exécution de ce service quotidien de transport des matières postales. Signalons au passage la clause 10 de la pièce P-3:

> L'entrepreneur s'engage en outre à protéger les dépêches, quand elles seront en route, contre les intempéries ou autre cause d'avarie et contre les dommages de toutes sortes; et, à tenir constamment les sacs sous sa propre garde ou celle des courriers employés par lui, sauf pendant que les dépêches sont examinées par un maître de poste ou autre employé de la poste dûment autorisé.

Il semblerait bien, à cette lecture, que l'entrepreneur assume entière responsabilité «contre les dommages de toutes sortes», et assure la sauvegarde des colis et effets dont il prend livraison à l'occasion de son service journalier.

Le 22 août 1960, la gérante de la Caisse Populaire à St-Calixte, comté de Montcalm, Madame Armand Hervieux, avait confié au bureau de poste de l'endroit, pour transmission à la succursale régionale des Caisses populaires, à Joliette, un paquet, dûment ficelé, étiqueté, et scellé, contenant $14,000 en billets de banque. Mademoiselle Lise Hervieux, la jeune fille du témoin précité, déposa personnellement ce colis à la poste à St-Calixte et en obtint la certification, ainsi qu'il appert à la pièce P-2 portant la date du 23 août.

Quelques heures plus tard, Dollard Pérusse recueillait dans son camion le courrier expédié par le bureau de St-Calixte comprenant, entre autres envois, les $14,000 ci-haut mentionnés.

L'un des points d'arrêt du parcours à suivre était au village de Bois-des-Filion. Pérusse stoppa vis-à-vis la boîte postale de l'endroit et dit avoir éteint le moteur de son véhicule, mais négligea de retirer la clé d'allumage. Cette boîte se trouvait à environ 50 pieds du camion, dont le conducteur avait aussi ouvert le coffre arrière afin d'y déposer de nouveaux colis. Pérusse eut à peine le temps de prendre livraison de quelques sacs quand il constata la mise en marche de son camion, réalisant aussitôt qu'il venait d'être victime d'un vol. Les parties conviennent que l'envoi contenant $14,000 en billets ne fut jamais retracé.

La requérante allègue au premier paragraphe de sa pétition que la loi des postes attribuerait «la responsabilité de la livraison des lettres et colis déposés à la poste . . . au Ministère des Postes présidé par le Ministre . . .». Cette prétention me paraît dépasser le texte de l'article 3 qui, on va le lire, ne fait pas mention de la responsabilité découlant de la livraison des lettres et colis. Je cite:

> Est établi un département du gouvernement du Canada, appelé ministère des Postes, dont le siège est à Ottawa et auquel préside le ministre des Postes nommé par commission sous le grand sceau du Canada. (1951, c 57, art. 3)

Il convient, cependant, de joindre à ce texte le sous-paragraphe 2 de l'article 2, qui se lit:

> (2) Un article est censé être en cours de transmission à compter de son dépôt à un bureau de poste jusqu'à sa livraison.

Nous verrons plus loin, à l'article 40, ce qu'il faut penser, en l'occurrence, de cette présomption. Dans les articles 4 et 7 de la pétition de droit, la Caisse populaire de St-Calixte prétend que le courrier, Dollard Pérusse, était «dans l'exécution de ses fonctions pour le ministère des Postes . . .» quand il prit possession du colis dont il s'agit et qu'il était alors le préposé et l'agent de la Couronne.

La défense produite par l'intimée comprend, d'abord, la négation en droit des paragraphes 1 et 2 de la pétition et celle, en faits et en droit, des paragraphes 5, 6, 7, 8, 9 et 10, puis, dans son article 5, soumet que:

> 5. Eu égard aux termes dudit contrat, le dénommé Dollard Pérusse, au moment du vol de son camion et des sacs de courrier qui y étaient contenus, le 23 août 1960, au Bois-des-Filion, agissait pour son propre compte et n'était en aucun titre l'employé ou le préposé de la Couronne. Il n'existe donc aucun lien de droit entre les parties

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C'est donc sous cet aspect de fait et de droit que s'engage le litige.

Le savant procureur de la requérante, Me Claude Gagnon, C.R., a fait valoir initialement que le différend relevait de la *Loi sur la responsabilité de la Couronne,* S.R.C. 1-2 Élisabeth II, c. 30, et, notamment, du sous-paragraphe (*c*) de l'article (2) à l'effect que « 'préposé' comprend un agent . . .», ce qui, selon Me Gagnon, conviendrait au cas de Dollard Pérusse.

Il sera dit ci-après que, dans l'opinion de la Cour, le statut précité devrait, en l'espèce, céder place à une législation particulière intitulée «*Loi sur les Postes*», S.R.C. 1952, c. 212.

Mais, supposé même, pour fins de discussion, que Pérusse fut un agent de la Couronne, la mésaventure qui lui advint le 23 août 1960 est-elle autre chose qu'un incident de force majeure donnant ouverture, à son égard et à celui de son présumé employeur, à l'exonération prévue par l'article 1072 du Code civil, dont le texte suit:

> Le débiteur n'est pas tenu de payer les dommages-intérêts lorsque l'inexécution de l'obligation est causée par cas fortuit ou force majeure, sans aucune faute de sa part, à moins qu'il ne s'y soit obligé spécialement par le contrat.

Assurément, Pérusse commit l'imprudence de laisser en place la clé d'allumage et cela, en violation des instructions périodiquement transmises par le Ministre des Postes à ses entrepreneurs (voir pièce I-3) mais, outre que cet oubli ne paraît pas être la cause immédiate («*causa causans*») du vol du camion, les bandits possédant, on le sait, les dispositifs requis à la mise en marche des moteurs d'autos, il resterait que la clause 10 du contrat, pièce P-3, tantôt récitée, met au compte de l'entrepreneur la responsabilité du transport des colis postaux.

Ce dernier document ne saurait être écarté par la requérante en vertu de l'exception «*res inter alios acta*» car, de deux choses l'une, Pérusse est ou n'est pas l'agent de l'intimée; dans la négative, aucun recours n'existe et, si l'hypothèse affirmative est la bonne, ce contrat seul établit un lien entre celui-ci et le Ministre, cela, à la connaissance même de la requérante. Au surplus, je ne puis accueillir cette alternative. Le célèbre juriste anglais, Sir Frederick Pollock, dans son ouvrage «The Law of Torts», 13th edition, 82, expose, avec une lucidité parfaite, les caractéristiques inhérentes à la qualité de contracteur qui, à mon sens, qualifierait la relation juridique existant entre Pérusse et le ministère des Postes:

> An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand. For the acts or omissions of such a one about the performance of his undertaking his employer is not liable to strangers, no more than the buyer of goods is liable to a person who may be injured by the careless handling of them by the seller or his men in the course of delivery. If the contract, for example, is to build a wall, and the builder "has a right to say to the employer, 'I will agree to do it, but I shall do it after my own fashion; I shall begin the wall at this end and not at the other;' there the relation of master and servant does not exist, and the employer is not liable".

La requérante invoque encore l'art. 18 du contrat P-3 pour établir que Pérusse ne serait pas un contracteur indépendant mais bien un agent pur et simple. La lecture de cette stipulation, à laquelle je réfère les parties, démontre uniquement qu'elle tient lieu de clause pénale et ne saurait avoir d'autre signification.

Mention a été faite des articles 8 et 22 de la *Loi des Postes*, auxquels je ne puis, toutefois, reconnaître de valeur probante dans le contexte de cette instance.

Il reste à noter que l'habile procureur de la Caisse populaire tente aussi d'insérer le débat dans les cadres de la *Loi sur la Responsabilité civile de la Couronne*, alléguant l'imprudence fautive de Pérusse, agent supposé de l'État, dont la responsabilité serait alors engagée, selon l'article 1054 du Code civil de la Province de Québec, auquel renvoit l'article 3(1)(*a*) du statut 1-2 Élisabeth II, c. 30, dont voici la teneur:

> . . .
>
> 3(1) La Couronne est responsable *in tort* des dommages dont elle serait responsable, si elle était un particulier en état de majorité et capacité,
>
> *a*) à l'égard d'un acte préjudiciable commis par un préposé de la Couronne, . . .

Puisque le législateur fédéral a porté une loi particulière régissant les modalités et structurant les divers organismes du service postal, il importe de recourir à ce statut et à nul autre, pour vider le débat.

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Dumoulin J.

Au sous-paragraphe (1) de l'article 2 (1) de la *Loi des Postes,* nous lisons ce qui suit:

> . . .1) «employé de la poste» signifie une personne employée à toute opération de la poste au Canada, mais ne comprend pas un entrepreneur de transport postal ou un employé de ce dernier;

La phraséologie de ce texte convient en tout point à celle du contrat intervenu entre la requérante et l'intimée, où Pérusse est désigné sous le qualificatif d'entrepreneur à chaque clause, ou presque, de cet écrit. Puis l'article 40 paraît viser explicitement l'éventualité ici soumise; cette disposition est ainsi libellée:

> 40. Ni Sa Majesté ni le ministre des Postes n'est responsable, envers qui que ce soit, à l'égard d'une réclamation découlant de la perte, du retard ou du traitement défectueux de tout object déposé à un bureau de poste, sauf les prescriptions de la présente loi ou des règlements.

Il n'est guère besoin de signaler qu'en l'espèce la requérante recherche l'indemnisation civile d'une perte découlant du défaut de livraison d'un envoi de $14,000 à la Caisse populaire de Joliette.

Vainement, la requérante prétendrait récuser la *Loi des Postes* sous prétexte qu'elle n'est pas mentionnée aux sous-paragraphes 3, 4 et 5 de l'art. 3, de la *Loi sur la Responsabilité civile de la Couronne,* dont le sous-paragraphe suivant, (6), décrète expressément que:

> (6) Rien de contenu au présent article ne rend la Couronne responsable à l'égard d'une chose accomplie ou omise dans l'exercice d'une faculté ou d'un pouvoir qui, sans l'adoption du présent article, aurait pu être exercé en vertu de la prérogative de la Couronne, ou de quelque faculté ou pouvoir conféré à la Couronne par statut, . . .

L'autorité de la loi postale est sauvegardée au désir évident de ce paragraphe.

La Cour n'hésite pas à tenir pour dûment établi par tous les facteurs de ce litige que Dollard Pérusse n'était ni l'agent ni le préposé de l'intimée, mais uniquement un contracteur indépendant, assumant, en considération d'un prix contractuel, le service de livraison postale entre Montréal et Rawdon.

A ce sujet, je partage l'avis de mon savant collègue, monsieur le Juge John Kearney, dans l'affaire de *Lendoiro* et *la Reine*[1] où il y allait aussi d'une poursuite en dommages

[1] [1962] Ex. C.R. 59 at 65-66.

intentée à la Couronne selon la *Loi de la Responsabilité civile.* A cette occasion, monsieur le Juge Kearney écrivait que:

This leads to the important issue of whether by reason of s. 40 of the *Post Office Act* s. 3(1)(*c*) of the *Crown Liability Act* has any applicability in the present case.

It is submitted on behalf of the appellant that s. 3(1)(*c*) of the *Crown Liability Act* which came into force on November 15, 1953, if it did not completely suspersede the exculpatory provisions of the *Post Office Act* which have been on the statute books for many years, at least placed decided limitations on the effect to be given to such provisions. It need hardly be said that the two acts must be read together.

In this connection, counsel for the suppliant submitted that s. 3(1)(*a*) of the *Crown Liability Act* lays down the general rule that liability attaches to the Crown in the same manner as it does to ordinary citizens in respect of a tort committed by one of its servants, except in certain instances specifically mentioned in the Act. Thus, for example, s. 3(4) states that notwithstanding s. 3(1) the liability of the Crown is limited by reason of certain provisions of the *Shipping Act;* similarly, s 4(1) provides that no procedings lie against the Crown if the claimant is entitled to a pension or compensation payable out of the Consolidated Revenue Fund; section 4(3) exempts the Crown from liability for damages sustained by any person, caused by a tort committed by a servant of the Crown while driving a motor vehicle on a highway, unless the driver of the motor vehicle or his personal representative is liable for the damages so sustained.

Counsel for the suppliant concluded from the foregoing that the *Post Office Act* was inapplicable because no mention is made of it among the foregoing exceptions. Assuming for a moment such to be the case, the following quotation from *Barker v. Edgar* [1898] A.C. 748 at 754, is found in Craies on *Statute Law,* 4th ed., p. 321:

"When the Legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms."

Although it is true that the *Post Office Act* is not mentioned by name in the *Crown Liability Act,* I think it is referred to by implication in the provisions of subsection (6) of section 3 which reads in part as follows:

"Nothing in this section makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority that, if this section had not been passed, would have been exercisable by virtue of the prerogative of the Crown, *or any power or authority conferred on the Crown by any statute,* . . ." (emphasis supplied)

I think the statutory provisions of section 40 of the *Post Office Act,* which was enacted in its present form by S. of C. 1940, c. 57, clearly vest in the Crown the power or authority to determine by regulation to what extent, if any, it will be liable for claims arising from the loss, delay or mishandling of anything deposited in a post office—and that in the absence of anything to the contrary contained either in the Act itself or its regulations, no liability exists.

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Dumoulin J.

Quant à cette autre cause qui me fut citée par la poursuite, *Cour de Recorder et Cité de Montréal* v. *Société Radio-Canada*[1], il me suffira de souligner que, dans ce cas, l'honorable Juge Létourneau, au nom de la Cour d'appel, s'est efforcé de prouver que la *Loi canadienne sur la Radiodiffusion,* 1936, 1 Ed. VIII, c. 24, arts. 8, 23 et 24, faisait de la société Radio-Canada un rouage gouvernemental ou encore un agent ou mandataire de la Couronne, et que, dans l'espèce présente, la loi pertinente, celle des Postes, exclut nommément de son rayon d'action un entrepreneur ou contracteur indépendant comme l'était Dollard Pérusse.

PAR CES MOTIFS, cette Cour ordonne et décide que la Requérante n'a pas droit au recours sollicité dans sa pétition, et que Sa Majesté La Reine pourra recouvrer de la dite requérante ses frais de Cour, après taxation.

Jugement conforme.

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déc. 11, 12 13 et 16

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janv. 15

ENTRE:

JEAN JULIEN FORTIN ....APPELANT;

ET

LE MINISTRE DU REVENU NATIONAL .... INTIMÉ.

Revenu—Impôt sur le revenu—Loi de l'Impôt sur le Revenu, S.R.C. 1952, ch. 148, art. 12(1)(b)—Ingénieur professionnel—Déboursés afférents à la pratique de la profession d'ingénieur professionnel—Dépenses réclamées à titre de déductions—Appel rejeté.

L'appelant réclamait initialement la déduction d'un montant global de $148,680 49, qui, selon lui, aurait représenté des dépenses et déboursés afférents à la pratique même de sa profession d'ingénieur professionnel. Plus tard, à l'enquête, il rectifia le chiffre de ses dépenses qu'il ramena au total de $131,553.42 comparé avec celui de $99,284.57 alloué par le Ministre, soit un écart de $32,268 85 sur lequel la Commission doit se prononcer.

Déférée en appel à la Commission celle-ci a maintenu la cotisation du Ministre. D'où le présent pourvoi devant cette Cour.

Jugé: L'appel est rejeté.

2. L'examen comptable des dépenses établi par l'intimé ne fut pas révoqué en doute par l'appelant, ce qui constitue un aveu implicite du bien-fondé des prétentions de l'intimé.

[1] (1941) 70 B R. 65, à 72-73-74-75

3. La cotisation de $99,284.57, dressée par l'intimé pour dépenses réclamées et accordées lors des cotisations, est en tout point conforme aux dispositions de la *Loi de l'Impôt.*

APPEL d'une décision de la Commission d'appel de l'Impôt.

La cause fut instruite par l'Honorable Juge Dumoulin à Québec.

Roland Fradette, c.r. pour l'appelant.

Paul Boivin, c.r. pour l'intimé.

Les faits et questions de droit sont exposés dans les motivés de la décision que rend maintenant (15 janvier 1964) Monsieur le JUGE DUMOULIN:

Le 16 Janvier 1961, l'appelant interjetait appel devant cette Cour d'une décision de la Commission d'appel de l'impôt, en date du 6 décembre 1960, concernant la cotisation du revenu de monsieur Jean Julien Fortin pour les années d'imposition 1948 à 1955, inclusivement.

L'appelant, domicilié à Chicoutimi, province de Québec, est un ingénieur professionnel exerçant pour son propre compte depuis 1957, alors qu'il cessait d'être à l'emploi de la compagnie Aluminum of Canada, Ltd., dans la ville d'Arvida.

L'enquête et audition de cette cause en première instance, si je puis dire ainsi, ne dura pas moins de onze jours, mais se réduisit à très peu de chose devant cette Cour. Aucun témoin ne fut cité et l'appelant, par l'intermédiaire de son savant procureur, M^{e} Roland Fradette, C.R., se désista de la plupart des moyens de droit précédemment soulevés, ceux, notamment, du transport de créances consenti par Jean Julien Fortin en faveur d'une petite compagnie qu'il contrôlait personnellement.

En Cour de l'Échiquier, les deux parties convinrent de produire, comme preuve unique, le dossier de l'affaire telle qu'entendue par la Commission d'appel de l'impôt. Conformément aux faits qui me furent soumis, le débat tout entier peut se résumer de la façon que voici: l'appelant réclamait initialement la déduction d'un montant global de $148,680.49, qui, selon lui, aurait représenté des dépenses et déboursés afférents à la pratique même de sa profession.

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La somme précitée eut alors été déduite du revenu imposable imputé à Fortin par le Ministre du Revenu national, soit $247,519.44. A l'enquête, le chiffre des dépenses supposément encourues par l'appelant fut, de l'aveu même de son procureur, ramené au total de $131,553.42.

A la page 57 de la transcription des notes sténographiques des plaidoiries, nous lisons ce qui suit:

> Par Me Paul Boivin, C.R.
>
> Procureur de l'intimé.—
>
> . . . et, son chiffre de dépenses, d'après Monsieur Fortin lui-même, il arrivait . . . il réclamait $131,553.42
>
> PAR LA COUR
>
> Me Fradette, convenez-vous de ça?
>
> Par Me Roland Fradette, C.R.
>
> Procureur de l'appelant.—
>
> Oui, j'en conviens. Ça apparaît d'après les pièces. Là, je m'en rends compte.

Un acquiescement aussi catégorique au chiffre rectifié des dépenses alléguées, ne laissait à la Cour que de prononcer sur la différence entre ce montant et celui de $99,284.57 alloué par le département, soit un écart de $32,268.85.

L'intimé avait confié à certains comptables de son bureau de Québec, la préparation minutieuse d'un relevé des dépenses alléguées, par l'ingénieur Fortin, et la Cour n'hésite pas à reconnaître que ces fonctionnaires se sont acquittés de cette tâche avec un soin et une précision remarquables. Ce long travail est en quelque sorte l'expertise critique des états produits par Jean Julien Fortin.

Me Paul Boivin, C.R., procureur de l'intimé, a confiné sa plaidoirie dans les cadres stricts de l'exposé comptable dont il s'agit, s'appliquant à faire ressortir l'exactitude des calculs et, le cas échéant, les motifs qui avaient induit le Ministre du Revenu national à refuser la déductibilité d'une partie assez importante de la détaxe postulée.

A titre d'exemple, nous voyons, presque à chaque page de cette étude, qui se trouve au dossier mais non pas à titre de pièce produite, des postes ainsi libellés: «charité», «impôt personnel», «salaire J.J. Fortin», «salaire des employés de La Tourbière (Peat Moss)», «divers» (sans spécification).

Un état plus succinct, que j'ai intitulé 'Grand Tableau', fut également utilisé par le procureur de l'intimé, et ce document récapitulatif comprend neuf colonnes. Je me limiterai à signaler que la quatrième, intitulée «Déboursés qui, à leur face même, ne constituent pas des frais d'opérations», établit un chiffre de $85,001.99; que la sixième, intitulée «Déboursés dont la nature n'est pas expliquée par pièces justificatives», donne un total de $56,059.56; et que la colonne 9 consent une déduction de $99,284.57 pour «Dépenses réclamées et accordées lors des cotisations».

L'intimé a soutenu, en outre, qu'une application stricte et rigoureuse de la Loi eut ramené cette déduction à une somme de $69,263.27, mais que le ministère concerné n'entendait cependant pas revenir sur l'allocation première de $99,284.57.

L'appelant ne jugea pas à propos de révoquer en doute cet examen comptable soigneusement particularisé ni d'en contester la moindre partie. Ce silence laissa la Cour, je dois le dire, sous l'impression d'un aveu tout au moins implicite du bien-fondé des prétentions de l'intimé et, après un ré-examen de la preuve produite, il m'est impossible de déceler aucune raison qui puisse m'induire à ne pas les tenir pour légalement établies.

Par ces motifs, la Cour conclut à l'inadmissibilité de l'appel et que la cotisation dressée par l'intimé paraît en tout point conforme aux dispositions de la Loi de l'impôt. L'appel est rejeté et l'intimé aura droit de recouvrer tous les frais après taxation.

Jugement conforme.

1963 nov. 20 — 1964 janv. 16

ENTRE:

CLAUDE BELLE-ISLE ....APPELANT;

ET

LE MINISTRE DU REVENU NATIONAL .... INTIMÉ.

Revenu—Impôt sur le revenu—Loi de l'impôt sur le revenu, S.R.C. 1952, ch. 148, arts. 20(1), (5)(c), 11(3)(d)—Déductions admises dans le calcul du revenu—Biens susceptibles de dépréciation—Vente de biens susceptibles de dépréciation—Produit d'une vente de biens—Excédent du produit d'une vente de biens sur le coût en capital non déprécié—Partie irrécouvrable du produit d'une vente de biens—Appel rejeté.

En 1951 l'appelant acquit un hôtel au prix de $175,000. Après sept ans d'exploitation, il le revendit $111,280 établi comme suit: 5,896 actions ordinaires de la «Cie Gérard Dessert Ltée», qui lui sont transportées par le nouvel acquéreur de l'hôtel, et évaluées à $29,480. En plus, l'acheteur assume une hypothèque de $81,800 sur cet immeuble. Le même jour, l'appelant vend à Gérard Dessert pour un prix de $121,700 les 5,896 actions sans valeur au pair et entièrement libérées de la Cie Gérard Dessert Ltée qu'il contrôle personnellement.

L'appelant reçoit au comptant $50,000 de Gérard Dessert qui assume le remboursement de l'hypothèque de $81,800 et le solde de la revente des actions, soit $71,700, devant s'effectuer à raison d'un versement mensuel de $400 avec prorogation jusqu'à l'année 1991 pour le complément définitif de la transaction.

Il resterait que l'appelant aurait disposé de son hôtel et du fonds commercial contre une hypothèque de $81,800 acceptée par la Cie Gérard Dessert Ltée, plus $121,700, dont $50,000 versés comptant en compensation des actions acquises par Gérard Dessert; au total, un coût d'achat de $203,500.

L'intimé ne postule que la dépréciation consentie à l'appelant durant les sept ans d'exploitation de l'hôtel s'élevant à $70,884.26.

La Commission d'appel de l'Impôt, ayant rejeté l'opposition de Claude Belle-Isle à ce recouvrement de la dépréciation allouée, il en appelle de cette décision.

Jugé: L'appel est rejeté.

2. L'appelant ne peut justifier ses prétentions par un texte juridique à l'encontre de l'article 20 sous-paragraphe (1) et (5)(*c*) de la *Loi de l'Impôt sur le revenu* S.R.C. 1952, ch. 148 se lisant comme suit:

20(1) Lorsque, dans une année d'imposition, il a été disposé de biens d'un contribuable, susceptibles de dépréciation et appartenant à une catégorie prescrite, et que le produit de la disposition excède le coût en capital non déprécié, pour lui, des biens susceptibles de dépréciation de cette catégorie, immédiatement avant leur aliénation, le moindre

a) du montant de l'excédent, ou

b) du montant de ce que serait l'excédent s'il avait été disposé des biens pour ce qu'ils ont coûté en capital au contribuable doit être inclus dans le calcul de son revenu pour l'année.

. . .

(5)

. . .

(c) «produit d'une disposition» de biens comprend
(i) le prix de vente des biens qui ont été vendus

. . .

3. En outre, l'article 11(3)(d) de la *Loi de l'Impôt sur le Revenu* assure à l'appelant une mesure suffisante de protection advenant la déconfiture financière de l'acheteur; l'article se lisant comme suit:

. . .

11(3d) Lorsqu'un montant dû à un contribuable au titre ou au compte du produit de la disposition de biens susceptibles de dépréciation du contribuable et appartenant à une catégorie prescrite, déterminé aux fins de l'article 20, est établi par lui comme étant devenu une mauvaise créance dans une année d'imposition, on peut déduire, dans le calcul de son revenu pour l'année, le moindre des deux montants suivants:

(a) le montant ainsi dû au contribuable, ou

(b) le montant, s'il en est, par lequel ce qu'il lui en a coûté en capital pour ces biens, déterminé aux fins de l'article 20, excède l'ensemble des montants, s'il en est, qu'il a réalisés au compte du produit de la disposition.

4. Les deux prescriptions statutaires ci-haut citées suffisent à résoudre le problème sans qu'il soit besoin de recourir à l'article 137 qui est inapplicable en l'occurrence.

5. L'intimé était en droit de taxer la récupération de l'allocation du coût en capital réclamée par l'appelant dans les années antérieures à l'année de la vente et de postuler la remise de la dépréciation consentie à l'appelant durant les sept ans d'exploitation de l'hôtel Brunswick s'élevant à $70,884.26.

APPEL d'une décision de la Commission d'appel de l'Impôt.

L'appel fut entendu par l'Honorable Juge Dumoulin à Montréal.

J.-M. Poulin pour l'appelant.

Paul Boivin, c.r. pour l'intimé.

Les faits et questions de droit sont exposés dans les motivés de la décision que rend maintenant (16 janvier 1964) monsieur le Juge Dumoulin:

Le 19 mars 1963, la Commission de l'impôt maintenait une cotisation du 14 juillet 1960 par laquelle le Ministre du Revenu national exigeait de Claude Belle-Isle, l'appelant, pour l'année d'imposition 1958, un impôt de $37,730.80, plus un montant d'intérêt de $2,641.10, couvrant l'augmentation de taxe du contribuable pendant la période du

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14 juillet 1960 au 19 mars 1963. L'appelant se pourvoit en appel de cette décision.

Les Faits:

Le 23 juillet 1951, Claude Belle-Isle se portait acquéreur de l'hôtel "Brunswick" dans la ville de Richmond, province de Québec, pour un prix de $175,000, et en continua l'exploitation pendant environ sept ans.

Le 6 août 1958, Belle-Isle prétendait disposer de cet hôtel pour un prix de vente de $111,280 comprenant l'émission, en son nom, de 5,896 actions ordinaires de la compagnie «Gérard Dessert, Limitée», acquéreur de l'immeuble, qui assumait aussi une hypothèque de $81,800. Autrement dit, les actions ordinaires mises au nom de Belle-Isle étaient alors évaluées à $29,480, comme il appert à la pièce A-1, datée le 6 août 1958, reçue devant le notaire Georges Sylvestre de Sherbrooke.

Notons de suite que l'appelant admit, devant la Commission d'appel de l'impôt et en Cour de l'Échiquier, que cette première transaction ne fut pas faite à distance (at arm's length) puisqu'il contrôlait personnellement la compagnie Gérard Dessert Limitée, dont il s'était engagé à obtenir l'incorporation, tel que dit à la pièce A-4, paragraphe 4, ainsi rédigé:

> 4. Le vendeur obtiendra des lettres patentes constituant en corporation une compagnie qui achètera du vendeur son commerce ci-haut désigné pour des actions entièrement libérées et qui prendra à sa charge les dettes qui suivent: . . .

Le même jour, 6 août 1958, par un second acte notarié, reçu par le même officier public, Georges Sylvestre, Claude Belle-Isle revendait à Gérard Dessert personnellement les 5,896 actions ordinaires, sans valeur au pair, et entièrement libérées, du capital social de la compagnie Gérard Dessert Limitée, pour un prix sensiblement supérieur à celui de leur prétendue acquisition, soit $121,700 (cf. pièce A-2). Belle-Isle, dans ce même acte, reconnaissait avoir reçu au comptant un versement de $50,000 dont il donnait quittance à Gérard Dessert.

L'appelant, selon toute apparence, entendait faire un placement à long terme, puisque le remboursement de l'hypothèque de $81,800 ne devait s'effectuer qu'à partir du 1er septembre 1958, à raison de versements mensuels de $400, et le solde de la revente des actions à Gérard Dessert, soit $71,700 était aussi soumis à des conditions identiques de remboursement, à compter de l'extinction totale de l'hypothèque, ce qui prorogeait à 1991 le complément définitif de la transaction.

Le 14 juillet 1960, le Ministère de Revenu national, par une seconde cotisation, réclamait de Belle-Isle la taxe afférente au profit supposément réalisé sur la revente de 5,896 actions de la compagnie Gérard Dessert, Limitée, soit l'écart entre leur supposé prix d'achat, $29,480, et celui de leur cession à Gérard Dessert personnellement, $121,700, ou un gain de $92,220.

L'intimé, toutefois, ne persista pas dans cette prétention et, lors de l'enquête devant la Commission d'appel de l'impôt, amenda considérablement sa position juridique en ne postulant rien autre chose que la remise de la dépréciation consentie à Claude Belle-Isle durant les sept ans d'exploitation de l'hôtel Brunswick, s'élevant à $70,884.26.

Dès lors, les moyens de droit soulevés par chacune des parties deviennent assez manifestes; d'un côté, l'intimé désire récupérer la dépréciation ($70,884.26) allouée à un immeuble commercial dont le prix de vente aurait été d'environ $203,000 et, par contre, l'appelant fait valoir qu'il a vendu un fonds de commerce valant $3,500, et un hôtel au prix de $111,280, selon que stipulé au contrat notarié du 6 août 1958, pièce A-1, vente qui, nous l'avons vu, fut conclue arbitrairement en ce qui concerne, du moins, la valeur alors attribuée par Claude Belle-Isle aux 5,896 actions de la compagnie Gérard Dessert, Limitée. Il s'agit donc d'établir logiquement le prix de vente de l'hôtel Brunswick.

Et d'abord, s'il ne m'est pas loisible d'attacher une signification probante à la valeur unilatéralement attribuée dans le contrat, pièce A-1, par l'appelant, à ses actions de la compagnie Gérard Dessert, Limitée, cet acte indique bien, par ailleurs, les facteurs qui rendent vraisemblable la créance hypothécaire de $81,800 mise au compte de la compagnie précitée.

Le second contrat, pièce A-2, dont la simultanéité avec le précédent est parfaite, établit, de façon concluante, je crois, la valeur réelle attribuée aux actions par les parties contractantes, vendeur et acquéreur, un élément essentiel

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de toute vente, mais qui fait défaut dans ce que la pièce A-1 consigne. Si cette opinion est fondée, il resterait que Claude Belle-Isle aurait disposé de son hôtel et du fonds commercial contre une hypothèque de $81,800 acceptée par la compagnie Gérard Dessert, Limitée, plus $121,700, dont $50,000 versés au comptant, en compensation des actions acquises par Gérard Dessert; au total, un coût d'achat de $203,500.

Cela étant, les modalités de paiement de l'hypothèque et des actions sociales, réparties sur 33 ans, n'influent guère sur le contexte juridique de l'affaire, à moins qu'une disposition de la loi n'en autorise la considération. L'appelant n'a pas rapporté de texte justifiant cette prétention et l'article 20, sous-paragraphes (1) et (5) (*c*) de la *Loi de l'impôt sur le revenu*, S.R.C. 1952, ch. 148, ne paraît guère accréditer une telle interprétation; je cite:

20 (1) Lorsque, dans une année d'imposition, il a été disposé de biens d'un contribuable, susceptibles de dépréciation et appartenant à une catégorie prescrite, et que le produit de la disposition excède le coût en capital non déprécié, pour lui, des biens susceptibles de dépréciation de cette catégorie, immédiatement avant leur aliénation, le moindre

a) du montant de l'excédent, ou

b) du montant de ce que serait l'excédent s'il avait été disposé des biens pour ce qu'ils ont coûté en capital au contribuable.

doit être inclus dans le calcul de son revenu pour l'année.

. . .

(5)

. . .

(*c*) «produit d'une disposition» de biens comprend

(i) le prix de vente des biens qui ont été vendus

. . .

Au surplus, l'apurement différé de ces dettes ne crée aucun préjudice éventuel à l'appelant-vendeur advenant la déconfiture financière de l'acheteur, puisque l'article 11(3)(*d*) de la *Loi de l'impôt sur le revenu,* dont le texte suit, assure au premier une mesure suffisante de protection:

. . .

11 (3*d*) Lorsqu'un montant dû à un contribuable au titre ou au compte du produit de la disposition de biens susceptibles de dépréciation du contribuable et appartenant à une catégorie prescrite, déterminé aux fins de l'article 20, est établi par lui comme étant devenu une mauvaise créance dans une année d'imposition, on peut déduire, dans le calcul de son revenu pour l'année, le moindre des deux montants suivants:

a) le montant ainsi dû au contribuable, ou

b) le montant, s'il en est, par lequel ce qu'il lui en a coûté en capital pour ces biens, déterminé aux fins de l'article 20, excède l'ensemble des montants, s'il en est, qu'il a réalisés au compte du produit de la disposition.

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La Cour est d'avis que ces deux prescriptions statutaires suffisent à résoudre le problème sans qu'il soit besoin de recourir à l'article 137, dont l'applicabilité est plus que douteuse en l'occurrence. Elle estime également que l'intimé, comme il l'allègue au paragraphe 12 de sa réponse à l'avis d'appel ". . . était en droit de taxer la récupération de l'allocation du coût en capital réclamée par l'appelant dans les années antérieures à l'année de la vente".

Pour peu que cette citation, d'une rédaction aussi vague qu'imprécise, signifie que l'intimé postule la reprise de la dépréciation consentie à l'appelant, soit une somme de $70,884.26, la Cour, estimant fondée cette demande, l'accorde.

PAR CES MOTIFS, l'appel est rejeté et l'intimé aura droit de recouvrer tous ses frais après leur taxation.

Jugement conforme.

ENTRE:

1963 nov 26 — 1964 fev 12

LE MINISTRE DU REVENU NATIONAL .... APPELANT;

ET

Dr JEAN BEAUDIN .... INTIMÉ.

Revenu—Loi de l'Impôt sur le Revenu, S R C. 1952, ch. 148, art. 139(1)(e) Initiative ou affaire d'un caractère commercial—Pari sur courses de chevaux—Divertissements et passe-temps—Gains non taxables contre contribuable n'exerçant pas le métier ou la seule occupation de «bookmaker».

Médecin de campagne, l'intimé est propriétaire de chevaux de courses qui lui rapportent des gains. Il s'en sert à l'occasion pour ses visites médicales.

Le Ministre a cotisé les profits déclarés par l'intimé sur les gains obtenus aux courses pour les années 1957, 1958 et 1959, prétendant que ces gains provenaient d'une initiative ou affaire d'un caractère commercial au sens de l'art. 139(1)(*e*) de la Loi de l'Impôt sur le Revenu S.R.C. 1952, ch 148, soit: de courses de chevaux.

S'étant pourvu en appel devant la Commission, l'appel de l'intimé a été accueilli. D'où le présent pourvoi par le Ministre devant cette Cour.

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Jugé: Appel rejeté.

2. En interprétant une loi d'ordre fiscal, la Cour est liée par la doctrine et la jurisprudence qui exige une stricte et littérale concordance entre les termes du statut pertinent et les faits même de l'instance. Ici la preuve révèle que le témoignage de l'intimé ne peut être mis en doute, ni justifier la prétention de l'appelant qu'il s'agirait d'une initiative de nature commerciale.

3. Le degré d'intérêt ou de zèle selon lequel un contribuable s'adonne à un passe-temps n'en change pas pour autant la nature.

(c.f. Graham v. Green (1925) 2 K.B. 37, 30-42; 9 Tax Cases 309, 312-4; Down v. Compston (1937) 53, T.L.R. 545, 21 Tax Cases, 60).

APPEL d'une décision de la Commission d'Appel de l'Impôt. Appel rejeté avec dépens.

La cause fut instruite devant l'Honorable Juge Dumoulin à Montréal.

Paul Boivin, c.r. et *Paul Ollivier,* c.r. pour l'appelant.

Honorable Sénateur Gustave Monette, c.r. et *R. Michaud* pour l'intimé.

Les faits et les questions de droit sont exposés dans les motivés de la décision que rend maintenant (12 février 1964) Monsieur le JUGE DUMOULIN.

Le 30 janvier 1963, la Commission de l'impôt accueillait l'appel interjeté par le D^{r} Jean Beaudin de Napierville, P.Q., d'une cotisation imposée par le Ministre du Revenu national relativement aux revenus de l'intimé pour les années d'imposition 1957, 1958 et 1959.

Le Ministre du Revenu national ajoutait aux profits déclarés par l'intimé pour les années 1957, 1958 et 1959, les montants ci-dessous:

1957	$ 4,230
1958	$ 6,918
1959	$20,000

Ces ajoutés aux déclarations du D^{r} Beaudin provenaient, selon le Ministre intéressé, d'une «initiative ou affaire d'un caractère commercial» au sens de l'art. 139(1)(*e*) de la *Loi de l'impôt sur le revenu* (S.R.C. 1952, c. 148) soit: de courses de chevaux.

Le D^{r} Jean Beaudin, entendu en témoignage, a déposé devant la Cour qu'il pratiquait sa profession de médecin, depuis 30 ans, dans le secteur rural de Napierville. Grand amateur de chevaux, il a toujours manifesté un vif intérêt, à titre sportif, aux courses locales où il faisait participer périodiquement la bête dont il se servait pour ses visites médicales.

En 1956, il se rendit, avec quelques amis, à Delaware, Ohio, où il fit l'acquisition, au prix de $1,700, d'un trotteur surnommé «Carpetbagger». Après que le Dr Beaudin eut soumis l'animal à un entraînement approprié, cet achat s'avéra très heureux, comme l'établit l'annexe # 3 de la déclaration de l'intimé pour 1959, pièce non cotée en autant que je le sache, mais que l'on trouvera dans le dossier, ici produit, de la Commission d'appel de l'impôt.

Nous avons vu ci-haut le relevé triennal des gains qui, en 1959, atteignaient la somme rondelette de $20,000. Jusqu'en 1958, l'intimé gardait un homme d'écurie qu'il paraît avoir remplacé par un jockey dont la rémunération initiale de $500 fut portée à $2,000 en 1959.

Beaudin, en 1957, avait acheté un camion, payé $300, affecté au transport de son cheval trotteur, Carpetbagger, dès lors inscrit aux pistes montréalaises de Blue Bonnets et du Parc Richelieu. L'intimé achetait aussi, en 1958, pour $300, une terre de 4 arpents destinée à l'entraînement de ses deux chevaux, dont un seul, cependant, le célèbre Carpetbagger, participait fréquemment aux épreuves sportives.

L'appelant a mis en regard les profits assurés par le coursier et les honoraires professionnels du Dr Beaudin, qui, durant l'année 1959, étaient de l'ordre de $8,755, mais que des dépenses de $5,339.57 réduisaient au mince total de $3,435.43 (voir rapport d'impôt TI pour l'année 1959).

Contre-interrogé à ce sujet, l'intimé, qui paraît prématurément vieilli, dit que son âge, 60 ans, lui interdisait, entr'autre, de répondre aux appels d'urgence la nuit, et que son état de santé l'obligeait en quelque sorte à proportionner son labeur professionnel à sa condition physique. Cette explication m'a semblé raisonnable et véridique ainsi que, du reste, l'assez long récit des incidents de la cause fait par le témoin.

Je dois, en l'occurrence, interpréter une loi d'ordre fiscal et l'on sait que la doctrine et la jurisprudence exigent une stricte et littérale concordance entre les termes du statut pertinent et les faits mêmes de l'instance. Je ne relève rien

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dans la preuve rapportée devant moi qui puisse m'autoriser à révoquer en doute le témoignage de l'intimé ni justifier la prétention de l'appelant qu'il s'agirait d'une initiative de nature commerciale. A n'en pas douter, ce médecin campagnard semble bien avoir dévoué tous ses moments de loisir, et peut-être même un peu plus que cela, aux prouesses hippiques de ses bêtes.

Il n'en reste pas moins que le degré d'intérêt ou de zèle selon lequel on s'adonne à un passe-temps (hobby) n'en change pas pour autant la nature. Dans ce même ordre d'idée, je reproduirai approbativement la citation que je lis dans les motifs de jugement du savant membre de la Commission d'impôt, Me Maurice Boisvert, C.R.[1]

> Les principes ci-dessus ont été consacrés et référés aux commentaires que nous trouvons dans Hannan & Farnsworth, *The Principles of Income Taxation,* aux pages 26, 27 et 28, voici ce que disent ces auteurs:
>
> In *Graham v. Green,* [1925] 2 K.B. 37, 39-42; 9 Tax Cas. 309, 312-4,—*Held,* that the moneys thus won were not profits or gains derived from a trade or vocation or otherwise, and were therefore not assessable. In the course of his judgment Rowlatt J. said that a winning bet was substantially in the same position as a gift or a finding:
>
> '. . . There is no increment, there is no service, there is merely the picking up of something either by the will of the person who had it before or because there is no person to oppose the picking up . . . A bet is merely an irrational agreement that one person should pay another person something on the happening of an event . . . There is no relevance at all between the event and the acquisition of property. The event does not really produce it at all. It rests, as I say, on a mere irrational agreement . . . But then there is no doubt that if you set on foot an organised seeking after emoluments which are not in themselves profits, you may create, by way of a trade or an adventure, or a vocation, a subject matter which does bear fruit in the shape of profits or gains . . . A person may organise an effort to finding things. He may start a salvage or exploring undertaking and he may make profits. The profits are not the profits of the findings, they are the profits of the adventure as a whole . . . !'
>
> "After dealing with the position of a bookmaker, the learned judge went on to say:
>
> 'Now we come to . . . the man who bets with the bookmaker . . . I do not think he could be said to organise his effort in the same way as a bookmaker organises his, for I do not think the subject matter from his point of view is susceptible of it. In effect all he is doing is just what a man does who is a skilful player at cards, who plays every day. He plays today, and he plays tomorrow, and he plays the next day, and he is skilful on each of the three days, more skilful on the whole than the people with whom he plays, and he wins. But it does not seem you can

[1] (1963) 31 Tax A.B.C. 102, 105-106.

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find, in that case, any conception arising in which his individual operations can be said to be merged in the way that particular operations are merged in the conception of a trade. I think all you can say of that man, in the fair use of the English language, is that he is addicted to betting. It is extremely difficult to express, but it seems to me that people would say he is addicted to betting, and could not say that his vocation is betting.'

"BETTING ON PERSONAL SKILL.

It has been held that the mere fact that a player wins bets on his own skill in sports or pastimes does not make him liable to tax on his winnings, even if they are consistent and spread over a long period.

The respondent, a professional golfer, in addition to a retaining fee from a certain golf club received fees for instructing members in golf, profits from the sale of golfing requisites, fees for newspaper articles, prize money from tournaments, etc., all of which were assessed upon him year by year in respect of his profession, employment or vocation. He also, over a period of ten years, habitually engaged in private games of golf for bets of varying amounts—sometimes as often as three or four times a week. Throughout that period he had derived substantial sums amounting (after deduction of lost bets) to as much as £1,000 per annum. *Held,* that these winnings did not arise from his employment or vocation, that he was not carrying on a business of betting, and that the winning were accordingly not assessable to income tax: *Down v. Compston* (1937) 53 T.L.R. 545; 21 Tax Cas. 60. Lawrence J. agreed with the argument for the respondent that there was no more organisation in this case than there was in *Graham v. Green.*"

PAR TOUS CES MOTIFS, la Cour confirme la décision de la Commission de l'impôt et rejette l'appel, avec allocation des dépens de Cour à l'intimé, après taxation.

Jugement conforme.

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Jan. 22, 23

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Feb. 27

BETWEEN:

JAN V. WEINBERGER .... APPELLANT;

AND

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

Revenue—Income tax—Income Tax Act R.S.C. 1952, c. 148, ss. 11(1)(a), 12(1)(b) and 144(1)—Income Tax Regulations, s. 1100(1)(c)—Value of uncorroborated evidence of appellant—Standard of proof—Capital cost of patent—Expense of turning patent to account not to be included in capital cost of patent.

This is an appeal from the disallowance by the respondent of a claim to a deduction equal to 1/17 of the amount calculated by the appellant to be the cost to him of proving an invention patented by him in 1946.

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He began to receive royalties from his patented invention in 1954 and it was in that year that he first claimed the deduction as a capital cost allowance.

It was found as a fact that the appellant did incur expenses of about $61,000 for production of cloth for use in testing his invention and in making the tests, and that 65% of this expense was incurred after the application for a patent had been made and that this portion of the expense had been incurred to make the invention commercially successful as well as, to some extent, for the purpose of satisfying the patent examiner that the invention had the utility to support a patent.

Held: That although the onus is on the appellant to establish the facts upon which his right to relief depends and his evidence when unsupported should be weighed with care, it must not be forgotten that there is no rule of law requiring corroboration of the testimony of an appellant and that the standard of proof required is that applicable in civil cases, that is to say, proof by a preponderance of evidence.

2. That the expenses incurred by the appellant in perfecting his invention are part of the "actual capital cost" of the patent be obtained therefor within the meaning of that expression in s. 144(1)(2) of the *Income Tax Act.*

3. That the cost of a patent to an inventor ordinarily includes not only what it has cost him to disclose his invention to the public in the prescribed manner and to satisfy the Commissioner of Patents that he is entitled to a patent therefor but also whatever other costs he has in fact incurred in producing the invention for which the patent is sought and in perfecting it to the point where its utility can be demonstrated and a patent can be obtained.

4. That expense incurred by an inventor for the purpose of turning the invention to account, as opposed to expense incurred to perfect the invention to the point where a patent can be obtained, cannot be regarded as part of the cost of the monopoly which the inventor is already in a position to obtain simply by disclosing his invention in the required manner.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Thurlow at Ottawa.

L. M. Joyal for appellant.

G. W. Ainslie and *D. G. H. Bowman* for respondent.

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

THURLOW J. now (February 27, 1964) delivered the following judgment:

This is an appeal from a judgment of the Tax Appeal Board which allowed in part an appeal by the appellant against an assessment of income tax for the year 1954. The matter in issue is the right of the appellant to a deduction, in computing his income for tax purposes, of capital cost allowance in respect of what he alleges to be the capital cost to him of a patent obtained by him in 1946 for an invention which he had devised some years earlier.

The appellant is an industrial consultant who emigrated from Czechoslovakia first to the United States and later to Canada in 1938. Some years before he left Czechoslovakia he had conceived an idea for weaving cloth in such a manner that the force of objects striking it would be distributed and dissipated over a considerable area bordering the point of impact, thus making the cloth resistent to penetration by bullets and other flying objects, and he had tried to put the idea into practice, using cotton as the material, but it did not work. After coming to Canada the appellant tried again using in various blends some further materials such as viscose, bermberg rayon and silk, and ultimately nylon. Supplies of nylon at that time were closely controlled for use in making parachutes but the appellant was able to acquire a small quantity of nylon filament and a larger quantity of nylon waste from which he had some 1,500 yards of cloth woven in the manner which he had contrived. To do this it was necessary to spin the material into threads of various gauges and then to weave the cloth from them but before the waste nylon could be spun it was necessary to have it cut in particular lengths and for this purpose the appellant devised a machine for which he later obtained a patent. This particular patent however proved valueless as a better machine was invented not long afterwards. All this was done at considerable out-of-pocket expense to the appellant but the 1,500 yards of cloth made of nylon enabled him to prove the soundness of his theory with respect to the manner of weaving which he had devised and to obtain a Canadian patent therefor. Whether he also obtained patents therefor in other countries does not appear.

The experiments in Canada for the purpose of testing his invention were carried out over the period from 1939 to 1946. In the meantime he had apparently satisfied himself of the soundness of his theory for he applied for a Canadian patent in October 1943, but he continued testing for some time thereafter in the hope of finding a practicable way of

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realizing its utility as well as, according to his evidence, for the purpose of satisfying the patent examiner that the invention had the utility necessary to support a patent. The patent was ultimately granted in 1946 but he derived no return from it until 1954 when according to his income tax return he received royalties amounting to $675. Up to that year he had never sought to deduct, in computing his income for tax purposes, any part of the expense which he had incurred in proving the invention but in his return for that year he deducted $3,588 representing $\frac{1}{17}$ of an amount of $61,000 which he calculated to be the total amount of his expenses in connection therewith. The Minister having disallowed the whole of such claim, the appellant appealed to the Tax Appeal Board which held that a sum of $500 representing costs incidental to the application for the patent were costs in respect of which capital cost allowance might be claimed but that the appellant was not entitled to capital cost allowance in respect of the other sums allegedly expended in connection with the invention. The appellant thereupon appealed to this Court and the Minister cross-appealed but subsequently at the commencement of the trial abandoned the cross-appeal. In so doing counsel for the Minister stated his position as being that the actual capital cost to the appellant of obtaining the patent, within the meaning of s. 144 of the *Income Tax Act,* R.S.C. 1952, c. 148, was $500 and that he was prepared to admit that the capital cost as defined in that subsection, at the commencement of the 1949 taxation year, was $394.10.

Basically the Minister's case is that the appellant is not entitled to the capital cost allowance claimed because the patent cost the appellant nothing but the legal expenses of obtaining it and in support of this position he challenged the evidence that the expenses in question were incurred and submitted that even if they or some portion of them were incurred they did not constitute any part of the "cost" or the "capital cost" or the "actual capital cost" of the patent within the meaning of these expressions as used in the *Income Tax Act* and the Regulations made pursuant thereto.

At the trial of the appeal to this Court the appellant gave evidence of the facts which I have outlined and answered in a forthright manner all the questions put to him respecting the alleged expenses and what they were for as well as to whom the amounts were paid. He explained his lack of records to support his statements by saying that security arrangements in effect at the time made it necessary for him to destroy documents which might disclose the source of his materials and that he had destroyed them. His evidence was not shaken by cross-examination. That considerable expense would be involved in proving the validity of his theory and the practical usefulness of it is I think apparent from the nature of the invention and in the course of the trial it was conceded that he had in fact conducted tests though nothing was admitted as to the number of tests conducted or their purpose or cost. On the other hand nothing was offered in the way of evidence to contradict the appellant.

While the onus is on the appellant in proceedings of this nature to establish the facts upon which his right to relief depends and the evidence of an appellant when unsupported is I think to be weighed with care, because of the temptation sometimes experienced by taxpayers to shape facts to suit their own purposes, it must not be forgotten that there is no rule of law requiring corroboration of the testimony of an appellant to support a finding and that the standard of proof required is that applicable in civil cases, that is to say, proof by a preponderance of evidence.

In the present case, the appellant impressed me as a reliable witness and bearing in mind the considerations which I have mentioned, as well as the fact that the situation is not one in which there was any statutory obligation on the appellant to keep records for tax purposes, I can see no valid reason for refusing to accept as credible his evidence that he incurred the expenses in question. I accordingly find that he did incur expenses to the extent of about $61,000 over a period of years, 98 per cent. of which occurred in the years 1939 to 1946, for the production of cloth for use in making tests of his invention and in making some 60 of such tests. I also find that 65 per cent. of this expense was incurred after the application for the patent was made and that this portion of the expense was incurred for the purpose of making the invention commercially successful as well as to some extent for the purpose of satisfy-

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ing the patent examiner that the invention had the utility to support a patent.

By s. 12(1)(*b*) of the *Income Tax Act* R.S.C. 1952, c. 148 it is provided that in computing income, no deduction shall be made in respect of an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by Part I of the Act but by s. 11(1)(*a*) it is also provided that:

> 11. (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year:
>
> (*a*) such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation;

Section 1100(1)(*c*) of the Income Tax Regulations as applicable to the year 1954 provided that:

> 1100. (1) Under paragraph (*a*) of subsection (1) of section 11 of the Act, there is hereby allowed to a taxpayer, in computing his income from a business or property, as the case may be, deductions for each taxation year equal to
>
> . . .
>
> (*c*) such amount as he may claim in respect of a property of class 14 in Schedule B not exceeding the lesser of
>
> (i) the amount for the year obtained by apportioning the capital cost to him of the property equally over the life of the property remaining at the time the cost was incurred, or
>
> (ii) the undepreciated capital cost to him as of the end of the taxation year (before making any deduction under this subsection for the taxation year) of property of the class;

Schedule B, Class 14 reads in part as follows:

> Schedule B
>
> CLASS 14
>
> Property that is a patent, franchise, concession or license for a limited period in respect of property . . .

With respect to property owned by a taxpayer at the time of the coming into force of the 1948 *Income Tax Act*, s. 144 of the present Act provides as follows:

> 144. (1) Where a taxpayer has acquired depreciable property before the commencement of the 1949 taxation year, the following rules are applicable for the purpose of section 20 and regulations made under paragraph (*a*) of subsection (1) of section 11;

(*a*) except in a case to which paragraph (*b*) applies, all such property shall be deemed to have been acquired at the commencement of that year at a capital cost equal to

(i) the actual capital cost (or the capital cost as it is deemed to be by subsection (3) or (4)), of such of the said property as the taxpayer had at the commencement of that year,

minus the aggregate of

(ii) the total amount of depreciation for such of the said property as he had at the commencement of that year that, since the commencement of 1917, has been or should have been taken into account, in accordance with the practice of the Department of National Revenue, in ascertaining the taxpayer's income for the purpose of the *Income War Tax Act*, or in ascertaining his loss for a year for which there was no income under that Act, . . .

As paragraph (*b*) of subsection (1) and subsections (3) and (4) have no application in the present case, the effect of s. 144(1)(*a*) is that the appellant's patent is deemed to have been acquired at the commencement of 1949 at a capital cost equal to the "actual capital cost" of the property to him minus the amount referred to in paragraph (ii).

The first and the most substantial problem which arises on these provisions is whether the expenses incurred by the appellant in perfecting his invention are part of the "actual capital cost" of the patent which he obtained therefor within the meaning of that expression in s.144(1)(*a*). There appears to be no decided case offering any guidance on this question but, in my opinion, such expenses do form part of the actual capital cost of the patent. The significant property right in the case of a patent is the monopoly which it evidences and confers. That monopoly is an exclusive right granted for the term of 17 years to make, use, construct and vend to others to be used the invention in respect of which the patent has been granted and in the theory of the patent law that monopoly is granted in consideration of the disclosure of the invention to the public. A patent under the statute is thus obtainable by an inventor only when he has in fact invented something for which a patent may be obtained, that is to say, something which is new and useful in the sense of the patent law and when he has complied with the requirements of the law by disclosing the invention in the appropriate manner. It seems to me therefore to follow that the cost of a patent to an inventor would ordinarily include not only what it has cost him to disclose his invention to the public in the prescribed manner

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and to satisfy the Commissioner of Patents that he is entitled to a patent therefor but whatever other costs he has in fact incurred in producing the invention for which the patent is sought and in perfecting it to the point where its utility can be demonstrated and a patent can be obtained under the law relating thereto. Such expenses may be small in some cases and great in others but that feature in itself does not appear to me to bear on the question whether or not they are part of the cost of the patent to the inventor.

On the other hand once the invention has been perfected to the point where a patent can be obtained, an inventor may go on to incur further expense for the purpose of turning the invention to account and here I think it becomes necessary to distinguish between such expense and expense which has been incurred to perfect the invention, for whatever treatment of the former may be appropriate for accounting purposes, it does not seem to me that such expense can be regarded as part of the cost of the monopoly which the inventor is already in a position to obtain simply by disclosing his invention in the manner required by the patent law.

In the present case the evidence satisfies me that the expense incurred by the appellant prior to the time when he applied for the patent in question, that is to say, some 35 per cent of the total amount of $61,000 expended, was in fact incurred for the purpose of perfecting the invention and should accordingly be treated as part of the "actual capital cost" of the patent to him and I am also satisfied that some part of the remainder of the $61,000 expended is attributable to satisfying the patent examiner that the patent had the utility necessary to support a patent and that such part should also be regarded as part of the actual capital cost of the patent to him. But however the rest of the $61,000 may be classified the evidence leaves me unsatisfied that it was in fact part of the "actual capital cost" of the patent, or that it can be taken into account in computing capital cost for the purposes of the statute. Viewing the matter at large, I think it is safe to assume that of the $61,000, an amount of $22,000 represents costs incurred by the appellant in making and proving his invention and obtaining the patent in question and I accordingly find that that amount was the actual capital cost of the patent to him.

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Two further points raised in the course of argument on behalf of the Minister should also be mentioned. Counsel pointed to the provision in Regulation 1100(1)(*c*)(i) for calculating capital cost allowance on the basis of "the life of the property remaining at the time the cost was incurred" and he submitted first that this showed that the expenses of perfecting an invention should not be considered to be part of the capital cost of a patent therefor since there would be no patent in existence at the time when the expense was incurred and, consequently, no part of such expense could be taken into account in calculating capital cost allowance in respect of a patent obtained after the commencement of the 1949 taxation year, and secondly that since the same regulation applies in respect of patents obtained both before and after that time, it would be illogical to treat such expenses as forming part of the capital cost of a patent acquired prior to that time when they could not be taken into account in computing capital cost allowance in respect of a patent obtained after that time. In the view I take of the matter it is not necessary to the determination of this case to express any opinion as to the effect of the words which I have quoted from Regulation 1100(1)(*c*)(i) with respect to a patent obtained after the beginning of 1949 but even assuming for the present purpose that the Minister's contention in that respect is correct, I do not think it can prevail in the case of a patent acquired before that time to which the provisions of s.144(1) apply. That subsection provides that in the case of property held at the commencement of the 1949 taxation year, for the purposes of regulations made under s. 11(1)(*a*) of the Act, the property (in this case the patent) "shall be deemed to have been acquired at the commencement of the year at a capital cost equal to the actual capital cost" less the amount therein mentioned. However limited the object which this provision may have been designed to serve it is an express enactment that for the purpose of the regulations a certain set of facts shall be deemed to have occurred and in the cases to which it applies it cannot be disregarded. Under this provision therefore property to which it applies is deemed to have been acquired on the date mentioned at the amount so prescribed and it appears to me to follow from this that the fictitious amount so prescribed as the capital cost of the property must be treated as having been incurred at the

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fictitious date of acquisition of the property and that expenditure which properly makes up part of the actual capital cost of such property to the owner must be taken into account in making the calculation prescribed by the subsection regardless of when such expenditure may have actually been incurred. When therefore one comes to apply the regulation in a case such as the present one no problem of the kind raised arises since the property is *ex hypothesi* in existence at the commencement of the 1949 taxation year and is deemed to have been acquired on that date at an amount which, because it is a fictitious amount can only be treated as having been incurred at that time. The point is accordingly, in my opinion, without substance.

The other point was that since no evidence was given of the practice of the Department of National Revenue in ascertaining (the appellant's) income for the purpose of the *Income War Tax Act* the total amount of depreciation in respect of the patent that "should have been taken into account in accordance with the practice of the Department" under that statute had not been established and that accordingly the appellant had not discharged the onus of proving the capital cost of the patent as defined by s. 144 (1)(*a*). It was not however suggested that the whole capital cost of a patent granted in 1946 would have been depreciable in that and the following two years under the practice followed by the department under the *Income War Tax Act* and on it being pointed out that the admission made at the commencement of the trial so indicated counsel retreated somewhat from the position that the appeal should be dismissed on that ground and submitted that in the event of a finding being made that the cost of the invention forms part of the actual capital cost of the patent the matter should be referred back to the Minister for the purpose of ascertaining the total amount of depreciation thereon which should have been taken into account under the earlier statute. This, I think, is the proper course under the circumstances.

The appeal will therefore be allowed and the assessment will be referred back to the Minister for reconsideration and re-assessment in accordance with these reasons. The appellant is entitled to the costs of the appeal.

Judgment accordingly.

BETWEEN:

1963 Oct. 15 — 1964 Mar. 11

WHITEHALL LABORATORIES LIMITED .... APPELLANT;

AND

ULTRAVITE LABORATORIES LIMITED .... RESPONDENT.

Trade Marks—Registration—Trade Marks Act, S. of C. 1952-53, c. 49, ss. 12(1)(d) and 6(5)(e)—Confusion—First impression as criterion of confusion.

This is an appeal by Whitehall Laboratories Limited, from the decision of the Registrar of Trade Marks allowing the registration of the trade mark "Dandress" by the respondent over the opposition of the appellant which alleged that the said trade mark was confusing with its already registered trade mark "Resdan" and was accordingly not registrable.

Held: That the decisive criterion as to the existence of confusion between two trade marks is one of first impression.

2. That the trade marks "Resdan" and "Dandress" sound phonetically confusing at least on first impression.

3. That the appeal is allowed.

APPEAL from a decision of the Registrar of Trade Marks.

The appeal was heard by the Honourable Mr. Justice Dumoulin at Ottawa.

Cuthbert Scott, Q.C. for appellant.

Roy Saffrey for respondent.

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

DUMOULIN J. now (March 11, 1964) delivered the following judgment:

The above mentioned appellant, assignee of the registered trade mark "RESDAN", opposed the respondent's application for registration of "DANDRESS" as another trade mark, under serial No. 259-985.

On February 7, 1962, the Registrar of Trade Marks rejected this opposition, having arrived at the conclusion "that the two marks in their totalities are not confusing

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and that their concurrent use in the same area would not be likely to lead to the inference that the wares emanate from the same person".

From this decision, the Whitehall Laboratories Ltd., appeal to this Court.

Three grounds of appeal were put forward on the opponent's behalf, of which two, namely paragraphs 1 and 2, need be retained. Paragraph 1 is as follows:

> (1) That under the provisions of Section 37(2)(*b*) of the *Trade Marks Act*, the word DANDRESS is not registrable as offending the provisions of section 12(1)(*d*) of the Act, and accordingly should be refused registration by virtue of the provisions of Section 36(1)(*b*) of the Act.

The opening lines of paragraph 2 state that:

> (2) Section 12(1)(*d*) enacts that where a word or mark is confusing with a registered trade mark it is not registrable . . .

These quotations are taken from the Registrar of Trade Marks' file on which the respondent relied in support of its contestation of the appeal.

Reverting now to the subject matter, the gist of the problem consists in the correct application of section 12(1)(*d*) which enacts that:

> 12. (1) Subject to section 13, a trade mark is registrable if it is not
> . . .
> *d*) confusing with a registered trade mark;
> . . .

One of the main objects pursued by the *Trade Marks Act* is the avoidance of confusion between trade names or trade marks, so that the public may be protected against deception or misrepresentation.

It would be, of course, utterly impossible to define the ever-changing guiles resorted to by unfair trade competition, wittingly or unwittingly. Section 6, s-s. (5)(*e*) of our *Trade Marks Act*, 1-2 Elizabeth II, c. 49(1953), suggests certain norms with which the Court should comply when examining the possibility of confusion and I quote:

> 6. (5) In determining whether trade marks or trade names are confusing, the court or the Registrar, as the case may be, shall have regard to all the surrounding circumstances including
> . . .
> *e*) the degree of resemblance between the trade marks or trade names in appearance or sound or in the ideas suggested by them;
> . . .

In other words, it has been held, as will be seen hereunder, by the highest legal authorities, that the decisive criterion was one of first impression.

The late Mr. Justice Kerwin, as he then was, speaking for the Supreme Court of Canada, *in re Battle Pharmaceuticals v. The British Drug Houses Ltd.*[1], expressed himself thus on this issue:

> The principle adopted by the House of Lords on that point is the same as has governed this Court in proceedings under section 52 of *The Unfair Competition Act* and it is found in a passage in the dissenting judgment of Lord Justice Luxmoore in the Court of Appeal, which was accepted in the House of Lords by all the peers as a fair statement of the duty cast upon the court. The passage referred to appears in the speech of Viscount Maugham at page 86 of the report:
>
> > "The answer to the question whether the sound of one word resembles too nearly the sound of another so as to bring the former within the limits of s. 12 of the *Trade Marks Act*, 1938, must nearly always depend on first impression, for obviously a person who is familiar with both words will neither be deceived nor confused. It is the person who only knows the one word, and has perhaps an imperfect recollection of it, who is likely to be deceived or confused. Little assistance, therefore, is to be obtained from a meticulous comparison of the two words, letter by letter and syllable by syllable, pronounced with the clarity to be expected from a teacher of elocution. The Court must be careful to make allowance for imperfect recollection and the effect of careless pronunciation and speech on the part not only of the person seeking to buy under the trade description, but also of the shop assistant ministering to that person's wants."
>
> Applying that principle to the case at bar, we are satisfied that the President of the Exchequer Court came to the right conclusion.

The British decision alluded to above was that of *Aristoc Ltd. v. Rysta Ltd.*[2], delivered on December 8, 1944, in the House of Lords.

In the opinion of the Court, the trade styles "RESDAN" and "DANDRESS" sound phonetically confusing at least on first impression and such is the applicable touchstone.

For the reasons above, I reach the conclusion that the appellant's opposition should be allowed and the decision of the learned Registrar of Trade Marks of February 7, 1962, set aside. The appellant (opponent) will be entitled to recover its costs after taxation.

Judgment accordingly.

[1] [1945-1946] S.C.R. 50 at 53.
[2] (1945) 62 R.P.C. 65 at 72.

1963
Nov. 12
1964
Mar. 9

BETWEEN:

C. B. JEAN LORENZEN ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Income Tax Act R.S.C. 1952, c. 148, s. 15(1) and 139(1)(e), (m) and (2)(b)—Whether taxpayer an employee or proprietor of a business—Real estate salesman—Taxation year—The Real Estate and Business Brokers Act, R.S.O. 1960, c. 332, ss. 3 and 45.

During the period from 1953 and including the 1955 and 1957 taxation years the appellant was engaged in selling real estate in the City of Windsor, Ontario and vicinity as a saleslady for one George Lawton, a real estate broker. At the same time she operated a rooming house and cared for her two children so that her real estate activities were confined to the afternoons, evenings and weekends. She was registered under the *Real Estate and Business Brokers' Act* as a saleslady employed by George Lawton, a registered real estate broker, who was described in her application for registration as her employer. For the taxation years 1955 and 1957, the appellant adopted a fiscal period ending on March 31 for her taxation year but the respondent reassessed her income for the two years using the calendar year.

The evidence disclosed that the appellant worked under a commission arrangement with Lawton, that all of the properties dealt with by the appellant were listed with Lawton, that Lawton's name but not that of the appellant appeared on the listing agreement form used by the appellant, that all commissions receivable on the sale of properties by the appellant were payable to and the property of Lawton, that the appellant was provided with a desk, telephone and secretarial services at Lawton's office, that the appellant did not pay any municipal business tax, did no advertising, did not pay a commercial telephone rate, that her name did not appear on or about Lawton's business premises and that advertising done by Lawton on her behalf indicated that he was her employer.

Held: That on the facts the appellant was not the proprietor of a business within the meaning of s. 15(1) of the *Income Tax Act* and therefore was not entitled to adopt a fiscal year ending at a date other than the end of the calendar year.

2. That the appeal is dismissed.

APPEAL under the *Income Tax Act.*

The appeal was heard before the Honourable Mr. Justice Cattanach at Windsor.

A. B. Weingarden for appellant.

F. J. Dubrule and *E. E. Campbell* for respondent.

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

CATTANACH J. now (March 9, 1964) delivered the following judgment:

These are appeals against the appellant's income tax assessments for the taxation years 1955 and 1957.

As the identical problem is involved in both appeals they were heard together. The sole issue between the parties is whether the appellant is entitled to adopt fiscal periods ending March 31 in the years in question for her taxation years as contended by her, or whether her income should be ascertained on the basis of the calendar years as contended by the Minister and upon which basis the assessments appealed against were made by him.

In order for the appellant to be entitled to adopt a fiscal period other than a calendar year, she must be the "proprietor of a business" within the meaning of those words as used in section 15(1) of the *Income Tax Act*, 1952, R.S.C., c. 148 which reads as follows:

> 15. (1) Where a person is a partner or an individual is a proprietor of a business, his income from the partnership or business for a taxation year shall be deemed to be his income from the partnership or business for the fiscal period or periods that ended in the year.

If the appellant is not the proprietor of a business, then her taxation years must be the calendar years in accordance with section 139(2)(*b*) wherein, "taxation year" is defined as follows:

> (2) For the purposes of this Act, a "taxation year" is
>
> . . .
>
> (*b*) in the case of an individual, a calendar year,
>
> . . .

The appellant resided in the City of Windsor, Ontario, as the wife of a medical practitioner in that city for sixteen years after which time they separated. There were two children of that marriage then aged seven and three who remained in the care of the appellant. This responsibility required the appellant to augment her income and accordingly she opened her home to paying guests. In addition, she obtained employment as a saleslady in a department store. However, the regular hours of such employment detracted from the time the appellant could devote to her children. She, therefore, turned her thoughts to becoming a real estate salesman because of her wide

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Cattanach J.

social acquaintanceship in Windsor and particularly since she felt such occupation would permit of working hours best suited to her convenience.

Accordingly she sought and obtained an interview with George Lawton, a well established real estate broker who was personaly known to the appellant, who agreed that she should sell real estate on his behalf.

There was no written agreement between the appellant and Lawton.

However, the appellant was precluded by section 3 of *The Real Estate and Business Brokers' Act*, 1950, R.S.O., c. 332 from selling real estate unless she was registered as a salesman of a real estate broker registered as such under the Act. Lawton was so registered as a real estate broker.

Accordingly, the appellant, at the suggestion and with the assistance of Lawton, made an application dated October 13, 1953 for registration as a salesman for George Lawton on a form prescribed by the Act. The printed portion of the form described Lawton as the employer of the appellant and the nature of her employment was described as a saleslady. The application was supported by the affidavit of the appellant verifying the information contained therein. Also attached to the application was a "Certificate of Employer" completed by Lawton who was described as the appellant's employer. It was also certified therein by Lawton that the appellant "will not share in either the expenses or profits of my/our real estate business, but will be paid on a commission basis for work performed."

This application was made by the appellant under the name C. B. Jean Seymour and was introduced in Evidence as Exhibit I. In the interval between the appellant's 1955 income tax return wherein she was also described as C. B. Jean Seymour and her return for 1957 wherein she was described as C. B. Jean Lorenzen, she married a Mr. Lorenzen which accounts for the appellant's change of name and her description in the present style of cause.

The appellant was duly licensed as a salesman for Lawton and began her duties forthwith.

The commission arrangements between the appellant and Lawton were that for any property exclusively listed for sale with the broker, i.e. Lawton, of which the appellant negotiated the sale she received 40 percent of the commission received by the broker. If the appellant persuaded a vendor to list a property with Lawton she was entitled to 20 percent of the broker's commission regardless of who sold the property. However, if the appellant both listed and sold a property, she would then receive both the 20 percent and 40 percent shares of the broker's commission.

In addition to properties listed exclusively for sale with one broker, many properties were listed with a broker on a co-operative basis now described in the trade as multiple listing. The significance of multiple listing is that if the listing broker is a member of a Real Estate Board, then every other broker who is also a member of the Board may offer the property for sale.

The commission on the sale of a property subject to multiple listing is divided three ways among the listing broker, the selling broker and the Real Estate Board.

Since the appellant was entitled to 20 percent of the commission received by Lawton on the sale of a property listed with him by her, it follows that when a property listed by her is subject to multiple listing and is sold by another broker, her share of the commission is correspondingly less.

The appellant became keenly aware of this circumstance and in company with other salesmen on Lawton's staff, although not all of them, she pointed out this iniquity suggesting that it was contrary to the salesman's financial interest to recommend multiple listing to a vendor. Lawton agreed with these representations and increased the listing salesman's share of the broker's commission on the sale of properties subject to multiple listing to 60 percent. This revised arrangement was applicable to all salesmen on Lawton's staff and not solely to the appellant.

The balance of any commissions as arranged between the appellant and Lawton was retained by him.

A specimen form of listing agreement used by the appellant and furnished to her by Lawton was introduced in evidence as Exhibit R2. By this document a vendor authorizes George Lawton to sell the property. The appellant's name does not appear on this form, although she testified that she invariably signed as witness when she persuaded a vendor to sign the form.

The appellant freely admitted that under the provisions of *The Real Estate and Business Brokers' Act* (*supra*) she

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could make sales only on behalf of the broker with whom she was registered, any listings she obtained must be made with that broker and she could be registered as a salesman with only one broker at a time. I agree that such is the effect of the Act.

Within two months of beginning as a real estate salesman with Lawton, the appellant was put on a maximum $60 per week drawing account against her share of the broker's commission earned by her with quarterly accountings between the appellant and Lawton.

All commissions receivable on the sale of properties were payable to and the property of Lawton with subsequent distribution to the appellant in accordance with commission divisions arranged between them as above described.

The appellant was neither required, nor expected to spend any stipulated time in Lawton's business premises, nor to report at any specific time, although she testified that she normally went there in the forenoon when her household chores were done. She was allowed the utmost latitude as to when and where she would work. At Lawton's office she was provided with a desk, telephone and secretarial services, access to the broker's listing records and all like facilities.

The appellant's selling activities necessitated long periods of absence from the broker's office. She estimated the time so spent as being equally apportioned between the usual daytime working hours and the evenings and weekends.

The appellant provided her own automobile and bore the expense thereof. She also paid the fee for her real estate salesman licence and the cost of a surety bond.

Because of the time required by her real estate activities, the appellant employed a housekeeper to assist in the rooming house which the appellant continued to operate. Although the housekeper answered the telephone and recorded messages for the appellant, this was incidental to her housekeeping duties and in no way was she directly employed in connection with the appellant's real estate selling.

The appellant did not pay any municipal business tax. She conducted no newspaper advertising, nor did she advertise in the local telephone directory or have a business listing therein. She did not pay a commercial telephone rate.

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The appellant's name did not appear in any manner on or about Lawton's business premises, nor did she exhibit any sign indicative of her capacity as a real estate salesman about her home. In fact she was precluded from doing so by municipal zoning by-laws and regulations.

Any advertising on behalf of the appellant was done by Lawton. Under section 45 of *The Real Estate and Business Brokers' Act,* (*supra*) a broker is required in any advertising of property to clearly indicate his own name as the person advertising and that he is the broker and that any reference to the name of a salesman in an advertisement must clearly indicate the broker as being the employer of the salesman. This method of advertising was done consistently by Lawton.

On the basis of the facts above recited, the appellant contends that she was not an employee in the service of George Lawton in his business as a real estate broker, but rather that she was an independent agent and, therefore, the proprietor of a business and as such entitled to adopt for a taxation year a fiscal period in accordance with section 15(1) of the *Income Tax Act* as quoted at the outset.

In section 139(1) of the *Income Tax Act, "business"* is defined in paragraph (*e*) as including, "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" and in paragraph (*m*) the terms "employment", "servant" and "employee" are defined as follows:—

> (*m*) "employment" means the position of an individual in the service of some other person (including Her Majesty or a foreign state or sovereign) and "servant" or "employee" means a person holding such a position; . . .

The question to be resolved is whether the appellant was the "proprietor of a business" or an "employee".

On the facts I find that the appellant was not the proprietor of a business within the meaning of section 15(1) of the Act and, therefore, was not entitled to adopt a fiscal year ending at a date other than the end of the calendar year.

It follows that the Minister was right in assessing the appellant as he did and the appeals herein must be dismissed with costs.

Judgment accordingly.

1963 Sep. 30 — 1964 Mar. 10

BETWEEN:

THE SEVEN-UP COMPANY (*Opponent*) .... APPELLANT;

AND

JAMES D. HEAVEY, trading as MUGS-UP ROOT BEER COMPANY (*Applicant*) ... RESPONDENT.

Trade Marks—Registration—Trade Marks Act, S. of C. 1952-53, c. 49, ss. 12(1)(d) and 37—Confusion—Survey of consumers—Affidavit evidence of confusion by consumers.

This is an appeal by the Seven-Up Company from a decision of the Registrar of Trade Marks allowing the registration of the trade mark "Mugs-Up" over the opposition of the appellant which alleged that the said trade mark was confusing with its already registered trade mark "Seven-Up" and was accordingly not registrable. In support of its allegation of confusion, the appellant produced 29 affidavits, all identical, wherein 29 persons questioned during the survey deposed to their belief that Seven-Up and Mugs-Up were made by the same company.

Held: That the survey on behalf of the appellant which led to the swearing of the affidavits produced at the hearing was conducted in such a manner as to be suggestive if not directly leading.

2. That the adverb "up" by itself is not the property of any firm or company so long as it is not hyphenated in a deceptive manner with an existing trade mark.

3. That "Seven-Up" and "Mugs-Up" give rise to no probable or reasonable confusion.

4. That the appeal is dismissed.

APPEAL from a decision of the Registrar of Trade Marks.

The appeal was heard before the Honourable Mr. Justice Dumoulin at Ottawa.

D. F. Sim, Q.C. for appellant.

R. G. McClenahan for respondent.

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

DUMOULIN J. now (March 10, 1964) delivered the following judgment:

The Seven-Up Company filed with the Registrar of Trade Marks its opposition to the application of James D.

Heavey, trading as Mugs-Up Root Beer Co., for registration of a trade mark "MUGS-UP", in association with the sale of root beer and root beer concentrates.

On May 24, 1961, the Registrar, after considering the literal evidence tendered and hearing counsel for both litigants, on May 17, 1961, "arrived at the conclusion that although the marks of the parties have a common component 'UP' they are in their totalities completely dissimilar", and therefore rejected the opposition pursuant to section 37 of the Act.

From this decision the Seven-Up Company dissents and produced on July 21, 1961, a notice of appeal.

After hearing the submissions of counsel for the opponent, I expressed the opinion that they were insufficient to offset the Registrar's decision.

I was then requested to withhold judgment until I had perused a list of 29 affidavits sworn to by as many consumers of soft drinks, and particularly of that carbonated non-alcoholic one called Seven-Up. These attestations, identically worded or nearly so, were obtained in the course of a survey by agents of the opponent company. The canvassers were given, in writing, some precautionary instructions, a copy of which will be found in the record, to the effect, *inter alia,* that they should be "very careful not to give the persons interviewed any leading questions or to suggest the type of answers to this questionnaire". The affidavit form itself comprises six paragraphs, two of which, paragraphs 3 and 4, read as follows:

> 3. That when the form was completed he asked me "Why do you think there may be a connection between 7-UP and MUGS-UP?" My reply appears on the aforesaid form: "Because they both end in—UP".
>
> 4. That I did not know that the gentleman who interviewed me was a representative of the 7-UP Company or that there was any dispute between the owners of the trade-marks 7-UP and MUGS-UP until I was asked to make this affidavit on June 19, 1963.

The test to which each deponent was put will be found annexed to the affidavit and reads thus:

> These are the names of various soft drinks. Some of those in the right hand column may be made by the same companies that make those in the left hand column. Will you please match the names of the soft drinks that you think are made by the same companies?

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1. COKE	1. HOWDY
2. PEPSI	2. MUGS-UP
3. 7-UP	3. FANTA
4. CANADA DRY	4. TEEM
5. ORANGE CRUSH	5. PURE SPRING.

Not unexpectedly perhaps, all of the 29 consumers questioned matched "7-UP" and "MUGS-UP", tagging the latter also with No. 3. The Court remains unimpressed by a probing of this kind which, notwithstanding the would-be precautions surrounding it, must needs be suggestive if not directly leading. Moreover, I believe that a permissible inference well within the scope of judicial discretion permits one to say that if all the 29 people interviewed replied conformably to the opponent's expectations, at least as many others may have or would have said that no confusion arose in their mind between the two trade marks "SEVEN-UP" and MUGS-UP".

The deciding factor must reside in the proper interpretation given to the law itself, namely, section 12(1)(*d*) of the *Trade Marks Act,* 1-2 Elizabeth II, c. 49, reading:

> **12.** (1) Subject to section 13, a trade mark is registrable if it is not
>
> . . .
>
> *d*) confusing with a registered trade mark.
>
> . . .

The adverb "up" by itself is not the property of any firm or company so long as it is not hyphenated in a deceptive manner with an existing trade mark. "Seven-Up" and "Mugs-up", in my view, give rise to no probable or reasonable confusion.

For these reasons, the learned Registrar properly allowed the registration sought for in application serial No. 252-398, and this Court must dismiss (opponent) appellant's opposition with all costs allowed to the (applicant) respondent.

Judgment accordingly.

1964
Feb. 24, 25
Mar. 25

BETWEEN:

HARRY HORTICK .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, s. 139(1)(e)—Income or capital gain—Purchase and sale of real estate—Financial venture.

In 1956 the appellant, who was president of Harry Hortick Machinery & Supply Co. of Montreal, purchased the machinery and real property of the Birmingham Small Arms Company in Montreal, paying $120,000 for the land and $55,000 for the machinery. The real property purchased consisted of 15,000 sq. ft. of factory space, 2,000 sq. ft. of office space, a railway siding, 30,000 sq. ft of paved exterior space and 300,000 sq. ft. of vacant land. The appellant's company which was leasing office and storage facilities had never required more than a total of 7,500 sq. ft. of space, including 600 sq. ft. of office space. The appellant was not financially able to complete the purchase by himself and entered into an arrangement with Charles and Harry Shafter who put up $160,000 for a 50% interest in the said property, the appellant contributing the balance of $15,000. The respective interests of the appellant and the Shafters in the property were set out in the deed of sale dated November 8, 1956, as Charles Shafter, 30%, Harry Shafter 20%, and the appellant, 50%. A few days after the appellant had completed the purchase and had taken possession of the property, he approached a representative of Peacock Co. Ltd. with the information that the machinery and plant were for sale. On November 15, 1956, Peacock Co. Ltd. made an offer to purchase the property, excluding the machinery, for $450,000, which offer was accepted by the appellant and the Shafters. The sale to Peacock Co. Ltd. was completed on December 14, 1956, and the appellant and the Shafters realized a profit of $330,000 thereon.

The appellant's taxable income for 1956 was reassessed by the respondent to include his share of the profit realized on the sale of the said property.

Held: That the transaction in question was a financial venture within the meaning of s. 139(1)(*e*) of the *Income Tax Act,* notwithstanding the appellant's professed intention at the time of the purchase of the property to acquire it as a long-term investment; and the two decisive factors supporting this conclusion are the appellant's lack of capital, necessitating a quick sale to prevent the interest charges on the borrowed money, the taxes and other expenses from mounting to too large a sum, and the degree by which the accommodation afforded by the purchased property exceeded the requirements of the appellant's company.

2. Appeal dismissed.

APPEAL from a decision of the Tax Appeal Board.

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

Claude Couture for appellants.

Paul Boivin, Q.C. and *P. R. O. MacKell* for respondent.

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

DUMOULIN J. now (March 25, 1964) delivered the following judgment:

This is an appeal from a decision of the Tax Appeal Board, dated September 20, 1962[1] in respect of the assessment for taxation year 1956, of one Harry Hortick, of 4960 Glencairn Avenue, Montreal; the above-mentioned decision affirmed a reassessment by the Minister of National Revenue which dealt with a $450,000 real estate transaction as income for the pertinent year and not as a realization of a capital asset.

At the start of the hearing, it was agreed by all parties that the two other cognate appeals, *post* p. 931 and *post* p. 932, should also be decided according to the evidence presently adduced.

The facts of the case offer no great complexity.

Mr. Harry Hortick, the appellant, is president of the Harry Hortick Machinery & Supply Co., dealing in machinery and machinery supplies. At no time the requirements of his business needed any larger space than 7,500 square feet. In 1956, for instance, the appellant's commercial premises were located on Notre Dame St., with a floor space of only 600 square feet, plus some open air storage in a neighbouring yard. Harry Hortick was not the owner but the lessee of his office and storage facilities.

Mr. Hortick, in his evidence, relates that during 1956, having purchased a certain quantity of material from B.S.A. (Birmingham Small Arms) Company, he came in touch with one Victor Bull, then manager of this firm's Montreal branch, who inquired whether or not he would be interested in buying their stock of machinery and also the entire B.S.A. property consisting of approximately 15,000 feet of factory space, 2,000 feet of office space, a railway siding,

[1] (1962-63) 30 Tax A.B.C. 8.

30,000 feet of paved exterior space and 300,000 feet of vacant land, for a total price of $275,000. Mr. Bull told Hortick that B.S.A. had decided to give up their business pursuits at that particular place and were, therefore, desirous of liquidating their assets, moveable and immoveable. Hortick declined the suggestion but, some time after, he was asked to quote a price and agreed to offer $55,000 for the stock in trade and $100,000 for all of the real estate, which submissions, in turn, were refused by the B.S.A. people. Eventually, Harry Hortick tendered a price of $120,000 for the land and $55,000 for the machinery and this met the approval of the company.

On October 6, 1956, B.S.A.'s acceptance was evidenced in a letter also acknowledging receipt from Harry Hortick Machinery & Supply Co., of a $5,000 cheque as a guarantee of good faith and a bond of sale. (cf. Ex. A-2).

I may note immediately that the appellant, in his testimony, emphatically stated his intention of entering into this transaction merely as a long-term investment, proposing, at least so he said, to install his office in part of the B.S.A. buildings and to rent the residue accommodation both inside and outside on the 300,000 feet of land. Until then, Hortick had occupied an office of 600 square feet and concluded arrangements with the J. B. Baillargeon Express Co., for storage up to a limit of 15,000 square feet, a maximum capacity which was never attained.

Hortick's only concern was, next, to devise ways and means of obtaining indispensable financial assistance, since he practically possessed no monetary means. In his quest for money, he first approached one of his brothers-in-law, Mr. Jack Cohen, who was interested and, with the prospective borrower, inspected the B.S.A. property. Shortly after this initial talk, Mr. Cohen was confronted with the obligation of moving his offices elsewhere, having received notification that the expiring lease would not be renewed. He still would have advanced up to $150,000 or $160,000 on condition that the land be sold over to his own company, a proposal to which Hortick could not accede.

Subsequently, the appellant met one of his clients, Meyer Levine, suggesting a partnership on an equal 50-50 footing. Levine showed interest in the proposal, although he did not require more than some 8,000 square feet for storage pur-

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poses, but insisted on Hortick investing dollar for dollar with him, a requirement totally impossible in Hortick's actual financial straits.

The people subsequently contacted by the appellant were two well-to-do brothers, Messrs. Charles and Harry Shafter, dealers in heating supplies. Four or five months before the date of purchase, November 8, 1956, Charles Shafter had carefully looked over the B.S.A. property with the view of installing his business there. A couple of years previously the Shafter's place of business on Dorchester St. had been expropriated by the City of Montreal and they were faced with the necessity of moving to more spacious quarters than their actual ones. The interior storage space needed amounted to 40,000 or 50,000 square feet and approximately 100,000 feet of outdoor storage.

Mr. Charles Shafter, who testified at some length, stated that he and his brother were willing to obtain the open space at the B.S.A. property and eventually agreed on a loan to Hortick of $160,000 on a 50-50 ownership basis. This sum included both machinery valued by Hortick at $55,000 and the land set at $120,000. The residue, $15,000, was provided by Hortick personally, this being his only contribution in the deal.

At this point, some contradiction between Shafter's and Hortick's evidence crept in, but can nowise influence the issue. According to Shafter, the appellant's only objective was the buildings, for which the Shafter brothers wanted a monthly rental of $3,000, much over and above Hortick's offer of $1,000. "And therefore", continues Mr. Shafter, "a certain degree of friction between ourselves could not be avoided". Hortick, in his testimony, had denied the intrusion of any friction whatsoever and insisted upon the smooth unity of views between himself and the Shafters.

The deed of sale entered into with B.S.A. Ltd. apportioned the interests in the property as follows: Charles Shafter 30%, Harry Shafter 20%, and Harry Hortick 50%, and bears date November 8, 1956 (Ex. A-3).

Shortly after, the appellant took possession of the buildings and, wishing to dispose of some machinery, telephoned one of the superintendents of the Peacock Co. Ltd. in Montreal, Mr. Fred MacKay, who hastened to meet him. Called as a witness, MacKay stated that in the course of their conversation Hortick told him the plant was for sale. Mr. MacKay immediately relayed this information to the president of his company, Mr. William Ferguson, adding that a large quantity of machinery and tools was also up for sale.

William Ferguson, also a witness, declared that Peacock Ltd. hoped to expand its business facilities, especially in the Ville La Salle area. "That same afternoon" (November 14, 1956) continues this witness, "Mr. Lucas and I went on the grounds. I asked Mr. Hortick if he would consider selling the property; this gentleman replied that, first of all, he must consult his partners. I arranged an interview for 10 o'clock the following morning at my office. Charles Shafter and Harry Hortick duly showed up the next day. I consulted with the vice president of Peacock Bros., Mr. Lucas, and we took the initiative of inquiring about a price for the entire B.S.A. property, land and buildings. Shafter and Hortick spoke of a price of $500,000. A discussion ensued and this was reduced to $450,000. On behalf of Peacock Ltd., Lucas and myself accepted; written offers and acceptances were at once prepared". Mr. Ferguson, in cross examination, remained unshaken in his statement that "my company" (Peacock Ltd.) "had no intention whatever of renting space so that any mention of this would have quickly been passed off. I opened the conversation with Hortick on the possibility of buying".

Mr. Frank Lucas, the next witness, corroborates Mr. Ferguson on the point that their only motive for visiting the B.S.A. establishment was an eventual purchase of the entire property. Lucas goes on to say: "At the November 15 meeting in Mr. Ferguson's bureau, I, at once, told our two visitors that our company was decidedly concerned in buying the B.S.A. holdings and not at all in machine tools." This same witness adds that at the first meeting, November 14, Mr. Hortick said "Would you be interested to rent the property?".

The conclusion of this bargaining was promptly reached "on or about December 14, 1956, when the aforesaid property was sold to Peacock Bros. Ltd. for a price of $450,000", a profit of $330,000 (the tools and machinery estimated at $55,000 were retained by Hortick) realized in the short period of some five weeks, November 8—December 14. (cf. Notice of appeal, para. 7).

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The problem consists in elucidating the true nature of this transaction: enhancement of a capital asset or an adventure in the nature of trade, or a scheme for profit making, as envisaged by section 139(1)(*e*) of the *Income Tax Act*, 1952, R.S.C. c. 148.

Insofar as Hortick is concerned, two decisive factors are ever present throughout the deal:

a) his lack of available money, making him dependent upon interest bearing loans, imperatively impelled him to seek for the quickest possible way of reaping a profit that payment of interest, civic taxes and sundry other obligations of proprietorship, would whittle away as time passed on;

b) the unbridgeable vacuum between the requirements of his trade, namely, 600 feet of office floor plus an unreached maximum of 15,000 feet of storage allotted to him at Baillargeon Express Ltd., and the much more considerable interior and exterior space afforded by the B.S.A. offices and vacant land, previously mentioned in these notes.

It is unnecessary to discuss at length Hortick's declaration of intent. A long list of precedents in the manner of income tax cases prove that assertions of this sort are given but slight importance, especially so when, as presently, the facts materially contradict such a statement. Hortick may have entertained the notion of a long-term investment upon entering into this bargain and shortly afterwards changed his mind at the alluring prospect of the huge $330,000 gain, thereby fully agreeing to pursue a profit-making scheme.

For the reasons above, the Court is of opinion that Hortick's participation in the matter at bar falls in the category of financial ventures foreseen by section 139(1)(*e*) of the Act and that his appeal from the decision of the Tax Appeal Board, dated September 20, 1962, in respect of taxation year 1956, should be dismissed. The respondent is entitled to obtain all costs after taxation.

Judgment accordingly.

BETWEEN: 1964 Feb. 24, 25 — Nov. 25

HARRY SHAFTER ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

At the start of the trial in the appeal of *Harry Hortick v. Minister of National Revenue, ante* p. 925 the parties agreed that the evidence adduced in the latter case should serve *mutatis mutandis* in the present instance.

I must note, however, that the financial position of the appellant completely differed from that of Harry Hortick whose relative impecuniosity had led him to borrow $160,000 for the purchase of the B.S.A. holdings.

Notwithstanding an advance by the two Shafter brothers of 91% of the purchase money, the appellant and Charles Shafter agreed that Harry Hortick should be regarded as half-owner of the newly acquired property.

Since the appellant was investing his personal funds, he evidently had no external pressure to apprehend and would become assessable for his share of the gain realized on the resale only if his participation to this deal fell in the category of undertakings, foreseen by section 139(1)(*e*) of the *Income Tax Act*, "an adventure or concern in the nature of trade".

The Shafter brothers at the material time, December 14, 1956, operated two places of business in Montreal, one on Dorchester Boulevard and the other on Beaumont St. in the northern section. Their only interest resided in the B.S.A. lands and not at all in the buildings, which they readily would have disposed of as evidenced by the prohibitive rental of $3,000 monthly asked of Harry Hortick. At all events, the proven facts show that Harry Shafter was in complete agreement with Hortick in the latter's attempts to sell their joint and recent acquisition to Peacock Bros. Ltd. The irresistible notion arising from the appellant's actions is that his true incentive was the obtention of a quick profit of windfall proportions. This motivating factor surely existed when Harry Shafter consented to finance for a share the alluring bargain outlined to him by Hortick.

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I am unable to detect any appreciable difference between the issue at bar and the analogous cases of *Bay Ridge Estates v. Minister of National Revenue*[1] and *Regal Heights Ltd. v. Minister of National Revenue*[2], to which I refer the litigants.

In conclusion, the Court is of opinion that the appellant engaged into a venture in the nature of trade, and was therefore regularly and properly assessed by the respondent for his share of the accruing gain. The appeal should be dismissed and the respondent entitled to recover his costs after taxation.

Judgment accordingly.

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Feb. 24, 25

Nov. 25

BETWEEN:

CHARLES SHAFTER ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

At the start of the trial in the appeal of *Harry Hortick v. Minister of National Revenue, ante* p. 925 the parties agreed that the evidence adduced in the latter case should serve *mutatis mutandis* in the present instance.

I must note, however, that the financial position of the appellant completely differed from that of Harry Hortick whose relative impecuniosity had led him to borrow $160,000 for the purchase of the B.S.A. holdings.

Notwithstanding an advance by the two Shafter brothers of 91% of the purchase money, the appellant and Harry Shafter agreed that Harry Hortick should be regarded as half-owner of the newly acquired property.

Since the appellant was investing his personal funds, he evidently had no external pressure to apprehend and would become assessable for his share of the gain realized on the resale only if his participation to this deal fell in the category of undertakings foreseen by section 139(1)(*e*) of the

[1] [1959] Ex. C.R. 248. [2] [1960] S.C.R. 902.

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Income Tax Act, "an adventure or concern in the nature of trade".

The Shafter brothers at the material time, December 14, 1956, operated two places of business in Montreal, one on Dorchester Boulevard and the other on Beaumont St. in the northern section. Their only interest resided in the B.S.A. lands and not at all in the buildings, which they readily would have disposed of as evidenced by the prohibitive rental of $3,000 monthly asked of Harry Hortick. At all events, the proven facts show that Charles Shafter was in complete agreement with Hortick in the latter's attempts to sell their joint and recent acquisition to Peacock Bros. Ltd. The irresistible notion arising from the appellant's actions is that his true incentive was the obtention of a quick profit of windfall proportions. This motivating factor surely existed when Charles Shafter consented to finance for a share the alluring bargain outlined to him by Hortick. I am unable to detect any appreciable difference between the issue at bar and the analogous cases of *Bay Ridge Estates v. Minister of National Revenue*[1], and *Regal Heights Ltd. v. Minister of National Revenue*[2], to which I refer the litigants.

In conclusion, the Court is of opinion that the appellant engaged into a venture in the nature of trade, and was therefore regularly and properly assessed by the respondent for his share of the accruing gain. The appeal should be dismissed and the respondent entitled to recover his costs after taxation.

Judgment accordingly.

[1] [1959] Ex C.R. 248.

[2] [1960] S.C.R. 902.

1964 Jan. 23, 24 Apr. 7

BETWEEN:

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

ROGER ELKIN CHRISTIE .... RESPONDENT.

Revenue—Income tax—Income Tax Act R S C 1952, c. 148, s. 12(1)(a) and (b)—Expense incurred to produce income from a business—Deductibility of initiation fee.

In 1959 the respondent, a licensed real estate broker who had been an officer and shareholder of an incorporated real estate brokerage firm carrying on business in London, Ontario, commenced carrying on business as a real estate broker under his own name and on his own account. He had been an active associate member of the London Real Estate Board but, since this class of membership was restricted to employees or salesmen of active members of the Board, he was required to become an active member in order to retain his membership in the Board. To do so he paid the required initiation fee of $1,000 In computing his 1959 taxable income the respondent deducted the $1,000 on the ground that payment of the initiation fee was an expense incurred for the purpose of producing income from his real estate brokerage business.

The evidence established that the respondent would have been precluded from using the Board's services, including the cooperative or multiple listing service, if he had not become an active member thereof and paid the required initiation fee and that more than half of his income in 1959 was directly attributable to commissions on sales of properties listed through the Board's cooperative listing service and the balance of his income was indirectly attributable thereto.

Held: That the payment of the initiation fee was not an expense incurred in the course of operations from which the respondent earned his 1959 income but was made at a time anterior to the commencement thereof and accordingly was not the kind of outlay or expense properly deductible in ascertaining his income.

2. That the initiation fee was not paid by the respondent for any particular year or number of years, so that the fee or any proportion thereof cannot have any relationship to the respondent's business in any one year.

3. That the appeal is allowed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Cattanach at London.

F. J. Dubrule and *M. Barkin* for appellant.

J. H. Gillies, Q.C. for respondent.

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

CATTANACH J. now (April 7, 1964) delivered the following judgment:

This is an appeal from a decision of the Tax Appeal Board dated March 16, 1962[1] allowing the respondent's appeal against his income tax assessment for the 1959 taxation year.

In his income tax return for that year the respondent claimed that he was entitled to deduct an initiation fee of $1,000 paid to The London Real Estate Board for membership therein, as an expense in computing his taxable income from his real estate brokerage business.

In assessing the respondent the Minister by notice of reassessment mailed on February 16, 1961 disallowed the deduction so claimed by the respondent. The respondent objected to the assessment, but the Minister affirmed it. The respondent then appealed to the Tax Appeal Board which allowed his appeal. It is from that decision that the Minister now appeals to this Court.

The deduction was disallowed by the Minister because, in his view, the outlay or expense in question was not incurred by the respondent for the purpose of gaining or producing income from his business within the meaning of section 12(1)(*a*) of the *Income Tax Act*, 1952, R.S.C., c. 148, but was an outlay or payment on account of capital, within the meaning of section 12(1)(*b*) thereof.

The respondent contends that section 12(1)(*b*) is not applicable as the outlay was in no sense an outlay on account of capital, but was clearly one made for the purpose envisaged in the excepting provision contained in section 12(1)(*a*).

Section 12 reads, in part, as follows:

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

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

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

[1] 29 Tax A.B.C. 1.

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The respondent first entered the real estate business in January 1952 as a salesman licensed under *The Real Estate and Business Brokers' Act* of the Province of Ontario for W. W. Evans and Sons, real estate brokers of London, Ontario. This firm was a member of the London Real Estate Board which at that time was a voluntary association of real estate brokers in the City of London and its environs having been formed in 1921.

On September 17, 1954 the London Real Estate Board (hereinafter sometimes referred to as "the Board") was incorporated pursuant to the laws of the Province of Ontario as a corporation without share capital without the purpose of gain for its members and any profits or accretions to the corporation are to be used in promoting its objects.

The basic objects of the corporation are to advance the interests of those engaged in the marketing of real estate and to establish standards of fair practice and business ethics.

One of the more important functions of the Board is to conduct and supervise a photo cooperative listing service now referred to as a multiple listing service. Under this particular listing service, when a prospective vendor of real estate lists a property for sale the listing broker obtains from the vendor a listing contract, on a standard listing agreement provided by the Board, in triplicate, one copy of which is retained by the listing broker, the second is retained by the vendor and the third is sent to the Board. All listings were for a minimum period of sixty days, which period is now increased to ninety days. Within twenty-four hours of the listing broker's receipt of such signed listing agreement he must forward the third copy to the Board.

The use of this service is obligatory with respect to all properties, other than vacant lands, located within the City of London area.

Each member office and each licensed sales person thereof is entitled to receive a copy of each such listing and such copies are supplied to them by the Board.

Any member office is allowed to advertise a property so listed as soon as a copy of such listing is received in the member's office.

Membership in the Board is divided into five classes, namely, active, probationary active, active associate, associate and honorary.

Any real estate dealer, broker or duly accredited officer of a corporation or partnership actively engaged in the real estate business or lending institution and who has maintained an office in the City of London or its environs for a period of six months immediately preceding the date of application is eligible for active membership provided the applicant has passed a broker's examination as provided by the Board during the period of probation.

Probationary active membership is limited to brokers who have not been members of the Board. Such membership does not entitle the holder to the benefits of cooperative listing. However, on the expiration of the six month probationary period a probationary active member may make application for active membership.

Active associate membership is restricted to any employee or salesman in the office of an active member.

Persons who are not actively engaged in the real estate business, but who have some connection therewith are eligible for associate membership.

In Article V, section 10 of the by-laws of the Board, provision is made for an initiation fee as follows:

(*a*) for active members, $1,000.00

(*b*) for active associate members, $10.00

(*c*) for associate members, $8.00

(*d*) for honorary members, nil.

Section 12 thereof provides for annual membership dues for active members in the amount of $30.00 and for associate members in the amount of $10.00, the said annual membership dues to become due and payable in advance as of January 1 each year.

The respondent, while employed as a salesman for W. W. Evans & Sons was a member of the unincorporated Board as an active associate member.

In 1955 the respondent, with two other salesmen in the firm of W. W. Evans & Sons, left that firm and formed a joint stock company under the name of Carruthers, Evans and Christie Limited to carry on a real estate brokerage business.

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In order to comply with the requirements of *The Real Estate and Business Brokers' Act*, 1950, R.S.O. c. 332, the respondent, Carruthers and Evans, the three officers and shareholders of the limited company, were licensed as real estate brokers thereunder.

Active membership in the London Real Estate Board was taken out by the Company in the name of Carruthers, rather than in the corporate name and apparently the respondent became an active associate member of the Board, but it is certain that the initiation fee for active membership was paid by the Company.

The respondent took an active interest in the affairs of the London Real Estate Board, being a director thereof and in 1961 he became the vice-president.

In May 1959 the respondent decided to sever his connection with Carruthers, Evans and Christie, Limited and to carry on business as a real estate broker under his own name and on his own account. Accordingly he applied for and obtained a broker's licence in his own name from the appropriate provincial authority.

He also made application for active membership in the Board. The respondent's application for active membership was given special consideration at a meeting of the directors. It was decided by them that the respondent should be admitted to active membership forthwith and that he would not be required to undergo a six month period of probationary membership.

However, the respondent was required to pay the prescribed initiation fee of $1,000 which he did by cheque dated June 1, 1959. This is the payment in question in this appeal. The annual membership dues, or any portion thereof, which may have been paid by the respondent in the 1959 taxation year, is not in issue in this appeal, such payment being properly deductible.

The respondent testified that if the probationary period antecedent to active membership in the Board had not been waived, in all likelihood he would not have embarked on this venture. He also considered that active membership in the Board was essential to the success of his business. While it is true that the licence as a real estate broker entitled him to engage in the business of marketing real estate anywhere in the Province of Ontario, nevertheless lack of membership in the London Real Estate Board would deny him access to cooperative listing therein.

The general manager of the Board testified that the volume of multiple listing sales in the London area in 1960 exceeded $12,000,000 and in 1961 this volume was in excess of $17,000,000 which, in each year, was slightly over fifty percent of all real estate sales in the area. He further testified that eighty-seven percent of the real estate brokers in the London area were members of the Board and thirteen percent were not.

The respondent testified that in the year 1959 fifty-three percent of his income was directly attributable to commissions on sales of properties cooperatively listed and the balance of forty-seven percent was indirectly attributable thereto. He also added that of the five hundred listings available to him in 1959, four hundred and eighty-eight were cooperative listings and twelve were exclusive listings.

It is, therefore, obvious that active membership in the Board was particularly valuable and advantageous to the respondent.

The respondent, so long as he remains in the real estate brokerage business in London and maintains his membership in the Board in good standing by payment of the annual membership dues and adherence to the rules of the Board, will not be required to pay the $1,000 initiation fee again. The respondent is not a member of, nor has he applied for membership in, any local real estate Board in Ontario, other than the Board in London.

In my view the expenditure of $1,000 for the initiation fee for membership in the London Real Estate Board which the respondent seeks to deduct is not the kind of outlay or expense that can properly enter into the ascertainment of his net profit or gain in the 1959 taxation year or in any other year.

The initiation fee paid by the respondent for active membership was an expenditure antecedent to his membership in the Board and the consequential right to participate in the cooperative listing service and to earn income therefrom. It seems clear to me that an outlay or expense such as this is not expended in the course of operations from which the respondent earned his income, but at a time anterior to the commencement thereof and in order to

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Cattanach J.

entitle him to participate in the cooperative listing service of the Board from which it follows that this is not the kind of outlay or expense that is properly deductible in ascertaining his income.

Further, the respondent's taxable income for 1959 consisted basically of the commissions received on the sales of real estate effected by him less the costs and expenses of conducting that business. It is not reasonable that the initiation fee which the respondent paid for membership in the Board could properly be offset against receipts for that year. The fee was not paid for any particular year or number of years. Therefore, the fee or any proportion thereof cannot have any relationship to the respondent's business in any one year.

In my view, therefore, the initiation fee so paid by the respondent cannot have been an outlay or expense made or incurred by him for the purpose of gaining or producing income from his business within the meaning of the exclusions outlined in section 12(1)(*a*).

It was strenuously argued on behalf of the respondent that the facts of the present case are analogous to those prevailing in *The Royal Trust Company v. M.N.R.*[1] decided by Thorson P. There the point in issue was whether the Royal Trust Company could deduct initiation fee paid by it to various clubs, in addition to annual dues, on behalf of its officers to enhance its business. The President held that the initiation fees and annual dues were properly deductible as expenses incurred for the purpose of gaining or producing income from the business of the taxpayer. The distinction lies in the fact that the initiation fees paid by the Company were recurring expenses since they were paid for membership of many employees, in different areas, not for membership of the Company, and when an officer of the Company left the area, the Company would be obliged to pay the initiation fee for membership of his successor, all of which payments were laid out in the course of the Company's business operations.

However, the respondent herein paid the initiation fee once and for all, on his own behalf at a time antecedent to the commencement of his business, active membership in

[1] [1957] C.T.C. 32.

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the Board being a condition precedent to participation in the Board's cooperative listing service.

The Minister, was, therefore, right in assessing the respondent as he did from which it follows that the appeal must be allowed with costs.

Judgment accordingly.

1964
May 19
May 20

BETWEEN:

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

CROWN TRUST COMPANY, (McARDLE ESTATE) .... RESPONDENT.

Revenue—Income tax—Civil Code of Quebec, art. 607, and 905 to 924—Whether refund of premiums from company pension plan on death of participant taxable as income of his estate.

The late Kenneth J. McArdle, an employee of Public and Industrial Relations Limited died before reaching pension age under the terms of his employer's contributory pension plan in which he was a participant. The trusees of the plan paid the refund of premiums to the executors of his estate. This payment was assessed by the appellant as income of the estate accruing at the time it was paid while the respondent contended that it should be considered as income due to the deceased personally.

Held: That no factual difference or legal distinction can be drawn between the collective expression "Estate" and its physical specification, the heir or heirs, so that it does appear obvious that the expression "Estate" as used in Article XI of the Pension Plan is not only indicative of an entity authorized to receive payment, but acknowledges also an ownership of and absolute right to such payment in the heirs of the late participant and the pension refund is properly taxable as income of the Estate.

2. Appeal allowed.

APPEAL under the *Income Tax Act*.

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

Paul Boivin, Q.C. and *Roger Tassé* for appellant.

John H. Gomery for respondent.

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

DUMOULIN J. now (May 20, 1964) delivered the following judgment:

The late Kenneth J. McArdle, an employee of Public and Industrial Relations Limited, died on February 7, 1957, and under a will of October 17, 1955, had bequeathed the usufruct of his estate to his wife, during her lifetime, and the capital of the estate to his three daughters.

McArdle was a participant in a pension plan instituted by his employer firm under which trustees had been appointed to whom premiums were payable in part by the company and in part by the employees, by way of deductions from their salaries. Under McArdle's will, Crown Trust Company and his former legal advisers were appointed executors.

In February of 1958, pursuant, *inter alia,* to art. XI of the Pension Plan, an amount of $13,844.20 was paid over by the fund's trustees as a refund of premiums to the deceased's Executors, McArdle having died seven years before pension age.

The appellant, for taxation year 1959, assessed this repayment of $13,844.20 as "income of the estate", accruing at the time it was paid, whilst the respondent's contention is that it should be considered as income due to the deceased personally.

The pecuniary figure, let it be said, separating one viewpoint from the other, does not exceed $390.75.

Some confusion seems to exist in the respondent's interpretation of the legal nature of Testamentary Executors, the scope and extent of their powers and functions.

We have here, initially, a matter of civil rights constitutionally imparted to the relevant provincial law. This law, stated by art. 607 of the *Civil Code of Quebec,* enacts that:

> 607. The lawful heirs when they inherit, are seized by law alone of the property, rights and actions of the deceased, subject to the obligation of discharging all the liabilities of the succession.

An old maxim inspiring the above text "Le mort saisit le vif", renders the heirs, testamentary or legal, the living "continuers" of the dead legator.

Therefore, any right possessed by Mr. McArdle at the time of his demise, all sums, chattels, all property real or personal vesting in him, instantly passed on to his heirs of which his Testamentary Executors were merely the representatives for administration purposes. Nothing that had not become the property of those heirs could possibly fall within the ambit of the Executors' powers. Ample evidence of this transitory stewardship is found in arts. 905 to 924 inclusive of the *Civil Code*, s. VI, entitled "Of Testamentary Executors". One instance is conclusive, that found in the third paragraph of C.C. art. 918:

> When his duties are at an end, the testamentary executor must render an account to the heir or legatee, who receives the succession, and pay him over the balance remaining in his hands.

Now, art. XI of the Pension Plan, intituled "Death Benefit", provides as follows:

> XI. If a Participant should die while in the employ of the Employer, the death benefit payable under any contract then held by the Trustees (Pension fund trustees) in respect to the Participant shall, subject to Section 4 of Article VII hereof, be paid to the Estate of the Participant.

Since no factual difference nor legal distinction can be drawn between the collective expression "Estate" and its physical specification, the heir or heirs, it does appear obvious that the expression "Estate" in Article XI is not only indicative of an entity authorized to receive payment, but acknowledges also an ownership of and absolute right to such payment in the heirs of the late Participant.

For the reasons above, the decision of the Tax Appeal Board in this case is annulled, the Court holding that the pension refund in the sum of $13,844.20 is taxable as income of the Estate and the Minister's assessment right in fact and law. The appeal is allowed with all taxable costs in favour of appellant.

Judgment accordingly.

1964
May 19, 20
May 20

BETWEEN:

WARNFORD COURT (CANADA) LIMITED .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Purchase and subsequent sale of real estate—Income or capital gain—Time when intention of purchaser material.

The appellant purchased a parcel of real estate in Toronto that was developed and in an income producing state. Almost immediately it sold the property at a substantial profit.

It was established on the evidence that the appellant purchased the property for income-producing purposes and that the quick resale was the result of completely unexpected offers to purchase the property becoming too great for the appellant to resist. It was also found on the evidence that the re-sale of the property was not a possibility contemplated by the appellant at the time it entered into the agreement to purchase the property.

Held: That for the purpose of determining whether a transaction is a transaction in the course of a business or is a venture in the nature of trade, the time as of which the intention of the purchaser is significant is ordinarily the time when the purchase agreement becomes legally binding rather than the time when legal title is acquired, and since there is no evidence from which to draw any inference that the appellant had in mind at that time even a possibility of re-sale, the profit from the sale of the property by the appellant was improperly assessed as income.

2. Appeal allowed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Jackett, President of the Court, at Toronto.

E. A. Goodman, Q.C. for appellant.

T. Z. Boles and *E. E. Campbell* for respondent.

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

JACKETT P. now (May 20, 1964) delivered the following judgment:

I do not think that this appeal calls for a review of the cases or for a review of the evidence. The facts are set out in the decision of the Tax Appeal Board.

On the one hand, there was a purchase of a parcel of real estate in downtown Toronto that was developed and in an income-producing state. Upon the evidence, it was purchased for income-producing purposes.

On the other hand, there is the fact that the sale had hardly been completed when there was a quick resale resulting in a substantial profit. Unexplained, that quick re-sale and profit might give rise to an inference that the acquisition and re-sale was a venture in the nature of trade within the meaning of those words as used in the definition of "business" in the *Income Tax Act*. The resale, however, has been explained by the evidence of Mr. Sebba, which I accept, that the increasing amounts of the offers made to the appellant by the person who purchased from the appellant, which offers were completely unexpected, became too great for him to resist.

I further accept his evidence that possibility of re-sale was not one of the possibilities contemplated by the appellant at the time that the appellant entered into the agreement for acquisition of the property.

For the purpose of determining whether a transaction is a transaction in the course of a business or is a venture in the nature of trade, the time as of which the intention of the purchaser is significant is ordinarily, in my opinion, the time when the purchase agreement becomes legally binding rather than the time when legal title is acquired.

As I understand *Regal Heights Limited v. Minister of National Revenue*[1], there were at the time of acquisition by the appellant of the property there involved, two alternative intentions, one being the proposed development of a shopping centre and the other being re-sale in the event that it became impossible to carry out that development.

In this case I can find no evidence upon which there can be based any inference that, at the time of acquisition of the property, the appellant had in mind even a possibility of re-sale.

The only other case to which I think I should refer is *Irrigation Industries Limited v. Minister of National Revenue*[2]. I refer to that case only to say that, having

[1] [1960] S.C.R. 902.
[2] [1962] Ex. C.R. 346.

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Jackett P.

regard to the conclusion that I have reached, I do not find it necessary to deal with Mr. Goodman's alternative argument.

The appeal is allowed with costs.

Judgment accordingly.

1964

May 21, 22

May 22

BETWEEN:

ALBERT PICHOSKY ....APPELLANT;

AND

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

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 21(1), 22(1), 63(6), (7) and 67(1)—Transfer of property by taxpayer to wife or children by means of trust.

In the 1959 taxation year, the Stork Company paid a dividend of $60,000 to Albert Pichosky Limited, all the shares of which belonged to the trustees of the Albert Pichosky Trust, the income from which was payable to Mrs. Albert Pichosky during her life, then to their two sons until they attained the age of thirty years. The shares in Albert Pichosky Limited were acquired by the Trust out of a sum of $1,600 paid by the appellant to the trustees as the corpus of the Trust. The dividend of $60,000 was included by the respondent in the income of the appellant for 1959.

Held: That s. 21(1) and 22(1) of the *Income Tax Act* provide only for income that otherwise would be taxable in the hands of the transferee being taxable in the hands of the transferor.

2. That assuming that Albert Pichosky Limited was a personal corporation so that the dividend is deemed to have been received by its shareholders in 1959, thus making it income deemed to have been received by the Albert Pichosky Trust for purposes of the *Income Tax Act*, the fact is that the Trust received no income in 1959 and no income would therefore be payable to a beneficiary in 1959 so as to be taxable in the hands of that beneficiary in 1959. The dividend would not therefore have been otherwise taxable in the hands of Mrs. Pichosky or the sons and it follows that the dividend is not taxable in the hands of the appellant.

3. That the appeal is allowed.

APPEAL under the *Income Tax Act*.

The appeal was heard by the Honourable Mr. Justice Jackett, President of the Court, at Toronto.

F. E. LaBrie for appellant.

M. A. Mogan and *D. G. H. Bowman* for respondent.

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

JACKETT P. now (May 22, 1964) delivered the following judgment:

I think I should dispose of this case now. I have a clear view on a point that disposes of the appeal and I do not think that I should undertake to decide points that are not relevant on the view that I take of that point.

The essential facts are that a company, which I may refer to as the Stork Company, paid a dividend of $60,000 to Albert Pichosky Limited in the 1959 taxation year and that that dividend has been included in the income of the appellant, Albert Pichosky, by the Minister of National Revenue in assessing him under the *Income Tax Act* for the 1959 taxation year.

The validity of the assessment has been sustained on assumptions that I might summarize as being

(*a*) that Albert Pichosky Limited is a personal corporation within section 68 of the *Income Tax Act* and that its income for its 1959 taxation year is therefore deemed to have been distributed to and received by its shareholders at the end of that year by virtue of section 67 of the *Income Tax Act;*

(*b*) that the shares of Albert Pichosky Limited belonged to the trustees of the Albert Pichosky Trust, the income from which is payable to Mrs. Albert Pichosky during her life, and after her death to their sons until they attain the age of thirty years;

(*c*) that the shares in Albert Pichosky Limited were acquired by the Albert Pichosky Trust out of a sum of $1,600 paid by the appellant to the trustees as the corpus of the Trust, and that section 21 or section 22, or both, have the effect of making the income from the shares taxable in the hands of the appellant on the view that the $1,600 was property transferred by the appellant to Mrs. Pichosky, the sons, or both Mrs. Pichosky and the sons, within the meaning of those sections.

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In my view, subsection (1) of section 21 and subsection (1) of section 22 clearly provide only for income that otherwise would be taxable in the hands of the transferee being taxable in the hands of the transferor. I think this view is clinched by the enacting words at the end of subsection (1) of section 21, which provide that the income from the property or the property substituted therefor shall be deemed to be income of the transferor "and not of the transferee". Similar words are to be found in subsection (1) of section 22.

Assuming that Albert Pichosky Limited was a personal corporation, the $60,000 dividend is deemed to have been received by its shareholders in 1959. That would make it income deemed to have been received by the Albert Pichosky Trust for purposes of the *Income Tax Act*. (See section 67(1).) In fact, however, the Trust received no income in 1959 and no income would therefore be "payable" to a beneficiary in 1959 so as to be taxable in the hands of that beneficiary in 1959. (See section 63, subsection (6) and subsection (7).) The $60,000 dividend would not therefore have been otherwise taxable in the hands of Mrs. Pichosky or the sons and it follows therefore, on the view of section 21 and section 22 that I have already indicated, that the $60,000 dividend is not taxable in the hands of the appellant.

The appeal is allowed with costs.

Judgment accordingly.

1964
May 25, 26
May 26

BETWEEN:

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

CANADA TRUST COMPANY (ESTATE OF MARY VIOLA MAINE) .... RESPONDENT.

Revenue—Estate tax—Estate Tax Act, S. of C. 1958, c. 29, ss. 3(1), (2) and 58(1)—Aggregate net value of property passing on death—Trusts—Whether word "authorize" imposes a duty to act.

Under the will of the late Jonathan Francis Maine who predeceased his wife, Mary Viola Maine, a trust was established under the terms of which the income from the bulk of the estate was to be paid to the testator's wife, and the trustees were authorized to pay to her such additional amounts as she might desire or request. On the decease of the wife, the appellant included in his computation of the aggregate net value of the property passing on her death the value of the property held by the trustees pursuant to her late husband's will on the ground that prior to her decease, she had the power under the terms of the trust to dispose of that property.

Held: That the terms of the trust include a mere authorization to the trustees to make certain payments to Mrs. Maine but do not confer upon her a right to require that such payments be made.

2. That whereas the use by the testator of the words "direct" and "instruct" in his will clearly impose a defined duty on the trustees, the word "authorize" implies an authority to act rather than a duty to act in the manner desired or requested by Mrs. Maine.

3. Appeal dismissed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Jackett, President of the Court, at London.

F. J. Dubrule and *M. L. Ainsley* for appellant.

R. S. Macnab for respondent.

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

JACKETT P. now (May 26, 1964) delivered the following judgment:

This is an appeal by the Minister of National Revenue under the *Estate Tax Act* from a judgment of the Income

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Jackett P.

Tax Appeal Board allowing an appeal by the respondent as executor of the estate of Mary Viola Maine from the assessment of the respondent by the Minister in respect of that estate.

The sole question raised by this appeal is whether the Minister of National Revenue was correct in including, in his computation of the aggregate net value of the property passing on the death of Mary Viola Maine, the value of the property held by trustees pursuant to the will of her husband, Jonathan Francis Maine, who had predeceased her.

The expression "aggregate net value" is an expression used in the *Estate Tax Act* to describe the result of the first of three main stages in the computation of estate tax. I refer to subsection (2) of section 2 and subsection (1) of section 8 of that Act.

Mrs. Maine died in 1962 and it is common ground that tax is payable under the *Estate Tax Act* in respect of her death.

The provisions of the *Estate Tax Act* that require to be considered are paragraph (*a*) of subsection (1) of section 3, subsection (2) of section 3, and paragraph (i) of subsection (1) of section 58. Section 3(1), in so far as relevant, reads as follows:

3. (1) There shall be included in computing the aggregate net value of the property passing on the death of a person the value of all property, wherever situated, passing on the death of such person, including, without restricting the generality of the foregoing,

(*a*) all property of which the deceased was, immediately prior to his death, competent to dispose;

. . . .

The particular words in paragraph (*a*) that are of significance in this appeal are the words

property of which the deceased was . . . competent to dispose.

Subsection (2) of section 3, in so far as applicable, reads as follows:

3. (2) For the purposes of this section,

(*a*) a person shall be deemed to have been competent to dispose of any property if he had such an estate or interest therein or such general power as would, if he were *sui juris*, have enabled him to dispose of that property;

. . . .

Paragraph (i) of subsection (1) of section 58 is a definition of the expression "general power" and reads, in part, as follows:

"general power" includes any power or authority enabling the donee or other holder thereof to appoint, appropriate or dispose of property as he sees fit, whether exercisable by instrument *inter vivos* or by will, or both, . . .

The effect for present purposes of the provisions that I have read is that, even though certain property did not in fact pass on the death of Mrs. Maine, its value must be included in the aggregate net value of the property passing on her death if, immediately prior to her death, she had such an estate or interest therein as would have enabled her to dispose of such property or if, immediately prior to her death, she had any power or authority enabling her to appropriate or dispose of such property as she saw fit.

Counsel for the Minister has reduced the matter to a somewhat simpler formula, which is sufficiently accurate and comprehensive for the determination of the present appeal. He puts the question: could Mrs. Maine on the day after her husband's death have said, "I want all of that property"? As I understand counsel for the Minister, if the Court would have enforced such a demand, the appeal should succeed, and, if the Court would not have enforced such a demand, the appeal must fail.

The answer to the question raised by the appeal must therefore depend upon the meaning of the will of Jonathan Francis Maine, Mrs. Maine's husband, who as I have already said had predeceased her. That will is Exhibit R-1.

By that will the husband appointed one of his sons and the respondent trust company as the executors and trustees of his will and he left to them, as his executors and trustees, his entire estate upon certain trusts. Those trusts are set out in four paragraphs lettered from A to D inclusive.

Before considering in detail the particular paragraph that I have to interpret it is relevant to examine in a general way the trust provisions as a whole.

Paragraph A is a paragraph that falls into two parts. The first part is a trust to pay out of the capital of the estate all the testator's just debts, et cetera. The second part is a provision with reference to succession duty which reads in part: "I do hereby direct that all gifts . . . in this my will

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. . . shall be free of Succession Duty". I emphasize that the testator here used the word "direct".

Paragraph B also falls into two parts. The first part is a trust "to permit" the testator's wife the use of a certain residence and the second part is an instruction with reference to payment of certain expenses in connection with that residence. The second part reads in part:

> I do instruct my executors and trustees to pay all expenses in connection with the carrying on and maintenance of such residence out of the capital of my estate.

I emphasize that the testator here used the word "instruct".

Paragraph C is the paragraph upon which the Minister relies as creating a power or authority that falls within section 3(1)(*a*) and I therefore quote it in full:

> To pay unto my said wife, Mary Viola Maine, the income out of the capital of my estate, or, if in her absolute discretion, the income be not sufficient to adequately maintain my said wife in the manner in which she is accustomed or if she shall desire any additional amounts from time to time then I do hereby authorise my said executors and trustees to pay such amounts to her as she may request or desire.

I will, of course, return to an examination of this paragraph when I complete my general outline of the will.

Paragraph D provides for the conversion of all the assets of the testator's estate remaining at the death of his wife, for the payment of certain charitable bequests and for the division of the residue among two sons and a daughter.

I have reviewed the terms of this brief will to make it clear that I am considering the effect of paragraph C in the context of the whole will. I shall now examine that paragraph in more detail.

Looking at paragraph C of the enumeration of trusts, it appears that it also falls into two parts. The first part of paragraph C is a trust "to pay unto my said wife . . . the income out of the capital of my estate". That part of the will is a clear creation of a trust enforcible by Mrs. Maine by appropriate legal action if the trustees had failed, at any time, to pay such income to her. The second part of paragraph C is, in terms at least, a mere authority to make certain payments to Mrs. Maine. The operative words are "I do hereby authorize my said executors and trustees to pay such amounts to her as she may request or desire". Now, what are the amounts that Mrs. Maine may request or may desire? Those words refer back to the earlier words in paragraph C, reading as follows:

> if in her absolute discretion, the income be not sufficient to adequately maintain my said wife in the manner in which she is accustomed or if she shall desire any additional amounts from time to time . . .

Those are the words which describe the circumstances in which additional payments may be desired or requested.

The question I have to decide is whether paragraph C enabled Mrs. Maine to dispose of the capital of the trust set up by her husband's estate.

If paragraph C enabled Mrs. Maine to require the trustees to pay to her the whole of the capital of the trust, it, in effect, enabled her to dispose of it within the meaning of the statute. See *The Montreal Trust Company v. The Minister of National Revenue*[1].

I cannot, however, construe paragraph C, the operative words of which are a mere authorization to the trustees to make certain payments to Mrs. Maine, as conferring on her a right to require that such payments be made. I am conscious of the fact that the words "in her absolute discretion" in paragraph C carry a strong implication that the testator intended that her views in relation to the possible additional payments were to prevail. I cannot, however, read those words, where they appear in the description of the circumstances that may give rise to additional payments, as overriding the clear meaning of the word "authorize" in the operative words of the provision.

My conclusion is strengthened by the use by the testator of the word "direct" in the corresponding part of paragraph A and by the use of the word "instruct" in the corresponding part of paragraph B. Those words clearly impose a defined duty on the trustees. In contrast, the word "authorize" implies an authority to act rather than a duty to act in the manner desired or requested by Mrs. Maine. I am also strengthened in my conclusion by a contrast between the first part of paragraph C and the second part. The first part of paragraph C is a trust to pay the income out of capital to Mrs. Maine. Had it been intended that the second part was to create a right in Mrs. Maine to appropriate the capital as she saw fit, then, in my view, words would have been used similar to the words used in

[1] [1956] S.C.R. 702.

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the will which was before the Supreme Court of Canada in *The Montreal Trust Company v. The Minister of National Revenue, supra,* and I refer particularly to the judgment of the then Chief Justice of Canada at page 704 where he states that

> There was a further trust "to pay to my wife . . . the whole or such portion of the corpus thereof as she may from time to time and at any time during her life request or desire".

In paragraph C we find, on the contrary, that while the first part is a trust expressed in the language used in the will that was before the Court in the *Montreal Trust* case, the second part is couched in language that mererly authorizes the trustees to make a payment.

I have in mind that there is a doctrine in connection with the interpretation of statutes that authorizing words may in certain circumstances carry with them an implied duty to exercise the authority when the conditions precedent to its exercise have arisen. I refer to the authorities of which the leading case is *Julius v. Lord Bishop of Oxford*[1]. These authorities were not discussed during the course of argument and I doubt that they apply to the interpretation of a will. In any event, as I recall these authorities, they would not, even if applicable here, have required the trustees to make the payments requested or desired by Mrs. Maine but would merely have required the trustees to exercise the jurisdiction conferred on them of deciding whether or not the payments desired or requested should be made. In that connection, I should say that I have not overlooked the argument of counsel for the Minister that there is a dominating desire by the testator, appearing in his will, that his wife should not suffer from want. In my view, however, my interpretation of paragraph C is consistent with that view of the will. The reservation of a final decision to the trustees with reference to any desire or request of Mrs. Maine to pay out all or some substantial part of the capital can be explained by the testator's possible apprehension that Mrs. Maine, as she became older, might have been constrained to request or desire money for some benevolent purpose in such a substantial amount that, in the view of the trustees, the capital of the trust would have been so impaired as to have left her without adequate means for her own needs

[1] (1880) 5 A.C. 214.

for the balance of her life. It is not unreasonable to assume that the trustees were being given an ultimate authority to protect her against any such eventuality.

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In what I have said I have adopted an interpretation of paragraph C that is as favourable as possible to the contention of the Minister. In doing so, I must not be taken to have formed an opinion with reference to the arguments put forward by counsel for the respondent for a more restrictive interpretation of paragraph C.

The appeal is dismissed with costs.

Judgment accordingly.

BETWEEN:

1964
Jun 1, 2, 3, 4
Jun 9

AKTIEBOLAGET ASTRA, APOTEKARNES KEMISKA FABRIKER ... APPELLANT;

AND

NOVOCOL CHEMICAL MANUFACTURING COMPANY OF CANADA LIMITED ... RESPONDENT.

Patents—Patent Act R S C. 1952, c 203, ss 19 and 41(3) and (4)—Compulsory Licence—Function of Court on appeal from decision of Commissioner of Patents under s 41 of Patent Act—Decision of Commissioner to be interfered with only if manifestly wrong—Royalty or other consideration in respect of compulsory licence—Function of Court on appeal from determination of royalty by Commissioner of Patents—Medicine to be available to public at lowest possible price but not so as to prevent due reward to inventor—Patentee should adduce evidence before Commissioner to support royalty he claims.

The appellant, the owner of a patent in respect of an invention for the preparation of a local anaesthetic known as lidocaine, appealed from the order of the Commissioner of Patents granting a licence to the respondent to use the said invention. The appeal was confined to the matter of the grant of the licence and to the amount of the royalty fixed by the Commissioner.

Held: That the appeal provided for by s 41(4) of the *Patent Act* extends not only to a "decision" of the Commissioner to grant or not to grant a licence and his decision as to the terms thereof but also to a decision by him as to whether or not "he sees good reason" not to grant a licence.

2. That the decision of the Commissioner as to whether or not he saw good reason not to grant the licence should not be interfered with on

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appeal unless it was manifestly wrong or the Court comes to the conclusion that no person properly instructed as to the law and acting judicially could have reached the Commissioner's decision on the facts that were before him.

3. That the legislative policy underlying s. 41(3) is that the new substances to which it applies are in the public interest to be free from legalized monopoly.
4. That the evidence produced by the appellant is insufficient to persuade the Court that the Commissioner was manifestly wrong in deciding to grant the licence.
5. That the duty imposed upon the Commissioner by s. 41(3) of the *Patent Act* to fix the amount of "royalty or other consideration" in respect of a compulsory licence does not give rise to proceedings between parties with one side or the other having the onus of proof, and, on appeal from the determination thereof by the Commissioner, the Court will refer the matter back to the Commissioner if he did not have sufficient material before him to discharge his duty under the statute.
6. That evidence that would be relevant in a matter under s. 19 of the *Patent Act* would also be relevant in considering "royalty or other consideration" under s. 41(3), but in addition there must be such evidence, if any, as may be necessary to enable the Commissioner to have regard to the desirability of making the medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention.
7. That the desirability of making the substance available at "the lowest possible price" is only one of the considerations to which the Commissioner must have regard, and, although it may reduce the royalty or other consideration below what would otherwise be fixed, it must not prevent due reward to the inventor for the research leading to the invention and it would not itself reduce the royalty to nothing or a merely nominal amount.
8. That since there is no adequate evidence as to the value of the invention to those who would be prepared to pay for the right to exploit it commercially, the matter is referred back to the Commissioner for further inquiry with regard to "Royalty or other consideration".
9. That when the patentee is given an opportunity, after the Commissioner decides to grant a licence, to adduce evidence in support of the royalty he claims, it lies with the patentee, by whatever means are open to him, to present substantial support for such royalty, and if he fails to do so, he will be in a weak position to complain of any holding by the Commissioner.

APPEAL from an order of the Commissioner of Patents.

The appeal was heard by the Honourable Mr. Justice Jackett, President of the Court, at Ottawa.

Christopher Robinson, Q.C. and *R. S. Smart* for appellant.

George H. Riches, Q.C. and *Peter Robinson* for defendant.

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

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JACKETT P. now (June 9, 1964) delivered the following judgment:

This is an appeal from an order of the Commissioner of Patents, made pursuant to subsection (3) of section 41 of the *Patent Act,* R.S.C. 1952, c. 203, granting to the respondent a licence for the use of an invention for the preparation of a local anaesthetic known as lidocaine.

The appellant is the owner of a patent under the *Patent Act* (No. 503,645) in respect of the invention and sells the substance under the trade mark Xylocaine. In 1961, the respondent commenced manufacturing a preparation containing lidocaine and was about to market it under the trade mark Octocaine when it was stopped by a restraining order issued out of the Supreme Court of Ontario in an action brought by the appellant against the respondent for infringement of the appellant's aforesaid patent.

The relevant portion of section 41 of the *Patent Act* reads as follows:

> (3) In the case of any patent for an invention intended for or capable of being used for the preparation or production of food or medicine, the Commissioner shall, unless he sees good reason to the contrary, grant to any person applying for the same, a licence limited to the use of the invention for the purposes of the preparation or production of food or medicine but not otherwise; and, in settling the terms of such licence and fixing the amount of royalty or other consideration payable the Commissioner shall have regard to the desirability of making the food or medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention.
>
> (4) Any decision of the Commissioner under this section is subject to appeal to the Exchequer Court.

The appellant's first appeal is against the granting of the licence to the respondent. An alternative appeal against the terms of the licence granted by the Commissioner and against the royalty fixed by the Commissioner was restricted during argument to an objection to the royalty fixed by the Commissioner.

Before considering the arguments in support of the appeal against the granting of the licence, it is well to consider what this Court's function is on such an appeal.

Subsection (3) of section 41 directs the Commissioner, in the case, *inter alia,* of a patent for an invention capable of

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being used for the preparation of medicine, to grant a licence to a person applying therefor "unless he sees good reason to the contrary". That is, a licence is to be granted pursuant to such an application unless "he", that is the Commissioner, sees good reason why it should not be granted. Subsection (4) provides that any such "decision" of the Commissioner is subject to an appeal to this Court.

I am of the view that such an appeal extends not only to a "decision" of the Commissioner to grant or not to grant a licence and any decision by him as to the terms of a licence, but also to a decision by him as to whether or not "he sees good reason" not to grant a licence. However, under the subsection, the decision as to whether the Commissioner did or did not see good reason not to grant the licence was a decision for the Commissioner to make and it should not be interfered with on appeal unless it was "manifestly wrong". See *Parke, Davis & Company v. Fine Chemicals of Canada, Ltd.*[1] per Martland J., delivering the judgment of the majority of the Supreme Court of Canada. In other words, the decision will not be interfered with unless "it was manifestly against sound and fundamental principles". See *Pioneer Laundry and Dry Cleaners, Ld. v. Minister of National Revenue*[2], quoted in *Minister of National Revenue v. Wrights' Canadian Ropes*[3].

The significance of this is that, unless it is made to appear that the Commissioner has acted in contravention of some principle of law, the Court cannot interefere even on an appeal. One example of such a contravention is the case where the facts are, in the opinion of the Court, insufficient in law to support the Commissioner's conclusion. The Court can interfere if it comes to the conclusion that no person properly instructed as to the law and acting judicially could have reached the Commissioner's decision on the facts that were before him. Compare *Canadian Lift Truck Co. Ltd v. Deputy Minister of National Revenue for Customs and Excise*[4]. The Court cannot, however, overrule the Commissioner "merely because it would itself on those facts have come to a different conclusion". See *Minister of National Revenue v. Wrights' Canadian Ropes, supra,* at

[1] [1959] S.C.R. 219 at 228. [2] [1940] A.C. 127 at 136.
[3] [1947] A.C. 109 at 122-3.
[4] (1956) 1 D.L.R. (2d) 497, per Kellock J. at p 498.

pp. 122-3. I apply this reasoning to the determination of the Commissioner that he "sees no good reason to the contrary" on my understanding of the decision of the Supreme Court of Canada in the *Parke, Davis* case that these words make the Commissioner the sole judge of "good reason to the contrary" in the same sense that the Minister in the *Wright's Canadian Ropes* case was made "sole judge of the fact of reasonableness or normalcy". I may say, with respect, that, in the absence of that decision, I should have reached the same conclusion in any event.

My duty, therefore, on the appeal against the granting of the licence, is to decide whether the Commissioner was manifestly wrong in deciding that he did not see "good reason" not to grant the licence.

A further preliminary comment is that the legislative policy underlying subsection (3) of section 41 is that the new "substances" to which it applies are "in the public interest, to be free from legalized monopoly". See *Parke, Davis & Company v. Fine Chemicals of Canada, Ltd., supra,* per Rand J., delivering the judgment of himself and Abbott J. at p. 222.

The respondent and the appellant each placed material before the Commissioner by way of affidavits. In addition, there was a hearing by the Commissioner during which the principal witnesses were submitted to cross-examination. Written arguments were filed with the Commissioner after the hearing. Full opportunity was given to the appellant to show reasons why the licence should not be granted. There is no suggestion that there is any fault to be found with the Commissioner's conduct of the matter.

The reasons put forward by the appellant in support of its submission that the Commissioner was manifestly wrong in not deciding that "he sees good reason" why the licence should not be granted were advanced under two different headings, namely, the probable effect of granting the licence upon competition and the conduct of the respondent in relation to the product lidocaine. I shall endeavour to summarize the submissions in respect of these reasons.

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With reference to the probable effect of the proposed licence upon competition, the appellant refers to the following facts:

(*a*) the respondent is a wholly owned Canadian subsidiary of a United States company, which has been in the dental business since 1911, the Canadian company having been set up in 1926, since which time the parent company has been making and the respondent has been distributing in Canada anaesthetics other than lidocaine;

(*b*) upon its application for a licence in respect of lidocaine, the respondent estimated its probable sales of that substance at an amount equal to the total of its current sales of the anaesthetics manufactured by its parent company;

(*c*) there are only seven dealers who get the respondent's full line of products and to whom it would supply Octocaine if it gets the licence;

(*d*) those seven dealers constitute the full membership of an association that was known as the Canadian Dental Trade Association, and a 1947 report by the Commissioner of Combines concluded that they had been operating a combine in Canada;

(*e*) the respondent was originally an associate member of the Canadian Dental Trade Association and subsequently became a full member and, at the time of the Combines inquiry, it did not supply its products to dealers who were not members;

(*f*) those seven dealers now control the bulk of the Canadian market for anaesthetics;

(*g*) while the Canadian Dental Trade Association was dissolved shortly after the Combines report, the position as between the respondent and the seven dealers is essentially unchanged;

(*h*) the seven dealers endeavour to adhere to the respondent's "suggested prices";

(*i*) the appellant's distribution policy is quite different from that of the respondent in that it supplies all dealers including cooperatives and so-called independents and, for that reason, the appellant is not in favour with the seven dealers, who control the bulk of the market;

(*j*) the appellant is apprehensive that, if the respondent gets a licence in respect of lidocaine, the seven dealers who now have to acquire Xylocaine from the appellant will acquire Octocaine from the respondent, in which event it might become uneconomic for the appellant to continue to distribute Xylocaine in Canada and there is a fair chance that the price competition from the independents and cooperatives would be eliminated, leaving the seven dealers in control of the market where they now have to meet outside competition.

In this summary, I have set out the facts relied on by the appellant in respect of competition, as I understand the appellant's submissions. I have not attempted myself to weigh the evidence and I do not make any finding as to the facts or as to whether the evidence is such as to justify the conclusions and inferences suggested. Furthermore, I express no opinion as to whether, assuming the correctness of the facts as summarized, there is "good reason" why the licence should not have been granted. I do conclude, however, that, not only was it open to the Commissioner to have concluded that there was insufficient evidence on certain points to justify a finding to the effect contended by the appellant, but, even if he had accepted all of the appellant's points, it was open to the Commissioner to reach the conclusion that the possibility or probability of the elimination of some competition among dealers was not sufficient to constitute "good reason" for withholding a licence that would result in competition among manufacturers as contemplated by subsection (3) of section 41. I cannot conclude, on this branch of the case, that the Commissioner was "manifestly wrong".

The second branch of the appellant's case on the appeal against granting the licence consisted of a detailed examination of statements in publications of the respondent's parent company concerning lidocaine and similar statements in a professional text book of which the President of the respondent was one of the authors. Undoubtedly, some of these statements were designed to raise doubts as to whether lidocaine was a safe product to use as an anaesthetic and they were made at a time when the respondent was selling its anaesthetics in competition with lidocaine. A very strong

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case has also been made out for the view that the author of these statements was deliberately over-stating facts against lidocaine or alternatively was deliberately making misstatements about it. I do not find it necessary to make any finding as to the character of the discrepancies in the statements in question. It may be that an appropriate panel of professional writers would find an acceptable explanation of the conduct criticized or, on the other hand, would find that the writer had not been able to maintain his professional judgment and integrity when it came in conflict with his commercial interests. Assuming, without deciding, that the worst possible description of the conduct of the respondent's officers is the correct one, I still find any conclusion that that conduct presages conduct by the respondent of such a character that it constitutes "good reason" for refusing a licence under subsection (3) of section 41 to be so tenuous that I cannot base on it a decision that the Commissioner was "manifestly wrong" in not acting on it.

I have in mind that the appellant put its reasons forward to be considered cumulatively. I have done that, as well as I can, and I remain unable to reach the conclusion that the Commissioner was "manifestly wrong" in deciding to grant the licence.

The remaining question is whether the Commissioner's decision with regard to royalty is wrong. The Commissioner gave no reasons for that part of his decision issued on May 21, 1963. He simply directed that the royalty be set at $12\frac{1}{2}$ per cent of the net selling price of the crude product before processing for patients' consumption and that, in the event that the respondent should process all of its production for sale as finished product, the royalty payments be based on what would be a fair selling price of the crude product to others. By the Notice of Appeal, the appellant takes the position that there is no adequate foundation in the evidence for such a decision as to royalty.

If the evidence before the Commissioner was inadequate to enable him intelligently to arrive at a royalty that would give due weight to all relevant considerations, the matter must be referred back to the Commissioner to reconsider the decision as to "royalty or other consideration". See *Parke, Davis & Company v. Fine Chemicals of Canada, Ltd., supra,* per Rand J. at p. 223 and per Martland J. at pp. 228-9.

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The duty imposed upon the Commissioner by section 19 of the *Patent Act* to determine "reasonable compensation" for use by the Government of Canada of a patented invention and the duty imposed on the Commissioner by subsection (3) of section 41 to fix the amount of "royalty or other consideration" in respect of a compulsory licence do not give rise to proceedings between parties with one side or the other having the onus of proof. On an appeal from a determination by the Commissioner in the discharge of either of these duties, the Court will refer the matter back to the Commissioner if he did not have sufficient material before him to discharge his duty under the statute. See *The King v. Irving Air Chute Inc.*[1] and *Parke, Davis & Company v. Fine Chemicals of Canada, Ltd., supra.*

The necessary material in a case under section 19 is material upon which a finding can be made as to the reasonable royalty or consideration that "would be arrived at between a willing licensor and willing licensee bargaining on equal terms". See *The King v. Irving Air Chute Inc., supra,* per Rand J. at p. 623, per Estey J. at p. 627 and per Locke J. at p. 634. I do not accept the submission of the appellant that the royalty should be designed to approximate the appellant's profits on sales. A "willing licensee" would not pay for the licence an amount that would approximate the whole of the profit from the use of the invention. Some help can be obtained in determining the nature of the relevant evidence by reference to the reasons for judgment in the latter case and particularly those of Rand, Estey and Locke JJ.

In my view, the evidence relevant in a section 19 matter would also be relevant in considering "royalty or other consideration" under subsection (3) of section 41. In addition there must be such evidence, if any, as may be necessary to enable the Commissioner to have regard "to the desirability of making the . . . medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention". The requirements of the subsection were stated succinctly in *Parke, Davis & Company v. Fine Chemicals of Canada, Ltd., supra,* at p. 228 by Martland J. as follows: ". . . the royalty allowed should be commensurate with the mainte-

[1] [1949] S.C.R. 613.

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nance of research incentive and the importance of both process and substance".

The application of the latter part of subsection (3) of section 41 might, in some circumstances, give rise to difficulty. Read literally, it requires consideration to be given to the desirability of making the food or medicine available at "the lowest possible price" consistent with giving the "inventor" due reward for the research leading to the invention. Does this mean, for example, that, if the particular inventor has already had "due reward" for the research, or if there was no research leading to the particular invention, or if the inventor has no interest in the patent because he had assigned his invention, the desirability of making the substance available at "the lowest possible price" must prevail and that the royalty or other consideration must, to achieve that objective, be nothing or merely nominal? I am of the view that that question should be answered in the negative. The consideration spelled out in the subsection is only one consideration to which the Commissioner must "have regard". It must be allowed to influence the decision but it does not displace consideration of matters that would otherwise determine the result. Regard for the desirability of making the substance available at the lowest possible price may reduce the "royalty or other consideration" below what would otherwise be fixed on the principles laid down in the *Irving Air Chute* case (but not so as to prevent due reward to the inventor for the research leading to the invention). To allow this factor to operate to eliminate what would otherwise be a substantial royalty would not, however, in my view, be a proper discharge of the Commissioner's duty to fix "royalty or other consideration".

I have ventured to say so much about this very difficult question of interpretation in the hope that it may be of some assistance to the Commissioner in the performance of the duty imposed on him by this subsection.

My task is relatively simple. In the absence of adequate evidence, and I find there is none, as to the value of the invention to those who would be prepared to pay for the right to exploit it commercially, I must allow the appeal and refer the matter back to the Commissioner for further inquiry with regard to "royalty or other consideration".

Evidence may also be necessary concerning the factor described by Rand J. in the *Parke, Davis* case, *supra,* at p. 223, as "the maintenance of research incentive". Whether or not that is required in this case is a matter for consideration by the Commissioner on which I express no opinion.

I should not leave the case without referring to two other points mentioned by Rand J. in the *Parke, Davis* case at p. 223.

While there was no onus on the appellant to see that there was before the Commissioner upon the application for the licence evidence sufficient to enable the Commissioner to fix "royalty or other consideration", so that the appellant does not fail on this appeal for not having discharged an onus of proof, nevertheless, when the patentee is given an opportunity, after the Commissioner decides to grant a licence, to adduce such evidence, "it lies with the patentee, by whatever means are open to him, to present substantial support for the royalty which he claims" and if he fails to do so, "he will be in a weak position to complain of any holding by the Commissioner". This being the position, the Commissioner might consider, in future cases under subsection (3) of section 41, after he decides that the case is one for a licence, to afford the parties an opportunity of presenting evidence on the question of "royalty or other consideration" before deciding that question. See *Parke, Davis & Company v. Fine Chemicals of Canada, Ltd., supra,* per Rand J. at p. 223.

Secondly, I draw attention to the observation made by Rand J. in the same part of his judgment, with reference to this question of "royalty or other consideration" that "it is not sufficient for the patentee to sit back and, if they only are available, keep important facts undisclosed as being private and confidential".

As success is divided there will be no costs.

Judgment accordingly.

1963 Oct 28, 29, 30, 31 Nov. 1 — 1964 June 16

BETWEEN:

NETA L. PECK .... SUPPLIANT;

AND

HER MAJESTY THE QUEEN .... RESPONDENT.

Petition of Right—Civil Service Act, R S C 1952, c 48, ss. 5 and 19—Civil Service Regulations, s. 118—Crown Liability Act, S. of C. 1952-3, c. 30, ss. 3(1)(a) and 4(2)—Dismissal of Civil Servant—Proper dismissal procedure—Defamation of character—Qualified privilege—Malice.

The suppliant, a civil servant from September 18, 1940 to the date of her dismissal, September 1, 1960, claimed reinstatement, damages for defamation of character, damages for wrongful dismissal and damages for not having been given a proper opportunity, prior to her dismissal, to present her side of the case as provided for by s. 118 of the *Civil Service Regulations.*

The suppliant had been employed by the Department of National Defence until 1949 when she was transferred to the Department of Fisheries, where she remained until she was dismissed in 1960. She had started in the Civil Service as a stenographer Grade I and was a stenographer Grade IV, occupying the position of secretary to the Director of the Information and Education Service in the Department of Fisheries at the time of her dismissal. The reasons for her dismissal as stated in the Notice of Dismissal dated July 26, 1960 were her "failure to maintain the confidence which is essential in secretarial responsibility and lack of maintenance of satisfactory personal staff relations". The suppliant had an interview with the Deputy Minister of Fisheries on July 29, 1960, which purported to be in compliance with s. 118 of the *Civil Service Regulations.*

Held: That Section 19 of the *Civil Service Act* puts into statutory effect the long standing rule that servants of the Crown, in the absence of provision to the contrary, which does not avail the suppliant herein, hold office during pleasure, and the suppliant accordingly has no right to the relief sought by her that she should be reinstated in her employment, nor has this Court jurisdiction to order such relief.

2. That since the suppliant's appointment was at pleasure under Section 19 of the Act she could have been dismissed arbitrarily without cause or notice and, accordingly, she has no right to any damages for wrongful dismissal.

3. That the statements in Mr. Lamb's letter of July 26, 1960 to the suppliant and the reasons for dismissal given in the notice of dismissal, which are relied upon by the suppliant to support her claim to damages for defamation of character are, in their plain and ordinary meaning, clearly defamatory of the suppliant and there was publication of the letter and the enclosed notice of dismissal not only to the stenographer to whom it was dictated by Mr. Lamb but also to other employees in the filing room of the Department by reason of a carbon copy of the letter and the notice being made a matter of record. However, these statements were made in the discharge of a duty arising in the course of employment and result in qualified privilege.

4. That on an occasion of qualified privilege the presumption of malice is rebutted and the suppliant can succeed only if she can prove that the respondent was not using the occasion honestly for the purpose for which the law gives protection, but was actuated by some indirect motive not connected with the privilege, i.e. malice in the popular sense. By virtue of Secs. 3(1) and 4(2) of the *Crown Liability Act* the suppliant must prove that there was malice in fact on the part of those making the statements complained of, in that they were actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made, and this the suppliant has failed to do. Her claim for damages for defamation of character accordingly fails.
5. That the suppliant's claim for damages for not having been given a proper opportunity to present her side of the case prior to dismissal, as provided for by s. 118 of the *Civil Service Regulations* must also fail because the allegations against her were communicated to her beforehand in a degree of particularity which was adequate and commensurate with the informality of the hearing and further because the suppliant knew in advance the allegations against her.
6. That the necessity of notice of the impending proceeding is implicit in Sec. 118 of the *Civil Service Regulations* and the length of such notice must be reasonable, the Court having jurisdiction to review the adequacy of such notice. In this case, the suppliant had a maximum of two clear days' notice but she stated she was available any time and did not object to the length of notice so must be taken to have waived any inadequacy of notice if such existed.

PETITION OF RIGHT for reinstatement and damages resulting from alleged wrongful dismissal of a civil servant.

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

David Scott for suppliant.

D. H. Aylen for respondent.

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

CATTANACH J. now (June 16, 1964) delivered the following judgment.

In her petition of right the suppliant, who was employed as a civil servant with the classification of Clerk Grade IV in the Information and Educational Service of the Department of Fisheries at Ottawa, Ontario, but was dismissed from her employment, complains that her dismissal was improper and seeks in her prayer for relief:

(*a*) reinstatement with full pay, effective September 1, 1960, together with full benefits insofar as accumulated sick leave and other grounds are concerned on the ground that she was wrongfully dismissed;

(*b*) damages for defamation of character in that a letter accompanying the notice of dismissal, together with reasons given in the notice of dismissal contained statements falsely imputing that the suppliant is unfit to be a civil servant (which statements will be set forth in detail later) and which were published;

(*c*) damages for wrongful dismissal in the amount of $15,000;

(*d*) damages in the amount of $15,000 for not having been given, prior to her dismissal, a proper opportunity to present her side of the case to the Deputy Head or to a senior officer nominated by the Deputy Head.

The suppliant, who was one of a family of eleven, entered the Civil Service of Canada on September 18, 1940 at the age of twenty-one after having qualified by written examination held shortly before that date in Windsor, Ontario. Her first assignment was as a stenographer Grade I in personnel administration of the Department of National Defence. She was later transferred to the Legal Services of the Air Force in that Department. She remained in that Department from 1940 to 1949 and progressed through stenographic Grades I, II and III.

The suppliant, at her own request, was then transferred to the Department of Fisheries as a stenographer Grade III where she was first employed in the office of the Assistant Deputy Minister from where she was transferred to the Information and Educational Service of that Department and where she was continuously employed until her dismissal on September 1, 1960, except from January 1957 until October of that year when she served in the personnel section of the Department.

To the time of her dismissal she had served for a period of nineteen years, eleven months and fifteen days during which time she was never denied the annual efficiency increment. Her total service in the government was divided almost equally between the Department of National Defence and the Department of Fisheries. She was promoted to stenographer Grade IV effective April 1, 1955 while in the employ of the Department of Fisheries.

The suppliant at all material times, except for a brief interlude which will be described in detail later, occupied the position of secretary to the Director of the Information and Educational Service and served under a succession of persons occupying that position, the last of whom being T. H. Turner who recommended the suppliant's transfer and failing that her dismissal.

Mr. Turner joined the Information and Educational Service of the Department of Fisheries in 1948, serving first as an information officer. From 1955 to 1957 he was Assistant Director and in 1957 he became Director. Therefore, the suppliant's and Mr. Turner's periods of service in the Department were coincident.

In the fall of 1956, when Mr. Wooding was Director, friction developed between him and the suppliant to the extent that remedial action was required. Accordingly, with the concurrence of the Deputy Minister, the suppliant was transferred to the personnel section of Administration Services under the direction of Mr. J. S. Forrest.

At that time the suppliant's source of grievance was her belief that certain duties performed by her were to be assigned to the position of Editorial Assistant classified as a Clerk Grade IV and held by Mr. Craig in order that such position might be reclassified as a Principal Clerk and this despite the fact that persistent and repeated attempts and representations of the suppliant to have the position she occupied reclassified to a higher status.

The Service was in the development stage with a small staff as a consequence of which there was some overlapping of responsibilities and as the volume of work increased it became desirable to clarify the functions of positions. No specific duties performed by the suppliant were identified as to be taken from her and assigned to Mr. Craig, with the exception of the supervision of the stock-room, which had been assumed by the suppliant, it being convenient for her to do so because of physical location of the stock-room. There was a further division of responsibility susceptible of conflict in the duties performed by the suppliant and the Editorial Assistant, Mr. Craig, with respect to files of reference material. There were two sets of reference files, one dealing with material for articles to be written which was

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under the supervision of Mr. Craig and another set concerning correspondence and work done in the office which was under the supervision of the suppliant. The reason for the reclassification of the position of Editorial Assistant was because of the increase in the volume of work.

In July, 1958 a competition for this reclassified position was advertised. The applicants were limited to employees of the Department of Fisheries. There were several applicants including Mr. Craig and the suppliant. A selection board was held under the chairmanship of Mr. Forrest and Mr. Craig was the successful applicant. It was the opinion of the Board that the duties of the position had been performed by Mr. Craig in the past in an eminently satisfactory manner and that his qualifications were superior to those of any other applicant. It was also the opinion of the Board that the suppliant was not possessed of the necessary qualifications either by training or experience.

The suppliant disagreed with the Board's decision and expressed to Mr. Turner and Mr. Forrest her view that the conduct of the Board was "peculiar". She contemplated an appeal from the Board's decision. In discussing the matter with Mr. Turner and Mr. Forrest she was told by them, without denying or advising against the exercise of her right of appeal, that she did not have the requisite qualifications. The suppliant did not appeal.

The suppliant worked in the Personnel section under Mr. Forrest for approximately nine months in 1957, during which time she expressed to him her view that some of the writers employed in the Information service were neither competent nor qualified and that her own ability to perform these duties was superior. She also expressed to him her view that her own administrative ability was superior to that of the Assistant Director.

In order that she might demonstrate her ability in these fields, Mr. Forrest asked the suppliant to prepare a procedure to deal with suggestion awards which the Civil Service Commission had just inaugurated and with the view of the possibility of the suppliant undertaking the duty of supervising the suggestion awards which might entitle her to a promotion to a higher grade. He specifically instructed the suppliant that this task should be entirely on her own initiative. Contrary to those instructions the suppliant forthwith telephoned other departments of government to learn how the plan had been implemented by them. Mr. Forrest testified that he then lost faith in the suppliant.

From his personal observations of the suppliant Mr. Forrest became concerned about her health, particularly because of her constant disturbance about her status in the Department. In January, 1957 he, therefore, recommended and arranged for the suppliant to undergo a medical examination by the medical officers of the Department of National Health and Welfare. The suppliant reluctantly agreed to submit to such examination the result of which being that she was found to be in good physical condition.

The suppliant had been under comparatively constant medical care because of physical ailments known to her, but which were not such as to affect her ability to work. At no time during her service in the Department of Fisheries did she apply for or take sick leave, except for occasional minor complaints and once when her leg was broken in a skiing accident, although she was granted a month's sick leave by the Department of National Defence in 1949 because of low blood pressure and nervous tension.

Because of office rumours which came to the suppliant's attention and scraps of conversations between fellow employees which she overheard, the suppliant concluded that her physical condition was a subject of concern to her superiors. These facts, in addition to Mr. Forrest's recommendation that she undergo a medical examination, prompted the suppliant to write a letter dated July 16, 1958 to Dr. Davey, the Chief of the Civil Service Health Division of the Department of National Health and Welfare enclosing two medical certificates, one dated July 2, 1957 from Dr. Charteris of Chatham, Ontario, who had been attending the suppliant for many years, stating that he had always found the suppliant's physical health satisfactory and the second dated July 15, 1958 from Dr. Dunning of Ottawa, Ontario stating that he had examined the suppliant on July 14, 1958 and found her to be in excellent physical condition. The suppliant's covering letter dated July 16, 1958 stated that the above mentioned medical certificates were forwarded with the hope that

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they would prevent a recurrence of any events similar to those which had previously happened. The suppliant, in so writing, had in mind the medical examination she underwent at the recommendation of Mr. Forrest in January, 1957 and to preclude any advantage being taken of her physical state to thwart her promotion or being used in any other manner detrimental to her. She considered it in her interest to have these medical certificates placed on record.

By letter dated June 24, 1959 the suppliant forwarded to the Department of National Health and Welfare a still further certificate from Dr. Charteris dated June 19, 1959 repeating that after examination he found the suppliant's "general health in good physical condition". The suppliant stated in this letter that this additional medical certificate was being submitted for the same purpose as those forwarded under cover of her previous letter of July 16, 1958.

It had been the suppliant's view that the duties performed by her as secretary to the Director of the Service warranted reclassification to a higher grade. When she first assumed this post in 1950 the position was classified as a stenographer Grade III. On April 1, 1955 the position was reclassified as clerk Grade IV. In the Department of Fisheries there was a secretary assigned to each of the heads of six directorates. In the early fifties these positions were classified as Grade III. The Department, after prolonged negotiations with the Civil Service Commission, was successful in persuading the Commission that work performed by all six of the incumbents of the positions justified reclassification of each such position to Clerk Grade IV. The suppliant was included in this group of reclassifications which is the reclassification she received effective April 1, 1955. However, the Department's success was achieved over the argument advanced by the Commission that all directorates were not of equal status and accordingly the responsibilities of the secretaries of the directors of the junior directorates were less and did not warrant higher classifications.

In the 1959-60 fiscal year the Department repeated its efforts to reclassify the positions of the six secretaries, this time from Clerk IV to Secretary to Executive and was again met with the adamant argument of the Commission that all the directorates did not carry equal responsibility.

The Department acceded to this argument in the belief that it would be futile to insist on all six positions being reclassified simultaneously and that it would be preferable to accept the reclassification of four of the six positions to Secretary to Executive and to atempt a reclassification of the two remaining positions being secretary to the Director of Administration and secretary to the Director of Information Service (the latter being the position held by the suppliant) at a later time. Accordingly, the 1959-60 estimates of the Department, which came to the attention of the suppliant, included a provision for reclassifying four of the six secretarial positions, but excluded the position of the suppliant.

In March, 1959 the suppliant spoke to her Director, Mr. Turner, pointing out that if the secretaries of the other directors were to be reclassified upward, there was no explicable reason why she should not be included as well. Mr. Turner agreed with the suppliant and suggested she should write a memorandum outlining her view that her position should also be reclassified which he, in turn, would pass to the Deputy Minister with his concurrence and recommendation endorsed thereon. This was done with the exception that the suppliant's memorandum, with her Director's endorsation was channelled to the Deputy Minister through Mr. Lamb, the Director of Administration.

Approximately a month later the suppliant enquired of Mr. Turner if any results had been forthcoming from her memorandum and his recommendation, whereupon she was advised that the memorandum had been passed to Mr. Lamb and that any enquiry should be directed to him. The suppliant forthwith enquired of Mr. Lamb as to any action or results, but received no immediate reply from him.

During the course of her examination of departmental files for the purpose of preparing her memorandum to the Director supporting her view that her position should be reclassified, the suppliant came across a letter from the Civil Service Commission which she construed as confirmation of her belief that duties of her position had been

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assigned to Mr. Craig to justify a reclassification of the position held by him to that of Principal Clerk which, of course, revived the suppliant's sense of grievance and prompted her to make still further enquiries.

With the concurrence of her Director, the suppliant wrote to the Civil Service Commission in May, 1959 as to the possibility of including her position with those of the secretaries of the other directors for reclassification. The suppliant received a reply from the Commission dated June 16, 1959 to the effect that upon review the Commission could not concur in the Department's recommendation that higher classification for the secretarial positions was warranted and that accordingly the recommendations reflected in the 1959-60 estimates were refused.

The Department did repeat its recommendation for reclassification of the positions of the secretaries of the Directors exclusive of the position held by the suppliant and the secretary to the Director of Administration in the estimates for the next ensuing fiscal year which was approved and implemented. However, the position of secretary to the Director of the Information and Consumer Service remained at Clerk Grade IV and after the dismissal of the suppliant on September 1, 1960 the position was filled at the stenographer Grade III level subject to the position of the succeeding incumbent being reviewed for the purpose of eventual reclassification to Clerk Grade IV.

In September 1959, the suppliant, in discussion with her Director, raised the matter of the letter from the Civil Service Commission with respect to the transfer of duties from her position to the position held by Mr. Craig. He did not agree with her interpretation of that letter. Immediately following this discussion the suppliant wrote her Director a memorandum on the subject, which memorandum was very shortly thereafter discussed with the suppliant by Mr. Turner and Mr. Lamb during which the suppliant was informed that the Civil Service Commission had no intention of reclassifying the suppliant's position and that the Commission had been under no misapprehension whatsoever in connection with the duties of the suppliant and those of the position of Mr. Craig which had

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been reclassified as a Principal Clerk. The suppliant expressed the wish to write to the Commission concerning the matter to which Mr. Turner and Mr. Lamb expressed no objection. The suppliant then wrote the Commission by registered letter dated September 24, 1959, the envelope being marked personal. Following receipt of this letter by the Civil Service Commission, Mr. Forrest received a telephone call from an employee of the Commission in which mention of the receipt of the letter was made and enquiry was also made as to who the suppliant was. Mr. Forrest, as chief of personnel, was conscious of his responsibility for harmony in staff relationships, therefore felt that he should have an informal and personal conversation with the suppliant, which was arranged during lunch hour. He introduced the subject, which he knew would be a difficult one, by an enquiry of what was the suppliant doing to the Department and by advising her he had learned of her letter to the Commission and forecast the nature of the reply as being confirmation of the information already given the suppliant by Mr. Turner and Mr. Lamb. The interview terminated very shortly having deteriorated into generalities.

Thereafter the suppliant complained to officers of the Commission that the receipt of her letter should not have been brought to the attention of the Chief of Personnel of her Department.

The suppliant, whose excellence in taking and transcribing shorthand notes was acknowledged, aspired to more responsible and higher paid work in the Department, particularly that of an information officer. In 1958 the Civil Service Commission advertised for competition of a position as Information Officer Grade I in the Information and Educational Service at Ottawa open to all employees of Federal Government Departments. One of the qualifications for eligibility was graduation from a university of recognized standing. Shortly before this advertisement, positions of Information Officer Grade IV and Information Officer Grade III in Halifax and Vancouver were advertised and subsequent thereto the position of Information Officer Grade IV in Newfoundland. All three of such positions were senior to the position in Ottawa, but in none of them

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was graduation from a university a qualification. The suppliant assumed that the qualifications for the post in Ottawa were so drafted as to preclude her eligibility.

The Department, in consultation with the Civil Service Commission, sought to fill the positions in Halifax, Vancouver and Newfoundland from persons in that area with experience in the writing field by competition open to all persons. The likelihood of finding a person with a university degree was remote, but such lack of academic qualification was to be compensated for by long practical experience. On the other hand, the qualifications of the position in Ottawa were designed to attract persons already in the government service employed in more junior positions who were possessed of academic training but who lacked practical experience for training on the job.

The disparity in educational qualifications for the respective positions, though apparent, is thus explainable and the qualifications were not designed with the intention of eliminating the suppliant as a potential applicant for the post in Ottawa.

This disparity in educational qualifications was the subject matter of a letter from the suppliant to the Chairman of the Civil Service Commission.

Still further incidents arose which are illustrative of the relationship between the suppliant and her superiors in the Department.

The suppliant was asked by officers of the Department, with the consent of her director, Mr. Turner, to record the proceedings of a conference on fishing gear. This she did, but she transcribed her notes at home because she felt that this additional work interfered with her normal work during regular office hours. Her director gave his permission to do this. The suppliant then claimed two days leave credit for overtime work which was not immediately forthcoming from the Director of Administration because it was contrary to the applicable regulations which require that overtime work shall be done upon a written request from the Director of Administration, the suppliant's director not being authorized to so permit. After a lengthy exchange of memoranda the suppliant was eventually granted two days leave credit. Her director supported and recommended the suppliant's request.

In July 1959 a model fishing boat costing $750 was mislaid. Mr. Turner asked the suppliant to check correspondence to ascertain if the model had been loaned to anyone. Within the next day Mr. Turner learned that the model had been placed on loan by the Deputy Minister to a former Deputy Minister who had been responsible for putting this particular class of boat into the patrol service of the Department. He thereupon told the suppliant to discontinue her check. The suppliant then demanded to know where the model was, it being her feeling that having spent two days in checking she had a right to know. The suppliant, during this conversation, persisted in her enquiry which was terminated in the suppliant being told by her director that the matter was none of her business.

The question of conflict of duties having arisen, the suppliant made numerous requests for clarification and a formal statement of the duties of her position directed to her Director, the Director of Administration and the Civil Service Commission, but despite these repeated requests no formal statement was ever produced to her. It was conjectured in evidence that a statement of the suppliant's duties would have been in existence or compiled when the position occupied by the suppliant was reclassified to Grade IV on April 1, 1955.

In the organizational and functional chart of the Information and Educational Service as at October 17, 1952 (Exhibit R14) the clerical section, shown to be under the direct responsibility of the Assistant Director, consisted of four persons, a Clerk Grade III, a Typist Grade II, a Stenographer Grade II and a Stenographer Grade I. The typist and clerk had no relationship to the suppliant, they being engaged in other work in another office. However, the suppliant did exercise a supervisory function over the Stenographer Grade II and the Stenographer Grade I who were Miss Dignan and Mrs. Besack, respectively. Miss Dignan, whose position is included in the clerical section also filled the position of secretary to the Assistant Director.

The suppliant, Miss Dignan and Mrs. Besack occupied the same office. It is certain from the evidence that the

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suppliant in part functioned as an office manager and as being in charge of a stenographic pool consisting of Miss Dignan and Mrs. Besack. When other employees of the Service required typing to be done they would bring the work to the suppliant who would assign it to either Miss Dignan or Mrs. Besack and check the completed work before returning it to the person asking it to be done. I think the evidence has established beyond any doubt that the suppliant was an exacting taskmaster and that she was equally unsparing of herself. While the direct responsibility for the supervision of the clerical section was that of the Assistant Director, nevertheless, the suppliant did exercise a supervisory function over the two junior employees as above described.

The relationship between the suppliant and her director and between the two junior employees under the suppliant's supervision was undoubtedly strained. When the suppliant returned to the Information and Educational Service after working in the Personnel section under the direction of Mr. Forrest from January to October 1957, she was aware that the then Director, Mr. Turner, was not anxious to have her back. She returned to her original place of employment at the direction and with the concurrence of the Deputy Minister who specifically directed that bygone difficulties should be forgotten and a fresh and improved start made. At that time he also advised the suppliant if there was a recurrence of previous difficulties the suppliant would be "out".

The suppliant did not entertain a high regard for either the competence or industry either of Miss Dignan or Mrs. Besak. She objected to what she considered an inordinate waste of stencils which could have been corrected rather than retyped and failure to read over copy before typing to ascertain if all words were decipherable.

In the suppliant's view Miss Dignan took an excessive amount of sick leave which the suppliant believed to be because of a goitre and thyroid condition and to which condition the suppliant attributed Miss Dignan's propensity to become upset and burst into tears when subjected to correction by her.

In May 1960 the Department arranged the transfer of Miss Dignan to the Industrial Development Service, to avoid the friction that was prevalent between her and the suppliant, and her replacement by Miss Brophy.

The suppliant's appraisal of Mrs. Besack was that she was somewhat contrary, was unable to follow directions either written or oral and when asked to do one thing she wished to do something else. It was the suppliant's understanding that Mrs. Besack was over-burdened by her family responsibilities and that she too was suffering from a thyroid disorder which accounted for her tendency to cry frequently and easily.

At Mr. Turner's request, Mr. Ronayne, the Assistant Director, who was responsible for the clerical section, conducted an investigation and concluded that both these employees were competent and capable of carrying out their duties in an adequate manner.

On October 14, 1959, a conversation took place during office hours between the suppliant and Mrs. Besack concerning a press announcement of the government's decision not to grant an overall increase to civil servants. The suppliant expressed the view that the proposed increase was not apposite because of unemployment in private industry and that many civil servants did not work as hard as persons in industry nor could they hold a job in industry. Apparently Mrs. Besack interpreted the suppliant's remarks as being directed at her.

Mrs. Besack went to Mr. Turner forthwith to complain of what she considered unbearable working conditions. Mr. Turner, because of Mrs. Besack's extremely agitated state, was unable to determine the precise cause of her disturbance other than to elicit that the suppliant had been rude to her. He calmed her by advising she should not permit herself to be upset and that efforts would be made to make working conditions more pleasant.

The next day, October 15, 1959, Mr. Turner called the suppliant into his office and informed her that effective forthwith she was relieved of all supervisory duties because she was not tempermentally suited to discharge them and henceforth they would be actively assumed by Mr. Ronayne.

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Mr. Turner thereupon recommended to the Deputy Minister that the suppliant should be transferred to a position elsewhere in the government service and failing arrangements to effect her transfer she should be dismissed from her employment.

It was Mr. Turner's view that the suppliant was overly officious, unduly inquisitive and inordinately rude which characteristics gave rise to continual tension, conflict and agitation with a consequent diminution in the efficiency of the Information and Educational Service for which he was responsible. He attributed such difficulties solely to the attitude of the suppliant.

While the suppliant was informed she was relieved of her supervisory duties on October 15, 1959 she was not effectively relieved of them until much later. The accommodation occupied by the Service did not permit of a separation of the staff and all three girls continued to occupy the same office. The suppliant continued to assign work to the two junior employees and to check the accuracy thereof. It was not until the Department moved to a new building in the spring of 1960 that it was possible to segregate the employees.

When Miss Dignan was transferred to other duties and replaced by Miss Brophy as described above, Miss Brophy came under the direct supervision of the suppliant. Miss Brophy testified that her relationship with the suppliant was most amicable.

On November 15, 1959 Mr. Turner in the presence of Mr. Ronayne dictated a memorandum to the suppliant advising her that she was to report to the Civil Service Commission for an interview. The suppliant testified she was not informed of the purpose of the interview either by her director or by the officers of the Civil Service Commission who composed the interviewing board.

On November 17, 1959 the suppliant was interviewed by a board of the Civil Service Commission, consisting of Mr. Grant, Mrs. Farley and Miss Henry. The purpose of this board was to assess the ability and personal suitability of the suppliant to perform supervisory duties with the possibility of recommending her transfer to another department of government.

Subsequent to the suppliant's interview with the Board, the suppliant not having heard any report, again attempted to obtain a written statement of her duties and on January 27, 1960 she wrote to the Chairman of the Civil Service Commission to enquire whether her duties would be changed when the Department moved to its new accommodation. She received a reply dated February 29, 1960 to the effect that her duties would neither be increased or decreased, but that it was the suppliant's duty to perform the duties assigned to her in a competent and cooperative manner.

In the meantime the suppliant had a further interview with Mr. Turner and Mr. Forrest concerning her duties and the possibility of promotion. The suppliant was asked to submit her conception of the duties of her position which she did by a document dated April 1, 1960 which was introduced in evidence as Exhibit S.28 consisting of a minute and detailed review of everything the suppliant did. She did not receive an official statement of duties in reply, nor any written comments on the statement prepared by herself.

It was the suppliant's avowed purpose to undertake and have assigned to her a number of duties to ensure that her position would be upgraded. Whatever the duties of the suppliant may have been or what she conceived them to be, she therefore took steps to guard against any intrusion on or diminution thereof.

When the Department moved to its new quarters the suppliant considered her duties as being reduced. Instead of having a telephone with a two line key switch and one of the lines with three extensions as she had before, she then had only a single line to answer.

The suppliant promptly wrote another letter dated June 12, 1960 to the Chairman of the Civil Service Commission complaining that contrary to the assurance in his letter of February 29, 1960 her duties were being diminished, she had only one telephone to answer, she was being relieved of her supervisory functions and the like, but that her prime objection was that duties performed by her would be assigned to other positions which would be upgraded and hers was not even with those duties.

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Prior to writing her letter of June 12, 1960 to the Chairman of the Civil Service Commission, the suppliant sent a memorandum in similar terms to the Assistant Deputy Minister on what the suppliant termed a private basis as to the advisability of discussing these matters with the Civil Service Commission. In an oral discussion the Assistant Deputy Minister, who disavowed his responsibility in personnel matters, recommended against the suppliant adopting such a course because it would constitute an impediment to the Department recommending a transfer for her if one should become available. The suppliant saw fit to disregard this advice.

On July 26, 1960 Mr. Lamb, Director of Administration, wrote a letter to the suppliant which was delivered to her by hand the same day in a sealed envelope. However, Mr. Lamb dictated the letter to his secretary and a carbon copy was placed upon the Departmental files. The content of such letter, together with the reasons given in a notice of dismissal enclosed therewith constitute the basis of the suppliant's claim for damages for defamation of character. The letter, introduced in evidence as Exhibit S5, reads as follows:

July 26th, 1960

Miss N. L. Peck,
Department of Fisheries,
Ottawa, Ontario.

Dear Miss Peck:

It is clearly evident because of your actions over the past two or three years that you are not satisfied to accept duties prescribed by the Department as those of Secretary to the Director of the Department's Information and Educational Service. As a Secretary, the Department acknowledges your ability in what might be termed the manual or mechanical function of the position but you have displayed a total lack of the confidence essential in secretarial responsibilities. There is also a proven lack of ability on your part to have satisfactory personal relations with members of the staff of the Information and Educational Service. Because of this, there has been a fairly constant agitation and aggravation to those concerned including the Director.

Sometime ago the Department took up with the Civil Service Commission, partly at your suggestion, the possibility of a transfer for you to another Department of Government. In order that your case might be fully and fairly dealt with, the Commission arranged that you be interviewed by a Board in order that a full appraisal of your situation, qualifications and possible moves might be made The Commission has informed the Department that it was so obvious to its officers that you possessed in full measure the defects of temperament to which this Department had referred that it was felt to be inadvisable to transfer you to another Department and so create a similar situation there. For this reason consideration could not be given to an internal transfer when positions of Clerk 4 (Secretarial) in the Department were being considered in recent weeks.

Despite discussions with you and the opportunity you have had to appear before the Civil Service Commission, no apparent improvement has taken place in your attitude nor in your relationship with supervisory and other staff. The Department has no alternative in the circumstance than to recommend your release from its service effective September 1st, 1960.

You will, no doubt, be aware of the provisions of Section 118 of the Civil Service Regulations. I attach the form prescribed by the Civil Service Commission to enable compliance with this Section. If you plan to take advantage of the provisions thereof, the Deputy Minister himself will hear your side of the case. He expects to be away from the Department for some time after August 1st. It will therefore be necessary that any discussion take place before July 29th.

Yours truly,

J. J. Lamb,
Director,
Administrative Service.

The notice enclosed therewith was in the following language:

NOTICE TO MISS NETA L. PECK UNDER SECTION 118 OF THE CIVIL SERVICE REGULATIONS

As you have already been informed, the Department proposes to take the appropriate steps to dismiss you, effective September 1st, 1960.

This is to advise you that you may present your side of the case to the Deputy Minister or to a senior officer of the Department nominated for that purpose by the Deputy Minister.

If you intend to take advantage of having your case heard in this manner, the Deputy Minister will hear any representations you may wish to make.

Reasons for dismissal:

Failure to maintain the confidence which is essential in secretarial responsibility and lack of maintenance of satisfactory personal staff relations.

J. J. Lamb,
Director,
Administrative Service,
DEPARTMENT OF FISHERIES.

Dated at Ottawa, this 26th day of July, 1960.

The concluding paragraph of Mr. Lamb's letter to the suppliant clearly indicated that if the suppliant wished to avail herself of section 118 of the Civil Service Regulations

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which permit of an employee, prior to dismissal, being given an opportunity to present her side of the case to the Deputy Head or to a senior officer nominated by the Deputy Head, then the matter would be heard by the Deputy Minister himself and it was imperative that the hearing take place on July 29, 1960 or before because the Deputy Minister would be absent for a prolonged period thereafter.

Accordingly the suppliant wrote Mr. Lamb a letter dated July 27, 1960 which was introduced in evidence as Exhibit S6 and reads as follows:

DEPARTMENT OF FISHERIES
Ottawa 772-P-426
27 July, 1960.

Mr. J. J. Lamb,
Director,
Administrative Service,
Department of Fisheries,
Ottawa, Ontario

Dear Mr. Lamb:

This is to acknowledge receipt of your letter of 26 July and to advise you that I propose to take advantage of Section 118 of the Civil Service Regulations. Would you, therefore, please make an appointment for me with the Deputy Minister. I am available any time.

However, would you be good enough to see that there will be available at the time of my appearance the following information:

(a) Statement of any confidence that I have divulged, together with approximate date and the name of the person or persons to whom I divulged the confidence.

(b) The names of any fellow members of the staff with whom I have been unable to establish working relationships.

(c) Details of the lack of confidence essential in secretarial responsibilities.

You will appreciate that in order for me to answer intelligently any accusations made, I should have full particulars of them.

Depending on the constitution of the meeting, it may be that I should be afforded the opportunity of having a representative present. If such is the case, will you please let me know the time of the meeting sufficiently in advance to allow me to make any arrangements that may be necessary.

Yours very truly,
Sgd. N. L. Peck
(Miss) N. L. Peck
Information Service

This letter bears an undated handwritten endorsation thereon initialled by Mr. Lamb as follows:

Appt.mt arranged for 9.30 AM—Jul 29 and Miss Peck so advised.

Other than being verbally informed by Mr. Lamb that the appointment with the Deputy Minister had been arranged for the morning of July 29, 1960 no answer was made to the suppliant's letter of July 27, 1960.

However Mr. Lamb requested Mr. Turner to obtain the names of any fellow members of the staff with whom the suppliant was unable to establish a satisfactory working relationship.

Mr. Turner thereupon conducted a survey of the staff to make a list of the persons who could not get along with the suppliant and to ensure that no person was incorrectly included. There were some employees who were good friends of the suppliant who were not canvassed as well as some who indicated that they had no complaint about the suppliant, but on the contrary entertained a high regard for her ability and cooperation. James Kiwlock, Mrs. Mary Hathaway, Miss Kathleen Stewart, James Steen and Mrs. Hopper (formerly Miss Brophy) each testified that they had received the utmost assistance and courtesy from the suppliant.

As a result of the canvass so conducted Mr. Turner supplied to Mr. Lamb, pursuant to his request, the names of, Mr. Ronayne, the Assistant Director, Mr. Boulden, Radio Information Officer, Mr. Craig, Miss Dignan, Mrs. Besack and his own. While Mr. Lamb did not give this list of names to the suppliant he did place the list before the Deputy Minister.

The interview took place on the morning of July 29, 1960 as arranged, the only persons present being the suppliant and the Deputy Minister. The duration of the meeting was approximately five minutes. The suppliant, as was her habit when discussing such matters with her senior officers, took a notebook with her and recorded in shorthand whatever the Deputy Minister said. She subsequently transcribed her notes and reconstructed her own answers and remarks. This transcript of the interview with the suppliant's interpolations, I am satisfied is accurate and reads as follows:

Interview with Mr. C. R. Clark, Deputy Minister of Fisheries—

29 July, 1960

Mr. Clark—Sit down, Miss Peck.

Miss Peck—Thanks.

Mr. Clark—Well, Miss Peck, what have you to say for yourself?

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Miss Peck—Could I see the Information I requested in my letter to Mr. Lamb.

Mr. Clark—I want to hear what you have to say.

Miss Peck—There isn't much I can say. When I returned to the Information Branch you said everything that happened previously was to be forgotten, to which I agreed. I have had difficulty ever since. I worked hard, attended meetings, helped everyone. I had to quibble for four months to get two days leave for typing all the minutes of the Vessel-Gear Conference at home—96 pages. I thought I should be entitled to a promotion when the other secretaries were being promoted. When I asked why my name was not included, I couldn't get an answer.

Mr. Clark—You finally did get your leave, didn't you?

Miss Peck—Yes.

Mr. Clark—You have upset too many of the staff.

Miss Peck—Could I have the names of the individuals with whom I can't establish working relationships.

Mr. Clark—Mr. Turner, Mr. Ronayne, Mr. Boulden, V. Craig, E. Dignan and Mrs. Besack.

Miss Peck—I have never argued with any of them. (Was surprised at the names given to me).

Mr. Clark—No, Miss Peck! This memorandum here doesn't indicate that.

Miss Peck—I was only comparing my temperament with that of other staff.

Mr. Clark—This here (referring to memorandum again) certainly reflects how bad your temperament is. You should take a look at yourself.

Miss Peck—I have a couple of times I have been taking courses to try to improve, but it's rather difficult to correct my faults by myself until someone tells me what is wrong with me.

Mr. Clark—Why just the other day somebody reported something about you and it was awful. I have never dismissed anyone before. In view of your temperament, I have no other alternative than to dismiss you.

Miss Peck—Is it possible for me to have a copy of the report submitted by the Civil Service Commission officials who interviewed me last November?

Mr. Clark—I will look into that. You will hear from Mr. Lamb.

Miss Peck—Fine. I intend to institute some sort of appeal. Thanks.

The suppliant did not meekly submit to the Deputy Minister's announcement that he had no alternative but to dismiss her.

On August 13, 1960 she wrote a further letter to the Chairman of the Civil Service Commission, introduced in evidence as Exhibit S.17, enclosing a copy of Mr. Lamb's letter to her dated July 26, 1960 and the enclosure therewith (Exhibit S.6) as well as a copy of her reply dated

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July 27, 1960 (Exhibit S.7) complaining that her shortcomings were never discussed with her by her superiors so that she could correct them, nor was she made aware of the substance of the staff's complaints about her so she could state her side of the case. Particularly since Mr. Lamb's letter of July 26, 1960 referred to an expression of the view of the Commission that "it was so obvious to its officers that you possessed in full measure the defects of temperament to which this Department has referred that it was felt to be inadvisable to transfer you to another Department and so create a similar situation there", the suppliant requested a copy of the transcript of the interview she had with officers of the Commission on November 17, 1959.

The Chairman replied by letter dated August 17, 1960 advising the suppliant that no transcript had been taken, but confirmed as a result of the interview, the Commission, while fully conscious of the suppliant's competence and skill as a clerk and stenographer, was not prepared to recommend her transfer to a position in any other department involving the supervision of staff.

On Saturday, July 30, 1960, the day following her interview with the Deputy Minister, the suppliant went to her home in Chatham, Ontario, where she consulted Dr. Charteris, her physician.

The suppliant had been Dr. Charteris' patient for thirty-five years. He had treated her occasionally prior to 1956 and continuously since then.

On January 4, 1956 he first observed an indication of menopause syndrome, the sympton being a cessation of menstruation. This condition in the suppliant produced irritability, fatigue and nervous tension which in the doctor's opinion persisted until 1961. In his view the suppliant's physical ability to work was affected only by fatigue, the balance of the manifestations of the suppliant's condition being primarily mental disturbance, tension and anxiety affected her personality which the Doctor testified from his personal knowledge of the suppliant had been a sunny disposition prior to 1956.

The suppliant consulted her physician in January, twice in April, on July 30, four times in November and four times in December all in the year 1960.

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The treatment prescribed by Dr. Charteris was rest for a minimum period of six months and hormone therapy. In his opinion the suppliant's physical condition, including the menopause state, was responsible for any ill disposition the suppliant may have felt towards her fellow workers and resulted in a persecution complex and state of anxiety.

Dr. Charteris also testified that he received a long distance telephone call at his office, prior to the suppliant's dismissal, from some male person whom he understood to be an officer of the Department of Fisheries. This unknown person enquired concerning the suppliant's health and the necessity for her having time off from work. Dr. Charteris advised the caller that the suppliant was ill, her duties should be lightened, a period of rest was required and she must of necessity consult a physician. He did not explain the nature of the suppliant's illness. No such telephone call emanated from any responsible officer of the Department of Fisheries and an exhaustive check of the Departmental records did not disclose that any call had been placed from the Department in Ottawa to Dr. Charteris in Chatham.

Dr. Charteris did not provide the suppliant with a written certificate concerning her condition, nor did he write to her employer advising leave of absence presumably because the suppliant did not ask him to do so. Dr. Charteris explained that the two certificates he provided to the suppliant dated July 2, 1957 and June 19, 1959 were of a routine nature and related exclusively to the state of her physical well being.

On August 24, 1960 a minute of a meeting of the Treasury Board was approved by the Governor-in-Council being P.C. 1960—8/1154 whereby the suppliant was dismissed from the government service, effective August 31, 1960. By an amending Order-in-Council being P.C. 1960—5-1322, the effective date of dismissal was changed to September 1, 1960.

In November the suppliant consulted Mr. C. N. Beauchamp, a solicitor who made representations by personal interviews and by mail to the Chairman of the Civil Service Commission and the Minister of Fisheries the substance of which were that because of the suppliant's state of health she should be reinstated, given a period of sick leave to regain her nervous balance and if following which there was no improvement in the suppliant's relations with the staff she should be permitted to resign. The Minister declined to intervene since he considered the matter to be one of Departmental administration, nor did the Civil Service Commission intervene. Mr. Beauchamp was supported in his representations to the authorities mentioned by a letter from Dr. Charteris dated September 1, 1960 in which he outlined his diagnosis of the suppliant's condition as recited above, but added a further contributing factor to her nervous tension. Her father became gravely ill and had to be hospitalized for a long period of time until he eventually died. Her mother had to be hospitalized for surgery on two occasions and had become an invalid. The suppliant bore the medical expenses of both her parents, which fact Dr. Charteris felt explained her unremitting attempts to better her position. He also added that if the suppliant's employer had consulted him he would have recommended a period of sick leave in order that the suppliant might regain her nervous balance from a menopause syndrome and home nervous tensions.

On January 7, 1961 Dr. Charteris wrote a similar letter to Dr. E. L. Davey of the Department of National Health and Welfare expressing the hope that his diagnosis of the suppliant's condition were sufficient to warrant recision of the suppliant's dismissal and her reassignment to another department.

At the date of her dismissal from the government service, the suppliant had to her credit twenty-seven days special leave and one hundred and fifty-two days sick leave. Further, if the suppliant had continued in her employment until September 18, 1960 she would have become entitled to four weeks furlough leave on completing twenty years of service.

The suppliant elected to take a deferred pension, payable to her at the age of sixty, based on the number of years of her service and on the average salary for the six highest paid years of her service.

Since the representations made on her behalf were to no avail, the suppliant initiated the proceedings herein without the assistance of counsel. Later she retained counsel who amended the pleadings extensively, but the claim for reinstatement with full pay and other attendant benefits

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effective from September 1, 1960 was left in at the suppliant's insistance.

Section 19 of the *Civil Service Act,* R.S.C. 1952, c. 48, provides in part as follows: "Except where otherwise expressly provided, all appointments to the Civil Service shall be upon competitive examinations under and pursuant to this Act, and shall be during pleasure."

This section puts into statutory effect the long standing rule that servants of the Crown, in the absence of provision to the contrary, which does not avail the suppliant herein, hold office during pleasure. Consequently, the suppliant has no right to the relief sought by her that she should be reinstated in her employment, nor has this Court jurisdiction to order such relief. Her claim in this respect must, therefore, be dismissed.

I am likewise of the opinion that the suppliant has no right to any damages for wrongful dismissal since such claim connotes in its ordinary sense a breach of contract. In this case the suppliant did not have any contract of employment and certainly not a contract that was not terminal at pleasure. The fact that her appointment was at pleasure under section 19 of the Act, means that she could have been dismissed arbitrarily without cause or notice.

Therefore, the suppliant has no right to any damages for wrongful dismissal in the ordinary sense of that term and her claim for damages therefor must also be dismissed.

There remains the suppliant's claims for damages in an unspecified amount, for defamation of character and for damages in the amount of $15,000 for not having been given a proper opportunity, prior to her dismissal, to present her side of the case to the Deputy Head or to a senior officer nominated by the Deputy Head.

With respect to the suppliant's claim for damages for defamation of character, the statements relied upon are those set out in Mr. Lamb's letter to the suppliant dated July 26, 1960 (Exhibit S5) together with the reasons given in the notice of dismissal therein to the effect that the suppliant has "displayed a total lack of the confidence essential in secretarial responsibilities" and a "proven lack of ability . . . to have satisfactory personal relations with members of the staff of the Information and Education Service", as well as the statement that "The Commission has informed the Department that it was so obvious to its officers that (the suppliant) possessed in full measure the defects of temperament to which this Department had referred that it was inadvisable to transfer (the suppliant) to another Department and so create a similar situation there."

There is no doubt that the foregoing statements tend to lower or degrade the suppliant in the eyes of society and are calculated to disparage her in her vocation. Accordingly the words complained of are in their plain and ordinary meaning clearly defamatory of the suppliant. Further there was inadvisable to transfer (the suppliant) to another other than the person to whom the letter was written. There was a publication of the letter and its enclosure not only to the stenographer to whom it was dictated by Mr. Lamb, but also to other clerks and employees in the filing room of the Department by reason of a carbon copy of the letter and enclosure being made a matter of record and to those persons before whom the matter would come in the course of effecting the suppliant's ultimate dismissal.

However, there are occasions upon which, on the grounds of public policy and convenience, a person may, without incurring legal liability, make statements about another which are defamatory.

In the present instance the statements complained of were made in the discharge of a duty arising in the course of employment and result in a qualified privilege.

Where a defamatory statement is published on an occasion of qualified privilege, as is my view in the present case, the presumption of malice which arises from the publication, is rebutted and the suppliant can only succeed if she can prove that the respondent was not using the occasion honestly for the purpose for which the law gives protection, but was actuated by some indirect motive not connected with the privilege i.e. malice in the popular acceptance of the term.

Section 3(1)(*a*) of the *Crown Liability Act* provides 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, . . .
>
> . . .

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and section 4(2) provides,

> 4. (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.
>
> . . .

Therefore, in order for the suppliant to succeed in tort for damages for libel it is incumbent upon her to prove that there was malice in fact on the part of Mr. Lamb or conceivably Mr. Turner in that either of them was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made.

This, in my opinion, the suppliant has failed to do.

Mr. Lamb, as Director of Administration, had been instructed by the Deputy Minister to take the necessary steps leading to the suppliant's dismissal. He was the author of the letter and its composition was his own. No one told him what to say in it. His sources of information were his instructions from the Deputy Minister, and his conversations with Mr. Turner and Mr. Forrest from which he knew their views. In addition he would have a departmental file on the suppliant and he had some acquaintance with her.

I am convinced that Mr. Lamb firmly believed all statements in his letter to be true, well substantiated and documented and neither do I think that the language thereof is so unnecessarily strong or disproportionate to the exigency of the occasion as to constitute any evidence of malice.

Neither do I construe Mr. Lamb's failure to reply to the suppliant's letter of July 27, 1960 (Exhibit S6) as evidence of malice. He did arrange for an appointment for the suppliant with the Deputy Minister. He turned the suppliant's letter over to the Deputy Minister who had decided to deal with the matter himself. It was the suppliant's specific request that three items of information enumerated in her letter should be available at the time of her appearance. He did obtain and supply to the Deputy Minister the information requested by the suppliant in one such item, viz. the names of the members of the staff with whom the suppliant was unable to establish working relationships. He did not supply information respecting the other two items of information which the suppliant requested which may have been already known to the Deputy Minister, nor did he answer the suppliant's enquiry as to the constitution of the meeting and the consequent propriety of the suppliant being represented thereat. The language of such request was so couched as to be susceptible of the interpretation that no reply was needed.

All of such factors, in my opinion, fall far short of establishing malice on the part of Mr. Lamb.

It was submitted by counsel for the suppliant that she is entitled to rely upon a state of malice existing in the mind of Mr. Turner and as authority for such proposition he relied upon a principle of law expressed by Cartwright J. in *Lacarte v. Board of Education of Toronto*[1] as follows:

> The applicable principle of law may, in my opinion, be stated as follows. Where a corporation is under a duty, whether of perfect or imperfect obligation, to publish a statement about X, and in the preparation of that statement relies on information furnished by one of its employees within the scope of whose employment it is to furnish the information, the malice of that employee in furnishing false and defamatory information which is made part of the statement published will in law be treated as the malice of the corporation, although all members of the board of directors or of trustees which authorizes the publication are individually free from malice.

Because of the view I take of Mr. Turner's state of mind, it is not necessary for me to decide whether in the circumstances of the present case Mr. Turner falls within the principle so outlined.

There were three factors relied upon by the suppliant as indicative of malice on the part of Mr. Turner being that (1) in response to a question on cross-examination Mr. Turner said he did not like the suppliant, (2) the relation between the suppliant and Mr. Turner was strained and (3) the canvass of employees by him to determine those who were unable to establish a satisfactory relationship with the suppliant was conducted unfairly and with an ulterior purpose in mind.

Mr. Turner's statement that he did not like the suppliant in response to a direct question on cross-examination was truthful and in the circumstances quite understandable. However, on re-examination Mr. Turner stated that while

[1] [1959] S.C.R. 465 at 476.

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he did not like the suppliant he did not dislike her or bear any hatred towards her and in my view this latter statement was equally true. The relationship between Mr. Turner and the suppliant was undoubtedly strained and her conduct was a source of irritation to him, but that irritation did not ripen into active dislike resulting in a desire to get rid of the suppliant for that reason. From my observation of Mr. Turner I concluded that he was a conscientious civil servant cognizant of his responsibility for the smooth and efficient operation of the service of which he was the director. His honest belief was that the suppliant's attitude towards himself and other employees disrupted that operation which was the motivating factor in his recommendation to the Deputy Minister that the suppliant be transferred and failing transfer that she be dismissed. The very fact that he recommended transfer first and dismissal as a last resort indicates to me that he bore the suppliant no malicious spite.

The canvass of the staff which Mr. Turner conducted was the direct result of a request from Mr. Lamb to be furnished with the names of those who did not get along with the suppliant and Mr. Lamb's request of Mr. Turner was in consequence of a specific enquiry by the suppliant in her letter of July 27, 1960. While Mr. Turner knew, with certainty, who some of those persons were, yet there were others whose feelings towards the suppliant were not known to him. Therefore, it was reasonable that he should enquire to ensure that no name was incorrectly included. It was equally reasonable that he should not approach those members of the staff whom he positively knew had no complaint concerning the suppliant since the request was for the names of those with whom the suppliant had unsatisfactory relationships.

Therefore, it is my view that these circumstances do not establish malice on the part of Mr. Turner, but rather that they are more consistent with a proper motive.

It follows accordingly that the suppliant's claim for defamation of character must be dismissed.

There remains for consideration the suppliant's claim for damages for not being given, prior to her dismissal, a proper opportunity to present her side of the case to the Deputy Head or to a senior officer nominated by the Deputy Head.

The suppliant's case, in this respect, is based on section 118 of the Civil Service Regulations providing as follows:

> No employee shall be dismissed, suspended or demoted without having been given an opportunity to present his side of the case to the Deputy Head or to a senior officer of the department nominated by the Deputy Head.

The Civil Service Regulations were made by the Civil Service Commission and approved by the Governor General in Council under the authority of section 5 of the *Civil Service Act,* Chapter 48, R.S.C. 1952 providing as follows:

> 5 (1) The Commission may make such regulations as it deems necessary or convenient for carrying out this Act, including regulations governing the performance by the Commission of its own duties hereunder.
>
> (2) All such regulations are subject to the approval of the Governor in Council.

In *Zamulinski v. The Queen*[1] Thorson P. in considering whether failure to give a civil servant an opportunity to present his side of the case as required by section 118 of the Regulations aforesaid, which he found to be *intra vires,* gives rise to a cause of action, had this to say at page 697:

> So I find that s. 118 of the Regulations was intra vires. That being so, it follows that the provisions of the Civil Service Act and the Regulations made under it, having the force of law, must be read together and effect given to each. Section 118 of the Regulations ought not, therefore, to be construed as inconsistent with s. 19 of the Act. In that view of s 118 of the Regulations all that it does is to give the civil servant whom it is proposed to dismiss an opportunity, prior to his dismissal, to present his side of the case to a senior officer of the Department nominated by the deputy head. When that opportunity has been given the right to dismiss at pleasure provided by s 19 of the Act is in full force and effect. The intendment of s 118 of the Regulations is plain, namely, that before the right of dismissal at pleasure under s. 19 of the Act is exercised the employee proposed to be dismissed should be given the opportunity prescribed by the section. To the extent that it is of importance in the matter of interpretation it may properly be said that if it is not contrary to the public policy that a civil servant may be dismissed at pleasure that before his dismissal goes into effect he should be given the opportunity prescribed by s. 118 of the Regulations.
>
> I, therefore, find that an employee of the Civil Service of Canada has the right under s. 118 of the Regulations to be given the opportunity, prior to his dismissal, of presenting his side of the case to a senior officer of the Department nominated by the deputy head. This gives him a claim under s. 118 of the Regulations and brings him within the jurisdiction of

[1] (1957) 10 D.L R. (2d) 685.

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this Court under s. 18(1)(*d*) of the Exchequer Court Act, R.S.C. 1952, c. 98, which provides:

"18(1) The Exchequer Court also has exclusive original jurisdiction to hear and determine the following matters:

(*d*) every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council."

In my opinion, the suppliant has a claim arising under a Regulation made by the Governor in Council, namely, a claim under s. 118 of the Civil Service Regulations. He had a right under that section to be given the opportunity, prior to his dismissal, to present his side of the case to a senior officer of the Department nominated by the deputy head. I find as a fact that this right was not given to him. It is a fundamental principle that the violation of a right gives a cause of action: vide *Ashby v. White et al.* (1703), 2 Ld. Raym. 938, 92 E.R. 126. Here there was a denial of a right to which the suppliant was legally entitled and he has a right to damages therefor. . . .

In *Zamulinski v. The Queen* (*supra*), the suppliant was not given the opportunity, prior to his dismissal to present his side of the case to a senior officer of the department nominated by the deputy head in accordance with the right afforded him under section 118 of the Civil Service Regulations whereas in the present case, the suppliant did have an interview with the Deputy Minister.

Therefore, the question to be determined is whether the opportunity afforded the suppliant in the circumstances as outlined herein constituted compliance with Section 118 of the Regulations.

To paraphrase Lord Loreburn's expression in *Board of Education v. Rice*[1] there must be an opportunity to present the case and a fair opportunity to controvert statements prejudicial to the suppliant's point of view.

Such an opportunity may be denied where the adverse case is not made known. The nature of the allegations against the suppliant must have been clearly specified beforehand so that she may have had a proper opportunity to prepare her defence, but the degree of particularity may vary according to the degree of informality with which the proceedings are conducted and even when they are inadequately specified, the defect may not be fatal if the suppliant was not thereby prejudiced, e.g. because she was already conversant with their general nature.

In applying these basic principles to the circumstances of the present case, the allegations against the suppliant

[1] [1911] A.C. 179.

were outlined in Mr. Lamb's letter to her dated July 26, 1960, one such allegation being, "you have displayed a total lack of the confidence essential in secretarial responsibilities", and this phraseology is repeated in the notice of dismissal appended to that letter. This language, removed from its context, is lacking in precision and is susceptible of the possible interpretation that the suppliant divulged confidences which came to her knowledge in her capacity as secretary to the director. This interpretation undoubtedly prompted the suppliant to request in her letter of July 27, 1960 to Mr. Lamb the particulars of any confidences which she is alleged to have divulged. However, it would appear that the suppliant was not unduly misled because in her letter of July 27, 1960 she also requested details of the lack of confidence essential in secretarial responsibilities. At no time was it suggested that the suppliant divulged confidential information.

The other reason for dismissal outlined in Mr. Lamb's letter and the notice enclosed therewith was the suppliant's proven lack of ability to have satisfactory personal relations with members of the staff. The language in which such allegation was expressed was clear and unequivocal. In her letter of July 27, 1960, the suppliant asked for the names of those members of the staff.

The letter written by Mr. Lamb, which has been reproduced herein, was of considerable length and in addition to the two extracts above, which were also set forth in the notice of dismissal, contained explanatory features. It made mention of the efforts to effect her transfer which were to no avail. While it is true that there were generalizations therein, the subject matter was such that particularization was difficult within the short scope permitted by a letter. The letter in question left no doubt as to the reasons why the suppliant was to be dismissed. Neither do I think that this letter came to the suppliant as a complete surprise. The strained situation was one of long duration and the suppliant herself had made the suggestion of her transfer.

Therefore, the suppliant was aware of the allegations against her beforehand expressed in sufficiently specific terms when she received Mr. Lamb's letter of July 26, 1960 on that date and had cause to suspect them well before that time.

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In her letter of July 27, 1960 she asked for what amounts to a statement of particulars, but her letter of that date did not demand that they be delivered to her before the interview with the Deputy Minister, but was a request that the information be available at the time of the hearing.

The names of the members of the staff were supplied to her at the time of her appearance when she requested them. Presumably, the Deputy Minister was in a position to furnish whatever other information the suppliant desired. The suppliant did ask, in general terms, for the information she had so requested and although she specifically asked for the names of the staff, which were given, she did not persist in her enquiry as to the additional information.

The proceeding was most informal and in my view, the allegations against the suppliant were communicated to her beforehand in a degree of particularity which was adequate and commensurate with the informality of the hearing and further the suppliant knew in advance the allegations against her.

By section 118 of the Regulations the necessity of notice of the impending proceeding is implicit therein. It follows that the length of notice must be reasonable and the Court may review the adequacy of the notice so given. The letter of Mr. Lamb's was received by the suppliant on July 26, 1960. It stated that the Deputy Minister would hear the suppliant's side of the case himself should she wish to avail herself of her right under section 118 of the Regulations, but that, because of the Deputy Minister's contemplated absence after August 1, 1960 the hearing should take place on or before July 29, 1960, i.e. the suppliant had a maximum of two clear days.

The suppliant immediately replied by letter dated July 27, 1960 stating that she wished to take advantage of her right under section 118 of the Regulations. She requested that the appointment with the Deputy Minister be made for her and also stated, "I am available any time". The appointment was made for July 29, 1960 and the suppliant was so informed verbally on July 27, 1960. She did not request an adjournment or complain in any way of the inadequacy of the length of notice, and, therefore, must be taken to have waived any inadequacy of notice if such existed.

In her letter of July 27, 1960 the suppliant raised the question of the possibility of having a representative present depending on the constitution of the meeting and accordingly requested to be informed of the time of the meeting sufficiently in advance to make any necessary arrangements to be represented. She was so informed of the time of the meeting and she had been informed the Deputy Minister would hear her, but she was not represented at the interview.

Where there is a right to appear in person there is some authority for the proposition, there is also a right to be represented by an agent or by counsel, but in any event the suppliant did not insist on that right, nor was that right denied her. She did not ask for an adjournment to procure a representative.

The actual hearing was very short, but the Deputy Minister did comply with what was required of him by the Civil Service Commission Regulations. The purpose of Section 118 thereof is to ensure that a civil servant shall not be dismissed until after the matter has been considered by the Deputy Minister or senior officer nominated by him and the civil servant whom it is proposed to dismiss has been given the opportunity to state her side of the case to that officer who may then decide to recommend or not to recommend dismissal.

The suppliant was invited to state her side of the case and the Deputy Minister expressed his willingness to hear her to which the suppliant replied that there was not much she could say other than despite her best efforts she was met with difficulties. She was not denied the opportunity to say anything she wished. She did not raise the matter of her ill-health as an extenuating factor as was done subsequently on her behalf, although her condition was known to her.

However much one may tend to sympathize with the suppliant, nevertheless, she was accorded her rights under Section 118 of the Regulations from which it follows that her claim for damages for not being given, prior to her dismissal, a proper opportunity to present her side of the case

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to the Deputy Head or to a senior officer nominated by him, must also be dismissed.

Therefore, the suppliant is not entitled to the relief sought by her petition of right herein and the respondent is entitled to costs herein to be taxed.

Judgment accordingly.

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CROWN—*Injunction - Expropriation - Expropriation Act R.S.C. 1952, c. 106, ss. 27, 28, 29 and 30—Cities and Towns Act (Quebec) R.S. 1925, c. 102, s. 519—British North America Act s. 125—Claim for local improvement taxes on compensation money—Prescription—Action properly instituted by information—Privilege under Quebec law—"Encumbrance"—"Charge"—Date for determining prescription of claims for taxes—Land abutting on street—Interest—Costs.* The Crown on March 20, 1957 expropriated certain lands in the Province of Quebec belonging to the defendant Elm Ridge Country Club Inc. and paid to it the sum of $900,000, in two instalments, in full payment of all claims arising out of the expropriation. At the time the first instalment was paid the club executed a partial release and remitted to the Crown a cheque for $15,571.58 in payment of a claim by the defendant, the City of Dorval for local improvement taxes allegedly owing on the lands by the club at the time of the expropriation, without admitting such liability. It was agreed that the said sum would be held by the Crown in a suspense account pending the negotiation of a settlement between the club and the City of Dorval. This settlement was not arrived at and the sole question in issue in this case is whether the City of Dorval is entitled to claim compensation and, if so, in what amount. The Court decided that the City of Dorval was entitled to compensation in the sum of $7,469.75 with interest to run on various portions of that amount as set forth in the reasons for judgment. *Held:* That as provided in the *Expropriation Act*, R.S.C. 1952, c. 106, ss. 27, 28, 29 and 30 the action is properly instituted by information exhibited in this Court by the Crown. 2. That a privilege exists and becomes a charge on the land assessed when determined by an assessment roll completed and deposited and the time when the delay for objection thereto has expired, and the contention that it becomes a charge on the land only when an action is taken to have the land sold fails. 3. That although the privilege or claim is usually maintained by a judgment of the Court before the three year prescription there was no necessity nor possibility of proceeding in this manner in view of s. 23 of the *Expropriation Act* which provides "The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property; *and any claim to or encumbrance upon such land or property shall, as respects Her Majesty, be converted into a claim to such compensation money or to a proportionate amount thereof*". 4. That a privilege under Quebec laws "is a right which a creditor has of being preferred to other creditors according to the origin of his claim" and cannot exist alone as it secures the fulfillment of some obligation and it therefore follows that the privilege considered here is a lien or liability attached to property or a charge thereon and being so meets with the definition of "encumbrance" in the English text and "charge" in the French text of s. 23 of the *Expropriation Act*. 5. That the date for determining if any of the City of Dorval's claims for taxes were prescribed under the three year prescription of s. 519 of the *Cities and Towns Act* (*Quebec*) R.S. 1925, c. 102 is the date of expropriation of the lands by the Crown, i e. March 20th, 1957 and not July 24th, 1962, the date of the information herein, and any such claim or claims should be deducted from the amount held in escrow by the Crown. 6. That the prescription against any right, whatever it may be, can start running only from the day it is open, and even then only if the action to enforce it is available and in the present instance, action could have been taken only on the due date of the taxes in each year and it is from that date only that prescription of the taxes can start running. 7. That the City of Dorval's contention that prescription runs from the date of each instalment the taxes for 1954 were payable. i.e. January 1, April 1, July 1 and October 1 fails since the whole amount of the local improvement tax for the year 1954 was due and exigible on January 1, 1954, the other instalments applying only to municipal taxes. 8. That the taxes for the year 1954 were prescribed on March 20, 1957 more than three years after their due date

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PATENTS—*Patent Act, R.S.C. 1952, c. 203, ss. 2(d), 24, 28(1)(b), 36(1), 46 and 80—Patent Act, S. of C. 1935, c. 32, s. 47—Invention to be defined in claim—Anticipation—What to be included in prior art when considering anticipation—What necessary to*

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constitute invention—Combination of things—Statutory presumption of validity—Onus of showing lack of inventive ingenuity on person attacking patent—Requirement to have patented articles marked with year of date of patent. The plaintiffs sued for infringement of a patent for a removeable sealing device for vehicle marking lights, the patent being owned by the plaintiff, Barbara DeFrees and licensed exclusively to the plaintiff Betts Machine Company. The validity of the patent was attacked for anticipation, lack of invention or subject matter and for failure of the patentee to have the patented articles marked in accordance with s. 24 of the *Patent Act*. The defendant alleged that since the patentee related his invention in the specification not to vehicle marking lamps but rather to a static seal and it was only in the claim of the patent that the invention was related to the automobile lamp field, all patents covering closures or means of sealing enclosures and static seals for housing any unit chambered containers or hollow bodies were brought into the prior art to be reviewed by the skilled workman. *Held:* That since it is clear from the title of the patent in suit that the art to be referred to is the vehicle marking light art and the claim relates to the art of vehicle lamps, this is the main art to be looked at by the Court or a skilled workman in order to determine whether or not the patent was anticipated or was obvious. However, the skilled workman or the Court may look at anything that may be of assistance in this regard, the reference in a patent dealing in one art (vehicle lamps) to another art (enclosures), as in this case, being one element to be considered in determining whether from such a directed use in the patent (use in vapour-proof containers) the patentee in effect invented something that was new or that was obvious. 2. That whether the statutory presumption of validity of a patent is a heavy or easy one to displace is a question of fact in each case. However, the alleged infringer has the burden of not only attacking the validity of the patent in issue but of also placing the Court in the position of one skilled in the prior art. 3. That in order to establish anticipation, the defendant must show that whatever is essential to the invention or necessary or material for its practical working and real utility appears in the prior publication. He must establish that the whole invention has been published with all the directions necessary to instruct the public how to put it into practice. When documents are produced as anticipations they must be read singly and must in no way be combined together to form a mosaic of extracts. In none of the prior art patents or publications produced in this case can an answer be found to the problem solved by the patent in issue, and the attack on the patent on the basis of anticipation or lack

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that the tension on the heated yarn should be correlated to its prescribed temperature, or its prescribed temperature and its linear speed of travel, to maintain it under tension adequate "to preclude substantially any ductility in the cooled yarn" is that the tension on the yarn should be so related with its temperature, or its temperature and its linear speed of travel, that it will be adequate to effect a substantial offset against the tendency of the yarn to become plastic by reason of the application of the heat to it, in order that the spiralled formation of the yearn should remain in it after it has been untwisted, so that the crimp in it will be permanent in the sense that it will withstand the stresses and temperatures to which it will be subjected in the course of production and the conditions of actual commercial use to which it will be put and still retain its crimp. 36. That the statutory provision for the *prima facie* validity of a Canadian patent enacted by section 48 of the *Patent Act* extends, not only to the attributes of patentability of novelty, utility and inventive ingenuity or lack of obviousness, all of which are presumed to be present until the contrary is shown, but also to the obligations imposed by law on a patentee and the requirements specified in the Act and that compliance with them is presumed until the contrary is shown. 37. That the onus of showing that a patent is invalid lies on the party attacking it, no matter what the ground of attack may be. 38. That the presumption of validity enacted by section 48 cannot be rebutted merely by the introduction of some evidence tending to establish invalidity. 39. That the evidence required to rebut the presumption of validity must be "credible" evidence and substantial enough to satisfy the Court that the patent is invalid. Halsbury's Laws of England, Third Edition, Vol. 15, at 343, applied. 40. That the onus of showing that a patent is invalid is not an easy one to discharge. 41. That the provision for the validity of a Canadian patent enacted by section 48 enures to the benefit of the owner of the patent until the party attacking it shows to the satisfaction of the Court that it is invalid. 42. That a prior publication must not be held to be anticipatory of an invention unless the information as to the invention given by it is, for the purposes of practical utility, equal to that given by the patent for the invention and shows everything that is essential to it so that a workman of ordinary skill in the relevant art would at once have perceived, understood and been able practically to apply the invention without the necessity of further experiment. It is not enough to prove that the information could have been used to produce the result of the invention in issue; there must have been a clear and unmistakeable direction to use it for such purpose. Nor is it sufficient that the prior publication contained suggestions which, taken with

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other suggestions, might be shown to have foreshadowed the invention or important steps in it, or that it contained the nucleus of the idea of the invention which could have been regarded as the beginning of its development. If the prior publication is to be regarded as a prior publication of the invention it must be shown that it published to the world the whole invention with all the material necessary to instruct the public how to put it into practice and that it so disclosed the invention to the public that no person could subsequently claim it as his own. A prior publication is not to be regarded as an anticipation of the invention unless it can be shown that a person grappling with the problem solved by the patent and having no knowledge of it but having the prior publication in his hand would have said, "That gives me what I wish." 43. That anticipation of an invention cannot be proved by resort to alleged inventions that were not put into practice or were inoperable. 44. That the statements of expert witnesses relating to the prior art, being made with the knowledge possessed at the date o the statements, should be carefully scrutinized. 45. That there was no information, for the purposes of practical utility, in either the Finlayson United Kingdom patent No. 424,880 or the Finlayson United States patent No. 2,-111,211 or the alleged use of the Finlayson machine at Spondon as to the invention defined in the claims in issue of patent No. 552,104 equal to that given by the patent. 46. That the mere statement in the specification of United Kingdom patent No. 424,880 that heat may be used to bring about the setting of the filaments which are thermoplastic or in the specification of United States patent No. 2,111,211 that hot air may be used as a setting agent, in the absence of a direction to use it, is not enough to make the patent an anticipation of the invention in issue. 47. That, since the invention defined in the claims in issue of patent No. 552,104 was made as early as November 13, 1950, the Chavanoz patents cannot be regarded as anticipatory of it. 48. That the invention defined in the claims in issue of patent No. 552,104 was not anticipated. 49. That the remarkable commercial success of the inventions in issue, even before any patents for them were granted, is conclusive proof that they were useful. 50. That the exercise of inventive ingenuity is an essential attribute of patentability. 51. That the question whether an alleged invention was obvious or not is exclusively a matter for the Court and it is not within the competence of a witness, whether an expert or not, to express his opinion on the subject. 52. That the trial judge has no right to determine the question whether an invention was obvious according to his own opinion on whether it was obvious or not. The issue is not

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REVENUE—*Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 11(1)(a), 20(1), 20(6)(g)—Sale of business as going concern—Determination of consideration received for depreciable property—Appeal allowed.* Appellant in March, 1956, sold its trucking business for $200,000. The appeal is from an assessment made by respondent in respect of the 1956 taxation year under which the sum of $117,540.99 was added to appellant's income as recaptured capital cost allowance under s. 20(1) of the Act. Other items added are not disputed. The matter at issue is what parts of the total sale price might reasonably be regarded as being the consideration for the disposition of the appellant's depreciable properties of various classes. The valuation to be attributed to goodwill was a key point to the allocation of the total consideration and after considering various factors the Court placed an evaluation of $50,000 as being reasonable for the goodwill of appellant's business, inclusive of its trucking licence. *Held* That a determination under s. 20(6)(*g*) of the Act is not necessarily based on the fair market value of the property in question and may be more or less than that value, depending on the circumstances. 2. That the fact that in five of the sub-sections of s. 20(6) which precede s-s. (*g*) the term "fair market value" is used and that it is not used in s-s. (*g*) (where the term "can reasonably be regarded" is used) is a clear indication that it was not intended by Parliament to be the standard to be used in applying s-s. (*g*). 3. That such a determination depends solely on what part of the total consideration can be allotted to each property in the light of all the circumstances of the particular case. 4. That after examining the matter item by item the appeal be allowed in part. HERB PAYNE TRANSPORT LIMITED v. MINISTER OF NATIONAL REVENUE.. .. 1

2.—*Succession duties—Dominion Succession Duty Act R.S.C. 1952, c. 89, s. 3(1)(f)(g)(h)—Life insurance policies proceeds—Policies*

REVENUE—Continued—Suite

placed in trust pursuant to separation agreement and leisury settlement—Income interest to wife at death of insured husband—Capital to children at death of wife—Whether a disposition for succession duty purposes—"Successions"—"Donees"—Appeal allowed. The deceased husband, prior to 1930, took out seven policies of insurance on his life, with his wife named as sole beneficiary. In that year his wife sued him for alimony and obtained a judgment directing a reference to the Local Master to fix the amounts. He also drew up a settlement which was found to be invalid as being a step taken by him without authority. In 1938 a valid settlement was arrived at. It provided that the policies were irrevocably transferred to trustees on these trusts: on the death of the insured husband to pay to the wife a lump sum of $20,000 plus the net income from the balance for her lifetime, after investment of the proceeds, and on her death to pay the entire remaining sum to the children of the marriage The husband retained the right to borrow on the policies to the extent of $30,000 for business purposes, such loans to be repaid; he also convenanted to pay the premiums, to not change beneficiaries and not allow the policies to lapse. The agreement recited that the assured was doing all this "for valuable consideration". The husband died in 1957. His wife and children survived him. The trustees paid the wife the $20,000 and held the balance on the afore-mentioned trusts. The Minister levied succession duty under the *Dominion Succession Duty Act* upon the amount of the fund held for the children contending that their interests in the proceeds of the insurance policies came to them as "successions" and dutiable accordingly. On appeal to this Court the appellants contended that the children were not "donees" and that their interests arose out of a transaction in which valuable consideration had been given. *Held* That the appeal be allowed. 2. That the proceeds of the insurance policies held for the children are not dutiable. 3. That valuable consideration had been given by the widow in the covenant under which the trust was effected and that the interests of the children, arising in 1938 under the trust, did not come to them by way of a donation or gift. 4. That the proceeds of the policies could not be held dutiable under s. 3(1)(*f*) of the Act as the property in question did not pass to the children on the death of the father but only on the death of the mother. 5. That the insurance monies were not within the words of s. (1)(*g*) as "any annuity or other interest purchased or provided by the deceased". 6. That the entire history of the matter from the beginning of the disputes between the husband and wife and the action at law against the husband to the settlement agreement reached in 1938 showed that the wife had in reality renounced her future or alternative benefits

REVENUE—Continued—Suite

TRADE MARKS—*Trade Marks Act R.S.C. 1952, c. 49, ss. 4(1), 6, 16, 37, 58—Application for order to expunge respondent's trade mark—"Heel Pruf"—"Heelpruf"—"Rubber matting"—"So associated"—Prior use—Affidavit and invoices—Evidence of notification and use—Application granted.* Applicant

WORDS AND PHRASES—MOTS ET EXPRESSIONS—Continued—Suite

WORDS AND PHRASES—MOTS ET EXPRESSIONS—Concluded—Fin

AMENDMENTS TO RULES
EXCHEQUER COURT OF CANADA

The General Rules and Orders of the Exchequer Court of Canada as made on April 21, 1931 and as amended from time to time (hereinafter referred to as "the Rules") are hereby amended, effective January 1, 1965, as follows:

1. (1) The words "or a Judge" where they appear in the Rules at the places described in Schedule "A" hereto are deleted.

   (2) The words "or Judge" where they appear in the Rules at the places described in Schedule "B" hereto are deleted.

   (3) The word "Judge" or "a Judge" where that word or words appear in the Rules at the places described in Schedule "C" hereto, is hereby deleted and the word "Court" or "the Court" is substituted therefor.

   (4) The words "a Judge in Chambers", where those words appear in the Rules at the places described in Schedule "D" hereto, are hereby deleted and the words "the Court" are substituted therefor.

   (5) The words "or to a Judge" in line 1 of Rule 67 are deleted.

   (6) The words "to him" in the second line of Rule 73 are deleted.

   (7) The words "or a Judge in Court" in the first and second lines of Rule 174, are deleted.

   (8) The words "the Judge" in the sixth line and in the ninth line of Rule 178 and in the third line of Rule 181 are deleted and, in each case, the words "a Judge" are substituted therefor.

   (9) The words "or his" in the first line of Rule 219 are deleted.

   (10) The words "or he" in the third and fourth lines of Rule 233 are deleted.

   (11) The words "Judge who tries the action" in the third line of Rule 237 are deleted and the word "Court" is substituted therefor.

   (12) The words "to a Judge in Chambers or" in the first line of Rule 258 are deleted.

   (13) Paragraph (*e*) of Rule 277A is amended by deleting the comma and the words "a Judge" in the first line and the third line thereof.

2. (1) Paragraph (*c*) of Rule 1 is repealed and the following is substituted therefor:

   > (*c*) The words "Exchequer Court" or "Court" when used in these Rules shall mean the Exchequer Court of Canada, any part of the business of which may be transacted, by virtue of section 33 of the Exchequer Court Act, by any Judge of that Court.

   (2) Paragraph (*d*) of Rule 1 is repealed.

   (3) Paragraph (*e*) of Rule 1 is repealed and the following is substituted therefor:

(e) "Registrar" includes a Deputy Registrar when acting as Registrar in the absence of the Registrar or when performing a function of the Registrar in accordance with an arrangement made by the Registrar or Acting Registrar or a direction given by the Registrar or Acting Registrar.

3. Rule 6 is amended by adding the following paragraph thereto:

4. A petition of right or a statement of claim shall show the place of residence of the suppliant or plaintiff at the time of the commencement of the action and, if the suppliant or plaintiff is not a natural person, the petition of right or statement of claim, as the case may be, shall show its legal character.

4. The words "Minister of Agriculture" where they appear in the fourth line of the second paragraph of Rule 36, in the fourth line of Rule 37 and in the third line of Rule 41 are deleted and the words "Attorney General of Canada" are substituted therefor.

5. Rules 60 and 68 are repealed.

6. The following is added to the Rules immediately following Rule 96:

RULE 96A

Particulars

Subject to paragraph (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words,

(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and

(b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

(2) Where it is necessary to give particulars of debt, expenses or damages and those particulars exceed 3 folios, they must be set out in a separate document referred to in the pleading and the pleading must state whether the document has already been served, and if so, when, or is to be served with the pleading.

(3) The Court may order a party to serve on any other party further and better particulars of any claim, defence or other matter stated in his pleading, or a further and better statement of the nature of the case on which he relies, and the order may be made on such terms as the Court thinks just.

(4) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of paragraph (3), the Court may, on such terms as it thinks just, order that party to serve on any other party

(a) where he alleges knowledge, particulars of the facts on which he relies; and

(b) where he alleges notice, particulars of the notice.

(5) An order under this rule shall not be made before service of the defence and such discovery of documents or examination for discovery as the party applying intends to have, unless, in the opinion of the Court, the order is necessary or desirable to enable the defendant to plead or for some other special reason.

(6) Where the applicant for an order under this rule did not apply in writing to the party against whom the order is sought for the particulars that he requires, the Court may in its discretion refuse to make the order unless of opinion that there were sufficient reasons for such an application in writing not having been made.

7. Rule 107 is amended by adding the following paragraph immediately after the first paragraph thereof:

The Attorney General, or a petitioner or plaintiff other than one petitioning or suing on behalf of a class may, at any time, without leave, by notice in writing, after having filed a consent from all other parties, wholly discontinue his action or withdraw any part or parts of his alleged cause of complaint, upon such terms as to costs or otherwise as may be contained in such consent.

8. The second paragraph of Rule 113 is repealed and the following is substituted therefor:

But where in an action it appears to the Court that the pleadings do not sufficiently define the issues of fact in dispute between the parties, it may, either upon application of one of the parties or of its own motion, direct the parties to prepare issues, and such issues shall, if the parties differ, be settled by the Court.

9. Rule 138 is repealed and the following is substituted therefor:

RULE 138

Using at trial examination for Discovery

Any party may, at the trial of an action or issue, use in evidence any part of the examination for the purposes of discovery of the opposite party; but the Court may look at the whole of the examination, and if of opinion that any other part is so connected with the part to be used that the last-mentioned part ought not to be used without such other part, may require such other part to be put in evidence by the party seeking to use such examination.

10. (1) The first paragraph of Rule 144A is repealed and the following substituted therefor:

In any action for damages arising out of any injury to the person, the Court may order that the person in respect of whose injury damages are claimed shall submit himself to examination at such place and by such duly qualified medical practitioner or practitioners or such medical officer or officers of the Department of Veterans' Affairs as may be deemed proper.

(2) The third and fourth paragraphs of Rule 144A are repealed and the following substituted therefor:

3. If the person ordered under this Rule to submit himself for examination fails, without good cause, to comply with such order, he shall, if he is the suppliant or plaintiff, be liable to have his action dismissed.

4. The Court may order that the Crown or other party seeking an order under the first or second paragraph of this Rule pay to the person to be examined or his parent or guardian all necessary travelling and maintenance expenses incurred or to be incurred in attending for such examination.

(3) Rule 144A is further amended by adding the following paragraph thereto:

6. Any person required to undergo examination pursuant to this Rule is entitled to have his solicitor and medical advisor or either of them at such examination and is entitled to a copy of any written record or report of the examination that the examiner may make.

11. Rule 147 is repealed and the following is substituted therefor:

RULE 147

Notice to Admit Facts

Any party may call upon any adverse party not less than 14 days before the commencement of trial, to admit, for the purposes of the cause, matter or issue only, any specific fact or facts mentioned in such notice.

In case of refusal or neglect to admit, after a notice under this Rule, the cost of proving the fact not admitted shall be paid by the party so neglecting or refusing, whatever the result of the action may be, unless at the hearing or trial the Court certify that the refusal to admit was reasonable.

A notice to admit facts may be in the terms of Form 26A in the Appendix to these Rules.

12. Rule 156 is repealed and the following substituted therefor:

RULE 156

Time and place for trial

When any action or other matter is ready for trial or hearing, the Court may, upon application of any party and after notice thereof served on all other parties, fix the time and place of trial or hearing and may direct when and in what manner and upon whom notice of trial or hearing is to be served. The order will, unless otherwise directed, be in the terms of Form 27 in the Appendix to these Rules.

General sittings of the Exchequer Court of Canada may be held at any place outside Ottawa at any time appointed by the Court, of which notice shall be published in the *Canada Gazette*; and any action or matter ready for trial or hearing may, without a direction under the first paragraph of this Rule having been obtained, be set down for trial or hearing at any such General Sittings by either party thereto, upon giving the opposite party ten days' notice of trial, or by consent of the parties.

Before making an application for an order fixing a date and place for trial or setting a case down for trial at a General Sittings, a party shall,

(*a*) unless the pleadings sufficiently define the issues of fact in dispute between the parties,

(i) file an agreement of all parties stating such issues, or

(ii) apply under Rule 113 for an order settling the issues of fact, and

(*b*) unless there are special reasons for fixing the date for trial a substantial time in advance of trial,

(i) have had examination for discovery or waive such examination,

(ii) have had production of documents or waive such production, and

(iii) have served such notices to admit under Rule 146 and Rule 147 as may be appropriate.

A party making an application for a date fixing a date and place for trial or setting a case down for trial at a General Sittings shall, before making the application, have filed a note signed by the solicitor or counsel stating

(*a*) the number of witnesses that the party proposes to call,

(*b*) the party's estimate of the length of the hearing in days or hours, and

(*c*) an indication of the quantity of documents in the case;

and every other party shall file such a note

(*d*) upon being served with a notice of application to fix the place and date of the trial, or

(*e*) upon being served with a notice of trial after a case has been set down for hearing at a General Sittings.

The Court may direct that an action or other matter that has been set down for hearing at a General Sittings be removed from the list for that sittings if, having regard to the probable length of the case, it is impractical to have it heard at that sittings.

Any such General Sittings shall be continued from day to day until the business coming before the Court be disposed of.

On the first day of each such General Sittings, the Court will deal with interlocutory and other matters that can be more conveniently dealt with at that sittings than in Ottawa.

13. Paragraph (1) of Rule 157 is repealed and the following is substituted therefor:

The party by whom any proceedings are set down for hearing or who gives notice of motion for an order fixing the date for hearing of any proceedings shall, at the time the proceedings are set down or the notice of motion is filed, as the case may be, have had prepared, and had certified by the Registrar, a copy of the record (being the pleadings and all such orders or other material on the Court's file as may be material to the disposition of the matter at or after trial) and shall supply an additional copy thereof for the use of the trial Judge. Such copy of the record shall be on such paper and in such state as is satisfactory to the Registrar.

The Judge's fiat or pronouncement disposing of the matter shall be endorsed or added to the certified copy of the record and signed or initialled by him.

14. The following rule is added immediately after Rule 157:

RULE 157A

Opening statements by counsel

Whenever, on the trial of any proceedings, any party proposes to adduce evidence, a counsel for the party shall, unless the presiding Judge otherwise directs, immediately before introducing any evidence, make a short statement giving a concise outline of the facts that the party proposes to prove and of the applicable law.

15. Rules 160 and 161 are repealed and the following are substituted therefor:

RULE 160

Postponement of trial

The Court may, if it is expedient in the interest of justice, postpone or adjourn the trial for such time, and upon such terms, if any, as seem fit.

RULE 161

Sitting or trial adjourned when Judge unable to attend

In case no Judge is able to attend on a day fixed for the hearing of any proceedings, such hearing shall stand adjourned from day to day until a Judge is able to attend.

16. Paragraph 2 of Rule 172 is repealed and the following paragraphs are substituted therefor:

2. When no party has, two weeks from the day the order was made, applied to the Registrar for an appointment to settle the minutes of the order, the Registrar may, ten days after sending to the parties, by ordinary mail, a draft of the order and after considering any representations received from the parties within that time, settle the minutes of the order.
3. When the Registrar has settled the minutes of an order under paragraph 2 hereof, the party upon whose application the order was granted shall forthwith pay to the Registrar a fee of $20 and shall not be permitted to take any further step in the matter until the fee has been paid.

17. Rule 206 is repealed and the following is substituted therefor:

RULE 206

Enforcing order of Court

Every order of the Court, whether in an action, cause or matter, may be enforced in the same manner as a judgment to the same effect.

18. The following is added immediately after Rule 222:

RULE 222A

Execution of judgment on condition

Where a judgment or order is to the effect that any party is entitled to any relief subject to or upon fulfilment of any condition or contingency, the party so entitled may, upon the fulfilment of the condition or contingency, and demand made upon the party against whom he is entitled to relief, apply to the Court for leave to issue execution against such party; and the Court may, if satisfied that the right to relief has arisen according to the terms of the judgment or order, order that execution issue accordingly, or may direct that any issue or question necessary for the determination of the rights of the parties be tried in any of the ways in which issues or questions arising in an action may be tried.

19. Rule 242 is amended by adding the following paragraph thereto:

Every interlocutory order granting an injunction is, whether or not the order expressly so provides, subject to rescission, suspension or amendment by order of the Court at any time after the order granting the injunction was made.

20. Rules 247, 248 and 249 are repealed and the following are substituted therefor:

RULE 247

Hearing of motions

A Judge will sit in open Court at Ottawa every Tuesday and Thursday, or on the next juridical day, in the event of any Tuesday or

Thursday being a holiday, for the purpose of hearing all motions and applications that can conveniently be heard at such sittings.

Counsel need not be robed for such sittings.

RULE 248

Setting down of motions

Motions and applications are to be set down to be heard at least two days before hearing under Rule 247 unless the Court shall otherwise order. This rule does not apply to *ex parte* motions.

RULE 249

Application to be made by motion

Where by these Rules any application is authorized to be made to the Court, it shall be made by motion.

21. Rule 256 is repealed.

22. Rule 259 is repealed and the following substituted therefor:

RULE 259

Rescission of *ex parte* orders

The Court may rescind any order that was made *ex parte* but no such rescission will affect the validity or character of anything done or not done before the rescinding order was made.

23. (1) All that part of Rule 287 preceding paragraph (2) thereof is repealed and the following is substituted therefor:

(1) The Registrar shall have power

(*a*) to do anything that he is by the Rules of Court authorized to do,

(*b*) if he is satisfied that all parties affected have consented thereto, make any order that the Court may make other than an order that is inconsistent with any order previously made by a judge,

(*c*) if he is satisfied that all parties affected have consented to a judgment that is limited to the payment of a fixed amount of money enter judgment accordingly, and

(*d*) give any judgment that the Court might give under paragraph (*b*) of Rule 124 in any action claiming only a liquidated amount of money.

(1A) In case any matter shall appear to the Registrar to be proper for consideration by the Court, he may refer the same to the Court and the Court may either dispose of the matter or refer it back to the Registrar, with such direction as it deems appropriate.

(2) Paragraph (2) of Rule 287 is amended by deleting the words "a Judge sitting in Chambers" and substituting the words "the Court" therefor.

(3) Paragraph (4) of Rule 287 is amended by deleting the words "Judge in Chambers" in the second line and substituting the word "Court" therefor and by deleting the word "Judge" in the last line and substituting the word "Court" therefor.

(4) Paragraph (5) of Rule 287 is amended by deleting the words "Monday" and "Friday" wherever they appear therein and

substituting the words "Tuesday" and "Thursday" respectively therefor, and by deleting the word "Judge" in the fifth line and substituting the word "Court" therefor.

24. Rule 289 is amended by deleting all the words in the said rule commencing with the word "Provided" in the fifth line.

25. Delete the words "The Judge" where they appear in the first line of Rule 290 and in the sixth line of Rule 291 and substitute the words "A Judge" therefor.

26. The following paragraph is added to Rule 298:

Before a matter has been set down for trial at a General Sittings or an order has been made fixing the time and place of trial, where any party desires to have the time appointed by these Rules or fixed by any order for his doing any act or taking any proceeding enlarged or abridged and the party or parties adverse in interest consent to such enlargement or abridgment, it is not necessary to obtain an order from the Court to enlarge or abridge the time and, in the absence of special circumstances, an application for an order enlarging or abridging the time shall not be made without having first sought such consent.

27. Rule 300 is repealed and the following substituted therefor:

RULE 300

Non-compliance

The Court may under special circumstances, depart from any limitation in these Rules upon the inherent right or power of the Court.

Non-compliance with any of these Rules or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court shall so direct but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit.

No application to set aside any proceeding for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity.

Where an application is made to set aside a proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the notice of motion.

28. The appendix is amended by adding the following immediately after Form 26:

FORM 26A

Notice to Admit Facts

(Rule 147)

IN THE EXCHEQUER COURT OF CANADA

Between

A.B.,
and
C.D.

TAKE NOTICE that the plaintiff (or defendant) requires the defendant (or plaintiff), within six days from service of this notice, to admit, for the purposes of this cause only, the several facts respectively hereunder specified, saving all just exceptions to the admissibility of such facts as evidence in this cause.

Dated, etc.

Solicitor for the plaintiff
(or defendant)

To the Solicitor for the
defendant (or plaintiff)
The facts, the admission of which is required,
are

1. That the automobile referred to in paragraph............of the statement of claim and in paragraph............of the statement of defence belonged at all relevant times to the plaintiff.
2. That J.D., referred to in the same paragraphs was, at all relevant times, a servant of the defendant, acting in the course of his employment.
3. That the cost of repairing the damages sustained by the aforesaid automobile in the collision referred to in paragraph............of the statement of claim and paragraph............of the statement of defence was............and that the expense was reasonably incurred.

29. Tariff A is amended by adding the following item immediately after Item 36:

> 36A. Counsel fees on negotiations with the opposing party with a view to agreeing on facts for purposes of trial or with a view, otherwise, to agreeing an arrangements to shorten or facilitate the trial of the matter, to be allowed on the same basis as counsel fees at trial.

30. A reference in this Order to a line of a rule is a reference to that line of the Rules as printed by the Queen's Printer and Controller of Stationery in 1962.

31. The Rules as amended hereby apply to proceedings pending in the Court at the time these amendments become effective as well as to proceedings commenced thereafter.

DATED at Ottawa, this 4th day of November, 1964.

W. R. Jackett,
President,
The Exchequer Court of Canada.

John D. Kearney
Jacques Dumoulin
A. L. Thurlow
Camil Noël
A. Alex Cattanach
Hugh F. Gibson

Puisne Judges,
The Exchequer Court of Canada.

SCHEDULE "A"

Delete "or a Judge"

(1) R. 23, 2nd l.
(2) R. 24, 2nd l
(3) R. 25, 2nd l.
(4) R. 26, 1st l.
(5) R. 27, 1st & 2nd ll
(6) R. 56, 9th l.
(7) R. 69, 7th l.
R. 69, 8th l.
(8) R. 71, 6th l.
(9) R. 76, 5th l.
R. 76, 9th l.
R. 76, 14th l.
(10) R. 77, 1st l
R 77, 5th l.

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R. 77, 10th & 11th ll.
R. 77, 13th l.
(11) R. 78, 2nd l.
R. 78, 7th l
(12) R 79, 7th l.
(13) R. 103, 9th l
(14) R 104, 7th l
(15) R 107, 2nd para. 3rd l
R. 107, 2nd para 4th l
R. 107, 4th para. 1st l
(16) R 109, 4th l
(17) R 110, 2nd l
(18) R. 111, 4th l.
(19) R. 114, 1st l
(20) R. 115, 1st l.
(21) R. 117, 4th l
(22) R. 118, 2nd l.
(23) R. 119, 3rd l.
(24) R 124(*a*), 10th l
R. 124(*a*), 14th & 15th ll
R. 124(*b*), 9th l.
R 124(*c*), 2nd l
(25) R. 127, 2nd l
(26) R 128, 2nd & 3rd ll
R 128, 7th l.
(27) R 129(*c*), 3rd l
R. 129(*d*).
(28) R. 130(*b*)
(29) R. 131, 9th l
(30) R. 135, 4th l
(31) R. 137, 2nd l
(32) R 140, 1st l
(33) R. 141, 3rd l
(34) R. 143, 2nd & 3rd ll
(35) R. 148, 1st l.
(36) R 149, 4th l.
R 149, 5th l.
(37) R. 151, 1st l.
(38) R. 153, 3rd l.
(39) R. 155, 14th l.
(40) R. 159, 2nd l
(41) R. 164, 2nd l
(42) R. 169, 1st l
R. 169, 9th l
(43) R. 205, 4th l
(44) R 208, 2nd l
(45) R. 211, 4th l
(46) R. 216, 2nd l
(47) R. 219, 1st l
(48) R. 226, 3rd l
(49) R. 228, 12th l
(50) R. 230, 5th l
(51) R. 231, 4th l.
(52) R 232, 3rd l.
(53) R 233, 1st l
(54) R. 235, 13th l.
(55) R. 236, 5th l
R. 236, 8th l.
(56) R. 237, 9th & 10th ll.
(57) R. 238, 3rd l
(58) R. 239, 1st l.
(59) R. 242, 2nd l.
(60) R. 243, 1st l
(61) R 244, 1st l.
R 244, 5th & 6th ll.
(62) R 245, 2nd l
(63) R 250, 2nd l
(64) R. 255, 2nd l
(65) R. 261, 2nd l.
R. 261, 3rd & 4th ll.
(66) R. 266, 4th l
(67) R 268, 2nd l.
(68) R 269, 11th l.
(69) R. 297, 4th l
(70) R. 298, 1st l

SCHEDULE "B"

Delete "or Judge"

(1) R 26, 4th l.
(2) R. 27, 5th l.
(3) R. 51, 5th l.
R. 51, 7th l.
(4) R. 75, 5th l
(5) R 110, 3rd l
(6) R. 117, 5th l
(7) R. 120, 8th l.
(8) R. 127, 3rd l.
(9) R 128, 5th l.
R. 128, 9th l.
(10) R. 144A(2), 1st l.
R. 144A(5), 4th l
(11) R. 151, 5th l.
R 151, 8th l.
(12) R. 164, 6th l.
R. 164, 10th l.
(13) R. 205, 5th l
(14) R. 208, 4th l
(15) R. 217, 2nd l
(16) R. 226, 9th l
(17) R. 229, 1st l
(18) R 232, 5th l
R 232, 10th l
R. 232, 12th l.
(19) R. 235, 15th l.
(20) R. 238, 3rd l.
R 238, 7th l
(21) R. 242, 3rd l
R. 242, 6th l
(22) R. 251, 1st l
(23) R 252, 2nd l
R 252, 4th l
R. 252, 6th & 7th ll.
(24) R. 253, 2nd & 3rd ll.
(25) R 281, 2nd l.
(26) Heading of Rule 298.

SCHEDULE "C"

Substitute "Court" or "the Court" for "Judge" or "a Judge"

(1)	R 18(1), 3rd l R. 18(2), 1st l. R 18(2), 2nd l. R 18(2), 8th l	(5)	R 73, 2nd l.
		(6)	R 136, 3rd l.
		(7)	R. 137, 6th l.
		(8)	R 237, 7th l
(2)	R. 54, 9th l.	(9)	R 274, 3rd l R. 274, 6th l.
(3)	R 55, 7th l.		
(4)	R. 59, 7th l.		

SCHEDULE "D"

Substitute "the Court" for "a Judge in Chambers"

(1)	R. 54, 2nd & 3rd ll.	(3)	R. 263, 6th l.
(2)	R. 107, 3rd para. 4th l.	(4)	R. 264(3), 2nd l.

AMENDMENT TO RULES EXCHEQUER COURT OF CANADA

Form 26A in the Appendix to the General Rules and Orders of the Exchequer Court of Canada as added thereto by paragraph 8 of the Order amending the Rules and Orders dated November 4, 1964, is hereby amended, effective January 1, 1965, by inserting immediately after the words "within six days from service of this" the words "notice, to admit, for the purposes of this".

Dated at Ottawa, this 3rd day of December, A.D. 1964.

W. R. Jackett
President,
The Exchequer Court of Canada
John D. Kearney
Jacques Dumoulin
A. L. Thurlow
Camil Noël
A. Alex Cattanach
Hugh F. Gibson
Puisne Judges,
The Exchequer Court of Canada

AMENDMENTS TO RULES EXCHEQUER COURT OF CANADA

1. Rule 156 of the General Rules and Orders of the Exchequer Court of Canada, as amended by the Order dated November 4, 1964, is amended by deleting the words "a date" at the end of the first line of the fourth paragraph thereof and substituting the words "an order" therefor.

2. (1) Paragraph 1 of Rule 172 of the said Rules is amended by adding the following words at the end of the first sentence thereof:

   but no declaratory or other relief other than that specifically pronounced by the Court shall be included, whether by consent or otherwise, in such minutes.

(2) The said Rule 172 is further amended by adding the following paragraphs thereto:

4. A party who is dissatisfied with the minutes of a judgment or order as settled by the Registrar may apply to the Court to vary the minutes as settled, upon serving the opposite party with two clear days' notice of the application; but no such application shall stay the entry of the judgment or order if the Registrar is of opinion that the application is frivolous or would unreasonably prejudice the successful party.
5. An application under paragraph 4 shall be based only on the ground that the minutes as settled do not in some one or more respects specified in the notice of application accord with the judgment pronounced by the Court or that some matter which should have been dealt with has been overlooked or accidentally omitted from the judgment as pronounced.

Dated at Ottawa, this 11th day of January, A.D. 1965.

W. R. Jackett
President,
The Exchequer Court of Canada

John D. Kearney
Jacques Dumoulin
A. L. Thurlow
Camil Noël
A. Alex Cattanach
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Puisne Judges,
The Exchequer Court of Canada

PRACTICE NOTE No. 1

September 1, 1964

Having regard to the large number of cases that are expected to come on for trial during the coming year and the heavy demands on the time of the Judges of the Court, the co-operation of counsel appearing for parties in cases that are in course of preparation for trial is sought with a view to ensuring that trials are completed without undue delay.

In this connection, the following matters are specifically drawn to the attention of counsel so engaged:

1. COSTS

The taxing officer will allow appropriate fees for time spent by solicitors or counsel in preparation for trial by way of making arrangements between the parties designed to shorten the trial of an action.

2. DEFINITION OF ISSUES OF FACT

Rule 113 of the Exchequer Court Rules reads, in part:

> But where in an action it appears to a Judge that the pleadings do not sufficiently define the issues of fact in dispute between the parties, he may direct the parties to prepare issues, and such issues shall, if the parties differ, be settled by the Judge.

Counsel are requested to review pleadings well in advance of trial with a view to making any necessary application to ensure that the "issues of fact" to be determined at trial are clearly and exhaustively "defined".

3. ADMISSION OF DOCUMENTS

Counsel are expected to establish before trial which documents can be admitted by consent without proof and which documents must be proved. Counsel will for this purpose be expected to make full use of Rule 146, which reads as follows:

> Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the action may be, unless at the hearing or trial the Court certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense
>
> A notice to admit documents may be in the terms of Form 26 in the Appendix to these Rules.

Counsel are requested to have available for the use of the Court and for the use of counsel for the adverse party, copies (preferably photostat) of the documentary exhibits it is proposed to put in evidence, bound together, where practicable, in chronological order. Each document should bear a notation, preferably signed by opposing counsel, as to whether it is "admitted" or its "admission is refused" pursuant to Rule 146. It would be an added convenience if the opposing parties could co-operate on an amalgamation of the Judge's copies of documents so that there would be one set in chronological order with a suitable notation on each document as to the party who proffers it.

4. ADMISSIONS OF FACTS

Counsel are requested to review the pleadings in planning their evidence at trial with a view to taking full advantage of admissions on the pleadings Rule 92 reads as follows:

> Every allegation of fact in any pleadings in an action, if not denied specifically or by necessary implication, or stated to be not admitted in the pleadings of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, person of unsound mind not so found by inquisition, or other person judicially incapacitated

Further proof of any allegation of fact in a pleading is therefore unnecessary unless it is

(*a*) denied specifically or by necessary implication, or

(*b*) stated to be "not admitted",

or unless the opposing party is a person judicially incapacitated.

Attention is also drawn to Rule 145, which reads as follows:

> Any party to a cause or matter may give notice, by his pleading or otherwise, that he admits the truth of the whole or any part of the case of any other party

It would be appreciated if counsel would consider before trial, the possibilities of proceedings under this Rule to shorten the duration of trials.

Attention is further drawn to Rule 4 of Order 32 of the English Rules (which would appear to be applicable in cases arising outside the Province of Quebec). That Rule reads as follows:

> 4. Any party may, by notice in writing, at any time not later than nine days before the day for which notice of trial has been given, or, if no notice of trial is required, not later than nine days after the action is set down for trial, call on any other party to admit, for the purposes of the cause, matter or issue only, any specific fact or facts mentioned in such notice. Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular cause, matter, or issue, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice: provided also, that the Court or a Judge may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

Counsel should consider taking advantage of this Rule with reference to specific facts. The party upon whom a notice to admit facts has been served may, of course, refuse to admit or fail to answer, but he would do so at his peril as to costs.

There is, of course, no intention to abridge the right of parties to a full and ample hearing of the issues between them giving rise to the necessity of having their disputes adjudicated. However, complete justice cannot be done to all parties having disputes to be adjudicated by the Court unless early dates for trial can be granted and time can be allowed to Judges for preparation of judgments without undue delay after completion of trials. Counsel are therefore expected to take all steps, consistent with protecting their clients' proper interests, that will aid the Judges in expediting the business of the Court.

W. R. Jackett
President.

PRACTICE NOTE No. 2

December 29, 1964

Much time is presently occupied during the course of argument while the judge makes a note of the names and citations of authorities and statutes referred to by counsel. To eliminate any unnecessary prolongation of the argument on that account, the following request is made:

Before a counsel commences argument or summing up, he is requested to supply, for the use of the Court, a list of the authorities and statutes upon which he intends to rely, including citations, and to supply a copy of the list to counsel for the other parties.

It is understood, of course, that counsel are not precluded from referring, during argument, to authorities or statutes not on the lists.

W. R. Jackett,
President.

MODIFICATIONS AUX RÈGLES
COUR DE L'ÉCHIQUIER DU CANADA

Les Règles et Ordonnances générales de la Cour de l'Échiquier du Canada, établies le 21 avril 1931 et modifiées de temps à autre par la suite (ci-après appelées «les Règles»), sont par les présentes modifiées, à compter du 1er janvier 1965, comme il suit:

1. (1) Les mots «ou un juge», «ou d'un juge», «ou à un juge» ou «ce dernier ou», selon le cas, qui apparaissent dans les Règles aux endroits indiqués à l'annexe «A» ci-jointe, sont retranchés.
   (2) Les mots «ou le juge», «ou du juge», «ou un juge», «ou d'un juge», «ou à un juge», «par lui ou», «ou au juge» ou «ou ce juge», selon le cas, qui apparaissent dans les Règles aux endroits indiqués à l'annexe «B» ci-jointe, sont retranchés.
   (3) Les mots «juge», «un juge», «du juge» ou «il», selon le cas, qui apparaissent dans les Règles aux endroits indiqués à l'annexe «C» ci-jointe, sont par les présentes retranchés et remplacés par les mots «Cour», «la Cour», «de la Cour» ou «elle», selon le cas.
   (4) Les mots «un juge en chambre», qui apparaissent dans les Règles aux endroits indiqués à l'annexe «D» ci-jointe, sont par les présentes retranchés et remplacés par les mots «la Cour».
   (5) Les mots «ou à un juge», à la première ligne de la Règle 67, sont retranchés.
   (6) Le mot «lui» à la deuxième ligne de la Règle 73 est retranché.
   (7) Les mots «ou un juge siégeant en cour», première et deuxième lignes de la Règle 174, sont retranchés.
   (8) Les mots «le juge» qui apparaissent à la sixième et à la dixième lignes de la Règle 178 et à la troisième ligne de la Règle 181, sont retranchés et, dans chaque cas, ces mots sont remplacés par les mots «un juge».
   (9) La présente modification ne s'applique pas à la version française (Règle 219).
   (10) La présente modification ne s'applique pas à la version française (Règle 233).
   (11) Les mots «le juge qui instruit l'action», à la troisième ligne de la Règle 237, sont retranchés et remplacés par les mots «la Cour».
   (12) Les mots «à un juge en chambre ou», à la première ligne de la Règle 258, sont retranchés.
   (13) L'alinéa *e*) de la Règle 277A est modifié par la suppression de la virgule et des mots «un juge» à la première et à la troisième lignes.
2. (1) L'alinéa *c*) de la Règle 1 est abrogé et remplacé par ce qui suit:

   c) Les expressions «Cour de l'Échiquier» ou «Cour», partout où elles se rencontrent dans les présentes Règles, signifient la Cour de l'Échiquier du Canada, dont toute partie des affaires peut, sous le régime de l'article 33 de la Loi sur la Cour de l'Échiquier, être expédiée par n'importe quel juge de cette Cour.

   (2) L'alinéa *d*) de la Règle 1 est abrogé.

(3) L'alinéa *e*) de la Règle 1 est abrogé et remplacé par ce qui suit:

e) L'expression «registraire» comprend un sous-registraire qui agit en qualité de registraire en l'absence du registraire ou qui remplit une fonction du registraire en conformité d'une disposition prise par le registraire ou sous-registraire ou d'une directive donnée par le registraire ou sous-registraire.

3. La Règle 6 est modifiée par l'adjonction du paragraphe suivant:

4. Une pétition de droit ou un exposé de demande doivent indiquer le lieu de résidence du requérant ou demandeur au moment du début de l'action et, si le requérant ou demandeur n'est pas une personne physique, la pétition de droit ou l'exposé de demande, selon le cas, doit indiquer le caractère juridique du requérant ou demandeur.

4. Les mots «ministre de l'Agriculture», qui apparaissent aux quatrième et cinquième lignes du deuxième paragraphe de la Règle 36, à la quatrième ligne de la Règle 37 et à la troisième ligne de la Règle 41, sont retranchés et remplacés par les mots «procureur général du Canada».

5. Les Règles 60 et 68 sont abrogées.

6. Les Règles sont modifiées par l'insertion, immédiatement après la Règle 96, de ce qui suit:

RÈGLE 96A

Détails

Sous réserve du paragraphe (2), toute plaidoirie doit fournir les détails nécessaires au sujet de toute réclamation, de toute défense ou de toute autre matière plaidée, y compris, sans préjudice de la généralité de ce qui précède,

a) Des détails au sujet de toute déclaration fausse, toute fraude, tout abus de confiance, tout manquement délibéré ou toute influence indue sur lesquels s'appuie la partie qui plaide, et

b) Lorsqu'une partie qui plaide allègue quelque état d'esprit chez quelque personne, qu'il s'agisse de dérangement ou de faiblesse d'esprit, ou de malice, d'intention de frauder ou de quelque autre état d'esprit, sauf la connaissance des détails au sujet des faits sur lesquels la partie s'appuie.

(2) Lorsqu'il est nécessaire de donner des détails au sujet de dettes, de dépenses ou de dommages-intérêts, et que ces renseignements excèdent trois folios, il faut en faire l'exposé dans un document séparé dont il est fait mention dans la plaidoirie qui doit indiquer également si le document a déjà été signifié et, le cas échéant, quand il l'a été, ou s'il doit l'être en même temps que la plaidoirie.

(3) La Cour peut ordonner à une partie de fournir à toute autre partie des détails plus amples et plus précis au sujet de toute réclamation, défense ou autre question mentionnée dans sa plaidoirie, ou un exposé plus ample et plus précis de la nature de la cause sur laquelle elle s'appuie, et l'ordonnance peut être rendue aux conditions que la Cour juge équitables

(4) Lorsqu'une partie allègue comme un fait qu'une personne a eu connaissance ou reçu avis de quelque fait, matière ou chose, alors, sans préjudice de la généralité du paragraphe (3), la Cour peut, aux conditions qu'elle juge équitables, ordonner à cette partie de fournir à toute autre partie

a) Lorsqu'elle allègue la connaissance, les détails au sujet des faits sur lesquels elle s'appuie; et

b) Lorsqu'elle allègue l'avis, les détails au sujet de l'avis.

(5) Une ordonnance en vertu de la présente Règle ne doit pas être rendue avant la signification de la défense et la communication de documents ou l'examen préalable que la partie qui présente la demande a l'intention de faire, à moins que, de l'avis de la Cour, l'ordonnance soit nécessaire ou souhaitable pour permettre au défendeur de plaider ou pour quelque autre raison spéciale.

(6) Lorsque la partie qui demande une ordonnance en vertu de la présente Règle n'a pas demandé par écrit à la partie contre laquelle elle demande l'ordonnance les détails dont elle a besoin, la Cour peut à sa discrétion refuser de rendre l'ordonnance, à moins qu'elle ne soit d'avis que des raisons suffisantes justifiaient l'omission d'une telle demande écrite.

7. La Règle 107 est modifiée par l'insertion immédiatement après le premier paragraphe, du paragraphe suivant:

Le procureur général ou un pétitionnaire ou demandeur autre que celui qui pétitionne ou poursuit au nom d'une catégorie peut, en tout temps, sans autorisation, par avis écrit, après avoir déposé un consentement de toutes les autres parties, se désister entièrement de son action ou retirer une ou des parties des moyens invoqués à l'appui de sa réclamation, à telles conditions concernant les frais ou de telle autre manière que ce consentement indique.

8. Le second paragraphe de la Règle 113 est abrogé et remplacé par ce qui suit:

Toutefois, dans une action, s'il apparaît à la Cour que les plaidoiries ne définissent pas suffisamment les questions de fait en contestation entre les parties, la Cour peut, soit à la demande de l'une des parties, soit de sa propre initiative, ordonner aux parties d'établir les points litigieux, et, si les parties diffèrent d'avis, la Cour doit régler ces points.

9. La Règle 138 est abrogée et remplacée par ce qui suit:

RÈGLE 138

Recours à l'examen préalable pendant le procès

Toute partie, lors de l'instruction d'une action ou contestation, peut se servir, à titre de preuve, d'une portion quelconque de l'examen préalable de la partie adverse; mais la Cour peut lire l'examen en entier, et, si elle est d'avis que toute autre portion est tellement liée à ce qui doit être utilisé que la portion en dernier lieu mentionnée ne devrait servir sans cette autre portion, elle peut exiger que cette dernière soit consignée comme preuve par la partie qui cherche à se servir de l'examen préalable.

10. (1) Le premier paragraphe de la Règle 144A est abrogé et remplacé par ce qui suit:

Dans toute action en dommages-intérêts pour quelque blessure à la personne, la Cour peut ordonner que la personne dont les blessures font l'objet d'une réclamation en dommages-intérêts se présente à un examen à l'endroit et devant le médecin ou les médecins compétents ou le médecin fonctionnaire ou les médecins fonctionnaires du ministère des Affaires des anciens combattants qui peuvent être jugés convenables

(2) Les troisième et quatrième paragraphes de la Règle 144A sont abrogés et remplacés par ce qui suit:

3. Si la personne qui, sous l'empire de la présente Règle, a reçu l'ordre de se présenter à un tel examen néglige, sans raison valable, de se

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conformer à une telle ordonnance, l'action de cette personne, si celle-ci est le demandeur ou le requérant, est susceptible d'être renvoyée.

4. La Cour peut ordonner que la Couronne ou toute autre partie demandant une ordonnance sous l'empire du premier ou du deuxième paragraphe de la présente Règle verse à la personne qui doit être examinée, ou à son père ou à sa mère ou à son tuteur, tous les frais nécessaires de déplacement et de subsistance occasionnés ou devant être occasionnés par leur présence audit examen.

(3) La Règle 144A est aussi modifiée par l'adjonction du paragraphe suivant:

6. Toute personne qui doit subir un examen sous l'empire de la présente Règle a droit de se faire accompagner par son avocat et son médecin ou par l'un ou l'autre à cet examen, et elle a droit à une copie de tout compte rendu ou rapport écrit de l'examen que l'examinateur peut faire.

11. La Règle 147 est abrogée et remplacée par ce qui suit:

RÈGLE 147

Avis d'admettre des faits

Toute partie peut enjoindre à toute partie adverse, au moins 14 jours avant le début de l'instruction, d'admettre, uniquement aux fins de la cause, de l'affaire ou du litige, tous faits précis mentionnés dans un tel avis ou l'un quelconque de ces faits.

En cas de refus ou négligence d'admettre, après un avis donné sous l'empire de la présente Règle, les frais occasionnés par la preuve du fait non admis doivent être acquittés par l'auteur de la négligence ou du refus, quel que soit le résultat de l'action, à moins qu'à l'audition ou instruction la Cour n'atteste que le refus d'admettre était raisonnable.

Un avis d'admettre des faits peut être rédigé selon la formule n° 26A de l'annexe aux présentes Règles.

12. La Règle 156 est abrogée et remplacée par ce qui suit:

RÈGLE 156

Date et lieu de l'instruction

Lorsqu'une action ou autre affaire est prête pour l'instruction ou l'audition, la Cour peut, sur requête de toute partie et après qu'avis en a été signifié à toutes les autres parties, fixer la date et le lieu de l'instruction ou audition et prescrire quand, comment et à qui doit être signifié l'avis de l'instruction ou audition. A moins d'instructions contraires, l'ordonnance doit être rédigée selon la formule 27 de l'annexe aux présentes Règles.

La Cour de l'Échiquier du Canada peut tenir en tout lieu en dehors d'Ottawa et en tout temps fixé par la Cour, des séances générales dont avis doit être publié dans la *Gazete du Canada;* et toute action ou affaire prête pour l'instruction ou audition peut, sans que des instructions aient été obtenues en vertu du premier paragraphe de la présente Règle, être inscrite pour instruction ou audition à une telle séance générale par l'une ou l'autre partie, sous réserve d'un avis d'instruction de 10 jours à la partie adverse, ou moyennant le consentement des parties.

Avant de demander une ordonnance fixant la date et le lieu de l'instruction ou d'inscrire une cause pour instruction à une séance générale, une partie doit

a) A moins que les plaidoiries ne définissent suffisamment les questions de fait en contestation entre les parties,
  (i) Déposer un exposé des points litigieux, sur lequel les parties sont d'accord, ou
  (ii) Demander, sous l'empire de la Règle 113, une ordonnance réglant les questions de fait, et
b) A moins que, pour des raisons spéciales, il ne faille fixer la date de l'instruction longtemps avant celle-ci,
  (i) Avoir fait l'examen préalable ou avoir renoncé à cet examen,
  (ii) Avoir exigé la production de documents ou avoir renoncé à cette production, et
  (iii) Avoir signifié tels avis d'admettre en vertu de la Règle 146 et de la Règle 147 qui peuvent être jugés appropriés.

Une partie qui demande une ordonnance fixant la date et le lieu de l'instruction ou l'inscription d'une cause pour instruction à une séance générale doit, avant de faire sa demande, avoir déposé une note signée par le procureur ou conseil indiquant

a) Le nombre de témoins que la partie se propose d'appeler,
b) La durée estimative, selon elle, de l'audition en jours ou en heures, et
c) Une idée de la quantité des documents relatifs à la cause;
Et toute autre partie doit déposer une telle note
d) Sur signification d'un avis de demande de fixation du lieu et de la date d'instruction, ou,
e) Sur signification d'un avis d'instruction après qu'une cause a été inscrite pour audition à une séance générale.

La Cour peut ordonner qu'une action ou autre affaire, inscrite pour instruction à une séance générale, soit radiée de la liste pour cette séance si, compte tenu de la durée probable de la cause, il est impossible de l'entendre à cette séance.

Ces séances générales doivent se poursuivre de jour en jour jusqu'à ce que les affaires dont la Cour est saisie soient terminées.

Le premier jour de chacune de ces séances générales, la Cour s'occupera des affaires interlocutoires et autres affaires dont il lui est plus facile de s'occuper à ces séances qu'à Ottawa.

13. Le paragraphe 1 de la Règle 157 est abrogé et remplacé par ce qui suit:

La partie qui inscrit les procédures pour audition ou qui donne avis de motion pour une ordonnance fixant la date de l'audition de toute procédure doit, au moment de l'inscription des procédures ou du dépôt de l'avis de motion, selon le cas, avoir fait préparer et avoir fait attester par le registraire une copie du dossier (c'est-à-dire des plaidoiries, de toutes les ordonnances et de tous les autres documents au dossier de la Cour qui pourraient être utiles pour le règlement de l'affaire à l'instruction ou après cette instruction) et doit en fournir une copie supplémentaire pour l'usage du juge à l'instruction Une telle copie du dossier doit être sur le papıer et dans l'état qu'exigera le registraire.

L'autorisation ou la décision du juge réglant l'affaire doit être ajoutée à la copie authentique du dossier ou mentionnée au verso de celle-ci, et signée ou initialée par lui.

14. La Règle suivante est ajoutée immédiatement après la Règle 157:

RÈGLE 157A

Déclarations préliminaires des conseils

Quand, lors de l'instruction d'une procédure, une partie se propose de fournir une preuve, un conseil de la partie doit, à moins que le juge qui préside n'en décide autrement, immédiatement avant de présenter quelque preuve, faire une brève déclaration donnant un exposé concis des faits que la partie se propose de prouver et des lois applicables.

15. Les Règles 160 et 161 sont abrogées et remplacées par ce qui suit:

RÈGLE 160

Remise de l'instruction

La Cour peut, s'il est opportun de le faire dans l'intérêt de la justice, remettre ou ajourner l'instruction à telle date et selon telles conditions, le cas échéant, qui semblent appropriées.

RÈGLE 161

Ajournement de l'audience ou de l'instruction quand le juge ne peut y assister

Si aucun juge ne peut être présent au jour fixé pour l'audition de quelque procédure, cette audition doit rester ajournée de jour en jour jusqu'à ce qu'un juge puisse y assister.

16. Le paragraphe 2 de la Règle 172 est abrogé et remplacé par les paragraphes suivants:

2. Quand, deux semaines après le jour où l'ordonnance a été rendue, aucune partie n'a demandé au registraire une convocation pour la détermination des minutes de l'ordonnance, le registraire peut, dix jours après avoir adressé aux parties, par courrier ordinaire, un projet d'ordonnance et, après avoir considéré les observations, s'il en est, faites par les parties dans les limites de ce délai, déterminer les minutes de l'ordonnance.
3. Lorsque le registraire a déterminé les minutes d'une ordonnance en vertu du paragraphe 2 ci-dessus, la partie à la demande de laquelle l'ordonnance a été rendue doit immédiatement verser au registraire des honoraires de $20 et elle ne sera pas autorisée à poursuivre l'affaire tant que ces honoraires n'auront pas été payés.

17. La Règle 206 est abrogée et remplacée par ce qui suit:

RÈGLE 206

Exécution d'une ordonnance de la Cour

Toute ordonnance de la Cour, dans une action, une cause ou une affaire, peut être exécutée de la même manière qu'un jugement au même effet.

18. La Règle suivante est ajoutée immédiatement après la Règle 222:

RÈGLE 222A

Exécution d'un jugement sous condition

Si un jugement ou une ordonnance porte qu'une partie a droit à quelque recours sous réserve ou après accomplissement de quelque condition ou éventualité, la partie ayant ce droit peut, après l'accomplissement de la condition ou éventualité et après qu'une demande a été faite à la partie contre laquelle elle a droit à un recours, demander à la Cour de délivrer un exécutoire contre cette partie; et la Cour peut, si elle est convaincue que le droit au recours existe conformément aux conditions du jugement ou de l'ordonnance, ordonner l'exécution en conséquence ou ordonner que tout point litigieux ou toute question nécessaire à la détermination des droits des parties soient examinés de l'une quelconque des façons dont les points ou questions qui surgissent au cours d'une action peuvent être instruits.

19. La Règle 242 est modifiée par l'adjonction du paragraphe suivant:

Chaque ordonnance interlocutoire accordant une injonction, que l'ordonnance le mentionne expressément ou non, est sujette à rescision, suspension ou modification par ordonnance de la Cour en tout temps après que l'ordonnance accordant l'injonction a été rendue

20. Les Règles 247, 248 et 249 sont abrogées et remplacées par ce qui suit:

RÈGLE 247

Audition de motions

Un juge siégera en audience publique à Ottawa chaque mardi et chaque jeudi, ou le jour juridique suivant, si le mardi ou le jeudi est un jour férié, afin d'entendre l'audition de toutes les motions et demandes qu'il peut sans inconvénient entendre à de telles séances.

Il n'est pas nécessaire que les conseils portent la toge pour ces séances.

RÈGLE 248

Inscription des motions

Les motions et les demandes doivent être inscrites pour audition au moins deux jours avant l'audition aux termes de la Règle 247, à moins que la Cour n'en ordonne autrement. La présente Règle ne s'applique pas aux motions *ex parte*.

RÈGLE 249

Demande par motion

Lorsque les présentes Règles autorisent la présentation d'une demande à la Cour, cette demande doit être présentée par voie de motion.

21. La Règle 256 est abrogée.

22. La Règle 259 est abrogée et remplacée par ce qui suit:

RÈGLE 259

Révocation d'ordonnances «ex parte»

La Cour peut révoquer toute ordonnance qui a été rendue *ex parte*; mais une telle révocation ne portera pas atteinte à la validité ni au caractère de ce qui a été fait ou n'a pas été fait avant que fût rendue l'ordonnance de révocation

23. (1) Toute la partie de la Règle 287 qui précède le paragraphe (2) de cette Règle est abrogée et remplacée par ce qui suit:

(1) Le registraire a le pouvoir

a) D'accomplir toutes les choses que les Règles de la Cour l'autorisent à accomplir,

b) S'il est convaincu que toutes les parties intéressées y ont consenti, rendre toute ordonnance que la Cour peut rendre, sauf une ordonnance qui est en désaccord avec quelque autre ordonnance rendue antérieurement par un juge, *c*) S'il est convaincu que toutes les parties intéressées ont consenti à un jugement qui est restreint au versement d'un montant fixe, inscrire le jugement en conséquence, et

d) Rendre tout jugement que la Cour peut rendre en vertu du paragraphe *b*) de la Règle 124 dans toute action par laquelle est uniquement réclamé un montant fixe.

(1A) S'il apparaît au registraire qu'une question est du ressort de la Cour, il peut déférer cette question à la Cour et celle-ci a la faculté de statuer sur la question ou de la renvoyer au registraire avec les instructions qu'elle estime utiles.

(2) Le paragraphe 2 de la Règle 287 est modifié par la substitution des mots «la Cour» aux mots «un juge siégeant en chambre».

(3) Le paragraphe 4 de la Règle 287 est modifié par la substition, à la deuxième ligne, des mots «la Cour» aux mots «un juge en chambre» et la substitution, à l'avant-dernière et à la dernière lignes, des mots «la Cour» aux mots «le juge».

(4) Le paragraphe 5 de la règle 287 est modifié par la substitution des mots «mardi» et «jeudi» respectivement aux mots «lundi» et «vendredi», chaque fois qu'ils s'y trouvent, et par la substitution, à la cinquième ligne, des mots «la Cour» aux mots «le juge».

24. La Règle 289 est modifiée par la suppression de tous les mots de ladite Règle qui suivent le mot «toutefois», à la cinquième ligne.

25. A la première ligne de la Règle 290 et à la septième ligne de la Règle 291, substituer les mots «un juge» aux mots «le juge».

26. Le paragraphe suivant est ajouté à la Règle 298:

Lorsque, avant qu'une affaire soit inscrite pour instruction à une séance générale ou qu'une ordonnance soit rendue fixant la date et le lieu de l'instruction, une partie quelconque désire faire augmenter ou abréger les délais prescrits par les présentes Règles ou fixés par quelque ordonnance pour l'accomplissement de tout acte ou l'introduction de toute procédure et que la partie adverse consent à une telle augmentation ou réduction, il n'est pas nécessaire d'obtenir une ordonnance de la Cour pour augmenter ou abréger le délai et, en l'absence de circonstances spéciales, une demande d'ordonnance tendant à augmenter ou abréger le délai ne doit pas être présentée sans qu'on ait d'abord obtenu un tel consentement.

27. La Règle 300 est abrogée et remplacée par ce qui suit:

RÈGLE 300

Inobservation

En des circonstances particulières, la Cour peut s'écarter de toute restriction contenue dans les présentes Règles au droit ou pouvoir inhérent de la Cour.

L'inobservation de l'une quelconque des présentes Règles ou de toute règle de pratique présentement en vigueur n'invalidera pas une procédure, à moins que la Cour n'ordonne qu'il en soit ainsi; mais une telle procédure peut être déclarée irrégulière, en tout ou en partie, ou être modifiée ou autrement réglée de la façon et selon les conditions que la Cour jugera appropriées.

Aucune demande du rejet de quelque procédure pour cause d'irrégularité ne sera reçue, à moins qu'elle ne soit présentée dans un délai raisonnable, ni si la partie qui présente la demande a pris de nouvelles mesures bien qu'elle connût l'irrégularité.

Si une demande de rejet d'une procédure pour cause d'irrégularité est présentée, les diverses objections qu'on a l'intention de soulever doivent être énoncées dans l'avis de motion.

28. L'annexe est modifiée par l'insertion, immédiatement après la formule 26, de ce qui suit:

FORMULE 26A

Avis pour admission de faits

(Règle 147)

COUR DE L'ÉCHIQUIER DU CANADA

Entre

A.B.,
et
C.D.

SACHEZ que le demandeur (ou défendeur) exige du défendeur (ou demandeur), dans les six jours qui suivent la signification du présent avis, aux fins de la présente cause seulement, l'admission des divers faits respectivement énoncés ci-après, sauf toutes exceptions pertinentes à l'admissibilité de ces faits comme preuve en la présente cause.

Daté, etc.

Procureur du demandeur
(ou défendeur)

Au procureur du défendeur
(ou demandeur)
Les faits dont on demande l'admission sont

1. Que l'automobile dont il est fait mention à l'alinéa...........de l'exposé de la demande et à l'alinéa...........de l'exposé de la défense appartenait, à tous les moments pertinents, au demandeur.
2. Que J.D., dont il est fait mention dans les mêmes alinéas, était, à tous les moments pertinents, un employé du défendeur et agissait dans l'exercice de son emploi.
3. Que les frais de réparation des dommages occasionnés à l'automobile susmentionnée au cours de la collision dont il est fait mention à l'alinéa..........de l'exposé de la demande et à l'alinéa........... de l'exposé de la défense s'établissaient à..........et que ces frais étaient raisonnables.

29. Le tarif A est modifié par l'insertion, immédiatement après l'article 36, de ce qui suit:

36A. Les honoraires d'un conseil pour des négociations avec la partie adverse en vue d'une entente sur les faits aux fins de l'instruction ou en vue, autrement, d'une entente sur des dispositions tendant à abréger ou faciliter l'instruction de l'affaire, seront alloués aux mêmes taux que les honoraires d'un conseil pour l'instruction.

30. Toute mention dans la présente ordonnance d'une ligne d'une Règle se rapporte à l'édition publiée en 1962, par l'imprimeur de la Reine, contrôleur de la papeterie.

31. Les Règles modifiées par les présentes s'appliquent aux procédures pendantes devant la Cour au moment de l'entrée en vigueur de ces modifications aussi bien qu'aux procédures instituées par la suite.

FAIT à Ottawa, ce 4e jour de novembre 1964.

W. R. Jackett

Président,

Cour de l'Échiquier du Canada.

John D. Kearney
Jacques Dumoulin
A. L. Thurlow
Camil Noël
A. Alex Cattanach
Hugh F. Gibson

Juges puînés,

Cour de l'Échiquier du Canada.

ANNEXE «A»

Retrancher «ou un juge», «ou d'un juge», «ou à un juge», ou «ce dernier ou», selon le cas

(1)	R. 23, 1re ligne
(2)	R. 24, 2e ligne
(3)	R. 25, 1re ligne
(4)	R. 26, 1re ligne
(5)	R. 27, 1re et 2e lignes
(6)	R. 56, 8e et 9e lignes
(7)	R. 69, 8e ligne
	R. 69, 9e ligne
(8)	R. 71, 7e ligne
(9)	R. 76, 5e ligne
	R. 76, 9e ligne
	R. 76, 14e ligne
(10)	R. 77, 2e ligne
	R. 77, 5e ligne
	R. 77, 12e ligne
	R. 77, 14e et 15e lignes
(11)	R. 78, 1re et 2e lignes
	R. 78, 8e ligne
(12)	R. 79, 7e ligne
(13)	R. 103, 10e ligne
(14)	R. 104, 7e et 8e lignes
(15)	R. 107, 2e par , 3e et 4e lignes
	R. 107, 2e par., 4e ligne
	R. 107, 4e par., 1re ligne
(16)	R. 109, 4e ligne
(17)	R. 110, 3e ligne
(18)	R. 111, 4e ligne
(19)	R. 114, 1re ligne
(20)	R. 115, 1re ligne
(21)	R. 117, 4e ligne
(22)	R. 118, 2e ligne
(23)	R. 119, 2e ligne
(24)	R 124(*a*), 11e ligne
	R 124(*a*), 16e ligne
	R. 124(*b*), 10e ligne
	R. 124(*c*), 3e ligne
(25)	R. 127, 1re ligne
(26)	R. 128, 2e ligne
	R. 128, 7e ligne
(27)	R. 129(*c*), 3e ligne
	R. 129(*d*)
(28)	R. 130(*b*)
(29)	R. 131, 9e ligne
(30)	R. 135, 4e ligne
(31)	R. 137, 3e ligne
(32)	R. 140, 1re ligne
(33)	R. 141, 3e ligne
(34)	R. 143, 3e ligne
(35)	R. 148, 1re ligne
(36)	R. 149, 4e ligne
	R. 149, 6e ligne
(37)	R. 151, 1re ligne
(38)	R. 153, 3e et 4e lignes
(39)	R. 155, 14e ligne
(40)	R. 159, 2e ligne
(41)	R. 164, 2e et 3e lignes
(42)	R. 169, 1re ligne
	R. 169, 7e ligne
	R. 169, 10e ligne
(43)	R. 205, 4e et 5e lignes
(44)	R. 208, 2e ligne
(45)	R. 211, 3e ligne
(46)	R. 216, 2e ligne
(47)	R. 219, 1re ligne
(48)	R. 226, 3e ligne

(49) R. 228, 13e ligne
(50) R 230, 6e ligne
(51) R. 231, 4e ligne
(52) R. 232, 3e ligne
(53) R. 233, 1re ligne
(54) R. 235, 13e ligne
(55) R. 236, 5e ligne
R. 236, 7e et 8e lignes
(56) R. 237, 10e ligne
(57) R. 238, 3e ligne
(58) R. 239, 1re ligne
(59) R. 242, 2e et 3e lignes
(60) R. 243, 1re ligne
(61) R. 244, 1re et 2e lignes
R. 244, 6e ligne
(62) R. 245, 2e ligne
(63) R. 250, 3e ligne
(64) R 255, 2e ligne
(65) R. 261, 2e ligne
R. 261, 3e ligne
(66) R. 266, 5e ligne
(67) R. 268, 2e et 3e lignes
(68) R. 269, 12e ligne
(69) R. 297, 5e ligne
(70) R. 298, 1re ligne

ANNEXE «B»

Retrancher «ou le juge», «ou du juge», «ou un juge», «ou d'un juge», «ou à un juge», «par lui ou», «ou au juge», «ou ce juge», selon le cas.

(1) R. 26, 4e ligne
(2) R. 27, 6e ligne
(3) R. 51, 5e ligne
R. 51, 7e et 8e lignes
(4) R. 75, 6e ligne
(5) R. 110, 4e ligne
(6) R. 117, 5e ligne
(7) R. 120, 7e ligne
(8) R. 127, 2e et 3e lignes
(9) R 128, 5e et 6e lignes
R. 128, 9e ligne
(10) R. 144A(2), 1re ligne
R. 144A(5), 5e ligne
(11) R. 151, 5e et 6e lignes
R. 151, 9e ligne
(12) R. 164, 6e ligne
R. 164, 11e ligne
(13) R. 205, 7e ligne
(14) R. 208, 4e et 5e lignes
(15) R. 217, 2e ligne
(16) R. 226, 9e ligne
(17) R 229, 1re ligne
(18) R. 232, 6e ligne
R. 232, 10e ligne
R. 232, 12e et 13e lignes
(19) R. 235. 15e ligne
(20) R. 238, 3e ligne
R. 238, 7e ligne
(21) R. 242, 3e et 4e lignes
R. 242, 6e ligne
(22) R. 251, 1re ligne
(23) R. 252, 2e ligne
R. 252, 3e ligne
R. 252, 6e ligne
(24) R. 253, 2e et 3e lignes
(25) R. 281, 2e ligne
(26) Rubrique de la R. 298

ANNEXE «C»

Substituer «Cour», «la Cour», «de la Cour», ou «elle», à «juge», «un juge», «du juge», ou «il», selon le cas.

(1) R. 18(1), 1re ligne
R. 18(2), 1re ligne
R. 18(2), 2e ligne
R. 18(2), 8e ligne
(2) R. 54, 9e ligne
(3) R. 55, 7e ligne
(4) R. 59, 7e ligne
(5) R. 73, 1re ligne
(6) R. 136, 3e ligne
(7) R. 137, 8e ligne
(8) R. 237, 7e ligne
(9) R. 274, 3e ligne
R 274, 6e ligne

ANNEXE «D»

Substituer «la Cour» à «un juge en chambre»

(1) R. 54, 3e ligne
(2) R. 107, 3e par, 4e et 5e lignes
(3) R. 263, 6e ligne
(4) R. 264(3), 1re ligne

MODIFICATION APPORTÉE AUX RÈGLES DE LA COUR DE L'ÉCHIQUIER DU CANADA

La formule 26A, qui apparaît en annexe aux Règles et Ordonnances générales de la Cour de l'Échiquier du Canada et à laquelle le paragraphe 8 de l'ordonnance modifiant les Règles et Ordonnances du 4 novembre 1964 a ajouté du texte, est par les présentes modifiée, à compter du 1er janvier 1965, par l'insertion immédiatement après les mots: «dans les six jours qui suivent la signification du présent avis», des mots «l'admission, aux fins de la présente cause seulement».

Daté à Ottawa, le 3 décembre 1964.

W. R. Jackett
président de la
Cour de l'Échiquier du Canada

John D. Kearney
Jacques Dumoulin
A. L. Thurlow
Camil Noël
A. Alex Cattanach
Hugh F. Gibson
Juges puînés de la
Cour de l'Échiquier du Canada

MODIFICATIONS APPORTÉES AUX RÈGLES DE LA COUR DE L'ÉCHIQUIER DU CANADA

1. La Règle 156 des Règles et Ordonnances générales de la Cour de l'Échiquier du Canada, telle que l'a modifiée l'ordonnance du 4 novembre 1964, est modifiée par le retranchement des mots «*a date*» à la fin de la première ligne du quatrième paragraphe (de la version anglaise desdites Règles) et leur remplacement par les mots «*an order*». (Cette modification ne vise que la version anglaise.)

2. (1) Le paragraphe 1er de la Règle 172 desdites Règles est modifié par l'adjonction des mots suivants à la fin de la première phrase qui s'y trouve:

mais aucun redressement déclaratoire ou autre, sauf celui qu'a spécifiquement rendu la Cour, doit être inclus dans ces minutes, soit par consentement soit d'autre façon.

(2) Ladite Règle 172 est de plus modifiée par l'adjonction des paragraphes suivants:

4. Toute partie non satisfaite des minutes d'un jugement ou ordonnance qu'a déterminées le registraire peut demander à la Cour de modifier les minutes ainsi déterminées dès qu'elle a signifié à la partie adverse un avis de deux jours francs d'une telle demande; toutefois, aucune semblable demande ne suspend l'inscription du jugement ou de l'ordonnance si le registraire estime que la demande est frivole ou causerait un préjudice déraisonnable à la partie qui a gain de cause.

5. Une demande prévue par le paragraphe 4 doit être fondée sur un des deux motifs suivants: les minutes telles qu'elles ont été déter-

minées ne sont pas, sous un ou des rapports quelconques dont fait mention l'avis de demande, conformes au jugement rendu par la Cour; ou, une question qui aurait dû faire l'objet d'une décision a été oubliée ou accidentellement omise du jugement tel qu'il a été rendu.

Daté à Ottawa, le 11 janvier 1965.

W. R. Jackett
président de la
Cour de l'Échiquier du Canada

John D. Kearney
Jacques Dumoulin
A. L. Thurlow
Camil Noël
A. Alex Cattanach
Hugh F. Gibson
Juges puînés de la
Cour de l'Échiquier du Canada

NOTE CONCERNANT LES RÈGLES DE PRATIQUE

Le 1er septembre 1964

Comme le nombre de causes à entendre au cours de la prochaine année sera vraisemblablement très élevé et que le temps dont disposent les juges de la Cour est partagé entre des tâches multiples, les procureurs qui comparaissent pour les parties dans des causes en voie de préparation sont invités à collaborer afin d'assurer que les procès puissent se dérouler sans retard excessif.

A cet égard, les avocats intéressés sont priés de noter particulièrement ce qui suit:

1. FRAIS

Le fonctionnaire taxateur allouera des frais appropriés pour le temps que les solliciteurs ou les procureurs consacrent, lors de la préparation d'un procès, à amener les parties à conclure des accords propres à abréger un procès.

2. DÉFINITION DES QUESTIONS DE FAIT

La règle 113 des Règles de la Cour de l'Échiquier se lit, en partie, ainsi qu'il suit:

> Toutefois, dans une action, s'il apparaît à un juge que les plaidoiries ne définissent pas suffisamment les questions de fait en contestation entre les parties, il peut ordonner à ces dernières d'établir les points litigieux, et, si les parties diffèrent, il doit régler ces points.

Les procureurs sont priés de revoir les plaidoiries, bien avant le procès, afin de faire le nécessaire pour que les «questions de fait» à être décidées lors du procès soient clairement et complètement «définies».

3. ADMISSION DE DOCUMENTS

On demande aux procureurs d'établir avant le procès la liste des documents qu'on consent à admettre sans établissement de preuve et la liste de ceux qui exigent une preuve. A cet égard, les procureurs devraient s'efforcer de mettre à profit, aussi pleinement que possible, les dispositions que renferme la règle 146, dont voici le texte:

> L'une ou l'autre partie peut enjoindre à la partie adverse d'admettre un document, sous réserve des exceptions légitimes; en cas de refus ou de négligence d'admettre, après cet avis, les frais occasionnés par la preuve de tout semblable document doivent être acquittés par l'auteur de la négligence ou du refus, quel que soit le résultat de l'action, à moins qu'à l'audition ou instruction de la Cour n'atteste que le refus d'admettre était raisonnable. De plus, il ne sera pas accordé de frais de preuve à l'égard d'un document à moins qu'un tel avis ne soit donné, sauf si l'omission de donner l'avis constitue une économie, suivant l'opinion du fonctionnaire taxateur.
>
> Un avis d'admettre des documents peut être rédigé selon la formule N° 26 de l'Annexe des présentes.

Chaque procureur est prié de placer à la disposition du tribunal et du procureur de la partie adverse des exemplaires (de préférence des photostats) des pièces documentaires qu'il se propose de déposer en preuve, reliés ensemble—si possible—selon l'ordre chronologique. Chaque document devrait porter une note, préférablement signée par le procureur de la partie adverse, indiquant si le document est «admis» ou si son «admission est refusée» comme le prévoit la règle 146. Il serait en outre extrêmement utile que les parties adverses réunissent des copies des documents à l'usage du juge et en préparent un jeu complet, établi selon l'ordre chronologique, chaque document portant une indication du nom de la partie qui le produit.

4. ADMISSION DE FAITS

En préparant la preuve qu'ils entendent soumettre au procès, les procureurs sont priés de revoir les plaidoiries afin de tirer tout le parti qu'offrent les admissions que celles-ci renferment. La règle 92 porte ce qui suit:

> Toute allégation de fait que renferme une plaidoirie dans une action, lorsqu'elle n'est pas niée spécifiquement ou par implication nécessaire, ou déclarée non admise dans la plaidoirie de la partie adverse, est censée admise, sauf contre un mineur, un aliéné, une personne faible d'esprit qui n'a pas été ainsi jugée par enquête, ou tout autre personne frappée d'incapacité judiciaire.

Une nouvelle preuve d'une allégation de fait que renferme une plaidoirie est donc superflue, sauf

(*a*) si elle est niée spécifiquement ou par implication nécessaire, ou

(*b*) si elle est déclarée «non admise»,

ou sauf si la partie adverse est une personne frappée d'incapacité judiciaire.

Il convient de noter également ce qu'énonce la règle 145, dont le texte est le suivant:

> Toute partie dans une cause ou affaire peut donner avis, par sa plaidoirie ou autrement, qu'elle admet la véracité de la totalité ou de l'un quelconque des allégués d'une autre partie.

Afin d'abréger la durée des procès, les procureurs auraient avantage à considérer, avant le procès, les possibilités d'applications de cette règle.

Signalons en outre la règle 4 de l'ordonnance 32 des Règles anglaises (qui, semble-t-il, sont applicables aux causes ayant pris naissance hors de la province de Québec). Cette règle se lit comme il suit:

> 4. Au moyen d'un avis écrit, une partie peut à tout moment mais au plus tard neuf jours avant la date pour laquelle l'avis du procès a été donné ou, si aucun avis de procès n'est requis, au plus tard neuf jours après que l'action est inscrite pour le procès, inviter la partie adverse à admettre, aux seules fins de la cause, question ou contestation, un ou des faits spécifiques quelconques mentionnés dans ledit avis. Cependant, toute admission faite en conformité d'un semblable avis est réputée n'avoir été faite que pour les objets de la cause, question ou contestation particulière, et ne pas constituer une admission pouvant être utilisée à l'encontre de la partie à une autre occasion, ou en faveur de toute personne autre que la partie qui donne l'avis; de plus, le tribunal ou un juge peut en tout temps permettre qu'une partie modifie ou retire une admission ainsi faite, aux conditions qu'il estime justes.

Les procureurs pourraient tirer parti de cette règle en ce qui concerne des faits particuliers. La partie à qui un avis d'admission de faits a été signifié peut, cela va de soi, refuser d'admettre ou omettre de répondre, mais elle le fait à ses propres risques pour ce qui est des frais.

Il ne s'agit nullement—on le comprendra sans doute—de restreindre le droit des parties à une audition complète des contestations qui les divisent et nécessitent l'arbitrage de leurs différends. Toutefois, pleine justice ne peut être rendue à toutes les parties à des conflits que doit trancher le tribunal que si des dates assez rapprochées peuvent être fixées pour les procès et si les juges peuvent disposer du temps nécessaire pour la préparation de leurs jugements, sans retard inutile, une fois le procès terminé. C'est pourquoi les procureurs feront, nous n'en doutons pas, leur possible pour aider les juges à accélérer les tâches du tribunal, tout en protégeant les intérêts légitimes de leurs clients.

Le président,
W. R. Jackett.

NOTE Nº 2 CONCERNANT LA PRATIQUE DE LA COUR

Le 29 décembre 1964

Le temps présentement consacré au cours des plaidoiries orales par le juge à noter la jurisprudence, les autorités et statuts cités, de part et d'autre, par les procureurs, pourrait être éliminé, en grande partie, et comme résultante, réduire d'autant la durée de la plaidoirie en se conformant à la directive suivante:

> Au commencement de sa plaidoirie chaque procureur produira, pour l'usage du tribunal et celui du procureur de la partie adverse, une liste de la jurisprudence, les autorités et statuts qu'il entend soumettre à l'appui de ses prétentions.
>
> Il est bien entendu que cette directive ne restreint en rien les procureurs de se référer, au cours des plaidoiries, à des autorités ou statuts qui n'auraient pas été inclus dans la liste en question.

Le président,
W. R. Jackett.